

Informal Fiduciary Relationships: Can Trust Heighten Duties?

By Wade L. McClure and Walker M. Duke

Most attorneys are familiar with the more common formal fiduciary relationships, such as those involving attorneys and clients, partners, agents, executors and trustees, and corporate officers. In these formal relationships, the fiduciary duty arises as a matter of law. Texas courts have also recognized that informal relationships outside these more traditional contexts can, in some instances, create fiduciary duties.

The Texas Supreme Court has noted that it is impossible to give a definition of the term "fiduciary" that is comprehensive enough to cover all cases. But generally, the term applies to any person who occupies a position of peculiar confidence toward another. It includes those informal relations that exist whenever one party trusts and relies upon another, as well as technical fiduciary relations. *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 512-13 (Tex. 1942).

An informal fiduciary relationship — sometimes referred to as a confidential relationship — may arise where one person trusts in and relies on another, whether the relationship is moral, social, domestic or purely personal. *Meyer v. Cathey*, 167 S.W.3d 327, 331 (Tex. 2005). To find a confidential, or informal, fiduciary relationship, the evidence must show that the dealings between the parties continued for such a time that one party was justified in relying on the other to act in his best

interest. *Carr v. Weiss*, 984 S.W.2d 753, 765 (Tex. App. — Amarillo 1999, pet. denied).

Whether an informal fiduciary relationship exists is to be determined from the details of the relationship between the persons involved. *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962). While it is normally a question of fact for the jury, the issue becomes a question of law when there is conclusive evidence. *Medical Specialist Group, P.A. v. Radiology Assoc.*, 171 S.W.3d 727, 730 (Tex. 2005).

But not every relationship that involves a high degree of trust and confidence rises to the level of a fiduciary relationship. Nor are Texas courts quick to find informal fiduciary relationships, particularly in business transactions. The underlying policy behind this approach is to give full force to contracts. *Meyer*, 167 S.W.3d at 331.

Thus, to impose an informal fiduciary relationship in a business transaction, a special relationship of trust must exist prior to, and separate from, the parties' agreement. *Schlumberger Technology Co. v. Swanson*, 959 S.W.2d 171, 176 (Tex. 1997). The fact that one business person trusts another, and relies upon his promise to perform a contract, does not rise to a confidential relationship. *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 595 (Tex. 1992).

Meyer v. Cathey exemplifies this approach. There, the plaintiff sued his business associate for breach of fiduciary duty arising out of their col-

laboration on a number of real estate development projects. The plaintiff was paid a base salary by the defendant plus a percentage of net profits. He also had a partnership interest in a previous apartment development project with the defendant and had co-signed a loan to finance that deal. The defendant also controlled the financing and the books, made all final decisions, and the plaintiff relied on him to treat him fairly and keep accurate financial records. The two ate lunch together every day for four years, and the defendant told the plaintiff they would "make millions" together.

Despite all these factors, the Texas Supreme Court refused to find an informal fiduciary relationship because there was no evidence of such a pre-existing relationship of trust between the two. The earlier projects had been arm's-length transactions into which the parties had entered for their mutual benefit. Thus, they did not establish a basis for a fiduciary relationship. The court also noted that mere subjective trust does not transform an arm's-length dealing into a fiduciary relationship.

Establishing an informal fiduciary relationship may be an uphill fight, but does happen. The Fort Worth Court of Appeals found a confidential relationship of trust when an individual assumed the role of financial advisor to two clients and represented that he would monitor and manage their investments. *W. Reserve Life Assur. Co. of Ohio v. Graben*, 233 S.W.3d 360

(Tex.App. — Fort Worth 2007, no pet.). In that case, the clients told the advisor that they were dependent on him for his counsel, experience and advice, and the advisor knew that the clients were not sophisticated investors. And another Court of Appeals ruled there was sufficient evidence for a confidential relationship of trust where a financial advisor had a long-standing personal relationship with the client, they had vacationed together, and the client turned to advisor for support during her divorce. *Lee v. Hasson*, No. 14-05-00004-CV, 2007 WL 236899 (Tex.App. — Houston [14th Dist.] 2007, pet. denied).

Why is it important to be aware of these informal fiduciary relationships? The heightened duties of a fiduciary — including loyalty and the utmost good faith, candor, integrity of the highest kind, and fair and honest dealing — may significantly elevate the applicable standard of care.

This is a very fact-driven analysis, as no two relationships are ever exactly alike. The key is to look at the details of the actual relationship between the parties to determine if there is a confidential relationship that imparts fiduciary duties. **HN**

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