

FRAUD, FIDUCIARIES, AND FAMILY LAW*

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I. INTRODUCTION¹

Creative theories of recovery abound for economic torts committed against the community estate.² These range from waste, depletion of assets, the community opportunity doctrine, and its inverse partner, the community jeopardy doctrine³ to the generic tort of fraud, which encompasses a number of varieties such as breach of fiduciary duty, fraudulent conveyance, excessive gifts to children, and gifts to paramours, just to name a few. The intermediate courts have not been consistent in their determination of whether an economic tort is actionable between spouses for damages to the community estate. The Supreme Court has not been entirely consistent either.

As in other civil litigation, fraud in the divorce context may be actual or constructive. Actual fraud is predicated upon the intent to deceive. The elements are: (1) that a material representation was made; (2) that it was false; (3) that the speaker made it knowing it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) that it

1. This introduction is adapted from Justice McClure's concurring opinion in *Sprick v. Sprick*, 25 S.W.3d 7, 14-15 (Tex. App.—El Paso 1999, no pet.) (McClure, J., concurring).

2. *See id.*

3. The community opportunity doctrine derives from the corporate opportunity doctrine and stands for the proposition that a spouse has an obligation to maximize the community estate by taking advantage of an opportunity to invest in a lucrative venture using community, rather than separate, funds. The community jeopardy doctrine operates in the reverse and suggests that a spouse also has an obligation to protect the community estate from risky pursuits by investing separate, rather than community, funds. As might be expected, whether an investment is potentially lucrative or risky is easier to discern in hindsight and is ordinarily fact specific. *Id.* at 15 n.3.

was made with the intention that it should be acted upon; (5) that the other party acted in reliance upon it; and (6) suffered damages as a result.⁴ “[C]onstructive fraud is the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests.”⁵ In other words, intent is irrelevant.

Because of the confidential relationship between a husband and wife, the marital partnership is fiduciary in nature.⁶ A breach of this fiduciary duty is frequently termed a “fraud on the community.”⁷ Generally speaking, the allegation is one of constructive rather than actual fraud:

Any such conduct in the marital relationship is termed fraud on the community because, although not actually fraudulent, it has all the consequences and legal effects of actual fraud in that such conduct tends to deceive the other spouse or violate confidences that exist as a result of the marriage.⁸

Constructive fraud includes actions of one spouse in unfairly disposing of or encumbering the other spouse’s interest in community property or unfairly incurring community indebtedness without the other spouse’s knowledge or consent.⁹ In the absence of fraud, “a spouse has the right to control and dispose of community property subject to his [or her] sole management.”¹⁰ Although the managing spouse need not obtain approval or consent for dispositions made of special community property, the fiduciary relationship between husband and wife “requires that a spouse’s disposition of . . . special community property be ‘fair’ to the other spouse.”¹¹ The managing spouse carries the burden of establishing that the disposition of property was fair.¹²

4. *Stone v. Lawyers Title Ins. Corp.*, 554 S.W.2d 183, 185 (Tex. 1977).

5. *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964).

6. *Matthews v. Matthews*, 725 S.W.2d 275, 279 (Tex. App.—Houston [1st Dist.] 1986, writ ref’d n.r.e.).

7. *In re Marriage of Moore*, 890 S.W.2d 821, 827 (Tex. App.—Amarillo 1994, no writ).

8. *Id.*

9. *Massey v. Massey*, 807 S.W.2d 391, 402 (Tex. App.—Houston [1st Dist.] 1991), writ denied, 867 S.W.2d 766 (Tex. 1993).

10. *Id.* at 401 (citing *Mazique v. Mazique*, 742 S.W.2d 805, 807 (Tex. App.—Houston [1st Dist.] 1987, no writ)).

11. *Id.* at 402. For managing community property, the Texas Family Code provides:

During marriage, each spouse has the sole management, control, and disposition of the community property that the spouse would have owned if single, including:

- (1) personal earnings;
- (2) revenue from separate property;
- (3) recoveries for personal injuries; and
- (4) the increase and mutations of, and the revenue from, all property subject to the spouse’s sole management, control, and disposition.

TEX. FAM. CODE ANN. § 3.102(a) (West 2008). Community property subject to a spouse’s sole management and control is sometimes referred to as “special community property,” particularly in

This Article covers the property doctrines of breach of fiduciary duty and other torts associated with, or related to, property within a fractured matrimonial relationship. The duties one spouse owes to the other may depend not only upon the spousal relationship but also upon that spouse's formal duty as a condominium board member, a corporate officer or director, a partner, a joint venturer, an executor or trustee, an attorney, an agent, or an employee.¹³ For example, if a spouse occupies a position as an officer or director in a corporation, he or she owes a fiduciary duty to the other spouse as well as a duty of loyalty to the corporation. This situation is compounded if one or both of the spouses are also employed by the corporation, since employees owe a duty of loyalty to the corporation by whom they are employed. To further compound the situation, assume that the spouses are attorneys that act for or represent the corporation in business and litigation matters. In short, this cat wears many hats.¹⁴

Thus, the practitioner must determine at the outset whether the fiduciary relationship is: (1) created or controlled by a specific statute, with specific elements of duty or proof; (2) created or modified by a contractual agreement between the fiduciary and beneficiary; or (3) created or controlled by common law.¹⁵ As this article will illustrate, a determination must be made whether a relationship exists as a matter of law—formal relationship—or as a matter of fact—informal relationship—because the initial burden of proof is different. Once the fiduciary relationship is established, the case law makes no distinction between formal and informal fiduciary relationships. After the fiduciary relationship is established, the burden is on the fiduciary to prove by a preponderance of the evidence that the fiduciary complied with his or her fiduciary duty, or that the transaction in question was “fair” to the beneficiary. Conflicts and overlaps frequently occur in the marital context when one spouse puts his or her interests ahead of, or before, the interest of the other spouse, a spousal-owned entity, or the community estate.¹⁶ Think of it as peeling an onion, one filmy layer at a time.

older case law. *Massey*, 807 S.W.2d at 402. All other “community property is subject to the joint management, control, and disposition of the spouses, unless the spouses provide otherwise by power of attorney in writing or other agreement.” § 3.102(c).

12. *Massey*, 807 S.W.2d at 401.

13. Spouses generally owe a fiduciary duty to each other. *See Boaz v. Boaz*, 221 S.W.3d 126, 133 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Sw. Tex. Pathology Assocs. v. Roosth*, 27 S.W.3d 204, 208 (Tex. App.—San Antonio 2000, pet. dismissed); *see also Ditta v. Conte*, 298 S.W.3d 187, 191 (Tex. 2009) (dictum). Spouses in a contested divorce proceeding do not owe each other a fiduciary duty. *Boaz*, 221 S.W.3d at 133; *Boyd v. Boyd*, 67 S.W.3d 398, 405 (Tex. App.—Fort Worth 2002, no pet.).

14. DR. SEUSS, *THE CAT IN THE HAT* (1957) (depicting the manner in which a cat wears a hat).

15. *See Crim Truck & Tractor Co. v. Navistar Int'l*, 823 S.W.2d 591, 593-94 (Tex. 1992), *superseded by statute*, TEX. REV. CIV. STAT. ANN. art. 4413 (36), § 6.06(e) (West Supp. 2010) (repealed 2003).

16. *See Massey*, 807 S.W.2d at 402.

II. DEFINING THE DUTY

A fiduciary duty is the most exacting civil duty recognized by law. The fiduciary owes the duties of "loyalty and good faith, integrity of the strictest kind, fair, honest dealing, and the duty not to conceal matters which might influence" the fiduciary's actions to the principal's prejudice.¹⁷ Although a fiduciary duty encompasses the duty of good faith and fair dealing, it often imposes an obligation on the fiduciary to place the interest of the beneficiary before the fiduciary's own interest.¹⁸

Black's Law Dictionary defines "fiduciary" as a noun (person), adjective (trust), capacity, duty, relation, and doctrine.¹⁹ As a noun, the term means "a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires."²⁰ A fiduciary has a duty to act primarily for another's benefit.²¹

As an adjective, it means "having the characteristics of a trust; analogous to a trust; relating to or founded upon a trust or confidence."²² One is said to act in a fiduciary capacity when the business transacted, or the money or property handled, is not owned by or for the fiduciary's benefit, but for the benefit of another person, "necessitating great confidence and trust on the one part and a high degree of good faith on the other."²³ The "term is not restricted to technical or express trusts" but includes such relations "as those of an attorney at law, guardian, executor, or broker, director of a corporation, and a public officer."²⁴

With regard to relationships, fiduciary is a "very broad term embracing both technical fiduciary relations and those informal relations which exist wherever one person trusts in or relies upon another."²⁵ It is "founded on trust or confidence reposed by one person in the integrity and fidelity of another."²⁶ Such a "relationship arises whenever confidence is reposed on one side, and domination and influence result on the other; the relation can be legal, social, domestic, or merely personal": a relationship between two persons involving a business, contract, or piece of property, or involving the general business or estate of one of them, "of such a character that each

17. *Hartford Cas. Ins. v. Walker Cnty. Agency, Inc.*, 808 S.W.2d 681, 687-88 (Tex. App.—Corpus Christi 1991, no writ) (citing *Douglas v. Aztec Petroleum Corp.*, 695 S.W.2d 312, 318 (Tex. App.—Tyler 1985, no writ)).

18. *Crim Truck & Tractor*, 823 S.W.2d at 594.

19. BLACK'S LAW DICTIONARY 625-26 (6th ed. 1990).

20. *Id.* at 625.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 626.

must repose trust and confidence in the other and must exercise a corresponding degree of fairness and good faith.”²⁷ From this, the law dictates that “neither party may exert influence or pressure upon the other, take selfish advantage of [the other’s] trust, or deal with the subject-matter of the trust” in such a way as to draw benefits “or prejudice the other except in the exercise of the utmost good faith and with the full knowledge and consent of that other.”²⁸

As a doctrine, the “fiduciary shield doctrine” is an equitable doctrine “which holds that actions taken by individual defendants solely in their capacity as corporate officers could not provide the basis for the exercise of jurisdiction over their persons, absent circumstances making such exercise appropriate.”²⁹ This doctrine “confers jurisdictional immunity upon corporate officials, even though their conduct [is] tortious as long as the actions taken were in the interests of the corporation and not purely personal and the corporation is not merely a shell for the individual and does not lack sufficient assets to respond.”³⁰

III. FORMAL “FIDUCIARY” RELATIONSHIPS³¹

A. Condominium Boards

Members and officers of condominium boards owe a fiduciary duty to the unit owners for their acts or omissions.³² Imagine the conflicts if

27. *Id.*

28. *Id.* Although the Texas Supreme Court has not explicitly adopted the fiduciary shield doctrine, several appellate courts have applied the doctrine to jurisdictional claims based on the theory of general jurisdiction to protect corporate officers who acted in a representative, rather than personal, capacity. *Brown v. Gen. Brick Sales Co.*, 39 S.W.3d 291, 297-300 (Tex. App.—Fort Worth 2001, no pet.) (failing to apply the fiduciary shield doctrine, but discussing the law of intermediate Texas appellate courts that have applied the theory). Under the fiduciary shield doctrine, there is no blanket protection from personal jurisdiction simply because the defendant’s alleged acts were done in a corporate capacity; instead, each defendant’s contacts with the forum state must be assessed individually. *D.H. Blair Inv. Banking Corp. v. Reardon*, 97 S.W.3d 269, 277-78 (Tex. App.—Houston [14th Dist.] 2002, pet. dismissed w.o.j.); *Shapolsky v. Brewton*, 56 S.W.3d 120, 133 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). The fiduciary shield doctrine did not protect the son of the publisher’s owner, who alleged that his representations regarding the publishing contract with the author were made in his capacity as an officer, employee, or agent of the publisher, and thus, his contacts established specific jurisdiction for the author’s action on the contract—the son had negotiated the contract and communicated with the author by telephone and mail in Texas, did not deny having made false statements during the communications, and alleged that the cause of action was substantially connected to the contacts. *Shapolsky*, 56 S.W.3d at 133.

29. BLACK’S LAW DICTIONARY 626 (6th ed. 1990).

30. *Id.* (alteration in original).

31. The Authors have confined “fiduciary” to a parenthetical to highlight the fact that formal relationships that were once considered to be fiduciary in nature may not be defined as strictly fiduciary any longer. Nevertheless, these relationships remain “formal” because they arise from a statutory basis. See *Meyer v. Cathey*, 167 S.W.3d 327, 330 (Tex. 2005) (explaining formal and informal fiduciary relationships).

32. TEX. PROP. CODE ANN. § 82.103(a) (West 2007); *Harris v. Spires Council of Co-Owners*, 981

Husband, while serving on the condominium board in the complex housing the community residence, authorized surveillance cameras in common areas to document the arrival and departure of Wife's paramour in violation of temporary orders enjoining Wife from having unrelated males stay overnight in the presence of the parties' child.

B. Partners and Joint Venturers

Generally speaking, unmarried couples do not owe fiduciary duties to each other.³³ In some cases, however, a cohabitant may be able to assert a claim that duties are owed by virtue of the parties' participation in a partnership or joint venture.³⁴ By statute, a partnership requires: (1) the receipt of or a right to receive a share of the business's profits; (2) an expression of intent to be partners in the business; (3) participation or the right to participate in control of the business; (4) sharing or agreeing to share in the business's losses or liabilities; and (5) contributing or agreeing to contribute money or property to the business.³⁵ A joint venture has four elements: (1) a community of interest in the venture; (2) an agreement to share profits; (3) an agreement to share losses; and (4) a mutual right of control or management of the enterprise.³⁶ Generally, a joint venture is governed by the rules applicable to partnerships.³⁷

1. General Partnerships

The Texas Uniform Partnership Act (TUPA) was replaced by the Texas Revised Partnership Act (TRPA), effective January 1, 1994.³⁸ TRPA applied to all partnerships created between 1994 and 2005.³⁹ The Texas Business Organizations Code (TBOC) applies to all partnerships created since 2006.⁴⁰ All entities existing prior to December 31, 2005, automatically became subject to the Code on January 1, 2010.⁴¹ Article 6132b-4.04 of TRPA, which expired January 1, 2010, provided:

S.W.2d 892, 897 (Tex. App.—Houston [1st Dist.] 1998, no pet.); *Sassen v. Tanglegrove Townhouse Condo. Ass'n*, 877 S.W.2d 489, 492 (Tex. App.—Texarkana 1994, writ denied).

33. See, e.g., *Smith v. Deneve*, 285 S.W.3d 909, 911 (Tex. App.—Dallas 2009, no pet.).

34. *Id.* at 914-15; TEX. BUS. ORGS. CODE ANN. § 152.052 (West 2010).

35. § 152.052.

36. *Ayco Dev. Corp. v. G.E.T. Serv. Co.*, 616 S.W.2d 184, 186 (Tex. 1981); *Arthur v. Grimmatt*, 319 S.W.3d 711, 716 (Tex. App.—El Paso 2009, pet. denied).

37. See TEX. BUS. ORGS. CODE ANN. § 152.051.

38. See Texas Revised Partnership Act, 73d Leg., R.S., ch. 917, § 1, 1993 Tex. Gen. Laws 3887 (expired Jan. 1, 2010).

39. See *id.*; TEX. BUS. ORGS. CODE ANN. § 152.002 (West 2010).

40. See § 152.002.

41. See *id.* § 402.001.

(a) Duties. A partner owes to the partnership, the other partners, and transferees of deceased partners designated in Section 5.04(b):

(1) a duty of loyalty; and

(2) a duty of care.

(b) Loyalty. A partner's duty of loyalty includes:

(1) accounting to the partnership and holding for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or from use by the partner of partnership property;

(2) refraining from dealing with the partnership on behalf of a party having an interest adverse to the partnership; and

(3) refraining from competing with the partnership or dealing with the partnership in a manner adverse to the partnership.

(c) Care. A partner's duty of care to the partnership and the other partners is to act in the conduct and winding up of the partnership business with the care an ordinarily prudent person would exercise in similar circumstances. An error in judgment does not by itself constitute a breach of this duty of care. A partner is presumed to satisfy this duty if the partner acts on an informed basis and in compliance with Subsection (d).⁴²

The State Bar Committee commentary following Section 4.04 recited:

Unlike the title of TUPA § 21, but like its test, Section 4.04 does not use the term "fiduciary." This section defines partner duties and implies that they are not to be expanded by loose use of "fiduciary" concepts from other contexts or by the rhetoric of some prior cases. Similarly, subsection (f) specifically states that a partner as such is not a trustee and is not held to the same standards as a trustee, thus further attempting to restrict reliance on the unfortunate language of prior law. The term "fiduciary" is inappropriate when used to describe the duties of a partner because a partner, unlike a true trustee, may legitimately pursue the partner's own self interest and not solely the interest of fellow partners or the partnerships.⁴³

42. Texas Revised Partnership Act, 73d Leg., R.S., ch. 917, § 1, 1993 Tex. Gen. Laws 3898, amended by Texas Revised Partnership Act, 78th Leg. R.S., ch. 572, § 20, 2003 Tex. Gen. Laws 1941 (expired Jan. 1, 2010).

43. TEX. REV. CIV. STAT. ANN. art. 6132b, § 4.04 cmt. (West Supp. 2004). For a discussion of the nuances between a fiduciary duty and a duty of loyalty and care, see *Red Sea Gaming, Inc. v. Block Invs. (Nev.) Co.*, No. 08-07-00288-CV, 2010 WL 108155 (Tex. App.—El Paso Jan. 13, 2010, pet. denied).

The TBOC has carried forward this language of TRPA, although it is now scattered across three sections entitled “General Standards of Partner’s Conduct,”⁴⁴ “Partner’s Duty of Loyalty,”⁴⁵ and “Partner’s Duty of Care.”⁴⁶ “A partner is liable to a partnership and the other partners for . . . a breach of the partnership agreement . . . or a violation of a duty to the partnership or other partners . . . that causes harm.”⁴⁷

It is not unusual for partnerships to be joined as additional defendants in family law cases. In one divorce action, medical partnerships and physicians were added as defendants.⁴⁸ The wife alleged that the defendants knowingly participated in her husband’s breach of his spousal fiduciary duty by entering into partnership amendments that permitted him to be expelled without cause for the purpose of defrauding her of a community property interest in her husband’s medical practice.⁴⁹ The trial court denied the defendants’ motions to compel arbitration and the defendants’ pleas in abatement.⁵⁰ The partnerships and doctors appealed.⁵¹ In stating that the relationship between a husband and wife is fiduciary in nature, the court added that a third party who knowingly assists in the breach of the fiduciary duty may also be liable.⁵²

2. Limited Partnership

The Texas Revised Limited Partnership Act also expired January 1, 2010.⁵³ The TBOC has now addressed specific issues of liability that had confused the courts for some time. At common law, general partners in a limited partnership owed fiduciary duties.⁵⁴ Some courts held that limited partners had fiduciary duties without drawing a distinction between general and limited partners.⁵⁵ These cases generalized as to the fiduciary duty

44. TEX. BUS. ORGS. CODE ANN. § 152.204 (West 2010).

45. *Id.* § 152.205.

46. *Id.* § 152.206.

47. *Id.* § 152.210.

48. *Sw. Tex. Pathology Assocs., L.L.P. v. Roosth*, 27 S.W.3d 204, 206 (Tex. App.—San Antonio 2000, pet. dism’d w.o.j.).

49. *Id.* at 208.

50. *Id.* at 206.

51. *Id.* at 207.

52. *Id.* at 208.

53. See Texas Revised Limited Partnership Act, 70th Leg., R.S., ch. 49, § 1, 1987 Tex. Gen. Laws 72 (expired Jan. 1, 2010).

54. See *Crenshaw v. Swenson*, 611 S.W.2d 887, 890 (Tex. App.—Austin 1981, writ ref’d n.r.e.); *Watson v. Ltd. Partners of WCKT, Ltd.*, 570 S.W.2d 179, 182 (Tex. App.—Austin 1978, writ ref’d n.r.e.). Managing partners owed the other partners one of the highest fiduciary duties recognized under the law. *Crenshaw*, 611 S.W.2d at 890. In a limited partnership, the general partner stood in the same fiduciary capacity to the limited partners as a trustee stands in relation to the beneficiaries of a trust. *Crenshaw*, 611 S.W.2d at 890; *Watson*, 570 S.W.2d at 182.

55. See *Dunnagan v. Watson*, 204 S.W.3d 30, 46 (Tex. App.—Fort Worth 2006, pet. denied) (stating generally that partners have fiduciary duties); *Zinda v. McCann St., Ltd.*, 178 S.W.3d 883, 890-91 (Tex. App.—Texarkana 2005, pet. denied) (same).

owed by partners and did not specifically discuss the fiduciary duty a limited partner has as opposed to a partner in a general partnership.⁵⁶ The courts just seemed to assume it existed.⁵⁷ The Fourteenth District Court of Appeals disagreed:

Our review of case law, however, reveals no authority for the existence of any fiduciary duties between limited partners. Rather, case law speaks to a fiduciary duty owed by the general partner to limited partners. Courts in other jurisdictions, however, have held that a limited partner does not owe a fiduciary duty unless it actively engages in control over the operation of the business so as to create duties that otherwise would not exist. We agree with [the] holdings of these cases.⁵⁸

Recently the Fifth Circuit addressed the topic of fiduciary duties owed by limited partners pursuant to Texas law.⁵⁹

Making no distinction between the fiduciary duties of general and limited partners, the Texas Supreme Court has stated that “[f]iduciary duties arise as a matter of law in certain formal relationships, including attorney-client, *partnership*, and trustee relationships.”⁶⁰ More specifically, in determining the liability of limited partners to other limited partners, Texas courts have applied the general principles of partnership noting that, “[p]artners have a duty to one another to make full disclosure of all matters affecting the partnership and to account for all partnership profits and property.”⁶¹ The court held that the jury was entitled to find a fiduciary duty owed to the plaintiff limited partner by the defendant limited partners when the general partner was president of the defendant limited partners.⁶²

With the advent of the TBOC, the duties are clear. A general partner has the rights, powers, and liabilities of a partner in a general partnership.⁶³ In other words, the general partner has a duty of loyalty and care. Limited partners, on the other hand, “shall not have any obligation or duty of a general partner solely by reason of being a limited partner.”⁶⁴

The practitioner is therefore cautioned to consider the continued viability of case law predating the statutory amendments. Attention should

56. See cases cited *supra* note 55.

57. See cases cited *supra* note 55.

58. AON Props. v. Riveraine Corp., No. 14-96-00229-CV, 1999 WL 12739, at *23 (Tex. App.—Houston [14th Dist.] Jan. 14, 1999, no pet.) (not designated for publication) (citations omitted).

59. *McBeth v. Carpenter*, 565 F.3d 171, 177-78 (5th Cir. 2009) (noting that Texas law does not recognize a distinction between fiduciary duties of general partners and those of limited partners).

60. *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998) (emphasis added) (evaluating claims involving limited partnerships).

61. *Zinda v. McCann St., Ltd.*, 178 S.W.3d 883, 890 (Tex. App.—Texarkana 2005, pet. denied) (upholding a jury verdict finding that the limited partner had not violated fiduciary duties owed to another limited partner).

62. *Id.* at 890-91.

63. TEX. BUS. ORGS. CODE ANN. § 153.152 (West 2010).

64. *Id.* § 153.003(c).

also be paid to the verbiage in the Business Law Pattern Jury Charge, which requires a showing of “utmost good faith” and “most scrupulous honesty.”⁶⁵ The TBOC limits the duty to care and loyalty.⁶⁶

C. Corporate Officers

Corporate officers owe a duty to the corporations they serve.⁶⁷ Historically, this has been viewed as a fiduciary duty. In *Miller*, the court held that the former husband owed a fiduciary duty to his former wife because of his position as the director, officer, and founder of the corporation.⁶⁸ This was a suit by the former wife to rescind a shareholders’ agreement in regards to corporate stock acquired by the husband prior to the parties’ divorce and allegedly not disposed of by the parties’ divorce decree.⁶⁹ The court applied a “special facts” exception to the general rule “that a director or officer does not stand in a fiduciary relation to a stockholder in respect to his stock,” which “impose[s] on the officer or director a limited fiduciary duty to disclose any knowledge of special matters relating to the corporate business that may affect the value of the stock.”⁷⁰ In *Dooley*, the wife sued her husband for divorce and joined corporations as third parties, claiming that the corporations were the alter ego of the husband and that the assets of the corporations should be divided in the community estate.⁷¹ The corporations filed a counter-claim against the wife and a cross-claim against the husband seeking an accounting of the husband’s and wife’s assets and a constructive trust on those assets, pursuant to allegations that the husband and wife misappropriated corporate funds.⁷² The court held that the husband and wife breached their fiduciary duty of loyalty to the stockholders since they were officers and directors of

65. Comm. on Pattern Jury Charges, STATE BAR OF TEXAS, *Texas Pattern Jury Charges: Business, Consumer, Insurance, Employment* PJC § 104.2 (2008).

66. Compare *Lee v. Hasson*, 286 S.W.3d 1, 21 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (analyzing a pattern jury charge for fiduciary duty), with *Red Sea Gaming v. Block Invs. (Nev.) Co.*, No. 08-97-00288-CV, 2010 WL 108155, at *3-4 (Tex. App.—El Paso Jan. 13, 2010, pet. denied) (analyzing a pattern jury charge in context of a partnership and noting the standard for the duty of loyalty and care).

67. *Int’l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 576 (Tex. 1963); *Lifshutz v. Lifshutz*, 199 S.W.3d 9, 18 (Tex. App.—San Antonio 2006, pet. denied); *Cotten v. Weatherford Bancshares, Inc.*, 187 S.W.3d 687, 698 (Tex. App.—Fort Worth 2006, pet. denied). Corporate officers do not owe a fiduciary duty to an individual shareholder unless there is some contract or special relationship between them in addition to the corporate relationship. *Cotten*, 187 S.W.3d at 698; *Grinnell v. Munson*, 137 S.W.3d 706, 718 (Tex. App.—San Antonio 2004, no pet.); *Faour v. Faour*, 789 S.W.2d 620, 622-23 (Tex. App.—Texarkana 1990, writ denied).

68. *Miller v. Miller*, 700 S.W.2d 941, 945-46 (Tex. App.—Dallas 1985, writ ref’d n.r.e.).

69. *Id.* at 943-44.

70. *Id.* at 945-46.

71. *Sw. Livestock & Trucking Co. v. Dooley*, 884 S.W.2d 805, 807 (Tex. App.—San Antonio 1994, writ denied).

72. *Id.*

the corporations.⁷³ “Corporate officers and directors are fiduciaries and transactions in which they receive personal gain in their dealings with the corporation are subject to the closest examination.”⁷⁴ Any property is held in constructive trust for the corporation.⁷⁵ Additionally, the court held that the wife could not avail herself of the equitable doctrine of alter ego when she participated in the very act which gave rise to her cause of action: disregarding the corporate structure.⁷⁶ An accounting of the community property was necessary to determine the identity of the property or the amount of money owed to the corporations.⁷⁷

The advent of the TBOC appears to have lessened these duties. Corporate directors shall discharge their duties “in good faith, with ordinary care, and in a manner the director reasonably believes to be in the best interest of the corporation.”⁷⁸ With regard to liability, the TBOC provides:

A director is not liable to the corporation, a member, or another person for an action taken or not taken as a director if the director acted in compliance with this section. A person seeking to establish liability of a director must prove that the director did not act:

- (1) in good faith;
- (2) with ordinary care; and
- (3) in a manner the director reasonably believed to be in the best interest of the corporation.⁷⁹

Just in case the reader were to miss the significance of § 2.221, the legislature added § 22.223: “A director of a corporation is not considered to have the duties of a trustee of a trust with respect to the corporation or with respect to property held or administered by the corporation, including property subject to restrictions imposed by the donor or transferor of the property.”⁸⁰

D. Agents

Agents owe a fiduciary duty to their principals.⁸¹ An agreement that exists between an agent and principal is integral when considering the scope of an agent’s duty to the principal.⁸² One spouse can act as agent for the

73. *Id.* at 810-11.

74. *Id.* at 809.

75. *Id.*

76. *Id.* at 810.

77. *Id.*

78. TEX. BUS. ORGS. CODE ANN. § 22.221(a) (West 2010).

79. § 22.221(b).

80. *Id.* § 22.223.

81. *Nat’l Plan Adm’rs, Inc. v. Nat’l Health Ins. Co.*, 235 S.W.3d 695, 700 (Tex. 2007); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002).

82. *Nat’l Plan Adm’rs*, 235 S.W.3d at 700.

other spouse in business or separate property matters and transactions.⁸³ One court has held that a husband was not the agent of his wife based solely on the marital relationship, which standing alone does not create an agency relationship.⁸⁴ Where no other evidence demonstrated an agency relationship, the plaintiff could not recover from the husband's share of the community estate nor from his separate estate.⁸⁵

E. Executors and Trustees

Executors and trustees owe a duty to the beneficiaries of the estate or trust which includes a strict duty of good faith and candor as well as the general duty of full disclosure respecting matters affecting the beneficiaries' interest.⁸⁶ For example, in *Lesikar v. Rappeport*, one of two sisters, individually and as co-trustee of a testamentary trust created by their father's will, brought suit against the other sister, that sister's husband, and their attorney for breach of fiduciary duty, fraud, and conspiracy, alleging that the defendants converted income from the estate property to their own use.⁸⁷ The trial court entered judgment on the jury verdict for the plaintiff sister.⁸⁸ The defendant sister and her husband appealed.⁸⁹ The court of appeals held that the husband's acquisitions of an assignee's interest in oil wells in exchange for indemnifying the assignee against the estate's claims against it created a conflict of interest, and thus, the defendant sister breached her fiduciary duty as co-executrix of the estate.⁹⁰ The evidence supported findings that the defendant sister and her husband committed fraud by failing to disclose their separate dealings with a potential debtor of the estate and participated jointly in acts of fraud giving rise to civil conspiracy.⁹¹

The court held that "[t]he existence of strained relations between the parties does not lessen the fiduciary's duty of full and complete disclosure."⁹² In addition, "[a]ll transactions between fiduciary and principal are presumptively fraudulent and void."⁹³ The court of appeals

83. *Taylor v. Martin*, 386 S.W.2d 211, 211 (Tex. Civ. App.—Waco 1964, writ dismissed).

84. *Id.*

85. *Id.* at 213-14.

86. TEX. PROP. CODE ANN. §§ 111.0035(b)(4)(B), 111.0035(c) (West 2010); *Humane Soc'y of Austin & Travis Cnty. v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975) (explaining that the fiduciary duty of the bank arose because it was executor of estate); *Montgomery v. Kennedy*, 651 S.W.2d 814, 817-18 (Tex. App.—El Paso 1983), *rev'd on other grounds*, 669 S.W.2d 309 (Tex. 1984) (holding that a trustee of testamentary trust owed fiduciary duty to life beneficiary).

87. *Lesikar v. Rappeport*, 33 S.W.3d 282, 290-91 (Tex. App.—Texarkana 2000, pet. denied).

88. *Id.* at 295.

89. *Id.*

90. *Id.* at 297.

91. *Id.* at 297-98.

92. *Id.* at 296 (citing *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984)).

93. *Id.* at 298 (citing *Chien v. Chen*, 759 S.W.2d 484, 495 (Tex. App.—Austin 1988, no writ)).

also held that “the burden lies on [fiduciaries] to establish the validity of any particular transaction” and to demonstrate that they “acted fairly and informed the other party of all material facts relating to the challenged transaction.”⁹⁴

F. Attorneys

Attorneys owe a fiduciary duty to their clients.⁹⁵ Indeed, the attorney-client relationship is a “special relationship” giving rise to a duty that, if breached, may support a mental anguish award.⁹⁶ The “special relationship” is a term of art that is fairly new to Texas law. Although it is generally termed a fiduciary relationship, unlike the two other fiduciary relationships (formal and informal), the special relationship gives rise only to the duty of good faith and fair dealing.⁹⁷ The special relationship does not carry with it the full range of fiduciary rights and duties normally associated with the other fiduciary relationships.⁹⁸ As the Texas Supreme Court has stated, “the duty of good faith and fair dealing merely requires the parties to ‘deal fairly’ with one another and does not encompass the often more onerous burden that requires a party to place the interest of the other party before his own, often attributed to a fiduciary duty.”⁹⁹ With the special relationship, as with the formal fiduciary relationship, the relationship exists as a matter of law, so the status of the parties again serves as its own proof that the relationship exists.¹⁰⁰

94. *Id.* (citing *Hoggett v. Brown*, 971, S.W.2d 472, 487 (Tex. App.—Houston [14th Dist.] 1997, pet. denied); *Chien*, 759 S.W.2d at 495).

95. *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988); *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964); *Arce v. Burrow*, 958 S.W.2d 239, 245 (Tex. App.—Houston [14th Dist.] 1997), *aff’d and modified*, 997 S.W.2d 229 (Tex. 1999); *Izzo v. Izzo*, No. 03-09-00395-CV, 2010 WL 1930179, at *7 (Tex. App.—Austin May 14, 2010, pet. denied) (not designated for publication); *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 S.W.3d 416, 428-29 (Tex. App.—Austin 2009, no pet.); *McGuire, Craddock, Strother & Hale, P.C. v. Transcon. Realty Invs., Inc.*, 251 S.W.3d 890, 894 (Tex. App.—Dallas 2008, pet. denied); *Thompson v. Vinson & Elkins*, 859 S.W.2d 617, 623 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied).

96. *See Vickery v. Vickery*, 999 S.W.2d 342, 377 (Tex. 1999) (Hecht, J., dissenting). *But see Toles v. Toles*, 113 S.W.3d 899 (Tex. App.—Dallas 2003, pet. denied) (discussing a case in which a former wife sued her former husband and the law firm that represented him in the divorce action for aiding and abetting the breach of a fiduciary duty). The *Toles* court held that although constructive fraud refers to the breach of the legal or equitable duty violating a fiduciary relationship, that relationship terminates in a contested divorce proceeding when a husband and wife each hire independent attorneys. *Id.* at 905. The court further held that the law firm representing the husband had no fiduciary duty to parties that were adverse to its client. *Id.*

97. *See Crim Truck & Tractor Co. v. Navistar Int’l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992).

98. *See id.*

99. *Id.*

100. *See Plaza Nat’l Bank v. Walker*, 767 S.W.2d 276, 278 (Tex. App.—Beaumont 1989, writ denied) (“We hold that such a relationship exists between a bank and its depositors.”).

G. Employees

During their employment, employees owe a fiduciary duty to their employers and are obligated to act in their employers' interests.¹⁰¹ Even after termination, employees are obligated not to divulge their employers' trade secrets even if they are not bound by confidentiality agreements.¹⁰² Former employees, however, can use general knowledge, skills, and experience acquired in the employment relationship, even when competing with their former employer.¹⁰³

IV. INFORMAL FIDUCIARY RELATIONSHIPS

While formal fiduciary relationships may arise as a matter of law via statute or contract, informal fiduciary relationships or "confidential relationships" may arise from moral, social, domestic, or personal relationships.¹⁰⁴ A fiduciary duty based on an informal relationship occurs when a high degree of trust, influence, or confidence has been acquired and abused.¹⁰⁵ A fiduciary relationship may arise either as a result of dominance on the part of one or weakness and dependence on the part of the other.¹⁰⁶ To prove an informal relationship, the plaintiff must establish that the dealings between the plaintiff and the fiduciary continued long enough to justify the plaintiff's reliance on the fiduciary to act in the plaintiff's best interest.¹⁰⁷ Both forms exist in family law, created by law or facts, because many spouses occupy the status of "classes of persons" in occupations, associations and positions, other than as spouses in a marital relationship.¹⁰⁸

101. See *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 201-02 (Tex. 2002).

102. See, e.g., *Norwood v. Norwood*, No. 02-07-00244-CV, 2008 WL 4926008, at *8 (Tex. App.—Fort Worth Nov. 13, 2008, no pet.) (not designated for publication); *Am. Derringer Corp. v. Bond*, 924 S.W.2d 773, 777 (Tex. App.—Waco 1996, no writ); *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 600-01 (Tex. App.—Amarillo 1995, no writ); *Welex Jet Servs. v. Owen*, 325 S.W.2d 856, 858 (Tex. App.—Fort Worth 1959, writ ref'd n.r.e.) ("Confidential information secured by reason of fiduciary relationships may not be used or disclosed to [employer]'s detriment irrespective of an agreement not to do so.").

103. See, e.g., *Bond*, 924 S.W.2d at 777; *Auto Wax Co. v. Byrd*, 599 S.W.2d 110, 112 (Tex. App.—Dallas 1980, no writ); *Welex Jet*, 325 S.W.2d at 858.

104. See *Crim Truck & Tractor*, 823 S.W.2d at 593-94.

105. See *id.* at 594; *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980).

106. See *Associated Indem. Corp. v. CAT Contracting, Inc.*, 918 S.W.2d 580, 596 (Tex. App.—Corpus Christi 1996), *aff'd in relevant part*, 964 S.W.2d 276 (Tex. 1998); *Texas Bank & Trust*, 595 S.W.2d at 508.

107. See *Trostle v. Trostle*, 77 S.W.3d 908, 914 (Tex. App.—Amarillo 2002, no pet.) (holding that subjective trust alone does not create a fiduciary relationship; the nature of relationship must be determined from objective facts); *Stephanz v. Laird*, 846 S.W.2d 895, 902 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

108. See *Trostle*, 77 S.W.3d at 914.

V. THE EARLY CASES

To understand where we are now, we must first examine the evolution of fiduciary litigation through the application of both common law and equitable principles of fairness to create duties of varying scope depending on the circumstances. Some of the most notable early Texas cases articulated the general principles of duty, breach, and appropriate remedy.

A. *Kinzbach Tool Co. v. Corbett-Wallace Corp.*¹⁰⁹

Corbett and Kinzbach were engaged in the oil field tool business.¹¹⁰ Mr. Corbett wanted to sell Mr. Kinzbach his contractual rights in a patented tool known as a whipstock.¹¹¹ Corbett persuaded Kinzbach's employee, Mr. Turner, to convince Kinzbach to make an offer to Corbett.¹¹² In exchange, Corbett agreed to pay Turner a commission, whereupon Corbett disclosed to Turner that he would sell the rights for \$20,000.¹¹³ The Texas Supreme Court found that Turner occupied the status of Kinzbach's fiduciary.¹¹⁴ The court imposed a fiduciary duty on "any person who occupies a position of peculiar confidence towards another. It refers to integrity and fidelity The term includes those informal relations which exist whenever one party trusts and relies upon another, as well as technical fiduciary relations."¹¹⁵ The court noted that during the negotiations leading to the consummation of the sale, Turner was a trusted employee of Kinzbach, and Turner failed to disclose his adverse interest in the deal to his employer:

[I]f the fiduciary "takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received."¹¹⁶

B. *Slay v. Burnett Trust*¹¹⁷

Mrs. Burnett established a trust for Texas Christian University.¹¹⁸ She named six trustees, including Mr. Slay, to manage the trust property.¹¹⁹ Mr.

109. See *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 509 (Tex. 1942).

110. See *id.*

111. See *id.*

112. See *id.* at 510-11.

113. *Id.* at 510.

114. *Id.* at 513.

115. *Id.* at 512-13.

116. *Id.* at 514 (quoting *United States v. Carter*, 217 U.S. 286, 306 (1910)).

117. *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945).

118. *Id.* at 379.

119. *Id.*

Slay, who also acted as Mrs. Burnett's attorney, became the chairman of the trustees upon Mrs. Burnett's death.¹²⁰ Relying on *Kinzbach*, the Texas Supreme Court exacted a strict standard for conduct among fiduciaries.¹²¹ A "duty of loyalty on the part of a trustee" prohibits him from using his position "to gain any benefit for himself at the expense of his . . . trust and from placing himself in any position where his self interest will or may conflict with his obligations as trustee."¹²² The court further held that a trustee cannot profit from the trust and explained that this rule springs from the trustee's duty to protect the interests of the estate and not to permit his personal interest to conflict, in any way, with that duty.¹²³ Finally, the court offered the trust beneficiary an election of remedies.¹²⁴ The beneficiary can require the trustee to account either: (1) for the original fund with interest, or (2) for the fund, as invested, with all profits realized.¹²⁵ Also, the breaching fiduciary must forfeit all benefit obtained in breach of the trust.¹²⁶

C. Thigpen v. Locke¹²⁷

Grantors of two deeds sought to set the deeds aside on the grounds that the Grantee was a friend, Grantors thought they were signing a lease, and the Grantee told them they could reclaim their property in five or six years after they repaid their debt to Grantee from rent on the property.¹²⁸ During their relationship, Grantee acted for the Grantors as a loan officer, personally guaranteeing Grantor's loans; a business advisor, encouraging Grantor to incorporate the business; and a shareholder, bookkeeper, director, and vice-president of Grantor's corporation.¹²⁹ The Texas Supreme Court held:

[M]ere subjective trust alone is not enough to transform arms-length dealing into a fiduciary relationship so as to avoid the statute of frauds. Businessmen generally do trust one another, and their dealings are frequently characterized by cordiality of the kind testified to here. If we should permit respondents to set aside their conveyances on such slender evidence, the security of contracts and conveyances in this state would be seriously jeopardized Our holding in no way detracts from the principle that a relationship of trust and confidence may be shown to arise informally from purely personal relationship[s]. All we hold is that

120. *Id.* at 380.

121. *Id.* at 387.

122. *Id.* at 387-88.

123. *Id.*

124. *Id.* at 393.

125. *Id.*

126. *Id.*

127. *Thigpen v. Locke*, 363 S.W.2d 247 (Tex. 1962).

128. *Id.* at 248-49.

129. *Id.* at 249.

[Grantors] do not testify to facts—other than their own subjective feelings—which show that their relationship with [Grantee] was anything more than a debtor-creditor relationship.¹³⁰

*D. International Bankers Life Insurance Co. v. Holloway*¹³¹

An insurance company brought suit against its former directors and officers for fraud, conspiracy, breach of fiduciary duty, mismanagement and misappropriation of corporate funds, and usurpation and appropriation of corporate opportunities.¹³² The trial court awarded the insurance company actual and exemplary damages.¹³³ The Texas Supreme Court recognized that corporate directors and officers are fiduciaries of the corporation.¹³⁴ Generally, Texas courts have held trustees liable for profits when the trustee receives a profit from the acquisition or disposition of property for the beneficiary.¹³⁵ For example, the courts would impose liability when the trustee sells property for one price and accounts to the corporation for a lesser price; the trustee buys at one price and sells to the company at a higher one; or the trustee has received a “secret bonus or advantage in the transaction in which he has acted for the corporation.”¹³⁶ Thus, the fiduciary cannot make any secret profit in his or her capacity as director.¹³⁷ Moreover, if the fiduciary breaches the trust, the court will hold the fiduciary accountable to the corporation for the personal profits realized by the fiduciary.¹³⁸

The directors had the burden to prove the fairness of their personal profits from each transaction.¹³⁹ This included the duty to obtain property for the plaintiff corporation at the “best possible price.”¹⁴⁰ The profit the directors sought to make for themselves belonged to the corporation.¹⁴¹ Indeed, fiduciaries have the duty to “exert all efforts in behalf of [the] corporation to the end that the sale of its stock would net the corporation the greatest possible return.”¹⁴² The court discussed the “scienter” requirement and how courts should evaluate directors that sell stock for personal gain:

130. *Id.* at 253.

131. *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567 (Tex. 1963).

132. *Id.* at 570.

133. *Id.*

134. *Id.* at 576.

135. *Id.* at 576-77.

136. *Id.* (quoting *Tenison v. Patton*, 95 Tex. 284, 294, 67 S.W. 92, 96 (1902)).

137. *Id.* at 577.

138. *See id.* at 581.

139. *Id.* at 577.

140. *Id.*

141. *Id.* at 577-78.

142. *Id.* at 578.

The probability of harm to the corporation is self-evident and the defendants had every reason to anticipate that their activities in promoting the sales of their personally owned stock . . . at prices below that at which the stock of the corporation was offered, would probably capture opportunities which might otherwise have been available to the corporation. . . . [However,] [w]e do not hold that a corporate stockholder and fiduciary is presumptively guilty of fiduciary breach in all cases when he sells personal stock during a time when the stock of the corporation is also on the market. We do hold that the making of such sales, under circumstances such as here, imposed on the defendants as stockholder-fiduciaries the burden of proving fairness when called to equitable accounting by the corporation.¹⁴³

VI. EVOLUTION OF FIDUCIARY AND ECONOMIC TORTS IN FAMILY LAW

As each spouse controls a portion of the community property, the relationship between husband and wife encompasses a level of "confidence and trust."¹⁴⁴ The court of appeals in Amarillo has noted:

This relationship requires that the spouses use the utmost good faith and frankness in their dealings with each other. Because of the nature of the spousal relationship, conduct of a spouse affecting the property rights of the other spouse may be fraudulent even though identical conduct would not be fraudulent as between non-spouses.¹⁴⁵

The breach of a fiduciary duty is a tort.¹⁴⁶ With the abolition of interspousal immunity by the Texas Supreme Court as to willful and intentional torts¹⁴⁷ and later as to any cause of action,¹⁴⁸ doors were opened to the family courts to try tort causes of action with a divorce. When a tort is tried with the divorce, the court must avoid awarding a double recovery.¹⁴⁹ A spouse may not be allowed to recover tort damages and a disproportionate division of the community estate based upon the same conduct.¹⁵⁰

143. *Id.*

144. *In re Marriage of Moore*, 890 S.W.2d 821, 830 (Tex. App.—Amarillo 1994, no writ).

145. *Id.*

146. *Douglas v. Aztec Petroleum Corp.*, 695 S.W.2d 312, 318 (Tex. App.—Tyler 1985, no writ); *Crutcher-Rolfs-Cummings, Inc. v. Ballard*, 540 S.W.2d 380, 388 (Tex. App.—Corpus Christi 1976, writ ref'd n.r.e.).

147. *Bounds v. Caudle*, 560 S.W.2d 925, 927 (Tex. 1977).

148. *Price v. Price*, 732 S.W.2d 316, 319 (Tex. 1987).

149. *Twyman v. Twyman*, 855 S.W.2d 619, 625 (Tex. 1993).

150. *Id.*

A. Management Rights and Duties

Management rights are limited by the fiduciary obligation created by the existence of the marital relationship.¹⁵¹ A trust relationship exists between a husband and wife as to the community property controlled by each spouse, and the managing spouse becomes a fiduciary to the other spouse in the management and disposition of special community property.¹⁵² The managing spouse has a duty not to dispose, transfer, or diminish the special community property under his or her control in fraud of the other spouse's ownership rights to that property.¹⁵³

The "trust fund doctrine" stands for the proposition that if the managing spouse is in fact handling both community property and the other spouse's separate property, then the managing spouse has the burden of producing records and tracing the community portion.¹⁵⁴ Failing this, then under the trust principles announced in *Farrow*¹⁵⁵ and *Sibley*,¹⁵⁶ the interests of the managing spouse are lost and the mixture becomes the other spouse's separate property.¹⁵⁷ *Farrow* applied the trust fund doctrine to the tracing or commingling of community and separate funds in a marriage, and determined that: (1) "if a man mixes trust funds with his own . . . the whole will be treated as trust property, except so far as he may be able to distinguish what is his own"; and (2) a property owner who wrongfully allows the property of another to become so intermingled and confused with his own property that it becomes impossible to identify has the burden to disclose such facts that will ensure a fair division; and if he does not agree to do so, the combined property or its monetary value will be, in turn, awarded to the injured party.¹⁵⁸ Under *Sibley*, the application of the trust fund doctrine in a divorce case means that "the trustee [husband] is presumed to have checked out his own money first."¹⁵⁹ Whether that premise states a rule (the "community-out-first rule") or merely a tracing method is beyond the scope of this Article.

B. Fraud on the Community

The terms "constructive fraud" and "fraud on the community" are essentially the same tort.¹⁶⁰ A spouse commits a fraud on the community or

151. *In re Marriage of Moore*, 890 S.W.2d 821, 830 (Tex. App.—Amarillo 1994, no writ).

152. *See id.* at 828-29.

153. *See id.* at 830.

154. *See id.* at 825-27.

155. *Farrow v. Farrow*, 238 S.W.2d 255, 256 (Tex. Civ. App.—Austin 1951, no writ).

156. *Sibley v. Sibley*, 286 S.W.2d 657, 659 (Tex. Civ. App.—Dallas 1955, writ dismissed).

157. *Id.*

158. *Farrow*, 238 S.W.2d at 256-57.

159. *Sibley*, 286 S.W.2d at 659.

160. *In re Marriage of Moore*, 890 S.W.2d 821, 827 (Tex. App.—Amarillo 1994, no writ).

constructively defrauds the other spouse if he or she makes an improper transfer of community property in breach of the fiduciary duty owed to the other spouse.¹⁶¹ Constructive fraud is the breach of some legal or equitable duty that, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests.¹⁶² Constructive fraud does not require an intent to deceive. It is the consequence of a breach of the relationship of trust and confidence between spouses involving a transfer, gift, waste, or dissipation of community property that is capricious, excessive, or arbitrary, which results in unfairness to the other spouse.¹⁶³ A presumption of constructive fraud arises where one spouse disposes of the other spouse's one-half interest in community property without the other's knowledge or consent.¹⁶⁴ Once alleged by the complainant, the responding party must carry the burden of rebutting the presumption of constructive fraud by proving the fairness of the transaction.¹⁶⁵

A spouse may make moderate gifts, transfers, or expenditures of community property to a third party.¹⁶⁶ A gift of community funds that is capricious, excessive, or arbitrary may be set aside as a constructive fraud on the other spouse.¹⁶⁷ In determining whether a spouse's actions constitute constructive fraud, the court may consider: the relationship between the spouse and the recipient; the size of the gift or transfer in relation to the total size of the community estate; the adequacy of the estate remaining in spite of the gift or transfer; and any special justifying factors for the gift or transfer.¹⁶⁸ Simply spending money or losing money in business or investments is not waste.¹⁶⁹ Generally, a spouse will not be required to account for funds spent during the marriage or lost in trading or business ventures; however, the spouse will be accountable for disposing, wasting, or hiding assets in order to defraud the other spouse of his or her interest in the property.¹⁷⁰ It is hard to imagine anything more wasteful than flushing money down the toilet.¹⁷¹

161. *Massey v. Massey*, 807 S.W.2d 391, 402 (Tex. App.—Houston [1st Dist.] 1991, no writ).

162. *Land v. Marshall*, 426 S.W.2d 841, 846 n.3 (Tex. 1968).

163. *Mazique v. Mazique*, 742 S.W.2d 805, 807 (Tex. App.—Houston [1st Dist.] 1987, no writ).

164. *Zieba v. Martin*, 928 S.W.2d 782, 789 (Tex. App.—Houston [14th Dist.] 1996, no writ); *Carnes v. Meador*, 533 S.W.2d 365, 370 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.).

165. *Mazique*, 742 S.W.2d at 807; *Massey*, 807 S.W.2d at 402.

166. *In re Marriage of Devine*, 869 S.W.2d 415, 422 (Tex. App.—Amarillo 1993, writ denied); *Mazique*, 742 S.W.2d at 808.

167. *Osuna v. Quintana*, 993 S.W.2d 201, 209-10 (Tex. App.—Corpus Christi 1999, no pet.);

Horlock v. Horlock, 533 S.W.2d 52, 55 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dismissed w.o.j.).

168. *Massey*, 807 S.W.2d at 402.

169. *Connell v. Connell*, 889 S.W.2d 534, 544 (Tex. App.—San Antonio 1994, writ denied).

170. *Reaney v. Reaney*, 505 S.W.2d 338, 339-41 (Tex. Civ. App.—Dallas 1974, no writ); *Pride v. Pride*, 318 S.W.2d 715, 718 (Tex. Civ. App.—Dallas 1958, no writ); *Swisher v. Swisher*, 190 S.W.2d 382, 384 (Tex. Civ. App.—Galveston 1945, no writ).

171. *See Ex parte Preston*, 162 Tex. 379, 347 S.W.2d 938, 939 (1961) (noting that Husband testified

*C. Schlueterbahn*¹⁷²

Texas recognizes the concept of fraud on the community, which the supreme court defined in *Schlueter* as a wrong committed by one spouse which may be considered by the trial court in its division of the community estate and which may justify a disproportionate division.¹⁷³ It is not, however, an independent tort giving rise to a cause of action between spouses.¹⁷⁴ Nor may it give rise to a recovery for punitive damages, inasmuch as “recovery of punitive damages requires a finding of an independent tort with accompanying actual damages.”¹⁷⁵ Instead, the “claim of fraud on the community is a means to an end” that seeks either to recover specific assets wrongfully conveyed or “to obtain a greater share of the community estate upon divorce” as compensation for the loss of community property.¹⁷⁶ Where the economic tort depletes the community estate so as to leave insufficient property available to the wronged spouse, the courts may impose a money judgment to achieve an equitable division.¹⁷⁷ The money judgment serves to recoup the value of the wronged spouse’s share of the estate that has been lost through the fraud.¹⁷⁸ “Because the amount of the judgment is directly referable to a specific value of lost community property, it will never exceed the total value of the community estate.”¹⁷⁹

Mr. Schlueter transferred various community assets to his father shortly before he filed for divorce.¹⁸⁰ In her counter-claim for divorce, Mrs. Schlueter brought independent tort claims against her husband and father-in-law, seeking damages for fraud, breach of fiduciary duty, and conspiracy.¹⁸¹ Based on the jury verdict, the trial court ordered a disproportionate division of the community estate in favor of Mrs. Schlueter and rendered judgment for her against Mr. Schlueter and his father for

he had flushed \$21,000 “down a commode and into the sewer system of the City of Fort Worth”).

172. Schlitterbahn is a family owned and operated company based in New Braunfels, Texas, which owns three water parks in Texas and one in Kansas. According to Wikipedia, “Schlitterbahn” is a made-up German word loosely translated as “slippery road.” See Schlitterbahn, WIKIPEDIA, <http://en.wikipedia.org/wiki/Schlitterbahn> (last visited February 28, 2011). “Schlueterbahn” is a word coined by the authors and denotes the slippery road paved by *Schlueter v. Schlueter*, 975 S.W.2d 584, 584 (Tex. 1998).

173. *Schlueter*, 975 S.W.2d at 588.

174. *Id.* at 585.

175. *Id.* at 589 (quoting *Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663, 665 (Tex. 1995)).

176. *Id.* at 588 (quoting *Belz v. Belz*, 667 S.W.2d 240, 247 (Tex. App.—Dallas 1984, writ ref’d n.r.e.)).

177. *Id.* (citing *Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981)).

178. *Id.* (citing *Mazique v. Mazique*, 742 S.W.2d 805, 808 (Tex. App.—Houston [1st Dist.] 1987, no writ)).

179. *Id.* at 588.

180. *Schlueter v. Schlueter*, 929 S.W.2d 94 (Tex. App.—Austin 1996), *aff’d in part, rev’d in part* by 975 S.W.2d 584 (Tex. 1998).

181. *Id.* at 94.

actual and exemplary damages.¹⁸² Holding that a tort cause of action for fraud on the community exists independently of a divorce proceeding, the Austin Court of Appeals affirmed.¹⁸³ The Texas Supreme Court granted petition for review to resolve the conflict among the courts of appeals on this question.¹⁸⁴

In reversing the court of appeals, the supreme court announced that there is no separate tort cause of action between spouses for fraud on the community estate independent of divorce proceedings.¹⁸⁵ A wronged spouse has an adequate remedy for fraud on the community through the “just and right” property division upon divorce.¹⁸⁶ The community property system in Texas provides that the trial court must enter a division of the married couple’s estate “in a manner that the court deems just and right,” considering the rights of the parties and any children of the marriage.¹⁸⁷ Such a standard may at times lead to a disproportionate division of assets and liabilities for the parties, depending on the circumstances that courts may consider in refusing to divide the marital estate equally.¹⁸⁸ *Schlueter* also recognizes that a court may “award a money judgment to one spouse against the other” to achieve an equitable division of the community estate.¹⁸⁹ But this is merely a means for recouping the defrauded spouse’s share of the community property lost as a result of the wrongdoing spouse’s breach of the trust relationship.¹⁹⁰ Such a recovery is not awarded as “separate damages” for an independent cause of action.¹⁹¹ “Because the amount of the judgment is directly referable to a specific value of lost community property, it will never exceed the total value of the community estate.”¹⁹² The wronged spouse should not suffer, however, just because, when it is time to divide the community estate, the other spouse has “depleted the estate such that there is not enough money or property left to effect a just and right division.”¹⁹³ In other words, injured spouses may

182. *Id.* at 100-01.

183. *Id.* at 100.

184. See Bradley L. Adams, *The Doctrine of Fraud on the Community*, 49 BAYLOR L. REV. 445, 456 (1997) (comparing the conflicting opinions of the Austin Court of Appeals in *Schlueter* and the Amarillo Court of Appeals in *In re Marriage of Moore*, 890 S.W. 2d 821 (Tex. App.—Amarillo 1994, no writ)).

185. *Schlueter*, 975 S.W.2d at 585.

186. *Id.* at 588.

187. TEX. FAM. CODE ANN. § 7.001 (West 2008).

188. *Murff v. Murff*, 615 S.W.2d 696, 698-99 (itemizing factors that a court may consider in making a disproportionate division of the community estate).

189. *Schlueter*, 975 S.W.2d at 588-89 (reasoning that trial courts have wide discretion and are allowed to take many factors into consideration in making a just and right division of the marital estate, including waste of community assets).

190. *Id.* at 588.

191. *Id.* at 589 (citing *In re Marriage of Moore*, 890 S.W.2d 821, 828 (Tex. App.—Amarillo 1994, no writ)).

192. *Id.* at 588.

193. *Id.*

recover an “appropriate share of not only that property existing in the community at the time of divorce, but also that which was improperly depleted from the community estate.”¹⁹⁴ Because there is no independent tort action for actual fraud in the divorce context, the wronged spouse may not recover punitive damages.¹⁹⁵ But if the wronged spouse proves the heightened culpability of actual fraud—deprivation of community assets done with dishonesty of purpose or an intent to deceive—the trial court may consider the fraud in the property division.¹⁹⁶

Although *Schlueter* has limited the method and extent of recovery, the doctrine of fraud on the community has not been abolished. Constructive fraud can still be alleged through claims of waste or dissipation; improper conveyance; excessive gifts; transfers or gifts to paramours; or similar conduct. Assume that husband and wife own liquid community assets of \$1 million. Husband spends \$250,000 on his girlfriend for expensive vacations. At the time of divorce, only \$750,000 of the estate remains on hand. Wife is not limited to recovering a disproportionate division of the existing \$750,000. She can seek a disproportionate division of \$1 million, the true value of the estate. Theoretically, the trial court could award wife all of the existing \$750,000. Husband would receive the “ghost assets”—the \$250,000 he took and spent. Now suppose that Husband has spent \$750,000 on his girlfriend and only \$250,000 remains in the community accounts. The court could award Wife the \$250,000, but this value represents only a quarter of the entire community. In effectuating a just and right division, the court could also award a money judgment against Husband, as long as the judgment did not exceed \$750,000. The judgment may or may not be collectible, but Husband’s separate estate—if he has one—is certainly fair game. And, if Husband wasted any monies that included Wife’s separate funds, she can bring an independent cause of action for actual fraud concerning her separate estate.¹⁹⁷

Spouses can also bring independent causes of action against each other for personal injury tort claims.¹⁹⁸ There is no potential for double recovery for pain and suffering because the damages are the separate property of the injured spouse and do not add to the marital estate.¹⁹⁹ The majority in *Schlueter* discussed the court’s prior decisions in *Bounds*,²⁰⁰ *Price*,²⁰¹ and *Twyman*.²⁰² The court found that the salient characteristics distinguishing the trilogy from the case at hand were that *Bounds*, *Price*, and *Twyman*

194. *Id.* at 589.

195. *Id.*

196. *Id.* at 589-90.

197. *Id.* at 590-91 (Hecht, J., dissenting).

198. *Id.* at 587.

199. *Id.*

200. *Bounds v. Caudle*, 560 S.W.2d 925, 927 (Tex. 1977).

201. *Price v. Price*, 732 S.W.2d 316, 319 (Tex. 1987).

202. *Twyman v. Twyman*, 855 S.W.2d 619, 625 (Tex. 1993).

involved independent causes of action for personal injury torts—wrongful death, a negligence claim for personal injury, and intentional infliction of emotional distress, respectively²⁰³—to which the dissent mounted a vigorous and exacting response:

If one spouse assaults the other, the wronged spouse can obtain not only a disproportionate share of the estate in a divorce proceeding but, if necessary to compensate fully for the wrong done, a judgment for actual damages and, on the requisite showing, punitive damages against the wrongdoer. The same rule applies if one spouse intentionally inflicts emotional distress on the other or negligently injures the other. But if one spouse defrauds the other of an interest in community property, the wronged spouse's sole redress is a disproportionate share of the estate in a divorce proceeding. That is the Court's holding in this case. The Court's only rationale for treating fraud on a spouse differently from other intentional torts is that fraud does not involve personal injuries The Court does not, indeed cannot, explain why an uneven division of the community estate is inadequate relief for personal injuries but adequate for fraud.²⁰⁴

*D. And Then Along Came Vickery*²⁰⁵

The introduction to this Article began with the observation that the Texas Supreme Court has not been consistent in its determination of whether an economic tort is actionable between spouses for damages to the community estate. On the heels of *Schlueter*, the court was presented with egregious facts in *Vickery*. Mrs. Vickery filed an action for bill of review seeking to set aside a divorce decree, a redivision of the community estate, and actual and punitive damages against her husband and a third party.²⁰⁶ Mr. Vickery, a personal injury attorney, convinced his wife they should divorce to protect their assets from a possible recovery by the plaintiff in a legal malpractice suit that was pending. Mr. Vickery turned to Dianne Richards, a family law attorney and law school friend, and asked her to prepare and file a "plain vanilla" petition for divorce on behalf of Mrs. Vickery.²⁰⁷ Richards did so without ever speaking to Mrs. Vickery.²⁰⁸ Mr. Vickery represented himself pro se but Richards prepared and filed an answer and cross-petition for divorce for him.²⁰⁹ Someone in Richards's office signed Mr. Vickery's name to the pleading.²¹⁰ A few weeks later, the

203. *Schlueter*, 975 S.W.2d at 587.

204. *Id.* at 590-91 (Hecht, J., dissenting).

205. *Vickery v. Vickery*, 999 S.W.2d 342, 342 (Tex. 1999) (Hecht, J., dissenting).

206. *Id.* at 343.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 346.

plaintiff in the malpractice suit offered to settle within the limits of malpractice insurance coverage, but Mr. Vickery never disclosed this to his wife.²¹¹ Meanwhile, he insisted that they divorce.²¹² She reluctantly agreed and signed a property settlement agreement that awarded her only a small fraction of the community estate.²¹³ Within a few months, Mr. Vickery married his wife's best friend.²¹⁴ Mrs. Vickery sued her former husband for fraud, conspiracy, breach of fiduciary duty, duress, and intentional infliction of emotional distress.²¹⁵ She also sued Richards for negligence, gross negligence, and violation of the Deceptive Trade Practices Act.²¹⁶

The jury found Mr. Vickery liable for fraud and breach of fiduciary duty and assessed actual damages of \$6.7 million for loss of marital property and \$1.3 million for mental anguish, plus \$1 million as punitive damages.²¹⁷ The jury also awarded Mrs. Vickery damages of \$450,000 against Richards.²¹⁸ The court of appeals affirmed in an unpublished opinion issued prior to the supreme court's ruling in *Schlueter*.²¹⁹ The supreme court denied Mr. Vickery's petition for review despite its recent ruling in *Schlueter*.²²⁰ Justice Hecht dissented from the denial in a published opinion, which incorporated as an appendix both the intermediate court's majority opinion and Justice Andell's dissent from that court's denial of rehearing en banc.²²¹

As Justice Hecht noted in his dissent:

Applying *Schlueter* would require that the actual and punitive damages awarded Mrs. Vickery against her former husband be reversed and the case remanded to the district court to reconsider what division of the community is just and right. The district court may consider Mr. Vickery's "dishonesty of purpose or intent to deceive" and "the heightened culpability of actual fraud" as found by the jury.²²²

By denying review, the supreme court allowed the actual and punitive damages to stand, which generates some dispute as to the current state of the law for economic torts committed against the community estate. This concern is amplified when one considers *Schlueter*'s invitation for a truly

211. *Id.* at 343.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 343-44.

216. *Id.* at 344.

217. *Id.*

218. *Id.*

219. See *Vickery v. Vickery*, No. 01-94-01004-CV, 1997 WL 751995, at *1 (Tex. App.—Houston [1st Dist.] 1997, pet. denied) (not designated for publication).

220. *Vickery*, 999 S.W.2d at 342.

221. See *id.* (Hecht, J., dissenting).

222. *Id.* at 344.

wronged spouse to allege actual—as opposed to constructive—fraud.²²³ Actual fraud allows recovery of a more disproportionate division.²²⁴ And remember that Mrs. Vickery alleged not only actual fraud, she sued for intentional infliction of emotional distress as well.²²⁵ The latter is a valid, independent tort actionable in a divorce case.²²⁶ The court may still award a disproportionate division of property for reasons other than the tortious conduct.²²⁷

E. The Constructive Trustee

In the wake of *Schlueter* and *Vickery*, inventive practitioners have developed new theories of recovery. Two recent cases have considered the fiduciary duty, which arises when one spouse is appointed the constructive trustee of monies belonging to the other spouse.²²⁸ In *Treuil*, Mr. Treuil took a lump sum distribution of retirement benefits twenty years after divorce.²²⁹ Five years later, Mrs. Treuil filed suit to enforce the decree to recover the percentage interest she had been awarded.²³⁰ Mr. Treuil raised a statute of limitations defense, and his former wife amended her pleadings to allege the discovery rule and the doctrine of fraudulent concealment.²³¹ The trial court entered judgment for approximately \$40,000 in Mrs. Treuil's favor.²³² Mr. Treuil appealed, complaining that the breach of fiduciary duty and breach of contract claims were barred by limitations and neither the discovery rule nor the doctrine of fraudulent concealment could salvage them.²³³

The court of appeals reversed and rendered.²³⁴ Mrs. Treuil's injury occurred when her former husband withdrew the retirement funds and failed to pay her.²³⁵ She had the burden to prove that his failure to pay her was inherently undiscoverable, and if she had actual or constructive knowledge that he had received a distribution before September 25, 2003, then she had failed to establish that her suit was timely filed.²³⁶ The parties' daughter testified that she had told her mother in 2002 that her father had pulled his

223. *Schlueter v. Schlueter*, 975 S.W.2d 584, 589-90 (Tex. 1998).

224. *Id.*

225. *Vickery*, 999 S.W.3d at 346 (Hecht, J., dissenting).

226. *Twyman v. Twyman*, 855 S.W.2d 619, 625 (Tex. 1993).

227. *Id.*

228. *See Jackson v. Jackson*, 319 S.W.3d 76, 76 (Tex. App.—San Antonio 2010, no pet.); *Treuil v. Treuil*, 311 S.W.3d 114, 114 (Tex. App.—Beaumont 2010, no pet.).

229. *Treuil*, 311 S.W.3d at 117.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 117-18.

234. *Id.* at 125.

235. *Id.* at 118.

236. *Id.* at 119-20.

retirement to open a business.²³⁷ The court held that there was no evidence to support Mrs. Treuil's claim that she filed suit within four years of the date her cause of action accrued under the discovery rule and that the doctrine of fraudulent concealment did not toll limitations.²³⁸ Even if a person to whom a fiduciary duty is owed is relieved of diligent inquiry, when the misconduct becomes apparent, it cannot be ignored, regardless of the relationship.²³⁹

A well-reasoned dissent focused on the language of the decree, which named Mr. Treuil as constructive trustee of Mrs. Treuil's funds.²⁴⁰ According to the dissent, the constructive trustee's duty of full disclosure alters the burden of proof.²⁴¹ Mr. Treuil took control of the money in 2002 and held it in trust for her.²⁴² A beneficiary has no duty to investigate until she has actual notice.²⁴³ Under common law, limitations do not begin to run "until the trustee repudiates the trust and notifies the beneficiary."²⁴⁴ "Regardless of the circumstances, the law provides that the beneficiary is entitled to rely on a trustee to fully disclose all relevant information."²⁴⁵ "The beneficiary is entitled to presume that a trustee holding trust property does so as a trustee, 'and the trust relationship continues unless plainly repudiated.'"²⁴⁶ Mr. Treuil did not repudiate the trust, and without a termination of the trust relationship, he continued as trustee until he spent all of Mrs. Treuil's money.²⁴⁷ When a trustee commingles trust property with his own, the commingled funds become the property of the trust until the trustee can trace what is his.²⁴⁸ The dissent noted that Mr. Treuil held Mrs. Treuil's money until 2004.²⁴⁹ She filed suit in 2007, which was within four years of the date when all of her trust funds disappeared.²⁵⁰

This concept finds support from language in Justice Brister's dissent in *Hagen*.²⁵¹ The 1976 divorce decree awarded a percentage of Mr. Hagen's military retirement pay to his wife if, as, and when he received it.²⁵² Eleven years after Mr. Hagen retired, the Veterans Administration (VA) determined that he had a service-connected disability.²⁵³ He elected to

237. *Id.* at 122.

238. *Id.* at 123-24.

239. *Id.* at 124 (citing *S.V. v. R.V.*, 933 S.W.2d 1, 8 (Tex. 1996)).

240. *Id.* at 125 (Gaultney, J., dissenting).

241. *Id.* at 126-27.

242. *Id.* at 117 (majority opinion).

243. *Id.* at 126 (Gaultney, J., dissenting).

244. *Id.* at 127.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 126.

249. *Id.*

250. *Id.*

251. *See Hagen v. Hagen*, 282 S.W.3d 899, 908 (Tex. 2009) (Brister, J., dissenting).

252. *Id.* at 900 (majority opinion).

253. *Id.* at 901.

receive disability payments in lieu of some of his retirement benefits.²⁵⁴ This election reduced the amount of retirement pay he received.²⁵⁵ When Mrs. Hagen began receiving her percentage of the reduced amount, she sought clarification of the decree.²⁵⁶ The trial court held that the decree divided only the retirement pay and did not divide his VA disability.²⁵⁷ It then ruled that Mrs. Hagen was only entitled to a percentage of the military retirement pay.²⁵⁸ The court of appeals reversed.²⁵⁹

The Texas Supreme Court first determined that the divorce decree was unambiguous in dividing the military benefits.²⁶⁰ “The question, then, is whether, at the time the decree was entered, military retirement pay included VA disability compensation.”²⁶¹ Mrs. Hagen argued that at the time of divorce, “Texas courts had established that disability pay was an earned property right.”²⁶² The court reiterated that while military disability pay is divisible, VA disability benefits are not.²⁶³ It also rejected her contention that Mr. Hagen was attempting to collaterally attack the decree.²⁶⁴

The crux of the dispute between the majority and dissenting opinions involved the court’s prior ruling in *Berry*.²⁶⁵ There, the agreed decree specified that Mrs. Berry would receive 25% of her husband’s gross Air Force disability retirement pay.²⁶⁶ Mr. Berry later elected to accept VA disability payments, and his retirement benefits were reduced accordingly.²⁶⁷ Mrs. Berry filed a motion to enforce her share of the gross benefits.²⁶⁸ She introduced into evidence Air Force statements reflecting that the gross Air Force disability retirement pay had not changed, but the VA disability benefits were credited against the retirement pay as a deduction and reduced the gross pay to a net amount.²⁶⁹ The trial court held Mrs. Berry was only entitled to a percentage of net pay.²⁷⁰ The court of

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 903.

259. *Id.* at 901.

260. *Id.* at 902.

261. *Id.*

262. *Id.* at 903.

263. *Id.*

264. *Id.* at 905.

265. *Berry v. Berry*, 780 S.W.2d 846, 847 (Tex. App.—Dallas 1989), *rev’d per curiam*, 786 S.W.2d 672, 674 (Tex. 1990).

266. *Id.*

267. *Id.* at 847–48.

268. *Id.* at 848.

269. *Id.* at 849.

270. *Id.* at 851.

appeals affirmed, but the supreme court reversed because the decree awarded Mrs. Berry a percentage of gross pay rather than net pay.²⁷¹

Justice Brister's dissent in *Hagen* argued that the majority opinion conflicted with *Berry* because neither decree mentioned VA disability pay, but Mrs. Berry won while Mrs. Hagen lost.²⁷² He wrote, "I would also try a little harder to find an alternative to today's judgment, which allows an ex-husband to cut off a community asset awarded to his ex-wife."²⁷³ Justice Brister opined that since the decree appointed Mr. Hagen as trustee of the funds for his former wife's use and benefit, "it is hard to see how his decision to waive those funds did not breach his fiduciary duty as her trustee."²⁷⁴ Nor is it clear why converting retirement pay to VA disability pay did not constitute conversion²⁷⁵

This language was relied upon in *Jackson*.²⁷⁶ At divorce, Mrs. Jackson was awarded 39.58% of her husband's disposable retired or retainer pay.²⁷⁷ The decree ordered direct payment but also appointed Mr. Jackson as a constructive trustee.²⁷⁸ The Defense Finance and Accounting Service (DFAS) paid Mrs. Jackson monthly from May 1995 until May 1999 when Mr. Jackson received a 100% disability rating.²⁷⁹ At that time, military retirees were required to waive a portion of gross retired pay, dollar for dollar, equal to the amount of their VA disability payments.²⁸⁰

Because Mr. Jackson's disability payments were greater than his retired pay, DFAS suspended retired pay from June 1, 1999, through December 1, 2003. Effective January 1, 2004, the law changed to allow concurrent receipt of disability benefits and retirement pay.²⁸¹ Mrs. Jackson began receiving monthly payments again.²⁸² But another change in the law allowed her former husband to elect to receive combat-related special compensation in lieu of concurrent receipt.²⁸³ When he elected combat-related special compensation toward the end of 2004, Mrs. Jackson was no longer entitled to receive benefits from DFAS because the combat-related special compensation is not considered retired pay.²⁸⁴ Mrs. Jackson filed a motion for enforcement in January 2005, alleging that Mr. Jackson breached his fiduciary duty as constructive trustee when he waived military

271. *Id.*

272. *Hagen v. Hagen*, 282 S.W.3d 899, 908 (Tex. 2009) (Brister, J., dissenting).

273. *Id.*

274. *Id.* at 909.

275. *Id.* at 912.

276. *Jackson v. Jackson*, 319 S.W.3d 76, 76 (Tex. App.—San Antonio 2010, no pet.).

277. *Id.* at 77.

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

retired pay to receive combat-related special compensation.²⁸⁵ The trial court denied the motion and Mrs. Jackson appealed, relying heavily on Justice Brister's dissent in *Hagen*.²⁸⁶

The court of appeals held that the nature of the trust relationship created by the decree must be determined by the language in the decree.²⁸⁷ Mr. Jackson was appointed trustee to the extent of his former wife's interest in disposable retired pay.²⁸⁸ His obligations as trustee arose only if the federal government failed to directly pay Mrs. Jackson.²⁸⁹

The court concluded that Mr. Jackson never had any obligation as trustee for two reasons.²⁹⁰ First, he never received any portion of his former wife's interest in the disposable retired pay.²⁹¹ Second, combat-related compensation is paid as a result of disability, not as a result of service.²⁹² Since Mrs. Jackson had an interest only in disposable retired pay as a result of Mr. Jackson's service, she had no interest in—and Mr. Jackson had no fiduciary duty with regard to—the combat-related compensation paid as a result of disability.²⁹³

VII. INCEPTION, DURATION, AND TERMINATION OF THE FIDUCIARY DUTY

A. Arising from Formal Fiduciary Relationship

A formal fiduciary relationship may exist prior to marriage.²⁹⁴ In most circumstances, the duty arises from a prior attorney-client relationship.²⁹⁵ Such was the case in *Izzo*.²⁹⁶ At the time they met, Mr. Izzo had been practicing law for one month and his future wife was working as a counselor.²⁹⁷ According to the facts related in the appellate decision, she owned a home and had invested an inheritance of \$180,000 to \$200,000 in mutual funds.²⁹⁸ A few months later, Mr. Izzo advised her that investing in

285. *Id.* at 77-78.

286. *Id.* at 78.

287. *Id.* at 81.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. See *Andrews v. Andrews*, 677 S.W.2d 171, 174 (Tex. App.—Austin 1984, no writ) (finding a fiduciary duty between a couple who had been living together for several years and had agreed to purchase a house together to use as their marital residence). In *Andrews*, even though the conduct occurred prior to the marriage, the nature of the premarital circumstances created a fiduciary relationship. *Id.*

295. *Izzo v. Izzo*, No. 03-09-00395-CV, 2010 WL 1930179, at *1 (Tex. App.—Austin May 14, 2010, no pet.).

296. *Id.* at *7.

297. *Id.* at *1.

298. *Id.*

real estate was safer.²⁹⁹ At his suggestion, they formed Federalist Investments, L.L.C. (Federalist) for the purpose of purchasing land and building an office that would house Mr. Izzo's law firm.³⁰⁰ The remaining office space would be leased to tenants.³⁰¹

The soon-to-be Mrs. Izzo invested \$80,000 in exchange for 80,000 shares in Federalist.³⁰² Mr. Izzo invested \$5,000 in exchange for 5,000 shares.³⁰³ Federalist then bought real estate for \$180,000 and built an office at a cost of \$525,000.³⁰⁴ Thereafter the parties married.³⁰⁵

Rental income from the building grossed about \$5,000 per month, but the law firm did not pay rent.³⁰⁶ Less than a year after marriage, Mrs. Izzo deeded her house to her husband, ostensibly for the purpose of refinancing.³⁰⁷ The house was then used as collateral to buy two parcels of real estate.³⁰⁸ Two and a half years later, Mr. Izzo directed one of his associates to draft a postmarital property agreement.³⁰⁹ Pursuant to its provisions, Mrs. Izzo would transfer her 80,000 shares in Federalist to her husband in return for an \$80,000 note, to be paid over ten years with 4.2% interest.³¹⁰ Mr. Izzo would then be the sole owner of Federalist, which in turn owned the office building.³¹¹ Mrs. Izzo's house would remain her separate property.³¹² The agreement designated all of the community estate as Mr. Izzo's separate property except for Mrs. Izzo's personalty and her counseling practice, which was worth \$7,500.³¹³ Mr. Izzo would receive his law practice, which he valued at \$778,000, his personalty, and both of the real estate lots.³¹⁴ This gave him over \$800,000 in community property, while his wife received property worth \$7,500.³¹⁵

The trial court found that Mr. Izzo led his wife to believe she had to sign the agreement to preserve the marriage.³¹⁶ She also believed that she would lose her \$80,000 investment in Federalist unless she signed.³¹⁷ Mr.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.* at *1 n.2.

307. *Id.* at *1.

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.* at *2.

317. *Id.*

Izzo filed for divorce a year later.³¹⁸ Mrs. Izzo counter-petitioned alleging involuntariness, unconscionability, and breach of fiduciary duty in connection with the execution of the postmarital agreement.³¹⁹ In a bifurcated proceeding, the trial court held the postmarital agreement to be unenforceable.³²⁰ The court specifically found that prior to marriage, Mr. Izzo assumed the role of attorney and investment advisor, taking possession of \$80,000 of assets.³²¹ As a result, a fiduciary relationship arose.³²² The subsequent marriage did not relieve him of his fiduciary duties, which he violated.³²³ The trial court's findings of fact recounted that Mr. Izzo allocated to himself 20% of the stock in Federalist, even though he only contributed 5%.³²⁴ He treated her investment as a loan, offered no interest during the years the money was invested, offered an unreasonable rate of interest on the deferred repayment, and failed to secure the note.³²⁵ Having set aside the postmarital agreement, the trial court then divided the property.³²⁶ Mr. Izzo was awarded his law practice, a vehicle, and his personality.³²⁷ Mrs. Izzo was awarded her counseling practice, a vehicle, the real estate lots, and her personality.³²⁸ The decree confirmed 80,000 shares of Federalist as Mrs. Izzo's separate property and 5,000 shares as Mr. Izzo's separate property.³²⁹ Mrs. Izzo's house was confirmed as separate property.³³⁰ Mr. Izzo appealed, claiming that the trial court erred in finding the postmarital agreement to be unenforceable.³³¹

The existence of a fiduciary relationship is relevant to whether a property agreement has been executed involuntarily.³³² An attorney-client relationship may be implied from the actions of the parties.³³³ The appellate court noted that in organizing Federalist and managing the drafting of the agreement, Mr. Izzo provided legal services typically related to entity formation.³³⁴ He thus owed a fiduciary duty prior to marriage and independent from the general fiduciary duty that he later owed as a spouse.³³⁵ "[E]ven if the only fiduciary responsibility . . . arose from the

318. *Id.* at *3.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.* at *4.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.* at *6.

333. *Id.*

334. *Id.*

335. *Id.* at *7.

general duty between spouses, such a duty would remain relevant to our analysis of the statutory affirmative defense to enforcement of a postmarital property agreement.”³³⁶ The fiduciary obligation imposes a duty to disclose all relevant information, exercise good faith and candor, and “to refrain from using the relationship to benefit the fiduciary’s personal interest, except with full knowledge and consent of the principal.”³³⁷ A transaction between a fiduciary and his principal is deemed unfair if the fiduciary significantly benefits from the transaction at the expense of the principal when viewed in the light of the circumstances present at the time the transaction occurred.³³⁸ Whenever a fiduciary receives a benefit or profits from transactions with his principal, a presumption of unfairness, undue influence, or fraud arises.³³⁹ The court concluded that the order invalidating the property agreement could be upheld solely on the basis of involuntariness.³⁴⁰

B. Pre- and Post-Marital Property Agreements

A fiduciary duty does not exist as a matter of law between persons about to marry with respect to premarital agreements, although it does exist in the context of postmarital agreements.³⁴¹ While the agreement was found unenforceable in *Izzo*, the opposite occurred in *In re Marriage of Smith*.³⁴² After twenty-nine years of marriage, the Smiths entered into a Separation and Partition Agreement (Agreement).³⁴³ Twenty years later (after forty-nine years of marriage), Mr. Smith filed for divorce.³⁴⁴ At issue was a broadly worded residual clause in the Agreement that mandated that all of his retirement benefits be awarded to him.³⁴⁵ The Texarkana Court of Appeals recognized the confidential relationship between a husband and wife, and noted that Texas courts have closely scrutinized marital property agreements and “have imposed the same duties of good faith and fair dealing on spouses as required of partners and other fiduciaries.”³⁴⁶ Courts will not protect a party who knowingly enters into a lawful but improvident contract.³⁴⁷ The court reasoned that the “fact that a bargain is a hard one does not entitle a party to be relieved therefrom if he [or she] assumed it

336. *Id.*

337. *Id.* at *8.

338. *Id.* at *8 n.11.

339. *Id.* at *9.

340. *Id.* at *13.

341. *See id.* at *5; *Marsh v. Marsh*, 949 S.W.2d 734, 739-40 n.4 (Tex. App.—Houston [14th Dist.] 1997, no writ).

342. *In re Marriage of Smith*, 115 S.W.3d 126, 136 (Tex. App.—Texarkana 2003, pet. denied).

343. *Id.* at 129.

344. *Id.*

345. *Id.*

346. *Id.* at 135.

347. *Id.*

fairly and voluntarily.”³⁴⁸ The court emphasized that for approximately twenty years, neither party took the position that the Agreement was unconscionable.³⁴⁹ And during those twenty years, both parties accepted the benefits of the Agreement without complaint of unconscionability.³⁵⁰

C. Fiduciary Duty Ends During Contested Proceedings

The fiduciary duty between husband and wife does not continue when a divorce is filed and both sides are represented by independent counsel.³⁵¹ But “[w]here a person is under a duty to disclose material information, refrains from doing so, and thereby leads another to contract in reliance on a mistaken understanding of the facts, the resulting contract is subject to rescission due to the intentional nondisclosure.”³⁵² There is a duty to speak that arises from the fiduciary or confidential relationship or “where a person is, ‘by force of circumstances,’ under a duty to speak.”³⁵³ The fiduciary duty arising from the marriage relationship is not continued when a husband and wife each hire independent counsel for representation in a contested divorce proceeding.³⁵⁴ Nonetheless, a duty to speak exists where “the parties to a mediated settlement agreement have represented to one another that they have each disclosed the marital property known to them.”³⁵⁵ When one voluntarily discloses information, he or she has a duty to disclose the whole truth instead of making a partial disclosure that conveys a false impression.³⁵⁶

D. Fiduciary Duty Terminates on Divorce

The fiduciary duty between spouses terminates upon divorce.³⁵⁷ While a constructive trustee owes a duty to the beneficiary, the same is not true of cotenants.³⁵⁸ “When a trial court fails to divide property at the time of divorce, the ex-spouses become tenants in common”³⁵⁹ and no fiduciary

348. *Id.*

349. *Id.*

350. *Id.*

351. *Parker v. Parker*, 897 S.W.2d 918, 924 (Tex. App.—Fort Worth 1995, writ denied); *Bass v. Bass*, 790 S.W.2d 113, 119 (Tex. App.—Fort Worth 1990, writ dismissed).

352. *Boyd v. Boyd*, 67 S.W.3d 398, 404-05 (Tex. App.—Fort Worth 2002, no pet.) (voiding a mediated settlement agreement for divorce because, during the mediation, the husband failed to disclose a bonus he had received).

353. *Id.* at 405.

354. *Id.*

355. *Id.*

356. *Id.*

357. *Grossnickle v. Grossnickle*, 935 S.W.2d 830, 846 (Tex. App.—Texarkana 1996, writ denied).

358. *In re Marriage of Notash*, 118 S.W.3d 868, 872 (Tex. App.—Texarkana 2003, no pet.).

359. *Id.*

or agency relationship exists “in the absence of an agreement or contract providing for such.”³⁶⁰

E. Statute of Limitations for Breach of Fiduciary Duty

A claim of fraud or misrepresentation is ordinarily a claim for a debt and a four-year statute of limitations controls.³⁶¹ A breach of fiduciary duty, which subsumes a claim of constructive fraud, is also governed by a four-year statute of limitations.³⁶²

In those rare cases when the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable, the Texas Supreme Court applies a judicially crafted exception to the general rule of accrual, known as the discovery rule.³⁶³ Under this rule, a cause of “action does not accrue until the plaintiff knew or in the exercise of reasonable diligence should have known of the wrongful act and resulting injury.”³⁶⁴ “[W]hen there has been a breach of fiduciary duty, the statute of limitations does not begin to run until the claimant knew or should have known of facts that in the exercise of reasonable diligence would have led to the discovery of the wrongful act.”³⁶⁵ The “fraudulent concealment doctrine” may be pled as an avoidance of the accrual of the cause of action, but historically, the discovery rule and the fraudulent concealment doctrine represent distinct concepts that exist for different reasons.³⁶⁶ The supreme court has revisited this issue, holding that “[t]his exception, which we call the ‘discovery rule’, applies in cases of fraud and fraudulent concealment, and in other cases in which ‘the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable.’”³⁶⁷ The El Paso Court of Appeals recently addressed the convergence of these rules in two companion cases brought by cousins involving the sale of mineral interests to the owner of the majority working interest and operator of oil and gas leases.³⁶⁸ The defendant argued that the discovery rule did not

360. *Id.* (quoting *Donnan v. Atl. Richfield*, 732 S.W.2d 715, 717 (Tex. App.—Corpus Christi 1986, writ denied).

361. *In re Estate of Herring*, 970 S.W.2d 583, 587 (Tex. App.—Corpus Christi 1998, no pet.); see TEX CIV. PRAC. & REM. CODE ANN. § 16.004(a)(3) (West 2008).

362. *Id.* § 16.051; *In re Herring*, 970 S.W.2d at 587.

363. See *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1996).

364. *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996) (citing *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 262 (Tex. 1994)).

365. *Little v. Smith*, 943 S.W.2d 414, 420 (Tex. 1997) (citing *Slay v. Burnett Trust*, 187 S.W.2d 377, 394 (Tex. 1945)).

366. *Wagner & Brown, LTD v. Horwood*, 58 S.W.3d 732, 736 (Tex. 2001).

367. *Murphy v. Campbell*, 964 S.W.2d 265, 270 (Tex. 1997) (quoting *Computer Assocs. Int’l*, 918 S.W.2d at 456).

368. See *Jones v. Thompson*, No. 08-08-00245-CV, 2010 WL 3157145, at *1 (Tex. App.—El Paso Aug. 11, 2010, pet. denied); *Holland v. Thompson*, No. 08-08-00311-CV, 2010 WL 3157148, at *1 (Tex. App.—El Paso Aug. 11, 2010, pet. denied).

apply because the separate and distinct doctrine of fraudulent concealment governs fraud claims.³⁶⁹ In response, the plaintiffs countered that the discovery rule applies to fraud claims as well.³⁷⁰ Both the Fourth Court of Appeals and the Eighth Court of Appeals have agreed with the plaintiff's position.³⁷¹

Fraudulent concealment works to estop a defendant from asserting limitations as a defense "because a person cannot be permitted to avoid liability for his actions by deceitfully concealing wrongdoing until limitations has run."³⁷² "The elements of fraudulent concealment are: (1) the existence of the underlying tort; (2) the defendant's knowledge of the tort; (3) the defendant's use of deception to conceal the tort; and (4) the plaintiff's reasonable reliance on the deception."³⁷³ A party asserting fraudulent concealment as an affirmative defense to the statute of limitations has the burden to raise it in response to the summary judgment motion and to come forward with summary judgment evidence raising a fact issue with regard to each of the four elements.³⁷⁴

VIII. REMEDIES

The injured beneficiary is entitled to recover damages against the fiduciary that are the result of the breach of fiduciary duty.³⁷⁵ An injured spouse may "recover [his or] her appropriate share of not only that property existing in the community at the time of divorce, but also that which was improperly depleted from the community estate."³⁷⁶ A money judgment is a viable remedy for achieving an equitable division of the marital estate of the parties.³⁷⁷ But it "can only be used as a means for the wronged spouse to recoup the value of his or her share of the community estate lost through the wrongdoer spouse's actions."³⁷⁸ "Because the amount of the judgment is directly referable to a specific value of lost community property, it will never exceed the total value of the community estate."³⁷⁹

369. See *S.V.*, 933 S.W.2d at 4; *Horwood*, 58 S.W.3d at 736.

370. See *Murphy*, 964 S.W.2d at 270 (citing *Computer Assocs. Int'l*, 918 S.W.2d at 456).

371. See *Jones*, 2010 WL 317145, at *5; *Holland*, 2010 WL 3157148, at *5; *BP Am. Prod. Co. v. Marshall*, 288 S.W.3d 430, 452 (Tex. App.—San Antonio 2008, pet. granted).

372. *S.V.*, 933 S.W.2d at 6.

373. *Glover v. Union Pac. R.R. Co.*, 187 S.W.3d 201, 217 (Tex. App.—Texarkana 2006, pet. denied) (quoting *Mitchell Energy Corp. v. Bartlett*, 958 S.W.2d 430, 439 (Tex. App.—Fort Worth 1997, pet. denied)).

374. See *Mitchell Energy Corp.*, 958 S.W.2d at 439.

375. See *Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex. 1998).

376. *Id.*

377. *Id.* (citing *Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981) (allowing money judgment against the husband for dissipating the parties' savings)).

378. *Id.* at 588.

379. *Id.* at 589.

A money judgment is also known as an "owelty judgment," which means equalization.³⁸⁰ It "may be used to equalize the property division for any reason."³⁸¹ To obtain a money judgment, evidence of the amount of the gift, transfer or conveyance should be specifically presented.³⁸²

A. Constructive Trust

A constructive trust is an equitable remedy "imposed by law because the person holding the title to property would profit by a wrong or would be unjustly enriched if he [or she] were permitted to keep the property."³⁸³ It is also a remedy created by the courts to compensate the victim of a breach of a fiduciary or confidential relationship.³⁸⁴ A court may place a constructive trust on an asset fraudulently conveyed if it is unique or if the estate is inadequate and the trustee must return the asset to the estate to effect an equitable division.³⁸⁵ To obtain a constructive trust, the proponent must prove three elements: (1) actual fraud or breach of a special trust or fiduciary relationship; (2) unjust enrichment of the wrongdoer; and (3) tracing to an identifiable res.³⁸⁶

B. Resulting Trust

Like the constructive trust, the doctrine of the resulting trust is invoked to prevent unjust enrichment.³⁸⁷ "A resulting trust arises by operation of law when title is conveyed to one person" but all or part of the purchase price is paid by another.³⁸⁸ "The trust arises out of the transaction and must arise at the time" title passes.³⁸⁹ The party who paid the purchase money is the equitable owner of the property, "and the titleholder is a mere trustee who holds [the property] for the benefit of those [who] furnished the

380. See *Massey v. Massey*, 807 S.W.2d 391, 404 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

381. *Id.*

382. See *Leal v. Leal*, 628 S.W.2d 168, 170 (Tex. App.—San Antonio 1982, no writ).

383. *Omohundro v. Matthews*, 161 Tex. 367, 341 S.W.2d 401, 405 (1960); see *Troxel v. Bishop*, 201 S.W.3d 290, 297 (Tex. App.—Dallas 2006, no pet.); *Sever v. Mass. Mut. Life Ins. Co.*, 944 S.W.2d 486, 492 (Tex. App.—Amarillo 1997, writ denied).

384. *Omohundro*, 161 Tex. at 373, 341 S.W.2d at 405 (1960); *In re Marriage of Loftis*, 40 S.W.3d 160, 165 (Tex. App.—Texarkana 2001, no pet.); *Exploration Co. v. Vega Oil & Gas Co.*, 843 S.W.2d 123, 126 (Tex. App.—Houston [14th Dist.] 1992, writ denied); *Hudspeth v. Stoker*, 644 S.W.2d 92, 94 (Tex. App.—San Antonio 1982, writ ref'd).

385. See *Omohundro*, 161 Tex. at 373, 341 S.W.2d at 405 (holding constructive trust an acceptable remedy under the unique facts of the case).

386. *In re Marriage of Harrison*, 310 S.W.3d 209, 212 (Tex. App.—Amarillo 2010, pet. denied).

387. *Nolana Dev. Ass'n v. Corsi*, 682 S.W.2d 246, 250 (Tex. 1984); *Savell v. Savell*, 837 S.W.2d 836, 839 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

388. *Cohrs v. Scott*, 161 Tex. 111, 117, 338 S.W.2d 127, 130 (1960).

389. *Id.* (emphasis deleted).

consideration.”³⁹⁰ The party claiming the resulting trust bears the burden of proving that community funds were used to make a purchase and there was no intent of actual ownership to vest in the third party.³⁹¹

C. *Quantum Meruit*

To recover a quantum meruit claim, a plaintiff must show: (1) the plaintiff rendered valuable services; (2) for the defendant; (3) the defendant accepted the services; and (4) the plaintiff rendered these services under circumstances as would reasonably notify the defendant of an expectation for payment.³⁹² In *Smith v. Deneve*, the court considered a claim for quantum meruit in the context of a couple cohabitating without benefit of marriage.³⁹³ Smith expected to be paid for work he performed on their house.³⁹⁴ He offered evidence that the couple “discussed the purchase price and the work that needed to be done” before the purchase.³⁹⁵ They jointly decided that they should make an offer.³⁹⁶ Smith “did substantial work on the house and spent money on materials used in the renovations,” and “his remodeling work increased the value of the house.”³⁹⁷ According to him, “[t]hey planned to fix up the house, sell it for a profit, and use the proceeds to buy a lake house.”³⁹⁸ Deneve argued that none of these facts tended to show “that she was reasonably notified that Smith expected to be paid.”³⁹⁹ She pointed out that “where people are living together as one household, services performed for each other are presumed to be gratuitous, and an express contract for remuneration must be shown or that circumstances existed showing a reasonable and proper expectation that there would be compensation.”⁴⁰⁰

The court agreed that “Smith presented no evidence that the circumstances reasonably notified Deneve that Smith expected to be paid for anything he did or any amounts he spent.”⁴⁰¹ In fact, the record indicated that Smith did not expect payment.⁴⁰² Instead, “he expected that

390. *Osuna v. Quintann*, 993 S.W.2d 201, 210 (Tex. App.—Corpus Christi 1999, no writ); *Masterson v. Hogue*, 842 S.W.2d 696, 697 (Tex. App.—Tyler 1992, no writ).

391. *Bell v. Smith*, 532 S.W.2d 680, 684 (Tex. Civ. App.—Fort Worth 1976, no writ).

392. *Smith v. Deneve*, 285 S.W.3d 904, 915 (Tex. App.—Dallas 2009, no pet.); *Johnston v. Kruse*, 261 S.W.3d 895, 901 (Tex. App.—Dallas 2008, no pet.).

393. *Smith*, 285 S.W.3d at 908.

394. *Id.* at 915.

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.* (citing *Coons-Andersen v. Andersen*, 104 S.W.3d 630, 638 (Tex. App.—Dallas 2003, no pet.)).

401. *Id.*

402. *Id.*

he and Deneve would stay together and eventually move into a house on a lake.”⁴⁰³ But the relationship soured, and the facts demonstrated “nothing more than that the parties lived together, expected to stay together, and mutually contributed to the household expenses during the relationship.”⁴⁰⁴

D. Texas Uniform Fraudulent Transfer Act

The Texas Uniform Fraudulent Transfer Act (TUFTA)⁴⁰⁵ may be a useful remedy for breach of fiduciary duty, especially against third parties.⁴⁰⁶ Although TUFTA was enacted to cover debtor-creditor issues, “creditor” is defined as a person “including a spouse” who has a claim.⁴⁰⁷ The claim need not be reduced to judgment.⁴⁰⁸ The Act provides that a transfer is fraudulent as to a creditor, whether the creditor’s claim arose before or within a reasonable time after the transfer was made, if the debtor made the transfer:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor’s ability to pay as they became due.⁴⁰⁹

A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer, and the debtor was insolvent at the time or the debtor became insolvent as a result of the transfer.⁴¹⁰

403. *Id.*

404. *Id.* at 915-16.

405. TEX. BUS. & COM. CODE ANN. §§ 24.001-.013 (West 2009).

406. J. Michael Putman, M.D.P.A. Money Purchase Pension Plan v. Stephenson, 805 S.W.2d 16, 17 (Tex. App.—Dallas 1991, no writ) (noting that TUFTA was remedy used to set aside husband’s conveyance of real property). *But see* Thomas v. Casale, 924 S.W.2d 433, 437 (Tex. App.—Fort Worth 1996, writ denied).

407. § 24.002(4).

408. § 24.002(3).

409. § 24.005(a).

410. § 24.006.

The party seeking to set aside the transfer must carry the burden of proof as to the elements of intent.⁴¹¹ Under TUFTA, a creditor may obtain the following remedies for relief against a transfer, subject to certain defenses available to the transferee as set forth in § 24.009.⁴¹² Section 24.008 provides:

- (1) avoidance of the transfer to the extent necessary to satisfy the creditor's claim;
- (2) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the applicable Texas Rules of Civil Procedure and the Civil Practice and Remedies Code; or
- (3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure:
 - (A) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;
 - (B) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or
 - (C) any other relief the circumstances may require.⁴¹³

The creditor may also obtain a judgment for the value of the asset transferred as provided by § 24.009 of the Texas Business and Commerce Code.⁴¹⁴

The court cannot award a double remedy.⁴¹⁵ Tort damages and a disproportionate division based on the same conduct are not allowed.⁴¹⁶

E. Disgorgement

The classic case involving disgorgement is *Kinzbach Tool*.⁴¹⁷ Kinzbach and Corbett were engaged in the oil field tool business.⁴¹⁸ Corbett owned contractual rights to a patented tool known as a

411. *E.g.*, *Rucker v. Steelman*, 619 S.W.2d 5, 7 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.); *see* § 24.005(b).

412. § 24.009.

413. § 24.008.

414. § 24.009.

415. *Twyman v. Twyman*, 855 S.W.2d 619, 625 (Tex. 1993).

416. *Id.* (holding that a disproportionate division of the community estate and an award for fraud may be contained in the same judgment; however, the record must reflect evidence to support a disproportionate division of the community estate on grounds other than the fraudulent transfer); *Toles v. Toles*, 45 S.W.3d 252, 264-65 (Tex. App.—Dallas 2002, writ denied).

417. *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 509 (Tex. 1942).

418. *Id.* at 510.

whipstock.⁴¹⁹ Corbett desired to sell the contract right to Kinzbach, but Kinzbach and Corbett were unfriendly with one another.⁴²⁰ Corbett contacted Turner, an employee of Kinzbach and offered to pay him a commission if Kinzbach bought the whipstock contract rights.⁴²¹ Corbett instructed Turner that he would take \$20,000 but he was not to mention the price to Kinzbach.⁴²² Turner approached Kinzbach and Kinzbach directed Turner to make inquiries about acquiring the whipstock contract rights.⁴²³ Kinzbach subsequently disclosed to Turner that he would be willing to pay as much as \$25,000.⁴²⁴ Turner did not disclose that he was to earn a commission on the sale to Kinzbach, and he did not disclose that Corbett would be willing to take \$20,000.⁴²⁵ Kinzbach subsequently purchased the contract rights for \$25,000 and then learned of the commission to be paid to Turner.⁴²⁶ Kinzbach terminated Turner and subsequently sued Corbett and Turner.⁴²⁷ Opining that Turner breached his duty of full disclosure, the court concluded that disgorgement of the commission was appropriate.⁴²⁸ The court rejected the defendants' argument that Kinzbach suffered no damages because he received full value for the price paid.⁴²⁹ The court concluded that if the fiduciary takes any gratuity or benefit or acquires any interest adverse to his principal without a full disclosure, it is a betrayal of his trust and a breach of fiduciary duty.⁴³⁰

F. Fee Forfeiture

An agent who breaches a fiduciary duty to the principal is not entitled to be compensated for services rendered, and fee forfeiture is a fundamental remedy.⁴³¹ The mere failure of the agent to discharge the duty of disclosure and reveal to the beneficiary all aspects of the transaction is in and of itself a breach justifying fee forfeiture.⁴³² The Texas Supreme Court has recognized that the function of fee forfeiture is not to compensate the principal for a violation of the duty of loyalty but to protect a relationship based on trust by discouraging an agent's disloyalty.⁴³³ Fee forfeiture has

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.*

423. *Id.* at 511.

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.* at 515.

429. *Id.* at 514.

430. *Id.*

431. *Douglas v. Aztec Petroleum Corp.*, 695 S.W.2d 312, 319 (Tex. App.—Tyler 1985, no writ).

432. *Russell v. Truitt*, 554 S.W.2d 948, 954 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

433. *Burrow v. Arce*, 997 S.W.2d 229, 238 (Tex. 1999).

been considered by the courts to be an appropriate remedy “without regard to whether the breach of fiduciary duty resulted in [actual] damages” to the beneficiary.⁴³⁴

Whether an attorney must forfeit his fee is determined by applying § 49 of the proposed Restatement (Third) of Law Governing Lawyers as well as additional factors based on the specific factual circumstances presented by each case.⁴³⁵ The amount is a question of law for the court, meaning it is not a jury issue—although a jury may need to consider certain factual disputes, such as whether or when the alleged misconduct occurred.⁴³⁶ The forfeiture remedy is restricted to “clear and serious” violations and must fit the circumstances presented.⁴³⁷ In determining whether a violation is clear and serious, the court should consider the gravity and timing of the violation; its willfulness; its effect on the value of the lawyer’s work for the client; any other threatened or actual harm to the client; and the adequacy of other remedies.⁴³⁸ “[T]he ‘willfulness’ factor requires consideration of the attorney’s culpability generally; it does not simply limit forfeiture to situations in which the attorney’s breach of duty was intentional.”⁴³⁹ “The ‘adequacy-of-other-remedies’ factor does not preclude forfeiture [even] when a client can be fully compensated by damages.”⁴⁴⁰ Ultimately, “the court must determine whether forfeiture is equitable and just.”⁴⁴¹

Moreover, the court must be cognizant of the public interest in maintaining the integrity of attorney-client relationships.⁴⁴² This is particularly true in family law cases. Courts in other jurisdictions have held that a sexual relationship between an attorney and client constitutes a breach of fiduciary duty as a matter of law, without regard to whether the client suffered economic damages.⁴⁴³ Where there are no economic damages, fee forfeiture has been applied as a remedy.⁴⁴⁴

434. *Id.* at 239-40.

435. *Id.* at 245.

436. *Id.* at 245-46.

437. *Id.* at 241.

438. *Id.* at 243.

439. *Id.*

440. *See id.* at 243-44.

441. *Haase v. Herberger*, 44 S.W.3d 267, 270 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (citing *Burrow*, 997 S.W.2d at 241).

442. *Burrow*, 997 S.W.2d at 244.

443. *See, e.g., In re Disciplinary Proceedings Against Kraemer*, 547 N.W.2d 186, 190 (Wis. 1996) (*per curiam*) (determining that an attorney who used his professional position for purposes of his own sexual gratification had violated the fundamental duty of trust inherent in the position he assumed as the lawyer for his client). Indiana takes a similar approach. *See In re Grimm*, 674 N.E.2d 551, 554-55 (Ind. 1996) (*per curiam*).

444. *See Burrow*, 997 S.W.2d at 241. Other remedies are beyond the scope of this Article, but consider the possibility of professional misconduct (grievance proceedings); malpractice (negligent mishandling of transference issues); tort damages (suit for intentional infliction of emotional distress); sexual assault (because of the client’s emotional vulnerability and the attorney’s exploitation thereof, the

G. Rescission

Rescission is available to a beneficiary who demonstrates a breach of fiduciary duty by the agent in causing the principal to enter into a designated transaction.⁴⁴⁵

IX. COMMON-LAW FRAUD

The concept of "fraud on the person" took on new meaning in *Vickery*.⁴⁴⁶ There, Mrs. Vickery alleged that her husband committed actual fraud against her individually by fraudulently securing her agreement to a divorce and a contractual division of property.⁴⁴⁷ Her claims were that, but for his misrepresentations about the reason for the divorce, she would have never agreed to the divorce or signed a contract dividing the community property.⁴⁴⁸ The court of appeals concluded that her claim was not one of constructive fraud on the community but of actual fraud perpetrated against her individually.⁴⁴⁹ In a common-law fraud action, which is an intentional tort, the plaintiff may recover damages for mental anguish, which will in turn support exemplary damages.⁴⁵⁰ And third parties are held jointly and severally liable for actual fraud along with the fraudulent spouse if there is sufficient evidence to prove that they knew about the spouse's fraudulent intent to injure the other spouse's rights.⁴⁵¹

Actual fraud involves dishonesty of purpose or intent to deceive.⁴⁵² In the family law context, it requires intent to harm by transferring or expending community property to deprive the other spouse of the "use and enjoyment of the assets involved in the transaction."⁴⁵³ Actual fraud requires a showing that: (1) a material misrepresentation was made; (2) it was false; (3) the speaker made it knowing it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made it with the intention that it should be acted upon by the party;

client was unable to resist sexual advances or consent to sexual relations); sanctions (righteous indignation gone awry). See Ann Crawford McClure & J. Christopher Nickelson, *Lust, Lawyers & Liability: Alice In Search of Wonderland*, State Bar of Texas Advanced Family Law Seminar, ch. 4 (2002) (discussing these issues).

445. *Miller v. Miller*, 700 S.W.2d 941, 952-53 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

446. *Vickery v. Vickery*, 999 S.W.2d 342, 343 (Tex. 1993) (Hecht, J., dissenting) (citing *Schlueter v. Schlueter*, 975 S.W.2d 584 589-90 (Tex. 1998)); see *supra* Part VI.D.

447. See *Vickery*, 999 S.W.2d at 342-44.

448. See *id.* at 343.

449. See *id.* at 342-44.

450. *Formosa Plastics Corp. v. Presidio Eng'rs & Contractors*, 960 S.W.2d 41, 47 (Tex. 1998).

451. *Thomas v. Casale*, 924 S.W.2d 433, 437 (Tex. App.—Fort Worth 1996, writ denied).

452. *Land v. Marshall*, 426 S.W.2d 841, 845 n.3 (Tex. 1968); *Horlock v. Horlock*, 533 S.W.2d 52, 54-55 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ dismissed w.o.j.) (holding that the fact that husband intentionally deprived wife of knowledge of gifts of money to children of a prior marriage did not constitute actual fraud).

453. *In re Marriage of Devine*, 869 S.W.2d 415, 421 (Tex. App.—Amarillo 1993, writ denied).

(5) the party acted in reliance upon it; and (6) the party thereby suffered injury.⁴⁵⁴

"A 'misrepresentation' may consist of the concealment of a material fact when there is a duty to speak."⁴⁵⁵ "[A] duty to speak . . . arises when one party knows that the other party is . . . ignorant of the material fact and does not have an equal opportunity to discover the truth."⁴⁵⁶ Generally speaking, the burden of proof falls upon the complaining party.⁴⁵⁷ But a fiduciary has the obligation to deal openly with and make full disclosure to the beneficiary.⁴⁵⁸ The mere failure of the fiduciary to disclose all aspects of the transaction to the beneficiary constitutes a breach of the fiduciary duty as a matter of law.⁴⁵⁹

In certain circumstances a presumption arises that the transaction was unfair which shifts the burden of persuasion to the fiduciary to demonstrate the transaction was fair and equitable to the beneficiary.⁴⁶⁰ Should the fiduciary fail to offer evidence rebutting the presumption, it is not necessary for the beneficiary to submit a breach of fiduciary duty question to the jury.⁴⁶¹ Some of the factors to be considered in determining whether the transaction was fair to the beneficiary include: whether there was full disclosure, whether there was adequacy of consideration, whether the beneficiary received independent advice, and whether the fiduciary benefitted at the expense of the beneficiary.⁴⁶²

X. CONCLUSION

In the thirteen years since *Schlueter* was decided, many family law specialists and practitioners have vocalized their disagreement with the

454. *Johnson & Johnson Med., Inc. v. Sanchez*, 924 S.W.2d 925, 929-30 (Tex. 1996).

455. *New Process Steel Corp. v. Steel Corp. of Tex.*, 703 S.W.2d 209, 214 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

456. *Id.*

457. *See Estate of Bridges v. Mosebrook*, 662 S.W.2d 116, 122 (Tex. App.—Fort Worth 1983, no writ). Very few family law opinions address the elements of actual fraud because the burden of proof for constructive fraud requires no intent to deceive. The elements for actual fraud have evolved from business transactions as opposed to the breach of fiduciary duty in the marital context. The "disposing-of-property spouse" must prove the fairness of all three factors to rebut the presumption of constructive fraud, to-wit: the size of the gift in relation to the total size of the community property, the adequacy of the remaining estate to support the complaining spouse in spite of the gift, and the relationship of donor and donee. *See Jackson v. Smith*, 703 S.W.2d 791, 795 (Tex. App.—Dallas 1985, no writ); *Mosebrook*, 662 S.W.2d at 122; *Horlock*, 533 S.W.2d at 55.

458. *Kinzbach Tool Co. v. Corbett Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942).

459. *Russell v. Truitt*, 554 S.W.2d 948, 954 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

460. *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1965); *Miller v. Miller*, 700 S.W.2d 941, 946 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (applying presumption of unfairness to transactions between a fiduciary and a party to whom he owes a duty of disclosure, thus imposing burden to establish fairness on the fiduciary).

461. *Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 509 (Tex. 1980).

462. *Estate of Townes v. Townes*, 867 S.W.2d 414, 417 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

holding. Their views tend to track Justice Hecht's dissent questioning "why spouses should be allowed to sue each other for assault, intentional infliction of emotional distress, and negligence, but not for fraud."⁴⁶³

Bear in mind that innovative lawyers crafted the remedy of reimbursement generations before the word ever appeared in the Texas Family Code. What remedies remain for economic torts in the marital context? Actual fraud may be alleged, justifying a greater disproportionate division.⁴⁶⁴ The injured spouse can sue "for fraud relating to separate property and recover damages as in any other case."⁴⁶⁵ The courts have created a distinction between a claim of constructive fraud against the community estate and a claim of actual fraud committed against the spouse "individually."⁴⁶⁶ Thus, "to the extent such fraud inflicts emotional distress, the wronged spouse will be entitled to recover mental anguish damages and punitive damages in excess of the community [estate] directly against the wrongdoer."⁴⁶⁷ And so this Article concludes as it began—creative theories of recovery abound.

463. *Schlueter v. Schlueter*, 975 S.W.2d 584, 591 (Tex. 1998) (Hecht, J., dissenting).

464. *Id.* at 589-90.

465. *Id.* at 591.

466. *Vickery v. Vickery*, 999 S.W.2d 342, 359 (Tex. 1999) (Hecht, J., dissenting) (highlighting the majority opinion of the intermediate court of appeals).

467. *Schlueter*, 975 S.W.2d at 591 (Hecht, J., dissenting).