

## Court Addresses Claims Against A Trustee Arising From The Management Of A Limited Partnership Interest

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In *Benge v. Thomas*, a settlor created a trust and appointed her daughter, Missi, as the trustee. No. 13-18-00619-CV, 2020 Tex. App. LEXIS 6888 (Tex. App.—Corpus Christi August 27, 2020, no pet.). The trust owned an interest in a limited partnership that contained mineral interests. Missi's daughter, Benge, was a beneficiary of the trust. Benge sued Missi for various claims of breach of fiduciary duty arising from the operation of the limited partnership and other issues. The trial court granted summary judgment for Missi, and Benge appealed.

The court of appeals first addressed Benge's claim that Missi breached her fiduciary duty to the trust by allowing the limited partnership's general partner to make objectionable transactions. Benge claimed that Missi breached her fiduciary duty in her capacity as trustee because she should have prevented the general partner from making the transactions. The court disagreed:

AFT Property as general partner had the authority to make these decisions. The evidence establishes as a matter of law that the 2012 Trust as a limited partner had no decision-making rights regarding AFT Minerals' assets. Benge's complaints all involve alleged damages to AFT Minerals and not to Benge herself. Thus, AFT Minerals would have had to bring these claims and not Missi in her capacity as trustee or Benge as a remainder beneficiary. *See Hall v. Douglas*, 380 S.W.3d 860, 873 (Tex. App.—Dallas 2012, no pet.) (“[C]laims for “a diminution in value of partnership interests or a share of partnership income” may be asserted only by the partnership itself.”); *see also Adam v. Harris*, 564 S.W.2d 152, 156-57 (Tex. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.) (“A clear line exists between actions of a trustee and those of an officer of a corporation owned wholly or in part by the trust, even where the same person ‘wears both hats.’”).

*Id.*

Benge also complained that Missi did not keep adequate records of the trust, and specifically complained that “Missi had a duty to keep records of AFT Minerals' transactions pursuant to her role as trustee of the 2012 Trust.” *Id.* The court acknowledged that a trustee has a duty to maintain

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accurate records regarding a trust's transactions, but disagreed that the trustee had a duty to maintain records regarding the transactions of a limited partnership that the trust has an interest in:

Here, Benge is not complaining of Missi's failure to perform any of the above-listed duties or of Missi's noncompliance with above-listed statutorily required maintenance of accounting records for the 2012 Trust. Benge does not complain about a lack of records of transactions involving the 2012 Trust, and she does not claim that Missi failed to maintain records of transactions in her capacity as trustee of the 2012 Trust. Instead, without supporting authority, she complains that Missi's duties of maintaining accounting records in her capacity as trustee encompassed a duty to also provide an accounting of AFT Minerals' transactions and that Missi failed to maintain records of those transactions.

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Moreover, as part of the agreements, as set up by Anne, AFT Property's limited partners, including the 2012 Trust, were not guaranteed any distributions from AFT Minerals and owned no interest in AFT Minerals' assets. Thus, to the extent that Benge argues that Missi had a duty to maintain records of AFT Minerals' transactions because AFT Minerals is a trust asset, we conclude that argument is without merit. Therefore, without more, we are unable to conclude that Missi had a duty in her capacity as trustee of the 2012 Trust to make an accounting of AFT Minerals' transactions to Benge and that Benge in her capacity as a remainder beneficiary of the 2012 Trust can demand such an accounting of AFT Minerals' transactions.

*Id.*

The court then addressed Benge's claim that Missi breached duties by failing to sue third parties to protect the trust's assets. The court framed this as a derivative claim on behalf of the trust against the trustee. The court stated that Benge solely relied on her standing as a "vested" remainder beneficiary of the trust to provide her standing to bring that claim. The court held that Benge was not a "vested" beneficiary, but a "contingent" beneficiary. The court held that a contingent remainder beneficiary does not have standing to sue regarding the administration of a trust:

Section 115.011 explicitly states, "Contingent beneficiaries designated as a class are not necessary parties to an action under Section 115.001." *Id.*; see also *id.* § 115.001. Section 115.011 explains that "necessary parties" to an action under § 115.001 are those beneficiaries of the trust "designated by name," "a person who is actually receiving distributions from the trust estate at the time the action is filed," and the trustee serving at the time the action is filed. *Id.* § 115.011(b)(2), (3), (4). In addition, in *Berry v. Berry*, this Court held that a contingent remainder beneficiary seeking relief individually did not have standing to sue the trustee because a contingent remainder beneficiary is not a necessary party, and we upheld the trial court's summary judgment dismissing the contingent remainder beneficiary's individual claim against the trustee. No. 13-18-00169-CV, 2020 Tex. App. LEXIS 1884, 2020 WL 1060576, at \*4 (Tex. App.—Corpus Christi-Edinburg Mar. 5, 2020, no pet.) (mem. op.) (citing *Davis v. First National Bank of Waco*, 139 Tex. 36, 161 S.W.2d 467, 472 (Tex. 1942) (noting that the court held that "[a]n expectant heir has no present interest or right in property that he may subsequently inherit and consequently he cannot maintain a suit

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for the enforcement or adjudication of a right in the property”; *Davis v. Davis*, 734 S.W.2d 707, 709-10 (Tex. App.—Houston [1st Dist.] 1987, writ ref’d n.r.e.) (explaining that the potential beneficiary “did not have standing to sue based on his claim that he is a potential beneficiary of trust assets” and “[o]ne cannot maintain a suit for the enforcement or adjudication of a right in property that he expects to inherit, because he has no present right or interest in the property”))). We conclude that Benge is a contingent remainder beneficiary as further explained below.

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Benge made no other argument in the trial court and makes no other argument on appeal supporting a conclusion that she has standing to bring a derivative claim on behalf of the 2012 Trust. See Tex. Prop. Code Ann. § 115.011; see *also id.* § 115.001. Thus, having concluded that Benge is a contingent remainder beneficiary with no standing and that her breach of fiduciary claims are meritless, we are unable to reverse the trial court’s granting of Missi’s plea to the jurisdiction on this basis.

*Id.* The court therefore concluded that Benge did not have standing to assert the claim because the way that she framed her standing was incorrect.

The court also affirmed the dismissal of Benge’s claims against third parties on behalf of the trust because she did not have standing to do so:

In addition, in *In re Benge*, 2018 Tex. App. LEXIS 1512, 2018 WL 1062899, at \*1 we cited *In re XTO Energy Inc.*, 471 S.W.3d 126, 131 (Tex. App.—Dallas 2015, no pet.), among other cases, stating that generally beneficiaries cannot bring derivative suits on behalf of the trust and concluded that the trial court in this case did not err in dismissing Benge’s derivative claims. See *Jacobs v. Jacobs*, 448 S.W.3d 626, 630 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (“The ‘law of the case’ doctrine is defined as that principle under which questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages.”). In *Berry*, we noted as an exception to this general rule, a “beneficiary [may] step into the trustee’s shoes and maintain a suit on the Trust’s behalf when “the trustee’s refusal to bring suit [against a third party on behalf of the trust is] wrongful.” *Berry*, 2020 Tex. App. LEXIS 1884, 2020 WL 1060576, at \*5. Here, Benge has not shown that Missi’s acts of not suing AFT Property, O&G, and AFT Minerals was a result of wrongful conduct. See *id.* Therefore, Benge has not shown that she has standing to sue Missi derivatively on behalf of the 2012 Trust on this basis.

*Id.* The court of appeals then affirmed an award of attorney’s fees to Missi under the Uniform Declaratory Judgment Act and also the Texas Trust Code. The court affirmed the trial court’s orders dismissing Benge’s claims.

**Interesting Note:** This case raises a very common and complex issue in trust administration: a trustee managing business interests. A trustee has a duty to act prudently in managing and investing

trust assets. A trustee has the duty to make assets productive while at the same time preserving the assets. *Hershbach v. City of Corpus Christi*, 883 S.W.2d 720, 735 (Tex. App.—Corpus Christi 1994, writ denied). It has a duty to properly manage, supervise, and safeguard trust assets. *Hoening v. Texas Commerce Bank*, 939 S.W.2d 656, 661 (Tex. App.—San Antonio 1996, no writ). There is a duty to invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. Tex. Prop. Code Ann. § 117.004. The proper standard against which a trustee is measured is that of an ordinary person in the conduct of his own affairs. *Stone v. King*, No. 13-98-022-CV, 2000 Tex. App. LEXIS 8070, 2000 WL 35729200 (Tex. App.—Corpus Christi 2000, pet. denied) (not designated for publication) (citing *Hoening v. Texas Commerce Bank, N.A.*, 939 S.W.2d 656, 661 (Tex. App.—San Antonio 1996, no writ)). However, the Texas Uniform Prudent Investor Act provides that in a trustee’s management of assets: “A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee’s representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.” Tex. Prop. Code § 117.004(f).

“The trustee’s duties apply not only in making investments but also in monitoring and reviewing investments, which is to be done in a manner that is reasonable and appropriate to the particular investments, courses of action, and strategies involved.” Restatement (Third) Of Trusts, §90(b). The trustee has a fiduciary duty to exercise his control of investments for the benefit of the trust beneficiaries. This would require the trustee to supervise corporate management to ensure that the officers and directors of the corporation are at all times managing the corporation in the best interest of the beneficiaries of the trust. SCOTT at §193 (“The trustee will be held accountable by the court if in the exercise of his power of control over the corporation he acts for his own interest rather than for the interest of the beneficiaries.”); *Johnson v. Witkowski*, 573 N.E.2d 513, 519 (Mass. App. Ct. 1991); *In Re Koretzky’s Estate*, 86 A.2d 238, 248 (NJ 1951); *In the Matter of Hubbell*, 97 N.E.2d 888, 891 (N.Y. 1950); *In the Matter of the Estate of Sakow*, 601 N.Y.S.2d 991 (N.Y. Surr. Ct. 1994); *In the Matter of the Estate of Schulman*, 568 N.Y.S.2d 669 (N.Y. App. Div. 1991); *Jennings v. Speaker*, 571 P.2d 358 (Ca. Ct. App. 1977).

The trustee has a duty to the trust beneficiaries to exercise the rights of a minority shareholder prudently. The Texas Business Organizations Code provides the statutory requirements for shareholder derivative proceedings. Tex. Bus. Orgs. Code Ann. §§ 21.551–.563. Under these statutes, a minority shareholder or partner may sue the managers/officers of a company or partnership for breaching duties owed to the entity. *Id.* If the trustee fails or refuses to exercise such rights (e.g., if the trustee individually is the alleged wrongdoer as an officer/director), the trust beneficiary has a claim for breach of fiduciary duty against the trustee for failing to exercise such minority shareholder rights. See, e.g., *Spear v. Fenkell*, No. 13-02391, 2015 U.S. Dist. LEXIS 76191 (D. Pa. June 12, 2015) (court did not dismiss claim by plaintiff that ESOP trustee breached fiduciary duties by not bringing a shareholder derivative action); *Atwood v. Burlington Indus. Equity*, No. 2L92CV00716, 1994 U.S. Dist. LEXIS 12347 (D.N.C. August 3, 1994) (plaintiff had claim that ESOP trustee breached fiduciary duties by failing to initiate a state law shareholder derivative action to recover for alleged breaches of fiduciary duty). See also *Pudela v. Swanson*, No. 91-C-3559, 1995 U.S. Dist. LEXIS 2148 n.6 (D. Ill. February 21, 1995) (ESOP trustee may have had a duty to bring shareholder derivative action to challenge over compensation to himself in other capacity).

This issue is even more complex where the trustee is also involved in the management of the business as an officer or director. See Mary Burdette, *Fiduciary Duties Within Fiduciary Duties: Trust Owning Stock in a Closely-Held Corporation*, State Bar of Texas, Advanced Estate Planning and Probate Course (2012). The issue is whether the trustee is liable for breach of fiduciary duty as a trustee due to the actions or inactions it committed as an officer or director of a business owned or

partially owned by the trust. There is very little authority in Texas on this issue. The authority that exists is old and holds that the trustee is not liable for its actions as an officer or director because those actions were taken in a different capacity. See *Adam v. Harris*, 564 S.W.2d 152 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.). But see *Cleaver v. Cleaver*, 935 S.W.2d 491 (Tex. App.—Tyler 1996, no writ). Cases from other jurisdictions hold that the trustee may be liable for actions taken as an officer or director where the trust owns a controlling interest in the business. See, e.g., *In re Sylvester's Estate*, 172 N.Y.S.2d 57 (S. Ct. 1958); *Taylor v. Errion*, 44 A.2d 356 (N.J. 1945); *Brown v. McLanahan*, 148 F.2d 703 (4th Cir. 1945); *In re Ebbets's Estate*, 267 N.Y.S. 268, 270 (Surrogate's Court 1933). One Texas case held that an executor did not breach any duties to liquidate a business where the estate only owned a minority interest. See *Guerra v. Guerra*, No. 04-10-00271-CV, 2011 Tex. App. LEXIS 6730 (Tex. App.—San Antonio August 24, 2011, no pet.).

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