

DECLARATORY JUDGMENT ACTIONS IN TRUST AND ESTATE LITIGATION MATTERS

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I. PURPOSE OF DECLARATORY JUDGMENT ACTIONS

A. **In General.** The purpose of declaratory judgment actions brought under the Texas Civil Practice and Remedies Code is to settle and to afford relief from uncertainty with respect to the rights, status, and other legal relations of parties. Tex. Civ. Prac. & Rem. Code Ann. § 37.002(b) (Vernon 2008). In the trust and estate area, a declaratory judgment action or motion for instructions can (i) provide clarity as to the powers, responsibilities, duties and liability of the executor or trustee, (ii) resolve a document construction issue, or (iii) determine a question arising in the administration or distribution of the estate or trust. References in this article to the term “declaratory judgment action” shall sometimes include motions for instructions that may be brought under Section 115.001 of the Texas Trust Code.

B. **Tort Actions.** A declaratory judgment action may not be brought to declare non liability in tort actions. Nor may a potential defendant use a declaratory judgment action to determine potential tort liability because the Declaratory Judgment Act was not intended to deprive a potential tort plaintiff of the right to decide whether, when, and where to sue. A suit to determine non liability in a negligence action is an improper use of the Declaratory Judgment Act. See *Abor v. Black*, 695 S.W.2d 564 (Tex., 1985)(mandamus relief denied on jurisdictional grounds in case involving declaratory judgment to determine non-liability in personal injury suit); *Stark v. Benckenstein*, 156 S.W.3d 112 (Tex. App.—Beaumont 2004, pet. denied); *Averitt v. PriceWaterhouseCoopers L.L.P.*, 89 S.W.3d 330 (Tex. App.—Fort Worth 2002, no pet.) (accounting firm prohibited from using declaratory judgment action to determine potential tort liability); *Trantham v. Isaacks*, 218 S.W.3d 750 (Tex. App.—Fort Worth 2007, pet. denied)(sanctions imposed against petitioner who sought declaratory judgment regarding whether petitioner’s statements were defamatory); *Adam v. Harris*, 564 S.W.2d 152 (Tex. Civ. App. —Houston (14th Dist) 1978, writ ref’d n.r.e.(petition for declaratory judgment filed by trustee asking the court for guidance as to whether trustee liable for conversion regarding past acts is invalid).

C. **Justiciable Controversy.** A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties, and the controversy will be resolved by the declaration sought. See *Bonham State Bank v. Beadle*, 907 S.W.2d 465 (Tex. 1995). A declaratory judgment does not vest a court with the power to pass upon hypothetical or contingent situations or to determine questions not then essential to the decision of an actual controversy, although such questions may in the future require adjudication. See *Texas Health Care Information Council v. Seton Health Plan, Inc.*, 94 S.W.3d 841 (Tex. App.—Austin 2002, pet. denied). On the other hand, where a trustee has reasonable doubt as to its duties or powers as trustee, a trustee may be able to seek the court’s instructions prior to a justiciable controversy pursuant to Section 115.001 of the Texas Trust Code.

D. **Suits Already Pending.** A counterclaim based on the Declaratory Judgment Act is properly raised if the counterclaim alleges a cause of action independent of the plaintiff’s claim. The Declaratory Judgment Act is not available to settle disputes already pending before the court. See *McCalla v. Ski River Development Inc.*, 239 S.W.3d 374 (Tex. App.—Waco 2007, no pet.); *BHP Petroleum v. Millard*, 800 S.W.2d 838 (Tex. 1990); *Indian Beach Owners’ Ass’n v.*

Linden, 222 S.W.3d 682 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *National Enterprise, Inc. v. E.N.E. Properties*, 167 S.W.3d 39 (Tex. App.—Waco 2005, no pet.).

E. Right to Declaratory Judgment or Instructions Not Absolute. The right to seek a declaratory judgment or instructions is not absolute. A party may not seek a Declaratory Judgment unless there is a justiciable controversy. An action may be filed by a trustee or beneficiary under § 115.001 to define the scope of the trustee's discretion under TEX. PROP. CODE § 115.001 only if there is a real need to resolve doubts, and "where the advice of competent lawyers is not sufficient protection because of the doubtful meaning of the trust instrument, or because of uncertainty as to the proper application of the law to the facts of the case." See *American National Bank of Beaumont v. Biggs*, 274 S.W.2d 209 (Tex. Civ. App.-Beaumont 1954 writ ref'd n.r.e.).

II. STATUTES AUTHORIZING DECLARATORY JUDGMENTS

A. Declaratory Judgment Action.

1. TEX. CIV. PRAC. & REM. CODE ANN. § 37.003 (Power of Courts to Render Judgment; Form and Effect) empowers a court to declare rights, status, and other legal relations either affirmative or negative in form and effect.
2. *Tex. Civ. Prac. & Rem. Code Ann. § 37.004* (Subject Matter of Relief) empowers a court to construe or to determine the validity of a Will, contract or "other writing".
3. *Tex. Civ. Prac. & Rem. Code Ann. § 37.005* (*Declarations Relating to Trust or Estate*) provides that a person interested as or through an executor or administrator, including an independent executor or administrator, a trustee, guardian, other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust or of the estate of a decedent, may have a declaration of rights or legal relations in respect to the trust or estate:
 - (a) to ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;
 - (b) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity;
 - (c) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings; or
 - (d) to determine rights or legal relations of an independent executor or independent administrator regarding fiduciary fees and the settling of accounts.

B. Texas Trust Code

1. Texas Trust Code § 115.001 (Jurisdiction) empowers a court to do the following:

- (1) construe a trust instrument;
- (2) determine the law applicable to a trust instrument;
- (3) appoint or remove a trustee;
- (4) determine the powers, responsibilities, duties, and liability of a trustee;
- (5) ascertain beneficiaries;
- (6) make determinations of fact affecting the administration, distribution, or duration of a trust;
- (7) determine a question arising in the administration or distribution of a trust;
- (8) relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or of this subtitle;
- (9) require an accounting by a trustee, review trustee fees, and settle interim or final accounts; and
- (10) surcharge a trustee.

TEX. PROP. CODE § 115.001. The list of proceedings set forth in § 115.001 is not exclusive, and a district court has jurisdiction over a proceeding by or against a trustee or a proceeding concerning a trust. TEX. PROP. CODE § 115.001(a-1).

C. Expedited Action Rules. A declaratory judgment action may not be filed under the expedited action rules because trust and probate matters are excluded from the scope of the rules. Tex. H.B. 274, 82nd Leg., R.S. (2011).

D. Estates Code. Section 405.003 of the Texas Estates Code (Judicial Discharge of Independent Executor) authorizes a judicial discharge of an independent executor in a declaratory judgment action. TEX. ESTATES CODE ANN. § 405.003. A discharge will not be effective as to false or undisclosed material information. The filing of a petition for judicial discharge may result in counterclaims brought by the beneficiaries, including counterclaims for breach of fiduciary duty, assessment of legal fees, and forfeiture of compensation. A court's approval of a fiduciary's accounting is not always definitive in adjudicating the fiduciary's tort liability.

E. Examples.

(i) Construction of Will. Decedent's Will provides for "house contents" to pass to second spouse. Decedent kept gold and stock certificates in the house. A declaratory judgment action would be valid in this case.

(ii) Construction of Trust Agreement. Trust passes to grandchildren upon death of child. Settlor's child adopts an adult prior to termination of the Trust. Trust

Agreement has ambiguous language regarding definition of a descendant, or declaration is sought regarding ascertainment of beneficiaries. A declaratory judgment action would be valid in this case.

(iii) Characterization of Marital Property. Decedent owned a closely held business that Decedent believed was Decedent's separate property. Surviving spouse claims a community property interest in the business. A declaratory judgment action would be valid in this case.

(iv) Determination of Marriage Status. Decedent dies while living with a "live in". "Live in" claims common law marriage and community property rights in all assets. A declaratory judgment action would be valid in this case.

(v) Compelling Trustee to Exercise Discretion a Particular Way. Guardian for Ward files declaratory action asking Court to declare that it would be in the best interest of Ward for trustees of discretionary trust for Ward to make distributions for the benefit of Ward's caretakers, and to compel trustees to exercise their discretion in a certain manner. A declaratory judgment action would not be valid in this case. See *Di Portanova v. Monroe*, 229 S.W.3d 324 (Tex. App—Houston [1st Dist.] 2006, pet. denied). A court cannot substitute its discretion for that of a trustee, and can interfere with the exercise of discretionary powers only in cases of fraud, misconduct, or clear abuse of discretion. See *Beaty v. Bales*, 677 S.W.2d 750 (Tex. App—Austin 1984, writ ref'd n.r.e.); *Coffee v. William Marsh Rice University*, 408 S.W.2d 269 (Tex.Civ.App.—Houston 1966, writ ref'd n.r.e.); *Brown v. Scherck*, 393 S.W.2d 172 (Tex.Civ.App—Corpus Christi 1965, no writ). Compare an action under Section 116.006 (d) of the Uniform Principal and Income Act which authorizes a trustee to petition a court to determine the advisability of exercising a "power to adjust" if the trustee reasonably believes that one or more beneficiaries will object to the manner in which the trustee intends to exercise or not exercise a discretionary power. TEX. PROP. CODE § 116.006.

(vi) Abuse of Discretion. Same facts as (v), except that a beneficiary receives a written response from the trustees that the requested distribution for the benefit of Ward's caretakers would not be in the "best interest" of Ward. Absent fraud, misconduct or abuse of discretion, a declaratory judgment action would not be valid. A controversy between a trustee and a beneficiary as to the wisdom of a suggested action by the trustee where there is room for choice does not concern "rights and other relations" of the parties, and forms no basis for a declaratory judgment. See *City Bank Farmers' Trust Co. v. Smith*, 263 N.Y. 292, 189 N.E. 222 (N.Y. 1934); See also *In re Carwithen's Estate*, 327 Pa. 490, 194 A. 743 (Pa. 1937). Assume that the trustees exercise their discretion and disallowed a distribution solely because the beneficiary had sued the trustee in its individual capacity in a matter unrelated to the trust. In this case, the beneficiary would have an action for breach of fiduciary duty, and it would be inappropriate for the trustee or beneficiary to file a declaratory judgment action. If the trustees based their decision on a construction of the term "best interest" that is patently unreasonable, then a declaratory judgment action may be appropriate to construe the terms "best interests".

(vii) Exercise of Discretion. Trustee has the broadest discretion to distribute trust assets for the beneficiary's comfort and welfare, taking into account the beneficiary's other resources and circumstances. Trustee files an action to determine if future expenditures for various hypothetical purposes will constitute authorized expenditures. A declaratory judgment action would not be valid in this case.

Assume instead that Trustee has discretion to distribute for the beneficiary's health, education, maintenance and support, but the trust agreement does not clarify whether the beneficiary's other resources or circumstances are to be taken into account. A declaratory judgment may be proper under these facts to determine the scope of Trustee's discretion.

(viii) Declaration of Non Liability. Trustee (without authority) sells a trust asset worth \$1M to Trustee for \$500,000. Trustee files a declaratory judgment action for the court to declare that trustee is not liable for self dealing. A declaratory judgment action would not be valid in this case because a declaration judgment action is not proper to determine non liability in tort actions. *See discussion, supra.* On the other hand, if the trust instrument is ambiguous as to whether a proposed sale would be authorized, then a declaratory judgment action would be valid.

(ix) Defamation Action. X brings Declaratory Judgment Action to determine his potential liability for defamation regarding statements he made in a newspaper about someone else. *Trantham v. Isaacks*, 218 S.W.3d 750 (Tex. App.—Fort Worth 2007, pet. denied) (held: not a proper use of Declaratory Judgment Action-sanctions imposed).

(x) Construction of Trust Agreement. Trust Agreement provides that trust shall terminate on later of deaths of A and B. One-half (1/2) of the income is payable to A during life, and one-half (1/2) of the income is payable to B during life A dies. The Trust Agreement does not address the disposition of the one-half (1/2) of the income that was being paid to A. A declaratory judgment action would be appropriate to construe the trust agreement to determine the disposition of the one-half (1/2) of the income that was being paid to A.

(xi) Action Commenced. A and B enter into a contract. A sues B for breach of contract. B counterclaims for declaratory judgment asking the court to construe the contract. The Declaratory Judgment Act is not available to settle disputes already pending before the court.

III. JURISDICTION AND VENUE IN DECLARATORY JUDGMENT ACTIONS AND IMPACT OF ARBITRATION CLAUSES

A. Jurisdiction. A statutory probate court has exclusive jurisdiction over all probate proceedings, contested or uncontested. Texas Estates Code Ann. §32.005. A district court and a statutory probate court have concurrent jurisdiction over the following matters:

- (1) An action by or against a trustee;
- (2) An action involving an inter vivos trust, testamentary trust, or charitable trust, including a charitable trust as defined by Section 123.001 of the Texas Property Code;
- (3) An action involving a personal representative of an estate in which each other party aligned with the personal representative is not an interested person in that estate;
- (4) An action against an agent or former agent under a power of attorney arising out of the agent's performance of the duties of an agent; and
- (5) An action to determine the validity of a power of attorney or to determine an agent's rights, powers, or duties under a power of attorney.

TEX. ESTATES CODE ANN. §32.005 (Vernon 2013); TEX. PROP. CODE ANN. § 115.001.

Section 115.0001 of the Texas Property Code refers to proceedings by or against a trustee and all proceedings concerning trusts. The mere fact that trust funds are implicated by a claim does not necessarily transform the claim into one "concerning" or "involving" trusts. TEX. PROP. CODE § 115.001. See *In re J.P. Morgan Chase Bank, N. A.*, 361 S.W.3d 703 (Tex. App.—Corpus Christi 2011), orig. proceeding.

Factors to consider by practioners in determining in which court to file include, but are not limited to, the following: (i) which court will most objectively review and consider legal authorities; (ii) which court may have specialized expertise in a particular area; (iii) which court may have a busier docket which could result in delays.

B. Venue. Venue for Declaratory Judgment Actions is governed by Chapter 15 of the Texas Civil Practice & Remedies Code. Venue for actions brought under Texas Trust Code Section 115.001 is governed by Texas Trust Code Section 115.002. See also Section 33.052 of the Texas Estates Code (Concurrent Venue).

C. Impact of Arbitration Clauses on Declaratory Judgment Actions.

1. Texas Supreme Court. In *Rachel v. Reitz*, 403 S.W.3d 840 (Tex. 2013), the Texas Supreme Court upheld the enforceability of an arbitration clause in an *intervivos* trust agreement. The arbitration clause in *Rachal* read as follows:

Arbitration. Despite anything herein to the contrary, I intend that as to any dispute of any kind involving this Trust or any of the parties or persons concerned herewith (e.g., beneficiaries, Trustees), arbitration as provided herein shall be the sole and exclusive remedy, and no legal proceedings shall be allowed or given effect except as they may relate to enforcing or implementing such arbitration in accordance herewith. Judgment on any arbitration award pursuant hereto shall be binding and enforceable on all said parties.

Reitz, a trust beneficiary, alleged that Rachal, the trustee, had misappropriated trust assets and failed to provide an accounting as required by law. Reitz sought a temporary

injunction, Rachal's removal as trustee, and damages. Rachal denied the allegations, and moved to compel arbitration of the dispute under the Texas Arbitration Act ("TAA").

Section 171.001 (Arbitration Agreements Valid) of the Civil Practice and Remedies Code provides as follows:

- (a) A written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that:
 - (1) exists at the time of the agreement, or
 - (2) arises between the parties after the date of the agreement.
- (b) A party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a contract.

In *Rachal*, the Court held that the inter vivos trust agreement in question was an "agreement" within the meaning of Section 171.001 of the Texas Arbitration Act. TEX. CIV. PRAC. & REM. CODE § 171.001. The Court further held that Reitz has received direct benefits from the trust, and thus concluded that mutual assent existed between the settlor of the trust and Reitz. The Court noted in a footnote that Reitz did not assert, and thus the Court did not need to decide, whether the doctrine of unclean hands barred Rachal from relying on the equitable doctrine of direct benefits estoppels.

2. Arbitration Preemption of Court Jurisdiction in Declaratory Judgment Actions. In order to compel arbitration, the following two elements must be established:

- (1) The arbitration clause is enforceable against a party; and
- (2) The dispute must be within the scope of the agreement.

The arbitration clause in *Rachal* referred to "a dispute of any kind involving this Trust or any of the parties or persons concerned herewith". Is a construction suit a "dispute of any kind"?

3. Unanswered Questions. Will an arbitration clause in a Will, including a Will establishing a testamentary trust be enforceable? Is such a clause an "agreement" in the context of a Will? How will the due process rights of minors or unborn persons be protected in an arbitration proceeding? How are fees awarded under the Texas Arbitration act, and how do these provisions compare to Section 114.064 of the Texas Property Code? In cases of allegations that a Will or Trust is invalid due to undue influence or incapacity, how can an arbitration clause be enforceable if the underlying document is held to be invalid?

IV. BINDING ALL PARTIES

A. In General. An estate or trust is not a legal entity that can be sued or be sued. See *Ray Malooly Trust v. Juhl*, 186 S.W.3d 568 (Tex. 2006); see *In re Ashton*, 266 S.W.3d 602 (Tex. App.—Dallas 2008, no writ). Any legal proceeding must be brought by or against an

executor or trustee, as the case may be. Only parties that have standing may bring an action. Also, the capacity in which a party is joined in a lawsuit may impact jurisdiction, venue, whether the estate or trust is liable for damages, and whether the executor or trustee is entitled to fund the litigation out of the estate or trust.

B. Statutes.

1. Declaratory Judgment Act. The Declaratory Judgment Act has a broader standard for necessary parties than does the Texas Trust Code. Section 37.006 (Parties) of the Texas Civil Practice and Remedies Code provides, in part, that all persons who have or claim any interest that would be affected by the declaration must be made parties. A declaration does not prejudice the rights of a person not a party to the proceeding. Tex. Civ. Prac. & Rem. Code § 37.006.

2. Trust Code. Section 115.011 (Parties) of the Texas Trust Code provides that contingent beneficiaries designated as a class are not necessary parties to an action under Section 115.001 (Jurisdiction). The only necessary parties to such an action are:

- (a) a beneficiary of the trust on whose act or obligation the action is predicated;
- (b) a beneficiary of the trust designated by name, other than a beneficiary whose interest has been distributed, extinguished, terminated, or paid;
- (c) a person who is actually receiving distributions from the trust estate at the time the action is filed; and
- (d) the trustee, if a trustee is serving at the time the action is filed.

TEX. PROP. CODE §§ 115.001, 115.011.

Section 115.013 (Pleadings and Judgments) of the Texas Trust Code provides that a person is bound by an order binding another in the following cases:

- (a) an order binding the sole holder or all coholders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, binds other persons to the extent their interests, as objects, takers in default, or otherwise are subject to the power;
- (b) to the extent there is no conflict of interest between them or among persons represented:
 - (A) an order binding a guardian of the estate or a guardian ad litem binds the ward; and
 - (B) an order binding a trustee binds beneficiaries of the trust in proceedings to review the acts or accounts of a prior fiduciary and in proceedings involving creditors or other third parties;
- (c) if there is no conflict of interest and no guardian of the estate or guardian ad litem has been appointed, a parent may represent his minor child as guardian ad litem or as next friend; and

(d) an unborn or unascertained person who is not otherwise represented is bound by an order to the extent his interest is adequately represented by another party having a substantially identical interest in the proceeding.

C. Use of Ad Litem. Instead of relying on virtual representation, one can request the appointment of an ad litem to represent contingent remainder interests, unborns, minors, any beneficiary under a disability, and unnamed or unknown beneficiaries. In Bexar County, the usual fees charged by an ad litem in an agreed matter rarely exceed \$1,000.

V. ATTORNEYS' FEES IN DECLARATORY JUDGMENT ACTIONS

A. Statutory Provisions

1. Declaratory Judgment Act.

(a) Fees and Costs. Section 37.009 of the Texas Civil Practice and Remedies Code provides as follows: "In any proceeding under this chapter, the court may award costs and reasonable attorney's fees as are equitable and just." *Canales v. Zapatero*, 773 S.W.2d 659, 661 (Tex.App.—San Antonio) 1989, writ denied); *Fuqua v. Fuqua*, 750 S.W.2d 238, 246 (Tex.App.—Dallas 1988, writ denied).

(b) Trust and Estates. The Declaratory Judgment Act entrusts attorneys' fee awards to the trial court's sound discretion, subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact, and to the additional requirements that fees be equitable and just, which are matters of law. It is an abuse of discretion for a trial court to rule arbitrarily, unreasonably, or without regard to guiding legal principles. See e.g., *Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex.1997); or to rule without supporting evidence, *Beaumont Bank v. Buller*, 806 S.W.2d 223, 226 (Tex.1991).

The award of attorneys' fees in a declaratory judgment action lies with the discretion of the trial court, and is not dependent upon a finding that a party "substantially prevailed." See *Oake v. Collin County*, 692 S.W.2d 454, 455 (Tex. 1985); see *Horne v. Ross*, 777 S.W.2d 755, 757 (Tex.App.—San Antonio 1989, no writ); *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996); *Hachar v. Hachar*, 153 S.W.3d 138 (Tex.App.—San Antonio 2004, no pet.). Decisions have been upheld where the trial court failed to award attorneys' fees to the prevailing party and where the trial court awarded attorneys' fees to the losing party. *Oake*, 692 S.W.2d 454; *District Judges of Collin County v. Commissioners Court of Collin County*, 677 S.W.2d 743 (Tex.App.—Dallas 1984, writ ref'd n.r.e.).

2. Texas Trust Code Provisions.

(a) Award of Attorneys' Fees. Section 114.064 of the Texas Trust Code provides for the award of attorneys' fees in actions "under this code." Tex. Prop. Code Ann. § 114.064. Section 114.064 of the Texas Trust Code provides that "[i]n any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just."

The trial court is given discretion to award costs and attorneys' fees that are "reasonable and necessary" following a determination by the court that the fees are "equitable and just." Section 114.064 of the Texas Trust Code allows for recovery of costs whereas Section 352.052 of the Tex. Estates Code allows for the recovery of expenses and disbursements. Tex. Estates Code §352.052. See *In re Estate of Johnson*, 340 S.W.3d 769 (Tex App.-San Antonio 2011, pet. dismissed). The granting or denying of attorneys' fees under this section is within the sound discretion of the trial court, and a reviewing court may not reverse the trial court's judgment absent a clear showing that the trial court abused its discretion by acting without reference to any guiding rules and principles. See *Hachar*, 153 S.W.3d at 142; see *Lee v. Lee*, 47 S.W.3d 767, 793-94 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

Section 114.064 of the Texas Trust Code provides the Court with broad discretion in awarding attorneys' fees, even to the extent of awarding fees to parties who do not prevail in litigation and who are not beneficiaries of the subject trust. See *In Re Ray Ellison*, 261 S.W.3d 111 (Tex. App. — San Antonio 2008, pet. denied.) ("The granting or denying of attorney's fees under the Trust Code is within the sound discretion of the trial court, and a reviewing court may not reverse the trial court's judgment absent a clear showing that the trial court abused its discretion by acting without reference to any guiding rules and principles."); See also *Texarkana Nat. Bank v. Brown*, 920 F. Supp 706 (E.D. Tex. 1996) (bank trustee found to have breached fiduciary duty ordered to pay \$238,084 of attorneys' fees to beneficiaries to reimburse them for attorneys' fees).

(b) Reimbursement of Expenses. Texas Trust Code Section 114.063 provides that: "(a) A Trustee may discharge and reimburse himself from trust principal or income or partly from both for: ... (2) expenses incurred while administering or protecting the trust ...". TEX. PROP. CODE § 114.063.

(c) Judicial Control of Discretionary Powers. Texas Trust Code Section 116.006(d) provides that a trustee who reasonably believes that one or more beneficiaries of the trust will object to the manner in which

the trustee intends to exercise or not exercise a discretionary power to adjust under Section 116.005 may petition the Court to determine whether the proposed exercise or non exercise of the power was an abuse of discretion. The Trustee is required to advance all fees and costs. Upon conclusion of the proceeding, the Court is granted the power to award fees to or against the beneficiaries or the Trustee. TEX. PROP. CODE §§ 116.005, 116.006.

B. Terms of Trust Agreement

The terms of a trust agreement can affect payment of attorneys' fees. For example, assume that one of two co-trustees employs counsel, and that the terms of the trust agreement require that all actions by co-trustees must be approved by the joint and unanimous consent of both co-trustees. The employment of the attorney was not authorized, and thus the trust should not be held liable for any attorneys' fees. See *Conte v. Conte*, 56 S.W.3d 830 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

The question has arisen as to whether the terms of a trust agreement can affect the court's power to award fees authorized by statute. If, for example, a trust agreement provides that under no circumstances shall the trustee be liable for or assessed attorneys' fees if the Trustee acted reasonably, the question is whether the standard in the trust agreement can impact the statutory award of attorneys' fees under, for example, Tex. Trust Code § 114.064. It is not clear whether a statutory right to recover attorneys' fees, or to have attorneys' fees assessed against the opposing counsel, can be circumvented by the express terms of an instrument. See *Hoenig v. Texas Commerce Bank*, 939 S.W.2d 656 (Tex. App.—San Antonio 1996, no writ)(terms of trust document did not affect trial court's power to award attorney's fees pursuant to TEX. TRUST CODE § 114.064).

VI. BUSINESS ASPECTS OF ATTORNEY'S FEES IN DECLARATORY JUDGMENT ACTIONS

The business decision on whether to trigger contested litigation, or whether to settle the case early on is often impacted by the estimate of attorneys' fees to be incurred. In a Declaratory Judgment action, the court, in general, has the power to award fees to all of the parties, including the losing parties. Thus, in evaluating the business aspects of litigation, one must account for the possibility that opposing counsel's attorneys' fees will come out of the "pot."

The amount of fees to be incurred in a contested Declaratory Judgment action may be impacted by a number of factors, including the following: (i) the counsel that is involved in the matter (ii) the Court, (iii) the complexity of the issues, and (iv) the amount at stake. Before undertaking contested litigation, or in considering whether to settle a case early on, it is imperative to take into account the amount of attorneys' fees that will be incurred by all parties in the case.

VII. WILL INITIATING AN ARBITRATION ACTION OR FILING A DECLARATORY JUDGMENT ACTION TRIGGER A NO CONTEST CLAUSE?

A. Statutes.

Section 254.005 (Forfeiture Clause) of the Texas Estates Code provides as follows:

A provision in a will that would cause a forfeiture of or void a devise or provision in favor of a person for bringing any court action, including contesting a will, is enforceable unless in a court action determining whether the forfeiture clause should be enforced, the person who brought the action contrary to the forfeiture clause establishes by a preponderance of the evidence that :

- (1) just cause existed for bringing the action; and
- (2) the action was brought and maintained in good faith.

Section 112.038 (Forfeiture Clause) of the Texas Trust Code provides as follows:

A provision in a trust that would cause a forfeiture of or void an interest for bringing any court action, including contesting a trust, is enforceable unless in a court action determining whether the forfeiture clause should be enforced, the person who brought the action contrary to the forfeiture clause establishes by a preponderance of the evidence that :

- (1) just cause existed for bringing the action; and
- (2) the action was brought and maintained in good faith.

B. Declaratory Judgment Actions. The determination of whether the filing of a Declaratory Judgment Action will trigger a no contest clause depends on the Will or trust agreement, and on the facts. No contest clauses are strictly construed. *See Conte v. Conte*, 56 S.W.3d 830 (Tex. App--Houston [1st Dist.] 2001, no pet.). Declaratory Judgment Actions that do not seek to alter the terms of a will or trust agreement do not violate a no contest clause. *Di Portanova v. Monroe*, 229 S.W.3d 324 (Tex. App—Houston [1st Dist.] 2006, pet. denied). *In Matter of Estate of Hodges*, 725 S.W.2d 265 (Tex. App.—Amarillo 1986, writ ref'd n.r.e) (holding that an action seeking declaratory judgment that non-beneficiary executor had no standing to contest family settlement was action to construe, rather than contest, will). A no contest clause will be enforceable unless the party triggering the no contest clause can prove by a preponderance of the evidence that just cause existed for bringing the action and the action was brought and maintained in good faith.

May a contestant eliminate all risk of triggering a no contest clause by filing a Declaratory Judgment Action asking the Court to declare whether contestant's intent to file an action in the

future will trigger a no contest clause? The answer again depends on the terms of the no contest clause, and whether the contestant can prove by a preponderance of the evidence that just cause existed for bringing the action and the action was brought and maintained in good faith.

C. Arbitration Action. Will initiating arbitration in accordance with an arbitration clause in a will or trust trigger a no contest clause? The answer depends in part on the exact terms of the “no contest” clause. Also, Section 254.005 of the Texas Estates Code and Section 112.038 of the Texas Trust Code refer to “bringing any court action”. Is initiating an arbitration a “court action” within the meaning of Texas Estates Code Section 254.005 or Section 112.038 of the Texas Trust Code?

VIII. COUNTERCLAIMS

Parties joined in any type of declaratory judgment action are required to state as a counterclaim any claim against the plaintiff if the claim arises out of the transaction or occurrence that is the subject matter of the plaintiff’s claim. TEX. R. CIV. P. 97. In a “friendly” declaratory judgment action matter, serious consideration must be given to compulsory counterclaims because the failure to bring a compulsory counterclaim forfeits valuable rights of the party that could have brought the counterclaims.

A counterclaim based on the Declaratory Judgment Act is properly raised if the counterclaim alleges a cause of action independent of the plaintiff’s claim. The Declaratory Judgment Act is not available to settle disputes already pending before the court. See *McCalla v. Ski River Development Inc.*, 239 S.W.3d 374 (Tex. App.—Waco 2007, no pet.); *BHP Petroleum v. Millard*, 800 S.W.2d 838 (Tex. 1990); *Indian Beach Owners’ Ass’n v. Linden*, 222 S.W.3d 682 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *National Enterprise, Inc. v. E.N.E. Properties*, 167 S.W.3d 39 (Tex. App.—Waco 2005, no pet.).

IX. CONCLUSION

A declaratory judgment action or motion for instructions can be a cost effective means to resolve issues. A declaratory judgment action or motion for instructions in a contested matter is similar to other contested litigation, except for the fact that a court has broader discretion to award or assess attorneys’ fees.