FUNDAMENTAL DUTIES OF A TRUSTEE

A Guide for Trustees in a
Post-Uniform Trust Code World

Presented by Edward Jones Trust Company

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INTRODUCTION

Since the time of King Arthur, the basis of a trustee's responsibility has been of the highest order. It is well settled that a trustee's duties to the trust beneficiaries are one of the law's "highest duties." Generally speaking, there are nine main duties charged to all trustees. Each of these duties places specific and detailed responsibilities upon a trustee and every trustee should be cognizant of them at all times when they are serving as trustee.

With this background in mind, the purpose of this article is to provide general notes on the nature of the trustee's duties and how they affect the trustee and their relationship with trust beneficiaries. To accomplish this, the basic tenants of fiduciary law that are derived from English common law principles which generally have been adopted and restated by U.S. court decisions will be evaluated.

Moreover, there has been a recent trend for individual states to begin codifying the common law and case law rules by adopting various forms of a "trust code." These codes are an attempt to solidify common law notions. The recently drafted Uniform Trust Code ("UTC") is an attempt to unify various notions regarding fiduciary responsibilities from both the common law and various state trust codes. At its core, the UTC aspires to clarify and simplify some rules that were dated, and to provide added layers of protection and flexibility in the administration of modern trusts. As the UTC has been adopted in over 20 states, with several more states currently proposing the same in their legislatures, this article will compare the common law features of fiduciary law to the UTC codifications.

Lastly, the effect of these various trustee responsibilities will be viewed in real world examples to identify concerns that must be revealed to clients serving as trustees or professionals advising those serving as trustees.

I. THE DUTY TO ADMINISTER TRUSTS - To manage the trust in accordance with its terms for the duration of the trusteeship.

A. COMMON LAW: The duty to administer a trust is the starting point in defining the relationship between the grantor, trustee, and beneficiary. By virtue of accepting the position of trustee, an individual or entity undertakes a specific set of responsibilities that encompass the overall administration of the trust. The administration of a trust encompasses several duties that are embodied within the duty to administer trusts. A trustee is charged with, amongst others, obligations of loyalty, good faith, prudence, and impartiality that fall under the larger umbrella of the duty to administer trusts.

The duty of the trustee to administer the trust calls upon the trustee to manage the trust in accordance with its terms for the duration of the trusteeship. This duty extends from the point of acceptance through resignation of the trustee (and possibly until the appointment of a successor), or upon the termination of the trust.

B. UTC: The UTC has generally followed the common law's lead in relation to the duty to administer trusts. Specifically, the UTC states that a trustee must manage the trust solely for the benefit of the trust's beneficiaries, and in doing so the trustee must follow the terms and purposes of the trust in good faith. While self evident, it is worthy to note that congruent with the common law, the UTC duty to administer the trust does not take effect until the trustee has accepted the trusteeship.

Furthermore, the UTC solidifies the long held common law position that part of the general duty to administer trusts obligates trustees to treat the interests of all beneficiaries equally, to act with prudence, and to keep beneficiaries reasonably informed of trust matters. A failure on the part of the trustee to meet these responsibilities is a breach of the duty to administer the trust.

It is important to note that the trustee's responsibility of treating beneficiaries equally requires the trustee to consider the present as well as the remainder interests in all decisions regarding the management and distribution of the trust property. To excessively favor income beneficiaries or remainder beneficiaries can lead to a breach of this duty. This is often evidenced by the investment allocations and/or the distribution patterns of the trustee.

Also pertinent is that the UTC states that prudence requires the trustee to consider the terms, purposes, distributional requirements, and other circumstances surrounding the trust and to exercise reasonable care, skill, and caution in so doing. All of these responsibilities fall under the umbrella of the duty to administer trusts.

C. APPLICATION: Trustees, or their professional advisors, who are not mindful of the present as well as the future beneficiaries in their decisions may violate their duty to administer the trust by potentially favoring certain interests over others. The nature of the legal relationship of the trustee to the various beneficiaries dictates that the trustee must undertake certain actions. A trustee's failure to recognize their legal duties and to fulfill those obligations results in an increased exposure to liability.

Furthermore, a failure to act can lead to trouble. For example, in *Fontenot v. Choppin*, the trustee, the grantor's sister, was removed for her inaction relating to the trust for the benefit of the grantor's son. The trustee's failure to monitor an IRA account, failure to invest life insurance proceeds (rather, she placed them in an interest bearing checking account only), failure to render accountings, and failure to follow the terms of the trust by not dispersing trust funds for the beneficiary's education led to the decision by the trial court to remove her as trustee.

The duty to administer can also appear in a subtler context as an implied duty. In *Hatleberg v. Norwest Bank Wisconsin*, even though the drafting attorney made the error in the trust document, the corporate trustee was still found in violation of the duty.

In *Hatleberg*, as part of an estate planning strategy, a trust officer suggested to a client that she create an irrevocable trust in order to make gift tax exempt transfers of money.

The client had her attorney-neighbor draft a trust for those purposes, but the attorney omitted language that provided for a present interest in the gifted property. Three years and $440,000 in gifts later, the trustee notified the attorney of the missing gift provisions, sent him sample language to use, and requested that he make the change in the document while they continued to administer the trust and continued advising the client to make further contributions. Upon the grantor's death, the estate was responsible for $173,644 in additional taxes because the error caused the trust assets to be included in the grantor's estate.

The court determined that even though the trustee may not have had a duty to act initially, they created an assumed duty by their examination and review of the trust for accuracy when they notified the attorney of the faults with the document. In addition, they held themselves out as having "special knowledge in estate planning and estate tax reduction" and therefore "would have been wise to verify whether the trust document adequately represented [their] promises."

What these cases illustrate is that a trustee must be cognizant of the substantial responsibility and potential liability that comes with serving as trustee. All too common are situations like that in *Fontenot* where a family member either refuses or fails to apply the appropriate time and effort in properly administering their fiduciary duties. While a "professional" (i.e. trust company, bank, etc.) may alleviate some concerns, *Hatleberg* shows that they too can fail to administer the trust properly.

II. DUTY OF LOYALTY - An obligation owed by a trustee to a beneficiary that binds the trustee to act in the best interests of the beneficiary while refraining from placing their own interests above those of the beneficiary.

A. COMMON LAW: The duty of loyalty has long been recognized, as the most fundamental duty owed by a trustee. It is a duty that is not imposed by any "magic" language in a trust document, but rather is inherent in the relationship between grantor, trustee, and beneficiary.

Under this duty, a trustee is obligated to administer the trust solely in the interest of the trust's beneficiaries. Therefore, it is imperative that the trustee must refrain from engaging in "self-dealing" or anything that may be construed as an act that benefits the trustee in some way to the detriment of a trust beneficiary. The most common situations of "self dealing" arise when a trustee profits from the trust, or when a trustee puts themselves in an unfair position to benefit from the trust at the expense of a beneficiary.

While some transactions that may benefit a trustee indirectly (receiving fees, etc.) are allowable, the common law has also established "voidable transactions" if a trustee benefits from an action but fails to obtain consent from a beneficiary for such gain. This can occur even if the trustee acted in good faith, the transaction on its face was fair and reasonable and the trustee obtained a unanimous consent from the beneficiaries. Other common occurrences of such voidable transactions are when the trustee does not disclose

all material facts, the transaction is not fair and reasonable, or if the trustee is found to have exerted improper influence because of their position.

Other "allowable" trustee benefits also exist even though, on their face, they could be construed as a breach of the duty of loyalty. For example, the court in *Caldwell v. Hanes* reiterated the common law principal prohibiting self dealing by stating that "the rule of undivided loyalty mandates that a trustee must neither deal with trust property for the benefit of himself nor place himself in a position inconsistent with the interests of the trust." As exceptions to the general rule, however, the court carved out limited situations by noting that a grantor of a trust may reduce a trustee's duty of loyalty by "express language in the trust instrument or consent [that] reduces the standard of duty to good faith and permits the court to weigh the merits of the transaction." In addition, the court opined that "where the settlors themselves create a conflict of interest, a trustee cannot be liable for violation of the duty of undivided loyalty."

B. UTC: The UTC confirms that a trustee has a strict duty of loyalty to beneficiaries. The UTC does not greatly modify the well settled common law on this issue. A longstanding debate has existed, however, over whether a professional trustee should be held to a higher standard of reasonableness and care than a "layman" trustee.

The UTC claims to have closed the debate when it adopted Section 806, which states "[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, shall use those special skills or expertise." Accordingly, a self-proclaimed "professional" trustee, whether institutional or individual, should have the skill to support all claims as to their competence and ability to serve as trustee.

C. APPLICATION: A few historical cases expose these issues more fully. In *Noonan Estate*, an executor advised the son of the testatrix that the testatrix's home should be sold quickly after her death in order to escape a judgement lien. The executor then sold the property to his private secretary, personally loaned her most of the purchase money and took back a mortgage on the property. The court held that these acts constituted self-dealing because the executor administered the trust for the benefit of someone other than the beneficiary of the trust. The actions here were not taken in good faith, as the executor "must well have known" that it was impossible to revive the lien that he was attempting to escape, and in addition the secretary to whom he sold the property was an experienced title examiner.

The court stated that "an executor is a fiduciary no less than is a trustee, and as such primarily owes a duty of loyalty to a beneficiary of his trust." Furthermore, "[a] trustee is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person." The court continued to cite common law principals when it stated that the "test of forbidden self dealing is whether the fiduciary had a personal interest in the subject transaction of such a substantial nature that it *might* have affected his judgement in material connection (emphasis added)."

Here, it was improper for the executor to sell the decedent's residence to a third person for the purpose of benefiting the third person rather than the trust estate. The sale to his secretary was sufficient to find a breach of duty for violating the rule against self-dealing, added with his loan and mortgage attached to the property. Also important, though, is the notion that whether possible influence "might" have affected the trustee's judgment is the standard of proof on this issue. In other words, one does not have to prove a trustee was actually influenced, just that the trustee might have been influenced.

In another case, *Wagner v. Spurlock*, a breach of the duty of loyalty took the form of a failure to disclose material facts to the beneficiaries. This failure resulted in fraudulent conduct on the part of the trustee and an award of punitive damages in addition to compensatory damages.

In *Wagner*, due to a prior legal dispute, funds were placed in escrow as part of a settlement between three siblings pertaining to the distribution of the trust funds, over which one sibling was serving as trustee. Once the IRS issued a closing letter to the trustee confirming that no additional estate taxes would be due from the estate the trustee was to distribute the balance of the funds to two of her siblings. The trustee received the closing letter in October; however she failed to disclose it to her siblings until December. In addition, prior to her disclosure, the trustee sent a new settlement letter to her siblings proposing that she be paid $100,000.00 in exchange for releasing the siblings from any additional tax liability of the estate. She sent this letter even after she had received written confirmation from the IRS that there would be no further taxes owed. Once she did disclose the closing letter, the trustee allegedly had the escrow agent conceal the date of the letter so the siblings would not know of its receipt several months earlier.

A lower court found in favor of the trust beneficiaries, and an appellate court affirmed the ruling and assessment of compensatory and punitive damages. While it may be possible that the trustee in this case was actually attempting to abscond with the $100,000.00, the court's holding serves as a reminder that a failure to disclose material facts to a beneficiary may amount to fraud in the fiduciary context, and may therefore result in trustee liability including punitive damages.

These cases and the UTC show that the duty of loyalty is a serious charge for a trustee. Moreover, the possibility of punitive damages shows that a court is willing to use all of its power to enforce this duty.

III. **DELEGATION BY A TRUSTEE -** A responsibility that a trustee owes to the grantor and beneficiary to personally carryout the management of trust assets and other matters that the trustee has agreed to undertake.

A. COMMON LAW: In general, a trustee has an affirmative duty to not delegate the doing of acts he can reasonably be required to personally perform. A trustee may employ agents, attorneys, etc. where prudent under the circumstances. However, a critical factor in determining whether a delegation was prudent in a given situation is the amount of discretion granted to the agent.

The applicability of the general rule regarding delegation stated above is not entirely clear as it relates to corporate trustees. The nature of corporate trustees, who may only act through their directors, officers, and employees, requires the trustee to delegate responsibilities more often than an individual trustee. A corporate trustee, however, is not given the unfettered discretion to delegate responsibilities at its will. Generally speaking the courts understand that a corporate trustee is generally chosen for objectivity and expertise and cannot take a passive role in the administration of the trust for which it accepted a fiduciary responsibility.

B. UTC: The UTC specifically addresses the issue of trustee delegation. The UTC commentary states that "[a] trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances." In addition, the UTC holds the trustee to a standard of reasonable care, skill, and caution when selecting an agent. The UTC commentary notes that the trustee is under a "duty to periodically review the agent's actions in order to monitor the agent's performance and compliance with the terms of delegation." Finally, the UTC identifies the agent as having a duty of reasonable care to comply with the terms of the delegation.

Accordingly, the UTC leaves delegation powers of the trustee to be scrutinized by the reasonableness standard. Notice again, however, that the UTC states that the test of that reasonableness shall be compared to that which "a Trustee of comparable skills" would use. This again may stand for the notion that a "professional" trustee should be held to a higher standard under the UTC. The UTC commentary points out as an example that a family trustee might delegate accountings and reporting responsibilities when a corporate trustee would not.

C. APPLICATION: Delegation issues that are actually litigated often involve a professional trustee and its working structure. In *Dunkley v. Peoples Bank & Trust Co.*, the trust officer construed a trust that granted the corporate trustee broad discretion over the trust's assets to care for the surviving spouse after his wife deceased. He was to be the primary beneficiary for the remainder of his lifetime, and upon his death, the separate trust assets that were owned by the deceased spouse were to pass to her child. In administering the trust, the trust officer was found to have not given due regard to the remainder interest in the trust, and therefore did not follow the intent of the grantor. Rather than only using the portion of the trust that was necessary to provide for the care of the surviving spouse, the trust officer authorized distributions far beyond this level and substantially depleted the balance of the trust.

The court held that a board, committee, or officer should only exercise certain levels of discretionary acts of a corporate trustee. As part of the overall responsibility to not delegate certain functions, a trustee is required to exercise independent judgment in making decisions. In *Dunkley*, the court found that the defendant bank did have a trust committee to authorize and oversee discretionary distributions, but that "it did not, for all practical purposes, function." The court continued on to say that it is "convinced that persons who hire banks to act as trustees of estates…do not intend that one individual

have the [discretionary] power. Instead, they believe, and have a right to believe, that the "entire bank" is working for them and providing the business judgment necessary to properly care for their life savings."

The court, in finding the trustee liable for a breach of its duties opined that "the trustee in this case did not act with the judgment and business acumen that one would expect of a layman with little business experience, and certainly not with that expected of a professional trustee with a trust officer trained as a lawyer." This case shows that the trustee's delegation to a single trust officer to determine proper distributions was improper.

IV. DUTY TO KEEP AND RENDER ACCOUNTS - The trustee has the role of keeper of records and provider of transactional details.

A. COMMON LAW: In accordance with its regular responsibilities to a beneficiary, a trustee has a duty to the beneficiaries to keep clear and accurate records of transactions dealing with trust matters. In accordance with this requirement, a trustee's records must be detailed enough to reflect amounts received, amounts expended, and gains and losses on trust investments. In addition, the records of the trustee should reflect allocations between income and principal so that the current as well as remainder beneficiaries of a trust are kept informed of the trust's matters.

It is imperative for a trustee to keep proper records of transactions. If a trustee fails to account properly, all doubts are resolved against the trustee. Furthermore, to the extent there are any deficiencies in a trustee's accounting, or if the trustee cannot account for missing funds, the trustee will be held personally liable for the arrearage. Therefore, the trustee may be required to reduce or return any compensation it may have received while serving as trustee during the deficiency, may be removed from the post of trustee, or the trustee may be forced to repay the lost funds personally. The law does not require mens rea in this duty, rather the mere failure to account shifts the burden to the trustee to justify the difference or face liability.

Along with keeping proper accountings, the trustee also has an ongoing requirement to render an accounting to the beneficiaries of a trust when reasonably called upon to so act. Some trust documents stipulate a minimum accounting period, but in most cases the trustee is well advised to provide at least an annual accounting of all transactions.

B. UTC: The UTC again has propounded specific duties in regards to the common law duty to inform and report. Specifically, the trustee must advise all beneficiaries currently eligible for income or principal, and any other beneficiaries that request it, of all trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. The UTC identifies this requirement as a trustee's report, and the trustee must provide said report in a reasonably understandable format.

C. APPLICATION: The common law and the UTC are similarly strict in this duty. In *Pazdernik v. Stemler*, the court outlined the standard imposed in cases where a trustee fails to account to or provide beneficiaries with proper records. In *Pazdernik*, the trustee had failed to account for over $39,000.00 of trust assets that were apparently spent on care for the beneficiary over a seventeen year period. Accordingly, the remainder beneficiaries sued on account.

In its holding, the court emphasized that "all presumptions are against [the trustee] on his accounting, or that all doubts on the accounting are resolved against him." In addition, "the trustee has the burden of showing on the accounting how much principal and income he has received and from whom, how much disbursed and to whom, and what is on hand at the time." However, the court found there to be very special circumstances that would render application of the traditional rule "harsh and unnecessary" so it was recognized but not applied. The claim of the remainder beneficiaries was not granted, as the court reasoned that there was no suggestion or even evidence that the trustee diverted funds for her own benefit and that spending approximately $187.50/month on the beneficiary seemed "entirely reasonable." While the outcome may have been lenient, this case clearly shows that a trustee who fails to keep a proper accounting exposes itself to near strict liability.

The UTC also states that it is a breach of duty for a trustee to fail to provide and render proper accountings. The UTC delineates who should receive the trustee's report and what it should contain.

With these rules in mind, it is clear that a trustee has a significant burden to bear in that they must notify the beneficiaries of all accountings and be responsible for their accuracy. If there is an error, whether or not it is intentional, it appears that near strict liability will be placed upon the trustee for any arrearage.

V. DUTY TO FURNISH INFORMATION - The right of beneficiaries to receive a copy of the trust, along with detailed information including all material facts, accountings, and transactions.

A. COMMON LAW: The duty of a trustee to furnish information includes all of the accounting requirements discussed in the "duty to keep and render accounts" section, coupled with a requirement that a trustee provide all material facts to the beneficiaries. This duty not only requires that a trustee provide information upon request, but also that a trustee affirmatively discloses certain information.

A trustee also is required to provide to each beneficiary of a trust that requests it all relevant information as to the administration of the trust, a detailed accounting of trust assets, and what processes and procedures the trustee is using in the management of those assets.

In addition to the foregoing, beneficiaries are entitled to examine the trust documents themselves, documents relating to the trust's administration and to inspect the opinions of

experts which the trustee has procured during its administration. There is an exception to the rule of inspection when a trustee has procured an opinion of counsel for the trustee's own protection if a situation arises where there is a conflict between the trustee and beneficiaries.

While many jurisdictions differ, generally speaking the duty to furnish information extends beyond the current trust beneficiaries to include any future interests as well. There are some jurisdictions, however, that only require disclosure to current beneficiaries.

B. UTC: Perhaps the most controversial provisions of the UTC fall under the duty to furnish information. As a backdrop, it is important to note that the UTC created new definitions (and accordingly classifications) of beneficiaries and qualified what each beneficiary shall receive, at a minimum, with regards to information concerning the trust. The three main classifications of beneficiaries are a) the Permissible Distributee; b) the Qualified Beneficiary; and c) the Beneficiary. Generally speaking, the Permissible Distributee is anyone able to receive benefits from the trust currently (i.e. income and spray beneficiaries); the Qualified Beneficiary is anyone that can receive benefits currently, or anyone that would become eligible to receive benefits if the trust were to terminate or if any particular person were to die; and the Beneficiary is any beneficiary that may receive benefits from the trust, either vested or contingent.

With these rules in mind, the UTC requires that any beneficiary that requests information regarding the trust administration is entitled to it. Moreover, the trustee must keep the qualified beneficiaries reasonably informed of the trust administration and all material facts necessary for them to protect their interests. Within 60 days of a trust becoming irrevocable, a change in trustee, or a formerly revocable trust becoming irrevocable, the trustee must notify all qualified beneficiaries of the trust's existence, the identity of the settlors, their right to a copy of the trust and their right to receive a trustee's report (see above). These notice provisions apply to all trusts, but an exception is recognized. If a trust is revocable (i.e. a grantor trust), the trustee need not make disclosures to any beneficiary other than the settlor and those whom the settlor specifically directs.

C. APPLICATION: Failing to adequately disclose all material information will lead to liability. In *Rollins v. Branch Banking and Trust Company of Virginia*, the court imposed a duty to furnish information to beneficiaries to find the trustee liable for breaching their fiduciary duty for failing to keep the beneficiaries informed of all facts necessary for them to protect their interests. Here, the trustee's breach of duty allegedly contributed, if not caused, the loss of $25 million since they did not meet their duty to warn beneficiaries of a poorly performing but overly concentrated trust asset. In the trust document the beneficiaries, not the trustee, retained the right to control the retention and sale/purchase of stock. Accordingly, the trustee did little in regards to monitoring and advising the beneficiaries of the investments. The court held that the exculpatory provision did not relieve the trustee of their ongoing duty to provide the beneficiaries with all relevant knowledge.

In so ruling, the court held that the trustee "has a duty to impart to the beneficiary any knowledge that he may have affecting the beneficiary's interest and he cannot rid himself of this 'duty to warn'." The "professional" trustee knew, or should have known, of the poor performance of the stock and so advised the beneficiaries. The liability of the trustee, even though they did not have the right to make investment decisions, rested on the fact that a trustee is not excused from liability for failing to execute the beneficiaries' instructions.

In another instance, the trustee in *McNeil v. McNeil* failed to comply with its duty to furnish information to each beneficiary of a trust. Here, the trustee withheld information from one of four children who was a beneficiary, along with the surviving spouse. The child became estranged from his parent and siblings who requested the trustee to withhold certain information from him. The trustee complied with this request and was held in breach for doing so by the Delaware Supreme Court.

The court reiterated a trustee's duty to furnish information to beneficiaries and to treat them impartially, even though the trust contained exculpatory language to the contrary. The court found the trustee liable for its failure to communicate essential facts to a trust beneficiary, while continuing on to state that beneficiaries must all be treated equally, even though the trust directs otherwise.

While the UTC was not available for application to these cases, it too requires that the trustee give all beneficiaries notice of trust conditions regardless of the terms of the trust stating otherwise. Moreover, the UTC notice provisions that require the trustee to notify the Qualified Beneficiaries of the trust's existence, the assets, the trustee, the trustee's report, etc., places a significant burden on the trustee. The trustee not only must comply with the 60 day requirement to provide such notice, the trustee must also identify all beneficiaries that are required to receive notice. This may include children, grandchildren or more remote descendants in light of the UTC's definition of a Qualified Beneficiary.

The UTC requirements may also impact an individual trustee who is not advised of the relevant notice requirements. A family trustee or a non-estate planning attorney may not be aware of the 60 day notice requirements or the trustee's reporting requirements. Accordingly, obtaining proper advice or retaining a professional trustee should be contemplated to protect all interested parties.

VI. DUTY TO EXERCISE REASONABLE CARE AND SKILL - Trustees have a duty to exercise reasonable care and skill in executing their duties and responsibilities as trustee in relation to the fact that, as a fiduciary, the trustee has the highest level of duty.

A. COMMON LAW: As a trustee, one is expected to exercise the care and skill that a man of ordinary prudence would in dealing with his own property. The standard to measure a trustee's level of care is that of a prudent man, rather than that of the trustee himself, regardless of whether the trustee is compensated or not.

Trustees in some cases may hold themselves out as having a greater expertise or skill in a given area. In such cases, the reasonableness and care of the trustee's actions are weighed based on the higher level of skill. For example, in the case of a corporate trustee, there is a higher degree of fidelity, vigilance, and ability that the trustee must adhere to since the corporate trustee holds itself out as being a "professional trustee."

These notions also apply for trustees that may have special knowledge greater than the general public. For example, accountants, attorneys or professional investment advisors will be required to use their professional skills if serving as trustee.

B. UTC: The UTC integrates generally the Uniform Principal and Income Act along with the Uniform Prudent Investor Act to solidify the notions of requiring reasonable care and skill for a trustee. Again, however, the UTC not only solidifies the common law in this area, it raises the level of service provided for specially equipped trustees. The UTC again requires that the trustee act as a prudent trustee of "comparable skills."

C. APPLICATION: *In re Estate of Maxedon*, one of the issues litigated was whether or not a corporate or professional fiduciary should be held to a higher standard than a non-professional fiduciary, and if so, what standard should apply. The issue arose from the actions taken by the trustee in liquidating trust assets for approximately $479,000 after they had valued the assets at nearly $658,000. The beneficiaries claimed that the trustee mismanaged the trust and therefore was in breach of its fiduciary duties.

The court was urged to follow the prudent investor standard that was in effect at the time and stated that trustees must act with skill, care, diligence and prudence in light of the circumstances. At the time of the decision, the court noted that no such cases had been decided previously in evaluating the additional burden placed on a professional fiduciary, if any. In order to make a determination on the issue and unable to rely on prior case authority, the court looked to the Restatement of Trusts for guidance.

Following the Restatement of Trusts, the court noted that a trustee is under a duty to "exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property." However, the court continued on to state (citing from the Restatement) that "if the trustee is a bank or trust company…it may properly be required to show that it has made a more thorough and complete investigation than would ordinarily be expected from an individual trustee."

The court relied on treatise text in stating that "if the trustee has a greater skill or more facilities than others…he is under a duty to employ such skill and facilities." Moreover, "if a trustee held himself out as having a higher degree of skill…he may incur a liability for failing to come up to the standard he has set."

As a result of the authority relied upon, the court in *Maxedon* determined that the standard of care of a bank trustee is higher than an ordinary nonprofessional trustee.

While professional trustees are held to a higher standard because of their expertise, they are not expected to be a guarantor of investment performance. As with any investment manager or advisor, the professional trustee's actions are evaluated on their prudence, and not on their performance. Moreover, in keeping with their prudent actions, a corporate trustee does have a burden of greater record keeping.

In summary, any trustee must act reasonably and prudently in executing their fiduciary duty. If a trustee has special skills, they must utilize them for the best interests of the beneficiaries or risk liability.

VII. DUTY TO TAKE CONTROL OF TRUST PROPERTY- Ensuring proper designation and title of trust property to secure the corpus by the trustee.

A. COMMON LAW: The trustee is obligated to take reasonable steps to secure control of trust property and to keep control of it. As part of this duty, a trustee must go beyond merely taking physical custody of trust property and must ensure its designation as property owned by the trust. It has been said that the law knows no such person as a passive trustee, and they cannot sleep on their trust. Where the property in question is real property, the trustee's duty may extend to the point of ensuring that the proper and necessary documentation is filed and/or recorded. For a trustee to fail to obtain and control trust assets is a fundamental breach of their fiduciary duty.

B. UTC: The UTC summarizes this duty succinctly**.** Specifically, the UTC clearly states that the trustee must take reasonable steps to control all of the trust property. The UTC commentary states that such a duty includes physical possession of property and securities. However, the commentators acknowledge that the trust terms may alleviate this duty and provide, as an example a situation that allows a surviving spouse to reside in the family residence rent free and with the tangible personal property at her use.

C. APPLICATION: While this is a seemingly transparent duty, to actually control that for which you are responsible, issues still arise. In *Brown v. Schwegmann*, the court underscored the duty of a trustee to "take reasonable steps to take, keep control of, and preserve the trust property." Here, such a duty was imposed on a trustee who failed to separate trust property from business property, and furthermore the trustee did not list the trust as a creditor or file proof of a claim on behalf of the trust in a corporation for which he as CEO initiated the bankruptcy proceedings.

The co-trustee (and brother of the beneficiary) was appointed to serve on behalf of the Brown trust that was created by his deceased father for the benefit of his sister. The co-trustee invested a significant portion of the trust's assets in the closely held family business that the co-trustee also managed after his father's illness. Evidence during trial showed that during his management of the trust the co-trustee failed to establish a separate bank account for the trust funds, and that instead trust funds stayed in the business partnership account with notes in the accounting record of what was owed to the trust. Over the years from 1986 to 1996, the records indicated that the trust was owed approximately $500,000.00 consisting of dividends and interest. Furthermore, the record

indicates that the dividends payable to the co-trustee's own trust were paid from the partnership into his personal drawing account, while the dividends owed to the Brown trust were left in the partnership bank account. During this same time the co-trustee allegedly used $11 million of the company's money to build several homes, fund his wife's political campaign, and to give gifts to his children's trust, among other things.

In 1997, the company was sold for $70 million, but no part of the proceeds was applied to pay the Brown trust the money that it was owed. When the acquiring company filed for bankruptcy two years later, the co-trustee failed to list the Brown trust as a creditor or take other steps to protect the trust assets. The court, in finding a breach of several fiduciary duties determined that the co-trustee was personally liable for the losses sustained by his sister's trust and that damages should be awarded as well. While the facts are somewhat over the top and the breaches of several duties are involved, the case shows that had the trustee simply obtained and held the trust assets properly, the liability could have been limited.

VIII. DUTY OF IMPARTIALITY - A trustee's responsibility to administer a trust so as to afford each beneficiary with the same level of benefits and protection. The duty extends to current as well as successive beneficiaries.

A. COMMON LAW: The common law recognizes that the trustee owes an equal duty to each beneficiary of a trust. A trustee who favors a beneficiary or a particular class over another is in violation of this principle. The typical application of this duty is in situations where current beneficial interests are weighed against those of successor or remainder beneficiaries; however the duty may be applied to current simultaneous beneficiaries as well.

Too often a trustee may focus on the present beneficiaries. This commonly occurs when the present beneficiaries exert too much influence on the trustee. This influence can come from the relationship between the beneficiary and the trustee, or from the current beneficiaries persistent complaining or irritation of the trustee.

B. UTC: The UTC specifically delineates areas of trust administration requiring impartiality. Specifically the code states that "if a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing and distributing the trust property, giving due regard to the beneficiary's respective interests. The UTC commentators warn that a trustee must be particularly sensitive of allocations between income and principal and shall closely monitor distribution allocations regarding the same. The UTC advises that the relevant Principal and Income Act for the jurisdiction should be addressed.

C. APPLICATION: Cases abound with complaints by the various classes of beneficiaries (i.e. present interests versus future interests) that their counterparts are receiving too much deference in the trustee's administration. In the *DuPont* case, in siding with the remainder beneficiaries, the court reversed a summary judgment granted in favor of the defendant trustee in such a case. The controversy grew out of a trustee's actions with respect to the holdings of a trust that consisted of stock in the bank.

The trustee determined that they could not hold the 58% interest in voting stock held by the testator, and upon a proposal from the two lifetime beneficiaries decided to convert the shares into a non-voting interest. In so doing, the trustee neglected to account for the remainder interest in the trust that was to take upon the death of the current beneficiaries. Under the terms of the trust, the remainder interest in the trust was to pass to the children of the primary beneficiaries upon their respective deaths. The interest of the remainder beneficiaries was allegedly harmed by this transaction because the shares that they initially were going to inherit held voting power in the bank, while the shares subsequent to the transaction were non-voting shares in a holding company that was created to facilitate the transfer.

In so ruling, the court poignantly reiterated the common law trust principle of treating two or more beneficiaries impartially:

> This principle has its commonest application where there are successive beneficiaries. Where the trustee is directed to pay the income to a beneficiary during his life and on his death to pay the principal to another beneficiary, the interests of the two beneficiaries are to a certain extent antagonistic, and the trustee has to preserve a fair balance between them. He is under a duty to the former beneficiary to take care not merely to preserve the trust property but to make it productive so that a reasonable income will be available for him. He is under a duty to the latter beneficiary to take care to preserve the principal of the trust property for him.

The UTC also addresses these issues on many levels. Section 803 clearly states that investments and distributions shall be made in an impartial manner. Moreover, other provisions induce this cannon of impartiality. The Principal and Income Act, the Prudent Investor Act and the notice provisions of the UTC all show a goal of balance in trustee administration.

IX. DUTY WITH RESPECT TO A CO-TRUSTEE - The dual accountability of a trustee for their own actions, inactions, and decisions, as well as those of their co-trustee(s).

A. COMMON LAW: In situations where multiple trustees are named to act, each has an obligation to participate in the trust administration, unless otherwise specified. While each trustee has a duty to use reasonable care to prevent others from committing a breach, where one trustee does breach their fiduciary duty it is the duty of the others to compel him to redress it.

B. UTC: The UTC centers most of its provisions concerning co-trustees under Section 703. Under this section, co-trustees are required to exercise reasonable care, to participate in the performance of trustee's functions unless properly assigned to another co-trustee, and to act by majority decision. The UTC does allow a trustee that dissents from the majority to absolve itself from liability by documenting such dissent, but even a

dissenting co-trustee must prevent any "serious breach of trust" and must "compel a co-trustee to redress a serious breach of trust."

C. APPLICATION: The court in *Anton* focused on the actions of co-trustees in their management of a trust to outline their respective responsibilities and obligations. This case involved two co-trustees, one of whom was the "dishonest" co-trustee who allegedly converted money from the trust for his personal use by having the other co-trustee sign blank checks on the trust account.

The other co-trustee was not absolved of liability, but rather the court held that she owed a duty of diligence to the trust as part of her trustee duties. In addition, the court held that "where there were several trustees, each was under a duty to participate fully in the administration." The court continued onward to state that a trustee "who delegated to another the administration of the trust, breached his duties of a trustee."

Here, the trustee who was signing the blank checks failed to meet her duty owed to the trust, as there was evidence that she did not review bank statements, cancelled checks, or the bills that the "dishonest" co-trustee was allegedly paying.

These rules lead to important advice to be heeded by any co-trustee. While many co-trustees "split" duties to minimize duplicative or excessive work, it is important for all trustees to continually monitor their co-trustee's actions and verify that the co-fiduciary is acting properly. As illustrated above, failure to do so may impugn liability.

The UTC reiterates these points by requiring a co-trustee to act unless performance of the trustee function is properly delegated. Moreover, the co-trustee can protect themselves from liability if they properly dissent from an action, but the co-trustee must be mindful of the potential that the act may be considered a serious breach of the trust. If this is the case, the co-trustee has a duty to protect the trust from such a breach.

CONCLUSION

In short, anyone accepting the important position of trustee must be aware of the significant responsibilities they are incurring. The common law, now supported and clarified by the UTC, delineates several specific requirements with which a trustee must comply. These requirements are amorphous, however, because a trustee must use their special skills that they may have in administering the trust. While these tasks are daunting, professional trustees are available and they may raise the bar for trustee responsibilities. As trustees and advisors to trustees, we all must be aware of these responsibilities and advise or act accordingly.