



**WINSTEAD**

# Co-Trustees Administering Trusts in Texas

**David F. Johnson**

# DISCLAIMERS

- These materials should not be considered as, or as a substitute for, legal advice; and they are not intended to nor do they create an attorney-client relationship.
- Since the materials included here are general, they may not apply to your individual legal or factual circumstances.
- You should not take (or refrain from taking) any action based on the information you obtain from these materials without first obtaining professional counsel.
- The views expressed in this presentation do not necessarily reflect those of the firm, its lawyers, or its clients.

# Areas of Discussion

- Advantages and drawbacks for co-trustee management
- Who can be a co-trustee and succession issues
- Fiduciary duties and joint management
- Duty and right to participate in management and cooperation
- Delegation of duties
- Duty to disclose
- Compensation
- Co-Trustee Deadlock
- Liability for co-trustee's actions
- Third party reliance on co-trustee's actions
- Duty to sue a co-trustee
- Costs of litigation (ultimate and in the interim)
- Litigation issues
- Attorney/client privilege issues
- Drafting issues

# Why Have Co-Trustees?

- Settlor/co-trustee has control
- Two heads are better than one
- Policing mechanism
- Creation of valid trust where settlor is trustee and beneficiary
- Positive tax ramifications
- Additional sophistication and specialization
- Politics with beneficiaries
- Record keeping functions

# Drawbacks to Co-Trustees

- Less efficient
- More expensive: compensation issues
- Deadlock and disagreements can create delay and added expense
- Co-trustees have added policing duties
- Added potential liability for co-trustees

# Who Can Be Co-Trustees

- First look to trust document.
- Texas statutes clarify that the settlor or a beneficiary can be a co-trustee. TPC 112.008.
- Other individuals can be a co-trustee; there is no felon limitation like there is for executors.
- Corporate trustees are allowed so long as they can exercise trust powers in Texas.

# Co-Trustee Succession Issues

- Trustee can resign, may need to seek court approval.
- Resignation is not effective until a new successor is appointed.
- Beneficiaries can remove a trustee by trust terms or court order.
- Potentially, current co-trustees may continue without replacing the resigning co-trustee and may even allow a sole trustee.
- Otherwise, if the co-trustee needs to be replaced, follow any non-judicial methods in the trust.
- If the trust is silent on succession, then an interested party must seek appointment by a court.

# Co-Trustee Succession Issues

- A successor co-trustee is liable for a predecessor's breach of trust "only if he knows or should know of a situation constituting a breach of trust committed by the predecessor and the successor trustee: (1) improperly permits it to continue; (2) fails to make a reasonable effort to compel the predecessor trustee to deliver the trust property; or (3) fails to make a reasonable effort to compel a redress of a breach of trust committed by the predecessor trustee." TPC 114.002.
- A trust document may relieve a successor co-trustee of an obligation to raise claims against prior co-trustees. *Benge v. Roberts*, No. 03-19-00719-CV, 2020 Tex. App. LEXIS 6335 (Tex. App.—Austin August 12, 2020, no pet.).

# Each Owe Fiduciary Duties

- Texas Property Code 113.051 provides: “The *trustee* shall administer the trust in good faith according to its terms and this subtitle. In the absence of any contrary terms in the trust instrument or contrary provisions of this subtitle, in administering the trust the *trustee* shall perform all of the duties imposed on trustees by the common law.”
- The term “*trustee*” means “the person holding the property in trust, including an original, *additional*, or successor trustee, whether or not the person is appointed or confirmed by a court.” Tex. Prop. Code § 111.004(18) (emphasis added).
- So, each co-trustee or additional trustee have common law duties.

# Co-Trustees Should Act Jointly

- Just because each co-trustee owes fiduciary duties does not mean that they act independently of each other.
- “The powers of trustees of a private trust, whether they are imperative or discretionary, personal or attached to the office, are held jointly.”
- “The trustees are regarded as a unit... They hold their powers as a group so that their authority can be exercised only by the action of all the trustees.”
- *Conte v. Conte*: co-trustee was not entitled to reimbursement for attorney’s fees related to suit by co-trustee where there was no agreement for same.

# Management Decisions

- Trust document controls management decisions.
- The Trust Code provides that, in the absence of trust direction, co-trustees generally act by majority decision. TPC 113.085.
- *Duncan v. O'Shea*, No. 07-19-00085-CV, 2020 Tex. App. LEXIS 6564 (Tex. App.—Amarillo August 17, 2020, no pet. history): the court affirmed a ruling that a trust could sell real estate where the majority of co-trustees voted for that action and over the objection of a dissenting co-trustee.
- If a co-trustee is unavailable to participate and prompt action is necessary to achieve the efficient administration or purposes of the trust or to avoid injury to the trust property or a beneficiary, the remaining co-trustee or a majority of the remaining co-trustees may act for the trust. TPC 113.085(d).
- Co-trustees can later ratify a single co-trustee's action.

# Duty To Participate

- A co-trustee has a duty to participate in the performance of a trustee's function. Tex. Prop. Code § 113.085(c).
- There are two exceptions, the co-trustee: (1) is unavailable to perform the function because of absence, illness, suspension, disqualification, or other temporary incapacity; or (2) has delegated the performance of the function to another trustee in accordance with the terms of the trust or applicable law, has communicated the delegation to all other co-trustees, and has filed the delegation in the records of the trust. TPC 113.085(c).
- An inactive co-trustee is still liable for conduct, and a court can remove an inactive co-trustee.

# Duty of Cooperation

- Co-trustees owe to each other, as well as to the beneficiaries of the trust, the duty to conduct themselves as to foster a spirit of mutual trust, confidence, and cooperation to the extent possible; at the same time, the trustees should maintain an attitude of vigilant concern for the proper administration or protection of the trust business and affairs.
- If a co-trustee refuses to cooperate and is hostile such that it impacts the administration of the trust, a court may remove that co-trustee.
- Example: *Ramirez v. Rodriguez*.

# Delegation By Co-Trustee

- At common law, delegation was not allowed.
- In Texas, a co-trustee may delegate to another the performance of a function unless the settlor specifically directs that the co-trustees jointly perform the function. TPC 113.085(e).
- “Unless a cotrustee’s delegation under this subsection is irrevocable, the cotrustee making the delegation may revoke the delegation.” *Id.*

# Delegation by Co-Trustee

- Texas Property Code Section 117.011 provides that a trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances.
- The trustee shall exercise reasonable care, skill, and caution in:  
(1) selecting an agent; (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.
- Normally used for third-party investment managers but does not preclude use by co-trustees.

# Direction/Delegation By Settlor

- A settlor can require delegation in a directed trust.
- If a trust instrument grants any person, including the trustor, an advisory or investment committee, or one or more co-trustees, authority to direct the making or retention of an investment or to perform any other act of management or administration of the trust to the exclusion of the other co-trustees, the excluded co-trustees are potentially not liable for a loss resulting from the exercise of that authority. TPC 114.0031.
- Limited statutory liability protection.

# Duty to Disclose

- The duty to disclose includes a co-trustee.
- A trustee, “particularly one empowered to exercise greater control, or having greater knowledge of trust affairs” is under a duty “to inform each co-trustee of all material facts relative to the administration of the trust that have come to his attention.”
- By refusing to provide a co-trustee with trust information, or a meaningful opportunity to review this information, “a co-trustee commits a breach of trust for which he may be removed as a trustee.”
- Co-trustee can seek an accounting.

# Compensation

- Unless the trust does not allow compensation or only limited compensation, a trustee's payment of reasonable compensation to itself is not a breach of fiduciary duty.
- Where there are multiple trustees, the combined compensation must be reasonable.
- Compensation ordinarily is to be divided among them in accordance with the relative value of their services.
- In the aggregate, the reasonable fees for multiple trustees may be higher than for a single trustee, because the normal duty of each trustee to participate in all aspects of administration can be expected not only to result in some duplication of effort but also to contribute to the quality of administration.

# Deadlock

- The Trust Code is silent on resolving deadlocks.
- Follow trust document if it has a mechanism.
- What happens when the trust is also silent?
- Suit for instructions from court.
- A court can modify the trust to add trustees or change decision making provisions, remove bad co-trustee or all co-trustees, grant a receivership or injunction, order an action or preclude one, suspend a trustee, appoint a temporary trustee, or enter other orders.

# Liability For Co-Trustee Acts

- At common law, co-trustees were considered sureties for each other, guaranteeing faithful performance to the beneficiaries.
- The Texas Property Code 114.006 states that a trustee who does not join in an action of a co-trustee is not liable for the co-trustee's action, unless the trustee does not exercise reasonable care.
- Each trustee shall exercise reasonable care to: (1) prevent a co-trustee from committing a serious breach of trust; and (2) compel a co-trustee to redress a serious breach of trust.
- Subject to the exercise of reasonable care, a dissenting trustee who joins in an action at the direction of the majority of the trustees and who has notified any co-trustee of the dissent in writing at or before the time of the action is not liable for the action.

# Liability For Co-Trustee Acts

- So, co-trustees have a duty to police their counterparts for serious breaches of duty, and what is serious or not is in the eye of the beholder.
- Even if a co-trustee attempts to delegate authority to a co-trustee, the delegating co-trustee may still be liable for failing to prevent its co-trustee from a serious breach of fiduciary duty.
- Revocable trust situation raises different issues: *In re Estate of Little*.

# Third Party Reliance on Co-Trustee

- A person who deals with a co-trustee may not be liable if the co-trustee exceeds its authority.
- The TPC 113.081 provides: “A person who deals with a trustee in good faith and for fair value actually received by the trust is not liable to the trustee or the beneficiaries of the trust if the trustee has exceeded the trustee’s authority in dealing with the person.”
- “A person other than a beneficiary is not required to inquire into the extent of the trustee’s powers or the propriety of the exercise of those powers if the person: (1) deals with the trustee in good faith; and (2) obtains: (A) a certification of trust described by Section 114.086; or (B) a copy of the trust instrument.”
- *Rice v. Malouf*.

# Co-Trustee Duty To Sue

- Once again, the TPC 114.006 states that a trustee shall exercise reasonable care to prevent a co-trustee from committing a serious breach of trust and to compel a co-trustee to redress a serious breach of trust.
- The TPC 113.082 allows a co-trustee to sue another co-trustee:
- “[A] court may, in its discretion, remove a trustee and deny part or all of the trustee’s compensation if: (1) the trustee materially violated or attempted to violate the terms of the trust and the violation or attempted violation results in a material financial loss to the trust; (2) the trustee becomes incapacitated or insolvent; (3) the trustee fails to make an accounting that is required by law or by the terms of the trust; or (4) the court finds other cause for removal.”
- “A beneficiary, cotrustee, or successor trustee may treat a violation resulting in removal as a breach of trust.”

# Co-Trustees Duty To Sue

- A co-trustee can seek the following remedies: (1) compel the trustee to perform the trustee's duty or duties; (2) enjoin the trustee from committing a breach of trust; (3) compel the trustee to redress a breach of trust, including compelling the trustee to pay money or to restore property; (4) order a trustee to account; (5) appoint a receiver to take possession of the trust property and administer the trust; (6) suspend the trustee; (7) remove the trustee as provided under Section 113.082; (8) reduce or deny compensation to the trustee; (9) subject to Subsection (b), void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property of which the trustee wrongfully disposed and recover the property or the proceeds from the property; or (10) order any other appropriate relief. Tex. Prop. Code § 114.008.

# Cost of Suing Co-Trustee

- Review trust document for relevant provisions.
- TPC 113.018 provides: “A trustee may employ attorneys, accountants, agents, including investment agents, and brokers reasonably necessary in the administration of the trust estate.”
- But it does not state who pays for the attorney.

# Cost of Suing Co-Trustee

- TPC 114.063 provides: “A trustee may discharge or reimburse himself from trust principal or income or partly from both for: (1) advances made for the convenience, benefit, or protection of the trust or its property; (2) expenses incurred while administering or protecting the trust or because of the trustee’s holding or owning any of the trust property; ... (b) The trustee has a lien against trust property to secure reimbursement under Subsection (a).”
- A judge or jury may find that reimbursement for a trustee retaining counsel to defend against a correct breach of fiduciary duty claim does not comply with these limitations.
- Likely deals with non-litigation expenses.

# Cost of Suing Co-Trustee

- TPC 114.064 provides “[i]n 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.”
- At the end of any litigation, a court may make an award of necessary and reasonable attorney’s fees that it deems equitable and just against any party.
- Does not discuss payment of fees in the interim.

# Cost of Suing Co-Trustee

- It seems reasonably clear that a trustee can retain and compensate attorneys for routine trust administration issues, such as preparing deeds, negotiating oil and gas leases, filing suit to construe a trust or collect rent or royalties, etc.
- These payments can be made immediately, subject to a beneficiary or successor trustee or co-trustee later challenging the payment as being a breach of fiduciary duty.
- This analysis, however, does not necessarily apply to co-trustees suing each other for breaching duties.
- The reimbursement for attorney's fees will likely be determined after it is determined whether the trustee breached duties or not.

# Cost of Suing Co-Trustee

- Can co-trustees pay attorneys from the trust in the interim where they are suing each other for breaching duties?
- Power to do so depends on agreement from co-trustees: *Conte v. Conte*.
- Abuse of the power depends on the outcome.
- A co-trustee should not pay attorneys from the trust until a fact finder has determined who should win: *In re Nunu*.
- Otherwise, the payment of fees where it is inappropriate do so is a breach of duty: *Stone v. King*.
- *In re Cousins* case is example of litigating the issue.

# Suing Third Parties

- In pursuing or defending litigation, co-trustees normally have discretion.
- TPC 113.019 provides that a trustee has the power to compromise, contest, arbitrate, or settle claims of or against the trust estate.
- Co-trustees have standing to sue, and generally, beneficiaries should not have standing.
- *In re XTO*: the court should not allow such a suit to proceed unless the beneficiary pleads and proves that the trustee's refusal to pursue litigation constitutes fraud, misconduct, or a clear abuse of discretion.

# Attorney/Client Communications

- Trustee can retain attorney and maintain confidentiality even as against beneficiaries.
- Co-trustees can jointly retain counsel and can jointly assert attorney-client privilege “[w]hen the same attorney simultaneously represents two or more clients on the same matter.”
- When co-trustees jointly retain counsel, their communications with their attorney are privileged as against third parties, such as beneficiaries.
- However, if the co-trustees themselves have a dispute, there is no privilege and the communication between the attorney and either one of the co-trustees is open to discovery by the other co-trustee.

# Attorney/Client Communications

- If one co-trustee hires counsel, it should be careful in sharing those communications with a co-trustee.
- A party generally waives privileges by disclosure to third parties.
- There is an allied-litigant privilege, but it only applies when there is a pending action.

# Other Litigation Issues

- Jurisdiction under TPC and Declaratory Judgment Act
- Venue
- Necessary parties
- Attorney's fees
- No-contest clause: TPC 112.038

# Drafting Considerations

- The Uniform Trust Code § 703 advises that the use of co-trusteeship calls for “careful reflection,” but adds: “Potential problems can be reduced by addressing division of responsibilities in the terms of the trust.”
- The trust should explicitly state: 1) provisions on the appointment, resignation, removal, and replacement of co-trustees; 2) the authority and responsibility of the co-trustees; 3) delegation of duties, if any; 4) instructions for the co-trustees on the management of the trust; 5) how the co-trustees will vote: unanimous, majority, etc.; 6) deadlock resolution provisions; 7) compensation; 8) retention and payment of counsel; 9) accounting and reports; and 10) exculpatory provisions (general and specific to delegation or deadlock resolution).
- Statutory limitations on exculpatory provisions.

# Conclusion

- When a settlor decides to use a co-trustee management structure, that decision comes with certain advantages and drawbacks.
- Co-trustees must know the law regarding their duties in order to comply with them.
- This paper was intended to provide guidance on co-trustee management and litigation in Texas.

# Conclusion

Visit Blog: [www.txfiduciarylitigator.com](http://www.txfiduciarylitigator.com)

David F. Johnson

Winstead PC

300 Throckmorton, Suite 1700

Fort Worth, Texas 76102

(817) 420-8225

(817) 420-8223

[dfjohnson@winstead.com](mailto:dfjohnson@winstead.com)