WINNING THE BATTLE *AND* THE WAR: A REMEDIES-CENTERED APPROACH TO LITIGATION INVOLVING DURABLE POWERS OF ATTORNEY

Mark R. Caldwell, Elliott E. Burdette, and Edward L. Rice*

* Mark R. Caldwell, General Course 2002, London School of Economics; B.A. 2002, Southern Methodist University; J.D. 2005, New England School of Law; Elliott E. Burdette, B.A. 1978, University of Texas; J.D. 1981, Southern Methodist University; Edward L. Rice, B.A. 1982, Texas A&M University; J.D. 1987, University of Houston.

I. INTRODUCTION

> *"[L]egal relations are like radio waves, which are omnipresent, but unnoticed, until someone turns on the radio. Legal relations are also unnoticed until someone turns on the radio by filing a lawsuit, planning a transaction, or otherwise calling the relation to our attention."*[1]

Estate planners, as a part of almost every estate plan, offer to prepare a durable financial power of attorney for their clients.[2] Planners often suggest that this relatively inexpensive instrument may avoid the costs and burdens of a guardianship. The attorney-in-fact can handle living arrangements and bills should the clients ever lose the ability to manage their own financial affairs.[3] Clients often name their spouse or an adult child to serve as their attorney-in-fact.[4] Under a durable power of attorney, clients entrust their entire life savings to that child or relative.[5] Sometimes attorneys-in-fact are experienced financial managers.[6] More often, they are not.[7] Planners may

[1] Curtis Nyquist, *Teaching Wesley Hohfeld's Theory of Legal Relations*, 52 J. LEGAL EDUC. 238, 247 n.34 (2002) (quoting a former student, Ken Mills).

[2] *See* Carolyn L. Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 575 (1996) ("Since its creation, the financial durable power of attorney has become an extremely popular planning device."). *See also id.* at 584 n.44.

[3] *See id.* at 575 ("[A financial durable power of attorney is] an effective alternative to guardianship or conservatorship proceedings when people become incompetent or incapacitated."). *See also id.* at 575 n.2 (noting commentators' opinion of cost-effectiveness).

[4] *See* Deborah L. Jacobs, *Putting Your Faith in a Power of Attorney*, N.Y. TIMES, May 20, 2009, *available at* http://www.nytimes.com/2009/05/21/your-money/estate-planning/21POWER.html?pagewanted=all (noting that this is both a common and necessary occurrence).

[5] *See* Dessin, *supra* note 2, at 582 ("Once a financial durable power of attorney is validly executed, it . . . authoriz[es] an agent to perform virtually any act with respect to the principal's property that the principal could perform.").

[6] *E.g.*, *In re* Davis, No. 02-11-00415-CV, 2012 WL 554761, at *1 (Tex. App.—Fort Worth Feb. 21, 2012, no pet. h.) (mem. op.) (noting that attorney-in-fact had been an accountant since 1970).

[7] *See* Jennifer L. Rhein, Note, *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 ELDER L.J. 165, 166–68 (2009) (providing examples of close relatives with no special qualifications being named as attorney-in-fact and then abusing their power).

advise the clients that the power of attorney creates a special relationship, called a "fiduciary" relationship.[8] Clients become "principals," and the people to whom they grant powers become "attorneys-in-fact." Planners often do not explain a fiduciary's special duties to the attorney-in-fact.[9] But most attorneys-in-fact quickly realize they have broad, unchecked powers.[10] With these great powers comes the risk of abuse.[11]

Usually, an attorney-in-fact is also a beneficiary or heir under the estate plan. As the estate plan is signed, a potential conflict is born. Does the attorney-in-fact spend all available resources to make the golden years truly golden or conserve the principal's assets, spending only what is minimally necessary to maximize his inheritance? Where is the balance between enhancing quality of life and effectuating the gifts in the estate plan? Does the attorney-in-fact wait until his parent's death to access the expected inheritance, or is the child tempted to borrow a little of the parent's money now? How does the attorney-in-fact deal with inquisitive beneficiaries under the estate plan? The attorney-in-fact has no duties to them, but they may want to know how assets are being managed. Does the attorney-in-fact change the beneficiary designations on life insurance policies, retirement plans, and bank accounts? Are the changes what the principal wants, what the principal needs, or is the attorney-in-fact overreaching? Once the principal executes the power of attorney, can the principal favor the attorney-in-fact without risking guardianship or estate litigation?

These are only a few of the issues that arise after a principal executes a durable power of attorney as part of an estate plan. Clients, documents in hand, leave their estate planners' offices believing their affairs are settled, unaware of the issues now looming upon the horizon. Meanwhile, the attorney-in-fact has broad powers, some general notions of fairness, and typically little or no advice about his specific legal duties. When problems arise, the elderly client may not be able to recognize that a family member

[8] *See infra* part III.C.

[9] *See infra* part III.E for a discussion of these duties.

[10] *See* Dessin, *supra* note 2, at 582.

[11] *See* Rhein, *supra* note 7, at 165 ("[A] durable power of attorney can be a weapon used to financially abuse elders by stripping them of their life savings. Durable powers of attorney agreements, which are based on agency law, often grant agents vast powers, including the ability to sell an elderly person's home and assets, make investments, cancel insurance policies, name new beneficiaries, and empty bank accounts."). *See also* Dessin, *supra* note 2, at 575 ("[C]oncerns have been voiced that perhaps we have created an instrument of abuse rather than a useful tool.").

has betrayed him. The inability to confront conflict cannot be over-stated. The client's fear of alienating the person upon whom he depends, being placed in a nursing home, or being isolated from family often induces him to consent tacitly to an attorney-in-fact's actions. The client, perhaps not trusting his memories or perceptions, may hesitate to act on his suspicions.

It is impossible to know how many people in Texas are serving, or will serve, as an attorney-in-fact. Anyone can copy the power of attorney form from the Texas Probate Code or another internet source. Since powers of attorney are much less expensive than trusts, they are much more common.[12] With the elderly population continuing to grow,[13] the numbers of powers of attorney will likely grow. Parents live longer. They remarry. One spouse's adult children often have little attachment to the new spouse or the new spouse's children. With or without blending, dysfunctional relationships increasingly fragment families. Economic opportunities or necessities can spread families across the country. The least successful child—the child most likely to become economically desperate—is often the one who remains behind, moves back in with Mom and Dad, and becomes the attorney-in-fact. Litigation over powers of attorney will likely increase.

II. A REMEDIES-CENTERED APPROACH

In contrast to this article, most legal scholarship about powers of attorney enumerates and explains the attorney-in-fact's various fiduciary duties.[14] Remedies—the legal and equitable consequences flowing from an attorney-in-fact's breach of his or her duty—often seem to be an afterthought. Discussing fiduciary duties without discussing what actually happens when the duties are breached seems abstract and academic.

---

[12] *See* Dessin, *supra* note 2, at 575 ("Additionally, there was a sentiment that the wealthy had an effective way of dealing with potential disability by creating a funded inter vivos trust, and that such a device was not available to most individuals because of the prohibitive cost. Since its creation, the financial durable power of attorney has become an extremely popular planning device.").

[13] *See* Frank B. Hobbs, *The Elderly Population*, THE U.S. CENSUS BUREAU, http://www.census.gov/population/www/pop-profile/elderpop.html (last visited May 24, 2012) (noting that while one in eight Americans were elderly (defined as persons sixty-five years old and older) in 1994, data indicates that one in five will be elderly by 2030, and that "[t]he oldest old is the fastest growing segment of the elderly population").

[14] *See, e.g.*, Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 17 (2001).

To win the battle and the war in litigation involving a durable power of attorney, litigators should approach an attorney-in-fact's fiduciary duties in terms of their legal significance—that is, the legal consequences resulting from the breach of those duties. As a legal realist, Lon Fuller's bold step in teaching contract law by opening with remedies signaled a central message: "[I]t is impossible to understand the nature of legal rights and relationships or to logically deduce remedial conclusions from them without knowing what courts can and actually will do to and for litigants."[15]

In focusing on remedies, this article explains what courts can and actually will do for the principal (and his beneficiaries or legal representatives) when an attorney-in-fact breaches various fiduciary duties. As Fuller suggests, ligation is not a theoretical exercise in the nature of legal rights. In the context of a power of attorney, it is a series of battles in a war to secure, recover, and control the principal's property.

The property at risk must be identified and the battle lines should be drawn along the four primary litigation goals:

> (1) Gathering information and identifying the principal's property;
>
> (2) Protecting the principal's property;
>
> (3) Recovering the principal's property; and
>
> (4) Accessing monetary damages against the attorney-in-fact.

As a framework to analyze litigation issues in cases involving a durable power of attorney, working backwards—taking a remedies-centered approach at the outset of a case—directs the litigation more efficiently than examining the traditional elements of a claim for breach of fiduciary duty in their respective order (duty, breach, causation, and damages).[16] After all, many remedies that are available do not require proof of all four elements.[17]

---

[15] Karl E. Klare, *Contracts Jurisprudence and the First-Year Casebook*, 54 N.Y.U. L. REV. 876, 882 (1979).

[16] *See* Wells Fargo Bank, N.A. v. Crocker, No. 13-07-00732-CV, 2009 WL 5135176, at *3 (Tex. App.—Corpus Christi Dec. 29, 2009, pet. denied) (mem. op.) (quoting Lundy v. Masson, 260 S.W.3d 482, 501 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); *see also* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment* PJC 104.2 (2010).

[17] *See infra* Part IV.B ("To compel the disclosure of material facts affecting the principal's property, the principal does not have to show a breach of fiduciary duty to which the information

The remedies-centered approach poses the following questions:

> (1) What property is in dispute or at risk?
>
> (2) Which of the four primary litigation goals need to be prioritized with respect to the property?
>
> (3) What remedies are available to achieve those goals?
>
> (4) What fiduciary duties (or other legal theories) will support the remedies sought?

The remedies-centered approach reflects the nature of the majority of cases involving a durable power of attorney. The battle lines are almost always drawn along the first three litigation goals: (1) obtaining information about the principal's property; (2) protecting the principal's property; and (3) recovering the principal's property. Rarely will the attorney-in-fact have adequate assets to restore the principal's estate. Thus, attempting to assess monetary damages is often the least important of the four litigation goals. The entire momentum of litigation can be significantly impacted if, from the very outset of the case, the attorney-in-fact is compelled to provide a full and complete accounting, restrained from taking further action as attorney-in-fact, or supplanted by a temporary guardian. Obtaining a declaration that a transaction is void often spells death. The results from these initial skirmishes often decide the war.

This article outlines the most common remedies available to achieve each litigation goal. It explains the remedies generally and then, where applicable, the various fiduciary duties or other legal remedies that support the remedy. The remedies and breaches of duties applicable to other fiduciaries supply much of the legal authority and guidance for remedying an attorney-in-fact's conduct. Finally, this article reviews key litigation concerns that each remedy presents.

III. KEY CONCEPTS

A. The Durable Power of Attorney Defined

A financial power of attorney is a written instrument that authorizes an agent to manage the principal's specified financial affairs.[18] A durable

pertains."); *infra* Part VI.A.1.b (noting that certain transfers may be voided only by proving lack of donative intent).

[18] *See* Hardy v. Robinson, 170 S.W.3d 777, 780 (Tex. App.—Waco 2005, no pet.).

power of attorney is effective regardless of the principal's subsequent disability or incompetency.[19] The parties to this instrument are: (1) the principal and (2) the agent or attorney-in-fact.[20] The principal is the party who entrusts the management of his or her financial affairs to the attorney-in-fact.[21] The principal depends upon the attorney-in-fact.[22] The attorney-in-fact is the party the power of attorney authorizes to act on the principal's behalf.[23] The attorney-in-fact is the principal's fiduciary.[24]

B. A Brief History

Durable powers of attorney are recent inventions, compared to wills and trusts.[25] Historically, the agency authority known as "power of attorney" did not exist unless the principal was capable of acting on his or her own behalf.[26] At common law, an agency relationship, including one created by power of attorney, terminated upon the incapacity of the principal.[27] The early statutes provided for the appointment of a guardian when a person did not have the capacity to handle his own estate, as the power of attorney was not allowed to continue to exist upon the incapacity of the principal.[28]

In the United States, durable powers of attorney emerged in 1954 when Virginia became the first state to institute legislation permitting their use.[29] Texas passed legislation authorizing their use in 1972.[30] The legislation authorized the power of attorney to remain in effect if the principal became incapacitated, but it did not expressly provide for the power to become effective or "spring into life" only in the event of the principal's

[19] TEX. PROB. CODE ANN. § 482(3) (West 2003); Gerry W. Beyer, *Estate Plans: The Durable Power of Attorney for Property Management*, 59 TEX. B.J. 314, 316 (1996).

[20] *See* Beyer, *supra* note 19, at 316.

[21] Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 800 (1983).

[22] *Id.*

[23] TEX. PROB. CODE ANN. § 482.

[24] *See* Vogt v. Warnock, 107 S.W.3d 778, 782 (Tex. App.—El Paso 2003, pet denied) (stating that "a power of attorney creates an agency relationship, which is a fiduciary relationship as a matter of law").

[25] Beyer, *supra* note 19, at 316.

[26] Comerica Bank–Tex. v. Tex. Commerce Bank Nat'l Ass'n, 2 S.W.3d 723, 725 (Tex. App.—Texarkana 1999, pet. denied).

[27] *Id.*

[28] *Id.*

[29] Beyer, *supra* note 19, at 316.

[30] *Comerica Bank–Tex.*, 2 S.W.3d at 725.

incapacity.[31] In 1993, the Texas Legislature passed the Durable Power of Attorney Act, authorizing a springing durable power of attorney.[32] The Texas Probate Code now allows a power of attorney to "contain a provision that 'this power of attorney is not affected by subsequent disability or incapacity of the principal,' or 'this power of attorney becomes effective on the disability or incapacity of the principal.'"[33]

C. The Fiduciary Relationship

A power of attorney creates an agency relationship.[34] This relationship is a fiduciary relationship as a matter of law.[35] The attorney-in-fact consents, as a matter of law, to have courts of equity measure his conduct toward the principal by a standard of finer loyalties.[36] "A fiduciary owes her principal a high duty of good faith, fair dealing, honest performance, and strict accountability."[37] In describing the much higher standard for measuring the conduct of a fiduciary, Justice Cardozo famously remarked:

> Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions.[38]

---

[31] *Id.*

[32] *Id.*; TEX. PROB. CODE ANN. § 482 (West 2003).

[33] *Comerica Bank–Tex.*, 2 S.W.3d at 725.

[34] *See* Vogt v. Warnock, 107 S.W.3d 778, 782 (Tex. App.—El Paso 2003, pet. denied).

[35] *Id.*

[36] Tex. Bank & Trust Co. v. Moore, 595 S.W.2d 502, 508 (Tex. 1980) (quoting Johnson v. Peckham, 120 S.W.2d 786, 788 (Tex. 1938)).

[37] Estate of Wallis, No. 12-07-00022-CV, 2010 WL 1987514, at *4 (Tex. App.—Tyler May 19, 2010, no pet.) (mem. op.); *see also* RESTATEMENT (SECOND) OF AGENCY § 387 (1957) ("Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency."); RESTATEMENT (SECOND) OF AGENCY § 387 cmt. b (1957) ("The agent's duty is not only to act solely for the benefit of the principal in matters entrusted to him, but also to take no unfair advantage of his position in the use of information or things acquired by him because of his position as agents or because of the opportunities which his position affords. . . . His duties of loyalty to the interests of his principal are the same as those of a trustee to his beneficiaries." (internal citations omitted)).

[38] Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928); *see also Johnson*, 120 S.W.2d at 788

In this sense, fiduciary law encompasses a moral component.[39]

A power of attorney creates two central features that are common to all fiduciary relationships.[40] The first feature is the "substitution function."[41] The attorney-in-fact performs services as a "stand-in" for the principal.[42] The second feature is the "delegation of power."[43] The principal grants to the attorney-in-fact the power to perform certain functions.[44] The law seeks to limit the potential abuse of this delegated power.[45]

D. The Goals of Fiduciary Law

A power of attorney inherently creates a fundamental dichotomy between the goals the instrument seeks to accomplish and the level of protection afforded to the principal:

> The two central characteristics of fiduciary relations—the substitution function and the delegation of power—pose a basic problem: while the [attorney-in-fact] must be entrusted with power in order to perform his function, his possession of the power creates a risk that he will misuse it and injure the [principal]. The [attorney-in-fact] cannot effectively benefit the [principal] without a delegation of power, but at the same time, it is difficult or impossible to eliminate the [attorney-in-fact]'s ability to use the power for another purpose to the detriment of the [principal]. Yet if the [principal] lessens his exposure to loss by reducing the delegated power, he may also reduce the benefit expected from the relation.[46]

("When persons enter into fiduciary relations each consents, as a matter of law, to have his conduct towards the other measured by the standards of the finer loyalties exacted by courts of equity. That is a sound rule and should not be whittled down by exceptions. If the existence of strained relations should be suffered to work an exception, then a designing fiduciary could easily bring about such relations to set the stage for a sharp bargain.").

[39] Frankel, *supra* note 21, at 830.

[40] *See id.* at 809.

[41] *See id.* at 800 n.17.

[42] *See id.*

[43] *See id.*

[44] *Id.*

[45] *See id.* at 804, 817.

[46] *Id.* at 809.

The law concerning durable powers of attorney focuses on the attorney-in-fact's potential abuse of power.[47] Courts should hold the attorney-in-fact accountable to the extent the principal requires protection.[48]

E. Categorizing Fiduciary Duties

Cases involving durable powers of attorney involve either intentional conduct or negligent conduct.[49] The conduct corresponds to two broad categories of duties breached: the duty of loyalty and the duty of care. [50] The goal of the duty of loyalty is to protect the principal by preventing abuse.[51] The duty of care protects the principal by ensuring quality fiduciary services.[52]

The duty of loyalty primarily addresses intentional conduct while the breach of the duty of care is akin to negligence.[53] Generally, the duty of care is considered a lesser fiduciary duty than the duty of loyalty.[54] The frequency with which litigation addresses each category of duties generally reflects this "hierarchy."[55] That is to say, more cases litigate principles similar to the crime of embezzlement and the tort of conversion, as opposed to evaluating the quality of the attorney-in-fact's financial management.[56]

IV. GOAL 1: GATHERING INFORMATION AND IDENTIFYING THE PRINCIPAL'S PROPERTY

Demanding information is the principal's first step toward regaining his assets or recovering for his loss. The attorney-in-fact often has exclusive possession or access to information about the principal's assets. Obtaining this information is essential. The information the attorney-in-fact provides,

[47] *Id.* at 817.

[48] *See id.* at 818.

[49] *See* Boxx, *supra* note 14, at 17 ("Generally, fiduciary responsibilities are as follows: to refrain from intentionally exploiting the relationship for personal gain (the duty of loyalty), and to carry out the fiduciary actions competently and without negligence (the duty of care).").

[50] 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW, *Fiduciary Duties*, at 129 (Peter Newman ed. 1998).

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* at 130.

[55] *See id.*

[56] *Id.*

or fails to provide, considerably impacts the litigation strategy and the remedies sought.

A. The Most Common Remedies

1. Statutory and Equitable Accounting

Texas Probate Code Section 489B(d) authorizes the principal to demand an accounting from the attorney-in-fact.[57] At a minimum, the accounting must include: (1) the principal's property within the attorney-in-fact's knowledge or possession; (2) all the attorney-in-fact's actions and decisions; (3) a complete account of the attorney-in-fact's receipts, disbursements, and other actions, including their source and nature, showing receipts of principal and income separately; (4) a list adequately describing all property over which the attorney-in-fact has exercised control, with its current value if the attorney-in-fact knows the value; (5) the cash balance on hand and the name and location of the depository where the balance is kept; (6) all known liabilities; and (7) such other information and facts that the attorney-in-fact knows as may be necessary to a full understanding of the property's exact condition.[58]

[57] The principal's children or beneficiaries are often the most concerned and upset, but it is commonly understood among practitioners that they lack the legal standing to demand such information. Texas Probate Code Section 489B(d) provides that the principal may demand an accounting from the attorney-in-fact. TEX. PROB. CODE ANN. § 489B(d) (West 2003). In cases where the principal lacks the capacity to request the accounting, at least one commentator notes that typically only a guardian or an executor would have the standing to demand a statutory accounting or to enforce the principal's right to require the attorney-in-fact to disclose information. *See* STANLEY M. JOHANSON, JOHANSON'S TEXAS PROBATE CODE ANNOTATED § 481 (2011 ed.) (comment entitled "Standing to compel accounting from holder of durable power"). In addition, it appears from the language of Section 489B(i) that the right to make a statutory demand for an accounting or other information extends to any person the principal designates. TEX. PROB. CODE ANN. § 489B(i). In situations where the principal is incapacitated, one common approach many litigators utilize to overcome the standing issue is to demand the information as "next friend" for the principal under Texas Rule of Civil Procedure 44. *See* TEX. R. CIV. P. 44.

[58] TEX. PROB. CODE ANN. § 489B(d)(1)–(7). The Texas legislature may revise the current Durable Power of Attorney Act and include additional protections for the principal. *See* William D. Pargaman, *What Has the Legislature Done to Us Now? (Don't Worry – It's Not Too Bad!)*, 2011 TEX. "PROB. & TR." LEGIS. UPDATE 1, 17–18 (Jan. 1, 2012), http://www.brownmccarroll.com/public/documents/2011_REPTL_Update.pdf.

Under certain circumstances, the fiduciary relationship enables courts to specify additional disclosure in a common-law equitable accounting.[59] An equitable accounting is proper when the facts and accounts presented are so complex that relief at law is inadequate.[60] When standard discovery procedures such as requests for production and interrogatories are inadequate, a trial court has the discretion to order an equitable accounting.[61] For example, a probate court can order an equitable accounting when the financial records the fiduciary offers are "confusing, inexplicable, and suggestive of other possible improprieties."[62]

2. Litigation Discovery

The scope of discovery is broad. The Texas Rules of Civil Procedure entitle a party to discover any unprivileged and relevant information that may lead to admissible evidence about the subject matter of the pending litigation.[63] The discovered information does not need to be admissible at trial, so long as it appears reasonably calculated to lead to the discovery of admissible evidence.[64] Information obtained through the discovery process has two important benefits. First, formally requesting information through discovery imposes a procedural duty on the attorney-in-fact to supplement his or her discovery responses throughout the proceedings.[65] Strained relations between the parties do not lessen the attorney-in-fact's ongoing duty to disclose information.[66] Formal discovery provides a ready procedural vehicle for compelling compliance,[67] and perhaps an avenue to

[59] *See, e.g.*, T.F.W. Mgmt., Inc. v. Westwood Shores Prop. Owners Ass'n, 79 S.W.3d 712, 717 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

[60] *Id.*

[61] *Id.* at 717–18.

[62] Phillips v. Estate of Poulin, No. 03-05-00098-CV, 2007 WL 2980179, at *3 (Tex. App.—Austin Oct. 12, 2007, no pet.) (mem. op.).

[63] TEX. R. CIV. P. 192.3(a).

[64] *Id.*

[65] TEX. R. CIV. P. 193.5(a).

[66] *See* Montgomery v. Kennedy, 669 S.W.2d 309, 313 (Tex. 1984) (Under a common-law fiduciary relationship, a strained relationship between a trustee and beneficiary did not affect the trustee's fiduciary duty to disclose the existence of a material asset. This would be equally applicable to an attorney-in-fact's ongoing duty to disclose supplemental information during formal discovery.).

[67] *See* TEX. R. CIV. P. 193.6(a).

recover attorney's fees.[68] Secondly, failing to timely supplement responses to formal discovery requests invokes the "exclusionary rule."[69] In other words, the trial court may exclude evidence the attorney-in-fact attempts to offer because he did not timely produce it after the principal requested it in written discovery.[70] To prevent surprises at trial, it is generally a good practice to issue written discovery requesting the statutory accounting information and all material information that might affect the principal's rights.

3. Audit

When an investigation of accounts or examination of vouchers appears necessary to render justice between the parties to any suit, the court can appoint an auditor or auditors to state the accounts between the parties in a report to the court.[71] "The purpose of the appointment is to have an account so made up that the undisputed items upon either side may be eliminated from the contest, and the issues thereby narrowed to the points actually in dispute."[72] An auditor's verified report prepared under Texas Rule of Civil Procedure 172, whether in the form of a summary, opinion, or otherwise, constitutes admissible evidence: (1) whether the facts or data in the report are otherwise admissible; and (2) whether the report embraces the ultimate issues to be decided by the trier of fact.[73] Whether an audit is appropriate will depend on the facts of each case.[74] Some level of complication is generally required before a court will order an audit.[75] The principal must

[68] TEX. R. CIV. P. 215.2(b)(8) ("In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure . . . .").

[69] *See id.*

[70] *Id.*

[71] TEX. R. CIV. P. 172.

[72] *In re* Coastal Nejapa, Ltd., No. 14-09-00239-CV, 2009 WL 2476555, at *3 (Tex. App.—Houston [14th Dist.] Aug. 13, 2009, no pet.) (mem. op.) (quoting Dwyer v. Kaltayer, 5 S.W. 75, 77 (Tex. 1887)).

[73] TEX. R. EVID. 706.

[74] *See, e.g.*, Kempner v. Galveston Cnty., 13 S.W. 460, 460 (Tex. 1890) (noting that the appointment of an auditor was appropriate); Daniel v. Daniel, 30 S.W.2d 801, 802 (Tex. Civ. App.—Fort Worth 1930, no writ) (noting that the appointment of an auditor was deemed appropriate).

[75] *See Dwyer*, 5 S.W. at 77.

also consider whether the expense of an audit is advisable because the auditor is entitled to reasonable compensation that is taxed as costs of suit[76] (but may be initially paid from the principal's assets).

B. Remedies Reviewed

An attorney-in-fact has a statutory duty to timely inform and account for actions taken pursuant to the power of attorney.[77] This duty also encompasses the duty to maintain records for each action taken under the power of attorney.[78] An attorney-in-fact is an agent with an affirmative common-law duty to disclose fully to the principal all material facts relating to actions taken within the scope of the power of attorney.[79] Finally, fiduciaries have a common-law, ongoing duty to account fully for assets within their trust.[80]

The fiduciary duty to disclose information supports the right to compel the attorney-in-fact to answer interrogatories and admissions and to produce documents that might not be discoverable.[81] To compel the disclosure of material facts affecting the principal's property, the principal does not have

[76] TEX. R. CIV. P. 172.

[77] TEX. PROB. CODE ANN. § 489B(a)–(b) (West 2003).

[78] *Id.* § 489B(c).

[79] Estate of Wallis, No. 12-07-00022-CV, 2010 WL 1987514, at *5 (Tex. App.—Tyler May 19, 2010, no pet.) (mem. op.) (citing Kinzbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509, 513–14 (Tex. 1942) (determining that employee, as fiduciary, had duty to fully disclose to employer all facts and circumstances concerning his dealings with another company involved in transaction with employer); Bright v. Addison, 171 S.W.3d 588, 597 (Tex. App.—Dallas 2005, pet. dism'd) (stating that fiduciary "has an affirmative duty to make full and accurate confession of all his fiduciary activities, transactions, profits, and mistakes" and a failure to do so is a breach of fiduciary duty); Uzzell v. Roe, No. 03-06-00402-CV, 2009 WL 1981389, at *2 (Tex. App.—Austin July 8, 2009, no pet.) (mem. op.) (holding that trustee failed and refused to provide account of trust transactions and wholly failed to communicate with beneficiary, thus breaching his fiduciary duty); Lee v. Hasson, 286 S.W.3d 1, 27 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (holding that financial advisor failed to disclose all important information to person to whom he owed a fiduciary duty, thereby breaching his fiduciary duty)).

[80] Corpus Christi Bank & Trust v. Roberts, 597 S.W.2d 752, 755 (Tex. 1980); *see also* RESTATEMENT (THIRD) OF AGENCY § 8.12 (2006) ("An agent has a duty, subject to any agreement with the principal, (1) not to deal with the principal's property so that it appears to be the agent's property; (2) not to mingle the principal's property with anyone else's; and (3) to keep and render accounts to the principal of money or other property received or paid out on the principal's account."); RESTATEMENT (THIRD) OF AGENCY § 8.12 cmt. d (2006).

[81] *See* Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996) (noting that the fiduciary duty to disclose "exists independently of the rules of discovery").

to show a breach of fiduciary duty to which the information pertains.[82] To the contrary, the principal is entitled to the information, in part, because it enables him to find out whether the attorney-in-fact has breached any fiduciary duty.

The duties to account and to disclose also support an audit.[83] If the attorney-in-fact renders an incomplete accounting or refuses to account or disclose adequately, the court can appoint an auditor to render the account.[84]

Finally, even if technical objections to standing are raised in connection with the statutory accounting demand, seeking similar information through formal discovery after a next friend[85] or temporary guardian[86] has filed suit provides an alternative method to achieve the same goal.[87] If the attorney-in-fact's responses to discovery are "confusing, inexplicable, and suggestive of other improprieties," a motion requesting that the attorney-in-

[82] *See supra* note 79 and accompanying text.

[83] *See, e.g.*, Beaty v. Bales, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.) ("The trustee is required to keep full, accurate, and orderly records concerning the status of the trust estate and of all acts performed thereunder. In Texas, unless there are provisions under the terms of an express trust, the Texas Trust Act generally grants to the district court original jurisdiction to require an accounting by the trustee. Under [Tex. R. Civ. P.] 172 the trial court can appoint an auditor to investigate accounts or examine vouchers and can require that a report be made to the court." (citations omitted)).

[84] *See, e.g.*, Corpus Christi Bank & Trust v. Roberts, 587 S.W.2d 173, 181–82 (Tex. Civ. App.—Corpus Christi 1979), *aff'd*, 597 S.W.2d 752 (Tex. 1980) (noting the "deplorable state" of the records and highlighting that the incomplete accounting by a prior trustee and the subsequent failure to correct by the then current trustee, in conjunction with the duty to account, permitted the trial court to require an audit).

[85] Texas Rule of Civil Procedure 44 states:

> Minors, lunatics, idiots, or persons non compos mentis who have no legal guardian may sue and be represented by "next friend" under the following rules:
>
> (1) Such next friend shall have the same rights concerning such suits as guardians have, but shall give security for costs, or affidavits in lieu thereof, when required.
>
> (2) Such next friend or his attorney of record may with the approval of the court compromise suits and agree to judgments, and such judgments, agreements and compromises, when approved by the court, shall be forever binding and conclusive upon the party plaintiff in such suit.

TEX. R. CIV. P. 44.

[86] *See* TEX. PROB. CODE ANN. § 875 (West Supp. 2011).

[87] *See supra* part IV.A.2.

fact be ordered to make an equitable accounting may be appropriate.[88] In complex cases, a request that an auditor be appointed, coupled with a motion for security for costs, can create significant leverage to induce settlement discussions.

V. GOAL 2: PROTECTING THE PRINCIPAL'S PROPERTY

A temporary restraining order[89] and temporary injunction[90] are often necessary to immediately protect and preserve the principal's property under the control of a rogue attorney-in-fact. "Locking up" the principal's assets as soon as possible is often more important than recovering monetary damages—particularly when the attorney-in-fact appears judgment proof.[91] Often the attorney-in-fact's lack of personal assets provides the motivation to plunder the principal's property in the first place.[92] Texas law does not presently provide a statutory mechanism to remove involuntarily an attorney-in-fact short of establishing a guardianship.[93] If the principal is competent, revoking the power of attorney, recording the revocation, and mailing copies of it to anyone known to hold the principal's assets may provide limited protection.[94] If the principal is incompetent, the court may establish a temporary guardianship quickly, which can include an order specifically suspending the power of attorney.[95]

[88] Phillips v. Estate of Poulin, No. 03-05-00098-CV, 2007 WL 2980179, at *3 (Tex. App.—Austin Oct. 12, 2007, no pet.) (mem. op.).

[89] TEX. R. CIV. P. 680.

[90] Fairfield v. Stonehenge Ass'n, 678 S.W.2d 608, 610 (Tex. App.—Houston [14th Dist.] 1984, no writ) ("First, the ultimate purpose of a temporary injunction is to preserve the status quo of the parties pending a final trial of the case on the merits.").

[91] *See* Mary C. Burdette, *Enforcing Beneficiaries' Rights*, State Bar of Tex. Prof. Dev. Program, Annual Advanced Estate Planning and Probate Course 34, at 41 (2010).

[92] Jacobs, *supra* note 4 ("'A power of attorney is a license to steal . . . . You have to be careful who you appoint as your agent.'" (quoting Bernard A. Krooks)).

[93] TEX. PROB. CODE ANN. § 485(a) (West 2003).

[94] *See id.* § 488.

[95] *Id.* § 485(b).

A. The Most Common Remedies

1. Injunctive Relief

Temporary injunctive relief is less expensive for the principal than temporary guardianship and preserves the status quo pending trial.[96] Texas courts have defined the "status quo" as being "the last, actual, peaceable, non-contested status which preceded the pending controversy."[97] A temporary restraining order is emergency injunctive relief, and it is an equitable remedy.[98] Since "courts of equity" impose fiduciary duties, it is unsurprising that certain aspects of fiduciary law make injunctive relief more accessible.[99] Generally, to obtain a temporary restraining order, the applicant must show: (1) a cause of action against the party seeking to be enjoined; (2) a probable right to the relief requested; and (3) imminent, irreparable harm in the interim.[100] Normally, the party requesting the injunction has the burden to prove the necessary elements.[101]

A cause of action against the party to be enjoined. A claim for breach of fiduciary duty against the attorney-in-fact satisfies this element. A self-dealing transaction creates a presumption of unfairness and fraud—a cause of action—without any allegation or proof of specific wrongdoing.[102]

A probable right to the relief requested. An applicant must establish a probable right to relief on final trial and a probable injury in the interim.[103] This refers not to probable victory, but to establishing a prima facie case.[104] Generally, an applicant shows a probable right of success on the merits by

[96] *See* Twyman v. Twyman, No. 01-08-00904-CV, 2009 WL 2050979, at *3 (Tex. App.—Houston [1st Dist.] July 16, 2009, no. pet.) (mem. op.).

[97] *See* Janus Films, Inc. v. City of Fort Worth, 358 S.W.2d 589, 589 (Tex. 1962).

[98] *Twyman*, 2009 WL 2050979, at *6.

[99] Obtaining a temporary restraining order/injunction is very technical and beyond the scope of this article. *See* TEX. R. CIV. P. 680–93.

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

[101] Patrick v. Thomas, No. 2-07-339-CV, 2008 WL 1932104, at *2 (Tex. App.—Fort Worth May 1, 2008, no pet.) (mem. op.).

[102] Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied) ("And where 'self-dealing' by the fiduciary is alleged, a 'presumption of unfairness' automatically arises and the burden is placed on the fiduciary to prove (a) that the questioned transaction was made in good faith, (b) for a fair consideration, and (c) after full and complete disclosure of all material information to the principal.").

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

[104] Burdette, *supra* note 91, at 42.

presenting evidence that tends to establish the alleged cause of action.[105] In a fiduciary case, when "self-dealing" is alleged, the "presumption of unfairness" attaches to the transactions in question, shifting the burden to the defendant to prove that the applicant will not recover.[106] One legal commentator argues that showing a fiduciary relationship existed and a probable breach of fiduciary duty establishes a prima facie case.[107]

Imminent, irreparable harm in the interim. The third element of "imminent, irreparable harm" may also apply in a special manner to fiduciary cases.[108] Trial courts exercise broad discretion in determining what acts constitute imminent harm.[109] A fiduciary's actions occurring several months before the filing of a temporary restraining order can support an implied conclusion that a fiduciary presents an ongoing danger to assets within his or her trust, and thus that imminent harm exists.[110] Imminent harm is usually the most difficult element to prove. When no direct evidence of imminent harm exists, one approach to consider is requesting, through a demand letter sent by certified mail, that the attorney-in-fact disclose information about his actions.[111] The attorney-in-fact's failure to answer such requests may then be used to support an argument that the attorney-in-fact's secrecy about his actions evidences an ongoing danger to those assets.[112]

Generally, irreparable harm occurs where there is no adequate remedy at law for damages.[113] In other words, the applicant "cannot be adequately compensated in damages or . . . the damages cannot be measured by any

[105] *Id.*; Williams Indus. v. Fry's Elecs., Inc., No. 01-02-00735-CV, 2003 WL 21357441, at *3 (Tex. App.—Houston [1st Dist.] June 12, 2003, no pet.) (mem. op.); *see also* Yarto v. Gilliland, 287 S.W.3d 83, 94 (Tex. App.—Corpus Christi 2009, no pet.) ("A probable right of success on the merits is shown by alleging a cause of action and introducing evidence that tends to sustain it.").

[106] *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Pattern Jury Charges: Business, Consumer, Insurance & Employment* PJC 104.2 (2010); Burdette, *supra* note 91, at 42.

[107] *Id.*

[108] *See* Twyman v. Twyman, No. 01-08-00904-CV, 2009 WL 2050979, at *3–5 (Tex. App.—Houston [1st Dist.] July 16, 2009, no pet.) (mem. op.).

[109] Walling v. Metcalfe, 863 S.W.2d 56, 58 (Tex. 1993) ("The decision to grant or deny a temporary writ of injunction lies in the sound discretion of the trial court, and the court's grant or denial is subject to reversal only for a clear abuse of that discretion.").

[110] *Twyman*, 2009 WL 2050979, at *5.

[111] *Id.* at *1.

[112] *Id.* at *5.

[113] *Id.* at *4.

certain pecuniary standard."[114] No adequate remedy at law exists if "damages are incapable of calculation or if the defendant is incapable of responding in damages."[115] If the defendant is going to be insolvent before trial, then the applicant does not have an adequate remedy at law.[116] The applicant must prove the insolvency or the writ is dissolvable.[117] Real estate is unique as a matter of law, but damage to personal property with unique intrinsic value may also be "irreparable."[118]

At least one Texas court has held in a fiduciary case that the person to whom the fiduciary duty is owed is not required to show that he or she has an inadequate remedy at law.[119] First, the court reasoned that a breach-of-fiduciary-duty claim is an equitable action and therefore the beneficiary need not show that he or she has no adequate remedy at law, even where an adequate remedy at law exists.[120] Second, the court reasoned that the inadequate remedy at law requirement is satisfied in fiduciary cases on the rationale that "the legal remedy is 'inadequate' because the funds will be reduced, pending final hearing, so that they will not be available in their

[114] *Id.*

[115] Tex. Indus. Gas v. Phx. Metallurgical Corp., 828 S.W.2d 529, 533 (Tex. App.—Houston [1st Dist.] 1992, no writ).

[116] *Id.*

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

[118] *See* Patrick v. Thomas, No. 2-07-339-CV, 2008 WL 1932104, at *2–3 (Tex. App.—Fort Worth May 1, 2008, no pet.) (mem. op.) (dealing with enjoining the sale of rare horses) (citing Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 705–06 (1990) (stating if certain goods, such as heirlooms, cannot be replaced by money, then money damages are not an adequate remedy for their loss and harm to them may be considered irreparable)).

[119] 183/620 Grp. Joint Venture v. SPF Joint Venture, 765 S.W.2d 901, 903 (Tex. App.—Austin 1989, writ dism'd w.o.j.) (citing 6 L. HAMILTON LOWE, TEXAS PRACTICE SERIES: REMEDIES § 113, at 149 (2d. ed. 1973)).

[120] *See id.* (citing 6 L. HAMILTON LOWE, TEXAS PRACTICE SERIES: REMEDIES, § 113, at 150 (2d ed. 1973); 4 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1339, at 937 (5th ed. 1941) (the issue of an adequate remedy at law does not even arise in such cases); 1 RESTATEMENT (SECOND) OF TRUSTS §§ 197–99, at 433–39 (beneficiary's remedies are exclusively equitable except where trustee is under duty to deliver money or chattels immediately and unconditionally); 3 AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS § 199.2, at 1639 (3d ed. 1967) (where reasonable likelihood exists that trustee will commit breach of trust the beneficiary may sue in equity to enjoin breach, any adequate remedy at law being immaterial); GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 870, at 107–08 (rev. 2d ed. 1982) (existence of adequate remedy at law has no effect on any equitable remedy available to beneficiary against defaulting trustee)).

entirety, in the interim, for the purposes for which they were delivered to the holder in the first place."[121] However, other Texas courts have required the person to whom a fiduciary duty is owed to show that no adequate remedy at law exists.[122]

At least one Texas court has considered the sufficiency of imminent, irreparable harm in the context of fiduciary litigation.[123] In *Twyman v. Twyman*, plaintiff attorney-in-fact sued defendant trustee for breach of fiduciary duty and conversion relative to her management of their mother's trust.[124] The trial court issued a temporary injunction against Defendant enjoining her from further withdrawing trust funds.[125] Plaintiff contended that imminent, irreparable harm existed because Defendant had engaged in a pattern of misappropriating trust funds and Defendant could not repay the funds either because she would spend the money or because other financial limitations would prevent her from repaying it.[126] Defendant contended that the Plaintiff had an adequate remedy at law because she had agreed, through a promissory note, to repay the trust and Plaintiff could enforce the promissory note according to its terms.[127] The issue was whether Plaintiff proved that the trust would suffer a probable, imminent, and irreparable injury, and if so, whether there was an adequate remedy at law.[128] The court of appeals upheld the injunction.[129] The court reasoned that Plaintiff had offered sufficient evidence to demonstrate an inadequate remedy at law:

> [Defendant's] past behavior of withdrawing money for personal use and executing a promissory note after [Plaintiff's] lawyer demanded an accounting, combined

[121] *Id.* at 904 (emphasis omitted) (citing Minexa Ariz., Inc. v. Staubach, 667 S.W.2d 563, 567–68 (Tex. App.—Dallas 1984, no writ)); *see also* McDonnell v. Campbell-Taggart Associated Bakeries, Inc., 376 S.W.2d 915, 920–21 (Tex. Civ. App.—Dallas 1964, no writ); Weiner v. Weiner, 245 S.W. 474, 475–76 (Tex. Civ. App.—Galveston 1922, writ dism'd); *cf.* Sonics Int'l, Inc. v. Dorchester Enters., 593 S.W.2d 390, 393 (Tex. Civ. App.—Dallas 1980, no writ); Baucum v. Texam Oil Corp., 423 S.W.2d 434, 440 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.).

[122] *See Ballenger*, 694 S.W.2d at 76–77.

[123] Twyman v. Twyman, No. 01-08-00904-CV, 2009 WL 2050979, at *4–5 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (mem. op.).

[124] *Id.* at *2.

[125] *Id.* at *2.

[126] *Id.* at *2–3.

[127] *Id.* at *4.

[128] *Id.* at *4–5.

[129] *Id.* at *6.

> with her subsequent failure to repay any of the funds withdrawn and her efforts to extend the terms of the note, demonstrates that allowing her access to the Trust funds could lead to more withdrawals that would not be repaid.[130]

Although Plaintiff had waited two years to file suit after he became aware of Defendant's conduct, Plaintiff had taken action to attempt to curtail Defendant's conduct.[131] Moreover, even though the trial court issued an injunction almost two years after the date Defendant last withdrew funds from the trust, there was no guarantee that Defendant would not attempt to withdraw funds from the trust in the future—especially if she remained trustee during the pending litigation.[132] The evidence presented at the temporary injunction hearing supported the implied conclusion that Defendant posed an ongoing danger to the trust assets.[133]

2. Temporary Guardianship of the Estate

A temporary guardianship is essentially an emergency proceeding designed to supervise and protect individuals who are "incapacitated" and whose assets or personal safety are in imminent danger.[134] An important difference between a temporary injunction and a temporary guardianship is that a temporary injunction only restrains an attorney-in-fact, while a temporary guardianship grants a third party the right to act positively for the principal. The court must limit the power of a temporary guardian, however, to those powers and duties necessary to protect the principal against the imminent danger shown.[135]

A permanent guardianship automatically suspends the power of an attorney-in-fact to act, but a temporary guardianship only suspends the power of an attorney-in-fact to act if the order appointing the temporary guardian expressly orders the power suspended.[136] To obtain a temporary

[130] *Id.* at *5.

[131] *Id.* at *5.

[132] *Id.*

[133] *Id.*

[134] TEX. PROB. CODE ANN. § 875(a) (West Supp. 2011).

[135] *Id.*

[136] *Compare id.* § 485(a) (West 2003) (stating that (1) when a court of the principal's domicile appoints a permanent guardian of the estate of the principal, the powers of the attorney-in-fact terminate when the guardian qualifies, and (2) the attorney-in-fact must deliver to the guardian of

guardianship, the applicant must present substantial evidence that the proposed ward is an incapacitated person.[137] The court must also have probable cause to believe that the proposed ward or the proposed ward's estate requires the immediate appointment of a guardian.[138] Texas Probate Code Section 875(g) states that the court shall establish a temporary guardianship if there is substantial evidence that: (1) the proposed ward is incapacitated,[139] and (2) there is imminent danger that the physical health or safety of the proposed ward will be seriously impaired, or that the proposed ward's estate will be seriously damaged or dissipated unless immediate action is taken.[140] A temporary guardianship only lasts for sixty days.[141] An expedited permanent guardianship can sometimes be a more efficient and effective remedy.

The breach of any fiduciary duty that poses imminent danger to the principal's (proposed ward's) assets will support an application to establish a temporary guardianship.[142] For example, a temporary guardianship may be appropriate where the attorney-in-fact has breached the duty of loyalty

---

the estate all assets of the estate of the principal in the attorney-in-fact's possession and must account to the guardian of the estate as the attorney in fact would to the principal had the principal terminated his powers), *with id.* § 485(b) (providing that when a court of the principal's domicile appoints a temporary guardian of the estate of the principal, the court may suspend the powers of the attorney-in-fact on the qualification of the temporary guardian until the temporary guardianship expires).

[137] *Id.* § 875(a).

[138] *Id.*

[139] Section § 601(14)(B) of the Texas Probate Code defines an "incapacitated person" as "an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for the individual's own physical health, *or* to manage the individual's own financial affairs." TEX. PROB. CODE ANN. § 601(14)(B) (West Supp. 2011) (emphasis added).

[140] *Id.* § 875(a), (g). The two different evidentiary standards can be confusing. *See* Guy Herman, *Practical Aspects of Guardianship Law*, 11th Annual Estate Planning, Guardianship, & Elder Law Conference August 2009, at 57 ("The potential for confusion in applying the appropriate standard is compounded by the direction of § 875(g) that 'the court determines that the applicant has established that there is substantial evidence that the person is a minor or other incapacitated person, that there is imminent danger that the physical health or safety of the [proposed ward] will be seriously impaired, or that the [proposed ward]'s estate will be seriously damaged or dissipated unless immediate action is taken.' This language suggests that all of the court's findings are to be by 'substantial evidence,' despite the provision in § 875(a) that the latter findings are to be determined under a 'probable cause' standard." (quoting TEX. PROB. CODE ANN. § 875(h) (West Supp. 2011))).

[141] TEX. PROB. CODE ANN. § 875(h).

[142] *Id.* § 875(c)(2).

through self-dealing transactions that transferred the principal's property to the attorney-in-fact or third parties. Similarly, a breach of the attorney-in-fact's duty of care by failing to pay the principal's monthly bills or maintain the principal's property may support a temporary guardianship. Finally, an attorney-in-fact's breach of the duty to disclose may also justify a temporary guardianship—especially where information is needed immediately to protect the principal's assets from waste.

B. Remedies Reviewed

When seeking to gain quick control over a rogue attorney-in-fact, a temporary restraining order coupled with an application to establish a temporary guardianship of the estate can be extraordinarily effective. To support a temporary restraining order, the applicant, as next friend for the principal, should seek a permanent injunction against the attorney-in-fact and also file a separate lawsuit for breach of fiduciary duty and possibly for conversion in the court exercising guardianship jurisdiction.[143]

Requesting a temporary restraining order simultaneously with the application for a temporary guardianship of the estate offers several significant advantages. First, Texas courts are sometimes reluctant to create temporary guardianships. They can drain the proposed ward's resources and the court's time. Further, a temporary restraining order may be a less restrictive alternative to address the imminent danger posed to the principal. Courts may deny an application to establish a temporary guardianship and suggest a temporary restraining order. Seeking a temporary restraining order provides the applicant with an alternative form of relief. Second, several days often elapse between the date the applicant files for a temporary guardianship and the hearing. The court must appoint an attorney ad litem, who needs time to complete a preliminary investigation.[144] The applicant is not typically required to notify the attorney-in-fact of the temporary guardianship proceeding, but news among family and friends often travels fast.[145] Assets can disappear during this "waiting" period. The court can provide immediate protection with an ex-

[143] *Id.* § 4G (conferring jurisdiction on a statutory probate court for all actions against an agent or former agent under a power of attorney arising out of the agent's performance of the duties of an agent and an action to determine the validity of a power of attorney or determine the agent's rights, powers, or duties under a power of attorney).

[144] *Id.* § 875(d).

[145] *See id.* § 875(e) (setting forth the notice requirements in a temporary guardianship).

parte temporary restraining order the day the applicant files for guardianship.[146]

VI. GOAL 3: RECOVERING THE PRINCIPAL'S PROPERTY

A. The Most Common Remedies

After (1) obtaining information on the principal's property and the attorney-in-fact's actions and (2) protecting the principal's property, the next litigation goal is to recover property wrongfully taken or to undo wrongful transactions. An attorney-in-fact may commit wrongful transactions in many ways. "Self-dealing" occurs when an attorney-in-fact participates in a transaction that benefits himself.[147] The attorney-in-fact often attempts to justify the self-dealing transaction as a "contract between himself and the principal" or as a "gift from the principal." Depending upon the facts of the transfer, several remedies may be available to invalidate such transactions.

1. Declaring Transactions Void

Orders voiding transactions are often combined with other remedies to effectuate or to complete the remedy. For example, a court may declare a deed purporting to transfer the principal's home to the attorney-in-fact void. The court might also order the attorney-in-fact to pay for damage to the property or disgorge rents he collected.

Self-dealing transactions are commonly attacked on the ground that the transaction is a breach of fiduciary duty. Because the issue of whether the transaction was "fair" to the principal is usually hotly contested, several other legal theories should be considered that may offer a simpler and more direct avenue to a favorable judgment.

a. Voiding Unauthorized Transactions

Perhaps the simplest method to attack an attorney-in-fact's self-dealing transaction is to examine whether the attorney-in-fact was authorized to perform the transaction (either by the power of attorney or by statute). It should never be assumed that a questionable transaction was within the attorney-in-fact's scope of authority.

---

[146] *See id.* § 875(c)(2); TEX. R. CIV. P. 680.

[147] *See* BLACK'S LAW DICTIONARY 1481 (9th ed. 2009).

An executed power of attorney creates an agency relationship as a matter of law.[148] An agent has a duty to act within the scope of the authority granted.[149] While the existence and nature of the agency relationship is generally a question of fact,[150] when the agency relationship is not in dispute, the scope of the agency relationship is a question of law.[151] The scope of an attorney-in-fact's authority must be ascertained from the language of the power of attorney. Generally, an agent's ability to bind his principal is limited to the scope of authority the principal grants.[152] Actions exceeding an attorney-in-fact's authority are voidable.[153]

[148] Sassen v. Tanglegrove Townhouse Condo. Ass'n, 877 S.W.2d 489, 492 (Tex. App.—Texarkana 1994, writ denied).

[149] RESTATEMENT (THIRD) OF AGENCY § 8.09 (2005).

[150] Brown & Brown of Tex., Inc. v. Omni Metals, Inc., 317 S.W.3d 361, 377 (Tex. App.—Houston [1st Dist.] 2010, pet. denied); Novamerican Steel, Inc. v. Delta Brands, Inc., 231 S.W.3d 499, 511 (Tex. App.—Dallas 2007, no pet.).

[151] *See* English v. Dhane, 286 S.W.2d 666, 669 (Tex. Civ. App.—Fort Worth), *rev'd on other grounds*, 294 S.W.2d 709 (Tex. 1956) ("It is only when the facts appertaining to the relation of principal and agent are in dispute that the issues as to agency and scope of agency need to be submitted to the jury."); *see also, e.g.*, Jerome I. Wright & Assocs. v. First Metro L.P., No. 03-04-00283-CV, 2004 WL 2186330, at *5–6 (Tex. App.—Austin Sept. 30, 2004, no pet.) (mem. op.) (noting that when the language of a statutory durable power of attorney form was unambiguous, the trial court could ascertain an attorney-in-fact's authority for the purpose of establishing personal jurisdiction).

[152] *See* Gaines v. Kelly, 235 S.W.3d 179, 185 n.3 (Tex. 2007) (restating the "general rule that [a] principal will not be charged with liability to a third person for the acts of the agent outside the scope of his delegated authority").

[153] *See* Morton v. Morris, 66 S.W. 94, 98 (Tex. Civ. App.—San Antonio 1901, no writ) (holding deed void because attorney-in-fact under power of attorney exceeded the scope of his authority). Scope-of-authority issues are also important when determining whether the agent is personally liable for transactions he claims to perform with third parties. When an agent exceeds his authority under the agency agreement, he is personally liable. *See* Albright v. Lay, 474 S.W.2d 287, 291 (Tex. Civ. App.—Corpus Christi 1971, no writ); *see also* Schwarz v. Straus-Frank Co., 382 S.W.2d 176, 178 (Tex. Civ. App.—San Antonio 1964, writ ref'd n.r.e.). Similarly, if an individual purports to act as an agent, but has no authority, he is liable individually, and the principal is not liable. *See Gaines*, 235 S.W.3d at 185 (reversing court of appeals and affirming no-evidence summary judgment exonerating the principal because there was no evidence the agent had actual or apparent authority for acts). If the agent acts within the scope of authority, but does not disclose the agency, then both agent and principal are liable. Medical Personnel Pool of Dallas, Inc. v. Seale, 554 S.W.2d 211, 214 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).

The agent's unauthorized actions do not bind the principal unless: (1) the principal ratifies those actions;[154] or (2) something estops the principal from denying the agent's authority to perform those actions.[155]

The power of attorney and certain statutes may prohibit the attorney-in-fact from conducting certain transactions. The rules governing scope of authority that are most commonly litigated are summarized below.

i. Gifts to Third Parties

The statutory power-of-attorney form includes a provision that allows the principal to authorize gifts.[156] In a non-tax context, an attorney-in-fact

[154] A competent principal can ratify an unauthorized transaction if the agent acted on the principal's behalf, the agent provided all material facts to the principal, and the agent's actions did not amount to a fraud on the principal. A principal cannot ratify a transaction if he lacks the mental capacity required to engage in the transaction on his own. RESTATEMENT (SECOND) OF AGENCY § 86 (1958). When attempting to establish a principal's liability for his agent's unauthorized transaction, the party alleging ratification has the burden of proof. BancTEXAS Allen Parkway v. Allied Am. Bank, 694 S.W.2d 179, 181 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.). If the agent fully and completely disclosed to the principal all material facts known to the agent regarding the transaction, a principal can choose to be bound by the agent's actions by making a definitive affirmation of the transaction. Tex. First Nat'l Bank v. Ng, 167 S.W.3d 842, 864 n.44 (Tex. App.—Houston [14th Dist.] 2005, pet. granted, judgm't vacated w.r.m.). A principal may also ratify the transaction by retaining the benefits of the transaction after learning of the unauthorized conduct. Willis v. Donnelly, 199 S.W.3d 262, 273 n.17 (Tex. 2006) (recognizing the general rule and finding it inapplicable); Land Title Co. of Dall. v. F.M. Stigler, Inc., 609 S.W.2d 754, 757 (Tex. 1980) (applying the rule); *see also* RESTATEMENT (SECOND) OF AGENCY § 140 (1958). "Ratification of the results of conduct without full knowledge of the conduct does not constitute express or (implied) ratification of the conduct." Crooks v. M1 Real Estate Partners, Ltd., 238 S.W.3d 474, 488 (Tex. App.—Dallas 2007, pet. denied). Because an agent must act to benefit his principal, Texas courts do not allow a principal to ratify a transaction where the agent's actions amount to a fraud upon the principal. *See* Herider Farms-El Paso, Inc. v. Criswell, 519 S.W.2d 473, 477–78 (Tex. Civ. App.—El Paso 1975, writ ref'd n.r.e.).

[155] Humble Nat'l Bank v. DCV, Inc., 933 S.W.2d 224, 237 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (explaining how the doctrine of apparent authority—giving the agent the appearance of authority to do certain acts—can estop the principal from attempting to "subsequently avoid liability for the agent's acts by alleging the agent lacked authority to do them").

[156] TEX. PROB. CODE ANN. § 490 (West 2003) ("I grant my agent (attorney in fact) the power to apply my property to make gifts, except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift."). *See* Tetens v. Garcia, No. 03-96-00147-CV, 1996 WL 656443, at *3 (Tex. App.—Austin Nov. 13, 1996, no writ) (not designated for publication) (finding that an attorney-in-fact's

will generally not be authorized to make gifts unless the power of attorney itself specifically grants the agent the power to make gifts.[157] This is because the powers of attorney authorize an agent to take care of ordinary, usual business matters that occur on an everyday, or at least frequent, basis.[158] Typically, a gift is not a usual occurrence.[159] The IRS has occasionally recognized gifts that the attorney-in-fact made with a principal's property, even though the power of attorney did not specifically authorize them, when the principal had demonstrated a pattern of gifting.[160]

ii. Gifts to the Attorney-in-Fact

The statutory durable-power-of-attorney form does not expressly authorize self-dealing.[161] In some states, courts find that language in

revocation of the principal's intended gift in a revocable trust account to a granddaughter was unauthorized and a breach of fiduciary duty because broad, express powers to sign and withdraw funds, to sell or make gifts of any of the principal's property, and to continue gifts for the benefit of the principal's family members did not include express authority to "undo" the principal's intended gift to his granddaughter in the revocable trust account). The unpublished *Tetens* opinion illustrates the strict construction courts may apply regarding gifts, but the concept of "undoing" gifts is a fact-specific characterization for *Tetens*. In other scenarios, the attorney-in-fact's duty to exercise express powers and put the principal's needs above others may incidentally result in "undoing" bequests through exhausting the principal's estate. In *Tetens*, the principal did not need the money. In view of the extensive scope of enumerated powers, the case should probably have balanced the principal's wishes as a factor in determining fairness when the self-dealing attorney-in-fact shifted money from the intended account beneficiary to estate beneficiaries who included the attorney-in-fact. Nevertheless, *Tetens* illustrates how characterizing a claim as a scope-of-authority issue may facilitate summary judgment.

[157] *See* KATHLEEN FORD BAY, *Tax, Fiduciary, and Other Issues Regarding a Financial Power of Attorney*, State Bar of Texas, Advanced Estate Planning and Probate Course, Chapter 39, at 10 (2002); *see also* Whitford v. Gaskill, 480 S.E.2d 690, 692 (N.C. 1997) (holding "that an attorney-in-fact acting pursuant to a broad general power of attorney lacks the authority to make a gift of the principal's real property unless that power is expressly conferred").

[158] BAY, *supra* note 157, at 10.

[159] *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 65(1) cmt. a (1958)).

[160] *Id.* at 12 ("Basically, unless the principal has a history of making gifts (and not always then), a general power of attorney that does not mention gifting will be treated as not being sufficient to allow the agent to make gifts." (citing Estate of Bronson v. Comm'r, 56 T.C.M. (CCH) 550 (1988); Estate of Gagliardi v. Comm'r, 89 T.C. 1207 (1987); Estate of Council v. Comm'r, 65 T.C. 594 (1975), *acq.*, 1976-2 C.B. 1)).

[161] *See* TEX. PROB. CODE ANN. § 490.

powers of attorney implicitly authorizes gifts.[162] However, many states do not imply authority for the attorney-in-fact to make gifts to himself.[163]

iii. Changing Life Insurance Beneficiary Designations

In a statutory durable power of attorney, Texas Probate Code Section 498(4) grants the attorney-in-fact the power to designate or change the beneficiary of the contract.[164] However, the attorney-in-fact can only name himself as a beneficiary to the extent that the principal named the attorney-in-fact as a beneficiary before the principal signed the power of attorney.[165]

---

[162] *See, e.g.*, LeCraw v. LeCraw, 401 S.E.2d 697, 699 (Ga. 1991); Taylor v. Vernon, 652 A.2d 912, 916 (Pa. 1995); *Whitford*, 480 S.E.2d at 692.

[163] *See, e.g.*, Kunewa v. Joshua, 924 P.2d 559, 565 (Haw. Ct. App. 1996) (holding that the clear and unambiguous language of the power of attorney did not expressly authorize the attorney-in-fact to make gifts to himself); Schock v. Nash, 732 A.2d 217, 226 (Del. 1999) (holding power of attorney did not expressly waive the duty of loyalty and authorize the attorney-in-fact to make gratuitous transfers to herself); Bienash v. Moller, 721 N.W.2d 431, 437 (S.D. 2006) ("[A]n attorney-in-fact may not self-deal unless the power of attorney from which his or her authority is derived expressly provides in clear and unmistakable language authorization for self-dealing acts." Attorney-in-fact did not have authority to change Principal's POD beneficiary although Principal wrote a document stating he was "fully aware of the changes to be made." The court considered the writing too vague to grant the power to self-deal.); Crosby v. Luehrs, 669 N.W.2d 635, 644 (Neb. 2003) ("No gift may be made by an attorney in fact to himself or herself unless the power to make such a gift is expressly granted in the instrument and there is shown a clear intent on the part of the principal to make such a gift. . . . The basic policy concern underlying the law that forbids self-dealing is not linked to any duty an agent may have to third parties, but is primarily addressed to the potential for fraud that exists when an agent acting pursuant to a durable power of attorney has the power to make gifts, especially after the principal becomes incapacitated." (citations omitted)); *see also* N.C. GEN. STAT. § 32A-14.1(b) (2011) ("[A] power [of attorney] described in subsection (a) of this section may not be exercised by the attorney-in-fact in favor of the attorney-in-fact or the estate, creditors, or the creditors of the estate of the attorney-in-fact."). *But see* Estate of Neff v. Comm'r, 73 T.C.M. (CCH) 2606, 2606–09 (1997) (Acting under a general durable power of attorney days before the death of the principal, attorneys-in-fact transferred annuities worth $10,000 each to nineteen beneficiaries, including the three attorneys-in-fact. Because the recipients of the annuities were the previously named beneficiaries and there was evidence that the principal had told many of her desire to make inter vivos gifts of the annuities, the tax court found these gifts to be proper under Oklahoma law.).

[164] TEX. PROB. CODE ANN. § 498(4).

[165] *Id.* § 498(4), (10). *See also* Estate of Wallis, No. 12-07-00022-CV, 2010 WL 1987514, at *6 (Tex. App.—Tyler May 19, 2010, no pet.) (mem. op.) (holding that even though attorney-in-fact had the authority to name herself as a beneficiary under Texas Probate Code Sections 498(4) and 503(a)(3) because she had been previously named as a beneficiary, she nonetheless breached her fiduciary duty to the principal by failing to disclose to the principal that she had changed the beneficiary designations on the accounts).

iv. Changing Retirement Plan Beneficiary Designations

In a statutory durable power of attorney, Texas Probate Code Section 503(a)(3) grants the attorney-in-fact the power to designate or change the beneficiary of the retirement plan.[166] However, the attorney-in-fact can only name himself as a beneficiary to the extent that the principal named the attorney-in-fact as a beneficiary before the principal signed the power of attorney.[167]

v. Executing Trusts/Changing the Principal's Estate Plan

In *Ritter v. Till*, the Fourteenth Court of Appeals stated that "[a]n agent acting under a power of attorney cannot have the requisite intent to create a trust."[168] In *Ritter*, the principal executed a statutory durable power of attorney, making his niece his attorney-in-fact.[169] He also executed a will leaving his farm to his niece, and if she did not survive, to his niece's daughters.[170] The principal intentionally left his nephew nothing.[171] The principal's niece, acting as attorney-in-fact, executed a revocable living trust and deeded the principal's farm to the trust.[172] The trust provided that the niece was to receive the farm when the principal died.[173] After the principal died—and after convoluted legal proceedings[174]—the niece's

[166] TEX. PROB. CODE ANN. § 503(a)(3).

[167] *Id.*

[168] 230 S.W.3d 197, 203 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (identified in some sources as *Filipp v. Till*).

[169] *Id.* at 199.

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] After her uncle died, the niece deeded the farm to another trust. However, the disinherited nephew took a default judgment in a trespass-to-try-title lawsuit against the niece. The probation of the testator's will after the nephew's lawsuit created a claim of title to the farm for the niece. Then, the niece executed a tardy disclaimer that acted as a statutory assignment of her interest to her daughters under Texas Probate Code Section 37A. The daughters sued the nephew but the trial court dismissed their suit with prejudice because of the nephew's default judgment against their mother. In *Ritter*, the failure of the trust meant the daughters successfully stated a claim for trespass to try title, and the trial court's dismissal of their suit was reversed and remanded to the trial court for further fun and frolic. *Id.*

daughters attempted to obtain the farm by contending the attorney-in-fact had failed to create a trust on behalf of the principal.[175]

The opinion does not mention whether the power of attorney in *Ritter* expressly granted the attorney-in-fact the power to create a trust.[176] The court began its analysis by noting that Texas Trust Code Section 112.002 "dictates that a trust is created 'only if the settlor manifests an intention to create a trust.'"[177] The court reasoned that an attorney-in-fact cannot form the requisite intent to create a trust.[178] The opinion then turned immediately to the Texas Probate Code section[179] that explains an attorney-in-fact's powers concerning trusts under the statutory durable power of attorney form.[180] The court recognized that Section 499(6) authorizes an attorney-in-fact to transfer property to an existing trust the principal has created, but it does not allow an attorney-in-fact acting under the statutory form to create a trust on the principal's behalf.[181] Accordingly, the court concluded that the deed transferring the principal's farm to the trust was ineffective.[182]

---

[175] *Id.* at 203.

[176] *Id.*

[177] *Id.*; *see also* TEX. PROP. CODE ANN. § 112.002 (West 2007).

[178] *Ritter*, 230 S.W.3d at 203.

[179] Section 490(a) sets forth a form known as a "statutory durable power of attorney," and it recognizes that a power of attorney's validity as a statutory durable power of attorney is not affected by adding powers beyond those in the form. Sections 492 through 504 correspond to categories of actions the statutory form refers to in very general terms, and those sections fill what would otherwise be gaps. Courts construe statutory powers of attorney strictly. Therefore, the gap-fillers in 492 through 504 expand and clarify the scope of authority the form grants. They do not prohibit adding powers. TEX PROB. CODE ANN. §§ 490, 492–504 (West 2003).

[180] *Ritter*, 230 S.W.3d at 203.

[181] *Id.* In 2011, the Real Estate, Probate, and Trust Law Section of the Texas State Bar sponsored HB 1858, which would have replaced the current durable power of attorney act with a new one based on the new Uniform Power of Attorney Act. The bill did not pass for a variety of reasons, but a similar bill is likely to be introduced in 2013. The relevant section dealing with the agent's power to create a trust reads:

> Sec. 571. AUTHORITY THAT REQUIRES SPECIFIC GRANT; GRANT OF GENERAL AUTHORITY.
>
> (a) An agent under a power of attorney may do the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject:
>
> (1) create, amend, revoke, or terminate an inter vivos trust;
>
> (2) make a gift;

Taken literally, the statement in *Ritter* that an attorney-in-fact cannot form the intent necessary to create a trust on the principal's behalf seems superfluous.[183] It was irrelevant under the facts to determine whether the Trust Code authorized an attorney-in-fact to create a trust.[184] Examining the Trust Code to determine whether it prevented an act that the principal did not authorize seems meaningless. The analysis should have stopped after strictly construing the power of attorney. *Ritter* probably makes more sense as a determination that the Texas Trust Code and the Texas Probate

(3) create or change rights of survivorship;

(4) create or change a beneficiary designation; or

(6) waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.

(b) Notwithstanding a grant of authority to perform an act described in Subsection (a) of this section, unless the power of attorney otherwise provides, an agent that is not an ancestor, spouse, or descendant of the principal may not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

(c) Subject to Subsections (a), (b), (d), and (e) of this section, if a power of attorney grants to an agent authority to perform all acts that a principal could perform, the agent has the general authority described in Sections 574 through 586 of this code.

(d) Unless the power of attorney otherwise provides, a grant of authority to make a gift is subject to Section 587 of this code.

(e) Subject to Subsections (a), (b), and (d) of this section, if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls.

(f) Authority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed or acquires later, whether or not the property is located in this state and whether or not the authority is exercised or the power of attorney is executed in this state.

(g) An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act.

Tex. H.B. 1858, 82d Leg., R.S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/pdf/HB01858I.pdf#navpanes=0.

[182] *Ritter*, 230 S.W.3d at 203.

[183] *Id.*

[184] *Id.*

Code do not expressly grant an attorney-in-fact the power to create a trust. In other words, to create a valid trust, the settlor must manifest an intent to create a trust.[185] However, the statutory durable power of attorney form does not reflect the required intent. Accordingly, the attorney-in-fact acting under a statutory durable power of attorney lacks the power to create a trust.[186]

Ritter may be interpreted in two ways: either (1) an attorney-in-fact can *never* create a trust on the principal's behalf (and thus can never have the power to direct how the principal's assets will be disposed at death); or (2) the Texas Trust Code coupled with the form of the statutory durable power of attorney as promulgated in the Texas Probate Code do not give an attorney-in-fact the power to create a trust on the principal's behalf unless the principal expressly enumerates the power in the power of attorney.

Several Texas statutes seem to support an argument that an attorney-in-fact can never create a trust on the principal's behalf and thereby incidentally have the power to determine who receives the remaining trust property when the principal dies.[187] These statutes provide clear, bright-line rules that strictly regulate who can execute documents that dispose of a person's assets upon death, and how they can do it. Texas Trust Code Section 112.002 plainly states that a settlor must manifest the intent to create a trust.[188] Other Texas statutes also require the property owner to be directly involved in disposing of his property upon death—whether by will or a non-probate device. Texas Probate Code Section 59 requires the testator to sign his will or have it done in his presence.[189] For multiparty accounts, Section 439 requires a written agreement for survivorship be "signed by the party who dies," and for P.O.D. rights "signed by the original payee or payees."[190] These bright-line rules limit the risk that an attorney-in-fact will abuse the power and alter the principal's estate plan or the rules of intestate succession to benefit the attorney-in-fact or a third party.[191] Allowing an attorney-in-fact to have the power to change how the principal's assets will pass at death could work a harsh result on disinherited beneficiaries to whom the attorney-in-fact owes no fiduciary

[185] TEX. PROP. CODE ANN. § 112.002 (West 2007).

[186] *See* TEX. PROB. CODE ANN. § 490 (West 2003); *see also Ritter*, 230 S.W.3d at 203.

[187] *See infra* notes 188–192.

[188] TEX. PROP. CODE ANN. § 112.002.

[189] TEX. PROB. CODE ANN. § 59 (West 2003).

[190] *Id.* § 439.

[191] *See* RESTATEMENT (THIRD) OF TRUSTS § 11(5), cmt. f (2003).

duties.[192] *Ritter* may reasonably view Texas Trust Code Section 112.002 as implementing the same public policy concerns.

Statutory arguments also appear to support the contention that an attorney-in-fact can create a trust on the principal's behalf, but only if and to the extent the principal expressly grants such power in the power of attorney. Texas Probate Code Section 491 States:

> The principal, by executing a statutory durable power of attorney that confers authority with respect to any class of transactions, empower the attorney-in-fact or agent for that class of transactions to . . . [(11)] in general, do any other lawful act that the principal may do with respect to a transaction.

The Texas Probate Code does not expressly prohibit a principal from empowering his attorney-in-fact to create a trust on the principal's behalf.[193] While Texas Probate Code Section 499(6) does not expressly give an attorney-in-fact acting under a statutory durable power of attorney the ability to create a trust, Section 490(a) allows the principal to add powers to a statutory durable power of attorney form.[194] This statutory argument favors allowing the principal to have the freedom to choose those powers he wishes to give his attorney-in-fact. There are many legitimate reasons a principal may desire to grant his attorney-in-fact the power to create a trust for the principal's benefit. For example, the attorney-in-fact may need the power to create a trust to accomplish proper estate planning objectives, such as avoiding a guardianship or probate, managing assets more efficiently, and qualifying for public benefits.[195]

Arguably, the discussion turns on whether an attorney-in-fact can manifest the requisite intent under the Texas Trust Code to create a trust

[192] "Fiduciary relationships are recognized in a variety of legal relations, historically including those involving attorney and client" as well as statutory attorney-in-fact. Thompson v. Vinson & Elkins, 859 S.W.2d 617, 623 (Tex. App.—Houston [1st Dist.] 1993, writ denied). However, courts in Texas "have consistently held that third parties have no standing to sue attorneys on causes of action arising out of their representation of others" because the attorney is not in a fiduciary relationship with and owes no fiduciary duties to the third parties. Dickey v. Jansen, 731 S.W.2d 581, 582–83 (Tex. App.—Houston [1st Dist.] 1987, writ refused n.r.e.). Similarly, an attorney-in-fact is neither in a fiduciary relationship with nor owes fiduciary duties to the disinherited beneficiaries.

[193] TEX. PROB. CODE ANN. §§ 499(6), 490(a).

[194] *Id.*

[195] *Id.*

(regardless of whether Texas statutes strictly prohibit an attorney-in-fact from creating a trust). From one standpoint, questioning an attorney-in-fact's power to create a trust on the basis of "intent" seems tenuous. A statutory durable power of attorney that confers authority with respect to a class of transactions empowers the attorney in fact, in general, to "do any . . . lawful act that the principal may do with respect to a transaction."[196] Gifts require the donor's intent.[197] Contracts require the contracting party's intent and a meeting of the minds.[198] Attorneys-in-fact routinely make gifts and enter contracts on the principal's behalf.[199] Texas Probate Code Section 491(11) essentially substitutes the attorney-in-fact's specific intent for the principal's to fulfill the acts the power of attorney authorizes.[200] Without this substitution feature, the attorney-in-fact could not accomplish many necessary transactions.[201] From another standpoint, the intent to create a present trust is distinguishable from the principal's intent to give his attorney-in-fact the power to create a trust sometime in the future—or

[196] TEX. PROB. CODE ANN. § 491(11).

[197] "The three elements constituting a gift are: (1) donative intent, (2) delivery of the property, and (3) acceptance of the property." Troxel v. Bishop, 201 S.W.3d. 290, 296 (Tex. App.—Dallas 2006, no pet.).

[198] RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1979) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.").

[199] *See supra* Part VI.A.1.a.i.

[200] TEX. PROB. CODE ANN. § 491(11).

[201] Even assuming the attorney-in-fact had the power to establish a trust for the principal and to deviate from the principal's previous estate plan, such action may still constitute self-dealing and a breach of fiduciary duty. The attorney-in-fact may be limited in his ability to direct how the remaining trust assets will be distributed upon the principals' death. Although generally an incompetent person does not have the legal ability to make a new will, many state statutes authorize a court to establish a trust for the incompetent person's benefit. *See, e.g.*, TEX. PROB. CODE ANN. § 867. The key distinguishing features in many of these trusts, however, are: (1) court supervision; (2) the best interest of the incompetent person dictating any incidental changes to his or her estate plan; and (3) the court does not overtly establish a new distribution scheme upon the incompetent person's death. In Texas, at the incompetent person's death, the remaining assets in a trust established with court oversight would be turned over to the incompetent person's personal representative. *See* TEX. PROB. CODE ANN. § 873. The potential for abuse is just as great for an attorney-in-fact executing a trust agreement as it is for an attorney-in-fact executing a will. It may, however, present no greater danger to the principal's interest than the trust and estate powers already in the statutory durable power of attorney form. If an attorney-in-fact can create a trust, public policy may require that the distributive provisions in any trust created by an attorney-in-fact be consistent with the incompetent person's existing estate plan. *See* RESTATEMENT (THIRD) OF TRUSTS § 11(5), cmt. f (2003).

not.[202] Moreover, is the intent to delegate the choice merely precatory and thus insufficient?[203]

One glaring problem remains with allowing an attorney-in-fact to create a trust on the principal's behalf when that power includes the ability to determine how the remaining assets will be disposed when the principal dies. It is difficult to harmonize the public policy prohibiting an attorney-in-fact from executing a will on the principal's behalf with allowing an attorney-in-fact to decide who will inherit the principal's assets at death.[204] If the principal cannot, as a matter of law, empower an attorney-in-fact to execute a will for him, why should the principal be able to grant essentially the same dispositive power through a trust? It appears the pubic policies seeking to limit the risk of abuse would be substantially similar in both cases.

Ritter is not the only Texas case to address whether an attorney-in-fact can create a trust on behalf of the principal. The Waco Court of Appeals has suggested that a principal can authorize an attorney-in-fact to create a trust.[205] In *Hardy v. Robinson*,[206] the court of appeals appeared to view *Ritter* as a determination that Section 499 does not empower the attorney-in-fact under a statutory durable power of attorney to create a trust. In *Hardy*, the principal executed a statutory durable power containing the following language: "Proceeds from any settlement or payments for injury should be placed in trust for the benefit of my sons . . . [and] [i]t is my desire that my sister . . . be appointed trustee of the trust to benefit my sons."[207] The principal's sons argued that the principal did not create a trust.[208] They argued that the special instructions were both an expansion and limitation on the attorney-in-fact's powers as an agent.[209] The attorney-in-fact contended that the special instructions in the power of attorney created a trust.[210]

---

[202] TEX. PROP. CODE ANN. § 112.002 (West 2007); TEX. PROB. CODE ANN. § 491(11).

[203] *See* AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 4.4 (5th ed. 2006).

[204] TEX. PROB. CODE ANN. §§ 59, 439; *see* Ritter v. Till, 230 S.W.3d 197, 203 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

[205] *See* Hardy v. Robinson, 170 S.W.3d 777, 781 (Tex. App.—Waco 2005, no pet.).

[206] *Id.*

[207] *Id.* at 779.

[208] *Id.* at 780.

[209] *Id.*

[210] *Id.*

The court cited *Ritter*, and it held that the principal did not manifest the requisite intent to create a trust simply by signing the power of attorney.[211] However, the court concluded:

> Because we must strictly construe [the] statutory durable power of attorney, we read the language in the special instructions as an expansion of power granted to [the attorney-in-fact], *i.e.*, a power to create a trust from any proceeds of the Lawsuit, which [the attorney-in-fact] would not otherwise be entitled to exercise under section 499.[212]

The court thus appeared to recognize that a principal could effectively expand the powers granted to an attorney-in-fact under a statutory durable power of attorney to include the power to create a trust.[213] The *Hardy* court distinguished the principal's intent to create a trust in the power of attorney from the principal's intent to give his attorney-in-fact the power to create a trust with the power of attorney.[214]

In sum, reasonable minds differ whether, on what grounds, and in what manner an attorney-in-fact can create a trust on the principal's behalf. Determining whether an attorney-in-fact's attempt to create a trust exceeds his power or is within his power, but breaches a fiduciary duty, can dramatically affect what remedies are available.

vi. Changing Beneficiary Designations on Bank Accounts

Because the Texas Probate Code requires the original payee to designate in writing the "payable on death" beneficiary of a joint P.O.D. account,[215] by statute the attorney-in-fact cannot designate the payee on death of a P.O.D. account.[216] Similarly, a joint account with right of survivorship

---

[211] *Id.* at 781.

[212] *Id.* At least one well-respected Texas estate-planning practitioner believes that an agent may be able to create a revocable trust if the power of attorney authorizes it. *See* DIANE REIS, TEXAS ESTATE PLANNING § 4.10 (Ward Miller ed., James Publishing, Inc. 2011).

[213] *Hardy*, 170 S.W.3d at 781.

[214] *See id.*

[215] *See* TEX. PROB. CODE ANN. § 439(b) (West Supp. 2011).

[216] *See* Armstrong v. Roberts, 211 S.W.3d 867, 870–71 (Tex. App.—El Paso 2006, pet. denied) (holding survivorship designation signed by attorney-in-fact was ineffective because Texas Probate Code Section 439 requires the person who dies to have signed the account agreement providing for survivorship); *see also* Parker v. JPMorgan Chase Bank, 95 S.W.3d 428,

requires: (1) a written agreement, (2) signed by the party who dies, (3) that specifies that the interest of the deceased passes to the surviving party.[217] Under certain situations, an attorney-in-fact may, however, be permitted to withdraw funds from an account in which the principal had previously designated payable-on-death beneficiaries essentially altering the principal's pre-existing non-probate estate plan.[218]

vii. Actions Antagonistic to the Principal's Interests Terminate the Agency Relationship

A course of conduct antagonistic to the interests of an agent's principal terminates the agent's authority unless the principal condones the course of conduct with full knowledge of the facts.[219] Terminating the agent's

431 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (ruling that account agreements did not fulfill the statutory requirements necessary to create a P.O.D. account because the decedent did not sign them); *cf.* Haas v. Voigt, 940 S.W.2d 198, 202–03 (Tex. App.—San Antonio 1996, writ denied) (ruling that husband and son signing new account agreements for community property survivorship accounts between husband and wife purporting to create survivorship accounts between husband and son were ineffective to revoke account agreement under Texas Probate Code Section 455, and awarding the accounts to wife after husband's death). Texas Probate Code Section 436(10) defines a "P.O.D. account" as "an account payable on request to one person during lifetime and on his death to one or more P.O.D. payees, or to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees." TEX. PROB. CODE ANN. § 436(10) (West 2011).

[217] TEX. PROB. CODE ANN. § 439(a) (West Supp. 2011). Texas Probate Code Section 436(4) defines "Joint Account" as an "account payable on request to one or more of two or more parties whether or not there is a right of survivorship." *Id.* § 436(4) (West 2003).

[218] Mayers v. Mayers, No. 04-01-00346-CV, 2002 WL 491737, at *4 (Tex. App.—San Antonio Apr. 3, 2002, no pet.) (not designated for publication) (noting that fraud was not established where there was no evidence that the first sibling suffered any injury by attorney-in-fact withdrawing certificate of deposit funds granting survivorship rights to sibling); *see also* Plummer v. Estate of Plummer, 51 S.W.3d 840, 842–44 (Tex. App.—Texarkana 2001, pet. denied) (holding that there was sufficient evidence for the jury to find that attorneys-in-fact did not breach their fiduciary duty by withdrawing their mother's funds from her certificates of deposit and re-depositing them into an account in which the attorneys-in-fact had a right of survivorship). In *Plummer*, the withdrawal at issue placed all of the mother's money into one account which effectively negated another sibling's pre-existing right of survivorship. The attorneys-in-fact testified that they consolidated the funds to pay hospital bills and to pay nursing home care. The court noted that the left-out sibling had no vested right in the certificate of deposit. The attorneys-in-fact also renounced their rights of survivorship in open court and testified that all remaining funds would pass equally under the terms of the mother's will.

[219] Cotton v. Rand, 93 Tex. 7, 51 S.W.838, 842 (1899) (ruling that an agent, contracting antagonistically to the principals' interests without the principals condoning the course of action

authority will also affect third parties who conspire in the agent's wrongful conduct. In *Remenchik v. Whittington*, the limited partners of a limited partnership sued their corporate general partner, the individual who was the president and sole shareholder of the entity acting as the general partner, and a third party contractor. The limited partners claimed that the contractor and the general partner had conspired to fraudulently be overpaid on a project.[220] The limited partners claimed that the general partner and its owner were their agents for the project and had breached their fiduciary duty to them. The jury found that the contractor had conspired with the general partner to cause the general partner to breach its fiduciary duty to the limited partners. The jury also found that the general partner, on behalf of the limited partners, (1) had entered into an accord and satisfaction with the contractor, (2) had released the claims against the contractor, (3) had estopped the plaintiffs from denying the authority of the general partner and its individual owner to resolve the partners' claims against the contractor, and (4) had waived the plaintiffs' claims against the contractor. The trial court entered judgment only against the corporate general partner.

On appeal, the limited partners contended that the general partner's conspiracy with the contractor to defraud the partnership terminated its authority to act as an agent for the partnership. The substance of their argument was that once the general partner conspired with the contractor to divert funds and profits from the partnership, the general partner's acts could not, as a matter of law, support the defenses the jury found. Accordingly, they argued, the trial court should have also rendered judgment against the contractor, notwithstanding the jury's findings supporting the contractor's defenses.

The court of appeals ruled that the defenses did not bar the limited partners' claims because once the corporate general partner and its owner conspired with the contractor to defraud the partnership, their agency terminated. The evidence supported the jury's finding that intentionally diverting funds from the partnership breached the fiduciary relationship. The court found that there was no evidence that the limited partners knew about the collusion among the general partner, its owner, and the contractor.

---

with knowledge of all of the facts surrounding it, terminated his authority by entering the contract), *modified on other grounds*, 93 Tex. 26, 53 S.W. 343 (1899).

[220]757 S.W.2d 836 (Tex. App.—Houston [14th Dist.] 1988, no writ); *but cf.* Najarro v. First Fed. Sav. & Loan Ass'n, 918 F.2d 513, 516 (5th Cir. Tex. 1990) (stating that an agent's course of conduct antagonistic to the interests of the principal that terminates actual authority does not necessarily negate apparent authority).

The principals (the limited partners) were not charged with the agent's knowledge, and the agent's acts did not bind them.[221] The court of appeals rendered judgment jointly and severally against the contractor, the general partner, and the sole shareholder of the entity acting as the general partner, for all of the overpayments made to the contractor. Thus, embarking upon a course of conduct antagonistic to the principal's interests (without the principal condoning the course of action with full knowledge of the facts) terminates the agency, voids subsequent transactions by the agent, and subjects any third party who conspires with the agent to liability for any damages in connection with the course of conduct.

b. Voiding Transactions Based on the Principal's Lack of Mental Capacity or Donative Intent

Analyzing the principal's mental capacity is relevant any time the facts reveal that the attorney-in-fact did not participate in the transaction or otherwise use the power of attorney to act on the principal's behalf.[222] The attorney-in-fact may claim that the principal acted alone in authorizing the questionable transaction or gift.[223] While the transaction may be voided by applying certain fiduciary principles,[224] determining the principal's mental capacity when the transaction or gift occurred may resolve the dispute more efficiently.

In Texas, the mental capacity required to sign a power of attorney is contractual capacity.[225] Similarly, the principal must have contractual capacity for each transaction the attorney-in-fact claims the principal made.[226] To enter a contract in Texas, a person must have had the mental ability to have "appreciated the effect of what she was doing and

[221] *Remenchik*, 757 S.W.2d at 841. The court stated that all agreements on behalf of the limited partners after their agent conspired with the contractor were "voidable," but given the court's analysis, the agreements were not formed. As a result, the proper terminology is "void."

[222] *See infra* notes 211–214 and accompanying text.

[223] *See, e.g.*, *Mayers*, 2002 WL 491737, at *4.

[224] *See infra* Part VI.A.1.c.

[225] Georgia Akers, *"Mind"ing Your Business: Estate Planning Documents and the Levels of Capacity Required for Execution*, EST. PLANNING & COMMUNITY PROP. L.J. 55, 69 (2010) ("While contractual capacity has traditionally been the standard for creating powers of attorney, some other jurisdictions only require testamentary capacity. Texas follows the contractual capacity standards.").

[226] *See* RESTATEMENT (SECOND) OF CONTRACTS § 12(1) (1979) ("No one can be bound by contract who has not legal capacity to incur at least voidable contractual duties.").

understood the nature and consequences of her acts and the business she was transacting."[227] The mental capacity required to sign a contract is substantially similar to the donative capacity to make gifts.[228] Texas courts have considered the improvidence of the gift (i.e., the practical effect of the gift) as a factor in determining donative capacity.[229]

Several significant legal presumptions must be overcome to successfully prove incapacity. First, the law presumes a party to be mentally competent and places the burden of proving incompetence on the party alleging it.[230] Elderly persons are not presumptively incompetent.[231] Second, absent proof and determination of mental incapacity, a person who signs a document is presumed to have read it and understood the document.[232] This presumption, however, is not without its limitations. Texas courts closely scrutinize contracts between a fiduciary and the person to whom fiduciary duties are owed.[233] In a confidential fiduciary relationship, courts do not strictly apply the presumption that parties read and understood what they signed.[234]

---

[227] Mandell & Wright v. Thomas, 441 S.W.2d 841, 845 (Tex. 1969).

[228] 38A C.J.S. *Gifts* § 12 (2008).

[229] Henneberger v. Sheahan, 278 S.W.2d 497, 499 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.). Capacity to make a gift and intent to make the gift are distinct:

> They seem to us to convey different concepts. Understanding includes a realization in every direction of the practical effects and consequences of a proposed act. On the other hand intent looks merely to the accomplishment of an act without necessarily understanding its effect and consequences. . . . Here Mrs. Sarah M. Henneberger, in her confused state of mind may have had the intention to give away her property, but her mental capacity was such that she was incapable of realizing the practical effect and consequences of so doing, to appreciate the significance of her act, or to comprehend the relation of things.

Id.

[230] Jackson v. Henninger, 482 S.W.2d 323, 324 (Tex. Civ. App.—Austin 1972, no writ).

[231] Edward D. Jones & Co. v. Fletcher, 975 S.W.2d 539, 545 (Tex. 1998) ("Unlike minors, the elderly are not presumptively incompetent, nor, we believe, should they be."); Turner v. Hendon, 269 S.W.3d 243, 248 (Tex. App.—El Paso 2008, pet. denied).

[232] Reyes v. Storage & Processors, Inc., 995 S.W.2d 722, 725 (Tex. App.—San Antonio 1999, pet. denied), *abrogated on other grounds by* Lawrence v. CDB Servs., Inc., 44 S.W.3d 544 (Tex. 2001).

[233] *See* Miller v. Miller, 700 S.W.2d 941, 949 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

[234] *Id.*

If the principal lacked the requisite mental capacity to enter into the contract, action needs to be taken to avoid the contract.[235] In Texas, a contract with an incompetent person is not automatically void; it is instead voidable at the incompetent person's election or one authorized to act on his or her behalf.[236] The voidable contract continues in effect until active steps are taken to disaffirm it.[237] An act disaffirming the contract must be distinct and unequivocal.[238] The contract does not need to be ratified for it to continue to be in effect.[239] A court-appointed guardian pursuing claims on the principal's behalf should promptly take unequivocal steps to disaffirm any known self-dealing contracts; otherwise, an argument can be raised that the guardian ratified the voidable contract since the person with the right and ability to annul the contract implicitly consented to it.[240]

Donative intent, as compared to mental capacity, has its own special rules and presumptions. While the party seeking to invalidate a transaction on the basis of lack of mental capacity has the burden to prove incapacity,[241] the party claiming that a transfer is a gift has the burden to prove the elements of a gift.[242] This means that if the gift cannot be invalidated for lack of donative capacity, it nonetheless may be invalidated if the party claiming the gift cannot prove donative intent.[243]

---

[235] *See infra* notes 236–240 and accompanying text.

[236] Price v. Golden, No. 03-99-00769-CV, 2000 WL 1228681, at *4 (Tex. App.—Austin Aug. 31, 2000, no pet.) (not designated for publication) (noting that the trial court erred in its conclusion of law that contract with incompetent was void) (citing Williams v. Sapieha, 61 S.W. 115, 116 (Tex. 1901); Knox v. Drews, 202 S.W.2d 335, 337 (Tex. Civ. App.—Austin 1947, writ dism'd); Breaux v. Allied Bank, 699 S.W.2d 599, 603 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.); Gaston v. Copeland, 335 S.W.2d 406, 409 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.)).

[237] *Price*, 2000 WL 1228681, at *4.

[238] *Id.* (citing *Breaux*, 699 S.W.2d at 603).

[239] *Id.* (citing Sterner v. Marathon Oil Co., 767 S.W.2d 686, 689 (Tex. 1989), (voidable contract may be valid and subsisting, interference with which may be tortious); Mo. Pac. Ry. Co. v. Brazil, 10 S.W. 403, 406 (Tex. 1888) (noting that "[c]ontracts only voidable are only obligatory until in some manner repudiated or annulled"); BLACK'S LAW DICTIONARY 1573–74 (6th ed. 1990)).

[240] *See id.* (citing *Williams*, 61 S.W. at 117; *Brazil*, 10 S.W. at 407; K.B. v. N.B., 811 S.W.2d 634, 638 (Tex. App.—San Antonio 1991, writ denied); Motel Enters., Inc. v. Nobani, 784 S.W.2d 545, 547 (Tex. App.—Houston [1st Dist.] 1990, no writ)).

[241] *See* Jackson v. Henninger, 482 S.W.2d 323, 324 (Tex. Civ. App.—Austin 1972, no writ).

[242] Olson v. Estate of Watson, 52 S.W.3d 865, 870 (Tex. App.—El Paso 2001, no pet.) (citing Rusk v. Rusk, 5 S.W.3d 299, 303 (Tex. App.—Houston [14th Dist.] 1999, pet. denied)).

[243] *See* Dorman v. Arnold, 932 S.W.2d 225, 228 (Tex. App.—Texarkana 1996, no writ).

To establish that the principal made a gift of property to the attorney-in-fact, the attorney-in-fact has the burden to prove: (1) the principal intended to make a gift; (2) the principal delivered the property to the attorney-in-fact; and (3) the attorney-in-fact accepted the property.[244] The party claiming the gift was made must prove these elements by "clear and convincing evidence."[245] The principal's intent is generally the primary issue.[246] The Texas Commission of Appeals noted this fact over ninety years ago:

> Among the indispensable conditions of a valid gift are the intention of the donor to absolutely and irrevocably divest himself of the title, dominion, and control of the subject of the gift in praesenti at the very time he undertakes to make the gift; * * * the irrevocable transfer of the present title, dominion, and control of the thing given to the donee, so that the donor can exercise no further act of dominion or control over it.[247]

"[T]he requisite donative intent is established by, among other things, evidence that the donor intended an immediate and unconditional divestiture of his or her ownership interests and an immediate and unconditional vesting of such interests in the donee."[248] Texas courts have held that statements of future intent coupled with retaining control over the allegedly gifted asset have been insufficient to establish donative intent. [249]

---

[244] *See* Sumaruk v. Todd, 560 S.W.2d 141, 146 (Tex. Civ. App.—Tyler 1977, no writ).

[245] *See Dorman*, 932 S.W.2d at 227 (citing Oadra v. Stegall, 871 S.W.2d 882, 892 (Tex. App.—Houston [14th Dist.] 1994, no writ)).

[246] Nipp v. Broumley, 285 S.W.3d 552, 559 (Tex. App.—Waco 2009, no pet.) (citing Hayes v. Rinehart, 65 S.W.3d 286, 289 (Tex. App.—Eastland 2001, no pet.); Lee v. Lee, 43 S.W.3d 636, 642 n.4 (Tex. App.—Fort Worth 2001, no pet.); *Dorman*, 932 S.W.2d at 227; Thompson v. Lawson, 793 S.W.2d 94, 96 (Tex. App.—Eastland 1990, writ denied)).

[247] Harmon v. Schmitz, 39 S.W.2d 587, 589 (Tex. Comm'n App. 1931, judgm't adopted) (alteration in original) (quoting Allen-West Comm'n Co. v. Grumbles, 129 F. 287, 290 (8th Cir. 1904)).

[248] *Nipp*, 285 S.W.3d at 559 (emphasis omitted) (citing Wells v. Sansing, 245 S.W.2d 964, 965 (Tex. 1952); Edwards v. Pena, 38 S.W.3d 191, 197 (Tex. App.—Corpus Christi 2001, no pet.); *Oadra*, 871 S.W.2d at 890; *Thompson*, 793 S.W.2d at 96; Akin v. Akin, 649 S.W.2d 700, 703 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.)).

[249] *See id.* (holding donor lacked donative intent to transfer ownership of certificates of deposit when evidence to prove donative intent consisted of past statements about donor's future intent); *see also Hayes*, 65 S.W.3d at 288–89.

Similarly, titling assets in the donee's name for purposes other than making a gift has also been held insufficient to establish donative intent.[250]

One way to prove donative intent is to establish a presumption of gift by proof the transaction transferred property from parent to child.[251] When property is deeded from a parent to a child or children, it is presumed that the parent intended to make a gift.[252] An exchange of consideration, however, precludes a gift.[253]

Assuming that the principal possessed the requisite mental capacity to make a gift and possessed the requisite donative intent, as long as the gift occurred while a fiduciary relationship existed,[254] the attorney-in-fact must still meet his or her burden as a fiduciary to show the gift was fair and reasonable.[255] Thus, multiple legal theories can create layers of obstacles

[250] *See Hayes*, 65 S.W.3d at 288–89 (The donor's brother and sister-in-law offered evidence that donor put money in alleged donee's name to get breathing machine and medication paid for by Medicare and Medicaid and to receive treatment at the V.A. Hospital.).

[251] *See* Richardson v. Laney, 911 S.W.2d 489, 492 (Tex. App.—Texarkana 1995, no writ).

[252] *Id.* at 493 (finding presumption of gift from parent to child rebutted where evidence established that the parent did not relinquish possession, but continued to live on the property, the property was put in child's name to retain Medicaid benefits, the deed was not recorded until after parent's death, and child judicially admitted parent owned property on parent's death); *see also Oadra*, 871 S.W.2d at 891 ("A presumption of gift arises if a parent delivers possession, conveys title, or purchases property in the name of a child. We have found no cases where the presumption arises when a child does the same for a parent." (citations omitted)).

[253] Hardy v. Hardy, No. 03-02-00780-CV, 2003 WL 21402002, at *3 (Tex. App.—Austin June 19, 2003) (mem. op.) ("Presumptions that transfers are gifts can be overcome by a showing that consideration was exchanged." (citing Ellebracht v. Ellebracht, 735 S.W.2d 658, 659–60 (Tex. App.—Austin 1987, no writ) (finding evidence supported decision that parent-to-child conveyance of land was not a gift because it was made in exchange for money and child's assumption of the debt encumbering the property))).

[254] *See* Vogt v. Warnock, 107 S.W.3d 778, 782 (Tex. App.—El Paso 2003, pet. denied) (holding a fiduciary relationship exists even if the attorney-in-fact never acts under the power of attorney).

[255] *See* Sorrell v. Elsey, 748 S.W.2d 584, 585 (Tex. App.—San Antonio 1988, writ denied); *see also* KATHLEEN (K.T.) T. WHITEHEAD, *Texas Legal Standards Related to Mental Capacity in Guardianship Proceedings*, State Bar of Texas, Advanced Guardianship Course, Chapter 8, at 5 (2008) ("In 'gift' transactions involving parties with fiduciary relationship, equity indulges presumption of unfairness and invalidity, and requires proof at hand of party claiming validity and benefits of transaction that it is fair and reasonable."); *see* Pace v. McEwen, 574 S.W.2d 792, 798 (Tex. Civ. App—El Paso 1978, writ ref'd n.r.e.) ("A gift between persons occupying confidential relations toward each other is, if its validity is attacked, always jealously scrutinized by a court of equity, and unless found to have been freely, voluntarily, and with a full understanding of the facts, will be invalidated."); *see, e.g.*, Alford v. Marino, No. 14-04-00912-CV, 2005 WL

the attorney-in-fact must overcome to prevent the court from voiding the transaction.

c. Voiding Transactions Using Fiduciary Principles

To recover monetary damages for breach of fiduciary duty in Texas, the plaintiff must prove: (1) the defendant is his fiduciary, (2) the fiduciary breached his duty to the plaintiff, and (3) the breach injured the plaintiff or benefited the fiduciary.[256] A plaintiff who wishes to recover monetary damages must prove not only a breach of fiduciary duty, but also causation and damages.[257] Monetary damages, however, are not the only possible legal injury that may result from a breach of fiduciary duty, so they are not the only available remedy.[258] A principal does not need to prove damages to avoid the fiduciary's self-dealing transaction.[259] The principal can avoid the self-dealing transaction even though the fiduciary has acted in good faith.[260] "[A] self-dealing transaction itself constitutes an injury *vel non*, the undoing of which is an available remedy."[261]

3310114, at *3, *5 (Tex. App.—Houston [14th Dist.] Dec. 8, 2005, no pet.) (mem. op.) (holding that trial court properly shifted the burden to Guardian to affirmatively prove his actions were beneficial and fair to Ward when Guardian could not explain how much of Ward's money he spent or where he spent most of it) (citing Estate of Townes v. Townes, 867 S.W.2d 414, 417 (Tex. App.—Houston [14th Dist.] 1993, writ denied)); *cf.* Porter v. Denas, No. 04-05-00455-CV, 2006 WL 1686515, at *5 (Tex. App.—San Antonio June 21, 2006, pet. denied) (mem. op.) (holding that the transfer of the IRA on death was not a gift as a matter of law because the elements of a gift, such as the intent to make a gift and the delivery of the gift, were absent, and because a gift was not made, the trial court erred by requiring the fiduciary to rebut the presumption of unfairness); *see also Pace*, 574 S.W.2d at 799 ("The question of the subjective mental capacity of Mrs. Spence and the probative value of the evidence necessary to be introduced to show her lack of mental capacity is entirely different from that previously discussed where the fiduciary had a duty to show the fairness and validity of the gifts and that they were free from the taint of fraud or undue influence."). *But cf. Vogt*, 107 S.W.3d at 785 (suggesting that donative intent plus mental capacity equals fairness as a matter of law, but performing some fairness analysis by noting that some of the transfers were in the form of a life estate which deprived the principal of nothing during his lifetime).

[256] Punts v. Wilson, 137 S.W.3d 889, 891 (Tex. App.—Texarkana 2004, no pet.).

[257] Fisher v. Miocene Oil & Gas Ltd., 335 F. App'x 483, 486–87 (5th Cir. 2009) (concluding that since Texas law does not require proof of damages as an element of a claim for breach of fiduciary duty, judgment should be entered voiding challenged self-dealing transactions).

[258] *Id.*

[259] *Id.* at 487.

[260] *Id.*

[261] *Id.*

When an attorney-in-fact engages in a self-dealing transaction with his principal, a presumption of unfairness arises, which shifts the burden of persuasion to the attorney-in-fact to show that the transaction was fair and equitable to the principal.[262] The attorney-in-fact may rebut the presumption.[263] In other words, fiduciaries in Texas are not strictly prohibited from self-dealing.[264] To the contrary, Texas courts have upheld the validity of some self-dealing transactions.[265]

Self-dealing transactions, therefore, are not void *ab initio*.[266] The terms "voidable" and "void" have distinct legal meanings.[267] If a transaction is void *ab initio*, it is null from its inception, of no legal effect.[268] In other words, self-dealing is not a breach of fiduciary duty, but it creates a presumption that the fiduciary failed to comply with specific duties, which the fiduciary must disprove.[269] In a recent trust case, the U.S. Fifth Circuit Court of Appeals pointed out that in Texas "[a] fiduciary's self-dealing transaction is not void per se, but is instead *voidable* at the election of the beneficiary."[270] Texas fiduciary case opinions often use the term

[262] *See* Tex. Bank & Trust Co. v. Moore, 595 S.W.2d 502, 509 (Tex. 1980); *see also* Lee v. Hasson, 286 S.W.3d 1, 22 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (explaining that the burden rested on fiduciary to show payments he received constituted fair and reasonable compensation for the services rendered and having failed to meet his burden, the contract was void). "*All* transactions between the fiduciary and his principal are presumptively fraudulent and *void*, which is merely to say that the burden lies on the fiduciary to establish the validity of any particular transaction in which he is involved." Chien v. Chen, 759 S.W.2d 484, 495 (Tex. App.—Austin 1988, no writ) (emphasis on "void" added).

[263] *See* Stephens Cnty. Museum, Inc. v. Swenson, 517 S.W.2d 257, 261 (Tex. 1974).

[264] *See Chien*, 759 S.W.2d at 495 (explaining that, while such transactions are presumptively void, the fiduciary is given the opportunity to rebut that presumption).

[265] *See* Vogt v. Warnock, 107 S.W.3d 778, 785 (Tex. App.—El Paso 2003, pet. denied) (donor established fairness of gifts as a matter of law).

[266] *See id.*

[267] Swain v. Wiley Coll., 74 S.W.3d 143, 146 (Tex. App.—Texarkana 2002, no pet.).

[268] Poag v. Flories, 317 S.W.3d 820, 825–26 (Tex. App.—Fort Worth 2010, pet. denied) (quoting Slaughter v. Qualls, 162 S.W.2d 671, 674 (Tex. 1942) ("That which is void is without vitality or legal effect. That which is voidable operates to accomplish the thing sought to be accomplished, until the fatal vice in the transaction has been judicially ascertained and declared.")); *cf. In re* Morgan Stanley & Co., 293 S.W.3d 182 (Tex. 2009) (orig. proceeding) (explaining at length the distinction between contract formation and contract defenses in the context of arbitration).

[269] *See Chien*, 759 S.W.2d at 495.

[270] Fisher v. Miocene Oil & Gas Ltd., 335 F. App'x 483, 487 (5th Cir. 2009) (emphasis in original).

"presumed void" when they mean "voidable."[271] Texas law allows the principal both to recover damages *and* avoid the self-dealing transaction, provided the relief does not constitute double recovery.[272]

i. The Duty to Disclose

In the context of voiding self-dealing transactions using fiduciary principles, courts have voided transactions when an attorney-in-fact has breached the duty to disclose.[273] In *In re Estate of Wallis*, Plaintiffs sued Defendant attorney-in-fact claiming that Defendant breached her fiduciary duty to the principal when she changed the beneficiary designations, without informing the principal, on the principal's profit sharing/401(k) plan and life insurance policy, naming herself as the primary beneficiary.[274] The trial court declared that the beneficiary designation forms signed by Defendant were void.[275] On appeal, Defendant contended the trial court erred in declaring that the beneficiary designations were void,[276] essentially because she had the legal authority to designate the beneficiary designations on an insurance or retirement plan transaction.[277] Plaintiffs contended that a power of attorney did not empower Defendant to act with impunity for her own benefit.[278] The issue on appeal was whether Plaintiffs had established that Defendant had breached her fiduciary duty to her principal, and thus were entitled to a constructive trust on the proceeds of the principal's 401(k) and life insurance proceeds.[279]

The court of appeals affirmed the trial court's judgment declaring void and setting aside the beneficiary designations that the attorney-in-fact made

[271] *See, e.g.*, Coon v. Ewing, 275 S.W. 481, 486 (Tex. Civ. App.—Beaumont 1925, writ dism'd) ("A contract between attorney and client . . . is not per se void, but is presumptively invalid . . . ."); *see also* 14 Tex. Jur. 3d *Contracts* § 113 (2006).

[272] *Fisher*, 335 F. App'x at 487.

[273] Estate of Wallis, No. 12-07-00022-CV, 2010 WL 1987514, at *6–7 (Tex. App.—Tyler May 19, 2010, no pet.) (mem. op.) (affirming trial court's judgment declaring void and setting aside beneficiary designations that the attorney-in-fact had changed to name herself without full disclosure to her principal).

[274] *Id.* at *1.

[275] *Id.* at *1.

[276] *Id.* at *4.

[277] *Id.* at *5–6 (citing TEX. PROB. CODE ANN. §§ 498(4), 503(a)(3) (West 2003)).

[278] *Id.* at *4.

[279] *See id.* at *7.

without full disclosure to her principal.[280] The court reasoned that although Defendant had the authority through the power of attorney to make beneficiary designations, her attendant duty of full and complete disclosure, and her duty to act with integrity, fidelity and good faith, prevented her from doing so without informing her principal (particularly in light of the fact that the principal named another beneficiary immediately before Defendant changed the designation).[281]

ii. The Duty of Fair Dealing

Courts have voided deeds when the attorney-in-fact has breached the duty of fair dealing by procuring the deed through deception.[282] In *Tuttlebee v. Tuttlebee*, Plaintiff sued Defendant, her brother-in-law, to cancel two warranty deeds.[283] Although Plaintiff wanted to leave real property to Defendant upon her death, Defendant successfully suggested that Plaintiff deed the property to him and reserve a life estate as a way to effect her desire.[284] After meeting with her estate-planning attorney and discussing her desire to update her will, it became apparent that Plaintiff had not understood what she had done with her property.[285] Defendant refused to re-convey the property.[286] The trial court found that Defendant had breached his fiduciary duty to Plaintiff and cancelled the deeds.[287]

On appeal, Defendant contended there was no evidence, or at least insufficient evidence, that he misrepresented any material facts or had committed fraud.[288] The issue on appeal was whether Defendant had committed constructive fraud by breaching his fiduciary duties arising out of a confidential relationship.[289] The court of appeals held that there was sufficient evidence in the record to uphold an implied finding that Defendant had breached his fiduciary duty of fair dealing in obtaining the

[280] *Id.*

[281] *Id.* at *6.

[282] Tuttlebee v. Tuttlebee, 702 S.W.2d 253, 255 (Tex. App.—Corpus Christi 1985, no writ).

[283] *Id.* at 225.

[284] *Id.*

[285] *Id.*

[286] *See id.* (stating that Plaintiff threatened litigation if the deeds were not canceled, subsequently initiating litigation).

[287] *Id.* at 256–57.

[288] *Id.* at 256.

[289] *Id.* at 257 (citing Archer v. Griffith, 390 S.W.2d 735 (Tex. 1964)).

deeds.[290] Defendant represented to Plaintiff that the deeds were a precautionary measure if her will was ever contested.[291] Plaintiff did not understand the legal consequences of what she had done, as on one occasion after she had conveyed the deeds, she contacted Defendant and expressed her desire to leave the property to him.[292] The court noted that Defendant remained silent and failed to inform Plaintiff that this was not necessary, since she had already conveyed the deeds (violating the duty to disclose).[293] Based on these facts, the court reasoned that there was sufficient evidence to show that Defendant had deceived Plaintiff in procuring the deeds.[294]

iii. The Duty of Loyalty

Breaching the duty of loyalty—entering "unfair" transactions with the principal—has supported the remedy of declaring such transactions void.[295] In *Lee v. Hasson*, Plaintiff life insurance agent and securities dealer sued Defendant for breaching an oral agreement relating to paying Plaintiff several million dollars for services rendered in connection with negotiating a favorable divorce settlement for Defendant.[296] Defendant counterclaimed, alleging the agreement was unenforceable.[297] The jury found that a relationship of trust and confidence existed between Plaintiff and Defendant when they entered into the oral agreement, but that Plaintiff had complied with his fiduciary duty to Defendant and therefore Plaintiff was entitled to enforce the agreement.[298] Plaintiff asked the trial court to disregard the jury's finding that Plaintiff and Defendant shared a confidential relationship.[299] The trial court disregarded the finding.[300]

---

[290] *Id.*

[291] *Id.*

[292] *Id.*

[293] *Id.*

[294] *Id.*

[295] Lee v. Hasson, 286 S.W.3d 1, 35 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (holding plaintiff fiduciary should have taken nothing in his breach-of-contract suit against defendant beneficiary because transaction between plaintiff and defendant was unfair).

[296] *Id.* at 11–12.

[297] *Id.* at 12.

[298] *Id.* at 12.

[299] *Id.*

[300] *Id.*

On appeal, Defendant contended that the trial court committed harmful error in disregarding the jury's finding that a confidential relationship existed.[301] Plaintiff contended that the evidence was insufficient to support the jury's finding that a confidential relationship existed.[302] Plaintiff further contended that the jury's finding that he complied with his fiduciary duty rendered the trial court's alleged error harmless.[303] The issue was whether the trial court properly disregarded the jury's finding that a confidential relationship existed between Plaintiff and Defendant.[304] The court of appeals overturned the trial court and held that the evidence was legally sufficient to allow a jury to find that a confidential relationship existed before the oral contract in question.[305]

The court noted that the existence of a fiduciary relationship was important because it imposed on Plaintiff an elevated burden to prove that he complied with his fiduciary duty in entering into the contract with Defendant.[306] The court also cited *Chien v. Chen*[307] for the proposition that transactions between a fiduciary and his principal are presumptively void.[308] After conducting a detailed analysis of whether the transaction between Plaintiff and Defendant was fair to Defendant, the court of appeals held that a reasonable jury could not have found that Plaintiff complied with his fiduciary duty to Defendant.[309] Therefore, Plaintiff failed to overcome the presumption that his contract with Defendant was void.[310] The court of appeals reversed the trial court's ruling and rendered a judgment that Plaintiff take nothing.[311]

---

[301] *Id.*

[302] *Id.* at 21.

[303] *Id.* at 20.

[304] *See id.* at 19.

[305] *Id.*

[306] *Id.* at 13.

[307] 759 S.W.2d 484, 495 (Tex. App.—Austin 1988, no writ).

[308] *Lee*, 286 S.W.3d at 13.

[309] *Id.* at 34–35.

[310] *Id.* at 35.

[311] *Id.* Plaintiff attempted to argue that he satisfied his duty to Defendant because Defendant chose the terms of their agreement. The court of appeals noted that this argument focuses solely on the terms of the agreement and implicitly rests on the assumption that the fairness of a transaction can be demonstrated by evidence that the principal chose the terms by which the property was promised or conveyed to a fiduciary. The court of appeals implicitly recognized that this argument may have some validity in cases where the property at issue is a unilateral gift to the fiduciary rather than compensation for services rendered or promised. *Id.* at 33 (citing Vogt v.

2. Rescission

Rescission is distinct from declaring the transaction void, but it is closely related. The difference between a void transaction and a voidable transaction clarifies and explains why the equitable remedy of rescission is available in breach-of-fiduciary-duty suits.[312] Rescission operates to extinguish a contract that is *legally valid* but must be set aside due to fraud, mistake, or for some other reason to avoid unjust enrichment.[313] Thus, rescission is not available when a contract is void—because by definition there is no contract to rescind.[314] Rescission is available to remedy an unfair agreement between a fiduciary and a beneficiary.[315]

When rescission is appropriate, "the measure of damage is the return of the consideration [the plaintiff] paid, together with such further special damage or expense as may have been reasonably incurred by the party wronged on account of the contract."[316] Under general contract principles, the party seeking rescission must offer to return any consideration it received from the other party under the contract.[317] The court may order rescission without restoring consideration when it is more equitable.[318] For

Warnock, 107 S.W.3d 778, 784–85 (Tex. App.—El Paso 2003, pet. denied).

[312] *See* E. Link Beck, *Remedies and Damages*, State Bar of Texas, Fiduciary Litigation, Chapter 11, at 6 (2008) (citing Archer v. Griffith, 390 S.W.2d 735, 740 (Tex. 1964), for the proposition that cancelling deed was appropriate when the fiduciary failed to establish the deed was fair, honest, and equitable); *see also* Miller v. Miller, 700 S.W.2d 941, 948 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (rescinding shareholder agreement entered into with fiduciary was proper where fiduciary failed to establish fairness of contract).

[313] Martin v. Cadle Co., 133 S.W.3d 897, 903 (Tex. App.—Dallas 2004, pet. denied) (citing Humphrey v. Camelot Retirement Cmty., 893 S.W.2d 55, 59 (Tex. App.—Corpus Christi 1994, no writ)); Country Cupboard, Inc. v. Texstar Corp., 570 S.W.2d 70, 73–74 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

[314] *See* Wesley v. Amerigo, Inc., No. 10-05-00041-CV, 2006 WL 22213, at *3 (Tex. App.—Waco Jan. 4, 2006, no pet.) (mem. op.) (citing *Martin*, 133 S.W.3d at 903).

[315] *Miller*, 700 S.W.2d at 942 (holding wife was entitled to rescind stock agreement executed with husband because husband breached his duty of disclosure).

[316] Italian Cowboy Partners, Ltd. v. Prudential Ins. Co., 341 S.W.3d 323, 345 (Tex. 2011) (quoting Smith v. Nat'l Resort Cmtys., Inc., 585 S.W.2d 655, 660 (Tex. 1979)); *see also* TEX. R. CIV. P. 56 (requiring special damages to be pleaded).

[317] Turner v. Hous. Agric. Credit Corp., 601 S.W.2d 61, 65 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (citing Tex. Co. v. State, 281 S.W.2d 83, 91 (Tex. 1955)).

[318] *Id.*

example, restoring consideration may be unnecessary to the extent that the wrongful conduct of the fraudulent party prevents restoration.[319]

3. Constructive Trust

Voiding a self-dealing or other wrongful transaction is only the first step to recovering the principal's property. Although a court may declare a transaction to be void, a constructive trust provides a vehicle for the principal to recover the property.[320]

A constructive trust is essentially an equitable legal fiction designed to prevent unjust enrichment.[321] It is not a real trust, but a remedy that arises by operation of law.[322] A constructive trust is a judgment that the person holding legal title has an equitable duty to convey the property to another because the original acquisition was wrongful, and the holder would be unjustly enriched if permitted to retain the property.[323] "A constructive trust's 'scope and application, within some limitations, is generally left to the discretion of the court imposing' it."[324] Appellate courts review a trial court's decision to impose a constructive trust under an abuse-of-discretion standard.[325]

The plaintiff has the burden to prove elements necessary to impose a constructive trust[326]: (1) the breach of a special trust, fiduciary relationship,

---

[319] *Id.*

[320] *See* Estate of Wallis, No. 12-07-00022-CV, 2010 WL 1987514, at *4 (Tex. App.—Tyler May 19, 2010, no pet.) (mem. op.).

[321] *Id.* (citing Procom Energy, L.L.A. v. Roach, 16 S.W.3d 377, 381 (Tex. App.—Tyler 2000, pet. denied).

[322] 4 William V. Dorsaneo III, *Texas Litigation Guide* § 55.01[2] (2011) (citing Mills v. Gray, 210 S.W.2d 985, 987 (Tex. 1948)).

[323] *Estate of Wallis*, 2010 WL 1987514, at *4 (citing Baker Botts, L.L.P. v. Cailloux, 224 S.W.3d 723, 736 (Tex. App.—San Antonio 2007, pet. denied); *see also* CARYL A. YZENBAARD, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 471 (3d ed. 2009) ("The constructive trust may be defined as a device used by equity to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs.").

[324] *Baker Botts, L.L.P.*, 224 S.W.3d at 736, (citing Wheeler v. Blacklands Prod. Credit Ass'n, 627 S.W.2d 846, 849 (Tex. App.—Fort Worth 1982, no writ)).

[325] *Id.* (citing Leach v. Conner, No. 13-01-468-CV, 2003 WL 22860911, at *7 (Tex. App.—Corpus Christi Dec. 4, 2003, no pet.) (mem. op.) (A trial court abuses its discretion in matters of equity when it rules: "(1) arbitrarily, unreasonably, or without regard to guiding legal principles; or (2) without supporting evidence.")).

[326] *Estate of Wallis*, 2010 WL 1987514, at *4 (citing Troxel v. Bishop, 201 S.W.3d 290, 297

or actual fraud; (2) unjust enrichment; and (3) tracing to an identifiable item or body of property.[327]

A power of attorney creates an agency relationship, establishing the first element as a matter of law.[328] The second element, unjust enrichment, is not an independent cause of action.[329] Instead, it "characterizes the result of a failure to make restitution of benefits either wrongfully or passively received under circumstances that give rise to an implied or quasi-contractual obligation" to return the property to its owner."[330] A constructive trust can apply to property in the hands of innocent third parties who gave no consideration.[331] The doctrine applies the principles of restitution to disputes where there is no actual contract, based on the equitable principle that it would be unconscionable for the person holding legal title to retain the property.[332]

The third element, tracing to an identifiable res, often proves the most difficult to establish, especially where the attorney-in-fact has converted the principal's property into additional forms. The general rule is that "when a party attempts to impose a constructive trust over funds," Texas law requires that "'the trust fund must be clearly traced into other specific

(Tex. App.—Dallas 2006, no pet.)).

[327] *Troxel*, 201 S.W.3d at 297.

[328] *See* Vogt v. Warnock, 107 S.W.3d 778, 782 (Tex. App.—El Paso 2003, pet. denied) ("[A] power of attorney creates an agency relationship, which is a fiduciary relationship as a matter of law.") (citing Plummer v. Estate of Plummer, 51 S.W.3d 840, 842 (Tex. App.—Texarkana 2001, pet. denied)); Sassen v. Tanglegrove Townhouse Condo. Ass'n, 877 S.W.2d 489, 492 (Tex. App.—Texarkana 1994, writ denied).

[329] Casstevens v. Smith, 269 S.W.3d 222, 229 (Tex. App.—Texarkana 2008, pet. denied).

[330] *Id.* (quoting Friberg-Cooper Water Supply Corp. v. Elledge, 197 S.W.3d 826, 832 (Tex. App.—Fort Worth 2006), *rev'd on other grounds*, 240 S.W.3d 869 (Tex. 2007) (in turn quoting Walker v. Cotter Props., Inc., 181 S.W.3d 895, 900 (Tex. App.—Dallas 2006, no pet.))); *see* 2 William V. Dorsaneo III, *Texas Litigation Guide* § 21A.04[1] (2011); *see also* Lilani v. Noorali, No. H-09-2617, 2011 WL 13667, at *11 (S.D. Tex. Jan. 3, 2011) ("The majority of Texas appellate courts hold that unjust enrichment is not an independent cause of action. This view prevails among Texas courts notwithstanding the fact that the Texas Supreme Court . . . refers to an unjust enrichment as a 'cause of action,' a 'remedy,' and a 'basis for recovery.' Most Texas courts have nevertheless read these statements as reiterations of the well-established principle that an equitable suit for restitution may be raised against a party based on the theory of unjust enrichment. The theory may apply when a defendant obtains a benefit from the plaintiff 'by fraud, duress, or the taking of an undue advantage.'") (internal citations omitted).

[331] Pope v. Garrett, 211 S.W.2d 559, 562, (Tex. 1948).

[332] Omohundro v. Matthews, 341 S.W.2d 401, 405 (Tex. 1960); Baker Botts, L.L.P. v. Cailloux, 224 S.W.3d 723, 736 (Tex. App.—San Antonio 2007, pet. denied).

property; that nothing must be left to conjecture, and that no presumptions, except the usual and necessary deductions from facts proven, can be indulged.'"[333]

The Texas Supreme Court reaffirmed the tracing requirement in *Wilz v. Flournoy*.[334] Under *Wilz*, once the plaintiff traces the property to an item of property, the entire property is subject to the constructive trust, except to the extent the fiduciary can distinguish and separate his own property from the trust property.[335] Where the fiduciary/wrongdoer mingles the trust funds with his own property or invests it in such a manner that the trust funds can no longer be separated or identified, the entire property is subject to the constructive trust remedy.[336]

A constructive trust is a broad remedy and follows the property or its proceeds if the property is converted into a new form.[337] In addition, at least one Texas court has imposed a constructive trust over the interests of individuals (non-fiduciaries) acquiring an ownership interest with the attorney-in-fact in the principal's property, noting that a constructive trust "reaches all those who are actually concerned in the fraud, all who directly and knowingly participate in its fruits, and all those who derive title from them voluntarily or with notice."[338]

Texas courts have held that a constructive trust was appropriate when the following fiduciary duties were breached: (1) breach of the duty of loyalty,[339] and (2) the duty to disclose.[340] In connection with the duty of loyalty, the practitioner should not overlook recovering the principal's

[333] *In re* Marriage of Harrison, 310 S.W.3d 209, 213 (Tex. App.—Amarillo 2010, pet. denied) (quoting Meyers v. Baylor Univ., 6 S.W.2d 393, 394 (Tex. Civ. App.—Dallas 1928, writ ref'd).

[334] 228 S.W.3d 674, 676 (Tex. 2007).

[335] *In re Marriage of Harrison*, 310 S.W.3d at 213 (citing *Wilz*, 228 S.W.3d at 676 (in turn citing Eaton v. Husted, 172 S.W.2d 493, 498–99 (Tex. 1943))).

[336] *Id.* (citing *Meyers*, 6 S.W.2d at 395).

[337] *In re* Estate of Crawford, 795 S.W.2d 835, 841 (Tex. App.—Amarillo 1990, no writ) (citing Hand v. Errington, 242 S.W. 722, 724 (Tex Comm'n App. 1922, judgm't adopted)).

[338] Smiley v. Johnson, 763 S.W.2d 1, 4 (Tex. App.—Dallas 1988, writ denied) (quoting Miller v. Himebaugh, 153 S.W. 338, 342 (Tex. Civ. App.—Amarillo 1913, writ ref'd) (in turn quoting Martin v. Robinson, 3 S.W. 550, 557 (Tex. 1887))).

[339] *See Wilz*, 228 S.W.3d at 676–77 (constructive trust imposed on real property obtained through using ward's funds to purchase real property).

[340] *See* Estate of Wallis, No. 12-07-00022-CV, 2010 WL 1987514, at *6–7 (Tex. App.—Tyler May 19, 2010, no pet.) (mem. op.) (holding constructive trust was properly imposed on retirement and insurance proceeds where attorney-in-fact failed to disclose to the principal that she had changed the beneficiary designations on the accounts).

property in the hands of third parties who aided and abetted the fiduciary, conspired with the fiduciary, or did not give value for the property.

B. Remedies Reviewed

Voiding wrongful transactions—whether the transactions constituted self-dealing, were made without the requisite capacity or donative intent, or exceeded the scope of the attorney-in-fact's power—can be extremely useful. Rescinding the transaction allows the principal to recover any consideration paid and expenses reasonably incurred.[341] Second, and perhaps more importantly, voiding the transaction may help restore the principal's estate and preserve the principal's original estate plan.[342] This goal is especially important where the typical adult child attorney-in-fact does not have the resources to answer in damages.

When analyzing questionable transactions, there are a variety of issues to consider when choosing a particular litigation strategy:

> If the principal allegedly makes the gift/signs the contract, then the analysis to void the transaction is focused on:
>
> A. The principal's mental capacity/donative intent; and
>
> B. Fairness of the gift/contract.[343]
>
> If the attorney-in-fact allegedly makes the gift/signs the contract, then the analysis to void the transaction is focused on:
>
> A. The scope of authority of the attorney-in-fact; and
>
> B. Fairness of the gift/contract.[344]

If the attorney-in-fact allegedly signed the contract or made the gift, resolving the issue of the attorney-in-fact's scope of authority on summary judgment may be efficient and cost-effective. Similarly, if the principal allegedly signed the contract or made the gift, medical records may quickly

[341] Smith v. Nat'l Resort Cmtys., Inc., 585 S.W.2d 655, 660 (Tex. 1979).

[342] *See* Tuttlebee v. Tuttlebee, 702 S.W.2d 253, 255 (Tex. App.—Corpus Christi 1985, no writ.).

[343] *See id.* at 255–57.

[344] *See Estate of Wallis*, 2010 WL 1987514, at *6.

reveal whether the principal possessed the requisite contractual or donative capacity. If the medical evidence does not provide a definite answer, the principal's understanding of a gift transaction may quickly resolve any doubt as to whether the principal had the requisite donative intent.

"Fairness," however, may require a more detailed analysis, especially in the context of a typical power-of-attorney case.[345] The Texas Pattern Jury Charge requires the attorney-in-fact to establish five elements to prove he complied with his fiduciary duty to the principal in any self-dealing transaction.[346] It is important to note that under the pattern jury charge the jury must answer "yes" to all five questions for the attorney-in-fact to avoid liability.[347] The jury must determine whether:

> (1) The transaction in question was fair and equitable to the principal;
>
> (2) The attorney-in-fact made reasonable use of the confidence that the principal placed in him;
>
> (3) The attorney-in-fact acted in the utmost good faith and exercised the most scrupulous honesty toward the principal;
>
> (4) The attorney-in-fact placed the interests of the principal before his own, did not use the advantage of his position to gain any benefit for himself at the expense of the principal, and did not place himself in any position where his self-interest might conflict with his obligations as a fiduciary; *and*
>
> (5) The attorney-in-fact fully and fairly disclosed all important information to the principal concerning the transaction.[348]

In other fiduciary contexts, Texas courts have expanded on the first element by using five "fairness factors" to determine whether the

---

[345] *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Fiduciary Duty* PJC 104.2 (2003).

[346] *Id.*

[347] *See, e.g.*, Lee v. Hasson, 286 S.W.3d 1, 21 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

[348] Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Fiduciary Duty* PJC 104.2 (2003).

transaction was fair to the party to whom the fiduciary duty was owed.[349] At least two of the five "fairness factors" and the last prong of the pattern jury charge include items such as "full disclosure" and "the benefit of independent advice."[350] These concepts are difficult to reconcile with incapacity. Conceivably, the principal must have some level of mental competency for the attorney-in-fact to meaningfully comply with his fiduciary duty. Texas law does not currently establish how the principal's lack of capacity affects the attorney-in-fact's burden under Texas Pattern Jury Charge 104.2.[351]

Assuming the principal is totally incapacitated, the attorney-in-fact will have difficulty establishing he complied with his fiduciary duty under the pattern jury charge. Is disclosure excused? If it is, then including the disclosure instruction found in Texas Pattern Jury Charge 104.2 may be reversible error under *Crown Life Insurance Co. v. Casteel* and its progeny.[352] Or is the attorney-in-fact strictly prohibited from entering into a self-dealing transaction with an incompetent principal because, under the pattern jury charge, he cannot prove he fulfilled his fiduciary duty to the principal? If so, then establishing that the attorney-in-fact has complied with his fiduciary duty may turn upon the degree to which the principal is incompetent. Trial courts have wide discretion to determine whether jury instructions are sufficient.[353] Courts must consider the circumstances at the time of the self-dealing transaction, not in hindsight.[354]

---

[349] *See Lee*, 286 S.W.3d at 21 (citing Collins v. Smith, 53 S.W.3d 832, 840 (Tex. App.—Houston [1st Dist.] 2001, no pet.)). In establishing fairness, Texas courts consider the following five factors: "(1) whether there was full disclosure regarding the transaction; (2) whether the consideration (if any) was adequate, (3) whether the beneficiary had the benefit of independent advice; (4) whether the fiduciary benefitted at the expense of the beneficiary; and (5) whether the fiduciary significantly benefitted from the transaction as viewed in light of the circumstances existing at the time of the transaction." *Id.* (citing Estate of Townes v. Townes, 867 S.W.2d 414, 417 (Tex. App.—Houston [14th Dist.] 1993, writ denied)).

[350] *Id.*; Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Fiduciary Duty* PJC 104.2 (2010).

[351] *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Fiduciary Duty* PJC 104.2 (2010).

[352] *See* 22 S.W.3d 378, 389 (Tex. 2000).

[353] Plainsman Trading Co. v. Crews, 898 S.W.2d 786, 791 (Tex. 1995).

[354] *See* Archer v. Griffith, 390 S.W.2d 735, 740 (Tex. 1964) (analyzing a contract with a fiduciary for fairness under "the circumstances existing at the time it was made").

Texas Pattern Jury Charge 104.2 (fiduciary self-dealing) is based in part on *Stephens County Museum, Inc. v. Swenson*.[355] In that case, the court referred to the fiduciary duty to disclose in terms of a "good faith effort" to fully inform the elderly principals about the nature and effect of a transaction.[356] The answer to these questions may only be clarified by further appellate review. Whether the courts follow *Swenson*, the pattern jury charge, or some other resolution will be an important issue as baby boomers increasingly outlive their mental capacities.

VII. GOAL 4: ASSESSING MONETARY DAMAGES AGAINST THE ATTORNEY-IN-FACT

Recovering monetary damages against the attorney-in-fact may be necessary to obtain a judgment that can be used to offset or eliminate the attorney-in-fact's beneficial share of the principal's estate. Whatever the motivation, a principal may recover several types of monetary damages under the factual scenarios typically presented in litigation involving a durable power of attorney.[357] Depending on the remedy sought, a party may not need to prove all of the traditional elements of a cause of action for breach of fiduciary duty to obtain relief, and, in some cases, may not even need to prove actual harm.[358]

A. The Most Common Remedies

1 Actual Damages

Breach of fiduciary duty is a tort.[359] An attorney-in-fact is liable for actual damages that were proximately caused by the breach of his fiduciary

[355] Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Fiduciary Duty* PJC 104.2 (2010).

[356] *See* Stephens Cnty. Museum, Inc. v. Swenson, 517 S.W.2d 257, 261 (Tex. 1974).

[357] *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business, Consumer, Insurance, & Employment* PJC 115.15 (2010).

[358] *Id.* (The plaintiff is entitled to equitable relief such as rescission, constructive trust, profit disgorgement, or fee forfeiture without having to show that the breach caused damages.) (citing Burrow v. Arce, 997 S.W.2d 229, 239–40 (Tex. 1999); Kinzbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509, 514 (Tex. 1942); RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. d (2006)).

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

duties.[360] "The elements of a breach of fiduciary duty claim are: (1) a fiduciary relationship between the plaintiff and defendant, (2) a breach by the defendant of his fiduciary duty to the plaintiff, and (3) an injury to the plaintiff or benefit to the defendant as a result of the defendant's breach."[361] Whenever a party seeks actual damages, the party must prove injury and causation.[362] In addition, when a party seeks to impose liability against the attorney-in-fact on a negligence basis (the duty of care) the party must also prove causation.[363]

Proximate cause encompasses two elements: cause in fact and foreseeability.[364] Cause in fact means that the act in question played a substantial factor in producing the injury and but for such act no harm would have resulted.[365] Foreseeability means that the fiduciary (or other

writ).

[360] *See generally* Morehead v. Gilmore, No. 01-02-00685-CV, 2003 WL 1848724 (Tex. App.—Houston [1st Dist.] Apr. 10, 2003, no pet.) (mem. op.) (affirming trial court's judgment awarding each sibling $27,800, which represented the amount of damages suffered by each sibling as a result of attorney-in-fact claiming ownership of their parents' estate, despite assurances she would divide it equally among all siblings); *see* Duncan v. Lichtenberger, 671 S.W.2d 948, 953 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.); *see also* Si Kyu Kim v. Harstan, Ltd., 286 S.W.3d 629, 635 (Tex. App.—El Paso 2009, pet. denied) (stating that breach of fiduciary duty requires showing that breach caused an injury). Parties have attempted to argue that the Texas Supreme Court has dispensed with the need to prove an actual injury and causation in a breach-of-fiduciary-duty case. *Id.* at 635 n.1 (citing *Burrow*, 997 S.W.2d at 240). The *Si Kyu Kim* court noted that the need to prove actual injury and causation are unnecessary only when a party seeks to forfeit some portion of an attorney's fees in connection with a breach of fiduciary duty; injury and causation are still required where a party seeks to recover damages for a breach of fiduciary duty. *Id.* (citing Longaker v. Evans, 32 S.W.3d 725, 733 n.2 (Tex. App.—San Antonio 2000, pet. withdrawn)). *See also* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business, Consumer, Insurance, & Employment* PJC 115.18 (2010) (Question on Actual Damages for Breach of Fiduciary Duty).

[361] Wells Fargo Bank, N.A. v. Crocker, No. 13-07-00732-CV, 2009 WL 5135176, at *3 (Tex. App.—Corpus Christi Dec. 29, 2009, pet. denied) (mem. op.) (quoting Lundy v. Masson, 260 S.W.3d 482, 501 (Tex. App.—Houston [14th Dist.] 2008, pet. denied)).

[362] *Si Kyu Kim*, 286 S.W.3d at 635 n.1 (citing *Longaker*, 32 S.W.3d at 733 n.2).

[363] "A negligence cause of action has three elements: (1) a legal duty owed by one person to another, (2) a breach of that duty, and (3) damages proximately caused by the breach." Mohseni v. Hartman, No. 01-10-00078-CV, 2011 WL 2304133, at *2 (Tex. App.—Houston [1st Dist.] June 9, 2011, no pet.) (holding that an independent executor does not owe a general legal duty of care to the unsecured creditor of an estate in the management of the estate's assets).

[364] Brown v. Edwards Transfer Co., 764 S.W.2d 220, 223 (Tex. 1988) (citing Williams v. Steves Indus., Inc., 699 S.W.2d 570, 575 (Tex. 1985)).

[365] *Id.* (citing Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 549 (Tex. 1985)).

actor), as a person of ordinary intelligence, should have anticipated the danger his act posed to others.[366] Proving causation can be a critical, as the "'[b]reach of the standard of care and causation are separate inquiries . . . and an abundance of evidence as to one cannot substitute for a deficiency of evidence as to the other.'"[367] Texas courts have refused to award actual damages in fiduciary cases where causation was not established. The Corpus Christi Court of Appeals recently held that causation was not established, even though the defendant had breached its duty of disclosure, where the plaintiffs failed to prove a cognizable injury, that is, that they were actually entitled to the disputed funds about which adequate disclosure had allegedly not been made.[368]

Actual damages are awarded to remedy a wrong or to compensate an injury.[369] Actual damages include economic damages, that is, damages for actual economic injury or pecuniary loss.[370] Actual damages are either "direct" or "consequential."[371] Direct damages are the necessary and usual result of a wrongful act; they flow naturally and necessarily from the wrong.[372] In contrast, consequential damages result naturally, but not necessarily, from the wrongful act.[373] Consequential damages need not be the usual result from a wrong, but they must be foreseeable and directly

[366] *Id.* (citing *Nixon*, 690 S.W.2d at 549–50). Foreseeability does not require that the actor foresee the particular accident or injury that occurs. *Id.* at 223–24 (citing Trinity River Auth. v. Williams, 689 S.W.2d 883, 886 (Tex. 1985)). Foreseeability also does not require that the actor anticipate just how the injury will grow out of the particular situation in question. *Id.* at 224 (citing Clark v. Waggoner, 452 S.W.2d 437, 440 (Tex. 1970)). Instead, all that is required to establish foreseeability is that: (1) the injury must be of such a general nature that a reasonably prudent person in the defendant's position should have anticipated it and (2) the injured party be so situated with relation to the wrongful act that injury might reasonably have been foreseen. *Id.* (citing Motsenbocker v. Wyatt, 369 S.W.2d 319, 323 (Tex. 1963) (in turn citing Carey v. Pure Distrib. Corp., 124 S.W.2d 847, 849 (Tex. 1939))); *see also* PROSSER & KEETON ON THE LAW OF TORTS, § 43, at 299 (W. Page Keeton ed., 5th ed. 1984) (citing, among other cases, Biggers v. Continental Bus Sys., Inc., 303 S.W.2d 359, 364 (Tex. 1957)).

[367] Wells Fargo Bank, N.A. v. Crocker, 13-07-00732-CV, 2009 WL 5135176, at *5 (Tex. App.—Corpus Christi Dec 29, 2009, pet. denied) (mem. op.) (quoting Alexander v. Turtur & Assocs., Inc., 146 S.W.3d 113, 119 (Tex. 2004) (alteration in original)).

[368] *See id.* at *5.

[369] Robertson Cnty. v. Wymola, 17 S.W.3d 334, 343–44 (Tex. App.—Austin 2000, pet. denied).

[370] TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(4), (12) (West 2008).

[371] Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 816 (Tex. 1997).

[372] *Id.*

[373] *Id.*

traceable to the wrongful act.[374] Damages that are too remote, too uncertain, or purely conjectural are not recoverable.[375]

Actual damages are most commonly recovered in a typical durable-power-of-attorney case where the attorney-in-fact spends the principal's assets for the attorney-in-fact's own benefit.[376]

a. Damages to Personal Property

When the fiduciary uses the principal's funds or other assets to acquire property for himself, the principal may seek the property itself or its value.[377] Under general damage principles,[378] when personal property is damaged, the owner may generally recover damages for the loss of the property's value.[379] This is typically measured by the difference in the property's market value immediately before and after the damage.[380] "Where the property is damaged but not totally destroyed, and repairing the property is economically feasible, the owner may choose between seeking the property's loss in value and the reasonable costs of repairs."[381] The owner may recover diminution in value and costs of repairs, as long as doing so would not amount to double recovery.[382] Damages for loss of use are also recoverable while the property is being repaired[383] or when converted property is returned.[384] Loss-of-use damages are typically

[374] *Id.*

[375] *Id.*

[376] *See generally* LeDoux v. LeDoux, No. 09-97-024-CV, 1998 WL 542733 (Tex. App.—Beaumont Aug. 27, 1998, pet. denied) (mem. op.) (not designated for publication) (holding that evidence was sufficient to support damages in the amount of $250,000 against attorney-in-fact for breach of fiduciary duty in connection with attorney-in-fact "squandering" his mother's assets and disposing of her estate for his own personal gain).

[377] Lesikar v. Rappeport, 33 S.W.3d 282, 304 (Tex. App.—Texarkana 2000, pet. denied).

[378] For a more exhaustive discussion, see MICHOL O'CONNOR, O'CONNOR'S TEXAS CAUSES OF ACTION Ch. 45-C (2012).

[379] Pasadena State Bank v. Isaac, 228 S.W.2d 127, 128 (Tex. 1950).

[380] *Id.*

[381] Cent. Freight Lines, Inc. v. Naztec, Inc., 790 S.W.2d 733, 734–35 (Tex. App.—El Paso 1990, no writ); RESTATEMENT (SECOND) OF TORTS § 928 (1979).

[382] Parkway Co. v. Woodruff, 901 S.W.2d 434, 441 (Tex. 1995) ("Texas law does not permit double recovery.").

[383] *Pasadena State Bank*, 228 S.W.2d at 129; *see also* TEX. R. CIV. P. 56 (special damages must be specifically pleaded).

[384] Winkle Chevy-Olds-Pontiac, Inc. v. Condon, 830 S.W.2d 740, 746 (Tex. App.—Corpus Christi 1992, writ dism'd).

measured by the reasonable cost of renting a replacement.[385] Moreover, they can exceed the value of the property.[386]

The above general rules vary slightly in conversion cases. Conversion claims are typically included in litigation against an attorney-in-fact as an alternative theory of recovery to breach of fiduciary duty, especially where money is involved.[387] Conversion is the wrongful exercise of dominion or control over another's property in denial of or inconsistent with the other's rights in that property.[388] Under certain situations, money may be converted.[389] Money may be converted when the money is: "(1) delivered for safe keeping; (2) intended to be kept segregated; (3) substantially in the form in which it is received or in an intact fund; and (4) not the subject of a title claim by the keeper."[390]

In conversion cases, the owner may recover damages for the loss in value of the property or the loss-of-use damages while the property was wrongfully detained.[391] In cases where the property's value fluctuates—for example, stocks and bonds—the general loss-of-value measure is slightly modified.[392] Texas courts have held that the measure of damages in this case is the highest intermediate value of the stock between the time the stock is converted and a reasonable time after the owner has received notice of the conversion.[393] Prejudgment interest is also recoverable for loss of use of the property from the date of conversion through the date of judgment.[394]

b. Damages to Real Property

The general damage principles pertaining to damages to real property are similar to those outlined above for personal property. While an

[385] *See* Mondragon v. Austin, 954 S.W.2d 191, 193 (Tex. App.—Austin 1997, pet. denied).

[386] *Id.* at 196.

[387] *See generally* Estate of Townes v. Townes, 867 S.W.2d 414 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

[388] *Id.* at 419.

[389] *Id.* at 419–20.

[390] *Id.*

[391] Winkle Chevy-Olds-Pontiac, Inc. v. Condon, 830 S.W.2d 740, 746 (Tex. App.—Corpus Christi 1992, writ dism'd).

[392] Reed v. White, Weld & Co., 571 S.W.2d 395, 397 (Tex. Civ. App.—Texarkana 1978, no writ).

[393] *Id.*

[394] Associated Tel. Directory Publishers, Inc. v. Five D's Publ'g Co., 849 S.W.2d 894, 900 (Tex. App.—Austin 1993, no writ).

exhaustive treatment of these damages is beyond the scope of this article, an owner is typically entitled to recover market value damages, cost of repairs, and loss-of-use damages.[395] Legal theories other than breach of fiduciary duty may support recovering consequential damages.[396] For example, where an attorney-in-fact wrongfully obtained real property (e.g., selling her mother's property to herself and her husband), at least one Texas court has awarded the rightful owner damages for loss of rent under a cause of action for trespass to try title.[397]

c. The Duty to Account

The principal's ability to require the attorney-in-fact to timely inform and to account for all action taken pursuant to the power of attorney is extremely powerful and can, in certain circumstances, support an award of actual damages.[398] The failure to meet the duty to account imposes *personal liability* on the fiduciary.[399] Once assets are traced to a fiduciary, a presumption arises that those assets were in her possession and the burden shifts to the fiduciary to account for the assets.[400] One commentator notes: "All doubts are resolved against a [fiduciary] who does not keep accurate accounts."[401] Texas courts have held fiduciaries personally liable for unaccounted for assets.[402] Similar principles apply to the law of trusts, as the Restatement (First) of Trusts § 172 provides:

> *b. Effect of failure to keep accounts.* If the trustee fails to keep proper accounts, he is liable for any loss or expense resulting from his failure to keep proper accounts. The

[395] *See* O'CONNOR, *supra* note 378, Ch. 45-D, § 1.1.

[396] *See id.*

[397] Musquiz v. Marroquin, 124 S.W.3d 906, 912 (Tex. App.—Corpus Christi 2004, pet. denied).

[398] *See, e.g.*, Maxwell's Unknown Heirs v. Bolding, 36 S.W.2d 267, 268 (Tex. Civ. App.—Waco 1931, no writ).

[399] RESTATEMENT (FIRST) OF TRUSTS § 172 cmt. b (1935); Corpus Christi Bank & Trust v. Roberts, 587 S.W.2d 173, 182 (Tex. Civ. App.—Corpus Christi 1979), *aff'd*, 597 S.W.2d 752 (Tex. 1980).

[400] Sierad v. Barnett, 164 S.W.3d 471, 477 (Tex. App.—Dallas 2005, no pet.) (citing Beaumont Bank, N.A. v. Buller, 806 S.W.2d 223, 226 (Tex. 1991)).

[401] CHARLES E. ROUNDS, JR. & CHARLES E. ROUNDS, III, LORING AND ROUNDS: A TRUSTEE'S HANDBOOK § 6.1.5.2 (8th ed. 2012).

[402] *See Corpus Christi Bank & Trust*, 587 S.W.2d at 181–82 (holding corporate successor trustee liable for approximately $26,450 of missing or unaccounted for funds).

> burden of proof is upon the trustee to show that he is entitled to the credits he claims, and his failure to keep proper accounts and vouchers may result in his failure to establish the credits he claims.[403]

Moreover, if the attorney-in-fact cannot identify and segregate the principal's assets from his own, the penalties are severe.[404] Texas courts have articulated the legal effect of commingling in other fiduciary contexts:

> In cases where [the fiduciary commingles] trust funds or property with his own funds or property, the burden will be *on the defendant* fiduciary to trace or segregate the funds. To the extent that the fiduciary fails or is unable to do so, the *entire* fund will be presumed to belong to the trust (or the beneficiary).[405]

In addition, whatever the attorney-in-fact has been paid out (or lost) will be presumed to have been paid out of his own money.[406]

d. The Duty of Loyalty

Breaching the duty of loyalty will support an award of actual damages.[407] In an unpublished opinion, the Beaumont Court of Appeals considered facts often presented in cases involving a durable power of attorney.[408] In *LeDoux v. LeDoux*,[409] Plaintiff sued Defendant attorney-in-fact for fraud, conversion, and breach of fiduciary duty regarding his management of their mother's property.[410] The jury entered judgment

[403] RESTATEMENT (FIRST) OF TRUSTS § 172 cmt. b (1935).

[404] *See* Joyce W. Moore, *Litigation Involving Fiduciaries: Trial Handbook 2009*, 33d Annual Advanced Estate Planning & Probate Course, Ch. 26, at 103 (2009).

[405] *Id.* (emphasis in original) (citing Eaton v. Husted, 172 S.W.2d 493, 497–98 (Tex. 1943); Andrews v. Brown, 10 S.W.2d 707, 709 (Tex. Comm'n. App. 1928); Meyers v. Baylor Univ., 6 S.W.2d 393, 395 (Tex. Civ. App.—Dallas 1928, writ ref'd)).

[406] *See id.* (citing Gen. Ass'n of Davidian Seventh Day Adventists, Inc. v. Gen. Ass'n of Davidian Seventh Day Adventists, 410 S.W.2d 256, 259 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.)).

[407] *See* LeDoux v. LeDoux, No. 09-97-024-CV, 1998 WL 542733, at *6 (Tex. App.—Beaumont Aug. 27, 1998, pet. denied) (mem. op.) (not designated for publication).

[408] *Id.* at *1.

[409] *Id.*

[410] *Id.*

against the attorney-in-fact on all claims and awarded damages in the amount of $250,000.[411]

Defendant contended that all the assets in question were gifts from his mother and that his conduct was consistent with her instructions.[412] Plaintiff contended Defendant had breached his fiduciary duties towards his mother, arising from either the power of attorney, or in the alternative, if their mother was not competent when she signed the power of attorney, arising from their informal confidential relationship.[413]

The issue on appeal was whether there was sufficient evidence to support the jury verdict.[414] The court of appeals held that the evidence was sufficient to sustain the finding of breach of fiduciary duty.[415] The court noted that shortly before signing the power of attorney, the principal had closed out a trust account and taken possession of approximately $213,858.[416] Out of this money, the attorney-in-fact opened a certificate of deposit in his name in the amount of $125,000.[417] Another $50,000 was divided among three CDs, which were then used for the mother's medical costs and "whatever the attorney-in-fact needed."[418] The attorney-in-fact also used the mother's funds to purchase a trailer, which he put in his name.[419] The court noted that these actions, in addition to other unjustified expenditures, amounted to the attorney-in-fact "squandering" his mother's assets.[420] The attorney-in-fact owed his mother a duty of loyalty.[421] An attorney-in-fact is generally prohibited from using his fiduciary relationship to benefit his personal interest, except with the principal's full knowledge and consent.[422] The jury chose not to believe the attorney-in-fact's explanation for the questioned transactions.[423]

---

[411] *Id.*

[412] *Id.*

[413] *Id.* at *2–3.

[414] *Id.* at *2.

[415] *Id.* at *6.

[416] *Id.* at *1.

[417] *Id.* at *3.

[418] *Id.*

[419] *Id.* at *4.

[420] *Id.*

[421] *See id.* at *2.

[422] *Id.*

[423] *Id.* at *6.

e. The Duty of Care

Actual damages may also be sought against the attorney-in-fact for breaching the duty of care.[424] Some scholars have argued that the duty of care is technically not a fiduciary duty.[425] In any event, under common-law agency principles an agent must fulfill its duties with reasonable care, diligence, good faith, and judgment, and if it fails to do so, it will be liable to its principal for the resulting damage.[426] Even when the exercise of an agent's duties is placed in the agent's absolute discretion, the agent still must use good faith and act reasonably in the discharge of them.[427]

Litigation involving durable powers of attorney may more frequently involve "duty of care" claims as opposed to "duty of loyalty" (self-dealing) claims, as more and more adult children find themselves serving as attorneys-in-fact without fully understanding their legal duties and limitations. Many attorneys-in-fact do not seek legal advice as to how to best serve as a fiduciary. The attorney-in-fact operating in this environment is susceptible to his siblings' claims that he mismanaged, wasted, or failed to properly invest mom's or dad's assets.[428] Paying the principal's debts and expenses inherently involves depleting the principal's resources, which may frustrate the principal's estate plan and expose the attorney-in-fact to significant liability.[429]

---

[424] *See* William A. Gregory, *The Fiduciary Duty of Care: A Perversion of Words*, 38 AKRON L. REV. 181, 181–82 n.5 (2005) (explaining an agent owes its principal a duty of loyalty as a well as a duty of care (citing RESTATEMENT (SECOND) OF AGENCY § 379 (1958))).

[425] *Id.* at 183 ("The problem is that a duty of care is not a fiduciary duty. . . . To describe negligent acts as being breaches of fiduciary duty is misleading, because a breach of fiduciary duty 'connotes disloyalty or infidelity. Mere incompetence is not enough.'"); *see also, e.g.*, Duerr v. Brown, 262 S.W.3d 63, 71 (Tex. App.—Houston [14th Dist.] 2008, no pet.) ("A legal malpractice claim focuses on whether an attorney represented a client with the requisite level of skill, while a breach of fiduciary duty claim encompasses whether an attorney obtained an improper benefit from the representation." (citing Aiken v. Hancock, 115 S.W.3d 26, 28 (Tex. App.—San Antonio 2003, pet. denied))).

[426] Sassen v. Tanglegrove Townhouse Condo. Ass'n, 877 S.W.2d 489, 492 (Tex. App.—Texarkana 1994, writ denied) (citing RESTATEMENT (SECOND) OF AGENCY § 401 (1958)); *see also* 3 Tex. Jur. 3d *Agency* §§ 115, 127 (2004); *see also* 3 AM JUR. 2D *Agency* § 215 (1986).

[427] *Sassen*, 877 S.W.2d at 492.

[428] *See* LeDoux v. LeDoux, No. 09-97-024-CV, 1998 WL 542733, at *1 (Tex. App.—Beaumont Aug. 27, 1998, pet. denied) (mem. op.) (not designated for publication).

[429] One legal commentator recommends that agents take the following steps once they assume their duties:

> (1) Prepare a formal inventory of all assets belonging to the principal, their values, and

Breaching the duty to act in good faith, with fair dealing, and with reasonable care, skill, and diligence (e.g., by acting arbitrary, capricious, or discriminatory) will support the award of actual damages.[430]

2. Profit Disgorgement

Texas courts have applied the remedy of "profit disgorgement" to remedy a breach of fiduciary duty.[431] This remedy is grounded in the concept that a fiduciary may not use his position to gain any benefit for

---

whether or not each asset is held as a right of survivorship, P.O.D., or i/t/f (in trust for; a Totten trust) account, and if there is a beneficiary designated by the principal (for life insurance and retirement benefit purposes)[;]

(2) Calculate the fraction that each nontestamentary asset bears to the entire estate[;]

(3) Pay expenses in the following order:

(i) in the same order that bequests would be abated under Texas Probate Code § 322B: personal property of the residuary estate; real property of the residuary estate; general bequests of personal property; general devises of real property; specific devises of personal property; and specific devises of real property; then

(ii) from non-testamentary dispositions, on a pro rata basis.

If there is not enough liquidity in the types of assets set forth in (i), then pay expenses from the non-testamentary dispositions, but keep track so that the executor can reimburse the non-testamentary accounts at a later time.

Or, alternatively, pay expenses on a purely proportionate basis. Keeping track will allow adjustments to be made after death. (This alternative is certainly easier to manage.)

[The decedent may have never expressed that he or she] wanted [his or her] assets to be spent in a certain order. Obviously, this is not going to present a problem if all the beneficiaries of the decedent are treated equally (or all the property goes to one person, like the spouse), but [this] will create a problem when the beneficiaries of non-testamentary assets differ from the beneficiaries of the probate estate.

Kathleen Ford Bay, *Drafting Powers of Attorney: Fiduciary and Other Issues Regarding a Financial Power of Attorney*, 11th ANNUAL ESTATE PLANNING, GUARDIANSHIP, AND ELDER LAW CONFERENCE, UNIVERSITY OF TEXAS SCHOOL OF LAW, at 30 (2009).

[430] *Sassen*, 877 S.W.2d at 493. The court found that the condominium association had breached its fiduciary duties to the owner under a power of attorney created in the declarations by failing to properly oversee repairs. The condominium owner was entitled to $35,000 (the reasonable cost to make repairs), which represented the actual damages suffered by the owner resulting from the fiduciary's negligent and arbitrary performance of its duties.

[431] ERI Consulting Eng'rs, Inc. v. Swinnea, 318 S.W.3d 867, 873 (Tex. 2010).

himself at the expense of his principal.[432] Courts may disgorge all ill-gotten profits from a fiduciary when a fiduciary agent usurps an opportunity properly belonging to a principal or competes with a principal.[433] Profit disgorgement illustrates how courts can utilize remedies for breach of fiduciary duty that go beyond compensating the principal.[434] "Unlike contract remedies that aim to put the aggrieved party in the same position as he would have been in absent the breach, the disgorgement remedy's goal is to put the fiduciary-wrongdoer in the same position she would have occupied had she not breached her duties."[435] As a result, the principal need not prove damages to be entitled to profit disgorgement.[436]

"A fiduciary must account for, and yield to the beneficiary, any profit he makes as a result of his breach of fiduciary duty."[437] The breach of numerous fiduciary duties will support the right to profit disgorgement, including the duty of full disclosure and the duty of fair dealing.[438]

3. Fee Forfeiture

While the Texas Probate Code authorizes the attorney-in-fact to be reimbursed for expenses incurred, the Code does not expressly authorize

---

[432] Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business, Consumer, Insurance, & Employment* PJC 115.16 (2010) (citing Schiller v. Elick, 240 S.W.2d 997, 999, 1001 (Tex. 1951) (affirming trial court's judgment that plaintiff was entitled to recover the minerals and money damages when fiduciary breached the duty of disclosure when procuring the minerals) (in turn citing Johnson v. Peckham, 120 S.W.2d 786, 788 (Tex. 1938)); Quinn v. Davis, 26 F.2d 80, 81 (5th Cir. 1928)); *see also* RESTATEMENT (THIRD) OF AGENCY §§ 8.01 cmt. d(1), 8.02, 8.06 (2006).

[433] *ERI Consulting Eng'rs, Inc.*, 318 S.W.3d at 873 (citing Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 200 (Tex. 2002) (courts may disgorge any profit where an agent diverted an opportunity from the principal or engaged in competition with the principal, and the agent or an entity controlled by the agent profited or benefited in some way)).

[434] Boxx, *supra* note 14, at 18.

[435] *Id.*

[436] *See* Daniel v. Falcon Interest Realty Corp., 190 S.W.3d 177, 186–87 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (rejecting argument that profit disgorgement was improper where party to whom fiduciary duty was owed allegedly benefited from fiduciary's action) (citing Kinzbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509, 514 (Tex. 1942)).

[437] *Id.* at 187.

[438] *See id.* at 185 (affirming trial court's judgment disgorging fiduciary subcontractor's profit made as a result of failing to disclose to general contractor side deal which personally benefited fiduciary).

compensation to the attorney-in-fact.[439] While fee forfeiture is often not applicable in cases involving powers of attorney, more and more powers contain compensation provisions.[440] An argument exists then that if the power of attorney does not expressly authorize compensation, the attorney-in-fact will not be entitled to a fee for serving.[441] Powers of attorney are strictly construed.[442] The nature and extent of the attorney-in-fact's authority must be ascertained from the instrument itself.[443] On the other hand, other states have allowed agents to be compensated—even without express authorization in the agency instrument—on the basis of an implied promise.[444] To clarify any uncertainty, the principal should state whether the agent is to be compensated for his or her services.[445] Many Texas powers of attorney now contain provisions allowing compensation.[446]

[439] TEX. PROB. CODE ANN. § 491(10) (West 2003).

[440] *See, e.g.*, *id.* § 241 (allowing for compensation for personal representatives).

[441] *See* 3 Tex. Jur. 3d *Agency* § 64 (2004) ("Thus, for purposes of interpreting a power of attorney, the meaning of general words in the instrument will be restricted by the context and construed accordingly.").

[442] Gouldy v. Metcalf, 12 S.W. 830, 831 (Tex. 1889).

[443] *Id.*

[444] *See* 3 AM. JUR. 2D *Agency* § 247 (citing Pennsylvania, Tennessee and Colorado cases).

[445] Beyer, *supra* note 19, at 320 ("Possible compensation methods include (1) hourly rate, (2) reference to corporate trustee fee schedules, and (3) percentage of income agent earns on the property."); *see also* David P. Stanush, *Agents, Principals, (Attorneys) and Durable Powers of Attorney—A Love Hate Relationship*, 27th Annual Advanced Estate Planning and Probate Course, Chapter 32, at 15 (2003), (citing Collin et al., *Durable Powers of Attorney and Health Care Directives*, § 5.04 (4th ed. 2010) (commentaries on the law of powers of attorney in all states) ("A 1984 survey by the American College of Trust and Estate Counsel reports that only four states have specific rules relating to compensation. Four others apparently do not allow compensation if the power is silent or there is no other agreement relating to compensation. All of the other states apparently have a judicial rule of reasonableness, which is at best uncertain. Since uncertainty in any instrument should be avoided, it would be better to spell out the agreement of the parties regarding compensation.")).

[446] *See, e.g.*, 4 ALOYSIUS A. LEOPOLD, TEXAS PRACTICE SERIES: LAND TITLES AND TITLE EXAMINATION § 22.20 (3d ed. 2005) (noting that "[m]any powers of attorney are based on services to be rendered").

The attorney-in-fact may have to forfeit his compensation where he has committed a breach of fiduciary duty:[447]

> An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a willful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned.[448]

A party need not prove actual injury and causation when a party seeks to forfeit some portion of a fiduciary's fees in connection with a breach of fiduciary duty:

> A fiduciary cannot say to the one to whom he bears such relationship: You have sustained no loss by my misconduct in receiving a commission from a party opposite to you, and therefore you are without remedy. It would be a dangerous precedent for us to say that unless some affirmative loss can be shown, the person who has violated his fiduciary relationship with another may hold on to any secret gain or benefit he may have thereby acquired. It is the law that in such instances if the fiduciary "takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust, and a breach of confidence, and he must account to his principal for all he has received."[449]

Fee forfeiture is a type of punishment: "The main purpose of fee forfeiture is not to compensate an injured principal. . . . Rather, the central purpose . . . is to protect relationships of trust and confidence by

[447] Hartford Cas. Ins. Co. v. Walker Cnty. Agency, Inc., 808 S.W.2d 681, 687–88 (Tex. App.—Corpus Christi 1991, no writ) (citing Douglas v. Aztec Petroleum Corp., 695 S.W.2d 312, 319 (Tex. App.—Tyler 1985, no writ)).

[448] Burrow v. Arce, 997 S.W.2d 229, 237 (Tex. 1999) (quoting RESTATEMENT (SECOND) OF AGENCY § 469 (1958)).

[449] Kinzbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509, 514 (Tex. 1942) (quoting United States v. Carter, 217 U.S. 286, 306 (1910)).

discouraging agents' disloyalty."[450] The remedy, however, is not automatic.[451] Even when forfeiture is appropriate, it may be partial.[452]

Like profit disgorgement, a party is not required to prove injury and causation where the party seeks fee forfeiture.[453] The breach of the duty of disclosure will support the right to fee forfeiture.[454] The extent to which the fee is forfeited will depend on the gravity of the breach.[455]

4. Punitive Damages

Punitive damages are recoverable for the breach of fiduciary duty existing in an agency relationship.[456] Generally, exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which it seeks recovery of exemplary damages results from fraud, malice, or gross negligence.[457] If the claimant relies on a statute authorizing exemplary damages in conjunction with a specified culpable mental state, exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the damages resulted from the specified circumstances or culpable mental state.[458] Although the

[450] ERI Consulting Eng'rs, Inc. v. Swinnea, 318 S.W.3d 867, 872–73 (Tex. 2010) (quoting *Burrow*, 997 S.W.2d at 238).

[451] *Burrow*, 997 S.W.2d at 241 (discussing RESTATEMENT (SECOND) OF AGENCY § 469 (1958)).

[452] *Id.* ("It would be inequitable for an agent who had performed extensive services faithfully to be denied all compensation for some slight, inadvertent misconduct that left the principal unharmed, and the threat of so drastic a result would unnecessarily and perhaps detrimentally burden the agent's exercise of judgment in conducting the principal's affairs.").

[453] Si Kyu Kim v. Harstan, Ltd., 286 S.W.3d 629, 635 n.1 (Tex. App.—El Paso 2009, pet. denied) (citing *Burrow*, 997 S.W.2d at 240); Longaker v. Evans, 32 S.W.3d 725, 733 n.2 (Tex. App.—San Antonio 2000, pet. withdrawn pursuant to settlement).

[454] *See Kinzbach Tool Co.*, 160 S.W.2d at 514; *see also* Russell v. Truitt, 554 S.W.2d 948, 952 (Tex. App.—Fort Worth 1977, writ ref'd n.r.e.) (dealing with secret deals between joint venturers).

[455] *Burrow*, 997 S.W.2d at 241.

[456] *See* Hartford Cas. Ins. Co. v. Walker Cnty. Agency, Inc., 808 S.W.2d 681, 688 (Tex. App.—Corpus Christi 1991, no writ) (citing Douglas v. Aztec Petroleum Corp., 695 S.W.2d 312, 319 (Tex. App.—Tyler 1985, no writ)).

[457] TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a) (West Supp. 2011).

[458] *Id.* § 41.003(c); *see* Estate of Preston, 346 S.W.3d 137, 168 (Tex. App.—Fort Worth 2011, no pet.) (explaining that clear and convincing evidence is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established); TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(2). This intermediate standard falls between the preponderance standard of civil proceedings and the

fiduciary's actual motives are immaterial, more than a simple breach of fiduciary duty is required to recover punitive damages—the acts constituting the breach must be fraudulent or at least intentional.[459] An intentional breach of fiduciary duty exists where the fiduciary intends to gain an additional benefit for himself[460] (i.e., in cases involving self-dealing).[461]

Generally, to recover punitive damages for tort claims, actual damages must be awarded.[462] Punitive damages may, however, be recoverable in equitable actions even where typical actual damages are not awarded[463]:

> It is consistent with equitable principles for equity to exact of a defaulting corporate fiduciary not only the profits rightfully belonging to the corporation but an additional exaction for unconscionable conduct. There should be a deterrent to conduct which equity condemns and for which it will grant relief.[464]

In addition, punitive damages are recoverable where equity requires property to be returned.[465] "Where equity requires the return of property, this 'recovery of the consideration paid as a result of fraud constitutes actual damages and will serve as a basis for the recovery of exemplary damages.'"[466]

---

reasonable doubt standard of criminal proceedings. *In re* G.M., 596 S.W.2d 846, 847 (Tex. 1980); State v. Addington, 588 S.W.2d 569, 570 (Tex. 1979).

[459] Lesikar v. Rappeport, 33 S.W.3d 282, 311 (Tex. App.—Texarkana 2000, pet. denied); *see also* Brosseau v. Ranzau, 81 S.W.3d 381, 396 (Tex. App.—Beaumont 2002, pet. denied) ("The 'intent' issue concerning exemplary damages for breach of fiduciary duty is whether the one with a fiduciary duty intended to gain an additional unwarranted benefit." (citing Cheek v. Humphreys, 800 S.W.2d 596, 599 (Tex. App.—Houston [14th Dist.] 1990, writ denied))).

[460] *Lesikar*, 33 S.W.3d at 311 (citing Int'l Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 583–84 (Tex. 1963)).

[461] *Id.* (citing Tex. Bank & Trust Co. v. Moore, 595 S.W.2d 502, 507 (Tex. 1980)).

[462] *Lesikar*, 33 S.W.3d at 310; *see also* Jim Walter Homes, Inc. v. Reed, 711 S.W.2d 617, 618 (Tex. 1986).

[463] *Lesikar*, 33 S.W.3d at 310; *see also* Nabours v. Longview Sav. & Loan Ass'n, 700 S.W.2d 901, 904 n.3 (Tex. 1985); *Int'l Bankers Life Ins. Co.*, 368 S.W.2d at 584.

[464] *Lesikar*, S.W.3d at 310 (quoting *Int'l Bankers Life Ins. Co.*, 368 S.W.2d at 584).

[465] *Id.*

[466] *Id.*; *see Nabours*, 700 S.W.2d at 904 (quoting *Int'l Bankers Life Ins. Co.*, 368 S.W.2d at 583); *see also* ProCom Energy, L.L.A. v. Roach, 16 S.W.3d 377, 385 (Tex. App.—Tyler 2000, no pet.) (finding that a lack of finding of actual damages did not preclude an award of punitive damages where constructive trust was obtained).

In determining the amount of exemplary damages, the trier of fact shall consider evidence, if any, relating to: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; (5) the extent to which such conduct offends a public sense of justice and propriety; and (6) the net worth of the defendant.[467]

5. Attorney's Fees

Generally, a prevailing party cannot recover attorney's fees from an opposing party unless permitted by statute, by a contract between the parties, or under equity.[468] Attorney's fees are not available for a breach-of-fiduciary-duty claim.[469] Attorney's fees may, however, be recoverable from the principal's estate to the extent a guardianship is sought.[470] Attorney's fees may also be considered as a component of a punitive damage award.[471] In many cases, litigants seek to impose liability on the attorney-in-fact by pleading additional causes of action that may provide the basis for attorney's fees.[472]

A prevailing party must generally segregate recoverable from unrecoverable attorney's fees.[473] A prevailing party is not excused from segregating fees simply because there are intertwined facts underlying claims for which attorney's fees are recoverable and unrecoverable—"it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be

[467] TEX. CIV. PRAC. & REM. CODE ANN. § 41.011 (West 2008).

[468] O'CONNOR, *supra* note 378, § 3.6 (citing Holland v. Wal-Mart Stores, Inc., 1 S.W.3d 91, 95 (Tex. 1999) and Knebel v. Capital Nat'l Bank, 518 S.W.2d 795, 799 (Tex. 1974)).

[469] W. Reserve Life Assurance Co. v. Graben, 233 S.W.3d 360, 377–78 (Tex. App.—Fort Worth 2007, no pet.) (holding trial court erred by awarding attorney's fees on breach-of-fiduciary-duty claim involving confidential relationship (citing Hooks v. Hooks, No. 2-03-263-CV, 2004 WL 1635838, at *2 (Tex. App.—Fort Worth July 22, 2004, no pet.) (mem. op.) (in turn citing Musquiz v. Marroquin, 124 S.W.3d 906, 913 (Tex. App.—Corpus Christi 2004, pet. denied)))).

[470] TEX. PROB. CODE ANN. §§ 665B, 875 (West Supp. 2011).

[471] *See* Cantu v. Butron, 921 S.W.2d 344, 354 (Tex. App.—Corpus Christi 1996, writ denied).

[472] *See, e.g.*, Lesikar v. Rappeport, 33 S.W.3d 282, 311 (Tex. App.—Texarkana 2000, pet. denied) (explaining that while a breach of duty alone would not support punitive damages, plaintiffs were entitled to punitive damages because they had plead facts showing fraud).

[473] *In re* Estate of Johnson, 340 S.W.3d 769, 789–90 (Tex. App.—San Antonio 2011, no pet.) (citing Varner v. Cardenas, 218 S.W.3d 68, 69 (Tex. 2007) (per curiam) (stating that *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006), holds "a prevailing party must segregate recoverable from unrecoverable attorney's fees in all cases")).

segregated."[474] In other words, a party must segregate its fees unless it can establish that the same discrete legal services were rendered with respect to both a recoverable and unrecoverable claim.[475]

Declaratory relief is commonly sought in cases involving powers of attorney. The Texas Civil Practices and Remedies Code § 37.004 states:

> A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.[476]

The Declaratory Judgments Act may provide a basis to recover attorney's fees in litigation involving a durable power of attorney under a variety of factual scenarios.[477] In many cases, the document evidencing the alleged self-dealing transaction, such as a deed, account agreement, or other payable-on-death beneficiary designation, is the subject of dispute.[478] Declaratory relief may be appropriate where there is a question about whether the attorney-in-fact had the authority to take a certain action.[479] The Declaratory Judgments Act, however, cannot be used as a vehicle to obtain attorney's fees that are not otherwise recoverable.[480]

---

[474] *Id.* at 790 (citing *Chapa*, 212 S.W.3d at 313–14).

[475] *Id.* (citing *Chapa*, 212 S.W.3d at 313–14; Hong Kong Dev., Inc. v. Nguyen, 229 S.W.3d 415, 455 (Tex. App.—Houston [1st Dist.] 2007, no pet.)).

[476] TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a) (West 2008).

[477] *See id.* § 37.009 (allowing for reasonable and equitable attorney's fees for any proceeding, so long as they are equitable and just).

[478] *See* Cooper v. Cochran, 288 S.W.3d 522, 529–30 (Tex. App.—Dallas 2009, no pet.) (finding that trust created was fraudulent and requiring defendant to pay attorney's fees).

[479] *See* Bocquet v. Herring, 972 S.W.2d 19, 21 (Tex. 1998).

[480] MBM Fin. Corp. v. Woodlands Operating Co., 292 S.W.3d 660, 669 (Tex. 2009) (explaining that a party who failed to recover attorney's fees for breach of contract was not entitled to recover attorney's fees when declarations sought were merely duplicative to issues raised by fraud and contract claims).

B. Remedies Reviewed

The combinations and types of damages that result from an attorney-in-fact's breach of his fiduciary duties are almost endless. Many times, more than one remedy will address a single breach of fiduciary duty.[481] The breach of the fiduciary duty may manifest itself over numerous transactions, with each occurrence resulting in a different harm to the principal or benefit to the attorney-in-fact.[482] Under the "one satisfaction rule," the principal may be forced to elect which remedy to pursue to ensure that more than one recovery for the same injury is not obtained.[483] Where the prevailing party fails to elect between alternative measures of damages, the court should use the findings that afford the greater recovery and render judgment accordingly.[484] Whatever the injury, the principal has numerous remedies at his disposal.

The elements of a cause of action for breach of fiduciary duty have a unique application. In many cases, the principal does not have to prove all the elements to obtain relief.[485] Fee forfeiture does not require proof of causation or a showing of damages.[486] Similarly, profit disgorgement does not require the principal to have suffered actual damages, and punitive damages are available when the principal establishes the right to these equitable remedies.[487]

VIII. CONCLUSION

To win the battle *and* the war in litigation involving a power of attorney, an attorney-in-fact's fiduciary duties must be deliberately and emphatically connected to the remedies that result from their breach. Understanding

[481] *E.g.*, Skaggs v. Guerra, 704 S.W.2d 51,56 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.) (explaining that if damages, as well as rescission, are essential to accomplish full justice, they will both be allowed); RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. d (2006).

[482] W. Reserve Life Assurance Co. v. Graben, 233 S.W.3d 360, 377 (Tex. App.—Fort Worth 2007, no pet.) (upholding a finding of breach of duty for multiple investment recommendations).

[483] *Id.* at 377 (citing Waite Hill Servs., Inc. v. World Class Metal Works, Inc., 959 S.W.2d 182, 184 (Tex. 1998)).

[484] Lesikar v. Rappeport, 33 S.W.3d 282, 304 (Tex. App.—Texarkana 2000, pet. denied) (citing Birchfield v. Texarkana Mem'l Hosp., 747 S.W.2d 361, 367 (Tex. 1987)).

[485] *See, e.g.*, Burrow v. Arce, 997 S.W.2d 229, 240 (Tex. 1999); Kinzbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509, 514 (Tex. 1942); ProCom Energy, L.L.A. v. Roach, 16 S.W.3d 377, 385 (Tex. App.—Tyler 2000, no pet.).

[486] *See Burrow*, 997 S.W.2d at 240.

[487] *Kinzbach Tool Co.*, 160 S.W.2d at 514; *ProCom Energy, L.L.A.*, 16 S.W.3d at 385.

what courts can and will do where the attorney-in-fact has breached a particular duty provides a significant tactical advantage. Perhaps no other method serves as a more powerful incentive to induce settlement than a well-drafted petition or motion for summary judgment that clearly outlines the consequences of the attorney-in-fact's actions and his or her personal exposure.

To win the war, it is essential to win the right battles quickly and efficiently. Aggressively pursuing information concerning the principal's assets, identifying the remedies that will most effectively restore the loss, and focusing on the breaches that best support those remedies provide the best chance of winning both the early battles *and* the war.