

**PATTERN JURY CHARGES:
FAMILY AND PROBATE**

**PROBATE, GUARDIANSHIP AND TRUSTS
WHERE ARE WE NOW.**

Presented by

Joyce Moore
Darlene Payne Smith
Jerry Frank Jones

Probate Committee Members

Joyce Moore, San Antonio
Honorable Sandee Marion, San Antonio
Vance Christopher, Houston

James Bass, San Antonio
Honorable Guy Herman, Austin
Marilyn Shell, Ft. Worth

Jerry Frank Jones, Austin

Ex officio members are

Honorable Polly Spencer, San Antonio

Darlene Payne Smith, Houston

Larry Flournoy, Dallas

Texas Bar Books
Sue Mills

State Bar of Texas
35th ANNUAL
ESTATE PLANNING AND PROBATE COURSE
June 8-10, 2011
Fort Worth

CHAPTER 15

All Rights Reserved 2011

CURRICULUM VITAE - JOYCE W. MOORE

Born San Antonio, Texas, November 27, 1951; admitted to bar, 1977, Texas; 1980, U.S. District Court, Western District of Texas; 1982, U.S. Supreme Court. Selected as one of *The Best Lawyers in America* (Commercial Litigation and Trusts and Estates) in 2010, 2009, 2008, 2007, 2006, 2005, 2004, 2003, and 2002. *Texas Lawyer Go To Guide* 2002 edition - selected as one of the five top probate and trust lawyers in the State of Texas. Selected as a *Texas Super Lawyer* in 2010, 2009, 2008, 2007, 2006, 2005, 2004, 2003, and 2002. Selected as a *Best Lawyer [Scene in SA]* in 2010, 2009, 2008, 2007, 2006, 2005, and 2004. Member of the College of the State Bar of Texas, Litigation Counsel of America, State Bar of Texas Standing Committee on Pattern Jury Charges - Family/Probate, San Antonio Bar Foundation, Bexar County Women's Bar Association, San Antonio Bar Association, Member of the State Bar of Texas District 10A Grievance Committee, July 1986 through July 1992. Education: North Texas State University (B.A. cum laude, 1973); University of Texas (J.D. with high honors, 1977). Phi Delta Phi; Order of the Coif, Chancellors, University of Texas Law Review, 1977.

Seminar Articles and Presentations (for preceding ten years only):

Fiduciary Litigation Case Law Update, Trial of a Fiduciary Litigation Case Course, Kerrville, Texas, December 16-17, 2010

Perspective on Protecting the Public Interest in Charity: Will Contests, Common Drafting Errors, Failed Purposed and Founders Syndrome - Panelist, 34th Annual Advanced Estate Planning & Probate Course, San Antonio, Texas, June 2010

Getting the Charge You Want and Arguing it to the Jury, Moderator, and Voir Dire and Jury Questionnaires - Panelist, 1st Annual Trial of a Fiduciary Litigation Case, Fredericksburg, Texas, December 2009

Litigation Involving Fiduciaries: Trial Handbook 2009 Probate & Trust Edition, 33rd Annual Advanced Estate Planning & Probate Course, Houston, Texas, June 10-12, 2009

Will Contests 2008, Tarrant County Probate Litigation Seminar, Fort Worth, Texas, September 19, 2008

Releases and Receipts and Judicial Accounting, 32nd Annual Advanced Estate Planning & Probate Course, Dallas, Texas, June 11-13, 2008

Quasi-Fiduciary Duties Between Partners: Hints on Drafting From a Litigator's Perspective, Dallas Bar Association - Probate, Trusts and Estates Section, Dallas, Texas, February 26, 2008

Another Look at Will Contest, Advanced Estate Planning and Probate Course, San Antonio, Texas, June 6-8, 2007 (author)

Risky Business: Recognizing and Managing Risks Associated with Fiduciary Service, 2007 Wealth Management & Trust Conference, Austin, Texas, March 29, 2007 (author)

In's and Out's of Privilege in Probate and Trust Litigation, State Bar of Texas Advanced Estate Planning and Probate Course, Houston, Texas, June 7 - 9, 2006

Show Cause, Contempt, Surcharge, and Injunctive Actions, Speaker, Texas College of Probate Judges Annual Conference, San Antonio, Texas, September 2005

Risky Business: Recognizing and Managing Risks Associated with Fiduciary Service, Financial Women International, Texas District Conference, San Antonio, Texas, April 9, 2005

Probate and Trust Litigation Tips and Tactics, State Bar of Texas Annual Advanced Estate Planning and Probate Course, San Antonio, Texas, June 9 - 11, 2004

1st Annual Fiduciary Litigation Seminar, Course Director and Speaker, Houston, Texas, May 6 - 7, 2004

Will Contests, LAU, Division of the State Bar of Texas, San Antonio, Texas, October 2003

Litigation Involving Fiduciaries: Trial Handbook 2003, Probate and Trust Edition, Advanced Estate Planning Strategies, Las Vegas, Nevada, April 24 - 26, 2003

Another Look at Will Contests, Travis County Bar Association Probate & Estate Planning, March 7, 2003

Hot Topics in Probate and Trust Litigation, State Bar of Texas 26th Annual Advanced Estate Planning and Probate Course, Dallas, Texas, June 5 - 7, 2002

A Different Look at Will Contests, Tarrant County Probate Bar Association, Probate Litigation Seminar, Ft. Worth, Texas, April 26, 2002

A Different Look at Will Contests, Docket Call in Probate Court Seminar, San Antonio, Texas, April 4 - 5, 2002

A Little Different Look at Will Contests, Texas College of Probate Judges, San Antonio, Texas, September 6 - 8, 2001

Will Contests, Procedural Snafus, Trial Tactics, State Bar of Texas 25th Annual Estate Planning and Probate Course, Houston, Texas, June 6 - 8, 2001

The Icing on the Cake - Preparing Your (Carefully Selected) Witness for Deposition and Trial, State Bar of Texas 25th Annual Estate Planning and Probate Course, Houston, Texas, June 6 - 8, 2001

Fiduciary Litigation: How to Avoid, Attack and Defend, Southwestern Legal Foundation 40th Annual Institute on Wills and Probate, Dallas, Texas, May 3 - 4, 2001

Quasi Fiduciary Duties Between Partners: Hints on Drafting From a Litigator's Prospective, Partnerships, Limited Partnerships, and Limited Liability Companies - University of Texas School of Law, Austin, Texas, July 13 - 14, 2000

Litigation Involving Fiduciaries: Trial Handbook 2000, Probate and Trust Edition, State Bar of Texas 24th Annual Estate Planning and Probate Course, Fort Worth, Texas, June 7 - 9, 2000

The Expert Witness in Probate and Trust Litigation, State Bar of Texas 24th Annual Estate Planning and Probate Course, Fort Worth, Texas, June 7 - 9, 2000

Risky Business: Recognizing and Managing Risks Associated with Fiduciary Service, Dallas Estate Planning Council, Dallas, Texas, March 2, 2000

JERRY FRANK JONES
400 West 15th Street, Suite 975
Austin, TX 78701
Phone: (512) 476-2929
Fax: (512) 472-3669
jerry@jerryfrankjones.com

Education: Williams College, Williamstown, Mass., B.A. 1967
University of Texas-Austin, J.D, 1971

Certification: Board Certified, Estate Planning & Probate by the State Bar
Bicycle Assembly & Maintenance, Barnett=s Bicycle Institute 2004

Fellow: American College of Trust and Estate Counsel

Instructor: University of Texas, Legal Assistant Program,
Estate Planning & Probate (1989-1995)

Honors **Super Lawyer, Texas Monthly** 2003--2010
The Best Lawyers in America, 2006--2010

Author:

- "Pattern Jury Charges: Probate: Where Are We Now?" Advanced Estate Planning & Probate Course 2011.
- "Limitations & Laches," State Bar of Texas, Advanced Estate Planning & Probate Course 2010.
- Presented: Exculpatory Clauses, by Frank N. Ikard, Fiduciary Litigation Course, State Bar of Texas (December 2009)
- LIMITATIONS IN FIDUCIARY LITIGATION," Advocate, Litigation Section, State Bar of Texas 2009.
- HE'S DEAD? Suing and Defending When There is A Dead Body," Car Crash Seminar 2005-2006, University of Texas, School of Law
- HE'S INCAPACITATED? Powers of Attorney. Advanced Real Estate Drafting Course, State Bar of Texas 2005.
- TEXAS LEGISLATIVE REPORT 1997, 1999, 2001, 2003 State Bar of Texas, Annual Advanced Estate Planning and Probate Course.
- HE'S DEAD? Real Estate in a Decedent's Estate, Advanced Real Estate Drafting Course 2002
- "A TOPICAL GUIDE: Advanced Estate Planning and Probate Course Articles" State Bar of Texas, Annual Advanced Estate Planning and Probate Course (Originally prepared in 1992; updated each year through 2011)
- "A TOPICAL GUIDE: Advanced Drafting: Estate Planning and Probate Course Articles" State Bar of Texas, Annual Advanced Drafting: Estate Planning and Probate Course (Originally in 1999; updated each year through 2006).
- "The 706 for Country Lawyers and Other Simple People," Travis County Probate and Trust Law Section, 1994.
- "DEATH AND TAXES: An Introduction To Taxes Concerning A Probate Attorney," prepared for the University of Texas Legal Assistant Program--1993.
- "Estate Planning for PWAs (Persons With AIDS)," 1992 Advanced Course.
- "Divorce: Effect Upon Life Insurance and Non Probate Assets," 1988, Probate & Property, magazine of the Real Property, Probate and Trust Section, American Bar Association.

Bar Associations and Activities:

- American College of Trust and Estate Counsel: Elected 1989; State Laws Committee; Fiduciary Litigation Committee
- American Bar Association: Co-Chair: Committee on Administration and Distribution of Estates and Trusts (I-3) (1996-98); Chairman: Committee on Planning and Administering Small Estates and Trust of the Real Estate, Probate & Trust Law Section (1995-1996); Vice-Chairman, Committee on Planning and Administering Small Estates (1988-1995)
- State Bar of Texas
 - Pattern Jury Charges: Family Law; Probate Committee Chair (2009 present); Family & Probate Co-Vice Chair (2010 present)
 - Real Estate, Probate and Trust Law Section, State Bar of Texas: Chair (2001-2002); Council 1994-1998; Legislative Liaison (1996-2003)
- Texas Academy of Probate Lawyers: Legislative Liaison (1997-2003)
- Travis County Bar Association: Board of Directors - 1986 – 1988; First Chairman, Probate Section
- Bastrop County Bar Association

TEXAS LEGISLATURE

- Legislative Liaison, Real Estate, Probate and Trust Law Section, State Bar of Texas (1997-2003)
- Legislative Liaison, Texas Academy of Probate Lawyers (1997-2003)
- Member, Texas Legislative Interim Study Committee on Community Property Laws (1999-2000)
- Member, Uniform Trust Code Study Committee, Texas Real Estate Probate and Trust Law Section, State Bar of Texas.

ADMITTED TO PRACTICE LAW:

- All Courts in the State of Texas
- United States District Court for the Western and Eastern Districts of Texas;
- U. S. Court of Appeals 5th Circuit, United States Tax Court.

Certified Bicycle Mechanic: Barnett's Bicycle Institute, December 2004

Alp d'Huez Club: October 2005.

TABLE OF CONTENTS

FOREWORD 1

EXHIBIT A 3

PJC BREACH OF DUTY BY TRUSTEE—OTHER THAN SELF-DEALING 5

PJC BREACH OF DUTY BY TRUSTEE—SELF-DEALING—DUTIES NOT MODIFIED OR
ELIMINATED BY TRUST 8

PJC BREACH OF DUTY BY TRUSTEE—SELF-DEALING—DUTIES MODIFIED BUT NOT
ELIMINATED BY TRUST 11

PJC BREACH OF DUTY BY TRUSTEE—SELF-DEALING—DUTY OF LOYALTY ELIMINATED . 12

PJC EXCULPATORY CLAUSE 14

EXHIBIT B 16

PJC FRAUD—EXECUTION OF WILL 20

PJC ATTORNEY’S FEES AND COSTS —WILL PROSECUTION OR DEFENSE 22

PJC FORFEITURE CLAUSE 27

EXHIBIT C 28

Foreword

History: The first Pattern Jury Charge Volume was published in 1969 (General Negligence; the Volume that is now General Negligence and Intentional Personal Torts). While no longer in publication, in 1970 the Worker's Compensation volume was published). Malpractice, Premises, Products was published in 1982. The committee turned to Business, Consumer, Insurance, Employment, that volume was published in 1990. Finally came the Family Law Volume which was first published in 1989.

The third jury trial in Texas, right after murder and cattle rustling, was a will contest. Nonetheless it was only in 2010 that work began on Pattern Jury Charges for Probate (Probate, Trusts and Guardianship). As early as 1999 there were unsuccessful efforts to create pattern jury charges in this area. This work has long been over due.

Uses: Jury Trials. Obviously this work is vital to lawyers and judges as they prepare the charge for the jury. But there are other uses and it will not be long before all probate lawyers have this volume on their desks.

Uses: Contests Before the Court. If a lawyer has a contested matter before the court, he can now expect the judge to reach for this volume to determine what questions he has to resolve to make his ruling; the practitioner can now more easily anticipate what questions must be addressed by evidence and argument.

Uses: Office Practice. Easily overlooked are the benefits to an office practice. If a client asks that a will or trust be prepared but there is some issue (for example the standard for capacity), there will now be a handy desk reference that will aid the practitioner. If the client is asking what his exposure is if he acts as trustee, the lawyer will have at hand the questions that will ultimately be asked to determine that liability. If the client is serving as a trustee and is concerned about what he has done and the consequences, these issues may be very instructive.

Headaches:

Placing the burden. Placing the burden on many of these issues was difficult. Too often the result, after placing the burden, made the question more difficult to understand. The committee has endeavored to comply with the law, comply with the burden of proof yet make these questions comprehensible.

Harmony. These issues were also drafted with an effort to be in harmony with the other volumes. It was not always successful but generally we could explain why our area requires a different formulation.

This Is Hard. It is amazing how difficult drafting these issues has been. Practicing law is hard. Drafting legislation is hard. Drafting legislation to avoid unintended consequences is hard. Drafting jury questions is the toughest of all. Not only did the committee have to anticipate numerous fact situations, the issues had to comply with existing law. It was discovered that many statutes that seemed obvious on their face, did not lend themselves to reasonable jury questions.

Status. Currently the committee has drafts on will contests, trust litigation, guardianship, and mental commitments.

Future Work. This is clearly a beginning and not an end. For example in probate alone breaches of fiduciary duty, removal and lost wills have not yet been addressed. There was just not enough time to get all of this ready for the next books which will be out in 2012.

Your Suggestions. If you have any suggestions about the issues in this article, or any of the issues as they are published, or if you wish to make any suggestions about other areas in which questions should be submitted, please feel free to communicate with me, preferably by email

Staff. Sue Mills of Texas Bar Books department has been our shepherd. She has attended every meeting. She has been an invaluable guide. When you look through the other PJC books you see that she has been involved in almost all of these books for a number of years. Yet she was patient with us and never lost her composure.

Pattern Jury Charge Oversight Committee.

We are also indebted to Justice Tracy Christopher, who is the chair of the PJC Oversight Committee. She attended one of our meetings and in an hour helped us improve our drafts immeasurably. A personal thanks to Alex Albright, vice chair of the PJC Oversight Committee, for thinking of me and giving me this opportunity.

Probate Committee

The members of the committee are

Joyce Moore, San Antonio
Honorable Sandee Marion, San Antonio
Honorable Guy Herman, Austin
Vance Christopher, Houston
James Bass, San Antonio
Marilyn Shell, Ft. Worth
Jerry Frank Jones, Austin
Darlene Payne Smith, Houston

Our ex officio members are

Honorable Polly Spencer, San Antonio
Larry Flournoy, Dallas

Thanks. As Jack Sampson said in his preface to an earlier Family Law Volume, Thanks for the “great, free-of-charge, education.”

Jerry Frank Jones

Exhibit A
Trusts

The Committee has drafts of the following trust issues. Only samples are reproduced below.

Mental Capacity to Create Inter Vivos Trust
Intention to Create Trust
Undue Influence
Forgery
Revocation of Trust
Modification of Trust
Amendment of Trust
Acceptance of Trust by Trustee
Forfeiture Clause
Breach of Duty by Trustee—Other Than Self-Dealing
Breach of Duty by Trustee—Self-Dealing—Duties Not Modified or Eliminated by Trust
Breach of Duty by Trustee—Self-Dealing—Duties Modified But Not Eliminated by Trust
Breach of Duty by Trustee—Self-Dealing—Duty of Loyalty Eliminated
Exculpatory Clause
Remedies for Breach of Fiduciary Duty (Comment)
Actual Damages for Breach of Trust
Removal of Trustee
Liability of Cotrustees - Not Modified by Document
Liability of Successor Trustee – Not Modified by Document
Third-Party Liability
Release
Limitations
Attorney’s Fees—Trust

PJC Breach of Duty by Trustee—Other Than Self-Dealing

QUESTION ____

Did *TRUSTEE* fail to comply with one or more of the following duties?

Answer “Yes” or “No” as to each.

1. [*list duties alleged to have been breached and the standard of care applicable to each, using language from the trust document, Texas Trust Code, or common law, as appropriate. See comment below*].

Answer: _____

2.

Answer: _____

3.

Answer: _____

If you have answered any part of Question ____ “Yes,” then answer Question ____ [*PJC on exculpatory clause if applicable; otherwise PJC on actual damages*] with regard to that duty. Otherwise, do not answer Question ____.

COMMENT

When to use. The foregoing question should be used in cases where the trustee is accused of failing to perform or negligently performing one or more of his duties (such as investment, accountings or other disclosure) set forth in the trust, by statute, or by common law but is not alleged to have engaged in any self-dealing transaction. If self-dealing is alleged, see [NEXT THREE PJCS]

Duties. The source of the duties for which a trustee may be held liable varies on a case-by-case basis. (1) The duties of a trustee must first be drawn from the trust (subject to the limitations expressed in sections 111.0035 and 114.007). Tex. Prop. Code §§ 111.005, 111.0035, 114.007. (2) To the extent not eliminated or modified by the trust, the duties are drawn from the Texas Trust Code. Tex. Prop. Code § 111.0035. (3) Only if the duty is not covered by either the trust or the Trust Code should resort be had to the common law. Tex. Prop. Code § 111.005. See also *Sterling Trust Co. v. Adderly*, 168 S.W. 3d 835, 846-847 (Tex. 2005); *National Plan Administrators, Inc. v. Nat’l Health Ins. Co.*, 235 S.W. 3d 695, 703-704 (Tex. 2007). Therefore, if the duties the trustee is alleged to have breached are not specified or modified in the trust agreement, the duties should be described using the applicable language found in the Trust Code.

If the duty is one that is not covered expressly by the trust agreement or the Trust Code, it may be described using generic, common-law fiduciary duties in the question or instruction. See, for example, PJC 104.2 comment entitled “Question where burden does not shift” in *Texas Pattern Jury Charges—Business, Consumer, Employment*.

Describing the duties. If the trust agreement specifies the conduct to be followed in connection with a particular duty, that language should be included in the instruction verbatim. See *Gochec v. Clayborne* 863 SW2d 516, 521 (Tex.App.Austin1993) writ denied. If the Trust Code is supplying the scope of the duty, the statutory language should be used. For example, if the trustee is accused of violating the “prudent investor” standard of care set forth in Tex. Prop. Code § 117.004, all relevant subsections of that provision should be set forth in the instruction:

- (a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.
- (b) A trustee’s investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.
- (c) Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:
 - (1) general economic conditions;
 - (2) the possible effect of inflation or deflation;
 - (3) the expected tax consequences of investment decisions or strategies;
 - (4) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;

- (5) the expected total return from income and the appreciation of capital;
 - (6) other resources of the beneficiaries;
 - (7) needs for liquidity, regularity of income, and preservation or appreciation of capital; and
 - (8) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.
- (d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

The instruction above does not include subsections (e) and (f) of Property Code section 117.004. If the trustee is a professional, subsection (f) should be included in the instruction:

- (f) A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.

Broad-form submission. Tex. R. Civ. P. 277 mandates broad-form submission whenever feasible. If there is no dispute as to what duties are imposed on the trustee, no issue about the sufficiency of the evidence as to any of the duties, and no difference in the damages arising from the breach of each duty, this question may be submitted in broad form with the duties listed in an instruction. Otherwise, the question should be submitted as shown above.

PJC Breach of Duty by Trustee—Self-Dealing—Duties Not Modified or Eliminated by Trust

QUESTION ____

Did *TRUSTEE* comply with his fiduciary duty to *BENEFICIARY* in connection with [*describe self-dealing transaction*]?

TRUSTEE owed *BENEFICIARY* a fiduciary duty. To prove he complied with this duty in connection with [*describe self-dealing transaction*], *TRUSTEE* must show that—

- a. the *transaction in question* was fair and equitable to *BENEFICIARY*; and
- b. *TRUSTEE* made reasonable use of the confidence placed in *him*; and
- c. *TRUSTEE* acted in good faith and in accordance with the purposes of the trust in connection with the *transaction* in question; and
- d. *TRUSTEE* placed the interests of *BENEFICIARY* before *his* own, did not use the advantage of *his* position to gain any benefit for *himself* at the expense of *BENEFICIARY*, and did not place *himself* in any position where *his* self-interest might conflict with *his* obligations as trustee; and
- e. *TRUSTEE* fully and fairly disclosed to *BENEFICIARY* all material facts known to *TRUSTEE* concerning the *transaction* in question that might affect *BENEFICIARY*'s rights.

Answer “Yes” or “No.”

Answer: _____

If you have answered Question ____ “No,” then answer Question ____ [*PJC on exculpatory clause if applicable; otherwise PJC on actual damages*]. Otherwise, do not answer Question ____.

COMMENT

When to use. The foregoing question should be submitted when the trustee is accused of self-dealing and the duties of loyalty and full disclosure have been neither modified nor eliminated by the trust instrument or by statute (see, e.g., Tex. Prop. Code § 113.052–.057).

Rewording. If more than one self-dealing transaction is alleged, the phrase *transaction in question was* in item a. should be replaced with the phrase *the transactions in question were*, and the word *transaction* in items c. and e. should be replaced with the word *transactions*.

Source of question and instruction. Unless limited or modified by the terms of the trust agreement or the Trust Code, trustees are subject to the same “common law” fiduciary duties as other fiduciaries. Tex. Prop. Code § 113.051. The foregoing question and instruction are derived from *Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d 257, 261 (Tex. 1974) (material issues are whether fiduciary made reasonable use of trust and confidence placed in him and whether transactions were ultimately fair and equitable to beneficiary); Tex. Prop. Code § 113.051 (trustee required to administer trust in good faith according to its terms); *Crim Truck & Tractor Co. v. Navistar International Transportation Corp.*, 823 S.W.2d 591, 594 (Tex. 1992) (fiduciary duty requires party to place interest of other party before his own); *Slay v. Burnett Trust*, 187 S.W.2d 377, 387–88 (Tex. 1945) (duty of loyalty prohibits trustee from using advantage of his position to gain any benefit for himself at expense of his cestui que trust and from placing himself in any position where his self-interest will or may conflict with his obligations as trustee); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 512–14 (Tex. 1942) (it is duty of fiduciary to deal openly and to make full disclosure to party with whom he stands in such relationship); and *Johnson v. Peckham*, 120 S.W.2d 786, 787 (Tex. 1938) (partners required to make full disclosure of all material facts within their knowledge relating to partnership affairs; it is necessary to make disclosure of all important information); *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984) (trustee owes beneficiary fiduciary duty of full disclosure of all material facts known to him that might affect beneficiary’s rights); *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (trustee’s duty of full disclosure extends to all material facts that might affect beneficiary’s rights).

Presumption of unfairness shifts burden of proof. When a fiduciary profits or benefits in any way from a transaction with the beneficiary, a presumption of unfairness arises that shifts the burden of persuasion to the fiduciary or the party claiming the validity or benefits of the transaction to show that the transaction was fair and equitable to the beneficiary. *Keck, Mahin & Cate, Grant Cook v. National Union Fire Insurance Co. of Pittsburgh*, 20 S.W.3d 692, 699 (Tex. 2000); *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 509 (Tex. 1980); *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964).

The presumption may be rebutted by the fiduciary. *Stephens County Museum, Inc.*, 517 S.W.2d at 261; *see also Texas Bank & Trust Co.*, 595 S.W.2d at 509. Normally, a rebuttable presumption shifts the burden of producing evidence to the party against whom it operates but does not shift the burden of persuasion to that party. *General Motors Corp. v. Saenz*, 873 S.W.2d 353, 359 (Tex. 1993). In fiduciary duty cases, however, the presumption of unfairness operates to shift both the burden of producing evidence and the burden of persuasion to the fiduciary. *Sorrell v. Elsey*, 748 S.W.2d 584, 586 (Tex. App.—San Antonio 1988, writ denied); *Miller v. Miller*, 700 S.W.2d 941, 945–46 (Tex. App.—Dallas 1985, writ ref’d n.r.e.); *Gum v. Schaefer*, 683 S.W.2d 803, 806 (Tex. App.—Corpus Christi 1984, no writ) (per curiam); *Fillion v. Troy*, 656 S.W.2d 912, 914 (Tex. App.—Houston [1st Dist.] 1983, writ ref’d n.r.e.); *Cole v. Plummer*, 559 S.W.2d 87, 89 (Tex. Civ. App.—Eastland 1977, writ ref’d n.r.e.); *see also Peckham*, 120 S.W.2d at 788 (issue of whether beneficiary of fiduciary relationship relied on fiduciary to perform his duties was immaterial).

If there is no evidence rebutting the presumption, no breach of fiduciary duty question is necessary. *Texas Bank & Trust Co.*, 595 S.W.2d at 509.

Liability questions normally place the burden of proof on the plaintiff, who is required to obtain an affirmative finding. When the burden is shifted to the fiduciary, however, a “No” answer supports liability. Thus, when the burden is on the fiduciary to prove compliance with his fiduciary duties, subsequent questions that depend on a finding of breach of fiduciary duty may need to be conditioned on a “No” answer to PJC _____.

PJC Breach of Duty by Trustee—Self-Dealing—Duties Modified But Not Eliminated by Trust

QUESTION ____

Did *TRUSTEE* comply with his duties as trustee in connection with the *purchase of trust property*?

TRUSTEE complied with *his* duties if *his purchase of the trust property was for fair and adequate consideration* and *he* acted in good faith and in accordance with the purposes of the trust.

Answer “Yes” or “No.”

Answer: _____

If you have answered Question ____ “No,” then answer Question ____ [*PJC on exculpatory clause if applicable; otherwise, PJC on actual damages*]. Otherwise, do not answer Question ____.

COMMENT

When to use. The foregoing question and instruction should be submitted in cases in which the trustee is accused of self-dealing and the trust agreement permits self-dealing under stated circumstances or otherwise modifies the duty of loyalty but does not completely eliminate it. Care should be taken to track the language of the document verbatim.

Source. Under current law, a settlor may modify or eliminate the duty of loyalty, which would otherwise prohibit the trustee from engaging in transactions with the trust from which the trustee or an affiliate of the trustee would personally profit or benefit. See Tex. Prop. Code § 111.004(1) for definition of “affiliate.” Although many duties may be modified or eliminated by the settlor, Tex. Prop. Code § 111.035 (4)(B) provides that a trustee’s duty to act in good faith and in accordance with the purposes of the trust may not be limited by the terms of the trust.

Rewording for other types of transactions and duties. The phrases *purchase of trust property* and *purchase of the trust property was for fair and adequate consideration* should be replaced with the language reflecting the specific type of transaction in issue. See Tex. Prop. Code §§ 113.052-.057, which prohibit certain self-dealing transactions, with some exceptions. However, even these prohibitions may be modified or eliminated by the trust document. Tex. Prop. Code § 111.0035.

**PJC Breach of Duty by Trustee—Self-Dealing—Duty of Loyalty
Eliminated**

QUESTION ____

Did *TRUSTEE* fail to comply with *his* duty as trustee when *he* purchased the trust property?

A trustee fails to comply with his duty as trustee if he fails to act in good faith or fails to act in accordance with the purposes of the trust.

“Good faith” means an action that is prompted by honesty of intention or a reasonable belief that the action was probably correct.

Answer “Yes” or “No.”

Answer: _____

If you have answered Question ____ “Yes,” then answer Question ____ [*PJC on exculpatory clause if applicable; otherwise, PJC on actual damages*]. Otherwise, do not answer Question ____.

COMMENT

When to use. The foregoing question and instructions should be submitted in cases in which the trustee is accused of self-dealing and the trust agreement permits self-dealing by completely eliminating the duty of loyalty.

Source. Under current law, a settlor may modify or eliminate the duty of loyalty, which would otherwise prohibit the trustee from engaging in transactions with the trust from which the trustee or an affiliate of the trustee would personally profit or benefit. See Tex. Prop. Code § 111.004(1) for definition of “affiliate.” However, the terms of the trust may not limit a trustee’s duty to act in good faith and in accordance with the purposes of the trust. Tex. Prop. Code § 111.0035(b)(4)(B).

The definition of “good faith” is derived from cases under Tex. Prob. Code § 243 (will contests). *See Ray v. McFarland*, 97 S.W.3d 728, 730 (Tex. App.—Fort Worth 2003, no pet.); *Collins v. Smith*, 53 S.W.3d 832, 842 (Tex. App.—Houston [1st Dist.] 2001, no pet.). The Committee expresses no opinion on whether these definitions are appropriate for use in other contexts.

Rewording for other types of transactions. The phrase *purchase of trust property* and *purchase trust property* should be replaced with language reflecting the specific type of transaction in issue. See Tex. Prop. Code §§ 113.052-.055, which prohibit certain self-dealing transactions. However, these prohibitions may be modified or eliminated by the trust document. Tex. Prop. Code § 111.0035.

DRAFT

PJC Exculpatory Clause

QUESTION __

Did *TRUSTEE* engage in the conduct inquired about in Question __ [*PJCs on breach of duty*] *in bad faith, or intentionally, or with reckless indifference to the interests of BENEFICIARY?*

Answer “Yes” or “No.”

Answer: _____

If you have answered Question __ “Yes,” then answer Question ____.
Otherwise, do not answer Question ____.

COMMENT

When to use. This submission is to be used only if the trust agreement has an exculpatory clause and should be conditioned on a finding that the trustee breached his duty as trustee.

Source. Even if the trustee has been found to have committed a breach of duty, he may nonetheless be protected from liability for his acts if the trust agreement contains language exculpating him from liability. *Texas Commerce Bank v. Grizzle*, 96 S.W.3d 240 (Tex. 2002). The foregoing submission is based on Tex. Prop. Code § 114.007, which sets the public policy limits on the scope of an exculpatory clause such that conduct that is in “bad faith”, “intentional”, or “with reckless indifference to the interest of the beneficiary” may not be excused by the terms of the trust.

Rewording of question. The wording *in bad faith, intentionally, or with reckless indifference to the interests of BENEFICIARY* in the foregoing question reflects the language of Tex. Prop. Code § 114.007. If the trust document provides greater exculpation than section 114.007 (for example, that the trustee is not liable for any breach of duty or not liable for conduct in bad faith), use the statutory language as shown in the question above. If the trust document provides less exculpation than section 114.007 (for example, that the trustee is not liable for honest mistakes in judgment), the question should be adapted in accordance with the terms of the instrument.

Intentional conduct. If intentional conduct is alleged, the following instruction, which is based on Tex. Penal Code § 6.03(a), may be used:

A person acts intentionally with respect to the nature of his conduct or to a result of his conduct when it is the conscious objective or desire to engage in the conduct or cause the result.

DRAFT

Exhibit B

WILL CONTESTS

The Committee has drafts of the following will contest issues. Only samples are reproduced below.

Burden of proof (Comment)
Testamentary capacity to execute will
Requirements of will
Holographic will
Undue influence
Fraud
Attorney's fees and costs—will prosecution or defense
Proponent in default
Alteration of will
Revocation of will
Forfeiture

Below are a sampling that will illustrate the problems and approach to Pattern Jury Charges in Will Contests.

PJC Testamentary Capacity to Execute Will

PJC Testamentary Capacity to Execute Will—Instruction

A decedent has testamentary capacity if, at the time the decedent signs a will, the decedent has—

1. Sufficient mental ability to understand that *he* is making a will; and
2. Sufficient mental ability to understand the effect of *his* act in making the will; and
3. Sufficient mental ability to understand the general nature and extent of *his* property; and
4. Sufficient mental ability to know *his* next of kin and natural objects of *his* bounty; and

5. Sufficient memory to collect in *his* mind the elements of the business to be transacted and to be able to hold the elements long enough to perceive their obvious relation to each other and to form a reasonable judgment as to these elements.

PJC Testamentary Capacity to Execute Will—Question Before Will Admitted to Probate

QUESTION ____

Did *DECEDENT* have testamentary capacity to sign *the document dated DATE*?

Answer “Yes” or “No.”

Answer: _____

PJC Testamentary Capacity to Execute Will—Question After Will Admitted to Probate

QUESTION ____

Do you find that *DECEDENT* did not have testamentary capacity to sign *the document dated DATE*?

Answer “*He* did have testamentary capacity” unless you find by a preponderance of the evidence that *he* did not have testamentary capacity, in which event answer “*He* did not have testamentary capacity.”

Answer “*He* did have testamentary capacity” or “*He* did not have testamentary capacity.”

Answer: _____

COMMENT

Source. The testamentary capacity test was originally set out in *Prather v. McClelland*, 13 S. W. 543, 546 (Tex. 1890). More recent formulations of the test can be found in *Tienken v. Midwestern State University*, 912 S.W.2d 878 (Tex. App.—Fort Worth 1995, no writ); *Pool v. Diana*, 2010 WL 1170234 (Tex. App.—Austin 2010, pet. denied) (mem. op.). A person must be of sound mind to execute a valid will in Texas. Tex. Prob. Code § 57. “Sound mind” means testamentary capacity under Texas law. *Chambers v. Chambers*, 542 S.W.2d 901, 907 (Tex. Civ. App.—Dallas 1976, no writ); *Bracewell v. Bracewell*, 20 S.W.3d 14, 19 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

The traditional formulation of item 1 in the instruction is “sufficient mental ability to understand the business in which he is engaged,” but the Committee believes that the wording shown above is more understandable to a jury. Although some cases include the phrase “and their claims against him” in item 4 in the instruction, the Committee has omitted the phrase because it may erroneously suggest that the testator has a legal obligation to leave his property to certain family members or other individuals.

Identifying document. Any appropriate wording to identify the document may be used in place of *the document dated DATE* in the question. For example, the document might be identified by its exhibit number.

Burden of proof. See PJC _____ (burden of proof (comment)) concerning the burden of proof before and after a will is admitted to probate. If a will has not been admitted to probate, the burden of proving capacity is on the proponent. Even if the will has a self proving affidavit the burden is still on the proponent. *Croucher v. Croucher*, 660 S.W.2d 55, 57 (Tex. 1983). If there is a contest after the will has been admitted to probate, then the burden of proof is on the contestant.

Capacity at time will executed. The proper inquiry is whether the testator had capacity at the time the will was executed. *Lee v. Lee*, 424 S.W.2d 609 (Tex. 1968). The court may also look to the testator’s state of mind at other times if these times tend to show the testator’s state of mind on the day the will was executed. *Horton v. Horton*, 965 S.W.2d 78 (Tex. App.—Fort Worth 1998, no pet.). Evidence of incapacity at other times can be used to establish incapacity at the time the will was executed if it “demonstrates that the condition persists and ‘has some probability of being the same condition which obtained at the time of the will’s making.’ ” *Croucher v. Croucher*, 660 S.W. 2d 55, 57 (Tex. 1983) (quoting *Lee v. Lee*, 424 S.W.2d at 611).

If insane delusion is raised. If the evidence raises the issue of insane delusion, an additional instruction is required. *Lindley v. Lindley*, 384 S.W.2d 676, 679 (Tex. 1964). In such a case, the following instruction may be used:

A person does not have testamentary capacity if he suffers from an “insane delusion” at the time he executes his will. An “insane delusion” is the belief of a state of supposed facts that do not exist and that no rational person would believe. The insane delusion, if any, must have caused the person to dispose of his property in a way that he would not have but for the insane delusion. A belief or decision, however illogical, if arrived at through a process of reasoning based on existing facts, is not an insane delusion.

DRAFT

PJC Fraud—Execution of Will

QUESTION ____

Did *DECEDENT* sign *the document dated DATE* as the result of fraud?

Fraud occurred if—

- a. a person made a material misrepresentation, and
- b. the misrepresentation was made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion, and
- c. the misrepresentation was made with the intention of inducing *DECEDENT* to sign *the document*, and
- d. *DECEDENT* relied on the misrepresentation in signing *the document*.

“Misrepresentation” means:

A false statement of fact

[or]

A promise of future performance made with an intent, at the time the promise was made, not to perform as promised

[or]

A statement of opinion based on a false statement of fact

[or]

A statement of opinion that the maker knows to be false

[or]

An expression of opinion that is false, made by one claiming or implying to have special knowledge of the subject matter of the opinion.

“Special knowledge” means knowledge or information superior to that possessed by *DECEDENT* and to which *DECEDENT* did not have equal access.

Answer “Yes” or “No.”

Answer: _____

COMMENT

Fraud is sometimes subsumed under the rubric of undue influence. *See Curry v. Curry*, 270 S.W.2d 208 (Tex. 1954). However, fraud may be a separate basis for setting aside a will. *Collins v. Smith*, 53 S.W.3d 832 (Houston [1st Dist.] 2001, no pet.).

Source. The elements of fraud in the foregoing submission are adapted from those in PJC 105.2 in *Texas Pattern Jury Charges—Business* (2010 ed.) and the cases cited in the

comment to that PJC. *See also, e.g., Collins v. Smith*, 53 S.W.3d at 838-39. The definitions of “misrepresentation” are based on those in PJC 105.3A–.3E in *Texas Pattern Jury Charges—Business* (2010 ed.) and the cases cited in the comments to those PJCs.

Use of “or.” If more than one definition of “misrepresentation” is used, each must be separated by the word *or*, because a finding of any one type of misrepresentation would support recovery. *See Lundy v. Masson*, 260 S.W.3d 482, 494 (Tex. App.—Houston [14th Dist.] 2008, pet. denied.).

When to use. The foregoing submission is appropriate if there is an allegation of intentional misrepresentation. If fraud through failure to disclose information when there is a duty to disclose is alleged, see PJC 105.4 in *Texas Pattern Jury Charges—Business* (2010 ed.).

Burden of proof. Fraud in the inducement of a will is considered a species of undue influence. *Curry*, 270 S.W.2d at 214. Thus, the burden of proving fraud is always on the contestant.

PJC Attorney’s Fees and Costs — Will Prosecution or Defense

QUESTION 1

Did *PARTY* act in good faith and with just cause, whether successful or not, in [prosecuting this suit for the purpose of having *the document dated DATE* admitted to probate] [defending *the document dated DATE* previously admitted to probate]?

“Good faith” means an action that is prompted by honesty of intention or a reasonable belief that the action was probably correct.

“With just cause” means that the actions were based on reasonable grounds and there was a fair and honest cause or reason for the actions.

Answer “Yes” or “No.”

Answer: _____

If you have answered Question 1 “Yes,” then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

What sum of money, if any, do you find to be necessary expenses and disbursements, including reasonable attorney’s fees, to [prosecute this suit for the purpose of having the *document dated DATE* admitted to probate] [defend the *document dated DATE* previously admitted to probate]?

Answer in dollars for each of the following:

1. For representation in the trial court. Answer: _____

2. For representation in the court of appeals. Answer: _____

3. For representation at the petition for Review stage in the Supreme Court

- of Texas. Answer: _____
4. For representation at the merits briefing stage in the Supreme Court of Texas. Answer: _____
5. For representation through oral argument and the completion of proceedings in the Supreme Court of Texas. Answer: _____

COMMENT

Source. Question 1 in the foregoing submission is based on Tex. Prob. Code § 243. The definitions of “good faith” and “just cause” are derived from *Ray v. McFarland*, 97 S.W.3d 728, 730 (Tex. App.—Fort Worth 2003, no pet.); *Collins v. Smith*, 53 S.W.3d 832, 842 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

Identifying document. Any appropriate wording to identify the document may be used in place of *the document dated DATE* in the question. For example, the document might be identified by its exhibit number.

Stages of representation. Depending on the evidence in a particular case, the court may submit a different number of elements and change the descriptions of the stages of representation.

Factors to consider. Rule 1.04(b) of the Texas Disciplinary Rules of Professional Conduct provides a nonexclusive list of factors to be considered in determining the reasonableness of a fee, which are included in the instruction below. *See* Tex. Disciplinary R. Prof'l Conduct 1.04(b), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 2005 & Supp. 2009) (Tex. State Bar R. art. X, § 9); *see also* *Braswell v. Braswell*, 476 S.W.2d 444 (Tex. Civ. App.—Waco 1972, writ *dism'd*). In an appropriate case, the following instruction may be used, but only the listed factors that are relevant in the particular case should be included:

Factors to consider in determining a reasonable fee include—

- a. the time and labor involved, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly;
- b. the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
- c. the fee customarily charged in the locality for similar legal services;
- d. the amount involved and the results obtained;

- e. the time limitations imposed by the client or the circumstances;
- f. the nature and length of the professional relationship with the client;
- g. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- h. uncertainty of collection before the legal services have been rendered.

The seventh item in R. 1.04(b), “whether the fee is fixed or contingent on results obtained,” has been omitted from the list. The Texas Supreme Court has ruled that Tex. Prob. Code § 243 is a reimbursement statute. Thus, if the proponent is not obligated to pay the fee, it is not reimbursable from the estate. *Russell v. Moeling*, 526 S.W.2d 533, 535 (Tex. 1975) (recognizing that purpose of Section 243 is “to pay the costs of attorney’s fees that are owed by the executor or administrator, and the allowance is not to the attorney, but to the administrator”); *Salmon v. Salmon*, 395 S.W.2d 29, 31 (Tex. 1965) (concluding that Probate Code section 243 authorized reimbursement of fees and expenses “incurred” by executors); *In re Estate of Arndt*, 187 S.W.3d 84, 90 (Tex. App.—Beaumont 2005, no pet.) (refusing to award appellate fees where there was no evidence party actually incurred liability for attorney’s fees).

Paralegal expenses. Concerning the inclusion of compensation for a legal assistant’s work in an award of attorney’s fees, see *Gill Savings Ass’n v. International Supply Co.*, 759 S.W.2d 697 (Tex. App.—Dallas 1988, writ denied.).

PJC Alteration of Will

PJC Alteration of Will—Before Will Admitted to Probate

Were the alterations to *the document dated DATE* made before *DECEDENT* signed it?

Answer “Yes” or “No.”

Answer: _____

PJC Alteration of Will—After Will Admitted to Probate Including Alterations

Were the alterations to *the document dated DATE* made after *DECEDENT* signed it?

Answer “Yes” or “No.”

Answer: _____

PJC Alteration of Will—After Will Admitted to Probate Excluding Alterations

Were the alterations to *the document dated DATE* made before *DECEDENT* signed it?

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. The foregoing submission should be used if it is disputed whether alterations to a will were made before or after its execution. Alterations or interlineations made on a will before it is signed and witnessed are valid. *See Schoenhals v. Schoenhals*, 366 S.W.2d

594 (Tex. Civ. App.—Amarillo 1963, writ ref'd n.r.e.); *Freeman v. Chick*, 252 S.W.2d 763 (Tex. Civ. App.—Austin 1952, writ dism'd). However, changes made after a will is executed are of no effect. *Leatherwood v. Stephens*, 24 S.W.2d 819 (Tex. Comm'n App. 1930); *Pullen v. Russ*, 209 S.W.2d 630, 636 (Tex. Civ. App.—Amarillo 1948, writ ref'd n.r.e.); *In re Estate of Flores*, 76 S.W.3d 624 (Tex. App.—Corpus Christi 2002, no pet.).

Burden of proof. See PJC ____ (burden of proof (comment) concerning the burden of proof before and after a will is admitted to probate. If the will has not been admitted to probate, the proponent who seeks to have the alterations given effect has the burden of proving that the alterations were made before the will was signed. If the will has already been admitted to probate and the order specifically admits the alterations to probate, the contestant who seeks to have the alterations ignored has the burden of proving that the alterations were made after execution of the will. However, if the will was admitted to probate and the order specifically excludes the alterations from probate, the proponent seeking to have the alterations given effect must prove that the alterations were made before the will was signed.

If order silent regarding alterations. The Committee has found no Texas authority on the effect of an order admitting a will to probate that is silent as to the admission or exclusion of alterations and expresses no opinion on which of PJC ____ or PJC____ should be used in such a situation.

PJC Forfeiture Clause

QUESTION 1

Did *CONTESTANT* have probable cause to bring this lawsuit?

Probable cause exists when, at the time of instituting the lawsuit, there was evidence that would lead a reasonable person to conclude that there was a reasonable likelihood that the challenge would be successful.

Answer “Yes” or “No.”

Answer: _____

If you have answered Question 1 “Yes,” then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Did *CONTESTANT* bring and maintain the lawsuit in good faith?

“Good faith” means an action that is prompted by honesty of intention or a reasonable belief that the action was probably correct.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. Use this submission when there is a provision in a will that would cause a forfeiture of a devise or void a devise or provision in favor of a person for bringing any lawsuit, including contesting a will. See Tex. Prob. Code § 64, which provides that such a provision in a will is unenforceable if probable cause exists for bringing the lawsuit and the lawsuit was brought and maintained in good faith.

Definitions. Neither “probable cause” nor “good faith” is defined in the Probate Code. The definition of “probable cause” is adapted from *Restatement (Third) of Property* § 8.5 cmt. c. (2003). The definition of “good faith” is derived from cases under Tex. Prob. Code § 243. See *Ray v. McFarland*, 97 S.W.3d 728, 730 (Tex. App.—Fort Worth 2003, no pet.); *Collins v. Smith*, 53 S.W.3d 832, 842 (Tex. App.—Houston [1st Dist.] 2001, no pet.). The Committee expresses no opinion on whether these definitions are appropriate for use in other contexts.

Exhibit C

Guardianship

DRAFT