DRAFTING FOR MULTIPLE EXECUTORS, TRUSTEES, AND AGENTS[1]

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CHAPTER 13

1. This outline and any related presentation are for educational purposes only and are not intended to establish an attorney-client relationship or provide legal advice. While some areas of the law are settled, other remain unsettled. In certain areas, the authors have endeavored to identify differing positions or arguments which may be taken or made with respect to specific unsettled legal issues.

Mark R. Caldwell
Shareholder

Mark R. Caldwell routinely represents executors, guardians, and beneficiaries in complex estate, trust, and guardianship litigation. He has also represented fiduciaries in all phases of estate, trust, and guardianship administration. Mark is passionate about holding those who exploit others accountable and defending those who have been wrongfully accused of doing so. 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. While he strives to advocate strong, aggressive positions for clients, Mark also strives to resolve disputes in an ethical, reasonable, and cost-effective manner.

Biography

Mark 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 in South Carolina, North Carolina, Hawaii, and California, he returned to North Texas and attended Eastfield Community College 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.
Mark is married and has three children. He enjoys spending time with his family, living an active life-style and traveling.

Representative Experience

- Obtained favorable jury verdict for lack of testamentary capacity and undue influence in hotly contested will contest and favorable jury verdict for lack of contractual capacity and breach of fiduciary duty in same lawsuit regarding certain non-probate beneficiary designations.
- Recovered significant settlement in case involving fraud on the community and breach of fiduciary duty through the use of a power of attorney.
- Obtained favorable jury verdict in a guardianship case involving an elderly ward.
- Successfully defeated claim that will was executed without testamentary capacity on summary judgment.
- Routinely obtains temporary injunctions and temporary guardianships to halt rogue agents from abusing their powers of attorney.
- Obtained partial summary judgment against Trustee for breach of fiduciary duty involving the failure to account.
- Represents guardians, executors, and administrators in all phases of guardianship and estate administration.
- Routinely serves as attorney ad litem and guardian ad litem in guardianship cases.
- Routinely serves as temporary guardian in contested guardianship cases and as temporary administrator and administrator in decedents' estates.
- Successfully obtained ancillary estate administration in California to collect and administer assets and claims due and owing to Texas estate.
- Successfully transferred guardianships to and from California.

Public Speaking & Publications

- Co-Author/Panelist: Getting Back on Track – What to do When Best-Laid Estate Plans Get Derailed – 28th Annual Advanced Estate Planning Strategies Course (2022).
- Author/Speaker: Disclosure and the Fiduciary: How Much, How Far and to Whom? – 15th Annual Fiduciary Litigation Seminar (2020).
- Author/Speaker: North Texas Probate Bench Bar: A Trustee's Duty to Disclose: A Dangerous Trap or a Useful Tool? (2020).
- Co-Author: You Settled it Right? Family Settlement Agreements in Probate, Trust and Guardianship Disputes" – Texas Tech Estate Planning and Community Property Law Journal, 11 Est. Plan. & Community Prop. L.J. 213 (Spring 2019).

- Co-Author/Speaker: State Bar of Texas: Changing IRA Beneficiary Designations After Death by Court Order or Agreement – Intermediate Estate Planning and Probate (2019)
- Co-Author/Speaker: National College of Probate Judges: "A Road Increasingly Traveled: Multistate Probate Issues" – (2019).
- Co-Author: "You Settled It, Right? Family Settlement Agreements in Probate, Trust and Guardianship Disputes" – North Texas Probate Bench Bar (2019).
- Co-Author/Speaker: "Choosing Your Own Adventure and Navigating Self-Dealing Transactions Under the New Power of Attorney Act" – 29th Annual Estate Planning & Probate Drafting (2018).
- Co-Author/Speaker: "A Road Increasingly Traveled: Multistate Probate Issues" – The Estate Planning, Trust and Probate Law Section of the San Diego County Bar Association (2017).
- Co-Author: "Ensure Powers of Attorney Fulfill Intended Purposes" – Estate Planning, Thompson Reuters Checkpoint, (January 2018).
- Co-Author: National College of Probate Judges: "Constitutional Considerations When Restricting Access to the Proposed Ward in Contested Guardianship Proceedings" – Spring Journal (2017).
- Co-Author/Speaker: State Bar of Texas: State Bar of Texas: "Litigation Involving Powers of Attorney & Bank Accounts" – Advanced Estate Planning & Probate (2017).
- Co-Author/Speaker: State Bar of Texas: "What's New in Guardianship" – Advanced Guardianship Law Course (2017).
- Co-Author/Speaker: State Bar of Texas: "The Shortest Route to Victory: Summary Judgment Practice in Probate and Trust Litigation" – 40th Annual Advanced Estate Planning and Probate Course (2016).
- Co-Author/Speaker: Dallas County Bar Association, Probate, Trust and Estates Section: "Trends in Litigating and Administering Guardianships" (2016).
- Author/Speaker: State Bar of Texas: "Injunctive Relief–The Lethal Preemptive Strike in Probate, Trust and Guardianship Litigation" – 39th Annual Advanced Estate Planning and Probate Course (2015).
- 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-Author: "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).
- Co-Author: "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-Author/Speaker: "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

- State Bar of Texas; Real Estate, Probate and Trust Law Section, Guardianship Committee; Member (2015-2018)
- Dallas Bar Association; Probate and Trust Section Member; Trial Skills Section Member
- Dallas Bar Association; Probate and Trust Section; Council Member (2015-2016)
- Dallas Association of Young Lawyers; Elder Law Section Member
- Member, St. Thomas More Society
- Dallas Bar Mentor Program; Participated as Mentee; Mentor, Edward V. Smith III
- Board of Directors and Vice President, City of Sachse Economic Development Corporation (2010-2014)
- Member, Charter Review Commission, City of Sachse, Texas (2012-2013)

Certifications, Awards and Recognition

- Board Certified Estate Planning and Probate Law – Texas Board of Legal Specialization
- Named Texas Super Lawyer by Texas Super Lawyers, a Thompson Reuters Service (2020-2022)

- Named Rising Star by Texas Super Lawyers, a Thompson Reuters service (2014-2019)
- Selected Rising Stars Top 100 Up & Coming Attorneys in Texas, a Thompson Reuters service (2018-2019)
- Named Best Lawyers in Dallas, by D. Magazine (2018-2021)

Education

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

Sarah V. Toraason
Shareholder

An experienced litigation attorney, Sarah Toraason has ten years' experience representing clients in complex commercial disputes involving securities, contract, business tort, insurance coverage, ERISA, and intellectual property claims in state and federal courts as well as arbitration. Sarah now applies her extensive business litigation background to representing clients in estate, trust, and guardianship disputes. She strives to be a strong advocate for her clients and approaches every matter with the goal of producing a successful and efficient resolution of their case.

Sarah graduated from the University of Richmond with a B.A. in Music and Leadership Studies and received her M.B.A. and M.A. from the University of Cincinnati. She earned her J.D. from William & Mary School of Law. After graduating from law school, Sarah served as a law clerk to the Honorable Henry Coke Morgan, Jr., of the United States District Court for the Eastern District of Virginia. She then clerked for the Honorable Fortunato P. Benavides of the United States Court of Appeals for the Fifth Circuit in Austin, Texas.

Prior to entering the legal profession, Sarah studied music and worked in arts administration for the Honolulu Symphony in Honolulu.

Sarah is admitted to practice in California (2003) and Texas (2004).

Representative Experience

- Obtained favorable jury verdict for lack of testamentary capacity and undue influence in hotly contested will contest and favorable jury verdict for lack of contractual capacity and breach of fiduciary duty in same lawsuit regarding certain non-probate beneficiary designations.
- Successfully defended former CFO of a national home-building company in a securities fraud class action in the Southern District of Florida and on appeal to the Eleventh Circuit.
- Obtained denial of class certification on behalf of Fortune 500 media company and certain officers and directors in a securities class action in the Northern District of Texas and on appeal to the Fifth Circuit.
- Represented for-profit educational institution in the Southern District of Texas and on appeal to the Fifth Circuit in a suit seeking to enforce a confidentiality provision in an arbitration agreement. The Fifth Circuit upheld award of preliminary and permanent injunction based on the confidentiality clause.
- Won dismissal of claims challenging design and administration of ERISA-governed severance plan and secured award of costs in favor of defendants. Defended judgment on appeal to the Fifth Circuit.
- Defended CEO of oil and natural gas company in a series of ten shareholder and derivative suits filed in state and federal court seeking to challenge potential acquisition of the company
- Defended oil and gas company in a hydraulic fracking case.
- Represented Fortune 500 company in a significant trademark suit.
- Represented large pharmaceutical manufacturer in putative nationwide antitrust class actions brought by direct and indirect purchaser plaintiffs in the Eastern District of Pennsylvania.
- Obtained dismissal of claims brought against insurance company and former claims adjuster in Texas state court.

Publications & Public Speaking

- Co-presenter: "Jury Selection in Probate Disputes: Avoiding the Minefield and Winning the Case," Clear Law Institute National Webinar (September 2019).
- Co-author/Co-presenter: "A Road Increasingly Traveled: Multistate Probate Issues," National College of Probate Judges Spring Journal and Spring Conference (2019).
- Co-author: "Not Your Typical Voir Dire: Selecting a Jury in a Will Contest Case," Dallas Bar Association, Headnotes (December 2018 edition).
- Co-author/Co-presenter: "A Road Increasingly Traveled: Multistate Probate Issues," Estate Planning, Trust and Probate Law Section of the San Diego County Bar Association (June 7, 2018).
- Co-author: "Constitutional Considerations When Restricting Access to the Proposed Ward in Contested Guardianship Proceedings," National College of Probate Judges Spring Journal (2017).
- Co-author/Co-presenter: "Planning to Avoid Power of Attorney Litigation," Texas Trust School (July 2017).

- Co-author/Co-presenter: “The Quick and Dirty E-Discovery Lowdown: An Introduction To What Should Be Keeping You Up at Night,” Texas Bar CLE (June 2010).
- Co-author: “Student Liability Lawsuits: Suggested Best Practices to Avoid Class and Mass Actions and Minimize Potential Exposure” (August 2010).

Education

- B.A., magna cum laude, University of Richmond, Richmond, Virginia (1996)
- M.B.A., University of Cincinnati, Cincinnati, Ohio (1998)
- M.A., University of Cincinnati, Cincinnati, Ohio (1998)
- J.D., Order of the Coif, William & Mary School of Law, Williamsburg, Virginia (2002)

Community and Bar Association Involvement

- Dallas Bar Association; Probate, Trust & Estates Section Member
- State Bar of Texas
- The William ‘Mac’ Taylor Inn of Court, Barrister
- Attorneys Serving the Community
- Assistant chancellor, Episcopal Diocese of Dallas

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I. INTRODUCTION

Selecting a fiduciary is one of the most important decisions to make during the estate planning process. In fact, this decision "probably has the most frequent and dramatic impact on family harmony."[1] Many people are inherently predisposed to appoint a family member in these roles because they grossly underestimate the risk to family harmony and grossly overestimate the benefits of naming a family member as a fiduciary.[2] The same tendency applies when naming co-fiduciaries. A client underestimates the risk of naming more than one fiduciary and grossly overestimates the benefits of appointing two or more people to this role.

This happens for a variety of reasons. Clients commonly desire to appoint more than one family member as a fiduciary to avoid feelings of jealously or resentment. When two people have different skills or talents, clients believe that by naming both people as co-fiduciaries, they are getting the best of both worlds. Similarly, many clients believe that naming co-fiduciaries imposes a "check and balance" system onto the administration of their trust, estate, or property. Appointing co-fiduciaries, however, often creates more problems than it solves. Appointing co-fiduciaries, particularly, when a parent requires their children to do a job as a group, has been referred to as "[t]he number one opportunity for an estate plan to go wrong."[3] As one practitioner notes, naming children as co-fiduciaries is like putting them in a rowboat:

> Imagine loading the children into a rowboat on a big lake and requiring them to agree on one destination when their rowboat can go in only one direction, no matter how many passengers it holds . . . It is very difficult for children with different financial profiles, different values, or different residential states to be on the same track at all times with each other, not to mention their respective spouses. Plans that require children to agree among themselves when their parents are both gone are simply fraught with danger.[4]

[1] Timothy P. O'Sullivan, *Family Harmony: An All Too Frequent Casualty of the Estate Planning Process*, 8 Marq. Elder's Advisor 253, 257–58 (2007)
[2] *Id.*
[3] Robert G. Edge, *Children in A Rowboat and Other Potential Mistakes in Estate Planning*, Part I, Prob. & Prop. 6, 7 (2003).
[4] *Id.* at 7-8.

Naming co-fiduciaries carries at least three downsides.

First, serving as a co-fiduciary is a complex job which is difficult to navigate. When someone is named as a trustee, executor or agent, he or she is becoming a fiduciary and taking on numerous and significant legal duties. Rarely does a fiduciary fully understand all of his or her fiduciary duties. But when someone becomes a co-fiduciary, he or she is taking on all the normal fiduciary duties, ***plus additional duties —*** thus, they are a "fiduciary plus." It is difficult for each co-fiduciary to understand his or her duties and/or potential liability. The governing instruments, statutes, and common law applicable to such relationships — particularly, with respect to a co-fiduciary's duties and liabilities — vary greatly in their development and specificity. Determining a co-fiduciary's particular duty or liability can be extremely difficult even for the most seasoned lawyer, let alone a lay person. Rarely are estate planning clients properly educated on the duties and liabilities of co-fiduciaries while contemplating whether to appoint more than one fiduciary.

Second, each co-fiduciary should ideally work together; however, each co-fiduciary may attempt to "row the boat" at different speeds and in a different direction — or take the oar out of the other co-fiduciary's hand altogether. For example, with respect to decision-making, co-trustees are generally required to act unanimously, unlike co-executors/administrators and co-agents, who may generally act independently. If anything, appointing co-fiduciaries lays the groundwork for a disordered, inconsistent and inefficient trust, estate, or property administration. Appointing co-fiduciaries also increases the risks of deadlock. Rarely do co-fiduciaries engage in the level of communication and cooperation necessary to administer an estate in an efficient and coordinated manner. Securing the acceptance of an alternative co-fiduciary to fill a vacancy can be challenging.

Third, adding more than fiduciary typically increases the cost of administration. Initially, co-fiduciaries must coordinate their activities amongst themselves, which usually means it takes longer to make decisions and to act. There is also inherent duplication. Staying informed often requires them to keep and maintain independent records. Due to the potential for conflicts and disagreements among co-fiduciaries, each co-fiduciary may need his or her own legal counsel, adding more costs. Resolving disagreements/deadlocks and/or remedying the conduct of a rogue co-fiduciary usually requires court action, further increasing costs.

For these reasons, many estate planners strongly recommend against naming co-fiduciaries and many

institutional/professional fiduciaries will not serve in such a role.

This article attempts to arm the estate planner with the information necessary to help a client who is considering appointing co-fiduciaries to make an informed decision. This article focuses of the most common types of co-fiduciaries: co-trustees, co-executors/administrators, and co-agents. Any attempt to properly identify the advantages and disadvantages of naming co-fiduciaries must start with understanding the relevant law applicable to each role. First, we identify and discuss the three main sources of authority which govern co-fiduciary's duties, powers, and liabilities: the governing instrument, the applicable statutes, and the common law. Next, we discuss when each respective co-fiduciary's duties begin and identify the basic fiduciary duties for each type of fiduciary and the additional duties applicable to a co-fiduciary for that type of role. We then outline the basic rules governing decision making for each type of co-fiduciary as well as the potential liability each particular co-fiduciary faces for acts of other co-fiduciary. After laying out the default rules for each co-fiduciary, we identify the best drafting practices when appointing co-fiduciaries, particularly how to address particular issues which are a frequent source of tension and dispute. Finally, we conclude our discussion by identifying the advantages and disadvantages of appointing co-fiduciaries.

II. CO-TRUSTEES

A. Section Overview

1. Key Points

- Attempting to determine a co-trustee's precise duty in any given context is complicated due to the interplay between the terms of the Trust, the Texas Trust Code, and the common law. The actual trust instrument should always be carefully considered – especially to the extent it may modify the general rules applicable to co-trustees.
- Co-trustees are required to participate in the administration of the trust unless the co-trustee is unavailable (absence, illness, suspension, disqualification or other temporary incapacity) or has properly delegated the performance of his or her function.
- Absent contrary terms in the Trust, co-trustees should act jointly.
- A co-trustee generally cannot commit the entire administration of the trust to another co-trustee.
- A co-trustee faces potential liability if a duty was improperly delegated, if the co-trustee failed to exercise reasonable care to prevent a co-trustee from committing a serious breach of trust, and/or if the co-trustee failed to exercise reasonable care to redress a serious breach of trust.
- Co-trustees are jointly and severally liable if they unite in a breach of trust.

2. Key Questions to Consider

- Does the settlor understand and appreciate the level of communication and coordination generally required for the co-trustees to act jointly and the increased the costs of administering the Trust?
- Are the co-trustees capable, from a practical standpoint, of consistently cooperating?
- Are the co-trustees more likely to agree than disagree?
- Are the co-trustees capable and willing to consistently share information with each other?
- Will the co-trustees consistently and properly document delegation?
- Will each co-trustee consistently exercise reasonable care to prevent the other co-trustee from committing a serious breach of trust?
- Will each co-trustee consistently exercise reasonable care to compel a co-trustee to redress a serious breach of trust?
- Is there really a need to appoint more than one co-trustee? (Probably not).

B. Sources of Authority in Analyzing Co-Trustee Issues

The nature and extent of any co-trustee's duties, powers, and liabilities are derived from three main sources of authority: (1) the terms of the trust;[5] (2) the Texas Trust Code;[6] and (3) the common law.[7] Texas Trust Code Section 113.051 states that a trustee shall administer a trust in good faith, according to its terms, and the Texas Trust Code.[8] In the absence of any contrary terms in the trust instrument or contrary provisions of the Texas Trust Code, in administering the trust, a trustee shall perform all of the duties imposed on trustees by the common law.[9] Additionally, Texas Trust Code Section 111.0035(a) states that, to the extent the terms of the trust do not provide otherwise, the Texas Trust Code governs: the duties and powers of a trustee; the relations among trustees; and the rights and interests of a beneficiary.[10] These statutory mandates look something like this:

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[5] TEX. TRUST CODE § 113.051.
[6] *Id.*
[7] *Id.*; *see also* Katherine C. Akinc, *Inside the Mind of a Trustee; The Importance of Understanding a Trustee's Perspective*, The 43rd Annual Advanced Estate Planning & Probate Course, 3 (2019).
[8] TEX. TRUST CODE § 113.051.
[9] *Id.*
[10] TEX. TRUST CODE § 111.0035(a).

Good Faith[11]		
Absent Contrary Terms[12]	**Absent Contrary TTC Provisions**[13]	**Trust Terms Do Not Provide Otherwise**
= Common Law[14]		**= TTC governs: (a) duties and powers of trustee; (b) relations among trustees; and (c) the rights and interests of a beneficiary**[15]

Thus, the starting point for determining any trustee's duties are the terms of the applicable trust instrument. The Trust will be construed to ascertain the intent of the settlor.[16] The settlor's intent must be ascertained from the language used within the four corners of the instrument.[17] Texas Trust Code Section 111.004(15) actually defines a trust's "terms" as "the manifest intent of the settlor." A trustee's "duties arise from the wording of the trust instrument."[18] With rare exceptions, the "terms of a trust prevail over any provision of" the Texas Trust Code.[19]

[11] TEX. TRUST CODE § 113.051.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] TEX. TRUST CODE § 111.0035(a).
[16] *Eckels v. Davis*, 111 S.W.3d 687, 694 (Tex. App.—Fort Worth 2003, pet. denied); *Nowlin v. Frost Nat'l Bank,* 908 S.W.2d 283, 286 (Tex. App.—Houston [1st Dist.] 1995, no writ).
[17] *Id.* citing *Shriner's Hosp. for Crippled Children of Tex. v. Stahl,* 610 S.W.2d 147, 151 (Tex. 1980) (applying this concept to construe a will).
[18] *Tolar v. Tolar*, 2015 WL 2393993, at *4 (Tex. App.—Tyler May 20, 2015, no pet.) (terms of the trust did not require trustee to correct flaws in the initial conveyance of trust property; trustee owed no duty to contribute her own property to the trust).
[19] TEX. TRUST CODE § 111.0035(a) and (b); *see also* TEX. TRUST CODE §§ 114.007(c) (a settlor, by the terms of the trust, may relieve the trustee from any duty or restriction imposed by the Texas Trust Code or by common law or may permit the trustee to do or not to do an action that would otherwise violate a duty or restriction imposed by the Texas Trust Code or by common law); TEX. TRUST CODE § 113.029(a)(a trustee must act "in accordance with the terms and purposes of the trust").

C. Co-Trustee Fiduciary Duties

1. When a Co-Trustee's Fiduciary Duties Begin

It is very common for two or more co-trustees to not start their roles at the exact same time. Thus, each person appointed as a co-trustee must know when his or her duties begin. Generally, a person named as trustee who does not accept the trust incurs no liability with respect to the trust.[20] However, "the signature of the person named as trustee on the writing evidencing the trust or on a separate written acceptance is conclusive evidence that the person accepted the trust."[21] Moreover, the Texas Trust Code states that, "a person named as trustee who exercises power or performs duties under the trust is presumed to have accepted the trust, except that a person named as trustee may engage in the following conduct ***without accepting the trust***:

(1) acting to preserve the trust property if, within a reasonable time after acting, the person gives notice of the rejection of the trust to:

(A) the settlor; or
(B) if the settlor is deceased or incapacitated, all beneficiaries then entitled to receive trust distributions from the trust; and

(2) inspecting or investigating trust property for any purpose, including determining the potential liability of the trust under environmental or other law.[22]

A person named as trustee who does not accept the trust incurs no liability with respect to the trust.[23]

2. Each Co-Trustee Owes Fiduciary Duties

It is well-established under Texas law that a fiduciary relationship exists between a trustee and the trust beneficiary.[24] The Texas Trust Code defines the term "trustee" as "the person holding the property in trust, including an original, ***additional***, or successor trustee, whether or not the person is appointed or confirmed by a court."[25] Consequently, co-trustees each occupy the same fiduciary relationship as to the trust's beneficiaries — each owes fiduciary duties. A trustee owes, as a matter of law and fact, all of those

[20] TEX. TRUST CODE § 112.009(b).
[21] TEX. TRUST CODE § 112.009(a).
[22] TEX. TRUST CODE § 112.009(a).
[23] TEX. TRUST CODE § 112.009(b).
[24] *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 735 (Tex. App.—Corpus Christi 1994, writ denied).
[25] TEX. TRUST CODE § 111.004(18) (emphasis added).

common law fiduciary duties and statutory duties[26] imposed through such relationship, including: the duty to administer the trust in good faith, according to its terms, and the Texas Trust Code;[27] the duty of loyalty;[28] the duty of full disclosure of all material facts that might affect the beneficiaries' rights,[29] (which is not lessened by strained relations between the parties);[30] the duty to account generally; [31] the duty to maintain records;[32] the fundamental duty to use the skill and prudence which an ordinary capable and careful person will use in the conduct of his own affairs;[33] the duty of care;[34] the duty to exercise discretion reasonably;[35] the duty of impartiality;[36] the

[26] *Ali v. Smith*, 554 S.W.3d 755, 762 (Tex. App.—Houston [14th Dist.] 2018, no pet.)("The fiduciary duty that an executor or administrator owes to the estate is derived from the statutes and common law."); TEX. EST. CODE § 351.001 ("The rights, powers, and duties of executors and administrators are governed by common law principles to the extent that those principles do not conflict with the statutes of this state.").

[27] TEX. TRUST CODE § 113.051.

[28] *Slay v. Burnett T*rust, 143 Tex. 621, 640, 187 S.W.2d 377, 388 (1945)("The trustee's duty of loyalty [prohibits] him from using the advantage of his position to gain any benefit for himself at the expense of his cestui que trust and from placing himself in any position where his self-interest will or may conflict with his obligations as trustee."); TEX. TRUST CODE § 114.001 ("The trustee is accountable to a beneficiary for the trust property and for any profit made by the trustee through or arising out of the administration of the trust, even though the profit does not result from a breach of trust."); TEX. TRUST CODE § 117.007 ("A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries."); *Nathan v. Hudson*, 376 S.W.2d 856, 860 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e) ("equity demands of a fiduciary the highest duty of loyalty"); AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *The Law of Trusts* Section 170 (4th ed. 1987) (the duty of loyalty to a trust's beneficiaries is considered the "most fundamental duty owed by the trustee to the beneficiaries of the trust ..."); RESTATEMENT (THIRD) OF TRUSTS § 78 (2007).

[29] *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996) (a trustee owes his or her beneficiaries "a fiduciary duty of full disclosure of all material facts known to them that might affect [the beneficiaries'] rights."); *See also* TEX. TRUST CODE § 113.151(a) (requiring trustee to account to beneficiaries for all trust transactions).

[30] *Lesikar v. Rappeport*, 33 S.W.3d 282, 296 (Tex. App.—Texarkana 2000, pet. denied) (citing *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984).

[31] *See* TEX. TRUST CODE §§ 113.151 and 113.152; RESTATEMENT (THIRD) OF TRUSTS § 83 (2007) ("A trustee has a duty to maintain clear, complete, and accurate books and records regarding the trust property and the administration of the trust, and, at reasonable intervals on request, to provide beneficiaries with reports or accountings."); *Corpus Christi Bank & Tr. v. Roberts*, 587 S.W.2d 173, 181 (Tex. Civ. App.—Corpus Christi 1979), aff'd, 597 S.W.2d 752 (Tex. 1980) ("A trustee is charged with the duty of maintaining an accurate account of all of the transactions relating to the trust property. He is chargeable with all assets coming into his hands, the disposition for which he cannot account."); *Republic Nat. Bank & Tr. Co. v. Bruce*, 130 Tex. 136, 140, 105 S.W.2d 882, 885 (Comm'n App. 1937) ("The relation of a trustee to the trust estate is personal and one of confidence. He handles another's property. The law ought and does demand of him a strict accounting to the letter and spirit of his contract. It tolerates no deviation therefrom which amounts to a breach of his agreement.") (internal citations omitted).

[32] *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.) (a trustee is required to keep full, accurate, and orderly records concerning the status of the trust estate and of all acts performed thereunder); BOGERT's, THE LAW OF TRUSTS AND TRUSTEES § 961 (At a minimum, "the trustee's records must be [in such a form] as to allow it to furnish the beneficiaries (and the court, if required or otherwise called upon to do so), all information about its administration of the trust that the beneficiaries need to protect their interests (or the court needs to determine whether the trustee has properly administered the trust.)").

[33] *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 888 (Tex. App.—Texarkana 1987, no writ), disapproved of on other grounds by *Tex. Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240 (Tex. 2002); RESTATEMENT (THIRD) OF TRUSTS § 77 (2007).

[34] *See Jewett v. Capital Nat. Bank of Austin*, 618 S.W.2d 109, 112 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.) ("a trustee can exercise his fiduciary duty in such a negligent manner that his lack of diligence will result in a breach of his fiduciary duty."); *Ertel v. O'Brien*, 852 S.W.2d 17, 21 (Tex. App.—Waco 1993, writ denied) ("a trustee commits breach of trust not only where he violates a duty in bad faith, or intentionally although in good faith, or negligently but also where he violates a duty because of a mistake."); *Republic Nat. Bank & Tr. Co. v. Bruce*, 130 Tex. 136, 140, 105 S.W.2d 882, 885 (Comm'n App. 1937) ("Every violation by a trustee of a duty which equity lays on him, whether willful or forgetful, is a breach of trust, for which he is liable") (internal citations omitted); *Lipsitz v. First Nat. Bank*, 288 S.W. 609, 612 (Tex. Civ. App.—Eastland 1926), aff'd, 293 S.W. 563 (Tex. Comm'n App. 1927), modified, 296 S.W. 490 (Tex. Comm'n App. 1927) ("Equity holds a trustee liable for every violation of a duty laid upon him, though such violation arises through oversight or forgetfulness.") (internal citations omitted).

[35] *State v. Rubion*, 158 Tex. 43, 51, 308 S.W.2d 4, 9 (1957) ("The discretion with which a trustee of a support trust is clothed in determining how much of the trust property shall be made available for the support of the beneficiary and when it shall be used is not an unbridled discretion . . . He may not act arbitrarily in the matter, however pure may be his motives . . . His discretion must be reasonably exercised to accomplish the purposes of the trust according to the settlor's intention and his exercise thereof is subject to judicial review and control").

[36] *See Perfect Union Lodge v. Interfirst Bank of San Antonio*, 713 S.W.2d 391 (Tex.App.—San Antonio 1986), *affirmed*, 748 S.W.2d 218 (Tex. 1988)(where will created a

duty to collect, preserve and protect the assets of the trust;[37] the duty to exercise reasonable care, skill and caution in selecting agents, establishing the scope and terms of any delegation of authority, and periodically reviewing the agent's actions;[38] the duty, upon the event of trust termination, to expeditiously make terminating distributions to the beneficiaries entitled to receive them;[39] the duty not to misapply fiduciary funds and property and not to self-deal[40] or commingle assets,[41] liabilities, or accounts (including those of himself or herself) and the duty not to seek or obtain, for himself or herself, any secret, undisclosed benefits, properties, assets, fees, commissions, payments, discounts, profits, gains, advantages, dividends, distributions, revenues, or other ownership interest; and the duty not to engage in oppressive/hostile conduct.[42]

Moreover, "[a] trustee commits breach of trust not only where he violates a duty in bad faith, or intentionally although in good faith, or negligently[,] but also where he violates a duty because of a mistake."[43]

Subject to clear and specific limitations, a settlor is free to draft and execute any trust terms the settlor desires.[44] Frequently, settlors seek to establish limits on the liability of his or her chosen trustee so that the trustee may be unburdened by certain claims of disgruntled, or even contingent, beneficiaries. However, the Texas Trust Code prohibits the complete and absolute exoneration and exculpation of a fiduciary, and in doing so imposes a "floor" of fiduciary conduct that even the settlor himself can neither excuse nor exculpate. Any term of a trust relieving the trustee of liability is unenforceable to the extent that such term relieves the liability of a trustee for a breach trust committed: (a) in bad faith; (b) intentionally; or (c) with reckless indifference to the interest of a beneficiary.[45] Each manner of breach of trust requires a heightened mental attitude by the trustee. Thus, for every trust in Texas, a trustee will be liable for, at the very least, breaches of trust the trustee committed in bad faith, intentionally, or with reckless

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testamentary trust with one lifetime beneficiary and a different remainder beneficiary, trustee must deal impartially with the two beneficiaries); *Brown v. Scherck*, 393 S.W.2d 172 (Tex. Civ. App.—Corpus Christi 1965, no writ)(testamentary trustees owe duty to protect the interests of the minor contingent beneficiaries, as well as administer the lifetime beneficiaries' interests). *See also* RESTATEMENT (2D) OF TRUSTS §§ 183 (if there are two or more beneficiaries of a trust, the trustee must deal impartially with them); 232 (if a trust is created for beneficiaries in succession, the trustee has a duty to act with due regard to their respective interests).

[37] *Hoenig v. Texas Commerce Bank, N.A.*, 939 S.W.2d 656 (Tex. App.—San Antonio 1996, reh'g overruled and Rule 130(d) motion) (trustee who failed to discover the existence of trust property, to include it in the trust inventory, to make the beneficiaries aware of it and to collect rent for its use, breached its fiduciary duty); *Tucker v. Dougherty Roofing Co.*, 137 S.W.2d 884, 887 (Tex. Civ. App.—Dallas 1940, writ dism'd judgm't cor.) ("The trustee, however, has the power, as well as the duty, to make expenditures or incur indebtedness for whatever repairs and changes are reasonably necessary to the preservation of the property for the purposes for which it was placed in trust.") (internal citations omitted); RESTATEMENT (SECOND) OF TRUSTS § 175 (1959); RESTATEMENT (SECOND) OF TRUSTS § 176.

[38] TEX. TRUST CODE § 117.011.

[39] TEX. TRUST CODE § 112.052.

[40] *Slay v. Burnett Tr.,* 143 Tex. 621, 640, 187 S.W.2d 377, 388 (1945) ("It is a well-settled rule that a trustee can make no profit out of his trust. The rule in such cases springs from his duty to protect the interests of the estate, and not to permit his personal interest to in any wise conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity.") (quoting *Magruder v. Drury,* 235 U.S. 106, 35 S.Ct. 77, 82, 59 L.Ed. 151, 156 (1914).

[41] RESTATEMENT (THIRD) OF TRUSTS § 84 (2007) ("a trustee has a duty not to commingle property of the trust with the trustee's own property."); *see also Moody v. Pitts*, 708 S.W.2d 930, 937 (Tex. App.—Corpus Christi 1986, no writ) ("If a trustee commingles trust funds with the trustee's own, the entire commingled fund is subject to the trust . . . [w]hen a trustee has commingled funds and has expended funds, the money expended is presumed to be the trustee's own.") (internal citations omitted); *Eaton v. Husted*, 163 S.W.2d 439, 444 (Tex. Civ. App.—Texarkana 1942), aff'd, 141 Tex. 349, 172 S.W.2d 493 (1943) ("If a man mixes trust funds with his own * * * the whole will be treated as trust property, except so far as he may be able to distinguish what is his own.") (internal citations omitted).

[42] *See e.g.*, TEX. TRUST CODE § 113.082(a)(4)'s "other cause for removal" and the case thereunder which interprets same to include ill-will or hostility between a trustee and the beneficiary or other close family members of that beneficiary. *Akin v. Dahl,* 661 S.W.2d 911 (Tex. 1983), *cert. denied,* 466 U.S. 938 (1984); *Barrientos v. Nava,* 94 S.W.3d 270 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (hostility toward beneficiaries' close family member justified removal and appointment of another person as the successor trustee).

[43] *Ertel v. O'Brien*, 852 S.W.2d 17, 21 (Tex. App.—Waco 1993, writ denied).

[44] *See e.g.* TEX. TRUST CODE §§ 111.0035, 112.031 (prohibiting the creation of a trust for an illegal purpose), 114.007 (prohibiting the complete exculpation of a trustee), 1110.035(b)(3) (prohibiting the modification of certain limitations periods), 1110.035(b)(4) (prohibiting the modification of the duty to respond to a demand for accounting or act in accordance with the trust purpose(s)), and other express limitations on the settlor's creativity and ability to deviate from specific provisions of the Texas Trust Code.

[45] TEX. TRUST CODE § 114.007(a).

indifference to the interest(s) of a beneficiary. Any trust provision relieving the trustee of liability is strictly construed.[46] A trustee is relieved of liability only to the extent that the trust instrument clearly provides that she shall be excused.[47] Finally, a term in a trust instrument relieving the trustee of liability for a breach of trust is ineffective to the extent that the term is inserted in the trust instrument as a result of an abuse by the trustee of a fiduciary duty to or confidential relationship with the settlor.[48]

3. Duty to Participate

Many lay persons believe one co-trustee will "naturally" do most of the work and the other co-trustee can sit on the sidelines unless and until "something happens." The estate planner should dispel this myth. Both co-trustees are required to participate and, as discussed below, a co-trustee who wishes to take a secondary rule must follow specific rules to properly delegate his or her duties.

A co-trustee has a statutory duty to participate in the performance of a trustee's function.[49] The Restatement (Third) of Trusts § 81 states: "If a trust has more than one trustee, except as otherwise provided by the terms of the trust, each trustee has a duty and the right to participate in the administration of the trust."[50] Additionally, "except as otherwise provided by the terms of the trust, each co-trustee has a duty, and also the right, of active, prudent participation in the performance of all aspects of the trust's administration. Implicit in this requirement of prudent participation is a duty of reasonable cooperation among the trustees."[51]

The duty to participate in administration of the trust contemplates proper delegation and some level of cooperation, but it does not require an equal level of effort or activity:[52]

> . . . the duty of participation by each of the co-trustees does not prevent them from deciding (short of constituting delegation) to allow one or more of the co-trustees to carry more of the burden in regard to various matters, for example, by initiating, analyzing, reporting, and making recommendations for reasonably informed action by all of the trustees.[53]

A co-trustee's duty to participate in administering the trust "does, however, normally prevent the trustees from "dividing" the trusteeship or its functions in a manner that is not authorized by the terms of the trust."[54]

Under the Texas Trust Code, a co-trustee's duty to participate in the performance of a trustee's function applies ***unless*** (1): the co-trustee is unavailable to perform the function because of absence, illness, suspension under this code or other law, disqualification, if any, under this code, disqualification under other law, or other temporary incapacity;[55] or (2) the co-trustee ***properly*** and ***permissibly*** delegated the performance of its function to another trustee.[56]

The delegation must be made in accordance with the terms of the trust or applicable law, be communicated to all other co-trustees, and be filed in the records of the trust.[57] Delegation is not allowed if the settlor specifically directs that the function be performed jointly.[58] Additionally, unless a co-trustee's delegation is irrevocable, the co-trustee making the delegation may revoke the delegation.[59]

4. Duty to Disclose By and Among Co-Trustees

As a corollary to the duty of a co-trustee to participate actively in the administration of the trust and the duty to redress any breach of trust, one authoritative treatise in the area of trust law has stated that "a co-trustee, particularly one empowered to exercise greater control or having greater knowledge of trust affairs, [has a duty] to inform each co-trustee of

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[46] *Neuhaus v. Richards*, 846 S.W.2d 70 (Tex. App.—Corpus Christi 1992, writ granted) (vacated pursuant to settlement on other grounds, *Richards v. Neuhaus* 871 S.W.2d 182 (Tex. 1994)).

[47] *Id*. at 75; *Jewett v. Capital National Bank of Austin*, 618 S.W.2d 109, 112 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.).

[48] TEX. TRUST CODE § 114.007(b).

[49] TEX. TRUST CODE § 113.085.

[50] RESTATEMENT (THIRD) OF TRUSTS § 81 (2007).

[51] RESTATEMENT (THIRD) OF TRUSTS § 81 (2007), cmt. c; *see also Ball v. Mills,* 376 So.2d 1174, 1182 (Fla. App. 1979) ("co-trustees owe to each other, as well as to the beneficiaries of the trust, the duty and obligation to so conduct themselves as to foster a spirit of mutual trust, confidence, and cooperation to the extent possible. At the same time, the trustees should maintain an attitude of vigilant concern for the proper administration or protection of the trust business and affairs.").

[52] RESTATEMENT (THIRD) OF TRUSTS, § 81 (2007), cmt. c.

[53] *Id.*

[54] *Id.*

[55] TEX. TRUST CODE § 113.085(c)(1).

[56] *See* TEX. TRUST CODE § 113.085 (c); *see also* RESTATEMENT (THIRD) OF TRUSTS § 81 (2007)("If a trust has more than one trustee, except as otherwise provided by the terms of the trust, each trustee has a duty and the right to participate in the administration of the trust. Each trustee also has a duty to use reasonable care to prevent a co-trustee from committing a breach of trust and, if a breach of trust occurs, to obtain redress.")

[57] TEX. TRUST CODE § 113.085(c).

[58] TEX. TRUST CODE § 113.085(e).

[59] *Id.*

all material facts that have come to his attention and that are relevant to the administration of the trust."[60] These duties exist and arise independently of whether the other co-trustee's decision-making vote matters:

> Even though a majority of the trustees may be authorized, by statute or by the trust instrument, to act for all trustees, the duty to inform arises from the basic duties of every trustee to comply with the trust terms, to see that the trust is properly executed, and to redress any breach of trust. Thus each trustee is entitled to access to trust records, to notice of trustees' meetings, and to participate in all decisions affecting administration of the trust.[61]

Another trust authority, LORING AND ROUNDS: A TRUSTEE'S HANDBOOK, offers the following hypothetical to illustrate a co-trustee's duty to stay informed:

> When co-trustee 1 is uncertain as to whether co-trustee 2 is reliable, co-trustee 1 should request from co-trustee 2 all the information that co-trustee 1 would need to make that determination. Co-trustee 2 would have a correlative duty of full disclosure. If the requested information is not forthcoming, *e.g*., co-trustee 2 unreasonably refuses to hand over vouchers that would support certain expenses that co-trustee 2 has paid from the trust estate, then co-trustee 1 would be well advised to retain independent counsel to assist with the investigation. If counsel is unable to extract the information, then the matter of co-trustee 2's reliability will have to be put before the court. Regardless of the outcome of the litigation, co-trustee 2 clearly has breached the duty to keep co-trustee 1 fully informed. Accordingly, the court at a minimum can be expected to hold co-trustee 2 personally liable for co-trustee 1's reasonable attorney's fees.[62]

D. Decision Making by Co-Trustees

At common-law, co-trustees had to act unanimously: "The traditional rule, in the case of private trusts, was that if there were two or more trustees, all had to concur in the exercise of their powers."[63] Absent contrary terms in the governing Trust instrument,[64] the Texas Trust Code provides that co-trustees "may act" by majority decision.[65] This language suggests that, unlike coexecutors, co-trustees cannot generally act independently unless the instrument provides otherwise.[66] In other words, co-trustees must act as a group.[67]

Disagreements between co-trustees can rise to such a level that prevents any action and the co-trustees are essentially deadlocked. As one practitioner has recently noted, the Texas Trust Code does not provide an easy solution to deadlocked co-trustees" and "does not explain what happens when there is a deadlock between an even number of co-trustees." [68] THE RESTATEMENT (THIRD) OF TRUSTS states the answer in such a situation is the for the co-trustees to seek court instructions: "if a situation arises in which prudence requires that the trustees reach a decision and they are unwilling or unable to do so, the trustees have a duty to apply to an appropriate court for instructions."[69]

The Texas Declaratory Judgments Act provides that: "A person interested as or through … a trustee …

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[60] BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 584, Duty of co-trustee to be active.

[61] *Id.*

[62] Charles E. Rounds, Jr. et. al, LORING AND ROUNDS: A TRUSTEE'S HANDBOOK, § 7.2.4 (2021 ed.).

[63] 3 SCOTT AND ASHER ON TRUSTS, WHEN POWERS EXERCISABLE BY SEVERAL TRUSTEES, § 18.3; *see also* RESTATEMENT (THIRD) OF TRUSTS, cmt. a ("[I]f there are three or more trustees their powers may be exercised by a majority.").

[64] *See Berry v. Berry,* 646 S.W.3d 516, 530 (Tex. 2022) ("The Trust Agreement could have altered this rule, but it does not. Instead, Section 5.2 of the Trust Agreement states that the Code shall apply "as fully as though its provisions were written into this instrument." The result is that the trustees "act by majority decision." Tex. Prop. Code § 113.085(a).")

[65] TEX. TRUST CODE § 113.085(a); *see also* RESTATEMENT (THIRD) OF TRUSTS § 81 (2007), cmt. a ("[I]f there are three or more trustees their powers may be exercised by a majority.").

[66] *Compare* TEX. TRUST CODE § 113.085 with TEX. EST. CODE § 307.002; *see also Shellberg v. Shellberg*, 459 S.W.2d 465, 470 (Civ. App.—Fort Worth 1970, ref. n.r.e.) ("The trust instrument conveyed the property to two trustees and provided that their powers were joint; the management, control and operation of the trust was to be by the joint action of the two trustees.").

[67] BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 554 ("The powers of trustees of a private trust, whether they are imperative or discretionary, personal or attached to the office, are held jointly, in the absence of statute or contrary direction in the trust instrument. The trustees are regarded as a unit. They are joint tenants of realty in the usual case. They hold their powers as a group so that their authority can be exercised only by the action of all the trustees. 'When the administration of a trust is vested in co-trustees, they all form but one collective trustee.'").

[68] David F. Johnson, *The More the Merrier? Issues Arising from Co-Trustees Administering Trusts*, 45th Annual Advanced Estate Planning & Probate (2021), 20.

[69] RESTATEMENT (THIRD) OF TRUSTS § 81 (2007), cmt. c.

may have a declaration of rights or legal relations in respect to the trust or estate: … (2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; (3) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings..."[70] Additionally, the Texas Trust Code states that a court has jurisdiction "over all proceedings by or against a trustee and all proceedings concerning trusts, including proceedings to: (1) construe a trust instrument; (2) determine the law applicable to a trust instrument; … (4) determine the powers, responsibilities, duties, and liability of a trustee; … (6) make determinations of fact affecting the administration, distribution, or duration of a trust; (7) determine a question arising in the administration or distribution of a trust; (8) relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or of this subtitle…"[71]

Consequently, co-trustees are authorized to seek court instruction where they are deadlocked on an important decision. "This remedy, however, has its drawbacks in that it is expensive and also there is necessary delay involved in filing suit, joining in proper or necessary parties, presenting the issue to the court, and obtaining a final ruling."[72]

Co-trustees should carefully consider their positions when deadlock appears likely or has already occurred. A co-trustee who takes a position that is especially unreasonable or refuses to participate or reasonably cooperate, risks removal.[73] The Texas Trust Code provides that: (a) A trustee may be removed in accordance with the terms of the trust instrument, or, on the petition of an interested person and after hearing, a court may, in its discretion, remove a trustee and deny part or all of the trustee's compensation if: (1) the trustee materially violated or attempted to violate the terms of the trust and the violation or attempted violation results in a material financial loss to the trust; (2) the trustee becomes incapacitated or insolvent; (3) the trustee fails to make an accounting that is required by law or by the terms of the trust; or (4) ***the court finds other cause for removal.***[74]

A receivership is another option to break a deadlock. The Texas Trust Code authorizes establishing a receivership to remedy a breach of trust that has occurred or may occur: "(a) To remedy a breach of trust that has occurred or might occur, the court may: … (5) ***appoint a receiver to take possession of the trust property and administer the trust***."[75] Alternatively, co-trustees may seek declaratory relief as to the validity of a decision by the majority of the co-trustees under the decision-making process set forth in the trust instrument.[76]

E. Co-Trustees Liability for Acts of Other Co-Trustee

In addition to facing liability for his or her own conduct, a co-trustee can be liable for the acts/omissions of the other co-trustee(s). In deciding to appoint co-trustees, rarely does a settlor understand that he or she is asking a family member to take on fiduciary duties ***plus additional duties.*** Whether and to what extent a duty has been properly delegated is a highly technical analysis. Similarly, it may be hard to determine in certain factual circumstances whether a co-trustee has properly complied with his or her duty of care to prevent another co-trustee from committing a serious breach of trust or to redress a breach of trust which has already occurred. These risks and uncertainties should be addressed with a settlor any time appointing co-trustees is being contemplated.

1. Improper Delegation

As noted, a trustee cannot properly commit the entire administration of the trust to an agent or other person, except as permitted to do so by the terms of the trust.[77] Analyzing whether any delegation was appropriate requires a careful review of the terms of the trust, since "the terms of the trust may permit a trustee to delegate to agents or other persons (e.g., a co-trustee) the administration of the trust or the performance of acts that could not otherwise properly be delegated."[78] Although the administration of a trust may not typically be delegated in full, a trustee may delegate fiduciary authority for a variety of purposes to properly selected, instructed, and supervised or monitored agents.[79]

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[70] TEX. CIV. PRAC. & REM. CODE § 37.005.
[71] TEX. TRUST CODE § 115.001.
[72] David F. Johnson, *The More the Merrier? Issues Arising from Co-Trustees Administering Trusts*, 45th Annual Advanced Estate Planning & Probate (2021), 21.
[73] David F. Johnson, *The More the Merrier? Issues Arising from Co-Trustees Administering Trusts*, 45th Annual Advanced Estate Planning & Probate (2021), 21.
[74] TEX. TRUST CODE § 113.082.
[75] TEX. TRUST CODE § 114.008.
[76] *Duncan v. O'Shea*, 2020 WL 4773058, at *1 (Tex. App. – Amarillo Aug. 17, 2020, no pet.) (holding trial court properly granted co-trustee's requires for a declaration that a majority of the co-trustees had the power to sell real property of the trust over objection of dissenting co-trustee according to the terms of the trust and applicable law).
[77] RESTATEMENT (THIRD) OF TRUSTS § 80, cmt. c (2007).
[78] RESTATEMENT (THIRD) OF TRUSTS § 80, cmt. h (2007).
[79] RESTATEMENT (THIRD) OF TRUSTS § 80 (2007).

The Texas Trust Code allows a trustee to delegate to a co-trustee the performance of a trustee's function ***unless*** the settlor specifically directs that the function be performed jointly.[80] The delegation must be made in accordance with the terms of the trust or applicable law, be communicated to all other co-trustees, and be filed in the records of the trust.[81]

The trustee may also have a duty to monitor. For example, the Texas Trust Code permits a trustee to delegate the investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances.[82] However, in that instance, the trustee shall exercise reasonable care, skill, and caution in, among things, "periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation."[83]

2. Failure to Exercise Reasonable Care

Texas Trust Code § 114.006 addresses the liability of co-trustees for the acts of other co-trustees. Texas Trust Code § 114.006(b) imposes an affirmative duty on each trustee to exercise reasonable care to prevent a co-trustee from committing a serious breach of trust.[84] SCOTT & ASHER ON TRUSTS, discusses the duty to supervise a co-trustee's conduct:

> All trustees are under a duty to participate in the administration of the trust and to use reasonable care to prevent co-trustees from committing breaches of trust. Even in the absence of improper delegation, a trustee who, by failing to exercise reasonable care in supervising the conduct of a co-trustee, allows the co-trustee to commit a breach of trust is liable. Thus, a trustee who permits a co-trustee to have sole custody of the trust property may be liable if the later misappropriates it. So also, if a trustee has reason to suspect that a co-trustee is committing or attempting to commit a breach of trust and does not take reasonable steps to prevent the co-trustee from so doing, and the trustee commits a breach of trust, both are liable.[85]

Under the Texas Trust Code, a trustee who does not join in an action of a co-trustee is not liable for the co-trustee's action, unless the trustee failed to exercise reasonable care.[86] The same rule essentially applies to a dissenting and reluctant co-trustee: a dissenting trustee who joins in an action at the direction of the majority of the trustees and who has notified any co-trustee of the dissent in writing at or before the time of the action is not liable for the action, unless such dissenting co-trustee failed to exercise reasonable care.[87] These rules incentivize co-trustees to not only stay informed about the administration of the trust, but also to voice their objections at or before the time the act to which they disagree is taken.

3. Failure to Redress Breach of Trust

Texas Trust Code § 114.006(b) imposes an affirmative duty on each trustee to exercise reasonable care to compel a co-trustee to redress a serious breach of trust.[88] Even a dissenting co-trustee must exercise reasonable care: a dissenting trustee who joins in an action at the direction of the majority of the trustees and who has notified any co-trustee of the dissent in writing at or before the time of the action is not liable for the action, ***unless*** such dissenting co-trustee failed to exercise reasonable care.[89] For example, the dissenting trustee would be liable if he or she was aware that the action was a breach of trust and failed to exercise reasonable care to redress it.[90]

4. Joint and Several Liability

"If several trustees unite in a breach of trust, they are jointly and severally liable and the entire claim of the beneficiary may be satisfied from the property of one trustee."[91]

F. Co-Trustee Succession

Texas Trust Code § 113.085 provides, "If a vacancy occurs in a cotrusteeship, the remaining co-trustees may act for the trust." Thus, the remaining trustee or co-trustees may administer the trust without filling the vacancy unless the instrument provides

[80] TEX. TRUST CODE § 113.085(e).
[81] TEX. TRUST CODE § 113.085(c).
[82] TEX. TRUST CODE § 117.011(a).
[83] TEX. TRUST CODE § 117.011(a)(3).
[84] TEX. TRUST CODE § 114.006(b).
[85] 4 SCOTT AND ASHER ON TRUSTS, When Powers Exercisable by Several Trustees, § 24.29.
[86] TEX. TRUST CODE § 114.006(a).
[87] TEX. TRUST CODE § 114.006(c).
[88] TEX. TRUST CODE § 114.006(b).
[89] TEX. TRUST CODE § 114.006(c).
[90] RESTATEMENT (THIRD) OF TRUSTS § 81, cmt. e (2007) ("A trustee who opposed an action taken upon decision by a majority of the trustees, and who made that opposition known to a co-trustee but thereafter reasonably joined in the action in order to avoid obstructing its execution, is not liable for the action unless the dissenting trustee was aware that the action was a breach of trust.").
[91] BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 862, Degree Against the Trustee for the Payment of Money - Damages; RESTATEMENT (THIRD) OF TRUSTS § 102, Liability of Multiple Trustees; Contribution (2012); 4 SCOTT & ASHER § 24.29, Liability for Co-Trustee's Breach of Trust.

otherwise.[92] From there, Texas Trust Code Section 112.009 states, "If the person named as the original trustee does not accept the trust or if the person is dead or does not have capacity to act as trustee, the person named as the alternate trustee under the terms of the trust or the person selected as alternate trustee according to a method prescribed in the terms of the trust may accept the trust. If a trustee is not named or if there is no alternate trustee designated or selected in the manner prescribed in the terms of the trust, the court shall appoint a trustee on a petition of any interested person."[93]

III. CO-EXECUTORS/ADMINISTRATORS

A. Section Overview

1. Key Points

- Attempting to determine a co-executors/administrator's precise duty in any given context is complicated due to the interplay between the terms of the Will, the Texas Estates Code and the common law. The actual will should always be carefully considered – especially to the extent it may modify the general rules applicable to co-executors/administrators.
- Co-executors/administrators are generally required to participate in the administration of the Estate – especially in filing an inventory, appraisement and list of claims, or affidavit in lieu thereof — otherwise, the non-joining co-executor/administrator risks losing his or her powers.
- Is delegation authorized under the terms of the will, the Texas Trust Code or the common law?
- Absent contrary terms in the will, co-executors/administrators may act independently, except when conveying real property.
- A co-executor/administrator probably cannot commit the entire administration of the estate to another co-executor/administrator and faces potential liability if the co-executor/administrator was negligent or failed to exercise reasonable care.

2. Key Questions to Consider

- Does the testator understand and appreciate that the level of communication and coordination that will generally be required for the co-executors/administrators to act properly will increase the costs of administering the estate?
- Are the co-executors/administrators capable, from a practical standpoint, of consistently cooperating?
- Are the co-executors/administrators more likely to agree than disagree?
- Are the co-executors/administrators capable and willing to consistently share information with each other?
- Will the co-executors/administrators consistently and properly document delegation?
- Will each co-executors/administrator prevent or redress known breaches of duty?
- In addition to complying with their own fiduciary duties, will each co-executor/administrator act with reasonable care to ensure that the other co-executors/administrator is performing his or her fiduciary duties?
- Is there really a need to appoint more than one co-executors/administrator? (Probably not).

B. Sources of Authority in Analyzing Co-Executor/Administrator Issues

The nature and extent of any co-executor/administrator's duties, powers, and liabilities are derived from three main sources of authority: the will;[94] the applicable statutes; and common law.[95]

Texas law has long held that "as trustee of the property of the estate, the executor is subject to the high fiduciary standards applicable to all trustees."[96] Despite this tenant, the standards set forth in the Texas Trust Code do not necessarily apply – unless the will expressly states that the executor is governed by the provisions of the Texas Trust Code.[97] This can be an incredibly nuanced analysis. For example, some wills may incorporate the Texas Trust Code with respect to the ***powers*** of the executor or may go further and state something like the "executor shall have and exercise all of the applicable ***rights, powers and privileges*** granted in this will to the Trustees of the Trust created

[92] TEX. TRUST CODE § 113.085(b).
[93] TEX. TRUST CODE § 112.009(c).
[94] TEX. ESTATES CODE § 22.034 (defining "Will" to include: (1) a codicil; and (2) a testamentary instrument that merely:(A) appoints an executor or guardian; (B) directs how property may not be disposed of; or (C) revokes another will).
[95] *Ali v. Smith*, 554 S.W.3d 755, 762 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (the fiduciary duty that an executor or administrator owes to the estate is derived from the statutes and common law).
[96] *Humane Soc'y of Austin & Travis Cty. v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975); *Mims-Brown v. Brown*, 428 S.W.3d 366, 374 (Tex. App.—Dallas 2014, no pet.) ("The fiduciary duties of an executor of an estate are the same as the fiduciary duties of a trustee.")
[97] *Humane Soc. of Austin & Travis Cnty. v. Austin Nat. Bank*, 531 S.W.2d 574, 577 (Tex. 1975) ("Even though the Texas Trust Act is not applicable, the executor of an estate is held to the same fiduciary standards in his administration of the estate as a trustee.").

herein,"[98] or "the executor's ***powers, duties and liabilities*** are governed by the standards that apply to trustees under the Texas Trust Code." If the provisions of the Texas Trust Code do not apply, then the fiduciary duties of the executor are defined by the common law standards for trustees as long as the standards do not conflict with statutory law.[99]

Whether the common law "***conflicts***" with statutory law is not always easy to determine. Moreover, the common law may not apply even if such is law is "***inconsistent***" with the Texas Estates Code.[100] As one treatise observes, "The common law is displaced not only by direct conflicts with statutes but also when courts interpret a statute more broadly than its plain language."[101] The common law has also been abrogated, "not because of a conflict with a provision of Texas law, but because of the absence of a specific statute on point."[102] Another commentator warns, "Due to the comprehensive statutory scheme set out in the Texas Estates Code, the statute has virtually no relevance to the estate practice and is rarely cited."[103] Still, in some contexts, Texas courts have relied on the common-law when determining an executors powers and/or liability.[104]

The will may impose additional duties or limit the duties of an executor/administrator.[105] "The source of the executor's power to act is the will."[106] Generally, an executor or administrator has a duty to comply fully with the terms of the will,[107] and must carefully consider the terms of the will in administering the Estate.[108] In some instances, the Texas Estates Code controls over the terms of a will.[109] On the other hand,

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[98] *Corpus Christi Nat. Bank v. Gerdes*, 551 S.W.2d 521, 523 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

[99] *See* TEX. ESTATES CODE § 351.001 (stating that "the rights, powers, and duties of executors and administrators are governed by common law principles to the extent that those principles do not conflict with the statutes of this state); O'CONNOR'S TEXAS PROBATE LAW HANDBOOK Ch. 5-A § 3 (2022 ed.).

[100] *Roberts v. Stewart*, 80 Tex. 379, 387, 15 S.W. 1108, 1111 (1891) (while common law gave named executor considerable power of estate before the will was admitted to probate, statutory requirement of the issuance of letters testamentary meant that before the issuance of such letters, the designated executor had no power over, and therefore no responsibility for, the estate property).

[101] 2 TEXAS PROBATE, ESTATE AND TRUST ADMINISTRATION § 30.01 (2021).

[102] *Id.* (citing *In re Guardianship of Neal's Estate*, 406 S.W.2d 496, 501 (Tex. Civ. App.—Houston 1966), writ ref'd n.r.e. sub nom. In re Guardianship of Neal, 407 S.W.2d 770 (Tex. 1966) (common law would have allowed guardian to make gifts ward would have made if competent but the Probate Code must be construed in conjunction with other statutory provisions which set out more specifically what a guardian may do ***and by implication what a guardian may not do*** in the management of the ward's estate; no specific statute authorized the type of gift guardian wanted to make)) (emphasis added).

[103] JOHANSON'S TEXAS ESTATES CODE, Commentary to § 351.101 (West 2022); *In re Guardianship of Estate of Neal*, 406 S.W.2d 496, 500 (Tex. App.— Houston 1966), writ ref'd n.r.e., 407 S.W.2d 770 (Tex. 1966) (discussing Probate Code §32, now Estates Code §351.001 and noting "by its silence denies [by] implication the exercise by the Probate Court of equitable powers. But even if the words, 'principles of the common law,' are construed to include equitable powers, [§32] does not grant to the court common law powers…").

[104] *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252, 262, 83 S.W. 6, 9-10 (1904) (discussing predecessor statute to TEX. EST. CODE § 351.101 and noting certain statute in effect at the time dealing with the continuation of a business did not apply to the continuation of a partnership; instead common law rule prohibiting executor from continuing a partnership applied); *see also Benton v. Martin*, 244 S.W.2d 930, 934 (Tex. Civ. App.—Fort Worth 1951, no writ) (relying on the common law which allowed executor, through a voluntary conveyance on the part of an heir, to acquire full title when based on full, fair and adequate consideration and where the executor has not concealed or withheld information or made any false or fraudulent representations in reference to the value of the property to support sale in spite of statute generally prohibiting an executor to purchase estate property).

[105] *Shriner's Hosp. for Crippled Children of Tex. v. Stahl*, 610 S.W.2d 147, 148 - 150 (Tex. 1980) (discussing the doctrine of ademption — the extinction of a specific bequest or devise because of the disappearance of or disposition of the subject matter given from the estate of the testator in his lifetime — and stating, ***absent a contrary intention expressed in the will***, the alienation or disappearance of the subject matter of a specific bequest from the testator's estate adeems the devise or bequest).

[106] *Ali v. Smith*, 554 S.W.3d 755, 762 (Tex. App.—Houston [14th Dist.] 2018, no pet.); *see also Jackson v. Cato,* 156 S.W.2d 302, 305 (Tex. Civ. App.—Amarillo 1941, writ ref'd w.o.m.), writ refused W.O.M. (Dec. 31, 1941) ("An executor obtains his authority from the probate law and the provisions of the will and is restricted to such authority as he so obtains").

[107] *See Bilek v. Tupa*, 549 S.W.2d 217, 222 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); *See e.g. Pendleton v. Hare*, 231 S.W. 334, 337 (Tex. Comm'n App. 1921) (will governs the distribution of the estate).

[108] *See e.g. Pendleton v. Hare*, 231 S.W. 334, 337 (Tex. Comm'n App. 1921)(will governs the distribution of the estate); *Boyles v. Gresham*, 153 Tex. 106, 112, 263 S.W.2d 935, 938 (Tex. 1954)("The will is but the expression of the desire of and direction by the testator as to what shall be done with the property left by him").

[109] TEX. ESTATES CODE § 254.005 (forfeiture clauses generally will not be construed to prevent a beneficiary from seeking to compel a fiduciary to perform the fiduciary's duties, seeking redress against a fiduciary for a breach of the fiduciary's duties, or seeking a judicial construction of a will or trust).

there are many instances where the Texas Estates Code gives deference to the terms of a will.[110]

Unlike the Texas Trust Code, there is no provision in the Texas Estates Code which expressly permits the exoneration of executors from liability. Many Texas Estate Code Sections detailing an executor's duties do not contain exceptions for good faith acts[111] or mistaken acts, and there are no Texas cases squarely addressing the issue of whether an executor may be exonerated from liability.[112] Likewise, the common law does not absolve an executor for breaching his or her fiduciary duties in good faith or by mistake.[113] Finally, the Texas Trust Code imposes limits on how far a settlor may go in exculpating a trustee — specifically, that a trustee may not be exculpated for a breach of trust committed in bad faith, intentionally, or with a reckless indifference to the interest of the beneficiary.[114] Similarly, a trustee may not be relieved of liability for any profit derived by the trustee from a breach of trust.[115]

C. Co-Executor/Administrator Fiduciary Duties

1. When a Co-Executor/Administrator's Duties Begin

An executor or administrator "has no title to or authority over the estate until the will is probated and he qualif[ies] as directed by statute."[116] Once appointed, and after qualifying, an executor/administrator's duties begin. Under Texas law, "upon the death of the testator as well as the intestate, the estate vests in the legatees under a will or the heirs of the intestate; "but, upon the issuance of letters testamentary or of administration upon any such estate, the executor or administrator shall have the right to the possession of the estate."[117] Texas Estates Code Section 101.003 provides in relevant part that, "[o]n the issuance of letters testamentary or of administration on an estate . . . the executor or administrator has the right to possession of the estate as the estate existed at the death of the testator or intestate" and "[t]he executor or administrator shall recover possession of the estate and hold the estate in trust to be disposed of in accordance with the law." Texas case law establishes that before the will is admitted to probate and the executor or administrator qualifies, the person named as executor or administrator cannot be held liable for breaching any duties: "Until probate of the will and qualification as executor, [the executor] could not be charged with neglect of reducing personal property to possession, for the simple reason that [the executor] had no right to it."[118]

2. Each Co-Executor/Administrator Owes Fiduciary Duties

It is well-established in Texas that the relationship between a personal representative and the estate's beneficiaries is one that gives rise to a fiduciary duty as a matter of law.[119] Thus, each co-executor/administrator assumes the same fiduciary duties that a singular executor/trustee does. The Texas Estates Code defines a "personal representative" to include: (1) ***an*** executor and independent executor; (2) ***an*** administrator, independent administrator, and

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[110] *See e.g.* TEX. ESTATES CODE § 310.003 (dealing with the allocation of expense to principal ***unless the will provides otherwise***); TEX. ESTATES CODE § 355.109 (a ***decedent's intent expressed in a will controls*** over the abatement of bequests provided by 355.109); TEX. ESTATES CODE § 254.006 (statute granting executor or other person power to designate administrator and specifying those instances where the person may serve ***unless the will provides otherwise***); TEX. ESTATES CODE § 255.152 (statute discussing scheme for failed devises do not apply to charitable bequests ***unless the will provides otherwise***); TEX. ESTATES CODE § 305.101 (a person to whom letters testamentary or of administration will be issued must enter into a bond before issuance of the letters ***unless*** the will directs that no bond or security be required of the person); TEX. ESTATES CODE § 356.652 (allowing a personal representative to purchase estate property if the will expressly authorizes the sale).

[111] *See e.g.* TEX. ESTATES CODE §§ 101.003, 351.102, 351.101; *Estate of Boylan*, 2015 WL 598531, at *4 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.)(relying on the common law applicable to trustees, and noting the fact that an act was taken in "good faith" was not a viable defense to claim executor breached his fiduciary duty); *see also Jewett v. Capital Nat. Bank of Austin*, 618 S.W.2d 109, 112 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.)(a trustee can exercise his fiduciary duty in such a negligent manner that his lack of diligence will result in a breach of his fiduciary duty).

[112] *C.f. In re Estate of Hughes*, 2014 WL 222922, at *5 (Tex. App.—Corpus Christi–Edinburg Jan. 16, 2014, pet. denied)(exculpatory provision of the will did not abrogate statutory authority or the inherent power of the trial court to remove an executor who misapplied estate funds).

[113] *Estate of Boylan*, 2015 WL 598531, at *4 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.)(good faith is not a defense to a breach of fiduciary duty); *Ertel v. O'Brien*, 852 S.W.2d 17, 21 (Tex. App.–Waco 1993, writ denied) ("A trustee commits breach of trust not only where he violates a duty in bad faith, or intentionally although in good faith, or negligently but also where he violates a duty because of a mistake").

[114] TEX. TRUST CODE § 114.007.

[115] *Id.*

[116] *Roberts v. Stewart*, 80 Tex. 379, 387, 15 S.W. 1108, 1110 (1891).

[117] *Id.*; *see also* TEX. EST. CODE §§ 101.001, 101.003.

[118] *Roberts v. Stewart*, 80 Tex. 379, 387, 15 S.W. 1108, 1111 (1891).

[119] *See Huie v. DeShazo,* 922 S.W.2d 920, 923 (Tex.1996); *Punts v. Wilson*, 137 S.W.3d 889, 891 (Tex. App.–Texarkana 2004).

temporary administrator; and (3) a successor to an executor or administrator listed in subsection (1) or (2).[120] The fiduciary standards of an executor of an estate are the same as the fiduciary standards of a trustee.[121] Note, however, those standards may not include statutory provisions found in the Texas Trust Code. There is at least some authority suggesting that unless the will specifically states that the personal representative is governed by the provisions in the Texas Trust Code, the fiduciary duties are defined by the common-law standards for trustees so long as they do not conflict with statutory law.[122]

Texas courts have long emphasized the special nature of the fiduciary duties owed by an executor and/or administrator:

> [The Independent Executor] manages [Estate assets] under an equitable obligation to act for the others' benefit and not his own. He is a "fiduciary" of whom the law requires an unusually high standard of ethical or moral conduct in reference to the beneficiaries and their interests. His "duties" are more than the ordinary "duties" of the marketplace. They connote fair dealing, good faith, fidelity, and integrity. He may have additional duties that he would not have in an ordinary business relation—a duty of full disclosure, for example, and a duty not to use the fiduciary relationship for personal benefit except with the full knowledge and consent of the beneficiaries.[123]

An executor owes, as a matter of law and fact, all of those common law fiduciary duties and statutory duties[124] imposed through such relationship, including: the strict duty of good faith and candor, as well as the general duty of full disclosure respecting matters affecting the beneficiaries' interests;[125] the duty of care;[126] the duty not to delegate acts that the executor is required to personally perform;[127] the duty to maintain books of account showing all income of the estate being administered, as well as all items of expense paid out on behalf of the estate;[128] the duty of competence;[129] the duty to comply fully with the terms of the will;[130] the duty to collect, preserve and protect the Estate's properties, and to reduce to possession all properties belonging to the Estate;[131] the duty to fully account for the Estate's assets;[132] the duty to file

[120] TEX. EST. CODE § 22.031.

[121] *Humane Society, etc. v. Austin Nat'l Bank,* 531 S.W.2d 574, 577 (Tex.1975), *cert. denied,* 425 U.S. 976, 96 S.Ct. 2177, 48 L.Ed.2d 800 (1976).

[122] O'CONNOR'S TEXAS PROBATE LAW HANDBOOK Ch. 5-A § 3.1.1, Duties (2022 ed.) (citing *Humane Soc'y v. Austin Nat'l Bank*, 531 S.W2d 574, 577 (Tex. 1975)).

[123] *Geeslin v. McElhenney*, 788 S.W.2d 683, 684–85 (Tex. App.—Austin 1990, no writ).

[124] *Ali v. Smith*, 554 S.W.3d 755, 762 (Tex. App.—Houston [14th Dist.] 2018, no pet.) ("The fiduciary duty that an executor or administrator owes to the estate is derived from the statutes and common law."); TEX. EST. CODE § 351.001 ("The rights, powers, and duties of executors and administrators are governed by common law principles to the extent that those principles do not conflict with the statutes of this state.").

[125] *Lesikar v. Rappeport*, 33 S.W.3d 282, 296 (Tex. App.—Texarkana 2000, pet. denied); *Punts v. Wilson*, 137 S.W.3d 889, 891 (Tex. App.—Texarkana 2004, no pet.) ("the fiduciary duties owed to the beneficiaries of an estate by an independent executor include a duty of full disclosure of all material facts known to the executor that might affect the beneficiaries' rights.").

[126] TEX. EST. CODE § 351.101 ("An executor or administrator of an estate shall take care of estate property as a prudent person would take of that person's own property, and if any buildings belong to the estate, the executor or administrator shall keep those buildings in good repair, except for extraordinary casualties, unless directed by a court order not to do so."); *Mohseni v. Hartman*, 363 S.W.3d 652, 656–57 (Tex. App.—Houston [1st Dist.] 2011, no pet.)(stating TEX. EST. CODE § 351.101 codifies common law duty holding the executor has a fiduciary duty to exercise reasonable care in the administration of the estate property); *Estate of Boylan*, 2015 WL 598531, at *4 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.) (executor required to exercise the judgment and care that persons of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs).

[127] *See Doherty v. Jpmorgan Chase Bank, N.A.,* 2010 WL 1053053, at *5 (Tex. App.—Houston [1st Dist.] Mar. 11, 2010, no pet.) (trustee's duty of discretion is non-delegable); *Richardson v. McCloskey*, 261 S.W. 801, 807 (Tex. Civ. App.—Austin 1924), rev'd, 276 S.W. 680 (Tex. Comm'n App. 1925) (executors essentially left property management to bookkeeper; improper conduct did not entitle executors to compensation).

[128] *Walling v. Hubbard*, 389 S.W.2d 581, 589 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.), writ dismissed w.o.j. (Nov. 3, 1965), writ refused NRE (Nov. 3, 1965).

[129] TEX. EST. CODE § 351.101.

[130] *See Bilek v. Tupa*, 549 S.W.2d 217, 222 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

[131] *Id.*; *Scott v. Taylor*, 294 S.W. 227, 234 (Tex. Civ. App.—Amarillo 1927, no writ); *Bandy v. First State Bank, Overton, Tex.*, 835 S.W.2d 609, 623 (Tex. 1992) ("The administrator has a fiduciary duty to preserve the assets of the estate."); *see also* TEX. EST. CODE § 351.102.

[132] *Sierad v. Barnett*, 164 S.W.3d 471, 480 (Tex. App.—Dallas 2005, no pet.) (once assets are traced to executor/administrator's hands and the amount of loss is shown, the burden is on executor/administrator to account for any claims or expenses as reasonable and necessary or to otherwise account for the loss, or loss of value, in the assets).

proper inventories and accountings;[133] the duty not to commingle Estate assets;[134] the duty to only pay claims that are just, legal and correct and otherwise proper;[135] the duty of loyalty;[136] the duty of impartiality;[137] the duty not to misapply fiduciary funds and property and not to self-deal[138] or commingle assets, liabilities, or accounts (including those of himself or herself) and the duty not to seek or obtain, for himself or herself, any secret, undisclosed benefits, properties, assets, fees, commissions, payments, discounts, profits, gains, advantages, dividends, distributions, revenues, or other ownership interest; the duty not to engage in oppressive/hostile conduct;[139] and the duty to timely administer[140] and close the Estate.[141] Doubts are resolved against the executor or administrator where he or she has been careless in the performance of his or her duties.[142]

3. Duty to Participate

When co-executors/administrators qualify, each takes an oath to "well and truly perform all the duties of executor/administrator of the estate of the deceased."[143] Unless co-executors/administrators have the authority to delegate their duties to others, or unless the will expressly divides up the duties among the appointed co-executors/administrators, all co-executors/administrators are required to participate in the administration of the estate.[144] From a practical standpoint, however, co-executors/administrators do not always walk in lock step. Frequently, one co-executor/administrator assumes the lion share of the role. Although there is no express statutory provision in the Texas Trust Code allowing an executor to delegate duties to a co-executor, such delegation may be authorized to the extent the will incorporates the Texas Trust Code. If the will does not incorporate the Texas Trust Code, "then the common-law delegation

[133] TEX. EST. CODE §§ 309.051 and 309.052; *Garcia v. Garcia,* 878 S.W.2d 678, 680 (Tex. App.—Corpus Christi 1994, no writ) (when fiduciary fails to file proper inventories and accounts, burden on fiduciary to show validity of deductions from assets).

[134] *Punts v. Wilson*, 137 S.W.3d 889, 892 (Tex. App.—Texarkana 2004, no pet.) ("When an independent executor takes the oath and qualifies in that capacity, he or she assumes all duties of a fiduciary as a matter of law which, in addition to other duties, includes the duty to avoid commingling of funds.").

[135] *See e.g., Scott v. Taylor,* 294 S.W. 227, 230 (Tex. Civ. App.—Amarillo 1927, no writ).

[136] *Estate of Boylan*, 2015 WL 598531, at *4 (Tex. App.—Fort Worth 2015, no pet.).

[137] *See* TEX. TRUST. CODE § 117.008.

[138] *Mims-Brown v. Brown*, 428 S.W.3d 366, 374 (Tex. App.—Dallas 2014, no pet.) ("As a fiduciary, an executor has a duty to protect the beneficiaries' interest by fair dealing in good faith with fidelity and integrity . . .[the executor's] personal interests may not conflict with his fiduciary obligations to the estate."); *Humane Soc. of Austin & Travis County v. Austin Nat. Bank*, 531 S.W.2d 574, 577 (Tex. 1975); *Geeslin v. McElhenney*, 788 S.W.2d 683, 684–85 (Tex. App.—Austin 1990, no writ).

[139] *See e.g.,* TEX. TRUST CODE § 113.082(a)(4)'s "other cause for removal" and the case thereunder which interprets same to include ill-will or hostility between a trustee and the beneficiary or other close family members of that beneficiary. *Akin v. Dahl,* 661 S.W.2d 911 (Tex. 1983), *cert. denied,* 466 U.S. 938 (1984); *Barrientos v. Nava,* 94 S.W.3d 270 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (hostility toward beneficiaries' close family member justified removal and appointment of another person as the successor trustee).

[140] *Estate of Sakima*, 2019 WL 4267766, at *3 (Tex. App.—Dallas 2019, no pet.) (trial court did not err in removing administrator who allowed estate administration to languish for over 7 years and failed to file proper estate accountings).

[141] *Sierad v. Barnett*, 164 S.W.3d 471, 480 (Tex. App.—Dallas 2005, no pet.) (noting administrator had fiduciary duty to timely close the Estate).

[142] *Scott v. Taylor*, 294 S.W. 227, 230 (Tex. Civ. App.—Amarillo 1927, no writ)("Where an administrator, as in this case, has been careless and negligent in his accounts and in performing the duties required by the statutes, such as filing his annual report, taking, preserving, and presenting vouchers, and in closing the estate at the end of three years from the date of his appointment, and when such carelessness is apparent from the face of the report when filed and the report is so obscure and confused that the services of an expert accountant are required to audit it, the rule is that if there is any reasonable doubt as to whether the administrator is entitled to a credit, such doubt will be resolved against him.").

[143] TEX. EST. CODE § 305.051 and 351.052.

[144] O'CONNOR'S TEXAS PROBATE LAW HANDBOOK Ch. 5-A § 3, Duties (2022 ed.); *Lesikar v. Rappeport*, 33 S.W.3d 282, 296 (Tex. App.—Texarkana 2000, pet. denied) ("As both co-executrices and beneficiaries, each owed the other a fiduciary duty, and each was entitled to the other's fulfilling her fiduciary obligations."); TEX. EST. CODE § 351.101(mandating that an executor or administrator of an estate shall take care of estate property as a prudent person would take of that person's own property TEX. EST. CODE § 351.102 (stating that immediately after receiving letters testamentary or of administration, the personal representative of an estate shall collect and take possession of the estate's personal property, record books, title papers, and other business papers); TEX. EST. CODE § 351.151(providing that if there is a reasonable prospect of collecting the claims or recovering the property of an estate, the personal representative of the estate shall use ordinary diligence to: (1) collect all claims and debts due the estate; and (2) recover possession of all property to which the estate has claim or title); *Brown v. Fore*, 12 S.W.2d 114, 116 (Tex. Comm'n App. 1929) (one executor is entitled to maintain a suit against his coexecutor upon a claim alleged to be due by him to the estate of the decedent).

rules for trustees presumably apply because a personal representative is considered a trustee of the decedent's estate."[145] A co-executor/administrator who abdicates his responsibility and does nothing faces exposure under common law principles.[146]

Texas Estates Code § 307.002 — the general joint personal representative statute which, with the exception of conveying real property, authorizes co-executors/administrators to act independently — does not expressly address what would control in the face of an apparent conflict between a will and the Texas Estates Code. However, secondary sources suggest the will would control:

> Although there is little authority on the question, there would seem to be no reason why a testator could not require all, or any specified number, of his personal representatives to join in any type of action, and it seems reasonable to believe the statute was not designed to cover those cases where a will makes some specific provision to the contrary.[147]

For example, this result may obtain "if the will adopts or incorporates the Texas Trust Code, which requires co-trustees to act by majority decision," in which case, "presumably all actions must be by majority decision."[148]

4. Duty to Disclose by and Among Co-Executors/Administrators

Although there is no express statute in the Texas Trust Code requiring co-executors/administrators to disclose all material facts that are relevant to the administration the estate, such a duty may exist to the extent the will incorporates the Texas Trust Code. If the will does not incorporate the Texas Trust Code, "then the common-law delegation rules for trustees presumably apply because a personal representative is considered a trustee of the decedent's estate."[149] From a practical standpoint, some level of disclosure is required, especially with regard to filing the inventory, appraisement and list of claims or affidavit in lieu thereof[150] (which must be filed under oath and which both co-executors/administrators should ideally approve), and because both right to demand an accounting from each co-executor or co-administrator.[151]

D. Decision Making by Co-Executors/Administrators

Texas Estates Code § 307.002 deals with joint executors or administrators and provides:

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[145] *See e.g.,* O'CONNOR'S TEXAS PROBATE LAW HANDBOOK Ch. 5-A § 3 Duties (2022 ed.); *See also* TEX. EST. CODE § 351.001 ("The rights, powers, and duties of executors and administrators are governed by common law principles to the extent that those principles do not conflict with the statutes of this state."); RESTATEMENT (THIRD) OF TRUSTS § 81, cmt. c(1) (2007)("The general duty of each co-trustee to participate in performing the functions of the trusteeship does not prevent delegation on a prudent basis between or among themselves with respect to essentially ministerial matters, such as the custody of trust property and the implementation of decisions that have been made by proper vote of the co-trustees . . . A trustee may also expressly delegate responsibilities and authority to the remaining co-trustee(s) in anticipation of the trustee's unavailability due to [absence, illness, or other temporary incapacity, or because of disqualification under other law] . . . [and] in circumstances in which adherence to the general rule . . . would not be practical and prudent because of cost or inefficiency, or even because delegation would be consistent with the settlor's expectations in designating, or providing for appointment of, that co-trustee").

[146] *See Jewett v. Capital Nat. Bank of Austin*, 618 S.W.2d 109, 112 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.) (trustee who literally did nothing to administer the trust was not relieved of its negligence in failing to review the trust periodically and was not relieved of its negligence in failing to diversify the corpus of the trust despite exculpatory language).

[147] 18 TEX. PRAC., PROB. & DECEDENTS' ESTATES § 702 Joint executors and administrators – Powers in general (citing *Anderson v. Stockdale*, 62 Tex. 54, 60 (1884); *Becker v. Am. Nat. Bank*, 286 S.W. 889 (Tex. Civ. App.—Austin 1926, no writ)); O'CONNOR'S TEXAS PROBATE LAW HANDBOOK Ch. 5-A § 4, Powers (2022 ed.) ("The ability of a corepresentative to act independently can be modified by the terms of the will").

[148] O'CONNOR'S TEXAS PROBATE LAW HANDBOOK Ch. 5-A § 4, Powers (2022 ed.) (citing Wakeman, *Performing a Pre-Mortem Autopsy: How to Dissect a Will Someone Else Drafted*, Intermediate Estate Planning & Probate, State Bar of Texas CLE, ch. 1 (2016)).

[149] O'CONNOR'S TEXAS PROBATE LAW HANDBOOK Ch. 5-A § 3 Duties (2022 ed.); *See also* TEX. EST. CODE § 351.001 ("The rights, powers, and duties of executors and administrators are governed by common law principles to the extent that those principles do not conflict with the statutes of this state."); BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 584, Duty of co-trustee to be active; Charles E. Rounds, Jr. et. al, LORING AND ROUNDS: A TRUSTEE'S HANDBOOK, § 7.2.4 (2021 ed.); RESTATEMENT (THIRD) OF TRUSTS § 81, cmt. b (2007).

[150] *See* TEX. EST. CODE § 309.055.

[151] *See Kelly v. Lobit*, 142 S.W.2d 301, 303 (Tex. Civ. App.—Galveston 1940, no writ)("They were jointly and severally required under the terms of said will to file an inventory and a list of claims due said estate, and the beneficiaries under said will had a right to demand an accounting from each of them of their administration of said estate as such executors").

> (a) Except as provided by Subsection (b), if there is more than one executor or administrator of an estate at the same time, the acts of one of the executors or administrators in that capacity are valid as if all the executors or administrators had acted jointly. If one of the executors or administrators dies, resigns, or is removed, a co-executor or co-administrator of the estate shall proceed with the administration as if the death, resignation, or removal had not occurred.
> (b) If there is more than one executor or administrator of an estate at the same time, all of the qualified executors or administrators who are acting in that capacity must join in the conveyance of real estate unless the court, after due hearing, authorizes fewer than all to act.

This statue applies to all co-executors and/or co-administrators, including those acting free of court supervision.[152] Texas Estates Code § 307.002 sets forth the general rule that if two or more persons are serving as co-executors or co-administrators of an estate, it is not necessary for them to act jointly. For example, one co-executor may incur a debt on behalf of the Estate, without the joinder of the other co-executor(s).[153] Therefore, the act of one co-executor or co-administrator is sufficient to bind the estate.[154] Indeed, the Texas Supreme Court has long held that co-executors and co-administrators "are regarded in law as one person, and consequently the acts of one of them in respect to the administration are deemed to be the acts of all, inasmuch as they have a joint and entire authority over the whole property."[155]

Exception 1: Conveying Real Property. Texas Estates Code § 307.002(b) requires co-executors or co-administrators to act jointly in conveying real property — unless the court, after due hearing, authorizes fewer than all to act. Co-executors or co-administrators must also act jointly in entering into contracts to convey real property.[156]

Exception 2: The Will Provides Otherwise. A testator can specify that a certain number of executors are required to join in a decision, despite the default provisions of Texas Estates Code § 307.002.[157]

Additionally, co-executors or co-administrators should also cooperate to file an inventory, appraisement and claims, or affidavit in lieu thereof. While one co-executor or co-administrator may file an inventory, appraisement and list of claims, or affidavit in lieu thereof, the co-executor or co-administrator who "neglects to make or file an inventory, appraisement, and list of claims or an affidavit in lieu of an inventory, appraisement, and list of claims ***may not interfere with and does not have any power over the estate after*** another representative makes and files an inventory, appraisement, and list of claims or an affidavit in lieu of an inventory, appraisement, and list of claims."[158] The only way to avoid being stripped of powers is for the non-filing co-executor or co-administrator to file a sufficient excuse within a limited time frame, otherwise removal is mandatory:

> The personal representative who files the inventory, appraisement, and list of claims or the affidavit in lieu of an inventory, appraisement, and list of claims is entitled to the whole administration unless, ***before the 61st day after*** the date the representative files the inventory, appraisement, and list of claims or the affidavit in lieu of an inventory, appraisement, and list of claims, one or more delinquent representatives file with the court a ***written, sworn, and reasonable excuse*** that the court considers satisfactory. The court shall enter an order removing one or more

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[152] *See Primm v. Mensing*, 14 Tex. Civ. App. 395, 396, 38 S.W. 382, 383 (1896, no writ) (applying these concepts set forth in TEX. EST. CODE § 307.002 to co-executors who were authorized to manage the estate independently of the probate court and without bond).

[153] *Id.* ("J. B. L. Primm had the authority to incur the liability alone, and without the necessity of joint action with his wife, who was the only other executor acting at the time").

[154] *Kelly v. Lobit*, 142 S.W.2d 301, 303 (Tex. Civ. App.—Galveston 1940, no writ) ("Each of said executors could legally act without the joinder of the other in matters pertaining to said estate, except in the sale of land, and the act of each in connection with said estate was binding upon the other.").

[155] *Dean v. Duffield*, 8 Tex. 235, 236 (1852) (claim presented to, and rejected by, one of several administrators, was sufficient to authorize the institution of suit to establish same).

[156] *Heffington v. Gillespie*, 176 S.W.2d 205, 210–11 (Tex. Civ. App.—Fort Worth 1943, no writ) ("No further force or effect can be given this contract merely because executor Gillespie testified that executor Meadows left all such matters to Gillespie and always executed all instruments that Gillespie prepared . . . The courts are not, in our opinion, permitted to speculate on the possibility, or the probability, of the full and complete acquiescence of one executor who has not contracted in writing to sell property belonging to the estate in his hands, when such contract is executed by only one executor and, in its executed condition, is not such a contract as may be enforced in the courts.").

[157] *Becker v. Am. Nat. Bank*, 286 S.W. 889, 891 (Tex. Civ. App.—Austin 1926, no writ).

[158] TEX. EST. CODE § 309.055(b).

> delinquent representatives and revoking those representatives' letters if: (1) an excuse is not filed; or (2) the court does not consider the filed excuse sufficient.[159]

E. Co-Executor/Administrator Liability For Acts of Other Co-Executor/Administrator

1. Failure to Exercise Reasonable Care

When it comes to co-executors/administrators, there is a common horror story that occurs with some frequency and goes something like this: Two people are appointed as co-executors of an Estate. For a variety of reasons, one of the co-executors takes the lead, while the other co-executor takes a passive role. After some time, the passive co-executor slowly drops off the map, failing to participate in the day-to-day affairs of the Estate and disappearing from communications between the other co-executor and professionals, like attorneys, CPAs, insurance agents, and the Estate's beneficiaries. Everything has been handled and everything is fine, until one day, it's not. What the passive co-executor thought was done, was in fact not done. The passive co-executor is named as a defendant in a lawsuit brought by the Estate's beneficiaries. What is this passive co-executor's fate? The answer will largely depend on whether the co-fiduciary participated in the wrongful conduct, knowingly permitted or acquiesced to the wrongful conduct, or negligently allowed the wrongful conduct to occur. Texas case law establishes that co-executors/administrators are liable for the misdeeds of each other: "coadministrators, . . . stand as sureties for each other . . . the one is responsible for the mal-administration of the other.[160] However, it appears that a co-executor/administrator must know, or have reason to know, of such misdeeds to be held liable.[161]

2. Failure to Redress Breach of Duty

Similarly, an innocent co-executor/administrator could be potentially liable for the misdeeds of another executor/administrator if the innocent co-executor/administrator was negligent or failed to exercise reasonable care:

> An important exception to the general rule of nonliability has been raised in situations where the fiduciary sought to be charged can reasonably be regarded as guilty of negligence. Such lack of care may inhere in the manner in which the innocent fiduciary permitted his cofiduciary to handle the administration of the estate, in not investigating suspicious conduct on the part of such cofiduciary, in signing papers tendered by the cofiduciary, or in innumerable other ways. One important aspect of the exception to nonliability raised with respect to negligent fiduciaries is that liability may be upheld despite the existence of factors or considerations which normally confirm the rule of nonliability, such as the fact that the fiduciary charged has never had possession or control of the assets of the estate. [162]

Because beneficiaries have a right to demand an accounting from each co-executor/co-administrator, it is important for them to stay informed and to investigate any suspicious conduct of co-fiduciaries to avoid being liable for negligently performing their duties.[163]

F. Co-Executor/Administrator Succession

Texas Estates Code § 307.002(a) makes it clear that if one of the executors or administrators dies, resigns, or is removed, a co-executor or co-administrator of the estate shall proceed with the administration as if the death, resignation, or removal had not occurred – *i.e.*, the remaining co-executor or co-administrator may act alone. Effective September 1, 2019, a testator may delegate to an executor named in the Will or to another person, the authority to designate

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[159] TEX. EST. CODE § 309.055(c).

[160] *Davis v. Thorn*, 6 Tex. 482, 485 (1851)("if one is in possession of most of the assets of the estate, and is misapplying and squandering them, the liability of the other to be seriously injured is a sufficient ground for relief, on the plain and acknowledged principles of equity jurisprudence.").

[161] *Lobit v. Marcoulides*, 225 S.W. 757, 761 (Tex. Civ. App.—Galveston 1920, writ ref'd)(co-executor not liable for sums wrongfully obtained by other co-executor in breach of prior agreement since he was not a party to the agreement, had no knowledge of its execution, and there was no evidence showing that he has received any property or money as a result of the breach of the agreement and wrongful acts of the other co-executor); *Peter v. Beverly*, 35 U.S. 532, 562, 9 L. Ed. 522 (1836)("For it is a well settled rule, that one executor is not responsible for the devastavit of his co-executor, any farther than he is shown to have been knowing and assenting at the time to such devastavit or misapplication of the assets: and merely permitting his co-executor to possess the assets; without going farther, and concurring in the application of them; does not render him answerable for the receipts of his co-executor. Each executor is liable only for his own acts, and what he receives and applies, unless he joins in the direction and misapplication of the assets.")

[162] *See* L. S. Tellier, *Coexecutor's, coadministrator's, or cotrustee's liability for defaults or wrongful acts of fiduciary in handling estate,* 65 A.L.R.2D 1019, §§ 2, 21 (Originally published in 1959).

[163] *See Kelly v. Lobit*, 142 S.W.2d 301, 303 (Tex. Civ. App.—Galveston 1940, no writ).

one or more persons to serve as administrator.[164] Unless the will provides otherwise, the person designated may serve only if: (1) each named executor is deceased, disqualified, or indicates by affidavit the executor's inability or unwillingness to serve; and (2) the designation is in writing and properly acknowledged; and (3) the person is not disqualified from serving.[165]

IV. CO-AGENTS

A. Section Overview

1. Key Points

- Attempting to determine a co-agent's precise duty in any given context is complicated due to the interplay between the terms of the power of attorney, the Texas Estates Code and the common law. The actual power of attorney should always be carefully considered – especially to the extent it may modify the general rules applicable to co-agents.
- Will both co-agents clearly "accept their appointment," so as to serve as co-agents in unison?
- Is delegation authorized under the terms of the power of attorney?
- Determining the precise scope of an agent's duties under a durable power of attorney, especially those duties involving self-dealing and/or self-interested transactions, is complex.
- What are the express terms and implied terms of any durable power of attorney?
- What other "aspects of the relationship" need to be considered to determine the nature of the fiduciary duties owed by the agent?
- Absent contrary terms in the power of attorney, co-agents may act independently.
- It is unclear as to whether a co-agent who has accepted their appointment, especially one for an incompetent principal, may let the other co-agent manage the principal's property and turn a blind eye to the other co-agent's acts/omissions.

2. Key Questions to Consider

- Does the principal understand and appreciate that co-agents, by default, may act independently, which impact, from a practical standpoint, reliance on the power of attorney by third parties?
- If the durable power of attorney requires the agents to act jointly, are the co-agents capable, from a practical standpoint, of consistently cooperating?
- If the durable power of attorney requires the agents to act jointly, are the co-agents more likely to agree than disagree?
- If the durable power of attorney provides that the agents are required to act jointly, are the co-agents capable and willing to consistently share information with each other?
- If the durable power of attorney allows delegation, will the co-agents consistently and properly document delegation?
- Will each co-agent "take action reasonably appropriate under the circumstances to safeguard a principal's best interest" when the co-agent has actual knowledge of a breach or imminent breach by another agent? What does this require?
- Does the law impose a duty on one co-agent to investigate the acts/omissions of another co-agent, particularly after both agents have accepted their appointment and the principal is incompetent?
- Is there really a need to appoint more than one co-agent or split authority under multiple agents?

B. Sources of Authority in Analyzing Co-Agent Issues

With respect to durable powers of attorney, there are three main sources of authority when analyzing co-agency issues: (1) the terms of the durable power of attorney; (2) the Durable Power of Attorney Act; and (3) the common law. With limited exceptions, the Durable Power of Attorney Act "applies to all durable powers of attorney."[166]

C. Co-Agent Fiduciary Duties

The 2017 legislative changes to the Texas Durable Power of Attorney Act (the "Act"), however, added considerable complexity to determining the scope of an agent's powers and the duties owed by an agent to the principal. For example, many sections contain multi-layered exceptions and cross references to other sections. It can thus be very difficult to easily ascertain those circumstances by which an agent's exercise of authority is permitted (or not permitted).

The starting place to determine an agent's duties is the power of attorney. A power of attorney creates an agency relationship.[167] Common-law agency principles may be limited contractually.[168] An agent's duties of performance with respect to the principal are

[164] TEX. EST. CODE § 254.006(a).
[165] TEX. EST. CODE § 254.006(c).
[166] TEX. EST. CODE § 751.0015.
[167] *See Vogt v. Warnock*, 107 S.W.3d 778, 782 (Tex. App.—El Paso 2003, pet. denied); *In re Estate of Wallis*, 2010 WL 1987514, at *4 (Tex. App.—Tyler 2010, no pet.); *Sassen v. Tanglegrove Townhouse Condominium Assoc.*, 877 S.W.2d 489, 492 (Tex. App.—Texarkana 1994, writ denied).
[168] *Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co*., 235 S.W.3d 695, 702 (Tex. 2007) (internal citations omitted).

subject to the terms of the governing document.[169] Indeed, unless otherwise provided by statute or law, duties owed by an agent to his principal may be altered by agreement.[170] Accordingly, the agreements between the agent and principal must be taken into consideration when determining the scope of an agent's fiduciary duty to his or her principal.[171] As the Texas Supreme Court observed:

> The Third Restatement carries forward the principle that the parameters of an agency relationship are to be established by the agreement of the parties. According to the Third Restatement, "[a]n agent has a duty to act in accordance with the express ***and implied terms*** of any contract between the agent and the principal." RESTATEMENT (THIRD) OF AGENCY § 8.07 (2006). "This section makes the basic point that an agent's duties of performance to the principal are subject to the terms of any contract between them." *Id.* cmt. a.[172]

Despite implied terms informing an agent's duties, no Texas case has outlined the precise "implied terms" of the statutory durable power of attorney. The Texas Estates Code provides that "a person may use a statutory durable power of attorney to grant an attorney in fact or agent powers with respect to a person's property and financial matters."[173] The statutory durable power of attorney form is found in Texas Estates Code Section 752.051 (the "**Statutory DPOA**"). The form is not exclusive and other forms of power of attorney may be used.[174] The Statutory DPOA primarily grants broad powers:

> "I appoint _____ (insert the name and address of the agent of the person appointed) as my agent to act for me in any lawful way with respect to all of the following powers that I have initiated below."[175]

The bottom of the Statutory DPOA also includes a section entitled, "Important Information for Agent," which warns the agent that when he or she "[accepts] the authority granted under this power of attorney," a fiduciary relationship is established with the principal."[176] The instruction section further states that "this is a special legal relationship that imposes on [the agent] legal duties that continue until [the agent] resign[s] or the power of attorney is terminated, suspended, or revoked by the principal or by operation of law."[177] Finally, the instruction section informs the agent that a fiduciary duty generally includes, among other things, "the duty to: (1) act in good faith; (2) do nothing beyond the authority granted in this power of attorney; (3) act loyally for the principal's benefit; (4) avoid conflicts that would impair your ability to act in the principal's best interest."[178]

Additional factors which must be taken into consideration when determining the scope of an agent's fiduciary duty to his or her principal include the nature and purpose of the relationship between the agent and principal.[179] Even in an agency relationship, courts take ***all aspects of the relationship*** into consideration when determining the nature of fiduciary duties flowing between the parties.[180]

Moreover, tort duties — such as the duty of care, competence and diligence — "will often overlap with an agent's duties of performance that are express or implied terms of a contract between principal and agent."[181] "Tort law imposes duties of care on an agent because the agent undertakes to act on behalf of the principal, because the principal's reliance on that undertaking is foreseeable by the agent, and because it is often socially useful that an agent fulfill the agent's undertaking to the principal."[182] The breach of a fiduciary duty is a tort.[183]

Finally, fiduciary duties are equitable in nature and generally not subject to hard and fast rules.[184] As the RESTATEMENT (THIRD OF AGENCY) emphasizes, "a

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[169] *Moore v. Estate of Moore*, 2021 WL 3282158, at *4 (Tex. App.—Amarillo July 30, 2021, no pet.)(citing *Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co*., 235 S.W.3d 695, 702 (Tex. 2007) (quoting RESTATEMENT (THIRD) OF AGENCY § 8.07 cmt. a (2006)) ("[A]n agent's duties of performance to the principal are subject to the terms of any contract between them.")).

[170] *In re Estate of Miller*, 446 S.W.3d 445, 455 (Tex. App.—Tyler 2014, no pet.) (citing *Nat'l Plan Adm'rs, Inc.*, 235 S.W.3d at 700 ("[A]n agent's duties of performance to the principal are subject to the terms of any contract between them.").

[171] *Nat'l Plan Adm'rs, Inc.*, 235 S.W.3d at 700.

[172] *Id.* at 702 (emphasis added).

[173] TEX. EST. CODE § 752.001(a).

[174] TEX. EST. CODE § 752.051.

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co*., 235 S.W.3d 695, 700 (Tex. 2007).

[180] *Id*.

[181] RESTATEMENT (THIRD) OF AGENCY § 8.08, cmt. b (2006).

[182] *Id.* (citing RESTATEMENT SECOND, TORTS § 323).

[183] *See BBVA Compass Inv. Sols., Inc. v. Brooks*, 456 S.W.3d 711, 721 (Tex. App.—Fort Worth 2015, no pet.).

[184] *Nat'l Plan Adm'rs, Inc.*, 235 S.W.3d at 702 (citing *Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508 (Tex.1980).

relationship of agency is not the sole basis on which a person may become subject to a fiduciary duty to another person."[185] For example, the principal and agent may have also had an informal relationship of trust and confidence.[186] Texas Estates Code Section 751.006 also provides that "the remedies under this chapter are not exclusive and do not abrogate any right or remedy under any law of this state other than this chapter."

"A fiduciary owes her principal a high duty of good faith, fair dealing, honest performance, and strict accountability."[187] An agent generally owes, as a matter of law and fact, all of those common law fiduciary duties and statutory duties imposed through such relationship, including: the duty to inform and to account for actions taken under the power of attorney;[188] the duty timely inform the principal of each action taken under a durable power of attorney;[189] the statutory duty to maintain records of each action taken or decision made by the agent;[190] the duty to maintain all records until delivered to the principal, released by the principal, or discharged by a court;[191] the duty to act within the scope of the authority granted;[192] the duty "to act loyally for the principal's benefit in all matters connected with the agency relationship;"[193] the duty to refrain, absent the principal's consent, from using his position or the principal's property to gain a benefit for himself at the principal's expense;[194] the duty, unless otherwise agreed, to act solely for the benefit of the principal in all matters connected with his agency;[195] and the duty to preserve the principal's estate plan in certain situations.[196]

The existence and nature of an agency relationship is generally a question of fact.[197] The existence of a fiduciary duty presents a question of law for the court.[198]

1. When a Co-Agent's Fiduciary Duties Begin

In 2017, the Texas Legislature amended Texas Estates Code § 751.101 to clarify that "a person who accepts appointment as an agent under a durable power of attorney as provided by Section 751.022 is a fiduciary as to the principal only when acting as an agent under the power of attorney and has a duty to inform and to account for actions taken under the power of attorney." Before a person may "act an agent," the person must first have "accepted their appointment." Tex. Estates Code § 751.022 provides:

> Except as otherwise provided in the durable power of attorney, a person accepts appointment as an agent under a durable power of attorney by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance of the appointment (emphasis added).

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[185] RESTATEMENT (THIRD) OF AGENCY § 8.01, cmt. c (2006).
[186] *Id.* ("Moreover, a court may also determine that one person's relationship with another warrants the imposition of fiduciary obligation to some degree on the basis that one party to the relationship has in fact reposed trust and confidence in the other and has done so consistently with the other's invitation").
[187] *Estate of Wallis*, 2010 WL 1987514, at *4 (Tex. App.—Tyler 2010, no pet.) (mem. op.); *see also* RESTATEMENT (SECOND) OF AGENCY § 387 (1957) ("Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency."); RESTATEMENT (SECOND) OF AGENCY § 387 cmt. B (1957) ("The agent's duty is not only to act solely for the benefit of the principal in matters entrusted to him, but also to take no unfair advantage of his position in the use of information or things acquired by him because of his position as agent or because of the opportunities which his position affords…His duties of loyalty to the interests of his principal are the same as those of a trustee to his beneficiaries.") (internal citations omitted).
[188] TEX. EST. CODE § 751.101.
[189] TEX. EST. CODE § 751.102.
[190] TEX. EST. CODE § 751.103(a).
[191] TEX. EST. CODE § 751.103(b).
[192] RESTATEMENT (THIRD) OF AGENCY § 8.09 (2005).
[193] *In re Estate of Miller*, 446 S.W.3d at 453 (citing RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006)).
[194] *Id.* at 453 (citing *Tex. Bank & Trust Co.*, 585 S.W.2d at 508-09); *Mims-Brown v. Brown*, 428 S.W.3d 366, 374 (Tex. App.—Dallas 2014, no pet.); *see also* RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (2006).
[195] *In re Estate of Miller*, 446 S.W.3d at 453 (citing *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002) (quoting RESTATEMENT (SECOND) OF AGENCY § 387 (1958)).
[196] TEX. EST. CODE § 751.122.
[197] *Brown & Brown of Tex., Inc. v. Omni Metals, Inc.*, 317 S.W.3d 361, 377 (Tex. App.—Houston [1st Dist.] 2010, pet. denied); *Novamerican Steel, Inc. v. Delta Brands, Inc.*, 231 S.W.3d 499, 511 (Tex. App.—Dallas 2007, no pet.).
[198] *Richard Nugent & CAO, Inc. v. Estate of Ellickson*, 543 S.W.3d 243, 256 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (citing *Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co.*, 235 S.W.3d 695, 704 (Tex. 2007).

Once an agent has accepted their appointment as agent, the agent becomes a fiduciary as to the principal only when acting as an agent under the power of attorney.[199] According to the Professor Johanson's commentary to Texas Estates Code Section 751.101, the 2017 Amendment resolved concerns raised by the decision in *Vogt v. Warnock*,[200] which held that a person who knew she had been named as an agent under a durable power of attorney stood in a fiduciary relationship with the principal despite never having acted under the power of attorney.[201] There is little Texas case law interpreting Section 751.101 and the statute poses several questions. For example, does the word "when" imply that fiduciary duties are imposed on an act-by-act basis? Note the subtle difference in effect if Texas Estates Code Section 751.101 had included "once" or "after" instead of "when." The former would trigger and impose a fiduciary relationship on all subsequent dealings, whereas the later seems to suggest that fiduciary duties are imposed on an act-by-act basis. But would this be contrary to the implied terms of a durable power of attorney once the principal becomes incompetent? Can an agent accept appointment and then cease acting or is there an implied duty once an agent has undertaken to act for an incompetent principal to continue to do so? Moreover, because Texas law recognizes a confidential and informal fiduciary relationships, it still appears fiduciary duties could be imposed on an agent notwithstanding the agent's claim his or her acts were "not taken as an agent for the principal." In summary, it is unclear how far Section 751.101 alters common law principles applicable to all agents.

2. Duty to Participate

Each co-agent owes duties to the common principal.[202] The precise commencement, scope and duration of each co-agent's duties, however, may be difficult to determine. An agent may only delegate authority under the durable power of attorney if the principal granted the agent this authority.[203] Unless otherwise agreed, an agent is as responsible to the principal for the conduct of a subagent in connection with the principal's affairs entrusted to the subagent as the agent is for his own conduct.[204]

Where a principal appoints co-agents under the Statutory DPOA, is the co-agent who essentially stays on the side-lines during the principal's incapacity liable for the acts/omissions of the other "lead" co-agent? For example, what if the passive agent assists the principal for one transaction and then does not continue to otherwise act for the principal, choosing instead to allow the lead co-agent to manage the principal's property? Assume further, the passive agent never puts himself or herself on the principal's bank accounts, content to only help as needed. Later, the passive agent learns the lead agent engaged in self-dealing and misappropriated the principal's assets. Is the passive agent liable for breaching a fiduciary duty for failing to act – i.e. failing to participate?

Arguments can be made that an agent, who has accepted their appointment, has no duty to participate in the management of the principal's property or stay informed as to the actions of the other agent. The Texas Estates Code does not impose an express duty of care on an agent or other express duty to supervise and monitor the acts/omissions of a co-agent – it only imposes a statutory duty to "take any action reasonably appropriate under the circumstances to safeguard the principal's best interest" on an agent who has "***actual knowledge*** of a breach or imminent breach of fiduciary duty by another agent."[205] Moreover, there are more sections, by number, in the Durable Power of Attorney Act which identify and explain "powers" than "duties." Additionally, the Texas Estates Code seems to impose fiduciary duties on only those agents who have both "accepted" his or her appointment and "only ***when acting*** as an agent under the power of attorney."[206] For example: an agent "has a duty to inform and to account for ***actions taken*** under the power of attorney;[207] an agent "shall timely inform the principal of ***each action taken*** under a durable power of attorney;"[208] and an agent "shall maintain records of ***each action taken*** or ***decision made*** by the agent."[209] The Texas Estates Code seems to provide a remedy for an agent who refuses to act – his or her agency is terminated. An agent who refuses to act potentially renders him or her "no longer qualified" to serve as agent, which arguably terminates his or her authority and vests a named remaining or successor agent with authority to act.[210] What level of

[199] TEX. EST. CODE § 751.101.
[200] *Vogt v. Warnock*, 107 S.W.3d 778 (Tex. App.–El Paso 2003, writ denied).
[201] Johanson's, TEXAS ESTATES CODE, Commentary to §751.101 (West 2022).
[202] RESTATEMENT (THIRD) OF AGENCY § 1.04 (2006).
[203] TEX. EST. CODE § 751.031.
[204] *Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches*, 215 S.W.2d 904, 932 (Tex. Civ. App.—Beaumont 1948, writ ref'd n.r.e.); *see also* RESTATEMENT (THIRD) OF AGENCY § 3.15, cmt. d (2007).
[205] TEX. EST. CODE § 751.121.
[206] TEX. EST. CODE §§ 751.022 and 751.101.
[207] TEX. EST. CODE § 751.101.
[208] TEX. EST. CODE § 751.102.
[209] TEX. EST. CODE § 751.103.
[210] TEX. EST. CODE § 751.132 (An agent's authority under a durable power of attorney terminates when the agent is no longer qualified).

"refusing to act" is necessary to trigger such a termination of agency authority is unclear.

On the other hand, arguments can be made that an agent, who has accepted their appointment, has a duty to participate in the management of the principal's property and stay informed as to the actions of the other agent (and/or not otherwise stick their head in the sand in willful ignorance of his or her co-agent's actions/omissions). Texas case law establishes that "a power of attorney creates an agency relationship;"[211] Common law authorities, such as the RESTATEMENT (THIRD) ON AGENCY, states an agent owes a duty of care: "Subject to any agreement with the principal, an agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents in similar circumstances;"[212] "if the agent receives property for the principal, the agent's duty is to use due care to safeguard it pending delivery to the principal;"[213] "providing a service gratuitously may subject an agent to duties of competence and diligence that are no different than those owed to a principal who agrees to compensate the agent."[214]

Additionally, Texas case law also establishes that "a negligent breach by an agent of an agency relationship constitutes an independent tort for which an action for damages will lie."[215] Additionally, the Texas Supreme Court long ago stated:

> He who undertakes to perform a service for another is the agent or servant of the person for whom the service is to be performed, and in accepting such employment he assumes that he possesses the requisite capacity and skill to efficiently perform such service, and that he will give to its performance the necessary diligence and care. If he is not in fact possessed of such capacity and skill as he assumes by his engagement that he has, or should fail to exercise that degree of care necessary to the service he has engaged to render, and damage results to the principal or master in consequence of his ignorance or negligence, he is liable therefor at the suit of the master.[216]

The Statutory Power of Attorney Form itself includes an "Important Information for Agent" which states, "This is a special legal relationship that imposes on you legal duties ***that continue until*** you resign or the power of attorney is terminated, suspended, or revoked by the principal or by operation of law."[217] That section of the form also states, "a fiduciary duty generally includes the duty to act in good faith." To the extent the "Important Information for Agent" forms part of the "agreement between the principal and agent," it should be taken into account when determining the nature and scope of the agent's duties.[218] "An agent has a duty to act in accordance with the express and implied terms of any contract between the agent and the principal."[219] Are the terms found in the "Important Information for Agent" in conflict with Texas Estates Code § 751.101? Are these contractual terms, which form the basis of independent liability?[220]

Finally, the duty of one agent to supervise and monitor another can be especially unclear where "accidental co-agents" exist, for example, when the principal signs a power of attorney that that does not revoke a previous power of attorney. Texas Estates Code § 751.135 states, "The execution of a durable power of attorney does not revoke a durable power of attorney previously executed by the principal ***unless*** the subsequent power of attorney provides that the previous power of attorney is revoked or that all other durable powers of attorney are revoked."

D. Decision Making by Co-Agents

At common law, if a principal appointed two or more individuals, the presumption was one of joint agency:

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[211] *In re Estate of Miller*, 446 S.W.3d 445, 454 (Tex. App.—Tyler 2014, no pet.).

[212] RESTATEMENT (THIRD) OF AGENCY § 8.08 (2006).

[213] RESTATEMENT (THIRD) OF AGENCY § 8.12, cmt. b (2006).

[214] RESTATEMENT (THIRD) OF AGENCY § 8.12, cmt. e (2006).

[215] *Ranger Cnty. Mut. Ins. Co. v. Guin*, 723 S.W.2d 656, 660 (Tex. 1987)(automobile insurer was negligent in failing to settle lawsuit against insured within policy limits); *see also Williams v. O'Daniels,* 35 Tex. 542, 544 (1872)(defendant agreed to carry merchandise to a suitable market and to sell it, and having brought it to a market it was seized by the shipper's creditors; jury properly instructed "that if, in the exercise of a sound discretion, defendant used such diligence and care as a prudent man would have used with his own cotton, then he would not be liable for its subsequent loss"); 3 TEX. JUR. 3D AGENCY § 162, Liability of agent to principal for negligence.

[216] *Murrah v. Brichta*, 9 S.W. 185, 187 (Tex. 1888)(loan agent who having engaged to place the loan for husband and wife on good security had a duty to do so; and, having failed in the performance of this duty, was liable regardless of whether such failure was attributable to his ignorance or his negligence).

[217] TEX. EST. CODE § 752.051.

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

[219] RESTATEMENT (THIRD) OF AGENCY § 8.07 (2006).

[220] *See Sassen v. Tanglegrove Townhouse Condo. Ass'n*, 877 S.W.2d 489, 493 (Tex. App.—Texarkana 1994, writ denied)(An agent's breach of its fiduciary duty, especially when the duty arises out of a written contract of agency, is a breach of contract as well as a tort).

> If a principal invests two or more individuals with authority to represent it in a particular transaction, it is ordinarily presumed that such authority was thus conferred because of special and personal considerations, so that the principal might obtain the benefit of the combined experience, discretion, and ability of such persons. Accordingly, unless it appears that the principal's intention was otherwise, as a general rule the powers invested by the principal in such agents must be jointly exercised by all of them, and may not be exercised by less than all of them.[221]

Texas Estates Code § 751.021 explicitly provides for co-agents acting independently:

> A principal may designate in a durable power of attorney two or more persons to act as co-agents. Unless the durable power of attorney otherwise provides, each co-agent may exercise authority independently of the other co-agent.

E. Co-Agent Liability for Acts of Other Agent

Texas Estates Code § 751.121 deals with liability for joint agents and provides:

> (a) An agent who has actual knowledge of a breach or imminent breach of fiduciary duty by another agent shall notify the principal and, if the principal is incapacitated, take any action reasonably appropriate under the circumstances to safeguard the principal's best interest. An agent who fails to notify the principal or take action as required by this subsection is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken the action.
> (b) Except as otherwise provided by Subsection (a) or the durable power of attorney, an agent who does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions of the other agent.

Although Texas Estates Code Section 751.121 expressly states a co-agent faces liability when he or she has actual knowledge of "a breach or imminent breach of fiduciary duty by another agent," it does not address whether a co-agent has a duty to investigate or otherwise gain actual knowledge of the other co-agent's acts or omissions. For example, should all co-agents be listed on the principal's financial accounts for monitoring purposes?

F. Co-Agent Succession

Tex. Estates Code § 751.023 deals with agent succession and states:

> (a) A principal may designate in a durable power of attorney one or more successor agents to act if an agent resigns, dies, or becomes incapacitated, is not qualified to serve, or declines to serve.
> (b) A principal may grant authority to designate one or more successor agents to an agent or other person designated by name, office, or function.
> (c) Unless the durable power of attorney otherwise provides, a successor agent:
>
> (1) has the same authority as the authority granted to the predecessor agent; and
> (2) is not considered an agent under this subtitle and may not act until all predecessor agents, including co-agents, to the successor agent have resigned, died, or become incapacitated, are not qualified to serve, or have declined to serve.

V. OTHER LEGAL THEORIES REGARDING LIABILITY FOR CO-FIDUCIARY'S ACTS & OMISSIONS

Any co-fiduciary must be aware of additional legal theories which may impose liability on them in addition to, or in spite of, the terms of the governing instrument and/or the applicable default rules.

A. Knowing Participation in Breach of Fiduciary Duty

"It is settled law of this State that were a third party knowingly participates in the breach of a fiduciary duty, such third party becomes a joint tort-

[221] 3 TEX. JUR. 3D AGENCY § 95; s*ee also Musquiz v. Marroquin*, 124 S.W.3d 906, 912 (Tex. App.—Corpus Christi–Edinburg 2004, pet. denied)(unambiguous language in power of attorney provided for the appointment of two attorneys-in-fact, conjunctively and equally); 3 AM. JUR. 2D AGENCY § 162; 2A C.J.S. AGENCY § 248.

feasor with the fiduciary and is liable as such."[222] The elements of a knowing participation claims are: (1) the existence of a fiduciary duty owed by a third party to the plaintiff; (2) the defendant knew of the fiduciary relationship; and (3) the defendant was aware of his participation in the third party's breach of its duty.[223]

B. Civil Conspiracy

An action for civil conspiracy has five elements: (1) a combination of two or more persons; (2) the persons seek to accomplish an object or course of action; (3) the persons reach a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts are taken in pursuance of the object or course of action; and (5) damages occur as a proximate result.[224] Conspiracy may be proved by inferences from circumstantial evidence.[225]

[222] *Kinzbach Tool Co. v. Corbett-Wallace Corp*., 138 Tex. 565, 160 (Tex. 1942) (holding third-party competitor liable for knowing participating in breach of fiduciary duty when it paid employee commission to obtain technology owned by employer at a favorable price.); *Kastner v. Jenkins & Gilchrest, P.C*., 231 S.W.3d 571, 580 (Tex. App.—Dallas 2007, no pet.).

[223] *Straehla v. AL Glob. Services, LLC*, 2020 WL 7364661, at *5 (Tex. App.—San Antonio Dec. 16, 2020, no pet. h.) (affirming trial court's denial of TCPA motion to dismiss; subcontractor established a prima facie case for knowing participation in breach of fiduciary duty); *Darocy v. Abildtrup*, 345 S.W.3d 129, 138 (Tex. App.—Dallas 2011, no pet.) (holding the evidence was legally and factually sufficient to support trial court's finding that party aided and participated in fiduciary's breaches of fiduciary duty).

[224] *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214 (Tex. 2017); *Insurance Co. of North America v. Morris*, 981 S.W.2d 667 (Tex. 1998); *Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc.*, 975 S.W.2d 546 (Tex. 1998); *Massey v. Armco Steel Co.*, 652 S.W.2d 932 (Tex. 1983); *Walker v. Hartman*, 516 S.W.3d 71 (Tex. App.—Beaumont 2017), review denied, (Aug. 31, 2018).

[225] *Chu v. Hong*, 249 S.W.3d 441, 447 (Tex. 2008); *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 581 (Tex. 1963)("The general rule is that conspiracy liability is sufficiently established by proof showing concert of action or other facts and circumstances from which the natural inference arises that the unlawful, overt acts were committed in furtherance of common design, intention, or purpose of the alleged conspirators"); *Jernigan v. Wainer*, 12 Tex. 189, 193 (1854)("When men enter into conspiracies, they are not likely to call in a witness. They resolve their schemes clandestinely and in secret. Their purpose is imposition and deception; and secrecy is necessary to its accomplishment. In such cases the injured party must necessarily have recourse to circumstantial evidence. For it is only by the inferences and deductions which men properly and naturally draw from the acts of others in such cases, that their intentions can be ascertained.").

VI. BEST DRAFTING PRACTICES

If anyone has read this far and still seeks to prepare estate planning documents naming co-fiduciaries, then they should stop, return to the beginning, and re-read the paper. If a client cannot be dissuaded from naming co-fiduciaries, whether co-trustees, co-executors/administrators, or co-agents, the estate planner must be prepared customize the estate plan appropriately. Certain co-fiduciary issues, if left unaddressed by the drafter, are prone to potential confusion and conflict. Chief among these issues are: (1) appointment, resignation, removal and replacement; (2) decision making; and (3) compensation.

A. Appointment, Resignation, Removal, and Replacement

1. Trustees

With respect to appointing co-trustees, the estate planner should consider a provision requiring the original intended number to be maintained at all times – particularly where a majority decision making process is used. For example, if a trust names three co-trustees, and one declines to serve, resigns or dies, the trust should make it clear whether the vacancy must be filled to avoid a potential deadlock between the remaining two co-trustees.

A trustee – like anyone else who has a job — may realize and decide at some point that "it's time to say goodbye." After all, a trustee may resign even though no one has requested the trustee's resignation or removal.[226] Alternatively, one or more beneficiaries of the trust may want to remove the trustee. A trust should contain specific provisions on the appointment, resignation, removal, and replacement of co-trustees.[227] A trustee cannot simply quit in the absence of an adequate provision in the trust instrument. Ideally, a trust should include some non-judicial methods for each of these various actions so that the co-trustees or beneficiaries do not have to go to court to approve a resignation or an appointment.[228] For example, Texas Trust Code Section 113.083 allows for a successor trustee to be selected according to the method, if any, prescribed in the trust instrument. Such method could include the use of a trust protector with the power to appoint trustees.[229]

Otherwise, the Texas Trust Code also allows a trustee to petition a court for permission to resign as

[226] *See Am. Sav. & Loan Ass'n of Houston v. Musick*, 531 S.W.2d 581, 587 (Tex. 1975).

[227] David F. Johnson, *The More the Merrier? Issues Arising from Co-Trustees Administering Trusts*, 45th Annual Advanced Estate Planning & Probate (2021), 53.

[228] *Id.*

[229] TEX. TRUST CODE § 114.0031.

trustee.[230] Absent a provision in the trust instrument, the trustee ***cannot resign or be discharged*** except with court permission or with the general consent of all persons interested in the execution of the trust.[231] Moreover, merely abandoning the trust or resigning ***does not*** vest the trust property in a successor ***nor*** relieve a trustee from liability.[232] Thus, a trustee who wants out should consider filing a petition to resign with a court of competent jurisdiction. The court may accept a trustee's resignation and discharge the trustee from the trust on the terms and conditions necessary to protect the rights of other interested persons.[233]

2. Executors/Administrators

Similarly, if co-executors/administrators are named, the will should specify what happens if one of the co-executors/executors declines to serve, resigns, or fails to serve for any other reason. Under the Default Rule, Texas Estates Code § 307.002(a), if there is more than one executor and one executor "dies, resigns, or is removed…the estate shall proceed with the administration as if the death, resignation, or removal had not occurred." As one commentator keenly observes:

> the statute does not specify what should happen if a named co-executor declines to serve before appointment. Should a named co-executor serve alone or should the next named individual serve? Is the testator's desire for coexecutors person dependent (e.g., the Testator believes his wife should always serve with a co-executor, but if the wife declines to serve, his son may serve as sole executor) or does the testator want co-executors no matter what? The will should provide clear instructions to carry out the testator's intent.[234]

The estate planner should also consider whether to utilize Texas Estates Code Section 254.006 to grant an executor named in the Will, or to another person, the authority to designate one or more persons to serve as administrator.[235]

3. Agents

The Estate planner should consider including a statement that the principal revokes all prior powers of attorney to avoid the possibility of inadvertently having multiple agents. Additionally, the Texas Estates Code states that "***unless the durable power of attorney otherwise provides***, a successor agent is not considered an agent . . . and may not act until all predecessor agents, including co-agents, to the successor agent have resigned, died, or become incapacitated, are not qualified to serve, or have declined to serve."[236] Therefore, the drafter should consider whether it is desirable to override the statutory succession order by, for example, allowing a successor agent to fill a co-agent's vacancy and serve alongside the other acting co-agent. Additionally, it may be desirable to grant someone the authority to fill vacancies. Texas Estates Code Section 751.023 expressly states that a principal may grant authority to designate one or more successor agents to an agent or other person designated by name, office, or function.

B. Decision-Making

1. Co-Trustees

The settlor should provide for how the co-trustees will vote: unanimous, majority, etc. The settlor should provide for any special delegations of duties, such as one co-trustee having primary responsibility for investments and accounting and another for distributions. Alternatively, the document may provide a broad delegation clause such as:

> *The co-Trustees at any time in office may at any time and from time to time agree among themselves, by an instrument in writing signed by them, that any one or more or all of their powers, duties and authorities hereunder, discretionary or otherwise, may be exercised by any of them or by a certain one of them. Any such instrument of delegation shall be effective for the period specified therein or until earlier revoked by a further instrument in writing signed and delivered by any co-Trustee to the others. Any person dealing with the co-Trustees shall be entitled to rely upon any such instrument of delegation until such person has actual notice of the termination thereof.*[237]

The settlor should consider including provisions to break deadlocks among co-trustees. One

[230] TEX. TRUST CODE § 113.081.
[231] *McCormick v. Hines*, 498 S.W.2d 58, 62–63 (Tex. Civ. App.—Amarillo 1973, writ dism'd) (finding agreement between some of the beneficiaries and the cotrustees which required cotrustees to resign and to petition the court to appoint new trustees was enforceable).
[232] *Republic Nat. Bank & Tr. Co. v. Bruce*, 130 Tex. 136, 140, 105 S.W.2d 882, 884 (Comm'n App. 1937).
[233] *Id.*
[234] *Christine Wakeman, Performing a Post-Mortem Autopsy: How to Dissect a Will Someone Else Drafted*, Intermediate Este Planning and Probate (2016), 9.
[235] TEX. EST. CODE § 254.006(a).
[236] TEX. EST. CODE § 751.023.
[237] George L. Cushing et al., *The Practical Response: Representing the Fiduciary*, SE87 ALI-ABA 157 (2000), 4.

commentor suggests the following solutions: "(1) a dominant co-trustee that has the final say regardless of disagreement; (2) decision by majority vote among the co-trustees (this does not work if there are only two trustees); (3) resorting a majority vote of the beneficiaries of the trust; or (4) resorting to a trust protector to break deadlocks."[238] Additionally, an individual or entity may be appointed solely to serve as an "independent tie breaker," making clear that the role and responsibilities of the tie-breaker extend only to acting in good faith to the resolution of the dispute.[239]

2. Co-Executors/Administrators

Under Texas Estates Code § 307.002, co-executors/administrators may act independently unless they are conveying real property. If more than two co-executors/administrators will be used, the drafter should consider whether to use a majority decision making structure, or a majority deadlock scheme.

3. Co-Agents

Unless the durable power of attorney otherwise provides, each co-agent may exercise authority independently of the other co-agent.[240] Thus, the estate planner should consider whether and to what extent it may be advisable to expressly provide that co-agents must act jointly. For example, should the principal borrow the default scheme found in the Texas Estates Code and require the co-agents to act jointly in the conveyance of real property? If more than two co-agents will be used, the drafter should consider whether to use a majority decision making structure, or a majority deadlock scheme. Additionally, the estate planner should consider whether to grant the agent the power to delegate authority granted under the power of attorney in accordance with Texas Estate Code Section 751.031(b)(5).

C. Compensation

Compensating co-fiduciaries presents a variety of problems: Are they each entitled to what a single fiduciary would make?[241] Are they entitled to compensation based on the duties that they primarily are responsible for?[242] Are they entitled to compensation based on the tasks they each actually perform? The trust, will, or power of attorney should include specific compensation terms.

D. Arbitration

To potentially resolve disputes without protracted litigation by and among co-fiduciaries, settlors and/or testators may also wish to include an arbitration or mediation provision.[243]

VII. ALTERNATIVES TO CO-FIDUCIARIES

If the client wants to name co-fiduciaries to add convenience and share burdens or to allow for the appointment of individuals with different skills and expertise, consider instead that the fiduciary may employ agents to assist them in fulfilling their duties and that the instrument and/or governing law may grant the fiduciary the power to delegate difficult functions to professional third parties.

If the client wants to name co-fiduciaries to avoid favoritism or offending a child, consider instead naming a third-party as the fiduciary or utilizing a trust committee to allow children to feel involved.

If the client wants to name co-fiduciaries to provide checks and balances, consider instead:

- **Educating the beneficiaries.** For example, the settlor could include disclosures in the trust agreement or otherwise setting forth the fiduciary duties owed by the trustee to the beneficiaries and explaining to the beneficiaries what their rights are so that they are in a better position to hold the trustee accountable.
- **Consider a Trust Protector or Trust Advisor.** The trust instrument may provide a person or committee with oversight and authority to remove and appoint trustees, advisors, trust committee members, and other protectors.[244]
- **Providing the beneficiaries with removal powers.** In lieu of utilizing a trust committee or trust protector, the trust instrument may provide a class of beneficiaries with authority to unilaterally remove and replace trustees.
- **Requiring disclosure.** Some trusts require mandatory accountings. In lieu of a formal accounting, consider requiring the dissemination of reports or financial statements at regular intervals to the beneficiaries and/or provide for periodic meetings of the fiduciary and beneficiaries. These authors know of no reason why a durable power of attorney could not include

[238] David F. Johnson, *The More the Merrier? Issues Arising from Co-Trustees Administering Trusts*, 45th Annual Advanced Estate Planning & Probate (2021), 54.
[239] George L. Cushing et al., *The Practical Response: Representing the Fiduciary*, SE87 ALI-ABA 157 (2000), 4.
[240] TEX. EST. CODE § 751.021.
[241] David F. Johnson, *The More the Merrier? Issues Arising from Co-Trustees Administering Trusts*, 45th Annual Advanced Estate Planning & Probate (2021), 54.
[242] *Id.*
[243] *See* Cameron McCulloch, Jr. & Michelle Rosenblatt, *Drafting & Enforcing Arbitration Clauses in Wills, Trusts, & Settlement Agreements*, 43rd Annual Advanced Estate Planning & Probate (2019); *see also Rachal v. Reitz*, 403 S.W.3d 840 (2013).
[244] TEX. TRUST CODE §114.0031.

similar terms to promote disclosure and reduce the potential for uncertainty and suspicion.