

ISSUES RELATED TO REMOTE BENEFICIARIES

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SPEECHES AND PUBLICATIONS

Exculpatory Clauses, Co-Author Lauren K. Davis, State Bar, Trial of a Fiduciary Litigation Case, December 2009.

Between the Deaths: Planning and Administrative Challenges, Advanced Estate Planning Course, Santa Fe April 2008

Utilizing Disclosure Rules to Obtain Discovery in Trust Litigation, Tarrant County Probate Litigation Seminar, Fort Worth, September 2008 Fort Worth

Role of Guardian Ad Litem in a Trust Case. Texas Bar CLE 13th Annual Advanced Estate Planning Strategies Course, 2007

Trustee Duties and Fiduciary Litigation, Recent Developments In Trust Law. Dallas Bar Association, May 2006.

Fiduciary Liability and Litigation: Are you a Target? Texas Bankers Association Advanced Trust Forum, November 2005.

Recent Developments in Trust Litigation, Tri County Bar Association, January 2005.

Fiduciary Litigation, Dallas Estate Planning Council, September 2004.

Fiduciary Litigation, Executors & Trustees, Fiduciary Litigation Seminar, May 2004.

Negotiating Fee Contracts and Recovering Fees in Fiduciary Litigation, Advanced Estate Planning Strategies, April 2004.

Trust Litigation in Texas, Second Annual Probate Litigation Seminar, October 2003.

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Negotiating Fee Contracts and Recovering Fees in Fiduciary Litigation, Travis County Bar Association, January 2003.

The Nuts and Bolts of Fiduciary Responsibility and Risk Management, Texas Banker's Association Personal Trust Seminar, December 2002.

Negotiating Fee Contracts and Recovering Fees in Fiduciary Litigation, Dallas Bar Association, November 2002.

Discretionary Distributions, 26th Annual Estate Planning & Probate Course, 2002.

Trust Litigation in Texas, Texas Society of CPA's Estate Planning and Probate Seminar, August 2002.

Trust Litigation in Texas, Tarrant County Probate Assoc. Litigation Seminar, 2002.

Specialty Drafting Regarding the Fiduciary, Travis County Bar Association, Probate and Estate Planning Seminar, March 2001.

Fiduciary Duties: What are They and How to Modify Them, Texas Banker's Association Estate Administration Seminar, October 2000.

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ISSUES RELATED TO REMOTE BENEFICIARIES

I. INTRODUCTION

This paper deals with trust litigation initiated by remote beneficiaries of trusts¹. It deals with a trustee's duty of disclosure to remote beneficiaries, as well as the standing of a remote beneficiary to initiate legal proceedings against the trustee for a statutory accounting and/or breach of trust.

While it is clear that some beneficiary must be able to represent the potentially conflicting interests of both the income and remainder beneficiaries in connection with the administration of a trust - the issue dealt with in this paper is whether remote remainder beneficiaries have standing to represent these interests if non-conflicted beneficiaries with preferential interests in the trust have standing to assert them.

Assume that an irrevocable trust provides for the net income to be distributed to A until the first to occur of his death or his fiftieth birthday, at which time the trust terminates and the trust estate is distributable to A, if he is living, or, if A is not then living, then to A's then living lineal descendants, per stirpes, or if A has no lineal descendants then living, then to A's heirs at law.

Assume that A has two adult children, C1 and C2; that C1 has two adult children, GC1 and GC2; and that C2 has one minor child, GC3. Finally, assume that A's great, great grandmother has a great grandchild, Z, who would be A's heir at law if he were to die without descendants surviving him. It is clear that, under the broad definition contained in the Texas Trust Code all of the above designated persons would be "beneficiaries" of the trust.

There are additional factors that may affect the rights and standing of the above designated beneficiaries, which include:

- 1.1. Whether A possesses the power to modify or revoke the trust;
- 1.2. Whether A possesses (and has exercised) an inter vivos general power of appointment over either:
 - 1.2.1. his equitable interest in the trust (*i.e.* power of appointment over his income or remainder interest but not the actual assets in the trust estate); or
 - 1.2.2. the trust estate of the trust (*i.e.* power of appointment over the actual assets

in the trust estate but not the income or remainder interest);

- 1.3. Whether A possesses (and has exercised) a testamentary general power of appointment over either:
 - 1.3.1. his equitable interest in the trust (*i.e.* power of appointment over his income or remainder interest but not the actual assets in the trust estate); or
 - 1.3.2. the trust estate of the trust (*i.e.* power of appointment over the actual assets in the trust estate but not the income or remainder interest);
- 1.4. Whether the terms of the trust provide that a particular class of beneficiary does not have standing to receive disclosure or institute legal action against the trustee.

This paper addresses: (1) the obligations of the trustee of the trust to disclose information to remote contingent beneficiaries; (2) the standing of remote contingent beneficiaries to compel the trustee to provide them with a statutory trust accounting; (3) the standing of remote contingent beneficiaries to prosecute a claim or cause of action against the trustee for breach of trust; and (4) the rights and remedies of other trust beneficiaries and trustees who are damaged by lawsuits improperly filed by remote contingent beneficiaries.

II. THE DUTY TO DISCLOSE

A. Duty To Disclose In Texas

a. The Common Law:

A trustee has a duty to disclose information to trust beneficiaries. The duty to disclose consists of three separate components: (1) the duty to disclose information regardless of a request by a beneficiary; (2) the duty to disclose information specifically requested by a beneficiary; and (3) the duty to allow a beneficiary to examine the books and records of the trust².

A trustee's general common law duty to disclose information to a beneficiary is specifically addressed in three important Texas trust cases: *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996); *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984); and *Shannon v. Frost National Bank of San Antonio*, 533 S.W.2d 389 (Tex.

²See Ikard, *Trustee's Duties To Disclose Information To Beneficiaries*, 32nd Annual Advanced Estate Planning and Probate Course, Dallas, Texas June 11-13, 2008.

¹ Usually remote contingent beneficiaries.

Civ. App. - San Antonio 1975, writ ref'd n.r.e.).³ The rule was clearly stated in *DeShazo* when the court held that trustees and executors owe beneficiaries a fiduciary duty of full disclosure of all material facts known to them that might affect the beneficiary's rights:

A trustee has the fiduciary duty, without any demand, to disclose to the beneficiaries all material facts known to the trustee that might affect the beneficiaries' rights. *DeShazo*, 922 S.W.2d 920; *Montgomery*, 669 S.W.2d 309, *Kinzbach v. Corbett-Wallace Corp.*, 160 S.W.2d 509 (Tex. 1942); *Shannon*, 533 S.W.2d 389; Restatement (Third) of Trusts § 82 (2007); Bogert, *The Law of Trusts and Trustees* § 961 (2d ed. rev. 1983).

The breach of the duty of full disclosure by a fiduciary is tantamount to **fraudulent concealment**. *Willis v. Maverick*, 760 S.W.2d 642 (Tex. 1988). The beneficiary is not required to prove the elements of fraud, and need not even prove that he relied on the fiduciary to disclose the information. *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1965); *Langford v. Shamburger*, 417 S.W.2d 438 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.); *Johnson v. Peckham*, 120 S.W.2d 786 (Tex. 1938); *Miller v. Miller*, 700 S.W.2d 941 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

The trustee's duty of full disclosure extends to all *material facts* affecting the beneficiaries' rights. This duty exists independently of the rules of discovery, applying even if no litigious dispute exists between the trustee and the beneficiaries. *Huie*, 922 S.W.2d at 923.

A trustee is under a common law duty to allow a beneficiary, on demand, to inspect the non-privileged books and records of the trust, as long as such request is reasonable. Restatement (Third) of Trusts § 82 (2007); Scott and Ascher on Trusts § 17.5 (5th ed. 2007); and Bogert, *The Law of Trusts and Trustees* § 961 (2d ed. rev. 1983).

There are no Texas cases specifically explaining how far down the contingent beneficiary line this duty goes. Simply stated, Texas courts have not established any meaningful test relating to disclosure to remote beneficiaries.

b. Texas Trust Code:

In 2005, the Texas Legislature enacted Tex. Prop. Code § 113.060, which provided that a trustee had the duty to keep beneficiaries informed.

However, in 2007, § 113.060 was repealed. When repealing this section, the Legislature provided that:

The enactment of Section 113.060 [in 2005]... was not intended to repeal any common law duty to keep a beneficiary of a trust reasonably informed, and the repeal by this Act of Section 113.060, Property Code, does not repeal any common-law duty to keep a beneficiary informed. The common-law duty to keep a beneficiary informed that existed immediately before January 1, 2006, is continued in effect. Section 22 of Acts 2007, 80th Leg., Ch. 451.

Therefore, the Texas Trust Code no longer contains disclosure provisions.

Conclusion:

The Texas Supreme Court has not promulgated a definition of the word "beneficiary." None of the reported cases in Texas establishing trustee's disclosure duties specifically deal with disclosure to remote beneficiaries. Each of the reported disclosure cases deal with disclosure to beneficiaries who are current, vested beneficiaries of the fiduciary relationship. This area of the law is still emerging.

B. Trust Treatises On Duty To Disclose To Remote Beneficiaries:

One would hope that the major trust treatises would be helpful in ascertaining the extent that there is a common law duty to disclose information to remote trust beneficiaries. It is clear that the treatment of the issue has evolved over time, but unfortunately, there is still not a clear standard on the issue.

a. Bogert

In 1983, Bogert, *The Law of Trusts and Trustees* § 961 (2d ed. rev. 1983) was one of the first treatises to recognize that remote beneficiaries may not be entitled to disclosure of information. Section 961 provides, in part, that:

There is some authority to the effect that in the absence of a contrary provision in the trust instrument or statute only current beneficiaries, those currently entitled to receive income or principal, are entitled to information from the trustee. Current beneficiaries would appear to include persons eligible to receive income or principal in the exercise of the trustee's discretion and may

³ See also: *Johnson v. Peckham*, 120 S.W.2d 786 (Tex. 1938); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509 (Tex. 1942); *City of Ft. Worth v. Pippen*, 439 S.W.2d 660 (Tex. 1969); and *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502 (Tex. 1980); Restatement (Second) of Trusts § 170 (1959); William F. Fratcher, *Scott on Trusts* § 170 (4th ed. 1987); George Gleason Bogert, *The Law of Trusts and Trustees* § 961 (2d ed. rev. 1983).

include remainder beneficiaries who have vested interests. This view is similar to one adopted by a majority of the states to the effect that only a beneficiary currently entitled to payment of trust income or principal may compel the trustee to render an account, although a contingent remainderman has standing to secure an account if he alleges and makes a case for mismanagement or waste of trust assets.

b. Scott

In 1987, *Scott on Trusts* § 173 (4th ed. 1987) stated the following on disclosure to beneficiaries:

Where a trust is created for several beneficiaries, each of them is entitled to information as to the trust. Where the trust is created in favor of successive beneficiaries, a beneficiary who has a future interest under the trust, as well as a beneficiary who is presently entitled to receive income, is entitled to such information, whether his interest is vested or contingent.

Twenty years later, *Scott and Ascher on Trusts* § 17.5 (5th ed. 2007) clearly begins with the language cited in § 173 above, but importantly expands upon such language, providing in part that:

When a trust is for the benefit of several beneficiaries, each is generally entitled to information about the trust. When the trust is in favor of successive beneficiaries, a beneficiary who has a future interest, as well as a beneficiary who is presently entitled to receive income, is ordinarily entitled to this information, whether the interest is vested or contingent, **though increasingly this is not true as to beneficiaries whose interests are subject to a right of revocation, a general power of appointment, or an unrestricted right of withdrawal.** (emphasis supplied)

The terms of the trust may regulate the amount of information the trustee is required to provide, as well as the frequency of its distribution. Likewise, though this is at the moment a matter of some controversy, it appears that the terms of the trust may, to some considerable extent, restrict the number of beneficiaries to whom the trustee is required to provide information. On the other hand, subject to very few exceptions, **all beneficiaries** are entitled to such information as is reasonably necessary to enable them to

enforce their rights or to obtain relief for a breach of trust.

c. Restatement of Trusts

The Restatement (Second) of Trusts § 173 (1959) generally provides that a trustee is under a duty to disclose to ~~the~~ beneficiary," upon request, information regarding the trust. However, the Restatement (Second) does not address the issue of what beneficiaries are entitled to such information. Comment *c* states that:

Although the terms of the trust may regulate the amount of information which the trustee must give and the frequency with which it must be given, the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust.

The Restatement (Third) of Trusts, published in 2007, greatly expanded upon the duty of disclosure to beneficiaries, and directly addresses the issue of disclosure to remote beneficiaries. Section 82 of the Restatement (Third) reflects the modern trend of restricting disclosure to remote beneficiaries and provides that:

§ 82 Duty to Furnish Information to Beneficiaries

- (1) Except as provided in § 74⁴ (revocable trusts) or as permissibly modified by the terms of the trust, a trustee has a duty:
 - (a) promptly to inform **fairly representative beneficiaries** of the existence of the trust, of their status as beneficiaries and their right to obtain further information, and of basic information concerning the trusteeship; (emphasis supplied)
 - (b) to inform beneficiaries of significant changes in their beneficiary status; and

⁴ § 74 provides in part that: "While a trust is revocable by the settlor and the settlor has capacity to act ... the rights of the beneficiaries are exercisable by and subject to the control of the settlor." This section further provides that: "To the extent that a trust is subject to a presently exercisable general power of appointment or power of withdrawal and the donee of the power has capacity to act, the donee has authority similar to the authority that the settlor of a revocable trust has under Subsection 1."

(c) to keep **fairly representative beneficiaries** reasonably informed of changes involving the trusteeship and about other significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests. (emphasis supplied)

(2) Except as provided in § 74 or as permissibly modified by the terms of the trust, a trustee also ordinarily has a duty promptly to respond to the request of any beneficiary for information concerning the trust and its administration, and to permit beneficiaries on a reasonable basis to inspect trust documents, records, and property holdings.

General Comment:

a. Duty in general; cross references.

The information requirements in this Section (§ 82) do not apply to revocable trusts while the settlor is alive and competent. ...

Subsection (1) of this Section calls for the trustee within a reasonable time to alert a cross section of the beneficiaries... to the existence of the trust and to give them certain initially useful information about it ... , and thereafter, if and as circumstances warrant ... to apprise various beneficiaries of significant information or developments to enable them to protect their interests. **Specifically, because differences in trust and beneficiary circumstances preclude imposing precise, universal rules in all these matters, the trustee's duty is to exercise reasonable judgment in deciding when, about what, and to whom information is to be provided under this subsection.** (emphasis supplied)

In addition, under Subsection (2), all beneficiaries (or their duly appointed representatives) are ordinarily entitled (but see

Comment *e* and §74), at reasonable hours and intervals, to inquire about the terms and asset holdings of the trust and about trust management and distributions (Comment *e*). This entitlement includes an associated right to examine trust accounts, other records, and tangible properties.

a(1) Fairly representative beneficiaries.

Language in Subsection (1) refers flexibly to "fairly representative" beneficiaries, balancing considerations of practicality for trustees and the importance in most trusts of reflecting the diversity of the beneficial interests and beneficiary concerns. Thus, the trustee's duty under this requirement is to make a good-faith effort to select and inform a limited number of beneficiaries whose interests and concerns appear fairly representative of - i.e., likely to coincide with - those of the trust's beneficiaries generally, thereby affording a reasonable opportunity for monitoring the trustee's duty of impartial ... as well as faithful, prudent ... administration of the trust.

A trustee's duty under Subsection (1) to provide information to fairly representative beneficiaries usually can be satisfied simply by providing the required information (i) to those beneficiaries who are then either entitled or eligible to receive distributions of income or principal and (ii) to those who would be entitled or eligible to receive distributions of income or principal if either the trust or current interests referred to in (i) above were then to terminate. ... (emphasis supplied)

Thus, over time, the treatises have recognized that a beneficiary's right to information is not as black and white as once stated.

d. Industry Standards Regarding Disclosure:

It is the author's understanding that corporate fiduciaries in Texas do not routinely disclose trust information or disseminate trust accountings to remote contingent beneficiaries who are not named in the trust.

e. The Ability of A Settlor to Waive The Common Law Duty of Disclosure to Remote Trust Beneficiaries:

The Texas Trust Code indirectly provides that the settlor of a trust may relieve a trustee of many disclosure requirements. Texas Trust Code §111.0035(c) (2009) provides that:

The terms of a trust may not limit any common-law duty to keep a beneficiary of an **irrevocable trust** who is 25 years of age or older informed at any time during which the beneficiary: (1) is entitled or permitted to receive distributions from the trust; or (2) would receive a distribution from the trust if the trust were terminated. (emphasis supplied)

Texas Trust Code § 111.0035(b) (2009) provides that the terms of the trust prevail over any provision of the Texas Trust Code, unless the Trust Code specifically provides otherwise. Thus, it is clear the provisions of a **revocable trust** may eliminate or modify any of the common law duties of disclosure.

It is also clear that the terms of an **irrevocable trust** may eliminate or modify any of the common law duties of disclosure with respect to: (1) beneficiaries younger than 25 years; and (2) beneficiaries of any age who are not entitled or permitted to receive distributions from the trust or who would not be entitled to receive distribution from the trust if the trust were terminated.

The problem is that Texas courts have not adequately defined the extent to which the common law duty of disclosure applies to these remote trust beneficiaries.

f. The Interrelation Between Texas Trust Code § 115.011 And A Trustee's Common Law Duty To Disclose:

A trustee has a common law duty to disclose information to certain beneficiaries. Regardless of how far this duty flows down the chain of remote contingent beneficiaries, in order to bring a lawsuit against a trustee for the breach of this duty, a beneficiary must be an "interested person" as such term is used in Texas Trust Code § 115.011 and as defined in Texas Trust Code § 111.004(7). See discussion below.

g. Conclusion:

The starting point is that Texas courts have not clearly defined the extent that the common law duty of disclosure applies to remote contingent beneficiaries. The *Restatement (Second) of Trusts* § 173 (1959) and William F. Fratcher, *Scott on Trusts* § 173 (4th ed. 1987) apparently make the common law duty apply to all trust beneficiaries no matter how remote.

This view has evolved through Bogert, *The Law of Trusts and Trustees* § 961 (2d ed. rev. 1983); the *Restatement (Third) of Trusts* § 82 (2007); and *Scott and Ascher on Trusts* § 17.5 (5th ed. 2007) to be much more restrictive.

The modern view seems to be as follows: (1) remainder beneficiaries of a revocable trust are not entitled to receive any information if the settlor is competent and does not want them to receive information; (2) the remainder beneficiaries of a trust where a beneficiary possesses a presently exercisable general power of appointment or power of withdrawal are not entitled to receive any information if the donee of the power does not want them to receive information; (3) any beneficiary, no matter how remote, is entitled to basic information regarding the trust (such as its existence, terms, and assets); and (4) the trustee of any other kind of trust is subject to general common law disclosure duties to fairly representative beneficiaries (who are (a) beneficiaries currently entitled to distribution of income or principal; (b) those who would be entitled or eligible to receive distributions of income of principal if either the trust or the preceding interests were to terminate; and (c) any other beneficiary who, in the discretion of the trustee, should receive information to protect the trust). It remains to be seen if Texas courts will adopt these common law rules.

It is also important to note that even if a common law disclosure duty applies to a remote contingent beneficiary, such a beneficiary would have to be an "interested person" under Texas Trust Code § 115.011 in order to prosecute a lawsuit against the trust for breach of this duty.

III. STANDING TO COMMENCE STATUTORY ACCOUNTING ACTIONS:

Section 113.151 (a) of the Texas Trust Code provides that a "beneficiary" may demand a statutory trust accounting. This statute provides, however, that, if the trustee fails to comply with the demand, "The court may require the trustee to deliver a [statutory accounting] to all beneficiaries upon finding that the nature of the beneficiary's interest is sufficient to require an accounting by the trustee." (emphasis supplied).

This section presents several interesting legal questions: (1) what does the court find? (2) Is the court only required to determine that the beneficiary

demanding the accounting has a "sufficient interest" in which case it is required to order that the accounting be provided to all beneficiaries no matter how remote? (3) does the court determine which members of the class of ~~all beneficiaries~~", as such term is defined by the code, are entitled to accountings?

Note that in order to enforce a statutory accounting demand, the court must find that: "the nature of the beneficiary's interest is sufficient to require an accounting by the trustee." What factors should the court consider to determine if the nature of the beneficiaries interest is sufficient?

The statute and cases give very little insight. In an ideal world, our courts would adopt uniform common law standards as to what interests would be sufficient (or, at least, what factors the court should consider). The author suggests that the same restrictions that apply to other forms of common law disclosure apply to the interest necessary to obtain an accounting. See the preceding discussion of the common law duty of disclosure.

It is the author's opinion that, regardless of what criteria the court should consider to determine whether a beneficiary's interest in the trust is sufficient to obtain an accounting, a beneficiary must meet the "interested person" requirements of Texas Trust Code § 115.011 in order to have standing to institute an action to compel an accounting. See the discussion of standing below.

IV. STANDING TO COMMENCE LEGAL ACTIONS:

Litigation against a trustee can be very expensive to all of the beneficiaries of the trust because all of the trustee's legal fees and litigation expenses (subject to ultimate resolution pursuant to Texas Trust Code § 114.064) are initially paid out of the trust estate of the trust. This type of litigation can also be very disruptive to the administration of the trust and the relationship of the parties involved.

There is a growing tendency for remote beneficiaries to either file harassing trust litigation or to "pile on" as additional parties in trust litigation to give the class of plaintiffs multiple status in the prosecution of trust litigation.

The author believes that at all times a beneficiary should be able to represent the income and remainder interests of the trust and should have standing to hold a trustee accountable for any breach of trust that affects either of these interests. The author also believes that there should be restrictions on a remote beneficiary who is virtually represented by another beneficiary to institute and/or prosecute trust litigation.

Texas Trust Code § 115.011 provides in part that:

"Any interested person may bring an action under Section 115.001 of this Act." Texas

Trust Code § 115.001 confers jurisdiction on certain courts over all proceedings "by or against a trustee and all proceedings concerning trusts..."

This section seems to govern a beneficiary's standing to sue a trustee for breach of any fiduciary duty (including, but not limited to, the disclosure duties set forth above) and/or to compel an accounting.

Texas Trust Code §111.004 (7) contains the definition of "interested person" and provides:

~~Interested person~~ means a trustee, beneficiary, or any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust. **Whether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding.** (emphasis supplied)

Texas Trust Code §111.004(2) contains the definition of "beneficiary" and provides that: "Beneficiary" means a person for whose benefit property is held in trust, regardless of the nature of the interest.

Texas Trust Code §111.004 (6) contains the definition of "interest" and provides that: "Interest" means any interest, whether legal or equitable or both, present or future, vested or contingent, defeasible or indefeasible.

Texas courts give little instruction regarding what factors should be considered in determining if a beneficiary is an "interested person" in the trust. There is, however, one reported case dealing with the standing of a remote beneficiary under Texas Trust Code § 115.011. In *Cote v. Bank One, Texas, N.A.*, No. 4:03-CV-296-A, 2003 WL 23194260 (N.D. Tex. Aug 01, 2003), the income beneficiary (Ms. Haltom) of a trust had a testamentary general power of appointment over the trust estate of the trust (the Haltom Trust). Ms. Haltom made a will exercising this power in favor of her two daughters (one of whom was the plaintiff). She subsequently signed an affidavit stating that she did not intend to change her will and that if she were to change it she did not intend to leave her residuary estate to anyone other than her two daughters. Shortly after her mother signed her will the plaintiff instituted litigation against the trustee of the trust.

The *Cote* court recognized that under Texas Trust Code § 115.011, any interested person may bring an action relating to trusts. It held, however, that:

However, Texas law is clear that a potential beneficiary of trust assets does not have

standing to sue: The possibility of inheritance does not create a present interest or right of title in property. A right to inherit does not vest until the death of the intestate ... One cannot maintain a suit for the enforcement or adjudication of a right in property that he expects to inherit, because he has no present right or interest in the property. *Davis v. Davis*, 734 S.W.2d 707, 709-10 (Tex. App. - Houston [14th Dist, 1987, writ ref'd n.r.e.) (internal citation omitted); see also, e.g. *Davis v. First Nat'l Bank*, 139 Tex. 36, 161 S.W.2d 467, 472 - 73 (Tex. 1942); *Clark v. Gauntt*, 138 Tex. 558, 161 S.W.2d 270, 272 (Tex. 1942)

While Mrs. Haltom's affidavit makes clear that Cote has a possibility of inheritance under her will, ... there is no certainty that [the plaintiff] will inherit. Mrs. Haltom could, despite her assertions to the contrary, elect to amend her will. Indeed, Mrs. Haltom executed her last will and testament on March 18, 2003, only four days after [the plaintiff] instituted this action ... Because [the plaintiff] does not have standing to pursue claims under the Haltom Trust, there is no possibility she can establish a cause of action against the [defendants] pursuant to their alleged involvement with the Haltom Trust.

Id. at *4.

The court clearly held that the donee of a testamentary power of appointment was not an interested person. What is the implication of this ruling on the beneficiaries who would take in default of the exercise of the power of appointment? Are they interested persons? If not, then who has standing to represent the interests of the remainder beneficiaries?

In the case of *Moon v. Lesikar*, 230 S.W.3d 800 (Tex. App. - Houston [14th Dist.] 2007, pet. denied) a Texas appellate court held for the first time that if the settlor of a revocable trust is also the sole beneficiary of the trust while alive and a trustee of the trust, then the settlor is the only person with standing to maintain an action concerning a trust under Texas Trust Code § 115.011. In this case a contingent remainder beneficiary attempted to sue the trustee for an alleged breach of trust that occurred while the settlor was alive. The court held that the remainder beneficiary "would appear to meet the definition of an interested person with standing to bring suit against a trustee for breach of fiduciary duty" but, because this was a revocable trust the traditional rules did not apply.

There are also cases holding that the standing of individuals to enforce a charitable trust depends on whether the trust is a public or private charity. *Gray v. Saint Matthews Cathedral Endowment Fund, Inc.*, 544 S.W.2d 488 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.). Persons having no special interest different from that of the general public have no standing to institute or maintain suit to enforce a public charitable trust. *Id.*

Another unresolved question is whether or not a beneficiary's standing to sue may be limited by the terms of a trust instrument. The author doubts that a provision in a trust providing that no beneficiary has standing to sue a trustee would survive a public policy attack. He is less sure that a trust provision limiting the standing of remote contingent beneficiaries would be struck down by the courts. The Default and Mandatory Rules in Texas Trust Code §111.0035 outline the situations where the terms of a trust do not prevail over provisions of the Texas Trust Code. These provisions provide that the terms of the trust prevail over the terms of the Texas Trust Code, except as provided to the contrary in this section of the act. These provisions provide that the terms of a trust do not prevail over the exculpatory provisions of the act (Texas Trust Code § 114.007) and the power of the court to exercise its jurisdiction. These provisions do not expressly provide that the terms of Texas Trust Code §115.011 may not be overridden by the terms of a trust. The Texas Supreme Court, in the case of *Texas Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240 (Tex. 2002) made it clear that it would strictly construe provisions of the Texas Trust Code providing that the terms of a trust instrument trump provisions of the Code.

The author's experience is that Texas courts are very liberal in granting remote contingent beneficiary's standing to prosecute trust litigation. Some courts completely ignore this provision and grant standing to exceedingly remote contingent beneficiary's solely because of their status as a "beneficiary" of the trust⁵. The author is encountering more and more litigation whereby remote contingent beneficiaries bring harassing and unfounded litigation to achieve personal advantage. It is submitted that the Legislature should

⁵ In a recent case that I was involved in the court ruled that: "Defendants repeatedly argue that Plaintiff's interest is remote, contingent, and, given the contentious relationship between Plaintiff and Defendants, highly unlikely to vest. ... A contingent remainder interest is an "interest" under section 111.004(6), and makes the Plaintiff an "interested person" as defined by section 111.00(7). Because Plaintiff is an interested person, he is permitted to bring suit under section 115.011(a). Defendant's request that Plaintiff's suit be dismissed for lack of standing is accordingly denied."

enact stricter restrictions on who has standing to institute trust litigation.

Conclusion:

As noted above with respect to a remote contingent beneficiary's right to disclosure of information, the trend appears to be to restrict the rights of contingent trust beneficiaries to interfere with the administration of a trust. It is the author's opinion that Texas Trust Code § 111.004(7) should be amended to incorporate the following rules into the definition of an "interested person" relating to standing:

1. Any necessary party to an action under Section 115.011 is, per se, an interested party with standing to maintain an action under Section 115.001.
2. Contingent beneficiaries do not have standing to maintain an action under Section 115.001 unless the court finds that no other beneficiary adequately and virtually represents their interest in the trust.
3. Any beneficiary that would receive distribution of all or a portion of the trust estate of the trust had the trust terminated on the date that the action was filed is an interested person with standing to maintain an action under Section 115.001.
4. While the settlor of a revocable inter vivos trust is living and competent, no beneficiary (other than the settlor, if he or she is a beneficiary) has standing to maintain an action under Section 115.001 of the Texas Trust Code unless such action is expressly authorized by the settlor. *Moon*, 230 S.W.3d 800.
5. The remainder beneficiaries of a trust where a beneficiary possesses a presently exercisable general power of appointment or power of withdrawal do not have standing to maintain an action under Section 115.001 unless such action is expressly authorized by the donee.
6. The donee designated in the will of a beneficiary with a testamentary power of appointment or power to assign does not have standing to maintain an action under Section 115.001. *Cote*, No. 4:03-CV-296-A, 2003 WL 23194260.
7. The court shall take into consideration all facts and circumstances concerning a testamentary power of appointment or power to assign and shall presume that if a donee of the testamentary power has an existing will that excludes the potential contingent beneficiary, that such contingent beneficiary

is not an "interested person" with standing to maintain an action under Section 115.001.

V. PROCEDURAL ISSUES:

When a remote contingent beneficiary initiates trust litigation against a trustee (or other beneficiaries), several procedural matters must be considered. Consideration should be given to whether or not the beneficiary has standing. Lack of standing may be raised at anytime during the litigation. *Tex. Ass'n of Bus. v. Air Control Bd.*, 852 S.W.2d 440, 443 - 445 (Tex. 1993) A plea in abatement may be used to seek dismissal when the plaintiff has no justiciable interest in the claims asserted and lacks standing. *Schenker v. City of San Antonio*, 369 S.W.2d 626 (Tex. Civ. App. - San Antonio 1963, writ ref'd n.r.e.); Dorsaneo, *Texas Litigation Guide*, § 103.02 [2][a][iii][C].

VI. REMEDIES AVAILABLE TO THE DEFENDANT IN LITIGATION BROUGHT BY A REMOTE CONTINGENT BENEFICIARY WHO IS DETERMINED NOT TO HAVE STANDING:

A. Texas Trust Code §114.064:

Texas Trust Code § 114.064 provides that: "In any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just." This provision was modeled after Civil Practice and Remedies Code §37.009. The seminal case interpreting § 114.064 is *Hachar v. Hachar*, 153 S.W.3d 138 (Tex. App. - San Antonio 2004, no pet.). *Hachar* holds: (1) that § 114.064 is not a "prevailing party" statute (i.e. the court may award attorney's fees to the losing party); (2) that the "reasonable and necessary" requirements of this statute are questions of fact to be determined by the fact-finder; (3) that the determination of whether attorney's fees are "reasonable and necessary" is guided by reference to the factors set forth in Rule 1.04 of the Rules of Professional Conduct; and (4) that the "equitable and just" requirements" are questions of law for the court to decide.

If a remote contingent beneficiary files a lawsuit against a trustee, then the trustee should seek attorney's fees and costs against the plaintiff, in his or her individual capacity, or, alternatively, against the trustee, in his representative capacity, pursuant to Texas Trust Code § 114.064. If a plaintiff is found to lack standing to bring the lawsuit then the court should award reasonable and necessary attorney's fees and costs against the plaintiff in his individual capacity.

While attorneys and costs in trust litigation are usually awarded against the losing party, the author has encountered courts that simply refuse to award any attorney's fees to either party. Notwithstanding this fact, Texas Trust Code § 114.064 is a major weapon to use in trust litigation where remote contingent

beneficiary seeks to interfere with the administration of the trust.

B. Texas Civil Practices & Remedies Code Chapter 10:

Civil Practice and Remedies Code Chapter 10 provides for sanctions against parties and their attorneys for filing frivolous pleadings. Section 10.001 of this Chapter provides:

The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry:

- (1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) each denial in the pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

The statute provides that a party may make a motion for sanctions, describing the specific conduct violating Section 10.001 and that the court may award to a party prevailing on such motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. If no due diligence is shown the court may award to the prevailing party all costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation. Sanctions

may be imposed by the attorney violating §10.001, his or her client or both of them.

If a party is merely seeking legal fees and costs against the remote contingent beneficiary, then he or she should proceed under Texas Trust Code § 114.064 rather than CPRC Chapter 10 because it is easier to prevail under the Trust Code. If the party is seeking to recover damages against the remote contingent beneficiary's attorney then he or she should consider CPRC Chapter 10. Any recovery under this Chapter will be difficult because the law is not well established in this area.

C. Texas Rule Of Civil Procedure Rule 13:

TRCP Rule 13 provides:

The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file an fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose appropriate sanction available under Rule 215-b, upon the person who signed it, a represented party, or both.

Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. "Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of

existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.

This is clearly the most difficult process for obtaining sanctions. As provided above with respect to Chapter 10, this section should never be used to seek attorney's fees against a remote contingent beneficiary because Texas Trust Code § 114.064 is a much easier process. If sanctions are sought against the attorney signing the pleadings then CPRC Chapter 10 is the preferred statute to proceed under.

VII. CONCLUSION:

Two trends are evolving. First, more remote contingent beneficiaries are instituting trust litigation. Second, the law seems to be evolving to restrict the rights of these types of beneficiaries to interfere in the administration of a trust. Unfortunately, Texas courts and the Texas legislature have not kept up with these trends. The law relating to the standing of remote contingent beneficiaries to institute and prosecute trust litigation is confusing and undeveloped. It is anticipated that the Real Estate Probate and Trust Law Section of the State Bar of Texas will cause legislation to be introduced in next year's legislative session to clarify the law in this area.

Referring again to the example recited at the beginning of this paper it is the author's opinion that:

1. "A" is an interested person in the trust with standing to maintain an action under Texas Trust Code § 115.001 because he is a person who is actually receiving distributions from the trust estate at the time that the action is filed (Texas Trust Code § 115.011 (b) (3)).
2. The Trustee of the trust is an interested person in the trust with standing to maintain an action under Texas Trust Code § 115.001 (Texas Trust Code § 115.011 (b) (4)).
3. C1 and C2 should be persons interested in the trust with standing to maintain an action under Texas Trust Code § 115.001 because A cannot adequately represent the remainder beneficiaries of the trust because A is the income beneficiary.
4. GC1, GC2 and GC3 should not be interested persons because their remainder interests are represented by their parents, C1 and C2. Unless these beneficiaries can prove that C1 and C2 have a conflict that prevents them from representing the remainder estate, the grandchildren should not be deemed to be interested persons with standing to sue.

5. Z should not be an interested person because his remainder interest is represented by C1 and C2. Unless these beneficiaries can prove that C1 and C2 have a conflict that prevents them from representing the remainder estate the grandchildren should not be deemed to be interested persons with standing to sue.
6. If A was a settlor with the power to modify or revoke the trust, then no beneficiary (other than A) should be deemed to be an interested person with standing to sue.
7. If A possesses an inter vivos general power of appointment over the trust estate of the trust then no beneficiary (other than A) should be deemed to be an interested person with standing to sue.
8. If A possesses a testamentary power over the trust estate of the trust, then the court should take this into consideration (as well as whether A has a current will that exercises such power) in determining whether A should be deemed to be an interested person with standing to sue.
9. Unresolved question: can the terms of the trust limit a beneficiary's standing to sue?