UNANSWERED QUESTIONS IN WILLS AND TRUSTS (AND HOW TO TRY AND ANSWER THEM)

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I. INTRODUCTION

A. Thanks

The authors would like to thank their families for putting up with them while putting this Article together.[1] With a busy law practice, projects like this often require sacrificing personal time that they would otherwise spend with family, and many thanks are due for their patience and understanding.[2] Thanks are also in order for the authors' coworkers.[3] In Joyce's office, Taylor Williams, Sasha Kiger, Jobe Jackson, and especially TJ Phillips deserve

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2. Author's acknowledgments.
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special thanks.[4] In Christian's office, law student intern Matthew Griffeth was especially helpful with proofreading and correcting the author's less-than-perfect citation format.[5] Thanks to you all for the help![6]

B. Questions Presented

The genesis of this Article was to present a set of questions about estate and trust law for which there are no perfect answers under Texas law at present.[7] As is often the case in these projects, the focus evolved a little bit, and a section has been added that presents various construction rules that might be of value to readers.[8] Thus, the authors hope to shed light specifically on the questions presented and help practitioners approach other questions that may not have clear answers.[9] The questions presented, which Parts III–IV of this Article pose, are as follows:

- The cloud cast by *XTO*: Does a trust beneficiary have the right to bring a derivative claim on behalf of the entire trust for damages or equitable relief against the corporation or individual serving as trustee?[10]
- Who is entitled to demand trust accountings, and can that entitlement be limited?[11]
- Can a testator exculpate an independent executor for breach of a duty imposed on him by statute or common law?[12]
- What limits can be placed on the fiduciary duties of trust protectors?[13]
- Can a party be estopped from contesting a will by accepting its benefits?[14]
- What rights do charitable major disaster beneficiaries have to notice of trust activities?[15]

4. Author's acknowledgments.
5. Author's acknowledgments.
6. Author's acknowledgments.
7. Author's original thought.
8. *See infra* Section II.C.
9. *See infra* Parts III–VIII.
10. *See infra* Part III.
11. *See infra* Part IV.
12. *See infra* Part V.
13. *See infra* Part VI.
14. *See infra* Part VII.
15. *See infra* Part VIII.

II. BACKGROUND

A. The Problem

Writing about trusts and estates cases can be difficult.[16] First, the economics of American jurisprudence make it unlikely that many cases ever get reported.[17] A beneficiary may get upset when the beneficiary's trustee will "only" buy the beneficiary a Buick for the beneficiary's support and maintenance, rather than the Cadillac the beneficiary wants.[18] But is the beneficiary really going to sue the trustee to get the Cadillac?[19] Even if the beneficiary wins, the beneficiary's trust will likely pay the trustee's legal expenses, which will no doubt be substantially more than the cost of any car.[20] Also, if the beneficiary does complain, is the beneficiary's case likely to get to the point where it will be reported?[21] In all likelihood, the parties will settle out of court.[22] Thus, the case will likely go unreported and remain unavailable as legal precedent for future disputes.[23]

Second, the high number of variables surrounding any particular trust distribution makes every situation as unique as a snowflake.[24] Put simply, when a trustee is acting properly, there are so many factors that go into the trustee's decision to act (or not act) that no two instances will ever be exactly the same.[25] Other areas of the law lack the plethora of opportunities to distinguish rules based on factual minutiae.[26] But in the world of trusts and estates, fiduciaries and other actors are frequently called on to act a certain way under a general rule, which may be modified dynamically, based on the particular language of a governing instrument.[27] As a result, the few reported cases that do exist are almost always illustrative, not determinative, with regard to any future case.[28]

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16. Author's original thought.

17. *See* Stephen Wills Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, 26 OHIO STATE J. ON DISP. RESOL. 627, 629–30 (2011).

18. Author's original hypothetical.

19. Author's original hypothetical.

20. Author's original hypothetical; *see* Murphy, *supra* note 17, at 629–30.

21. Author's original hypothetical.

22. Author's original hypothetical.

23. Author's original hypothetical.

24. *See generally* TEX. PROP. CODE ANN. § 113.006 (stating that a trustee may manage trust property on the conditions and time frame they see fit).

25. *Id.*

26. Author's original opinion.

27. *See generally* PROP. § 115.001 (granting district court jurisdiction over a variety of factual findings).

28. *See id.*

B. Sources of Law

Texas trust law comes from a confusing array of sources.[29] In order to better understand this patchwork, a brief review is in order.[30]

1. Statutory References

As most lawyers know, the Texas Estates Code (the TEC or the Estates Code) contains most of Texas's statutory provisions relating to wills and estates.[31] The TEC is a standalone body of law that replaced the Texas Probate Code on January 1, 2014.[32]

On the other hand, the Texas Trust Code (the TTC or the Trust Code) is contained within Title 9 of the Texas Property Code (the TPC), specifically, Sections 111.001 *et seq*.[33] The Trust Code was enacted in 1984 and replaced the Texas Trust Act (the Trust Act) of 1943.[34] The Trust Code contains most (but not all) of the statutory provisions relevant to the day-to-day activities of trustees.[35] Most of the TTC rules are default provisions that may be overridden in a trust instrument.[36] In practice, many of the statutory provisions, designed to be especially conservative, are regularly overridden by standard provisions in trust instruments to more effectively achieve the goals behind the trusts they govern.[37] In contrast, a testator cannot opt-out of most TEC provisions.[38]

2. Common Law

Where the Trust Code is silent, the next source of authority is the common law.[39] Trust Code Section 113.051 provides that "[i]n the absence of any contrary terms in the trust instrument or contrary provisions of [the Trust Code], in administering the trust, the trustee shall perform all of the duties imposed on trustees by the common law."[40] The analogous provision in the TEC is Section 351.001, which provides that common law principles

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29. *See* GERRY W. BEYER, TEXAS ESTATE PLANNING STATUTES WITH COMMENTARY: 2019–2021 EDITION, 656–58 (2019).
30. *See infra* Section II.B.1.
31. BEYER, *supra* note 29, at 658.
32. *Id.*
33. PROP. § 111.001.
34. BEYER, *supra* note 29, at 658.
35. *Id.*
36. *See* PROP. §§ 111.0035(b), 112.051.
37. *See* R & P Enters. v. LaGuarta, Gavrel & Kirk, 596 S.W.2d 517, 518 (Tex. 1980).
38. *See* MICKEY R. DAVIS, DAVIS' ESTATE PLANNING FORMS, ch. 4, § 4.7 (2021 ed.).
39. *See* PROP. § 111.005.
40. *Id.* § 113.051.

govern the "rights, powers, and duties of executors and administrators . . . to the extent that those principles do not conflict with the statutes of this state."[41]

Given the small number of cases on point, practitioners may be forced to look to extra-jurisdictional authority when seeking guidance for a given position.[42] Practitioners in Texas should note the wide variation in trust rules adopted by the various jurisdictions.[43] Where lawyers wish to rely on (or distinguish) extra-jurisdictional precedent, they are well-advised to examine the other rules applicable in such jurisdiction and compare them to those applicable in Texas.[44]

3. Federal Law

Although federal law often comes into play with regard to wills and trusts, it tends to focus on tax-related issues.[45] Such issues are not germane to the questions presented in this Article but may be relevant to practitioners researching other topics.[46]

4. Secondary Sources

While not technically precedential, an array of secondary sources is both available and frequently relied on by practitioners.[47] While many treatises, hornbooks, supplements, outlines, websites, and other sources are available, the most important secondary sources are the Restatement of Trusts and the Uniform Trust Code.[48]

The various Restatements of Trusts (collectively, the Restatements) have a storied history in American jurisprudence.[49] The Restatement (Third) of Trusts (the Restatement (Third)) was promulgated in 2003 and followed the Restatement (Second) of Trusts (the Restatement (Second)), which dates

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41. TEX. EST. CODE ANN. § 351.001.

42. *See* 72 TEX. JUR. 3D *Trusts* § 7 (2021).

43. *See* Ronald Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 REAL PROP. PROB. & TR. J. 697, 698–700 (2001).

44. *See* Christian S. Kelso, *But What's an Ascertainable Standard? Clarifying HEMS Distribution Standards and Other Fiduciary Considerations for Trustees*, INDEP. TR. ALL. CONF., ch. III § B(2) (May 17, 2021); PROP. § 111.005.

45. *See generally* I.R.C. §§ 2041, 2514 (granting power of appointment to estate beneficiaries and or decedents and imposing federal tax on certain gift and property transfers).

46. *See supra* Section I.B.

47. *See* RESTATEMENT OF TRS. (AM. L. INST. 1935); RESTATEMENT (SECOND) OF TRS. (AM. L. INST. 1959); RESTATEMENT (THIRD) OF TRS. (AM. L. INST. 2003); UNIF. TR. CODE. (UNIF. L. COMM'N 2000) (showing influential secondary sources for estate and trust proceedings).

48. *See* RESTATEMENT OF TRS. (AM. L. INST. 1935); RESTATEMENT (SECOND) OF TRS. (AM. L. INST. 1959); RESTATEMENT (THIRD) OF TRS. (AM. L. INST. 2003); UNIF. TR. CODE. . (UNIF. L. COMM'N 2000) (showing influential secondary sources for estate and trust proceedings).

49. *See* RESTATEMENT (SECOND) OF TRS. § 1 (AM. L. INST. 1959); RESTATEMENT (THIRD) OF TRS. § 1 (AM. L. INST. 2003); RESTATEMENT OF TRS. § 1 (AM. L. INST. 1935).

back to 1959.[50] The Restatement (Second) followed the original Restatement of Trusts (the Original Restatement), published in 1935.[51] Texas has not adopted the Restatements, but they are nonetheless valuable for context and guidance.[52] On the other hand, certain provisions in the Restatements are in direct conflict with the Trust Code, so caution is advised when relying on them.[53]

The Uniform Trust Code (the UTC) was approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2000.[54] Since then, a majority of U.S. states have adopted the UTC.[55] Texas, however, is not one of them, and legislative history indicates that specific UTC provisions have explicitly been rejected in the Trust Code.[56] Actually, the Trust Code predates the UTC, and it was one of the templates used by the NCCUSL when assembling the initial UTC drafts.[57]

Finally, the Uniform Probate Code (the UPC) was promulgated in 1969 as a joint project between the NCCUSL and the Real Property, Probate, and Trust Law Section of the American Bar Association.[58] Only sixteen states have adopted the UPC, and Texas is not one of them.[59] The UPC is seldom cited in Texas case law or commentary, although it sometimes provides a different approach to certain problems or questions.[60]

C. General Rules for Statutory Construction

Questions may arise in the estate and trust context because there is no clear "answer" within the applicable statutes, or at least that is how it appears, but appearances may be deceiving.[61]

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50. RESTATEMENT OF TRS. § 1 (AM. L. INST. 1935).

51. RESTATEMENT (SECOND) OF TRS. § 1(AM. L. INST. 1959).

52. *See* TEX. PROP. CODE ANN. § 111.035.

53. *See* Mary C. Burdette, *What Every Trustee Should Know*, 25 ST. BAR OF TEX. EST. PLAN. & PROB. COURSE § I (2014).

54. UNIF. TR. CODE., *refs. & annos*. (UNIF. L. COMM'N 2000).

55. *See id.*; Christina Bogdanski, *The Uniform Trust Code and the Common Law: An Analysis of Three Sections of the Code that Deviate from the Common Law and why the Drafters Changed the Law*, 37 CARDOZO L. REV. 1907, 1915 (2016).

56. *See* Burdette, *supra* note 53, at § I; PROP. §§ 111.035, 111.005.

57. *See* Kara Blanco, *The Best of Both Worlds: Incorporating Provisions of the Uniform Trust Code into Texas Law*, 38 TEX. TECH L. REV. 1105, 1106 (2006).

58. *See* Christina Bogdanski, *The Uniform Trust Code and the Common Law: An Analysis of Three Sections of the Code that Deviate from the Common Law and why the Drafters Changed the Law*, 37 CARDOZO L. REV. 1907, 1912 (2016).

59. *See id.*; Mary Randolph, *Probate Process in Uniform Probate Code (UPC) States*, ALLLAW, https://www.alllaw.com/articles/nolo/wills-trusts/process-uniform-probate-code-upc-states.html (last visited Oct. 31, 2021) [https://perma.cc/MZ99-7QYK].

60. *See generally* TEX. EST. CODE ANN. § 21.006, *revisor's note* (noting that the "Texas Probate Code governs all probate proceedings in county and probate courts").

61. *See supra* Section II.A; TEX. GOV'T CODE ANN. § 311.023 (guiding how to interpret ambiguous statutes).

Care must be taken when arguing that the common law should apply in an area already covered by statutory language.[62] Neither the estate planning attorney nor a court is free to ignore what the legislature has provided, even if it would seem to be preferable in terms of public policy or even necessary to fill a legislative "gap."[63]

This adage was recently illustrated in *Archer v. Anderson*, where the Texas Supreme Court refused to recognize the tort of "interference with inheritance" because the Texas legislature had already provided "extensive and thorough provisions to protect an owner's free use and devise of his property," and because the new cause of action would give a prospective donee rights the prospective donee would not otherwise have in the testator's property.[64]

In rejecting the argument that the creation of a new tort was necessary to provide a remedy not covered by statute, the Court in *Archer* noted that it was not free to judicially create a cause of action to fill a "gap" in the law based on an assumption of legislative oversight in an area which was already so pervasively covered by statute.[65] Specifically, the Court explained, "[i]f these remedies are inadequate, it is because of legislative choice or inaction, and filling them is work better suited for further legislation than judicial adventurism."[66]

Resorting to other states' law is even more dangerous, whether judicially declared common law or statutory law, even in those states that have adopted a uniform code.[67] This is because each state's entire statutory and often unique common law traditions must be considered before any parallels or precedents can be drawn.[68]

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62. TEX. PROP. CODE ANN. § 113.051 (providing that "[i]n the absence of any contrary terms in the trust instrument or contrary provisions of [the Texas Trust Code], in administering the trust, the trustee shall perform all of the duties imposed on trustees by the common law"); *see Do It Yourself Estate Planning*, AM. BAR ASS'N 13–28, https://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/diy_estate_planning/ (last visited Oct. 4, 2021) [https://perma.cc/R5VY-J892].

63. TEX. GOV'T CODE ANN. § 311.021.

64. Archer v. Anderson, 556 S.W.3d 228, 243 (Tex. 2018).

65. *See id.*

66. *Id.* at 236.

67. *See Uniform Laws*, LEGAL INFO. INST., https://www.law.cornell.edu/uniform (last visited Oct. 4, 2021) [https://perma.cc/H9CD-SF7B].

68. *See, e.g.*, Stegall v. Oadra, 868 S.W.2d 290, 291–93 (Tex. 1993) (noting how the Texas multi-party account statutes deviated from both the UPC provisions and from the traditional common law of joint tenancy when it came to ownership of funds in a joint account, the Court held that a co-trustee of a Texas "trust account" did not acquire an ownership interest in the funds either before or after the death of the co-trustee who deposited the funds, although that this might be contrary to the law of other jurisdictions); *see also In re* Guardianship of Neal's Est., 406 S.W. 2d 496, 501 (Tex. Civ. App—Houston [1st Dist.] 1966, writ ref'd n.r.e.) (stating that it "would serve no useful purpose" to discuss out of state cases applying the common law doctrine of "substantial judgment" when considering if a Texas guardian could make gifts from the ward's estate because "the present case must be decided in consonance with the statutes of this State").

When statutory answers prove elusive, various rules of construction might prove useful.[69] The Texas Code Construction Act (the CCA) statutorily provides a series of rules used for statutory construction.[70] However, most of the rules of statutory construction have been formulated and adopted by the Texas Supreme Court.[71]

1. The Public Policy of Texas Is Reflected in Its Statutes

Changing the meaning of a statute by adding words is a legislative, not a judicial, function.[72]

2. The Proper Construction of a Statute Is a Question of Law for the Court

The objective is to ascertain and give effect to the legislature's intent as expressed by the statute's language.[73] Courts must enforce statutes as written and refrain from rewriting text chosen by lawmakers.[74]

3. Courts Are Not Free to Judicially "Legislate" by Adding or Subtracting Words from a Statute Under the Guise of "Construction"

In construing a statute, a court must "assume the Legislature chose statutory language with care, included each chosen word for a purpose, and purposefully omitted all other words."[75] Moreover, the statute has not specifically addressed a subject that should not be construed as a legislative gap or oversight.[76]

4. Statutes Must Be Considered as a Whole Rather Than as Isolated Provisions

Statutes should be construed to give effect and reasonable meaning to the entire legislative scheme in which the specific provision is just one part of the whole.[77]

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69. TEX. GOV'T CODE ANN. § 311.023.

70. *Id.* §§ 311.001–002.

71. *See* Ronald L. Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339, 343, 357 (2012).

72. *See* Tex. Com. Bank, N.A. v. Grizzle, 96 S.W.3d 240, 250 (Tex. 2002); Ferreira v. Butler*,* 575 S.W.3d 331, 337 (Tex. 2019).

73. *See* City of Rockwall v. Hughes, 246 S.W.3d 621, 625 (Tex. 2008).

74. *See* KMS Retail Rowlett, LP v. City of Rowlett*,* 593 S.W.3d 175, 183 (Tex. 2019).

75. *In re* D.S., 602 S.W.3d 504, 514 (Tex. 2020); Leland v. Brandal*,* 257 S.W.3d 204, 206 (Tex. 2008).

76. *See* Archer v. Anderson*,* 556 S.W.3d 228, 234–36 (Tex. 2018).

77. *See* Tex. Dep't of Transp. v. City of Sunset Valley, 146 S.W.3d 637, 642 (Tex. 2004).

5. Unless There Are Specifically Defined Terms, a Court Must Construe a Statute's Words According to Their Plain and Common Meaning, Unless a Contrary Intention Is Apparent from the Context or Unless Such a Construction Leads to Absurd Results

If the language of a statute is unambiguous, its plain meaning will prevail.[78]

6. The Legislature Is Presumed to Have Acted with a Full Understanding of the Consequences of a Particular Piece of Legislation

In *Texas Commerce Bank, N.A. v. Grizzle*, when discussing the legislature's decision to allow a settlor of a trust to exonerate a corporate trustee from liability for almost all forms of self-dealing, even though this may lead to "harsh results," the Texas Supreme Court stated: "[W]e presume the Legislature was aware of this when it enacted the Texas Trust Act in 1943 . . . and when it subsequently enacted the Texas Trust Code effective January 1, 1984."[79]

7. The Legislature Is Presumed to be Aware of the Effect of Its Statutes on the Existing "Common Law"

The Court in *Grizzle* also noted that the Texas legislature elected to statutorily allow trustee self-dealing in most instances, presumably with full awareness of the fact that Section 222 of the Original Restatement, which sets out the common law rule prohibiting exculpation for fiduciary self-dealing, was in effect when the Trust Act was enacted in 1943, and that Section 222 of the Restatement (Second) (which also prohibited self-dealing by trustees) had been written by the time the Trust Code was enacted in 1984.[80]

8. A Court Is Not Free to Apply the Provisions of a Statute to a Situation in Which the Statute Is Inapplicable

Statutes are not interchangeable, and one statute should not be applied to an area or issue outside of its express coverage.[81] Importantly for trust and

78. *See City of Rockwall,* 246 S.W.3d at 625–26; *Leland*, 257 S.W.3d at 206; *accord* TGS-NOPEC Geophysical Co. v. Combs*,* 340 S.W.3d 432, 439 (Tex. 2011).

79. Tex. Com. Bank, N.A. v. Grizzle, 96 S.W.3d 240, 250 (Tex. 2002).

80. *See id.*; RESTATEMENT OF TRS. § 222 (AM. L. INST. 1935); RESTATEMENT (SECOND) OF TRS. § 222 (AM. L. INST. 1959).

81. *See* Abbie Gruwell, *Five Tips for Reading Legislation and Code*, AM. BAR ASS'N, https://www.

estate lawyers, the Trust Code and the Estates Code are two distinct statutory schemes, and the provisions related to trusts and trustees do not apply to estates and executors (or vice versa) unless expressly provided otherwise.[82] For an example of where certain provisions of the Trust Code were expressly made applicable to executors, refer to Trust Code Chapter 116 "Uniform Principal and Income Act"—specifically Section 116.002(3), defining a "fiduciary" to include a personal representative of an estate; and refer to Section 116.004 "General Principles," which applies to a "fiduciary."[83]

9. Last in Time Rule

The doctrine of *leges posteriores priores contrarias abrogant*, also known as the "Last in Time" rule states that, where two laws contradict, the latter of the two shall control.[84] This rule is sometimes referred to as the "implied repeal" rule or "repeal by implication."[85] While this rule may be applied more liberally in some Commonwealth jurisdictions, it is applied conservatively in Texas, where the preference is to find a way to read the statutes such that they do not contradict.[86] In *Wintermann v. McDonald*, the Texas Supreme Court held "in the absence of an express repeal by statute, where there is no positive repugnance between the provisions of the old and new statutes, the old and new statutes will each be construed so as to give effect, if possible, to both statutes."[87] Chief Justice Phillips explicitly laid out this language in a 1914 holding where the Texas Supreme Court stated:

> Though they may seem to be repugnant, if it is possible to fairly reconcile them, such is the duty of the court. A construction will be sought which harmonizes them and leaves both in concurrent operation, rather than destroys one of them. If the later statute reasonably admits of a construction which will allow effect to the older law and still leave an ample field for its own operation, a total repugnance cannot be said to exist, and therefore an

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americanbar.org/groups/government_public/resources/public_lawyer_career_center/Career_Articles/gruwell-article-five-tips-reading-legislation/ (last visited Oct. 4, 2021) [https://perma.cc/V89M-TFL9].

82. *See* Humane Soc'y of Austin & Travis Cty. v. Austin Nat'l Bank, 531 S.W.2d 574, 577 (Tex. 1975) (The Texas Supreme Court refused to apply the statutory provisions of the Trust Act to an executor of an estate because the Trust Act was applicable only to "express trusts" and not to estates, even though it also held that an executor was held to the same fiduciary standards "as a trustee.").

83. TEX. PROP. CODE ANN. §§ 116.002(3), 116.004.

84. *See, e.g.*, Radzanower v. Touche Ross & Co., 426 U.S. 148, 160 n.3 (1976) (Stevens, J., dissenting) (providing further explanation on the doctrine of "last in time").

85. *See* Sayles v. Robinson, 129 S.W. 346, 349–50 (Tex. 1910).

86. *See* Parshall v. State, 138 S.W. 759, 767 (Tex. Crim. App. 1911, no writ).

87. Wintermann v. McDonald, 102 S.W.2d 167, 171 (Tex. 1937).

> implied repeal does not result, since in such case both may stand and perform a distinct office.[88]

Still, in rare circumstances, there is simply no way to give both statutes effect; the "Last in Time" rule remains good law in Texas.[89]

III. THE CLOUD CAST BY *XTO*: DOES A TRUST BENEFICIARY HAVE THE RIGHT TO BRING A DERIVATIVE CLAIM ON BEHALF OF THE ENTIRE TRUST FOR DAMAGES OR FOR EQUITABLE RELIEF AGAINST THE CORPORATION OR INDIVIDUAL SERVING AS TRUSTEE?

A. Texas History of Derivative Actions in Trusts and Estates

For years, beneficiaries of Texas trusts have successfully brought derivative claims for damages to the trust as a whole against third parties and the corporations or individuals serving as the trustee.[90] Such derivative "standing," or more accurately, "capacity," to sue on behalf of the trustee has been allowed as long as the beneficiary both pleaded and proved that "the trustee cannot or will not enforce the cause of action that he has against [a] third person."[91]

An analogous, judicially created rule, allowing beneficiaries of an estate to pursue claims on behalf of the estate as a whole or against third parties or the person or entity serving as the personal representative of the estate, in cases where the personal representative "cannot or will not" enforce the cause of action, has an even longer judicial history.[92] In *Crain v. Crain*, the Texas Supreme Court held that:

> The Administratrix is a trustee, acting for the benefit of creditors and distributees, and that in cases where she will not or cannot act for the protection and preservation of the estate, the *cestui que trusts* have a right to act in the behalf, and for the protection of their eventual interests, and that such rights are the proper subjects of judicial cognizance.[93]

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88. Cole v. State, 170 S.W. 1036, 1037 (Tex. 1914).

89. R.A. Brown & Co. v. Chancellor, 61 Tex. 437, 441 (1884); *see* TEX. GOV'T CODE ANN. § 311.025; *see also* Hughes v. State, 41 Tex. 10, 14 (1874) (declaring that every statute is by implication a repeal of all prior statutes, so far as it is contrary and repugnant thereto); Neil v. Shackelford, 45 Tex. 119, 124 (1876).

90. *See* Interfirst Bank-Hous., N.A. v. Quintana Petroleum Corp., 699 S.W.2d 864, 874–75 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

91. *Id.*; Villarreal v. Wells Fargo Bank Brokerage Servs., 315 S.W.3d 109, 118 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

92. Crain v. Crain, 17 Tex. 80, 80 (1856).

93. *Id.*

The Texas Supreme Court took this one step further in *Chandler v. Welborn* by extending the right to bring such actions to creditors of the decedent.[94] In this pre-Probate Code case, which involved the right of creditors to bring a derivative action where there were no heirs of the estate, the court noted that:

> Article 1981 of our statutes provides that suits for the recovery of real and personal property belonging to the estate of a decedent may be instituted by the executor or administrator, and judgment in such cases is conclusive in the absence of fraud or collusion on the part of the representative.
>
> This statute states a general rule of procedure, and in the absence of circumstances requiring the intervention of equity vests in the personal representative the prior and exclusive right to bring such suits. It is clear, however, that the statute does not operate to deny in all cases the right of persons other than the executor or administrator to institute an action for the benefit of the estate. When administration is pending, the heirs are generally not entitled to maintain a suit for the recovery of property belonging to the estate, but in *Barrera v. Gannaway*, we observed that there are exceptions to this rule as pointed out in the opinion of the Court of Civil Appeals in that case. The last-mentioned opinion . . . after stating the general rule governing the maintenance of suits by heirs, declares that:
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> "Other exceptions to the general rule exist in cases where, there being an administration, it appears that the administrator will not or cannot act, or that his interest is antagonistic to that of the heirs desiring to sue."
>
> If art.1981 does not preclude the maintenance of suit by heirs under these circumstances, it is no obstacle to a suit by creditors in a similar case . . . . Equity will not suffer a right to be without a remedy. And when the legal remedies available to creditors are not adequate for the protection of their interests in the estate of their deceased debtor, equity will permit them to maintain a suit for the benefit of the estate.[95]

As in a derivative trust action, the burden is on the plaintiff in an estate case to plead and prove the facts necessary to establish an exception to the general rule—allowing only the personal representative to file suit on behalf of the estate.[96]

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94. Chandler v. Welborn, 294 S.W.2d 801, 807 (Tex. 1956).

95. *Id.* at 806–07 (citing Rogers v. Kennard, 54 Tex. 30, 37 (1880); *see* Lee v. Turner, 9 S.W. 149, 150 (Tex. 1888); Modern Woodmen of Am. v. Yanowsky, 187 S.W. 728, 731 (Tex. App.—San Antonio 1916, writ ref'd).

96. *See, e.g.*, Moody v. Moody, 613 S.W.3d 707, 718–19 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (holding that the purported heir did not have standing to bring an action on behalf of the estate because she failed to give notice to the personal representative of the estate before filing suit, and she did not cite to any interest of the personal representative that was "adverse" to the estate).

B. The XTO *Opinion and Its Fallout*

In 2015, and despite the long-standing judicial acceptance of derivative trust and estate actions, the Dallas Court of Appeals issued its opinion in a mandamus proceeding, *In re XTO Energy Inc.*, suggesting that there was "no Texas case authority allowing a trust beneficiary to sue a trustee derivatively on behalf of the Trust."[97] The court also examined some, but apparently not all, of the applicable Trust Code provisions (and ignored some of the provisions it did examine) before concluding that the beneficiary/plaintiff could not bring a derivative action for the benefit of the whole trust against the trustee, but the beneficiary/plaintiff could bring an action solely "on her own behalf."[98]

The discussion by the Dallas court in *XTO* on this issue is arguably nothing more than judicial musings or dicta because the beneficiary/plaintiff, in that case, *agreed* with the defendants that there was "nothing in Texas law [which] allows the beneficiary of a trust to bring a derivative claim on behalf of the trust against the trustee."[99] As other commentators on the *XTO* case have charitably noted, perhaps "[h]ad the issue been adequately briefed, the court likely would have come to a different conclusion."[100]

Unfortunately, whether the result of inadequate briefing or otherwise, this dicta in *XTO* has gained considerable traction among litigators defending trustees in beneficiary-filed derivative actions.[101] Furthermore, at least one other Texas Court of Appeals has relied upon *XTO* to preclude a beneficiary who filed a "derivative" action "on behalf of . . . a trustee of a trust" against that trustee in the trustee's individual capacity from proceeding to trial.[102]

The *XTO* opinion has also recently been used by the Corpus Christi–Edinburg Court of Appeals as one of its bases to deny standing to a co-trustee (which they referred to as his "derivative suit") against third parties in a matter where his two other co-trustees refused to do so, although it appears there may have been other reasons to support this holding.[103]

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97. *In re* XTO Energy Inc., 471 S.W.3d 126, 138 (Tex. App.—Dallas 2015, no pet.).

98. *Id.*

99. *Id.*

100. Frank N. Ikard & Adam Herron, *Standing, Capacity, and Necessary Parties in Trust Litigation*, 11 EST. PLAN. & CMTY. PROP. L.J. 255, 265 (2019).

101. *See In re XTO Energy*, 471 S.W.3d at 137.

102. *In re* Benge, No. 13-17-00616-CV, 2018 WL 1062899, at *1 (Tex. App.—Corpus Christi-Edinburg Feb. 27, 2018, no pet.) (refusing to issue a mandamus to compel a trial court to reinstate the beneficiary's derivative claims it had dismissed); Benge v. Thomas, No. 13-18-00619-CV, 2020 WL 5054800, at *1 (Tex. App.—Corpus Christi-Edinburg Aug. 27, 2020, no pet.) (rejecting those same claims on appeal because the beneficiary did not "adequately explain how she has standing to sue [the trustee] derivatively on behalf of the 2012 Trust for claims we have concluded have no merit" and, because the sub-issue of standing to sue "third parties" on behalf of the trustee was "inadequately briefed").

103. Berry v. Berry, No. 13-18-00169, 2020 WL 1060576, at *5 (Tex. App.—Corpus Christi–Edinburg Mar. 5, 2020, pet. filed).

C. The Court in XTO *Got It Wrong*

So, did the Dallas Court of Appeals get it wrong in *XTO*?[104] When the question is presented correctly, and all of the relevant statutory law and judicial precedent are considered, the answer to this question appears to be "yes."[105]

D. Understanding Who Is Suing Whom

To understand how the court in *XTO* got it wrong, it may help to restate the question to reflect what is actually happening in a case where a beneficiary is seeking to recover damages from a person serving as trustee due to that person's breach of trust.[106]

The defendants (as well as the plaintiff/beneficiary) in *XTO* argued that "*nothing in Texas law allows the beneficiary of a trust to bring a derivative claim on behalf of the trust against the trustee*."[107] Implicit in this argument was the suggestion that this type of suit is somehow different from a derivative claim brought by the beneficiary against a "third party"—an action that the Dallas Court of Appeals agreed was permissible if certain conditions were met.[108]

The problem is that in a derivative action, if correctly pleaded, the beneficiary is not technically suing "on behalf of the trust" or "the other beneficiaries," and the beneficiary is certainly not suing the "trustee."[109] To the contrary:

> 1. the beneficiary is bringing a derivative claim *on behalf of the trustee*; and
> 2. the claim is brought against the person serving as trustee *in that person's individual capacity* (or in its corporate capacity if a corporate trustee)—not in the person's representative capacity "as trustee."[110]

Thus, in legal effect, a derivative action against the trustee in the trustee's individual capacity is substantively no different from a derivative action against another third party who is also a "stranger" to the trust.[111]

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104. *See In re XTO Energy*, 471 S.W.3d at 137.
105. *See id.*
106. *See id.*
107. *Id.* (emphasis added).
108. *See id.* at 130–36.
109. *Id.* at 137–38.
110. *See Trustee Lacked Standing to Bring Derivative Action on Behalf of Trust*, SCHLAM STONE & DOLAN LLP (May 2, 2017), https://www.schlamstone.com/trustee-lacked-standing-to-bring-derivative-action-on-behalf-of-trust/ [https://perma.cc/N6Z3-TBFN].
111. *See id.*

E. The Beneficiary Is Suing on Behalf of the Trustee

The general rule in Texas is that only the trustee has the legal capacity to bring an action on behalf of the trust.[112]

Thus, when a trust beneficiary files a derivative action for damages or other injury caused to the trust as a whole, the beneficiary is in legal effect, *acting for the trustee of the trust*, since only the trustee has the requisite "title" or pecuniary interest needed to maintain an action.[113]

The fact that the trustee, *in the trustee's representative capacity*, is the "real party in interest" in a derivative trust action was clearly brought home in *Interfirst Bank* where the court held that, for purposes of applying the statute of limitations, it was the knowledge held by the successor trustees, and the capacity of the successor trustees of the trust that determined when and if limitations would be triggered, and not that the beneficiary was allegedly incompetent during most of the time period involved.[114]

Because the beneficiary is, in effect, stepping into the shoes of the trustee, the question before the court may be one of "capacity" to sue rather than "standing" to sue.[115] In any case, defendants should raise the issue affirmatively, whether as a verified denial under the Texas Rule of Civil Procedure 93, or as a confession and avoidance affirmative defense under Rule 94, or (to be on the safe side) both.[116]

F. Trustee Is a "Stranger to the Trust" or a "Third Party" in Individual Capacity

When a person is sued for damages or other relief for breach of fiduciary duty arising from the person's actions as trustee, the recovery sought should be against the person in the person's individual capacity, not in the person's representative capacity as trustee.[117]

> A person who sues or is sued in his official or representative capacity is, in contemplation of the law, regarded as a person distinct from the same person

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112. *See* Byars v. Thompson, 15 S.W. 1087, 1089 (Tex. 1891) (explaining because legal title to the property, as well as the right to possession and control, is vested in the trustee, the trustee or the successor trustee is normally the proper party to bring an action to redress the wrongdoing of third parties).

113. Interfirst Bank-Hous., N.A. v. Quintana Petroleum Corp., 699 S.W.2d 864, 874–75 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

114. *Id.*; *see also* Villarreal v. Wells Fargo Bank Brokerage Servs., 315 S.W.3d 109, 118 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (stating that beneficiaries' derivative claim on behalf of trustee against brokerage company was barred by limitations because the trustee had notice of the facts before limitations expired).

115. *See* Ikard & Herron, *supra* note 100, at 5.

116. TEX. R. CIV. P. 93–94.

117. *See* RESTATEMENT (SECOND) OF TORTS § 874 (AM. L. INST. 1979).

> in his individual capacity and is a stranger to his rights or liabilities as an individual. It is equally true that a person in his individual capacity is a stranger to his rights and liabilities as a fiduciary or in a representative capacity.[118]

This concept is clearly applicable to cases involving trustees.[119] Thus, a citation served on a person solely in the person's individual capacity does not equate to a citation served on that person in the person's representative capacity *as trustee and will not support a default judgment against the person as trustee*.[120]

Similarly, in the estate context, it has been recognized that an "executor in his individual capacity is a stranger to the estate" and may even sue to establish the executor's title to property of the estate against the claims of the beneficiaries.[121]

G. Beware Citing XTO *on Third Party Claims*

If the *XTO* court had properly analyzed the beneficiary's derivative claims against "the trustee" as one brought on behalf of the trustee against a "third party," it may have allowed the claim to proceed.[122] But even as to third-party claims, the *XTO* court focused on certain language in the trust document, which it felt gave the trustee very broad discretion in deciding whether or not to pursue litigation on behalf of the trust and then applied a stringent "abuse of discretion standard" to the question of whether the trustee's refusal to bring the litigation was "wrongful."[123] In another case, without such language, a less stringent rule may be applicable.[124]

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118. Elizondo v. Tex. Nat. Res. Conservation Comm'n, 974 S.W.2d 928, 931 (Tex. App.—Austin 1998, no pet.).

119. *See id.*

120. Price v. Dean, 990 S.W.2d 453, 454 (Tex. App.—Corpus Christi-Edinburg 1999, no pet.) (emphasis added).

121. Pryor v. Krause, 168 S.W. 498, 503 (Tex. App.—El Paso 1914, writ ref'd).

122. *See In re* XTO Energy, Inc., 471 S.W.3d 126, 131 (Tex. App.—Dallas 2015, no pet.) (citing *In re* Est. of Webb, 266 S.W.3d 544, 552 (Tex. App.—Ft. Worth 2008, pet. denied)); Interfirst Bank-Houston, N.A. v. Quintana Petroleum Corp., 699 S.W.2d 864, 874 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) ("Texas courts have held that a trust beneficiary may enforce a cause of action that the trustee has against a third party if the trustee cannot or will not do so.").

123. *See In re XTO Energy*, 471 S.W.3d at 131 (stressing that the language in the trust instrument gave the trustee the "discretion" to act or refuse to act "upon any evidence by it deemed sufficient," which it then characterized as "exceedingly broad discretion").

124. *See id.*

H. Trust Code Contemplates Derivative Suits Beneficiary for Benefit of Entire Trust

Unlike the derivative suit provisions for corporations and partnerships now found in the Texas Business Organizations Code, there has never been an explicit statutory provision expressly authorizing derivative claims against trustees.[125] However, the right to bring derivative suits by shareholders also began as a judicial, equitable exception to the general rule that corporate directors must file suits on behalf of the corporation.[126]

Nor has there ever been an explicit statute authorizing derivative claims by beneficiaries of estates against executors or third parties.[127] Nevertheless, as discussed above, derivative actions in trust and estates cases have had a long history in Texas jurisprudence, which is presumed to have been known by the Texas legislature when enacting and amending the Texas Trust Code.[128]

The court in *XTO* apparently focused only on the definitions of "interested person" and "person" found in TTC Section 111.004 (although it seemed to ignore the inclusion of a "beneficiary" in the former) and on the jurisdictional provisions of Sections 115.001 and 115.011 before reaching its "conclusion" that there was no statutory support in Texas for a derivative suit by a beneficiary against "the trustee."[129] The court also considered Section 94 of the Restatement (Third), dealing with suits brought by beneficiaries as a fiduciary for others.[130] Not only does this citation not appear to be on point, but there is also no indication in the opinion that it has ever been cited as authority by the Texas Supreme Court.[131]

Unfortunately, the *XTO* court appears to have completely ignored several provisions of the Trust Code, which do, expressly and implicitly, acknowledge that a beneficiary—as an "interested person" under Section 114.001(7)—may sue for damages to the entire trust.[132]

The language used in the Trust Code must be interpreted assuming that the legislature chose the words intentionally, in light of existing law, and with the intent that effect is given to the plain meaning of the words.[133]

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125. *See* TEX. BUS. ORG. CODE ANN. § 21.958.

126. *See* Chandler v. Welborn, 294 S.W.2d 801, 806 (Tex. 1956) ("[A]lthough the stockholders own no direct interest in the assets of the corporation, equity recognizes their right under certain circumstances to institute suit for the benefit of the corporation.").

127. *See* TEX. EST. CODE ANN. § 351.100.

128. *See supra* Section III.A.

129. *In re XTO Energy*, 471 S.W.3d at 137–38 (citing TEX. PROP. CODE ANN. §§ 111.004, 115.001).

130. RESTATEMENT (THIRD) OF TRS. § 94 (AM. L. INST. 2003).

131. *See In re XTO Energy*, 471 S.W.3d at 137–38.

132. PROP. § 114.001(7).

133. Fitzgerald v. Advanced Spine Fixation Sys. Inc., 996 S.W.2d 864, 866 (Tex. 1999) (explaining that when interpreting a statute, one starts with the plain language because "[i]t is a fair assumption that

Statutes should also be construed in a manner that makes "sense."[134] Not only does the plain meaning of the language in the cited sections below clearly reflect a legislative intent to allow derivative actions by a beneficiary against the person or entity serving as trustee, but none of these provisions also make any sense if, as *XTO* suggests, a trust beneficiary is limited to seeking recovery only for the trust beneficiary's "share" of the damages suffered by the trust.[135]

1. TTC Section 111.004(17) (Trust Property Defined)

Many of the provisions relating to a trustee's individual liability for breach of trust use the term "Trust Property."[136] This term is defined in the Trust Code as "property placed in trust by one of the methods specified in Section 112.001 or property otherwise transferred to or acquired or retained by the trustee for the trust."[137] The plain language in this section clearly reflects that it refers to all of the trust property, not to just the share or interest of a single beneficiary.[138]

2. TTC Section 114.001 (Liability of Trustee to Beneficiary)

Although the title may seem to indicate otherwise, the actual text of Section 114.001 indicates that the liability and recovery against a defalcating trustee go to the "trust property" or the entire "trust estate," not just to the share of a single beneficiary if there is more than one beneficiary.[139] Subsection (a) provides that a trustee is accountable to the beneficiary for the *trust property* and 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.[140] Subsection (c) covers "any damages resulting from such breach of trust" including:

> (1) *any* loss or depreciation in value of the *trust estate* as a result of the breach of trust; (2) *any* profit made by the trustee through the breach of trust; or (3) *any* profit that would have accrued to the *trust estate* if there had been no breach of trust.[141]

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the Legislature tries to say what it means, and therefore the words it chooses should be the surest guide to legislative intent").

134. Meritor Auto, Inc. v. Ruan Leasing Co., 44 S.W.3d 86, 90 (Tex. 2001).
135. *See In re XTO Energy*, 471 S.W.3d at 137; PROP. § 115.011.
136. *See* PROP. § 114.001.
137. *Id.* § 111.004(17).
138. *See id.*
139. *Id.* § 114.001.
140. *Id.* § 114.001(a) (emphasis added).
141. *Id.* § 114.001(c) (emphasis added).

The language of TTC Section 114.001 is straightforward and clear.[142] The trustee is liable for the entire trust estate, and the trustee is not allowed to keep any profits the trustee may have made—period.[143] The trustee's liability is not limited to damages attributable only to the share or the beneficiary's interest who brings the action.[144] And yet, this is the result that the dicta in *XTO* would require.[145]

3. TTC Section 114.008 (Remedies for Breach of Trust)

This section deals primarily with equitable and injunctive relief, and it clearly envisions that relief would extend to the entire trust, even if only one beneficiary filed the suit.[146] While this section does not specifically refer to the recovery of damages, these are clearly included as part of any "other appropriate relief" under TTC Section 114.008(a)(10).[147]

4. XTO *as a Bad Facts/Bad Law Case?*

While rejecting the plaintiff's right to bring suit against the trustee "on behalf of the trust as a whole," the court in *XTO* concluded that she could "bring claims on her own behalf" for damages accruing to her share or interest and that "her petition could be amended . . . accordingly."[148]

One cannot help but wonder if this holding had more to do with the type of trust involved in the case than with the actual merits of the "derivative" suit arguments, particularly given the fact that the plaintiff (mistakenly) conceded on appeal that there was nothing in Texas law that would allow her to bring a derivative claim against the trustee in its corporate capacity.[149]

The trust in *XTO* was a "net profits interest" mineral royalty trust with shares "publicly traded on the New York Stock Exchange."[150] It had literally hundreds of shareholder "beneficiaries," and its "shares" were freely bought and sold.[151] In recent years, the industry has expressed concern that persons may be purchasing shares in royalty trusts to bring lawsuits to recover

142. *See id*. § 114.001.

143. *Id.*

144. *See id.*

145. *In re* XTO Energy Inc., 471 S.W.3d 126, 137–38 (Tex. App.—Dallas 2015, no pet.).

146. *See*, *e.g.*, PROP. § 114.008(a)(5) (allowing the court to appoint a receiver to "take possession of the trust property and administer the trust").

147. *Id.* § 114.008(a)(10).

148. *In re XTO Energy*, 471 S.W.3d at 138 (citing PROP. §§ 111.004, 115.001, 115.011, but ignoring §§ 114.001 and 114.008 set out above).

149. *In re XTO Energy*, 471 S.W.3d at 137.

150. *Id.* at 129.

151. *See ExxonMobil Opens at Lifetime High, Holding onto Gas Opportunities from 2010 XTO Merger*, OIL & GAS 360 (June 24, 2014), https://www.oilandgas360.com/exxonmobil-opens-lifetime-high-holding-onto-gas-opportunities-2009-xto-merger/ [https://perma.cc/U69P-V8AV].

damages.[152] One can certainly see how detrimental to the rest of the shareholders such litigation might be.[153] Thus, the old saying that "bad facts make bad law" may have been at work in connection with the *XTO* court's reluctance to allow one of several hundred beneficiaries to bring a derivative suit against the trustee in the case before it.[154] However, it should not provide an excuse to extend "bad law" to other trusts.[155]

IV. WHO IS ENTITLED TO DEMAND TRUST ACCOUNTINGS AND CAN THAT ENTITLEMENT BE LIMITED?

A. History

The duty to inform has been a part of Anglo-American law since at least the early 1800s.[156] At that time, Joseph Story wrote, "[i]t is the duty of the trustee . . . to afford accurate information to the [beneficiary] of the disposition of the trust-property; and if he has not all the proper information, to seek for it and if practicable to obtain it."[157] In the latter half of the twentieth century, the duty to inform was cemented in the UTC, the Restatements, and the UPC.[158] Not long before the Restatement (Second) was released, the primary issue in this area was whether a duty to inform could be imposed at all.[159] At that time, some state statutes required accountings only every three years.[160] Today, however, it is generally accepted that the duty to inform is an unalterable part of effective trust law.[161] Thus, the focus has shifted to the question of what information must be shared.[162]

When the NCCUSL was working on the UTC, one of the most hotly debated issues was the extent to which a settlor might limit a trustee's duty to inform.[163] Lawyers and bankers have made it clear that "there remains considerable uncertainty and disagreement about the duty to inform

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152. *See, Investigation Announced for Investors in NASDAQ: MOXC Shares over Potential Wrongdoing at Moxican, Inc*., OPENPR (Sept. 8, 2021), https://www.openpr.com/news/2386758/ [https://perma.cc/R5CS-YEF5].

153. *See id.*; author's original thought.

154. *See In re XTO Energy*, 471 S.W.3d at 129.

155. Author's original thought.

156. T.P. Gallanis, *The Trustee's Duty to Inform*, 85 N.C. L. REV. 1595, 1617 (2007).

157. *Id.* (quoting JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA 619 (Melville M. Bigelow eds., 13th ed., 1886)).

158. *See* Julia C. Zajac & Robert Whitman, *Fiduciary Accounting Statutes for the 21st Century*, AM. L. INST. – AM. BAR ASS'N CONTINUING LEGAL EDU. 33, 349 (2011).

159. *See id.* at 341.

160. *See id.* at 341–42.

161. *See id.* at 340.

162. *See id.* at 350.

163. *See* Kevin D. Millard, *The Trustee's Duty to Inform and Report under the Uniform Trust Code*, 40 REAL PROP., PROB. & TR. J. 373, 375 (2005).

and . . . the extent to which" it may be abrogated.[164] The tension between the fundamental duties of trustees and settlors' desire to limit or eliminate information reporting has led to controversy over the provisions in the UTC.[165]

Interestingly, the Texas legislature enacted TTC Section 113.060 in 2005 in an attempt to codify the duty to inform.[166] However, this statute was immediately viewed as overbroad and repealed in 2007.[167] Thus, trustees in Texas find themselves saddled with both a statutory duty to account and a rather different common law duty to inform.[168]

The 2005 Texas legislature also included some UTC provisions concerning the duty to account.[169] These continue to be effective, but the portions adopted here lack some detail regarding the actual contents of a proper accounting.[170] Per the rule of statutory construction cited above in Section II.C.3, an omission by the legislature leads to the conclusion that it was intentional.[171] While this may provide trustees with some leeway, it leaves practitioners in the difficult position of being less equipped to determine whether a given document will qualify as a proper trust accounting under the statute.[172]

The case law that has developed against this historical backdrop is similarly frustrating.[173] The few available rules often lack broad application.[174] The next section discusses the status of these rulings.[175]

B. Common Law in Texas

When considering a client's fiduciary duty as a trustee, most practitioners first turn to the Trust Code.[176] However, the thoughtful practitioner will notice that the common law duty to inform predates the Trust Code and is broader than the statutory duty to account.[177] Also, the Trust

164. Zajac & Whitman, *supra* note 158, at 342.

165. *See id.* at 343.

166. *See* STANLEY M. JOHANSON, JOHANSON'S TEXAS ESTATES CODE ANNOTATED § 113.006 cmt. (2017 ed.).

167. *See id.*

168. *See* TEX. PROP. CODE ANN. § 113.051.

169. *See id.*

170. JOHANSON, *supra* note 166.

171. *See supra* Section II.C.3.

172. *See* David Fowler Johnson, *Corporate Trustee's Statements May Suffice For A Statutory Accounting*, TEX. FIDUCIARY LITIGATOR (Sept. 22, 2021), https://www.txfiduciarylitigator.com/2021/09/corporate-trustees-statements-may-suffice-for-a-statutory-accounting/ [https://perma.cc/89NK-U676].

173. *See* Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996); Hollenback v. Hanna, 802 S.W.2d 412, 414 (Tex. App.—San Antonio 1991, no pet.).

174. *See infra* Sections IV.B–D.

175. *See infra* Sections IV.B–D.

176. *See* TEX. PROP. CODE ANN. tit. 9, subt. B.

177. *See id.* § 113.051.

Code directs trustees to "perform all of the duties imposed on [them] by the common law."[178] Therefore, an examination limited to the Trust Code will generally be incomplete.[179]

Under the common law, "[t]rustees and executors owe beneficiaries 'a fiduciary duty to full disclosure of all material facts known to them that might affect [the beneficiaries'] rights.'"[180] As is made clear below, this duty is somewhat broader than the codified duty to account.[181] The common law also recognized that a settlor could not eliminate the duty to inform, but it has never been particularly instructive about how this duty might be diminished.[182]

C. Statutory Framework

The accounting rules in the Trust Code are found primarily in three sections.[183] The first, TTC Section 111.0035, sets out trustee duties that may not be waived.[184] TTC Section 113.152 sets out the required elements of a proper accounting.[185] However, the section in-between the two, TTC Section 113.151, is more interesting.[186] It addresses accounting demands.[187] This section is strangely worded and organized.[188] It begins by stating that a beneficiary may demand an accounting, but it never directs a trustee to respond to that accounting.[189] Instead, the section permits a court to order the accounting if it is not timely produced.[190] Similarly, subsection (b) permits an interested person to file suit to compel an accounting without making a demand.[191] Although not explicit, this section implies that accountings will generally be produced on demand.[192]

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178. *Id.*; *see also* PROP. §§ 111.005, 111.0035(c), 112.054(f), 114.07(c), 121.058 (for other references to the common law).

179. *See* Christian Kelso, *Trust Accountings and the Duty to Inform in Texas*, FARROW-GILLESPIE HEATH WITTER LLP (Nov. 26, 2019), https://www.fghwlaw.com/trust-accountings-and-duty-to-inform/ [https://perma.cc/JRV2-9EKB].

180. Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996) (citing Montgomery v. Kennedy, 669 S.W.2d 309, 313 (Tex. 1984)).

181. *See infra* Section IV.C.

182. Hollenbeck v. Hanna, 802 S.W.2d 412, 414 (Tex. App.—San Antonio 1991, no pet.).

183. *See infra* notes 184–92 and accompanying text.

184. TEX. PROP. CODE ANN. § 111.035.

185. *Id.* § 113.152.

186. *See id.* § 113.151.

187. *Id.*

188. *See id.*

189. *Id.*

190. *Id.*

191. *Id.* § 113.151(b).

192. *See id.* § 113.151.

D. Who Is Entitled?

A broad array of people are generally entitled to trust information.[193] TTC Section 113.152 makes provisions for both beneficiaries and interested persons.[194] TTC Section 111.004(2) defines a *beneficiary* as "a person for whose benefit property is held in trust, regardless of the nature of the interest."[195] TTC Section 111.004(6) defines *interest* to mean "any interest, whether legal or equitable or both, present or future, vested or contingent, defeasible or indefeasible."[196] TTC Section 111.004(7) defines an *interested person* as "a trustee, beneficiary, or any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust."[197] Thus, the statutory framework nets a relatively wide swath of beneficiaries.[198]

On the other hand, the non-waivable provisions of TTC Section 111.0035 relate only to so-called "first-tier beneficiaries."[199] Under TTC Section 111.0035(b)(4), first-tier beneficiaries include those who are "(i) entitled or permitted to receive distributions from the trust or (ii) would receive a distribution from the trust if the trust terminated at the time of the demand."[200] TTC Section 111.0035(c) is similar but slightly different.[201] It adds a requirement that first-tier beneficiaries be at least twenty-five years old.[202] Also, when it qualifies beneficiaries who "would receive a distribution from the trust if the trust were terminated," it leaves out the words "at the time of the demand."[203] This language is included in TTC Section 111.0035(b)(4).[204] The consequence of these differences is unclear.[205]

By restricting the non-waivable provisions to first-tier beneficiaries of irrevocable trusts, settlors are presumably permitted to limit the duties to account and inform with regard to other beneficiaries and revocable trusts.[206] This could prevent frivolous pestering by contingent remainder beneficiaries and the need to expend significant trust assets replying to their demands.[207] Consider, for example, the typical married couple with a run-of-the-mill

193. *See* Faulkner v. Bost, 137 S.W.3d 254, 257 (Tex. App.—Tyler 2004, no pet.).
194. *See* PROP. § 111.004(2).
195. *Id.* § 111.004(2).
196. *Id.* § 111.004(6).
197. *Id.* § 111.004(7).
198. *See id.* §§ 111.004(2), (6), (7).
199. *See id.* § 111.035.
200. *Id.* §§ 111.035(b)(4)(A)(i)–(ii).
201. *Id.* § 111.035(c).
202. *Id.*
203. *Id.*
204. *Id.* § 11.0035(b)(4).
205. *See id.*
206. *See* Kelso, *supra* note 179.
207. *Id.*

revocable living trust where husband and wife are grantors, co-trustees, and primary beneficiaries.[208] Does it make sense to allow this couple's children, grandchildren, and further descendants to demand an accounting of trust assets even though they will only take, if at all, under the trust terms after both of the parents have died?[209] These people would not be able to demand an accounting of the settlors' non-trust assets, so denying them this privilege regarding assets held in a revocable trust seems rational.[210]

But, case law makes rules confusing in this area.[211] In *Mayfield v. Peek*, a contingent beneficiary of a revocable trust was found to have standing to bring an action against a trustee for breach of fiduciary duty.[212] At trial, the court held that the beneficiary lacked standing because the interest was not vested.[213] But on appeal, the court noted that the Trust Code allows a court to "intervene in the administration of a trust to the extent that the court's jurisdiction is invoked by an interested person."[214] As described above, an *interested person* includes a beneficiary, regardless of whether the person's interest is "present or future, vested or contingent, defeasible or indefeasible."[215] Thus, the *Mayfield* court allowed the beneficiary to continue with her claim even though her interest was subject to defeasement by revocation of the trust.[216] While *Mayfield* did not involve an accounting or information demand, its logic would seem to apply to those as well.[217]

On the other hand, the court in *Berry v. Berry* determined that a contingent beneficiary lacked standing to require an accounting, stating that the claimant's interest was no greater than that of an heir apparent or beneficiary of a person who is still alive.[218] At least one respected commentator has stated publicly that the case was incorrectly decided, noting that, "[u]nlike an heir apparent or beneficiary of a person who is still alive, a contingent beneficiary of a trust currently owns a contingent interest in the trust."[219]

It is worth noting that *Mayfield* (where the contingent beneficiary *was* found to have standing) involved alleged breaches by a trustee who was a child of the settlor, and the settlor, who held the power to revoke the trust,

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208. Author's original hypothetical.
209. Author's original hypothetical.
210. Author's original hypothetical.
211. *See infra* notes 213–21 and accompanying text.
212. Mayfield v. Peek, 546 S.W.3d 253, 262–63 (Tex. App.—El Paso 2017, no pet.).
213. *Id.* at 255.
214. TEX. PROP. CODE ANN. § 115.001(c).
215. *Id.* § 111.004(6).
216. *Mayfield*, 546 S.W.3d at 267.
217. *See id.* at 262–63.
218. Berry v. Berry, No. 13-18-00169-CV, 2020 WL 1060576, at *4 (Tex. App.—Corpus Christi–Edinburg Mar. 5. 2020, pet. filed) (mem. op.).
219. Gerry W. Beyer, *Estate Planning Developments for Texas Professionals*, FROST, § III(A) (2020).

may have lacked mental capacity at the time the alleged breaches occurred. According to Bogert:

> [M]any courts have allowed other beneficiaries to pursue breach of duty claims after the settlor's death, related to the administration of the trust during the settlor's lifetime, when, for example, there are allegations that the trustee breached its duty during the settlor's lifetime and that the settlor had lost capacity, was under undue influence, or did not approve or ratify the trustee's conduct.[220]

E. Solutions

To minimize the potential for confusion on this issue, drafters may wish to include language in revocable trust agreements expressly limiting the trustee's duty to inform or account to first-tier beneficiaries as provided in TTC Section 111.0035(b)(4), (c).[221] Such language could be beneficial where privacy is a consideration.[222]

The foregoing notwithstanding, it should go without saying that beneficiaries generally should not demand accountings from trustees of revocable trusts, especially when the people holding the right to revoke are competent.[223] Such a demand is likely to raise the ire of powerholders and result in the demanding beneficiaries being cut out of their inheritances.[224] Even the court in *Mayfield* noted, "the fact that the trust is revocable might deny those contingent beneficiaries any relief on the merits."[225]

Note that this same principle applies where a trust instrument grants someone the power to appoint property away from a beneficiary.[226] Consider, for example, a typical dynasty trust established by a settlor for the benefit of the settlor's descendants.[227] The default terms of this trust call for standard per stirpital distributions to each successive generation, but primary beneficiaries are also given powers of appointment under which they may alter the default provisions.[228] These powers allow the settlor's son to change the relative percentage interests each of the settlor's children will inherit or

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220. GEORGE G. BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 964 (3d ed. 2010).

221. TEX. PROP. CODE ANN. §§ 111.0035(b)(4), (c).

222. *See id.*; author's original thought.

223. *See generally* Moon v. Lesikar, 230 S.W.3d 800, 806–11 (Tex. App.—Houston [14th Dist.] 2007, pet denied) (Guzman, J. concurring) (discussing the trustee's right to revoke).

224. *Id.*

225. Mayfield v. Peek, 546 S.W.3d 253, 261 (Tex. App.—El Paso 2017, no pet.).

226. *See id.*; PROP. § 112.001.

227. RONALD R. CRESSWELL, SARAH PATEL PACHECO, & PATRICK PACHECO, TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING § 5:512 (2020).

228. *See id.* § 5:318.

even divert some or all of that inheritance to charity.[229] In such a case, it would not be wise of a granddaughter to demand an accounting because the intervening child (the granddaughter's father) might exercise his power of appointment and effectively disown her.[230] Rightly or wrongly, this is the case, even if the son, acting as trustee of the trust, is grossly mismanaging it.[231]

Finally, one interesting case is helpful in this area because it draws a bright line in the area of standing.[232] In *Davis v. Davis*, a father wished to sue certain trustees on behalf of his sons as next of kin.[233] However, the court held that he lacked standing.[234] In that case, the boys' mother had been granted powers of managing conservator, including the power to represent sons in legal action, but the father only had powers of a possessory conservator, which the court found to be insufficient.[235]

V. CAN A TESTATOR EXCULPATE AN INDEPENDENT EXECUTOR FOR BREACH OF A DUTY IMPOSED ON HIM BY STATUTE OR BY THE COMMON LAW?

A. Background

The issue of whether a testator may exculpate an executor from liability for breach of statutory and common law fiduciary duties has never been squarely addressed in any reported Texas appellate decision to date.[236] And yet, estate planning attorneys in Texas routinely include exculpatory provisions purporting to be applicable to independent executors in wills they draft for their clients.[237]

This may indeed be the common practice, but it ignores the fact that, unlike trustees, broad exculpation of an independent executor by a testator for breach of statutory and common law fiduciary duties is not provided for by any statute in this state, nor is it recognized under common law principles.[238]

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229. *See id.* § 5:320.

230. *Id.*; author's hypothetical.

231. CRESSWELL, PACHECO, & PACHEO, *supra* note 227, § 5:319.

232. *See* Davis v. Davis, 734 S.W.2d 707, 709–10 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

233. *Id.* at 708.

234. *Id.* at 710.

235. *Id.* at 709.

236. Author's original thought.

237. *See* DONALD J. MALOUF, HENRY J. LISCHER, JR., & ALEX E. NAKOS, 11 WEST'S TEXAS FORMS: ESTATE PLANNING § 9:54 (4th ed. 2021); CRESSWELL, PACHECO, & PACHEO, *supra* note 227, § 5:408.

238. *See* TEX. PROP. CODE ANN. § 114.007.

To the contrary, the common law squarely rejects any notion that a fiduciary may be excused from breach of fiduciary duty simply because the fiduciary may have acted in "good faith" or "without gross negligence" or even as the result of a "mistake."[239] And, regardless of how an estate planning attorney may feel about the wisdom of allowing a testator to exculpate an executor, based on the rules of statutory construction, any attempt to fill an alleged "vacuum" in Texas law, or an attempt to allow a testator to exculpate an executor from breach of a statutory or common law fiduciary duty, should probably be left to the Texas legislature, and not be undertaken by a drafting attorney or by a court.[240]

B. Common Law Duties

In Texas, common law principles govern the rights, powers, and duties of executors and administrators "to the extent that those principles do not conflict with the statutes of this state."[241] Many common law duties, such as the duty to act competently, provide notice and disclosure to estate beneficiaries, and distribute the estate property per the terms of the will, are also found in specific provisions of the Estates Code.[242] As a result, Texas courts have not hesitated to apply common law principles of fiduciary duties to executors.[243] As the Texas Supreme Court noted in *Humane Society of Austin and Travis County v. Austin National Bank*, an executor is held to the same fiduciary standards in the executor's administration of the estates as a trustee, even though the provisions of the Trust Code are not applicable to estate administration.[244] Furthermore, under the common law, exculpation of a fiduciary is not allowed.[245]

1. Duty of Good Faith and Loyalty

A common law fiduciary owes an unwavering duty of good faith, fair dealing, loyalty, and fidelity to the fiduciary's beneficiaries.[246]

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239. *Id.*

240. *See* Tex. Comm. Bank v. Grizzle, N.A., 96 S.W.3d 240, 250–51 (Tex. 2002); Leland v. Brandal, 257 S.W.3d 204, 208 (Tex. 2008).

241. TEX. EST. CODE ANN. § 351.001.

242. *Id.* §§ 101.001, 306.002

243. *See id.* § 351.001.

244. Humane Soc'y of Austin & Travis Cnty. v. Austin Nat'l Bank, 531 S.W.2d 274, 277 (Tex. 1975).

245. RESTATEMENT (SECOND) OF TRS. § 222, cmt. (b) (AM. L. INST. 1959).

246. Herschbach v. Corpus Christi, 883 S.W.2d 720, 735 (Tex. App.—Corpus Christi–Edinburg 1994, writ denied).

2. Duty to Act Competently

A common law fiduciary is also required to exercise the judgment and care that persons of ordinary prudence, discretion, and intelligence exercise managing their affairs.[247] Moreover, a breach of fiduciary duty at common law can be based solely on negligent conduct.[248]

3. Duty of Disclosure

An executor has a common law duty to fully disclose all material facts known to the executor that might affect a beneficiary's interests, even if the parties are in litigation or their relationship is otherwise strained.[249]

4. Duty Not to Abdicate Responsibility

Liability cannot be avoided by simply abdicating the fiduciary role.[250] A fiduciary who fails or refuses to take any action to comply with the fiduciary's duty is not protected under common law principles.[251]

5. Duty to Seek Construction

Where the construction of a clause in a will is doubtful, and it is shown that the executor will probably have to act on the clause, an executor has a duty (as part of the executor's duty of competence) to apply to a court of competent jurisdiction for its construction.[252] An executor's duty to seek the construction of a doubtful clause in a will is particularly stringent when the clause relates to the ultimate distribution of the estate so that distributions to the wrong persons can be avoided.[253]

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247. Interfirst Bank Dallas v. Risser, 739 S.W.2d 882, 888 (Tex. App—Texarkana 1987, no writ), *disapproved of on other grounds by* Tex. Comm. Bank v. Grizzle, 96 S.W.3d 240 (Tex. 2002).

248. Jewett v. Capital Nat'l Bank of Austin, 618 S.W.2d 109, 112 (Tex. App.—Waco, writ ref'd n.r.e.); *see also* Crowder v. Meyer, No. 01-98-00105-CV, 1999 WL 82442, at *3 (Tex. App.—Houston [1st Dist.] Feb. 11, 1999, no pet.) (holding that an escrow agent who negligently dispersed funds to the wrong party was liable for the funds lost by its breach, not just for what the agent profited personally) (citing City of Fort Worth v. Pippen, 439 S.W.2d 660, 665 (Tex. 1969)).

249. Montgomery v. Kennedy, 669 S.W.2d 309, 313 (Tex. 1984) (holding that an executor committed extrinsic fraud by failing to fully disclose assets of the estate prior to a family settlement agreement).

250. *Id.*

251. *Jewett*, 618 S.W.2d at 112 (holding that a trustee who did nothing to comply with the terms of the trust was liable for losses caused by his abdication of responsibility).

252. Shindler v. Cooke, 90 S.W.2d 292, 293 (Tex. App.—Austin, 1935, writ ref'd) (holding that an executor had a duty to file suit to construe a will to determine the proper distribution of the estate).

253. *Id.*; Drew v. Jarvis, 216 S.W. 618, 620 (Tex. 1919) (stating that "[i]t is as much as the administrator's duty to withhold from the estate from one not lawfully entitled to receive it as it is his duty to surrender the estate whenever the administration may be closed, to those entitled of it").

6. "Good Faith" Defense

"Good faith" may not be a defense to a breach claim under common law principles.[254]

7. "Mistake" Defense

Mistake may also be of limited value to a breach claim under common law principles.[255] "A trustee commits a breach of trust not only when he violates a duty in bad faith, intentionally in good faith, or negligently, but also when he violates a duty because of a mistake."[256]

Even if negligently made or made in good faith, a mistake as to the proper interpretation of a will does not relieve an executor of liability for distributing the estate to the wrong person.[257] Failure to properly distribute the estate will subject the executor to liability under the common law.[258]

C. Statutory Provisions

1. Trust Code Does Not Apply

The Texas common law rule that a fiduciary cannot avoid liability for a breach of fiduciary duty, even if committed in "good faith" or as the result of "ordinary" negligence, can be altered for trustees but not for executors.[259] This is because the Trust Code expressly provides that a settlor may modify most of the statutory duties of the settlor's trustee and may also exculpate such trustee from liability for certain conduct.[260] However, the Trust Code does not apply to executors, and even though the Estates Code contains some specific sections which may alter the common law standards otherwise applicable to executors, these are few and far between.[261] The Estates Code

254. Republic Nat'l Bank & Trust Co. v. Bruce, 105 S.W.2d 882, 885 (Tex. [Comm'n Op.] 1937) (holding that by accepting a trust, the trustee becomes bound to execute it per the provisions of the trust, and if he pays out or distributes trust funds to the wrong party, he is personally liable for the loss).

255. *See infra* notes 257–59 and accompanying text.

256. Ertel v. O'Brien, 852 S.W.2d 17, 21 (Tex. App.—Waco 1993, writ denied); *Bruce*, 105 S.W.2d at 886.

257. *Jarvis*, 216 S.W at 620.

258. *See* Est. of Boylan, No. 02-14-00170-CV, 2015 WL 598531, at *4 (Tex. App.—Fort Worth Feb 12. 2015, no pet.) (mem. op.) (holding that an executor who unilaterally and mistakenly determined that a beneficiary had violated a no-contest clause and thereafter distributed the estate excluding the beneficiary, was personally liable for the amount not distributed, even if the failure was due to mistake or made in "good faith").

259. TEX. PROP. CODE ANN. § 114.007; *see also* Avary v. Bank of Am., N.A., 72 S.W.3d 779, 791–92 (Tex. App.—Dallas 2002, pet. denied) (discussing the fiduciary duties owed by an executor or trustee to their beneficiaries).

260. PROP. § 114.007.

261. *See infra* Sections V.C.2–4.

contains nothing remotely similar to the broad grants of authority given to a settlor of a trust under the Trust Code.[262]

2. Trust Code Limitations

Further, even though the Trust Code allows a settlor to modify or eliminate many of the duties of a trustee, there are limits on that power.[263] TTC Section 111.0035 allows the settlor of a trust to modify or eliminate most but not all of the statutory duties imposed on a trustee.[264] Chief among the statutory duties that cannot be modified or eliminated for a trustee is the duty "to act in good faith and in accordance with the purposes of the trust."[265]

The Trust Code also limits how far the settlor can go in "exculpating" a trustee for breach of duty.[266] Under TTC Section 114.007(a)(1), an exculpation clause is unenforceable in Texas to the extent it attempts to relieve a trustee of liability for a breach of trust committed in bad faith, intentionally, or with reckless indifference to the interest of a beneficiary.[267] A trustee also cannot be relieved of liability for any profit derived by the trustee from a breach of trust.[268] Thus, the Texas legislature has determined that, even as to trustees, public policy requires limits on the settlor's right to protect the settlor's trustee from liability.[269]

3. Estates Code Allows Few Modifications

In contrast to the relevant Trust Code provisions, the only exceptions or modifications to the duties imposed on independent executors are those carved out by the legislature and included in a few specific sections of the Estates Code.[270] Otherwise, the statute or the common law will apply.[271]

In some instances, the legislature has made doubly certain that no exception will be applied.[272] And in those rare instances where the legislature has determined an independent executor's good faith to be relevant to an issue, "good faith" has been expressly written into the statute.[273]

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262. *See* PROP. § 111.0035.
263. *Id.*
264. *Id.*
265. *Id.* § 111.0035(b)(4)(B).
266. *Id.* § 114.007(a)(1).
267. *See id.*
268. *Id*. § 114.007(a)(2).
269. *See id.*
270. TEX. EST. CODE ANN. § 351.001 (stating common law applies unless in "conflict with the statutes of this state").
271. *Id.*
272. *See id.* § 351.101.
273. *See id.* §§ 352.052(a), 404.003.

The legislature has also seen fit, in very limited cases, to expressly allow a testator to modify or alter the statutory and common law rules that might otherwise apply to executors.[274] Thus, the legislature is clearly aware of how to authorize a testator to modify the rules that are otherwise applicable to executors but has been very selective in doing so, just as it has been selective in determining when good faith should be relevant to the conduct of an executor.[275]

4. Lack of Exculpatory Statutes Cannot Be Ignored

Under the rules of statutory construction, the lack of a "good faith" exception or a "gross negligence" standard in the vast majority of Estates Code sections and the lack of any provisions similar to Trust Code Sections 111.0035 or 114.007, allowing settlors to alter the rules, cannot be ignored.[276] The absence of these provisions presumably reflects a decision by the legislature not to recognize "good faith" or "lack of gross negligence" as an overall defense to executor liability, as well as a legislative refusal to allow a testator to broadly exculpate the testator's executor from liability for a breach of statutory or common law duties.[277] Given the fact that duties of independent executors are covered by an extensive statutory scheme, the failure of the legislature to allow a testator to provide a good faith defense for the testator's executor in other matters or to modify most of the executor's statutory duties cannot be considered a legislative gap or oversight.[278]

The legislature is also presumed to act (or not act) in light of the existing judicial decisions.[279] More than forty-five years ago, the Supreme Court of Texas held that an independent executor owes the same high standard of conduct and the same common law fiduciary duties to estate beneficiaries as a trustee owes to beneficiaries of a trust, but it also held that none of the provisions of the Trust Code (including the protective ones) could apply to executors because the plain language of that statute limited its application to express trusts.[280] The fact that the legislature has failed to act on this alleged gap in the law for testators who may want to similarly exculpate their executors for forty-five years, is a strong indication that the legislature has consciously elected not to fill it.[281]

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274. *See id.* § 351.105; PROP. §§ 116.002(3), 116.004.
275. *See* EST. § 351.105; PROP. §§ 116.002(3), 116.004.
276. *See* PROP. §§ 111.0035, 114.007.
277. Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 540 (Tex. 1981).
278. Archer v. Anderson, 556 S.W.3d 228, 238 (Tex. 2018).
279. Tex. Humane Soc'y of Austin & Travis Cnty. v. Austin Nat'l Bank, 531 S.W.2d 574, 577 (Tex. 1975).
280. *Id.*
281. *Id.*

Under the guise of statutory construction, a court is not free to judicially legislate by creating exceptions to statutes or by judicially adopting new provisions.[282] The members of the Texas legislature solely determine public policy in Texas.[283] Had the legislature deemed it appropriate to allow a testator to modify the statutory or common law duties of an executor to broadly exculpate an executor from liability for misconduct, it clearly knew how to do so.[284] The fact that it has not elected to do so establishes that, until a statutory change is made, no estate planning attorney and no lower court should simply assume that a testator can exculpate the testator's executor or modify such executor's duties.[285]

VI. WHAT LIMITS CAN BE PLACED ON THE FIDUCIARY DUTIES OF TRUST PROTECTORS?

A. Background

Fascinating though it is, the unabridged history of trust protectors in American jurisprudence is beyond the scope of this Article.[286] Suffice to say, however, that the primary development of the trust protector concept came about in the 1980s and 1990s when offshore asset protection planning was all the rage.[287] In this area, the trust protector was used to maintain control over trust assets, lest some catastrophic event causes them to vanish.[288] For example, suppose an unfriendly dictator suddenly took over your sun-drenched jurisdiction of choice; in that case, your trust protector might step in and move the trust to a more welcoming place, or if your yodeling trustee insisted on investing your trust's assets in mortgage-backed securities offered by the Dusseldorf financial houses, your trusty trust protector might compel your trustee to change investment strategies.[289] That was the plan, anyway.[290] But with the expansion of trust planning in the U.S. and the increasing complexity of tax and other issues that trusts address so effectively, planners began to recognize that trust protectors could play a role

282. Tex. Com. Bank, N.A. v. Grizzle, 96 S.W.3d 240, 250 (Tex. 2002).
283. *Id.*
284. *Id.*
285. *Id.*
286. *See* Andrew T. Huber, *Trust Protectors: The Role Continues to Evolve*, 31 PROB. & PROP. MAG. 1, 2 (2017), https://www.americanbar.org/content/dam/aba/publications/probate_property_magazine/v31/01/2017_aba_rpte_pp_v31_1_article_huber_trust_protectors.pdf [https://perma.cc/6Q2Z-38BP].
287. *Id.*
288. *Id.*
289. Author's original hypothetical.
290. Author's original hypothetical.

in domestic planning as well, and their deployment has increased in recent decades, particularly to add a measure of flexibility to long-term trusts.[291]

B. What Is a Trust Protector?

Succinctly stated,

> [A] trust protector may be thought of as a disinterested third party whom the settlor appoints to represent his or her best interests in the administration of the trust. Trust protectors can be given a broad or narrow array of powers, depending on the situation. Among other things, these powers may be strictly administrative, relate to investment decisions, control distributions, or some combination thereof.[292]

The sky is very much the limit.[293] Potential trust protector powers include the power to:

- add, remove, or replace trustees;[294]
- modify a power of appointment;[295]
- terminate the trust or change its termination date;[296]
- direct investments;[297]
- correct ambiguities or scrivener's errors;[298]
- convert a trust into a supplemental needs or other special-purpose trust;[299]
- release, renounce, suspend, or limit powers otherwise conferred on another party (including the trustee or the trust protector him-or herself);[300]
- veto or direct discretionary trust distributions;[301]
- delay or accelerate scheduled distributions;[302]

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291. Eric A. Manterfield, *Trust Protectors for Family Business Interest Held in Trust*, SZ007 A.L.I. CONTINUING LEGAL EDUC. 1631, 1 (2017).

292. Katherine C. Akinc, *Inside the Mind of a Trustee: The Importance of Understanding a Trustee's Perspective*, 12 EST. PLAN. & COMTY. PROP. L.J. 185, 225 (2020).

293. *See id.*

294. Huber, *supra* note 286, at 2.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Trust Protector vs. Trustee*, WEALTH ADVISORS TR. CO., https://www.wealthadvisorstrust.com/blog/trust-protector-vs.-trustee-1 (last visited Oct. 4, 202) [https://perma.cc/28YR-ZPUJ].

- add or delete trust beneficiaries;[303]
- change the situs and governing law of the trust;[304]
- consent to the exercise of a power of appointment;[305]
- amend the trust's administrative provisions;[306]
- amend the trust's dispositive provisions;[307]
- approve the trustee's accounts;[308]
- mediate or arbitrate disputes between the trustee and the beneficiaries;[309]
- make changes to the trust to accommodate tax or other changes in law;[310]
- interpret the rights of beneficiaries;[311]
- change a distribution standard;[312]
- modify the rule against perpetuities which might apply to the trust;[313]
- direct the allocation of principle and income;[314]
- run a business owned by the trust;[315]
- vote shares of a trust;[316]
- set trustee compensation; and[317]
- appraise unmarketable securities or other assets for trust purposes.[318]

Another source defines the trust protector as being "a function that carries out enumerated administrative and strategic purposes generally not reserved to the trustee, settlor, or beneficiaries."[319] There is no mandate that the trust protector actually "protect" the trust.[320] The name itself could be

303. *Id.*
304. Suzanne L. Shier, *Trust Protectors: When and how should they be used?*, N. TR., 3 (May 2016), https://www.northerntrust.com/documents/commentary/wealthplanning-insights/trust-protectors.pdf [https://perma.cc/8KHL-VKWB].
305. *Id.*
306. *Id.*
307. *Id.*
308. Huber*, supra* note 286, at 2.
309. Shier, *supra* note 304, at 2.
310. *Id.*
311. Huber, *supra* note 286.
312. *Id.*
313. Author's original thought.
314. Huber, *supra* note 286, at 2.
315. *Id.*
316. *Id.*
317. *Id.*
318. Shyla R. Bucker & Michelle Rosenblatt, *A Rose by any Other Name: Utilizing and Drafting Powers for Trustees, Trust Advisors and Trust Protectors*, TAX SECTION ST. BAR OF TEX. 14 http://texastaxsection.org/Content/Newsletters/TTL%202015%20Win%20A%2008%20Rose%20by%20Any%20Other%20Name%20opt.pdf (last visited Oct. 4, 2021) [https://perma.cc/4JZH-9GZW].
319. Huber*, supra* note 286, at 2.
320. *Id.*

anything and has no inherent meaning.[321] This already implies a substance over form approach to trust protectors.[322] Additionally, a trust protector need not be a single person.[323] A settlor may appoint a group of people, often referred to as a "trust committee," for the same purposes.[324] All of this underscores the flexibility that is available when planning with a trust protector.[325]

A significant problem with this flexibility is that it blurs the lines between traditional roles in the trust context.[326] For example, trust protectors can be given powers that seem very much like those traditionally belonging to a trustee.[327] Other times, the powers seem like those reserved to a grantor.[328] Still, other times, a trust protector's powers may seem more like that of a director (see below) or even a beneficiary.[329] Until more substantive law is developed to delineate these roles and the consequences for crossing from one to the other, planners will be forced to make their best-educated guesses about how the law will eventually shake out.[330]

1. Trustee Distinguished

Unlike trustees, trust protectors are not vested with title.[331] Nor do trust protectors assume day-to-day management and control over trust assets.[332] Trustees are always saddled with fiduciary duties.[333] Trust protectors may or may not owe a fiduciary duty, depending on the circumstances.[334] Trustees generally owe their fiduciary duties to beneficiaries, but it is unclear to whom a trust protector might owe a duty.[335] Several of these notions are explored in more detail below.[336]

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321. *Id.*

322. *What is the Substance Over Form Doctrine?*, FREEMAN L., https://freemanlaw.com/substance-over-form-doctrine/ (last visited Oct. 4, 2021) [https://perma.cc/CHF2-LT9F].

323. *See* Shier, *supra* note 304.

324. *Id.* at 4.

325. *Id.* at 2.

326. *See* Huber, *supra* note 286, at 2.

327. *Id.*

328. Bucker & Rosenblatt, *supra* note 318, at 7.

329. Huber, *supra* note 286, at 2.

330. *See* Frederick R. Franke, Jr., *Trust Protectors*, FRANKE BECKETT LLC (Jan. 31, 2014), https://fredfranke.com/trust-protectors/ [https://perma.cc/6JZ6-8UY2].

331. BOGERT ET AL., *supra* note 220.

332. *See Trust Protector vs. Trustee*, *supra* note 302.

333. *Id.*

334. Huber, *supra* note 286, at 2.

335. *See id.*

336. *See infra* Section VI.D.

2. Trust Directors Distinguished

While the trust director remains similarly ill-defined in American jurisprudence, some distinctions apply generally.[337] Trust protectors hold powers that are more administrative in nature, whereas directors' powers typically focus on investments and distributions.[338] Often, a corporate trust company will manage the operations of a trust as trustee, but with the provison that a director can direct and manage the underlying assets.[339] This is attractive to clients wishing to keep costs down (particularly in a family business or other nontraditional assets), while maintaining a relatively high degree of control within the family.[340] This arrangement is also attractive to corporate fiduciaries who wish to avoid lawsuits by disgruntled beneficiaries over allegedly improper investments or distributions.[341] As with trust protectors, these relationships can be set out in any number of ways in a trust instrument or governed by a varying array of state laws.[342]

One might think of trust directors as third-party decision-makers who are entrusted with controlling some of a trustee's powers.[343] For this reason, directors have sometimes been found to have the same fiduciary duties as a trustee.[344] On the other hand, a trust protector is generally the party given the power to perform certain delineated, typically administrative, tasks without necessarily intruding on the trustee's role.[345] Trust instruments often provide that "the trust protector is not acting as a fiduciary, because the powers given to the trust protector are not typically traditional trustee powers."[346]

C. Legal Framework

As noted by Andrew Huber, "[t]he use of trust protectors in modern domestic trust planning has outpaced the body of law governing the role."[347] This leaves practitioners in an uncomfortable place and wanting guidance.[348]

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337. Charles E. Rounds, Jr. *Trust Protectors, Trust Directors, and the Uniform Directed Trust Act*, JD SUPRA (Aug. 1, 2017), https://www.jdsupra.com/legalnews/trust-protectors-trust-directors-and-t-70204/ [https://perma.cc/Y656-4NS8].

338. *Id.*

339. *See* Huber, *supra* note 286, at 2.

340. *See Trusts, Wealth Management and Succession Planning*, SOVEREIGN GRP., https://www.sovereigngroup.com/our-services/private-clients/sovereign-trust-and-trustee-services/trust-disadvantages-and-solutions/ (last visited Oct. 4, 2021) [https://perma.cc/R3QU-FNT5].

341. *See id.*

342. Huber, *supra* note 286, at 2.

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.* at 23.

348. *See id.* at 18–20.

There are very few U.S. appellate decisions regarding trust protectors.[349] The difficulties and uncertainties surrounding this body of law are aggravated by the novelty and diversity of drafting practices.[350]

Despite the lingering uncertainty, some guidance regarding trust protectors does exist.[351] Unfortunately, however, not all of the available guidance is applicable in Texas.[352] There are three primary approaches to trust protectors according to various states' laws.[353] Many states follow the Restatements, some follow the UTC, and others follow the so-called "Delaware approach."[354] The key differences between these approaches focus on the various duties prescribed for a trust protector by default and the ability of those duties to be amended in a trust instrument.[355] The approaches also differ in that some of them apply to both trust protectors and directors, without distinction, whereas others attempt to draw a more formal line between the two.[356] Texas follows the Delaware model.[357]

Texas's trust protector statute is found in TTC Section 114.0031.[358] It addresses both directed trusts and trust advisors, providing expressly that protectors fall under the broader term "advisor."[359]

TTC Section 114.0031 was first enacted in 2015.[360] At that time, subsection (e) provided that a trust protector "is considered to be an advisor and a fiduciary when exercising that authority except that the trust terms may provide that an advisor acts in a nonfiduciary capacity."[361] However, the statute was then modified in 2019 to provide that a trust protector,

> *is* a fiduciary regardless of trust terms to the contrary except that the trust terms may provide that an advisor acts in a nonfiduciary capacity if (1) the [protector's] only power is to remove and appoint trustees, advisors, trust committee members, or other protectors; and (2) the [protector] does not exercise that power to appoint the [protector's] self to a position described by Subdivision (1).[362]

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349. *Id.* at 23.
350. *Id.* at 19–20.
351. *Id.*
352. *Id.* at 19.
353. Levi M. Dillon & Jeffrey N. Myers, *Who's in Charge—Using Directed Trusts*, STANLEY M. JOHNSON, EST. PLAN. WORKSHOP 1, 1 (2015).
354. *Id.*
355. *See id.* at 1–12.
356. *See id.*
357. *Id.* at 9; *see* TEX. PROP. CODE ANN. § 114.0031.
358. PROP. § 114.0031.
359. *Id.* § 114.0031(a)(1).
360. *Id.*
361. Act of June 19, 2015, 84th Leg., ch. 1108, 2015 H.B. 3190 (amended 2019) (current version at PROP. § 14.0031(e)).
362. PROP. § 114.0031(e) (emphasis added).

Notably, the imposition of a fiduciary duty on trust protectors under the revised language of TTC Section 114.0031 is not mentioned in TTC Section 111.0035(b) (regarding nonwaivable provisions of the Trust Code).[363] That is, when the legislature amended Section 114.0031, they failed to amend Section 111.0035(b) to add the fiduciary duty it imposes to the list of things that cannot be changed by the terms of a trust instrument.[364] Query whether this incongruence is sufficient to trigger the rule of *leges posteriores priores contrarias abrogant* as described in Section II.C.0 above.[365]

As of this drafting, only two Texas cases address trust protectors generally or TTC Section 114.0031 specifically.[366] The first, In re Macy Lynee Quintanilla Trust, predates the 2019 amendment to Section 114.0031 and primarily addresses a trust protector's right to information.[367] The second, Ron v. Ron, is more helpful.[368] Citing Quintanilla, Ron first addressed the fiduciary duty issue by noting that "there is little authority discussing the role of trust protectors, which the [Texas] Trust Code only recognized in 2015."[369] The court further noted that the TTC "recognizes that a trust protector may be a fiduciary or a nonfiduciary."[370]

D. Lingering Questions

Despite the legal framework above, several questions remain.[371]

1. What Duties Are Owed?

Presumably, fiduciary duties that might apply to a trust protector are the same, or at least similar to those duties which apply to a trustee, so a brief examination of Texas law on this subject is in order.[372] First and foremost, a trustee owes a duty of loyalty.[373] Next, a trustee must keep and render accounts.[374] Ancillary to this duty is a beneficiary's right to demand an

363. *Id.* §§ 111.0035(b), 114.0031.
364. *See id.*
365. *See supra* Section II.C.9.
366. *See In re* Macy Lynne Quintanilla Trust, No. 04-17-00753-CV, 2018 WL 4903068, at *1 (Tex. App.—San Antonio Oct. 10, 2018, no pet.); Ron v. Ron, No. 19-CV-00211, 2020 WL 1426392, at *1 (S.D. Tex. Feb. 4, 2020).
367. *Quintanilla*, 2018 WL 4903068, at *1.
368. *Ron*, 2020 WL 1426392, at *2.
369. *Id.* at 5.
370. *Id.*
371. *See infra* Sections VI.E.1–4.
372. *See infra* notes 376–79 and accompanying text.
373. Slay v. Burnett Trust, 187 S.W.2d 377, 388 (Tex. 1945).
374. RESTATEMENT (SECOND) OF TRS. § 172 (AM. L. INST. 1959).

accounting.[375] Next, a trustee owes a duty of disclosure of relevant facts.[376] Finally, a trustee owes a duty to exercise reasonable care and skill.[377]

However, the roles of trustee and trust protector are different, suggesting that their respective duties should likewise differ.[378] Trust protectors are often granted only limited powers, and it may be both improper and unfair to saddle them with the fiduciary duties assigned to trustees.[379] One option, therefore, would be to assign some, but not all, of a trustee's fiduciary duties to a trust protector.[380] To be sure, the duties of loyalty and reasonable care are easily applied to most, if not all, trust protectors.[381] But the duties to keep records and provide disclosure are less clear.[382] Trust protectors often do not have access to all the information available to trustees, nor should they.[383] Similarly, it may be inappropriate to require full disclosure of things like a trust committee's decision-making process because doing so might discourage them from discussing facts candidly.[384]

When it comes to trust protectors, grantor intent varies widely.[385] From one trust to another, the set of powers each trust protector might hold can be quite different, so it may be necessary to analyze the fiduciary duties on a case-by-case basis.[386] Additionally, applying fiduciary duties to trust protectors may only be possible with certain accommodations in consideration of the limited scope of a particular protector's duties, as provided in a given trust instrument.[387]

2. To Whom Might a Trust Protector Owe a Duty?

There are many potential answers to this question.[388] The beneficiary, the trustee, the grantor, and (in some jurisdictions) even the trust itself might

375. TEX. PROP. CODE ANN. § 113.151(a).

376. Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996) (citing Montgomery v. Kennedy, 669 S.W.2d 309, 313 (Tex. 1984)); Kinszbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509, 513 (Tex. 1942)).

377. RESTATEMENT (SECOND) OF TRS. § 174 (AM. L. INST. 1959).

378. *See Trust Protector vs. Trustee*, *supra* note 302.

379. *See id.*

380. *See id.*

381. *See generally* Robert T. McLean Irrevocable Tr. v. Patrick Davis, P.C., 283 S.W.3d 786, 795–96 (Mo. Ct. App. 2009) ("allows an inference that the Trust Protector could be susceptible to liability for actions taken in bad faith").

382. *See* Huber, *supra* note 286, at 22–23.

383. *See* Richard C. Ausness, *The Role of Trust Protectors in American Trust Law*, 25 REAL PROP., TR. & EST. L.J. 319, 329–32 (2010).

384. *See id.*

385. *See* Huber, *supra* note 286, at 17, 20.

386. *See id.* at 19–20.

387. *See id.* at 16–17.

388. *See* Ausness, *supra* note 383, at 339–41.

be possible answers.[389] This question was examined in *Ron*, where a grantor claimed that a trust protector owed her a fiduciary duty.[390] In that case, the court asked whether such a duty was created by the trust instrument, Texas law, or an informal relationship and concluded that it was not.[391] Interestingly, the court did indicate in dicta that, based on the language of TTC Section 114.0031(e), the fiduciary duty might be owed to the trustee or even the trust itself.[392]

3. Is the Liability Joint and Several?

In Texas, when a trustee does not join a co-trustee, the trustee is not liable for the co-trustee's actions, unless the trustee does not exercise reasonable care to prevent the co-trustee from committing a serious breach of trust and to compel the co-trustee to redress a serious breach of trust.[393] Subject to this duty of reasonable care, a dissenting co-trustee who joins in an action at the direction of the majority of the co-trustees and who has notified any other co-trustee of the dissent in writing at or before the time of the action is not liable for the action.[394] Absent authority that is more on point for trust protectors, these rules should be considered in cases where multiple trust protectors are employed (i.e. as a trust committee).[395] However, one problem with this analysis is that it would impose a duty of disclosure which, as mentioned above, may not be proper as a matter of policy.[396] This, yet again, calls into question the extent to which trust protectors (or committees) should be assigned the same responsibilities and duties as trustees.[397]

4. Can a Trust Protector's Duty Be Mitigated?

Until the law is further developed, drafters wishing to limit the potential liabilities of trust protectors should take affirmative steps.[398] First and foremost, trust instruments should include express language that the trust protector serves in a non-fiduciary capacity.[399] Additionally, trust protector powers should be limited to those that are more administrative in nature and

389. *See id.*
390. Ron v. Ron, No. 19-CV-00211, 2020 WL 1426392, at *1 (S.D. Tex. Feb. 4, 2020).
391. *Id.* at *7.
392. *Id.*
393. TEX. PROP. CODE ANN. §§ 114.006(a)–(b).
394. *Id.* § 114.006(c).
395. *See id.*
396. *See id.*
397. *See id.*
398. *See id.*
399. *See* Raymond C. Radigan, *Defining Responsibilities When Multiple Parties Administer Trusts*, 40 EST. PLAN. 12, 18 (2013).

less substantive (if a grantor wants to give a trust protector substantive powers, the grantor should consider making that person either a co-trustee or special trustee).[400] Furthermore, by limiting the trust protector's powers, a grantor can limit how a trust protector might do (or fail to do) something actionable as a violation of fiduciary duty.[401] Similarly, the trust instrument should limit the protector's ability to act unilaterally or serve continually.[402] If a protector can only act when called upon by a third party, less can go wrong.[403] It may also be helpful to deny trust protectors compensation for their service on the theory that doing so evidences the grantor's intent that the trust protector role is relatively minor in scope, and thus does not rise to the level of fiduciary.[404] Finally, to provide a hedge against the development of unfavorable rules in the future, trust protectors should be given the power to release any of their powers.[405]

VII. CAN A PARTY BE ESTOPPED FROM CONTESTING A WILL BY ACCEPTING ITS BENEFITS?

A. Contests Limited to Interested Persons

Only "interested" persons have standing to contest a will in Texas.[406] Devisees under wills and heirs at law are generally considered "interested persons" for will contests.[407]

However, what if a person who would otherwise have standing to contest a will accepts benefits under that will?[408] Is that person then estopped from later contesting that will?[409] Recently, the Texas Supreme Court resolved the split on the issues of when and how the doctrine of estoppel by acceptance of benefits should be applied in the context of will contests and who has the burden to prove loss of standing or estoppel by acceptance of benefits.[410]

400. *See id.*
401. *See id.*
402. *See id.* at 14.
403. *See id.* at 20–21.
404. *See id.*
405. *See id.* at 21–22.
406. TEX. EST. CODE ANN. § 55.001.
407. *Id.* § 22.018; Logan v. Thomason, 202 S.W.2d 212, 215 (Tex. 1947).
408. *See* Est. of Johnson, No. 20-0424, 2021 WL 2172532, at *1 (Tex. Feb. 28, 2021).
409. *See id.*
410. *Id.* at *8.

B. The Previous Rule—Trevino v. Turcotte*: Any Benefit Bars Contest*

It appeared that the question of estoppel to contest a will by acceptance of benefits was definitively answered over forty years ago, when, in *Trevino v. Turcotte*, the Texas Supreme Court held that a person who accepts benefits under a will would be estopped from later contesting that will even if the person was not the party who accepted the benefit and even if the person later tried to avoid that estoppel.[411] In *Trevino*, the contestants' ancestor, through whom they originally claimed an interest, had accepted benefits under the will before he died.[412] In an attempt to avoid the estoppel effects of their ancestor's conduct, the would-be contestants obtained an assignment of what the court referred to as "minute" interests from another contestant and alternatively sought to piggy-back their standing on the contests being filed by others.[413] In rejecting these ploys, the court noted as follows:

> It is a fundamental rule of law that a person cannot take any beneficial interest under a will and at the same time retain or claim any interest, even if well founded, which would defeat or in any way prevent the full effect and operation of every part of the will.[414]

The court also noted that,

> [t]he rule of election and estoppel in will contests is based upon equity and public policy. It is designed to prevent one from embracing a beneficial interest devised to him under a will, and then later asserting a challenge of the will inconsistent with the acceptance of benefits.[415]

Trevino did not create the doctrine of estoppel by acceptance of benefits in will contests.[416] On the contrary, the rule that a person who accepts benefits under a will must adopt the whole contents of the instrument, conforming to its provisions, and renouncing every right inconsistent with it, is actually one of long duration in Texas.[417]

But *Trevino* did significantly expand and clarify the rule.[418] While the court began with a fairly straightforward application of the general rule that a will contestant must plead and prove that the will contestant has standing

411. Trevino v. Turcotte, 564 S.W.2d 682, 685–86, 689–90 (Tex. 1978).
412. *Id.*
413. *Id.*
414. *Id.* at 685–86.
415. *Id*. at 689.
416. *Id.*
417. *See* Smith v. Butler, 19 S.W. 1083, 1085 (Tex. 1892); Lindsley v. Lindsley, 163 S.W.2d 633, 637 (Tex. Comm'n App. 1942 holding approved, judgm't adopted).
418. *See Trevino*, 564 S.W.2d at 690.

as an interested person, the court went much further and clarified that even if a contestant once had standing, this could be lost by the contestant's or even an ancestor's acceptance of benefits under the will later contested, whether or not the contestant or the ancestor had full knowledge of the facts.[419] The court also rejected the argument that the contestant could maintain the contestant's status as an interested person because contests had been filed by others.[420] After noting that even though a will contest is a proceeding in rem, the court stated, "[w]e hold that the filing of a will contest by others cannot be deemed to revive the respondent's relinquished right to contest the 1960 will."[421] Finally, the court emphasized that the application of the estoppel by acceptance of benefits to will contests rested squarely on equitable and public policy grounds by refusing, as a matter of public policy, to allow a person once estopped from contesting a will to "un-estop" themselves and regain standing through assignment or other means:

> The question before us is not . . . whether or not interests may be alternatively asserted as grounds for contesting a will; it is instead whether or not a party who is estopped by equity from contesting by way of one interest may avoid that estoppel by acquiring another interest which is not estopped. No court has so held. To so hold would make a mockery of the equitable rule of election in will contests.[422]

So, what happened after *Trevino* to muddy the waters on the doctrine of estoppel by acceptance of benefits doctrine in will contest matters?[423]

At first, the ruling in *Trevino* was applied where any benefit was accepted—even if the acceptance was without full knowledge of the facts or law.[424] This rule was also applied without regard to the relative value of the benefit accepted or consideration of that which might result from a contest, as opposed to what the contestant may have received under the laws of intestacy.[425] This approach is consistent not only with *Trevino*, but also with

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419. *Id.* at 685–86.

420. *Id.* at 686.

421. *Id.* at 687.

422. *Id.* at 689.

423. *See id.*

424. *See, e.g.*, Sheffield v. Scott, 620 S.W.2d 691, 694 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (stating "[w]hether appellants had knowledge of all the facts and of all their rights at the moment they accepted the benefits is immaterial to a determination that they, by their acts and conduct after acceptance, became estopped to contest the will"); *accord In re* of Est. of McDaniel, 935 S.W.2d 827, 829 (Tex. App.—Texarkana 1996, writ denied) (holding that "[w]hether or not [the contestant] had knowledge of all the facts and of all his rights at the moment he accepted the benefits is immaterial to a determination that he, by his acts and conduct after acceptance, became estopped to contest the Will") (citing *Trevino*, 564 S.W.2d at 686).

425. *In re* Est. of Davis, 870 S.W.2d 320, 322 (Tex. App.—Eastland 1994, no writ) (applying the "any benefits" estoppel approach of *Trevino*.).

the opinion in *Wright v. Wright*, in which the court similarly rejected the relative value of the bequest argument in a widow's election case:

> [an election] . . . does not depend upon the value of the benefits. Nor is it to be determined by comparing them with what the statutes of descent and distribution would afford the beneficiary in the absence of a will.[426]

The public policy concerns expressed in *Trevino* also led the Austin Court of Appeals in *Kellner v. Blaschke* to confirm that an estoppel to contest a will based on receipt of benefits need not contain all of the technical elements of a true estoppel, including that of detrimental reliance by another party.[427]

C. A New Rule Is Promulgated—Estate of Johnson*: Acceptance of Benefits Under a Will Precludes a Later Contest of That Will*

Less than twenty years later, cracks began to appear in the doctrine set out in *Trevino*.[428] In 1991, the "any benefit" test espoused by the Texas Supreme Court in both *Trevino* and *Wright* was rejected by the Dallas Court of Appeals in *Holcomb v. Holcomb*.[429] In that opinion, the court held that estoppel would not apply to bar standing to contest a will if the contestant would have received the same or a greater amount of benefit under another will of the testator or under the laws of intestacy.[430] The Fort Worth Court of Appeals agreed with the *Holcomb* opinion in *In re Meeker*.[431] Thus, a balancing test came into being.[432] The question under *Holcomb* and its progeny is not whether any benefit has been accepted, but rather, what type of benefit was involved and whether the contestant would have received that benefit had there been no will or under another will.[433]

The balancing test as to whether the contestant would have received "the same or greater amount of benefit under another will" announced in *Holcomb* was expressly rejected by the Texarkana Court of Appeals in *Matter of Estate of McDaniel* as being "an inaccurate statement of Texas Supreme Court precedent on this issue."[434] Instead, the *McDaniel* Court announced its own rule: "The proper test for determining whether a beneficiary under a will has

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426. Wright v. Wright, 274 S.W.2d 670, 676 (Tex. 1955).

427. Kellner v. Blaschke, 334 S.W.2d 315, 320 (Tex. App.—Austin 1960, writ ref'd n.r.e).

428. *See* Holcomb v. Holcomb, 803 S.W.2d 411, 413–14 (Tex. App.—Dallas 1991, writ denied).

429. *Id.*

430. *Id.* at 414–15.

431. *In re* Meeker, 497 S.W.3d 551, 554–55 (Tex. App.—Fort Worth 2016, no pet.) (citing the *Holcomb* exception with approval).

432. *See id.* at 556–57.

433. *Holcomb*, 803 S.W.2d at 414.

434. *In re* Est. of Daniel, 935 S.W.2d 827, 829 (Tex. App.—Texarkana 1996, writ denied).

received benefits which estop him from contesting that will is whether the benefits granted him by the will are or are not something of which he could legally be deprived of without his consent."[435]

Texas law thus saw a split regarding these issues.[436] Due to those lingering questions surrounding the doctrine, the Texas Supreme Court, in May of 2021, resolved this split through its *Estate of Johnson* holding.[437] Under that opinion, the court decided that a party who accepts a benefit pursuant to the terms of a will is estopped from later contesting that will.[438] Indeed, "[a] beneficiary must firmly plant herself on the side of the will's validity or invalidity and accept the consequences of that election."[439] As a result, the "rule" in *Holcomb v. Holcomb* was expressly rejected—any benefit can work an estoppel *whether that benefit is lesser or greater than what the contestant would have obtained under a different will or under the law of intestacy*.[440]

However, the *Johnson* court further elaborated that a contestant retains the right to bring suit under more specific circumstances.[441] Notably, acceptance of a benefit that the contestant otherwise "has a present legal right to," such as funds pursuant to a POD or JTROS account, or an assertion of a community property interest, will *not* work an estoppel—those benefits are claimed through means *other than the will*.[442] Furthermore, a challenge to the executor's conduct or seeking the removal of the executor will also *not* work an estoppel.[443]

Another issue in the estoppel by acceptance of benefits arena was the question of who has the burden to prove that the contestant is estopped to bring the contest.[444] The *Holcomb* Court viewed estoppel by acceptance of benefits as an affirmative defense, under which the party asserting estoppel would have the burden of proof to demonstrate that the contestant "received benefits to which she would not have been entitled under [any] will, or even under the laws of intestacy."[445] And until recently, it appeared as though the burden of proof issue was resolved through that holding.[446]

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435. *Id.*
436. *See id.*
437. Est. of Johnson, No. 20-0424, 2021 WL 2172532, at *1 (Tex. May 28, 2021).
438. *Id.*
439. *Id.* at *6.
440. *See* Holcomb v. Holcomb, 803 S.W.3d 411, 414 (Tex. App.—Dallas 1991, writ denied).
441. *See Est. of Johnson*, 2021 WL 2172532, at *1.
442. *Id.* at *4; *see also In re* Est. of Perez-Muzza, 446 S.W.3d 415, 419–23 (Tex. App.—San Antonio 2014, pet. denied) (reasoning that if the accepted benefits are from non-probate assets or were a gift from someone who happened to be a devisee under the will then no estoppel will be found).
443. *See Est. of Johnson*, 2021 WL 2172532, at *6.
444. *Holcomb*, 803 SW.2d at 414.
445. *Id.*
446. *Id.*

However, the burden of proof issue re-surfaced in the *Johnson* case when the Texas Supreme Court was met with the challenge of addressing the Dallas Court of Appeals' opinion, which confusingly stated that the will on which the contestant is predicating her standing is apparently the same will she is contesting—meaning that, if her contest is successful, she would lose her standing as a devisee.[447] Given that such a rule would indeed create a confusing result, the Texas Supreme Court established a new burden-shifting analysis that would effectively preclude the dysfunction that would otherwise follow that prior opinion.[448]

Through its analysis, the Texas Supreme Court initially established that the contestant must first plead sufficient facts to demonstrate that the contestant is a "person interested in the estate."[449] From there, the burden then shifts to the will proponent to plead and provide evidence—at a pre-trial hearing on the issue—showing that the contestant has accepted a benefit pursuant to the will.[450] The requirement of a pre-trial hearing prevents the ridiculous result of having an invalidated will that would remove standing, which was the thought process following the opinion out of the Dallas Court of Appeals.[451] The will contestant may rebut this defense by showing that the benefit is otherwise legally entitled to them without regard to the will.[452]

The *Johnson* court further suggested *but did not hold* that a contestant may also avoid the estoppel defense by pleading and showing proof that the contestant accepted the benefit without knowing all of the material facts.[453] Once this is shown, the beneficiary must also return the benefit acquired pursuant to the will.[454] Perhaps the "knowing" component will create an issue to be debated among the courts of appeals in the future.[455] But, for now, it was simply an unsolidified part of an otherwise solid holding from the Texas Supreme Court.[456]

D. Cases Other Than Will Contests

It is worth noting that a similar doctrine, the doctrine of direct benefits estoppel, was more recently utilized by the Texas Supreme Court in *Rachal*

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447. Est. of Johnson, No. 05-18-01193-CV, 2019 WL 5704109, at *2 (Tex. App.—Dallas Nov. 4, 2019, pet. granted).

448. *See id.* at *1.

449. *Id.* at *4; TEX. EST. CODE ANN. § 55.001.

450. *Est. of Johnson*, 2021 WL 2172532, at *3.

451. *Id.* at *2.

452. *Id.* at *4.

453. *See id.* at *7 (holding that "[i]f a beneficiary or devisee lacks knowledge of some material fact at the time of acceptance, she may take steps to reject the benefit").

454. *Id.*

455. *See id.*; author's original thought.

456. *See Est. of Johnson*, 2021 WL 2172532, at *1.

v. Reitz to enforce arbitration provisions contained in a trust document against a trust beneficiary who was clearly not a signatory to the trust agreement:

> In accepting the benefits of the trust and suing to enforce its terms against the trustee so as to recover damages, Reitz's conduct indicated an acceptance of the terms and validity of the trust. In sum, we hold that the doctrine of direct benefits estoppel applies to bar Reitz's claim that the arbitration provision in the trust is invalid.[457]

In other words, the trust beneficiary was not allowed to pick and choose which portions of the trust document the beneficiary felt were valid while rejecting others.[458] Instead, the beneficiary was put to a take-it-or-leave-it election based on the court's reasoning that, since a beneficiary may disclaim the beneficiary's interest in the trust, the beneficiary has the opportunity to "opt out" of the arrangement proposed by the settlor.[459] In this instance, the court was not willing to let the beneficiary have it both ways.[460] We will have to wait and see if the will contestants in *Estate of Johnson* fair better.[461]

VIII. WHAT RIGHTS DO CHARITABLE MAJOR DISASTER BENEFICIARIES HAVE TO NOTICE OF TRUST ACTIVITIES?

A. Background

With the increasing use of dynasty trusts and various states extending their rule against perpetuities, the trend towards charitable beneficiaries is increasing in popularity.[462] Generally, these beneficiaries are inserted into clients' estate planning documents in case the clients' line of descendants, as well as the lines of any other contingent beneficiaries, die out.[463] Most clients would rather benefit a charity they know than an array of distant relatives

457. Rachal v. Reitz, 403 S.W.3d 840, 847 (Tex. 2013).
458. *See id.*
459. *Id.*
460. *See id.*
461. Author's original thought.
462. *See* Anthony Diosdi, *Dynasty Trusts - The Most Powerful Tool Available to Combat the Estate, Gift, and Generation Skipping Taxes*, SF TAX COUNS. (Feb. 2020), https://sftaxcounsel.com/dynasty-trusts-the-most-powerful-tool-available-to-combat-the-estate-gift-and-generation-skipping-taxes/ [https://perma.cc/N62N-4T6M].
463. *See 5 Ways to Incorporate Charitable Giving into Your Estate Plan*, KIPLINGER (Mar. 2, 2020), https://www.kiplinger.com/article/retirement/t021-c032-s014-5-ways-to-include-charities-in-your-estate-plan.html [https://perma.cc/2P82-3679].

they does not (and all their lawyers).[464] Because their interests are so tenuous, these charities are often referred to as "major disaster beneficiaries."[465]

But the incorporation of charitable beneficiaries into an estate plan adds complication because the attorney general (AG) is a proper party and may intervene in charitable trust proceedings.[466] Furthermore, the AG "may join and enter into a compromise, settlement agreement, contract, or judgment relating to a proceeding involving a charitable trust."[467] Additionally, any party initiating a charitable trust proceeding must give notice of the proceeding to the AG.[468] For these purposes, "a proceeding involving a charitable trust" means a suit or other judicial proceeding, the object of which is to:

- terminate a charitable trust or distribute its assets to other than charitable donees;[469]
- depart from the objects of the charitable trust as stated in the instrument creating the trust, including a proceeding in which the doctrine of *cy pres* is invoked;[470]
- construe, nullify, or impair the provisions of a testamentary or other instrument creating or affecting a charitable trust;[471]
- contest or set aside probate of an alleged will under which money, property, or another thing of value is given for charitable purposes;[472]
- allow a charitable trust to contest or set aside the probate of an alleged will;[473]
- determine matters relating to the probate and administration of an estate involving a charitable trust;[474] or
- obtain a declaratory judgment involving a charitable trust.[475]

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464. Author's original thought.

465. *See* Ned Piplovic, *Wills and Estate Planning: 6 Reasons Why your Will is Critical to Your Estate Plan*, RET. WATCH (Dec. 8, 2020), https://www.retirementwatch.com/wills-and-estate-planning-6-reasons-why-your-will-is-critical-to-your-estate-plan [https://perma.cc/UE9J-VFW5].

466. TEX. PROP. CODE ANN. § 123.002.

467. *Id.*

468. *Id.* § 123.003.

469. *Id.* § 123.001(3).

470. *Id.*

471. *Id.*

472. *Id.*

473. *Id.*

474. *Id.*

475. *Id.*

B. Problems

This statutory scheme poses two problems.[476] First, inserting another party into the mix complicates trust litigation and may also do the same for settlements and agreements outside of ligation.[477] Where the AG chooses to become involved, the AG's goals and motivations may be very different from those of the other parties.[478] With an effectively limitless budget, the AG, therefore, could (at least in theory) influence the dispute resolution process even in situations where a charitable beneficiary is not entitled to actually take anything.[479]

Second, by adding an additional procedural component to judicial proceedings, the rules provide an additional avenue for failure, which is unrelated to the merits of a given case.[480] That is, a party might have a victory snatched from the party's grasp when an appellant points out that the party has failed to provide the proper notice.[481]

The extent to which this scheme applies, if at all, remains unclear in instances where a charity's only interest is remote.[482] Under the TPC, "charitable trust" is defined to include "a trust: the *stated purpose* of which is to benefit a charitable entity."[483] Strictly construed, this definition should fail to capture a trust absent some express provision intended to benefit a charity.[484] However, case law indicates that the language should not be strictly construed.[485] Although *Wooten v. Fitz-Gerald* predates TPC Section 123.001 by some eighteen years, there is no indication that the more liberal construction has been foreclosed.[486] In other words, it may be possible to imply a "stated purpose" from the operative and another language in a trust instrument.[487]

While the notice requirement of TPC Section 123.003 only relates to judicial proceedings, Section 123.002 may apply to non-judicial proceedings.[488] Under that section, the AG "may join and enter into a compromise, settlement agreement, contract, or judgment relating to a

476. *See id.*; author's original thought.
477. *See id.*
478. *See id.* § 123.002.
479. *See id.*
480. *See id.* § 123.004
481. *See id.* §§ 123.003–004.
482. *See id.* § 123.001.
483. *Id.* § 123.001(2) (emphasis added).
484. *See id.*
485. *See* Wooten v. Fitz-Gerald, 440 S.W.2d 719, 724–26 (Tex. App.—El Paso 1969, writ ref'd n.r.e.) (stating that "[n]o formalities of language or technical words are necessary to establish charitable use or trust, as court will look through form to substance").
486. *Id.*
487. *Id.* at 723; TEX. PROP. CODE ANN. § 123.001.
488. *See* PROP. § 123.002.

proceeding involving a charitable trust."[489] Here, the question is whether the phrase "relating to a proceeding involving a charitable trust" modifies only "judgments" or all the activities listed.[490] If the former is correct, the AG could theoretically make itself a party to any dispute involving a charitable trust.[491] Conversely, if the latter is correct, the AG could only make itself a party to such dispute if and when a judicial proceeding was initiated.[492]

C. Possible Solutions

1. TTC Section 111.0035 Unavailable

It is tempting to think that the problems created by TPC Chapter 123 can be resolved by including language to that effect in a trust instrument.[493] After all, TTC Section 111.0035 clearly states that, subject to a few exceptions (none of which involve TPC Chapter 123), "the terms of a trust shall prevail over any provision of this [S]ubtitle."[494] However, Section 111.0035 is found in Subtitle B of Title 9 of the TPC, while Chapter 123 is found in Subtitle C thereof.[495] In fact, because it is in a different subtitle, TPC Chapter 123 is not even part of the Trust Code.[496] Thus, TTC Section 111.0035 does not permit a settlor to avoid the burdens of TPC Chapter 123.[497]

2. State That Benefitting Charity Is Not a Purpose

Notwithstanding the fact that TTC § 111.0035 does not allow a settlor to override TPC Chapter 123, it still may be beneficial to state in a trust instrument that its purposes do not include benefitting any charity unless certain conditions precedent are met.[498] In the typical scenario, a charitable major disaster beneficiary is not an intended beneficiary until such time as all the settlor's descendants have died out.[499] Put another way, the trust's purpose, for so long as there are descendants living, is to benefit those descendants to the exclusion of the major disaster beneficiary.[500]

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489. *Id.*
490. *Id.*
491. *See id.*
492. *See id.*
493. *See id.* §§ 123.001–.006.
494. *Id.* § 111.0035(b).
495. *See id.* §§ 111.001, 123.001–.006.
496. *See id.*
497. *See id.* §§ 111.0035, 123.001–.006.
498. *See id.* § 111.0035.
499. *See id.*; *supra* Section VIII.A.
500. *See id.* § 111.0035; *supra* Section VIII.A.

3. Make Gifts to Contingent Beneficiaries Outright

Where clients wish to benefit some set of contingent beneficiaries between the primary beneficiaries, and the major disaster beneficiary, gifts to those contingent beneficiaries should generally be made outright.[501] For example, a client might dispose of property: first to the client's descendants, if any, otherwise to the client's siblings and their descendants, if any, and failing all that, to the client's alma mater.[502] In such a case, it may be helpful to make the gift to the siblings and their descendants outright and free of trust.[503] Because these distributions would cause the trust to terminate, they reduce the likelihood that the charitable beneficiary would ever take under the trust, thereby reducing the chance that the trust might be considered to have a charitable purpose.[504] Of course, a drafter in this situation will generally allow for contingent trusts to hold the assets of beneficiaries who are minors or otherwise incapacitated.[505] Usually, however, such contingent trusts terminate upon a certain event (such as the beneficiary's reaching the age of majority) and/or distribute to the beneficiary's estate, so they are not as likely to benefit.[506]

4. When in Doubt, Send Notice

With existing trusts, a conservative approach to TTC Chapter 123 is generally advised.[507] If there is any question, sending a notice to the AG is generally preferable to explaining why it was not sent.[508] Most Texas estate planners agree that the AG is not particularly meddlesome in trust matters.[509] The AG will often decline to become involved and let the parties proceed as planned.[510]

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501. *See* Rania Combs, *Who Inherits If The Beneficiary Of My Will Dies Before Me?*, RANIA COMBS L., PLLC, (May 22, 2015) https://texaswillsandtrustslaw.com/resources/who-inherits-if-the-beneficiary-of-my-will-dies-before-me [https://perma.cc/58C9-MESQ]; *supra* Section VIII.A.

502. Author's original hypothetical.

503. *Id.*

504. *See* TEX. PROP. CODE ANN. §§ 112.052, 123.001(2)–(3).

505. *See id.* § 113.021.

506. *See id.* § 112.052.

507. *See id.* § 123.003(a)–(c).

508. *Id.* § 123.003(a).

509. *See id.*; *Charitable Trusts*, KEN PAXTON ATT'Y GEN. OF TEX., https://www.texasattorneygeneral.gov/divisions/financial-litigation/charitable-trusts (last visited Oct. 4, 2021) [https://perma.cc/J989-RZPD].

510. *See* PROP. § 123.002.

IX. CONCLUSION

Who knows what the legislature or the courts will do about the questions presented in this Article or any of the other questions that could have just as easily been covered.[511] No system of law is perfectly conceived or applied, but by pointing out a few cracks, we may be able to make the system work just a little bit better.[512]

511. *See supra* Section II.C.
512. *See supra* Sections II.A, II.C; author's original thought.