

INSIDE THE MIND OF A TRUSTEE: THE IMPORTANCE OF UNDERSTANDING A TRUSTEE’S PERSPECTIVE

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When advising clients as to who to designate as trustee, we, as attorneys, often caution that the role is not an honor; it is a job.¹ As with any job, there are certain rules and responsibilities that must be performed, and there is also a lot that goes on behind the scenes that laypeople are unaware of.² Records that must be kept, questions that must be asked, and other tasks that are often overlooked, but vital to the proper performance of the role of trustee.³

As opposed to other jobs though, where specific employment terms are typically set by an employer familiar with the business, for trustees, the terms of employment are largely determined by third-parties (*i.e.* an attorney and settlor) who most often has no personal experience performing the work being assigned to the trustee.⁴ One would not expect someone without experience in the food service industry to set the rules for a restaurant's kitchen and waitstaff.⁵ When should breaks be scheduled?⁶ What are the most common food safety concerns and how should they be addressed? Likewise, hospital guidelines prepared by someone without healthcare experience would surely neglect certain issues that any member of the hospital staff would know to address.⁷

As noted above, serving as trustee of any trust, but especially a trust for someone other than oneself, is a job.⁸ Advice given and trust terms drafted by attorneys without an understanding of how it will be interpreted and administered by trustees can not only fail to accomplish the settlor's

1. See, e.g., *Ditta v. Conte*, 298 S.W.3d 187, 191 (Tex. 2009) (elaborating on the high fiduciary standard imposed on a trustee); see generally, 72 TEX. JUR. 3D *Trusts* § 61 (2020) (“[h]igh fiduciary standards are imposed on trustees, who must handle trust property solely for the beneficiaries’ benefit.”).

2. See, e.g., *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720 (Tex. App.—Corpus Christi 1994, writ denied) (detailing duties and responsibilities owed by trustees); see generally, 72 TEX. JUR. 3D *Trusts* § 61 (“A trustee’s fundamental duties include the use of skill and prudence which an ordinary, capable, and careful person will use in the conduct of his or her own affairs as well as loyalty to the trust’s beneficiaries.”).

3. See generally, 72 TEX. JUR. 3D *Trusts* § 152 (“[a] trustee owes a duty to the beneficiaries to make full disclosure of all facts and circumstances concerning the trustee’s dealings with the trust assets.”); see also, *Why Naming the Right Trustee Is Critical*, FIDELITY.COM (Nov. 16, 2018), <https://www.fidelity.com/viewpoints/wealth-management/naming-the-right-trustee> [perma.cc/A6JM-D4RS] (providing reasons for why selecting the right trustee is crucially important).

4. See *State v. Gulbankian*, 196 N.W.2d 733, 727 (Wis. 1972) (the court noted that an attorney assisting as an executor “is an area in which it is difficult to police professional standards . . .”).

5. Questions posed by the author for purposes of this article.

6. *Id.*

7. *Id.*

8. See *supra* text accompanying notes 1–3.

objectives, but can backfire and lead to a situation much worse than if the property were simply left outright.⁹ Therefore, an understanding of the obligations, prudent actions, and overall mechanics behind the role of trustee leads to more accurate advice, better drafting and more trusts being administered as intended.¹⁰

I. ROLE OF TRUSTEE

Before delving into any discussion of how a trustee should properly administer a trust, an understanding of the role of a trustee is necessary.¹¹ At its core, a trustee is an individual or entity legally bound to administer property for the benefit of a beneficiary.¹²

A. Characteristics of a Good Trustee

Selecting the right trustee depends largely on the reason behind establishing the trust.¹³ For example, if tax-savings are the principal objective, the settlor should consider an independent trustee to allow for the allocation between principal and income, to provide the ability to make discretionary distributions, and generally to afford more flexibility in trust administration.¹⁴ If a trust is primarily intended to provide a structure through which a beneficiary can be educated regarding financial management, then the settlor may focus on selecting a trustee who has a good relationship with the beneficiary and who could take on a mentoring role in addition to the mechanics of administering the trust.¹⁵ However, regardless of the reason for creating the trust, there are certain characteristics shared by all good trustees, individual and corporate.¹⁶

9. See TEX. DISCIPLINARY R. PROF'L CONDUCT R. 1.02(a)(1; see also RONALD R. CRESSWELL ET AL., TEX. PRAC. GUIDE WILLS, TRUSTS, & EST. PLAN. §§ 5:3, 5:121 ("[t]he language of the settlor of a trust must demonstrate that he or she intended to impose an imperative obligation. . . . Additionally, since the trust relationship is a relatively complicated one being generally a three-party relationship in which a trustee owes a high duty of loyalty to the beneficiary the instrument should specify the details concerned with the execution and administration of the trust.").

10. See, e.g., CRESSWELL ET AL., *supra* note 9, § 5:359–76 (giving an overview of the duties and responsibilities of a trustee).

11. See *id.*

12. See *supra* text accompanying notes 1–3; TEX. PROP. CODE ANN. § 111.004(18) (defining trustee as "the person holding the property in trust, including an original, additional, or successor trustee, whether or not the person is appointed or confirmed by a court.").

13. See CRESSWELL ET AL., *supra* note 9, §§ 5:332–345 (providing numerous factors to be considered in choosing a trustee, including size and complexity of the trust, conflicts of interest, expenses, etc.) (Note: all references in this article to the "Texas Trust Code" are to the Texas Trust Code, which is codified in Article 9 of the Texas Property Code).

14. David Barbour and Barbara G. McComas, *Selecting a Trustee: Income Tax and Estate Tax Consideration*, 33 SW. L. J. 635 (1979).

15. Alan R. Bromberg & E.B. Fortson, *Selection of a Trustee: Tax and Other Considerations*, 19 SW. L. J. 523, 527–29 (1965).

16. See *id.*

1. Personal and Business Skills

Although wealth preservation may not be the primary reason for establishing a trust, it is inevitably one of the settlor's objectives.¹⁷ No trust will be of any use if the trustee imprudently administers and dissipates the trust estate.¹⁸ Therefore, a trustee should not only be organized and responsible, but ideally should have investment and accounting experience as well, or should at least be knowledgeable enough and willing to delegate these duties to agents with such experience.¹⁹

2. Peacemaker

Each financial institution offering corporate trustee services has its own culture, and a settlor should find one that he believes could smoothly integrate itself within the family, and especially with the trust beneficiaries.²⁰

If an individual family member or friend is being considered as a potential trustee, such person should be intuitive, a good communicator, and a natural problem-solver (and it wouldn't hurt if he or she also had a thick skin).²¹ Administering a trust will very likely require obtaining sensitive financial and personal information from beneficiaries, refusing to make certain distributions or investments, and explaining to remainder beneficiaries why other distributions were made. In some cases, a distribution or investment may objectively make sense, but nevertheless not be permissible under the trust terms. Understanding this and explaining it does not come naturally to most people. Choosing a diplomatic trustee is key.²²

Even within closely-knit families, there are few, if any, occasions for one adult family member to manage another adult family member's finances, so the trustee-beneficiary relationship introduces a new dynamic which can cause unanticipated results.²³

17. See generally, *6 reasons you should consider a trust*, FIDELITY (Apr. 12, 2019), <https://www.fidelity.com/viewpoints/personal-finance/reasons-to-consider-a-trust> [perma.cc/52JY-WTCY] (providing a general overview on trusts and the purposes for creating one).

18. See CRESSWELL ET AL., *supra* note 9, §§ 5:331–342.

19. See *id.*; see generally, *Understanding the Duties and Responsibilities of a Trustee*, ESTATEPLANNING.COM, <https://www.estateplanning.com/Duties-and-Responsibilities-of-a-Trustee/> [perma.cc/HH9U-9YMY] (last visited Jan. 21, 2020) (discussing the general concepts behind the duties and responsibilities of a trustee and what a trustee needs to know, e.g., familiarity with the various documents used in trusts).

20. See CRESSWELL ET AL., *supra* note 9, § 5:349 (discussing the benefits in hiring a corporate trustee, especially to deal with assets of considerable sizes).

21. See *id.* § 5:336 (discussing general conflicts of interests in determining who should be a trustee).

22. See *id.* §§ 5:333–39 (explaining why larger and more complex trusts may require the assistance of an expert in the field who is familiar with the types of assets handled).

23. See *id.*

If tension or hostility is anticipated from the beginning, a corporate trustee may be preferable.²⁴ In such situations, interviewing multiple corporate trustees to learn the institutional protocol for handling conflict and choosing the trustee with an approach that the settlor anticipates may work best for his family can lead to fewer problems for all parties in the future.²⁵

3. Available

Although the amount of time required varies depending on the trust terms, needs of the beneficiaries, and other factors, administering a trust can take a significant amount of time and energy.²⁶ Individuals, particularly those with strong business and interpersonal skills, often have careers, activities and personal obligations outside of work.²⁷ This can lead to a lack of or delayed communication between the trustee and beneficiary, which can cause feelings of resentment and suspicion from both sides.²⁸ The beneficiary may resent the trustee for not promptly responding to questions and requests and suspect that the trustee is not providing information because of mismanagement or theft.²⁹ The trustee may resent the beneficiary's expectations of immediate action, particularly if the trustee is not being compensated for serving as fiduciary.³⁰

Moreover, although a corporate trustee or an individual may always decline to serve as trustee, certain individuals may feel compelled by feelings of guilt or obligation to assume a role that he or she does not have the time or energy to do correctly.³¹ Therefore, the availability of a potential trustee should be considered both when initially naming such trustee and at the time of acceptance.³²

24. See *id.* §§ 5:349–52 (explaining why larger and more complex trusts may require the assistance of an expert in the field who is familiar with the types of assets handled).

25. See *id.*; see also, *Why Naming the Right Trustee Is Critical*, FIDELITY.COM (Nov. 16, 2018), <https://www.fidelity.com/viewpoints/wealth-management/naming-the-right-trustee> [perma.cc/NB7J-RCE4] (section offering the advantages of a corporate trustee).

26. See generally, *What Is Involved in a Trust Administration?* GLENDORLAW.COM, <https://www.glendoralaw.com/trust-administration/what-is-involved-in-a-trust-administration/> [perma.cc/BXT8-Z5WD] (last visited Jan. 21, 2020) (suggesting that an initial trust administration may take anywhere between two and six months); see, e.g., Karen S. Gerstner & Associates, P.C., *What Every Trustee Ought to Know*, <http://www.gerstnerlaw.com/images/docs/What%20Every%20Trustee.pdf> [perma.cc/AYV5-WDNE] (last visited Jan. 21, 2020) (in summary, outlining that a trustee should “devote the time, energy, and expertise necessary for the trust estate in question; . . .”).

27. See Gerstner, *supra* note 26 (author drawing a general inference).

28. See *id.* (“[a] long response time, coupled with little or no communication, will cause the beneficiary to believe you are devoting inadequate time and attention to your responsibilities . . . the importance of communication cannot be overemphasized.”).

29. *Id.*

30. *Id.*

31. See Mary Randolph, *Should You Serve as a Trustee?*, ALLLAW, <https://www.alllaw.com/articles/nolo/wills-trusts/should-you-serve-trustee.html> [perma.cc/ND6E-VWVW] (last visited Jan. 20, 2020).

32. *Id.*

B. Legal Duties of Trustee

All trustees are subject to certain legal duties that must be met in administering a trust.³³

1. Duty of Loyalty

The duty of loyalty requires that a trustee place the interests of the beneficiaries above the trustee's own interests.³⁴ This duty is reflected in Texas Trust Code section 117.007 which states that a trustee must invest and manage trust assets for the sole benefit of the beneficiaries.³⁵ A trustee is prohibited from using his or her fiduciary role to gain any benefit for himself or herself (other than trustee commissions), regardless of whether the trustee's actions *also* benefit the beneficiaries.³⁶ The fact that self-dealing, even when it benefits all parties, is a breach of the duty of loyalty, can be a difficult concept for laypersons to grasp. This is further complicated when a single person is both trustee and beneficiary of the same trust. If desired though, self-dealing restrictions may be waived in the underlying trust instrument.³⁷

2. Duty of Competence

A trustee also has the duty to act reasonably in exercising the trustee's discretion.³⁸ This requires that a trustee make informed decisions based on the terms of the trust and in a manner that carries out the settlor's intent.³⁹

As fundamental as this may seem, a trustee cannot fulfill this duty (or arguably any duty) if the trustee does not read and understand the trust instrument.⁴⁰ Generally speaking, it can be difficult for individual trustees to decipher the legalese of a trust agreement without the assistance of a trust attorney or other professional.⁴¹ As a result, such trustees may administer a trust based on what the settlor may have told them prior to death or according to *their interpretation* of the settlor's intent.⁴² Although such actions are understandable, inexperience and lack of understanding are not acceptable defenses to breach of fiduciary duty.⁴³ Practitioners need to emphasize to

33. See CRESSWELL ET AL., *supra* note 9, § 5:430.

34. *Id.* § 5:361.

35. *Id.*; TEX. TRUST CODE ANN. § 117.007.

36. See CRESSWELL ET AL., *supra* note 9, § 5:430.

37. *Id.*; TEX. TRUST CODE ANN. § 113.053; Texas Comm. Bank v. Grizzle, 96 S.W.3d 240, 251 (Tex. 2002).

38. See CRESSWELL ET AL., *supra* note 9, § 5:430; see Sassen v. Tanglegrove Townhouse Condo. Ass'n, 877 S.W.2d 489 (Tex. App.—Texarkana 1994, writ denied).

39. *Id.* § 5:368.

40. See *id.* § 5:122-27.

41. See *id.*

42. See *id.*

43. See Kevin J. Parker, *Trustee Defenses Statute of Limitations, Laches, Self-Executing Accounting Release Provisions, and Exculpatory Clauses*, (2009) <https://www.flprobatelitigation.com/wp-content/>

clients that individual trustees should consult with a trust attorney to make sure that they understand the trust terms *before* accepting the role of trustee.⁴⁴ Below is an example of a suggested trust provision to encourage individual trustees to seek such advice.

Recommendation for Individual Trustees. I recommend, but do not require, that for at least the first year in which any individual serve as Trustee of a trust hereunder, that such individual either appoint a corporate fiduciary to serve as agent for the trust or engage a qualified trust attorney to advise the individual Trustee as to proper administration of the trust. Expending trust funds to cover the costs of taking such actions shall be deemed reasonable and necessary. Alternatively, I recommend, but do not require, that each Beneficiary of a Descendant's Trust hereunder first serve as Co-Trustee for five years in order for the Beneficiary to learn about the duties and obligations of a trustee before appointing himself or herself as sole Trustee.

3. Duty of Disclosure

Trustees have a duty to keep beneficiaries reasonably informed of material facts concerning a trust's administration that might affect a beneficiary's rights.⁴⁵ The "high" duty of full disclosure is broad and extensive, although it is not unlimited.⁴⁶

Trustees most often satisfy their duties of full disclosure by providing accountings to beneficiaries.⁴⁷ Texas law requires that upon written demand of a beneficiary, a trustee has a duty to provide a formal trust accounting.⁴⁸ Trust accountings are discussed further in Section II.C below and the duty of disclosure is discussed further in Section III.A.1.⁴⁹

4. Duty of Care

Under common law, a trustee has the duty to administer a trust with care, diligence, and prudence.⁵⁰ A trustee must exercise such care and skill

uploads/sites/206/2009/12/ABA-article-trustee-defenses.pdf [perma.cc/FC5P-BAEU].

44. See Guidelines for Individual Executors & Trustees, https://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/guidelines_for_individual_executors_trustees/ [perma.cc/K2VA-XVKS] (last visited Jan. 20, 2020).

45. See CRESSWELL ET AL., *supra* note 9, § 5:369; Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996); Montgomery v. Kennedy, 669 S.W.2d 309, 313 (Tex. 1984).

46. See CRESSWELL ET AL., *supra* note 9, § 5:370; Avary v. Bank of Am., N.A., 72 S.W.3d 779, 797 (Tex. App.—Dallas 2002, pet. denied).

47. See CRESSWELL ET AL., *supra* note 9, § 5:370.

48. TEX. PROP. CODE ANN. § 113.151(a).

49. *Infra* Section II.C, III.A.1.

50. See CRESSWELL ET AL., *supra* note 9, §§ 5:339, 5:360.

as a person of ordinary prudence would exercise in dealing with the person's own property.⁵¹

Texas Trust Code section 117.004 codifies this rule in terms of the investment and management of trust assets by stating that "a trustee must invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust."⁵² If a trustee has additional skills or expertise, for example if a professional financial advisor or corporate trustee is serving, the trustee will be held to a higher standard given such skills and expertise.⁵³

5. *Duty of Impartiality*

Trustees also owe a duty of impartiality to all beneficiaries of a trust.⁵⁴ Texas Trust Code section 117.008 provides that if a trust has two or more beneficiaries, the trustee must act impartially in investing and managing the trust assets and must take into account differing interests of the beneficiaries.⁵⁵ Likewise, the Uniform Principal and Income Act states that a trustee "shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries. . ."⁵⁶

This may be one of the more difficult duties for a trustee to fulfill, particularly if the trust is a pot trust and the trustee is also one of the beneficiaries of such trust.⁵⁷

Nevertheless, the duty of impartiality can be waived to some extent if the settlor expresses a clear intent to favor one or more beneficiaries, or a certain class of beneficiaries over others.⁵⁸

6. *Ability to Waive Certain Trustee Duties*

Generally, the terms of a trust agreement prevail over conflicting provisions of the Texas Trust Code, meaning that in most cases, a trust agreement can modify the duties of a trustee.⁵⁹ As noted above, a trust agreement can contain provisions that limit a trustee's duty of impartiality and authorize a trustee to favor one class of beneficiaries over another class or may authorize self-dealing and conflicts of interest that would otherwise constitute breaches of the trustee's duty of loyalty.⁶⁰

51. *Id.* § 5:360.

52. TEX. PROP. CODE ANN. § 117.004(a).

53. *See id.*

54. *See* CRESSWELL ET AL., *supra* note 9, § 5:362.

55. TEX. PROP. CODE ANN. § 118.004.

56. *See id.* § 116.004(b).

57. *See id.*

58. *Id.*

59. *See* CRESSWELL ET AL., *supra* note 9, §§ 5:32, 5:455.

60. TEX. PROP. CODE ANN. § 112.051.

However, Texas Trust Code section 111.0035 contains certain mandatory provisions that cannot be waived and are discussed further in section C.2 below.⁶¹

C. Sources of Authority

There are three main sources of guidance and authority for a trustee, in the following order of priority: (1) the trust instrument, (2) the Texas Trust Code, and (3) common law.⁶²

1. Trust Instrument

Generally, the terms of a trust, as set forth in the governing instrument, serve as the primary source of guidance for a trustee.⁶³ It is well settled in Texas that the first principle of trust construction is to honor the intent of the settlor, and in determining such intent, courts first look to the text of the written instrument establishing the trust.⁶⁴

2. Texas Trust Code

To the extent that the terms of a trust instrument do not provide otherwise, the Texas Trust Code governs: (1) the duties and powers of a trustee; (2) relations among trustees; and (3) the rights and interests of the beneficiaries.⁶⁵

Moreover, the Texas Trust Code sets forth certain trustee duties, beneficiary rights and trust rules that cannot be waived.⁶⁶ Texas Trust Code section 111.0035(b) provides:

The terms of a trust prevail over any provision of this subtitle, except that the terms of a trust may not limit:

- (1) the requirements imposed under Section 112.03
- (2) the applicability of Section 114.007 to the exculpation term of a trust;
- (3) the periods of limitation for commencing a judicial proceeding regarding a trust;
- (4) a trustee's duty:
 - (A) with regard to an irrevocable trust, to respond to a demand for accounting made under Section 113.151 if the demand is from a beneficiary who, at the time of the demand:

61. TEX. PROP. CODE ANN. § 111.0035.

62. *See infra* Section C. 1–3.

63. TEX. PROP. CODE ANN. § 113.051.

64. *See* CRESSWELL ET AL., *supra* note 9, § 5:127.

65. TEX. PROP. CODE ANN. § 111.0035(a).

66. *See id.*

- (i) is entitled or permitted to receive distributions from the trust; or
 - (ii) would receive a distribution from the trust if the trust terminated at the time of the demand;
- (B) To act in good faith and in accordance with the purposes of the trust; and
- (5) The power of a court, in the interest of justice, to take action or exercise jurisdiction, including the power to:
 - (A) Modify or terminate a trust or take other action under Section 112.054;
 - (B) Remove a trustee under Section 113.082;
 - (C) Exercise jurisdiction under Section 115.001;
 - (D) Require, dispense with, modify, or terminate a trustee's bond; or
 - (E) Adjust or deny a trustee's compensation if the trustee commits a breach of trust.⁶⁷

Only if the terms of the trust are ambiguous, will a court look to extrinsic evidence, such as the facts and circumstances surrounding the formation of the trust, the actions of the settlor and the trustee in the time since the formation of the trust, and expressions of the settlor's intent.⁶⁸

3. Texas Common Law

The powers and duties of a trustee are also governed by common law to the extent the trust instrument does not validly provide otherwise, and the common law is not inconsistent with the provisions of the Texas Trust Code section 113.051 provides that “[i]n the absence of any contrary terms in the trust instrument or contrary provisions of [the Texas Trust Code], in administering the trust, the trustee shall perform all of the duties imposed on trustees by the common law.”⁶⁹

67. *See id.* § 111.002 (If the terms of this subtitle and the terms of a trust conflict, the terms of the trust control . . .); *see id.* § 113.001 (“A power given to a trustee [under the Trust Code] does not apply to a trust to the extent that the instrument creating the trust . . . conflicts with or limits the power.”); *see id.* § 113.051 (The trustee shall administer the trust according to its terms and this subtitle. In the absence of any contrary terms in the trust instrument or contrary provisions of this subtitle, in administering the trust, the trustee shall perform all of the duties imposed on trustees by the common law.); *see id.* § 113.059(a) (“[A] Settlor by provision in an instrument creating, modifying, amending, or revoking the trust may relieve the trustee from a duty, liability, or restriction imposed by this subtitle.”); *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984) (“ . . . the trustee's powers are conferred by the instrument and neither the court nor the trustee can add or take away such power. The trust is entitled to that construction which the maker intended.”); *Bleiden v. Greenspan*, 742 S.W.2d 93, 96 (Tex. Ct. App.—Beaumont 1987) (citations omitted), *rev'd on other grounds*, 751 S.W.2d 858 (1988) (“[I]t is well settled and elementary that the supreme goal of construing a trust instrument or a testamentary instrument, is to determine the intent of the testator-trustor-settlor.”).

68. *Nowlin v. First Nat'l Bank*, 908 S.W.2d 283, 286 (Tex. App.—Houston [1st Dist.] 1995).

69. *See id.* § 111.005.

D. Other Potential Sources

1. Restatement of Trusts

Texas has not adopted the Restatement of Trusts, so the Restatement is not binding in Texas.⁷⁰ Nevertheless, they still provide some guidance when construing and interpreting a trust for cases in which the Restatement does not conflict with the Texas Trust Code.⁷¹

Furthermore, as between the Restatement (Second) of Trusts and Restatement (Third) of Trusts, Texas courts have considered and cited the Restatement (Second) of Trusts in a number of decisions, but they have only cited the Restatement (Third) of Trusts three times.⁷² Time will tell if or how Texas courts will view the Restatement (Third) of Trusts.⁷³

2. Uniform Trust Code

Likewise, Texas has not adopted the Uniform Trust Code (in fact legislative history indicates certain provisions of the Texas Trust Code were enacted to expressly disavow any attempts to apply certain provisions), and it has no precedential value in this state.⁷⁴ Nevertheless, the Uniform Trust Code (“UTC”) still provides some guidance when drafting, construing, and administering trusts.⁷⁵

Despite not having adopted the Uniform Trust Code, there are certain areas in which the Texas Trust Code and the Uniform Trust Code overlap.⁷⁶ If faced with a Texas trust question falling within one of these overlapping areas and if there is no Texas case law on point, cases on point from a UTC state may be of some value.⁷⁷ As of 2019, the Uniform Trust Code, with some variations, has been adopted by approximately thirty-three states and two more are in the process of considering adoption.⁷⁸

70. Mary C. Burdette, What Every Trustee Should Know, Presented During the State Bar of Texas 2014 Estate Planning and Probate Drafting Course, in ST. B. OF TEX. 2016 EST. PLAN. & PROB. DRAFTING COURSE (Oct. 2014).

71. *Id.*

72. *Id.*; see *Keisling v. Landrum*, 218 S.W.3d 737 (Tex. App.—Fort Worth 2007, pet. denied); *Marsh v. Frost National Bank*, 129 S.W.2d 174 (Tex. App.—Corpus Christi 2004, writ denied); *Bergman v. Bergman Davison Webster Charitable Trust*, 2004 WL 24968 (Tex. App.—Amarillo 2004, no writ).

73. See Burdette, *supra* note 70.

74. *Id.*

75. *Id.*

76. See generally, Kara Blanco, *The Best of Both Worlds: Incorporating Provisions of the Uniform Trust Code into Texas Law*, 38 TEX. TECH L. REV. 1105 (2006) (exploring the similarities between the Uniform Trust Code and Texas law).

77. See *id.*

78. Uniform Trust Code, https://en.wikipedia.org/wiki/Uniform_Trust_Code [perma.cc/K2WZ-ABX9e] (last visited Feb. 28, 2020).

II. THE DIFFERENCE DRAFTING CAN MAKE

Since the trust agreement itself serves as the primary source of guidance in administering and interpreting the trusts established by it, it is vitally important that the document is carefully and thoughtfully drafted.⁷⁹

A. *Personal Statement of Intent*

The primary compass when interpreting the terms of a trust is to do so in a manner that carries out the settlor's intent for creating the trust.⁸⁰ If trust terms are called into question, courts first look to the language used within the four corners of the document and construe the trust instrument to give effect to all provisions so that no provision is rendered meaningless.⁸¹ However, in a practice area that relies so heavily on forms, this rule can lead to unintended consequences if a drafting attorney does not tailor the trust agreement to reflect each individual settlor's intentions.⁸²

1. *Deeper Understanding of Settlor's Rationale*

Practically speaking, explicitly spelling out a settlor's intent in the trust agreement can help a trustee and beneficiaries understand the rationale behind a trust structure or certain allowances or restrictions placed on the beneficiaries of the trust.⁸³ For example, an asset protection trust may contain a requirement that a corporate trustee serve at all time not because the settlor distrusted the beneficiary from serving as his own trustee, but rather to avoid loss of such protection regardless of the beneficiary's domicile.⁸⁴

An explanation of the settlor's rationale may also help make the plan structure more palatable or understandable for a disgruntled beneficiary, even if the beneficiary still disagrees with such reasoning.⁸⁵ For example, if the settlor-parent states that a larger portion of the trust is passing to the daughter because she reduced her work hours in order to care for her parent at the end of life, settlor-parent's son may not like or agree with this decision, but hopefully he will be more likely to respect it.⁸⁶ This not only protects and preserves the settlor's intentions, but hopefully provides a shield for the estate planning attorney as well.⁸⁷ In the context of a contentious family or anticipated trust contest, an explanation of the settlor's intent in his or her

79. TEX. PROP. CODE ANN. § 113.051.

80. See CRESSWELL ET AL., *supra* note 9, § 5:127.

81. See Hurley v. Moody Nat. Bank of Galveston, 98 S.W.3d 307, 310–11 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (citing Rekdahl v. Long, 417 S.W. 2d 387, 389 (Tex. 1967)); Myrick v. Moody, 802 S.W.2d 735, 738 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

82. See CRESSWELL ET AL., *supra* note 9, § 5:127.

83. See TEX. PROP. CODE ANN. § 112.002.

84. See *id.*

85. See *id.*

86. See *id.*

87. See *id.*

own words may also cut against claims of undue influence or lack of capacity and hopefully even ward off such contest claims before the courtroom.⁸⁸ An example of a basic statement of intent is set forth below.

Statement of Intent. This estate plan was formulated with the primary goal of achieving the distribution of the Settlor's assets according to the Settlor's desires. The Settlor has carefully and thoughtfully worked to provide for her children and more remote descendants by means that she believes are best suited to each individual.

Specifically, the Settlor acknowledges that the distribution of the trust estate between her children is unequal, resulting in daughter receiving property of a greater value than her son. This should not be taken as an indication of the Settlor's trust or affection. Rather, the property allocated to daughter's share consists primarily of real estate which the Settlor's daughter has helped manage during the Settlor's lifetime and which requires additional work to maintain and sell. On the other hand, the Settlor's son has taken a different career path and has not expressed any interest in real estate management. Therefore, the property allocated to son's share consists primarily of cash and securities.

2. Provides Guidance in Interpreting Certain Language

Even in harmonious families, a statement of intent can provide guidance to both trustees and beneficiaries.⁸⁹ For example, rather than set forth strict requirements to encourage a beneficiary to certain behaviors ("Trustee may distribute trust income and principal up to, but not exceeding, the beneficiary's annual salary"), a statement of intent can educate a trustee and beneficiary insofar as what the settlor believes should be considered "maintenance and support."⁹⁰ An example is set forth below.

Factors for Trustee Consideration. Settlor intends for the beneficiary to maintain a career and not to primarily rely on trust distributions for living expenses. If the beneficiary is maintaining a career, the trustee should interpret "maintenance" and "support" liberally to allow the beneficiary to supplement his or her lifestyle. If a beneficiary fails to hold a job so that trust distributions are the beneficiary's primary or sole source of support, the settlor recommends that the trustee construe the terms "maintenance" and "support" strictly to cover only the bare necessities.

88. *See id.*

89. Fred Franke & Anna Katherine Moody, *The Terms of the Trust: Extrinsic Evidence of Settlor Intent*, 40 ACTEC L.J. 15–16 (2014).

90. *See id.*

B. Show Me the Money — Distribution Standards

Since distribution standards determine when and how much property is paid from a trust, these provisions may be the most closely read and highly scrutinized provisions of a trust agreement.⁹¹ Some standards are clear on their face (“Trustee shall distribute 3% of trust property at least annually”) whereas others leave room for discretion (“Trustee may distribute trust net income and principal, or both to or for the beneficiary as the trustee determines, in such trustee’s sole and absolute discretion.”).⁹²

Understanding how trustees are likely to interpret distribution standards, as well as the extent of information gathering and record-keeping involved for the trustee to be able to properly interpret such standards, allows clients to make informed decisions about the standard to include in any given trust.⁹³ The choice of a word or phrase could make a significant difference in the amount of trust property distributed.⁹⁴

1. Mandatory Income Distributions

Within the range of distribution standards, mandatory distribution standards involve the least trustee discretion, but even then, such discretion exists. It is simply more nuanced.⁹⁵

a. Trust Investments

Section 117.003(b) of the Texas Uniform Prudent Investor Act (“UPIA”), found in Chapter 117 of the Texas Trust Code, states that the prudent investor rule “may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust.”⁹⁶ However, unless the trust agreement specifically provides for this, the general rule is that “a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule . . .”⁹⁷ Most notably, the Texas UPIA requires that the trustee must invest for “total return” and cannot invest solely for the purpose of generating accounting income to then distribute to the income beneficiary of a mandatory income distribution trust.⁹⁸

91. Allaya Lloyd, *Ascertainable Standards and Trust Distributions: What You Should Know*, LAW OFFICE OF LEWIS J. SARET BLOG (July 10, 2014), lewissaret.com/2014/07/10/ascertainable-standards-and-trust-distributions-what-you-should-know/ [perma.cc/P8MG-696Y].

92. *See id.*

93. *See id.*

94. *See id.*

95. *See* Sarah Patel Pacheco, *What Did You Mean By That? Trust Language and Application by Trustees*, NORRIS & WEBER (2011), <https://www.dallasprobatelawfirm.com/documents/004.-What-Did-You-Mean-By-That.Universal.pdf> [perma.cc/TP6L-ATYB].

96. TEX. PROP. CODE ANN. § 117.003(b).

97. *See id.* § 117.003(a).

98. *See id.* § 117.004(c)(5).

As noted in the section above, regarding duty of loyalty, the trustee's fiduciary duty of impartiality is particularly relevant in terms of trust investments as the trustee is directed to "act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries" for any trusts with two or more beneficiaries.⁹⁹ This includes substantially all trusts given that the "two or more beneficiaries" includes beneficiaries in succession (such as remainder beneficiaries) as well as simultaneous beneficiaries (such as multiple current income beneficiaries).¹⁰⁰

Therefore, if a settlor wishes to use a mandatory distribution standard and favor a current income beneficiary, the trust agreement needs to explicitly exempt the trustee from this UPIA requirement.¹⁰¹

b. Allocation Between Income and Principal

The terms of the trust, and to the extent addressed, the Uniform Principal and Income Act (UPAIA) found in Chapter 116 of the Texas Trust Code, as well as common law principles, govern allocations of receipts and disbursements between income and principal.¹⁰²

To determine trust accounting income, cash receipts and disbursements must be allocated between principal and income.¹⁰³ These allocations are mandated by the trust itself, and trust law, and failure to make them will likely result in improper distributions.¹⁰⁴ If neither the terms of the trust nor the UPAIA provide a rule for allocating a receipt or disbursement to income or principal, such receipt or disbursement shall be allocated to principal.¹⁰⁵

Even if the trust instrument grants the trustee discretion in allocating receipts and disbursements, such discretion cannot be exercised arbitrarily.¹⁰⁶ For one, in exercising its discretion to make allocations between income and principal, a trustee must act impartially and based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries.¹⁰⁷ An allocation made in accordance with the provisions of the UPAIA will be presumed to be fair and reasonable to all beneficiaries.¹⁰⁸ If neither the terms of the trust nor the Texas Trust Code provide a rule for allocating between principal and income, the item

99. *See id.* § 117.008.

100. *Id.*

101. *See id.*

102. *See id.* § 116.001.

103. *See id.* § 116.004(a).

104. *See id.*

105. *See id.* § 116.004(a)(4).

106. *See id.* § 116.004(b).

107. *See id.*; *Thorman v. Carr*, 408 S.W.2d 259, 261–62 (Tex. Civ. App.—San Antonio 1966), *aff'd per curiam*, 412 S.W.2d 45 (1967).

108. *See id.* § 116.004(b).

should be allocated to principal.¹⁰⁹ A trustee must be prepared to explain the basis for all allocations of principal and income to beneficiaries.¹¹⁰

c. Power to Adjust

Texas Trust Code Section 116.005 authorizes a trustee to adjust between principal and income if the trustee is in compliance with the prudent investor rule, the trust provides for distributions to a beneficiary by reference to the trust's "income" and the trustee cannot otherwise administer the trust impartially, based on what is fair and reasonable to all of the beneficiaries.¹¹¹ The power to adjust specifically includes "the power to allocate all or part of a capital gain to trust income."¹¹² This section lists nine factors that a trustee shall consider in deciding whether or how to exercise the power to adjust and prohibits a trustee from making an adjustment under certain circumstances.¹¹³

A court may not change a trustee's decision to exercise or not exercise the power to adjust "unless the court determines that the decision was an abuse of the trustee's discretion."¹¹⁴ If a court determines that a trustee has abused its discretion, the court may place the income and remainder beneficiaries in the positions that they would have occupied if the discretion had not been abused.¹¹⁵ If the trustee reasonably believes that one or more beneficiaries will object to the exercise of a discretionary power, the trustee may petition the court to determine whether the proposed discretionary act will result in an abuse of the trustee's discretion.¹¹⁶ In such a suit, the trustee is directed to advance from the trust principal all costs incident to the judicial determination, including attorney's fees of the trustee, of any beneficiary who is a party, and any guardian ad litem.¹¹⁷ At the conclusion of the proceeding, however the court may award costs and attorney's fees as the court deems to be "equitable and just" as provided in the Texas Trust Code section 114.064.¹¹⁸

2. Discretionary Distributions

Most trust instruments include distribution standards involving some degree of trustee discretion for various reasons.¹¹⁹ Generally, the hope is that such discretion provides flexibility for the trustee to best accomplish the

109. *See id.*

110. *See id.*

111. *See id.* § 116.005(a).

112. *Id.*

113. *See id.* § 116.005(b).

114. 72 TEX. JUR. 3D *Trusts* § 56 (2020).

115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.*; TEX. PROP. CODE ANN. § 114.064.

119. *See Pacheco, supra* note 95.

settlor's objectives as well as allows the trustee to protect the trust beneficiary from third parties or from the beneficiary himself.¹²⁰

a. Ascertainable standard

An ascertainable standard is any standard which a court can sufficiently interpret to compel a distribution.¹²¹ Limiting distributions to such standard is necessary to allow a trust beneficiary to serve as trustee of a trust for his or her benefit without causing the trust estate to be included in the trustee-beneficiary's estate.¹²²

The most commonly used ascertainable standard is health, education, maintenance and support (HEMS).¹²³ If this language is reigned in further — for example, only allowing distributions for health or education — that serves to make the standard even more ascertainable.¹²⁴ However, within this standard, there is still plenty of room for discretion.¹²⁵

i. Health

The term “health” may initially seem easily defined, but it is a safe assumption that few settlors of pre-twenty-first century trusts anticipated the growth and usage of medical marijuana!¹²⁶

Texas provides more guidance in interpreting what “health” means by stating that a “trustee may conclusively presume that medicine or treatments approved by a licensed physician are appropriate for the health of the beneficiary.”¹²⁷ The legislature added this section in response to requests from trustees administering court-created trusts who found daunting the variety of health-related requests they were receiving.¹²⁸ The trustees' concerns are understandable.¹²⁹ Life expectancy is increasing, but so is the prevalence of chronic illnesses, such as high blood pressure and diabetes.¹³⁰ Most trustees are not medical professionals and yet, the very nature of their fiduciary role necessitates that a trustee consider the health and life expectancy of a beneficiary in order to make distributions, investments and administrative decisions in the best interests of said beneficiary.

120. *See id.*

121. *See id.*

122. *Id.*; *see* I. R. C. § 2041(b)(1)(A).

123. *See* Pacheco, *supra* note 95.

124. Author's original opinion.

125. *See id.*

126. *Id.*

127. TEX. PROP. CODE ANN. § 142.005(b)(2).

128. *See* Tex. H.B. 564, 80th Leg., R.S. (2007).

129. *Id.*

130. *See* Mokdad, Ali, et al., *The State of U.S. Health, 1990–2016: Burden of Diseases, Injuries, and Risk Factors Among U.S. States*; NCBI (Apr. 10, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5933332/> [perma.cc/2ZV9-FUWU].

Moreover, distribution requests related to health may include alternative treatments, such as acupuncture or homeopathic remedies, as well as elective medical procedures such as plastic surgery, laser eye procedures, cosmetic dentistry, non-diagnostic full-body scans, tattoo removal, and others.¹³¹ Should a trustee make distributions for such procedures and if so, does that open the door to even more radical treatments?¹³² Moreover, should a trustee be expected to pay for healthcare expenses for a beneficiary who refused to take steps to care for himself?¹³³

As noted in the Restatement (Third), the term “health” often includes items that also fall within the definition of “support” which might provide a trustee with more justification for distribution (or make it more difficult to deny distribution).¹³⁴

ii. Education

Generally, education is considered to include living expenses, tuition, fees, books, and other cost of higher education or technical training.¹³⁵ However, there are still questions as to when educational distributions may be made for expenses outside of a four-year college degree.¹³⁶ For example, in *S. Bank & Trust Co. v. Brown*, the Court found that education did not include post-graduate studies but instead was limited to education up to, and including, a bachelor’s degree.¹³⁷ Even so, the Court acknowledged that “education is a broad and comprehensive term and its particular meaning must be determined by the context in which it is used.”¹³⁸

Most cases discussing what trust distributions fit within the term “education” thus far have dealt with post-graduate education, but distributions for private primary school can be significant as well.¹³⁹ The tuition charged by private schools averaged \$11,000 annually in the 2010–2011 academic year, which is the most recent year for which such data is available.¹⁴⁰ What about tutoring costs, SAT/ACT preparatory courses, and other similar expenses?¹⁴¹

131. *See id.*

132. Question posed by the author for purposes of this article.

133. *Id.*

134. *See* RESTATEMENT (THIRD) OF TRUSTS ENFORCEMENT AND CONSTRUCTION OF DISCRETIONARY INTEREST § 50 cmt. E (AM. LAW. INST. 2003).

135. *See id.*

136. *See S. Bank & Tr. Co. v. Brown*, 271 S.C. 260, 270–72 (S.C. 1978).

137. *Id.*

138. *Id.*

139. *See Lanston v. Children’s Hosp.*, 148 F.2d 689, 690–91 (D.C. Cir. 1945) (finding that it was within a trustee’s discretion to refuse to fund the further education of a beneficiary who was forty-two years old, well-educated, and had a “large income”); *Epstein v. Kuvin*, 95 A.2d 753, 754 (N.J. Super. Ct. App. Div. 1953) (holding that the term “college education” did not include medical school).

140. *See* Alia Wong, *Private Schools Are Becoming More Elite*, THE ATLANTIC (July 26, 2018), <https://www.theatlantic.com/education/archive/2018/07/why-private-schools-are-becoming-more-elite/566144/> [perma.cc/4S2B-GCLR].

141. Question posed by the author for the purposes of this article.

Additionally, should distributions be made for a beneficiary who does not maintain a passing grade average?¹⁴² A beneficiary who does not graduate college within a certain number of years?¹⁴³ And perhaps particularly relevant in today's environment, should distributions for a beneficiary's education be made if such distributions will deplete the trust estate?¹⁴⁴ Harvard's package of undergraduate tuition, room and board, and student fees for the 2000–2001 academic year was \$33,110.¹⁴⁵ However, the cost for this undergraduate package for the 2018–2019 academic year is \$67,580.¹⁴⁶ Did the settlor anticipate the rapid increase in educational expenses when the trust was initially established?¹⁴⁷

iii. "Support" and "Maintenance"

Courts have held that "support" means more than the basic or essential necessities of life.¹⁴⁸ Rather, support may include "regular mortgage payments, property taxes, suitable health insurance or care, existing programs of life and property insurance and continuation of accustomed patterns of vacation and charitable and family giving."¹⁴⁹ Moreover, unless specifically directed to do so by the trust instrument, a beneficiary is not required to exhaust all outside financial resources before the trustee should make support distributions from a trust.¹⁵⁰

"Support" further may include the educational expenses of the beneficiary's dependents.¹⁵¹ In *First National Bank of Beaumont*, the Texas Supreme Court held that because the settlor had paid for his daughters' college education, he obviously considered the expense a "necessary" expenditure.¹⁵²

The term "maintenance" is generally considered similar to the term "support."¹⁵³ In fact, the Restatement (Third) of Trusts considers these terms synonymous.¹⁵⁴

However, when the distribution standard includes the terms support or maintenance, a trustee's discretion is not unbridled discretion.¹⁵⁵ Rather, the

142. *Id.*

143. *Id.*

144. *Id.*

145. See 2000–01 Undergraduate Tuition and Fees Are Set, THE HARVARD GAZETTE (Mar. 9, 2000) <http://news.harvard.edu/gazette/story/2000/03/2000-01-undergraduate-tuition-and-fees-are-set/> [perma.cc/6D2Y-53R4].

146. See *Harvard at a Glance*; HARVARD U., <https://www.harvard.edu/about-harvard/harvard-glance> [perma.cc/N22L-JTZM] (last visited Jan. 19, 2020).

147. Question posed by the author for the purposes of this article..

148. See Pacheco, *supra* note 95.

149. See *id.*

150. See *Keisling v. Landrum*, 218 S.W.3d 737, 742–44 (Tex. App.—Fort Worth 2007).

151. See *First Nat'l Bank of Beaumont v. Howard*, 229 S.W.2d 781, 786 (Tex. 1950).

152. See *id.*

153. See Pacheco, *supra* note 95.

154. See *id.*

155. See *id.*

trustee's discretion must be "reasonably exercised to accomplish the purposes of the trust according to the settlor's intention and his exercise thereof is subject to judicial review and control."¹⁵⁶

The Texas Supreme Court, in *State v. Rubion*, recognized a number of factors that should be considered by a trustee exercising its discretion in a "support" or "maintenance" trust.¹⁵⁷ The factors include:

- The overall size of the trust estate;
- The beneficiary's life expectancy, age, and condition in life;
- The beneficiary's needs in the present and future;
- The other resources available to the beneficiary; and
- The beneficiary's mental and physical health, both present and future.¹⁵⁸

b. Factors to Consider in Interpreting Distribution Standards

i. Trust Size

Interpreting the terms of the trust requires the trustee to balance all relevant factors.¹⁵⁹ The Restatement provides that the standard may be increased if either: (1) the beneficiary's standard of living has increased, but remains consistent with the trust's productivity; or (2) failing to increase the beneficiary's standard of living results in the current beneficiaries receiving less favor than the remainder beneficiaries.¹⁶⁰

ii. Standard of Living

Trust distribution standards may direct a trustee to distribute the trust estate pursuant to a HEMS standard, but then further direct the trustee to make this determination by taking into consideration the beneficiary's standard of living at the settlor's date of death or at the date that the trust agreement was signed."¹⁶¹ Each determining date presents its own challenges.¹⁶²

On one hand, trust distributions tied to the beneficiary's standard of living when the trust agreement was signed make sense given that the settlor was presumably aware of the beneficiary's lifestyle at that time and likely intended for the beneficiary to maintain said lifestyle.¹⁶³ However, tying a standard of living to the date that the trust instrument is signed can be a significant burden for a trustee to accurately capture and keep records that

156. *See id.*

157. *See id.*

158. *State v. Rubion*, 308 S.W.2d 4, 10 (Tex. 1957).

159. *Id.*

160. *See Pacheco, supra* note 95.

161. *Id.*

162. *See id.*

163. *Id.*

reflect a complete picture of a beneficiary's lifestyle.¹⁶⁴ Distribution standards intended to maintain a beneficiary's lifestyle at date of signing can be particularly problematic if the actual trust is a testamentary trust and not even created, and the trustee not appointed, until a later time.¹⁶⁵

On the other hand, tying a distribution standard in a testamentary trust to maintain a beneficiary's lifestyle the settlor's death may be somewhat easier to document from a trustee's perspective, but depending on how often the settlor updated his estate plans, the beneficiary's standard of living may be significantly different than it was on the date that the underlying testamentary document was signed.¹⁶⁶

Regardless of the date when a beneficiary's standard of living is determined, basing distributions on a snapshot of any beneficiary's lifestyle at any specific time presents issues.¹⁶⁷ A college-age beneficiary may be living in a relatively low-cost apartment and subsisting on university food services and pizza when a trust is created.¹⁶⁸ This is not particularly unusual, but it is also presumably not what the settlor intends the trustee to base distribution determinations on for the remainder of the beneficiary's lifetime.¹⁶⁹

If using "standard of living" language in a trust instrument, consider also adding a provision with suggested documentation that the trustee may request from the beneficiary in order to determine his or her living standard as well as how often the trustee needs to re-examine a beneficiary's outside resources.¹⁷⁰ If an individual is serving as trustee, the settlor may also consider the inclusion of exculpatory language if these record-keeping procedures are not strictly followed.¹⁷¹

iii. *Present Versus Future Needs*

When making distributions, present and future needs of the beneficiary must be considered by the trustee.¹⁷² The trustee faces a tough decision if the trust is potentially insufficient to provide for both needs.¹⁷³ Hardly any courts have addressed this issue and their holdings are inconsistent¹⁷⁴ A

164. *Id.*

165. *Id.*

166. *See id.*

167. *Id.*

168. *See* Charles D. Fox IV, *Current Issues with Distribution Standards: Can They Come Back to Bite You?*, MCGUIRE WOODS LLP (2018), <https://www.trustededucationfoundation.com/wp-content/uploads/2017/02/2018-TAF-Fox-Current-Issues-with-Distribution-Standards.pdf> [perma.cc/PK49-FDAX].

169. *See id.*

170. *See* RESTATEMENT (THIRD) OF TRUSTS: ENFORCEMENT AND CONSTRUCTION OF DISCRETIONARY INTEREST § 50 cmt. e.

171. *See generally id.* § 96 (explaining the use of exculpatory clauses in trusts).

172. *See* Pacheco, *supra* note 95.

173. *Id.*

174. *Id.*

comparison of *State v. Rubion* and *Penix v. First National Bank of Paris* highlights these inconsistencies.¹⁷⁵

In *Rubion*, the Texas Supreme Court ruled that the trustee had abused his discretion by refusing to invade the principal of the trust to make payments for the beneficiary's care while she was in a state mental hospital.¹⁷⁶ The trustee argued that he was within his discretion to withhold payments of principal because the corpus of the trust should be preserved for the beneficiary's support if she were ever discharged from the hospital.¹⁷⁷ Further, that if the trust corpus were used to pay all of her medical care it would completely destroy the trust.¹⁷⁸ Disagreeing, the court held the trustee abused his discretion by withholding the entire principal, and the trustee should have determined what amount could have been distributed and distribute such amounts while still preserving the long-term health of the trust.¹⁷⁹

On the other hand, in *Penix*, the appellate court ruled that a trustee was within its discretion to withhold current distributions of principal as well as income, in order to meet the future needs of the beneficiary.¹⁸⁰ In this case, the beneficiary was a 9-year old girl, and the trustee argued successfully that the income produced from the trust was well in excess of what was needed for the beneficiary's current support.¹⁸¹ The trustee contended that any excess income above the beneficiary's current needs should be held in reserve for emergencies.¹⁸² The court found that the trustee was within its discretion, relying heavily on the language granting the trustee the power to carry out the terms of the trust "free from any supervision by the probate or other courts." The court discounted any significance of the word "shall" within the grant.¹⁸³

While *Penix* and *Rubion* appear to conflict with each other, they consistently adhere to the same rule.¹⁸⁴ When exercising discretion in a support trust, a trustee should consider both the present and future needs of the beneficiary.¹⁸⁵

Since such rule provides little help to trustees, this is an area where a statement of intent from the settlor may be particularly useful.¹⁸⁶ For example:

175. *Id.*; compare *Rubin*, 308 S.W.2d 4 with *Penix v. First National Bank of Paris*, 260 S.W.2d 63 (Tex. Civ. App.—Texarkana 1953, writ *ref'd*).

176. Pacheco, *supra* note 95, at 9; *Rubion*, 308 S.W.2d at 8.

177. Pacheco, *supra* note 95, at 9; *Rubion*, 308 S.W.2d at 8.

178. Pacheco, *supra* note 95, at 9; *Rubion*, 308 S.W.2d at 8.

179. Pacheco, *supra* note 95, at 9; *Rubion*, 308 S.W.2d at 9.

180. Pacheco, *supra* note 95, at 9; see *Penix*, 260 S.W.2d at 67.

181. Pacheco, *supra* note 95, at 9; *Penix*, 260 S.W.2d at 64–65.

182. Pacheco, *supra* note 95, at 9; *Penix*, 260 S.W.2d at 64–65.

183. Pacheco, *supra* note 95, at 9; *Penix*, 260 S.W.2d at 64–65.

184. Pacheco, *supra* note 95, at 9; *Penix*, 260 S.W.2d at 64–65.

185. Pacheco, *supra* note 95, at 9.

186. *Id.*

Statement of Intent. The Settlor intends the separate trusts for each of his grandchildren primarily provide the grandchild-beneficiary of such trust with the opportunity to attend any institute of higher education that the grandchild-beneficiary is qualified and able to attend. The Settlor recognizes that the educational expenses of certain grandchildren may exhaust their trusts at an earlier point than others. For those grandchildren who do not fully exhaust their trusts, distributions from such trusts shall be made in accordance with the ascertainable standards set forth in Section ___, and the Settlor encourages the trustee of each such trust to generously construe such standards in a manner to support the trust beneficiary in starting his or her own business or furthering his or her career.

c. Tax Planning

If a trust is established, all or in part to achieve tax savings, then some degree of discretion is generally desirable for distribution standards.¹⁸⁷ Unless an independent trustee will always serve, such discretion should be limited to an ascertainable standard so as to allow the opportunity for the beneficiary of the trust (or a related family member) to serve as trustee without causing estate tax inclusion.¹⁸⁸ Even documents that name an independent trustee frequently use an ascertainable standard to allow the possible future appointment of the settlor, settlor's spouse, beneficiary or other sensitive person as trustee without undesirable tax consequences.¹⁸⁹

While a complete discussion of the tax consequences related to ascertainable and non-ascertainable standards is beyond the scope of this article, it is important to recognize the implications of using such language in a trust instrument and what it conveys to the trustee and beneficiary.¹⁹⁰ A trustee may administer distributions from a trust created primarily for tax-planning reasons differently from a trust created primarily for asset protection reasons, especially in light of the fluctuating federal estate and gift tax exemption in the past twenty years.¹⁹¹

Therefore, the author has included a few examples of gift tax, estate tax, and income tax consequences resulting from distribution standards.¹⁹²

i. Avoidance of Gift Tax Consequences to Beneficiary/Trustee

An individual who is both trustee and beneficiary of a pot trust (a bad idea regardless of tax consequences) must be careful that distributions made to other trust beneficiaries are not considered gifts from the

187. See *id.* at 7–8.

188. See *id.*

189. See *id.*

190. See *id.*

191. See *id.*

192. See *id.*

trustee-beneficiary.¹⁹³ If the trustee's distribution power is not limited by an ascertainable standard, then distributions to or for the benefit of another beneficiary of the same trust could be considered as taxable gifts for federal gift tax purposes.¹⁹⁴ Although HEMS is a known safe harbor, whether any other standard is definite enough is determined based on the "entire context" of the trust instrument.¹⁹⁵ Thus, if the trust states that the *trustee's* determination is conclusive with respect to the exercise or non-exercise of the power, "then the power is not considered to be limited by the requisite standard."¹⁹⁶

Therefore, if a settlor envisions a trust beneficiary also serving as trustee of a pot trust, inclusion of a "reasonably fixed or ascertainable standard" is necessary to avoid gift tax consequences to the beneficiary-trustee.¹⁹⁷ And although there are no tax ramifications of including prioritization language, this is a perfect example of where such language could provide guidance and protection to both the trustee and beneficiaries.¹⁹⁸ "Furthermore, even if such a power is subject to an ascertainable standard and there are no gift tax consequences, property distributable to a person for whom the beneficiary/trustee has a legal obligation to support could be included in beneficiary/trustee's gross estate for federal estate tax purposes, unless the trustee is prohibited from making any distributions to a beneficiary that would satisfy the trustee's individual legal obligation to support such beneficiary."¹⁹⁹

ii. Avoidance of Estate Tax Inclusion If Settlor Is Trustee

Under IRC sections 2036 and 2038, when a settlor is the trustee or controls the trustee, then the "trustee's possession of a power to make distributions to or for the benefit of a beneficiary of the trust, if limited by an ascertainable standard relating to the beneficiary's health, education, support, or maintenance, will not cause the trust property to be included in the gross estate of the settlor-trustee for federal estate tax"²⁰⁰

iii. Settlor or Settlor's Spouse as Trustee — Income Tax Relevance

A trustee's power to distribute "*corpus* to or for a beneficiary or beneficiaries, limited by a "reasonably definite standard" set forth in the trust instrument, will not cause the trust income to be taxed to the settlor for federal

193. *See id.*

194. *See id.*; Treas. Reg. § 25.2511-1(g)(2).

195. *See Pacheco, supra* note 95, at 7–8; Treas. Reg. § 1.674(b)-1(b)(5)(i).

196. *See Pacheco, supra* note 95, at 7–8 (*emphasis added*).

197. *See id.*

198. *See id.*

199. *See Pacheco, supra* note 95, at 7–8; Treas. Reg. § 20.2041-1(c)(1).

200. *See Pacheco, supra* note 95, at 7–8.

income tax purposes.”²⁰¹ A reasonably definite standard includes “a power to distribute *corpus* for the education, support, maintenance, or health of the beneficiary.”²⁰²

d. Asset Protection Planning

If asset protection planning was a significant impetus for the creation of a trust, this should be conveyed to the trustee to consider when administering the trust, particularly when making trust distributions.²⁰³

If a beneficiary of a trust, as trustee or otherwise, holds a power to make distributions to himself or for his benefit, an issue can arise regarding the ability of the beneficiary’s creditors to satisfy claims against the beneficiary from the beneficiary’s interest in the trust.²⁰⁴ When, however, the trust has a spendthrift provision and the beneficiary’s power is limited by an ascertainable standard relating to the beneficiary’s health, education, support, or maintenance, a creditor generally cannot attach the beneficiary’s interest on the basis that the beneficiary holds a distribution right or power.²⁰⁵

i. Texas

Specifically, Texas law mandates that so long as the trust instrument provides that “the interest of a beneficiary shall be held subject to a ‘spendthrift trust’ [this] is sufficient to restrain voluntary or involuntary alienation of the interest by a beneficiary to the maximum extent permitted by [Texas law].”²⁰⁶

Additionally, the Texas legislature created a statutory fix for trusts lacking the desired spendthrift language in Texas Trust Code Section 113.029 which became effective September 1, 2009.²⁰⁷

Section 113.029(b) provides that:

Subject to Subsection (d), and unless the terms of the trust expressly indicate that a requirement provided by this subsection does not apply:

(1) a person, other than a settlor, who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee’s personal benefit may exercise the power only in accordance with an ascertainable standard relating to the trustee’s individual health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1), Internal Revenue Code of 1986; and

201. *Id.* at 8; I.R.C. § 674(b)(5)(A).

202. *See* Pacheco, *supra* note 95, at 8; Treas. Reg. § 1.674(b)–1(b)(5)(i).

203. Author’s Opinion.

204. *Id.*

205. TEX. PROP. CODE ANN. § 112.035.

206. *See id.* § 112.035(b).

207. *See id.* § 113.029(b).

(2) a trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.”²⁰⁸

(d) Section 113.029(b): does not apply to: (1) a power held by the settlor’s spouse who is the trustee of a trust for which a marital deduction, as defined by Section 2056(b)(5) or 2523(e), Internal Revenue Code of 1986, was previously allowed; (2) any trust during any period that the trust may be revoked or amended by its settlor; or (3) a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c), Internal Revenue Code of 1986.²⁰⁹

Also, section 112.035(d) was added to confirm that a settlor will not be considered a beneficiary solely because the trustee of an intentionally defective grantor trust can pay or reimburse income taxes.²¹⁰ Note, section 112.035 is one example where the Texas Trust Code has adopted provisions that conflict with the provisions of the Restatement (Third) of Trusts.²¹¹ In the event of such conflicts, the Texas Trust Code provision will control, at least as long as the trust’s situs remains in Texas.²¹²

ii. Not Texas

Not all states offer this same protection from creditors if a beneficiary also serves as trustee of a trust, even if distributions are limited to an ascertainable standard.²¹³

The Restatement (Third) of Trusts speaks to this issue and explains the rationale behind not extending the same degree of creditor protection to a beneficiary-trustee:

Sometimes a beneficiary is trustee of the discretionary trust, with authority to determine his or her own benefits. In such a case, a rule similar to that . . . [for self-settled trusts] applies, with creditors able to reach from time to time the maximum amount the trustee-beneficiary can properly take. As in other nonsettlor-beneficiary situations, the court may reserve a portion of that amount for the beneficiary’s actual needs for reasonable support, health care, and education The beneficiary’s rights and authority represent a limited form of ownership equivalence analogous to certain

208. *See id.*

209. *See id.* § 113.029(d).

210. *See id.* § 112.035(d); Tex. H.B. 564, 80th Leg., R.S. (2007).

211. *See id.* § 112.035; *see* Burdette, *supra* note 70.

212. *See* Burdette, *supra* note 70; *see generally*, SkyPark Aviation v. Lind, 523 S.W.3d 869 (Tex. App.—Eastland 2017) (explaining that secondary sources are treated as persuasive authority by courts).

213. Kenneth Kingma, *A Beneficiary Serving as Trustee May Affect Asset Protection*, LEXOLOGY (Apr. 2011), <http://www.lexology.com/librarydetail.aspx?g=7f98167d-1132-4ecb-9283-ce0d6bf78e9f> [perma.cc/6ZNG-25RS].

general powers . . . ; thus, the rule of this Comment is similarly unaffected by a purported spendthrift restraint²¹⁴

In the U.S., twenty-three states have adopted the Uniform Trust Code, at least in part, and fourteen of these states adopted section 504(e) of the UTC, or substantially similar language, which reads as follows:

(e) If the trustee's or co-trustee's discretion to make distributions for the trustee's or co-trustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest **except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee or co-trustee.**²¹⁵

Accordingly, if a creditor showed that a third-party trustee could be compelled under the trust's distribution standard to distribute property to the beneficiary, then the court may order the trustee to distribute such amounts to the beneficiary where they would then be subject to seizure by the creditor.²¹⁶

3. Using Distribution Standards to Encourage/Discourage Behaviors

a. Incentivizing Distributions

For a settlor who wishes to incentivize a beneficiary to take a specific action or actions, linking trust distributions to such actions may seem appealing.²¹⁷ Some examples of specific incentive provisions are —

- Distribution of certain amount upon earning an undergraduate and/or graduate degree;
- Matching earned income up to a specified amount (*e.g.* \$100,000);
- Specified amount of funds (*e.g.* \$200,000) to start a business; and
- Providing a monthly payment (*e.g.* \$10,000) to the “stay-at-home parent.”²¹⁸

A client's heart is usually in the right place when wanting to incentivize beneficiaries, but such terms can easily backfire when unanticipated circumstances arise.²¹⁹ Should a distribution be made to a beneficiary who opted to graduate early from an unaccredited online college rather than a four-year university in order to get the promised distribution?²²⁰ How many times should “start-up” distributions be made to a beneficiary to establish a

214. RESTATEMENT (THIRD) OF TRUSTS: TRANSFER OF ATTACHMENT OF DISCRETIONARY INTERESTS § 60, cmt. g (AM. LAW. INST. 2003).

215. UNIF. TRUST CODE § 504(e) (*emphasis added*).

216. *See id.*

217. *See* 10 GERRY W. BEYER, ET. AL, TEXAS PRACTICE SERIES: LAW OF WILLS § 42:1 (4th ed. 2019).

218. *See generally, id.* at § 42:3 (explaining the importance of specificity in incentive provisions).

219. *See id.*

220. Question posed by the author for the purposes of this article.

business if the beneficiary's prior businesses have already failed?²²¹ Does the client want to tie distributions to salary if it would discourage a beneficiary from following his dream to be a teacher?²²²

Estate planning attorneys also need to discuss with a client whether a specific incentive could simply be beyond a beneficiary's ability to achieve.²²³ Not all persons are intellectually capable of certain levels of education.²²⁴ Moreover, although the client might equate a graduate degree with maturity based on his own life experience, a beneficiary who struggles with formal education, but is nevertheless a brilliant entrepreneur—Steve Jobs, Michael Dell—might possess the maturity that the client envisioned.²²⁵

Moreover, unless a client intends to skip one or more generations of descendants when creating such trusts, trust beneficiaries a generation below the settlor may likely be past the age of attending school or establishing careers by the time trusts created under a parent's testamentary estate plans are actually established and funded.²²⁶

Another potential issue is that defining specific incentives now for future trust beneficiaries increases the likelihood that societal changes may warp client intent.²²⁷ A settlor who wanted to compensate a parent for staying home to raise children would have undoubtedly referenced a “stay-at-home mom” in a trust drafted in the 1950s.²²⁸ If the trust itself was not established until a much later date, such language may inadvertently thwart the settlor's intent if dad, not mom, was the parent who stayed home to care for children.²²⁹

If, despite the potential issues, a client nevertheless wants to use the trust as a means to incentivize beneficiaries, consider naming a trust protector/advisor or trust committee and giving such person or persons the power to override these provisions on a case-by-case basis if strict implementation would inadvertently miscarry the settlor's intent.²³⁰

b. Limiting Distributions

On the opposite side of incentivizing provisions, a trust instrument may also limit distributions for beneficiaries who take undesirable actions.²³¹ For example,

- Denying distributions if the beneficiary does not enter into a marital agreement before or after marriage;

221. Question posed by the author for the purposes of this article.

222. Question posed by the author for the purposes of this article.

223. See BEYER, *supra* note 217, § 42:1.

224. *See id.*

225. *See id.*

226. *See id.*

227. *See id.*

228. *See id.*

229. *See id.*

230. *See id.* § 42:1.

231. *See id.*

- Denying distributions if the beneficiary fails a drug test; and
- Denying distributions to a beneficiary who co-habits with a partner before marriage.²³²

The rationale for including such limitations is to not only discourage certain behaviors, but can also be to protect a beneficiary engaged in said behaviors.²³³ Continuing to make distributions to a beneficiary with substance-abuse problems may exacerbate the issue and lead to the beneficiary's deepened addiction or death.²³⁴

However, discovering such undesirable behaviors and enforcement of the trust terms may be a challenge for the trustee.²³⁵ Does a beneficiary have to provide the trustee with monthly drug tests even if such beneficiary has no drug history?²³⁶ Even if an attorney and a client agree on specific trust terms, it is essential to think through the logistics of implementing such terms.²³⁷ If the terms are too difficult to administer, they may fail (though not before causing considerable headaches for the trustee and beneficiary).²³⁸ If the difficulty in administering a trust terms is apparent from the offset, the designated trustee may decline its appointment as trustee for such trust.²³⁹

C. Accountings

Although a beneficiary has certain rights and a trustee has certain duties regarding trust accountings that cannot be waived, a settlor nevertheless has some degree of control over the frequency and contents of informal accountings.²⁴⁰ Informal accountings may be the primary means of information dissemination from a trustee, and if handled correctly, such informal accountings will hopefully satisfy beneficiaries so that a statutory accounting may never be demanded.²⁴¹

A trustee has a fiduciary duty, upon demand, to allow a beneficiary on a reasonable basis to inspect the books and non-privileged records of the trust.²⁴² That being said, a mandated open-door policy is generally not reasonable.²⁴³ Likewise, the beneficiary's rights to access information should not be restricted to the whims of the trustee.²⁴⁴

232. *See id.*

233. *See id.*

234. *See id.*

235. *See id.*

236. Question posed by the author for purposes of this article.

237. Author's opinion.

238. *See Beyer, supra* note 217 § 42:1 .

239. *See id.*

240. *See generally id.*

241. *See* RESTATEMENT (THIRD) OF TRUSTS: DUTY TO FURNISH INFORMATION TO BENEFICIARIES § 82 (AM. LAW. INST. 2003).

242. *Id.*

243. *See id.*

244. *See id.*

Moreover, a trustee's general fiduciary duty to keep beneficiaries informed and allow them to inspect the trust books and records differs from the preparation and providing of a trust accounting.²⁴⁵ This may not be apparent to laypersons serving as trustees and/or trust beneficiaries, so it may be prudent to explicitly address such options in the trust instrument itself.²⁴⁶

I. When Are Accounting Required?

a. Statutory Accountings

The Texas Trust Code gives a beneficiary the right to demand a written accounting of all of the trust transactions from inception or since the last accounting.²⁴⁷ Except in unusual circumstances, a trustee is not required to provide an accounting more frequently than once every 12 months.²⁴⁸ If the trustee fails or refuses to provide an accounting within 90 days of demand, the beneficiary may file suit to compel the trustee to provide the accounting, and if successful, the court may order the trustee in his individual capacity to pay all of the beneficiary's attorney's fees.²⁴⁹

An "interested person" also may file suit to compel the trustee to provide an accounting.²⁵⁰ The court will order the trustee to account if it finds that the "nature of the interest in the trust of, the claim against the trust by, or the effect of the administration of the trust on the interested person is sufficient to require an accounting by the trustee."²⁵¹

An "interested person" includes a trustee, beneficiary, or any other person having an interest in or claim against the trust or any person who is affected by the administration of the trust. Whether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding.²⁵²

b. Non-statutory Accountings

Notwithstanding the foregoing, a trustee has no duty to voluntarily make periodic accountings to the beneficiaries under Texas law unless a statutory accounting is demanded or required by the trust instrument.²⁵³ Therefore, if

245. *See id.*

246. *See id.*

247. TEX. TRUST. CODE ANN. § 113.151(a).

248. *Id.*

249. *Id.*

250. *See id.* § 113.151(b).

251. *Id.*

252. *Id.* § 111.004(7).

253. *See id.* § 113.151(a).

a settlor desires that regular accountings be provided to trust beneficiaries, this should be stated in the trust instrument.²⁵⁴

Likewise, if a settlor does not wish to require that a trustee provide regular trust accountings, the trust instrument should state as much.²⁵⁵ For example, preparing written accounting may be unnecessary for a trust in which the sole beneficiary is also the sole trustee, although the trustee should still maintain thorough and complete books and records.²⁵⁶ Moreover, depending on the assets held in the trust, the preparation and provision of a written accounting on a regular basis could become burdensome on individual trustees, particularly those serving without compensation, so accounting requirements could also differ between corporate and individual trustees or trustees serving with or without compensation.²⁵⁷

2. *Information In Accounting*

a. *Statutory Accountings*

A statutory trust accounting is an allocation of cash received and cash disbursed between principal and income and a description of all financial transactions affecting the trust.²⁵⁸ The contents of an accounting are set forth in Trust Code Section 113.152:

- (1) All trust property that has come to the trustee's knowledge or into the trustee's possession and that has not been previously listed or inventoried as property of the trust;
- (2) A complete account of receipts disbursements, and other transactions regarding the trust property for the period covered by the account, including their source and nature, with receipts of principal and income shown separately;
- (3) A listing of all trust property being administered, with an adequate description of each asset;
- (4) The cash balance on hand and the name and location of the depository where the balance is kept; and
- (5) all known liabilities owed by the trust.²⁵⁹

Since a trust accounting is the primary vehicle through which a beneficiary obtains the information necessary to protect his interests and enforce his rights, the accounting should be in understandable form and include all information necessary for the beneficiary to get a complete picture

254. *See id.*

255. Author's opinion.

256. Author's opinion.

257. Author's opinion.

258. TEX. PROP. CODE ANN. § 113.152.

259. *Id.*

of the trust administration during the time period covered.²⁶⁰ The detail required in an accounting and the amount of time required to prepare the accounting will depend on the nature of the trust assets and the activity (receipts of income, sales of assets, investments, payment of expenses and distributions to beneficiaries) of the trust.²⁶¹ An accounting also may put the beneficiary on notice of the trustee's acts for purposes of the statute of limitations on claims against the trustee.²⁶² For most trust-related actions, including a breach of fiduciary duty, the statute of limitations is four years.²⁶³

Based on the trustee's duty to maintain proper books and records, the trustee's records should permit the preparation of a trust accounting at a reasonable cost and in a reasonable period of time.²⁶⁴ If the trustee has not maintained his records in this manner, then he may have committed a breach of the duty to maintain proper books and records.²⁶⁵ Any portion of the cost of preparation of the accounting that is attributable to the trustee's inadequate records may be assessed against the trustee individually.²⁶⁶

b. Non-statutory Accountings

A formal Trust Code accounting may be expensive and the reasonable and necessary cost generally is a proper trust expense.²⁶⁷ Therefore, a trustee may consider offering to provide some type of substitute informal accounting as opposed to a full-blown formal trust accounting.²⁶⁸ The beneficiary is not obligated to accept anything less than a full and complete accounting, meeting all of the requirements of the Trust Code,²⁶⁹ However, there may be circumstances in which a beneficiary would agree to accept an alternative, less costly method of obtaining the desired information, at least as a preliminary step.²⁷⁰ This approach may be particularly useful for a trust that has been in existence for many years and for which no accounting has previously been provided.²⁷¹

A non-statutory accounting should still include much of the same information, but may also consist of copies of financial statements or tax returns rather than a single document summarizing all of the information.²⁷²

260. See RESTATEMENT (THIRD) OF TRUSTS: DUTY TO FURNISH INFORMATION TO BENEFICIARIES § 82 (AM. LAW. INST. 2003).

261. See *id.*

262. See *id.*

263. See *id.*

264. See Burdette, *supra* note 70, at 27.

265. *Id.* at 27.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. See *id.*

III. ADMINISTERING THE TRUST

Hand in hand with drafting a trust instrument is the understanding of how it will be administered.²⁷³

A. Communicate, Communicate, Communicate

Apart from the accounting discussed above, a trustee has a duty (not to mention that it is simply common sense) to communicate with beneficiaries about individual circumstances and the general administration of the trust.²⁷⁴

1. Duty of Disclosure

The duty of disclosure is fundamental to the trustee relationship.²⁷⁵ A trustee has much more than the traditional obligation not to make any material misrepresentations; he has an affirmative duty to make a full and accurate confession of all of his fiduciary activities, transactions, profits, and mistakes even when, and especially if, it hurts.²⁷⁶

Moreover, the breach of the duty of full disclosure by a trustee has been argued to be tantamount to fraudulent concealment.²⁷⁷ The beneficiary is not required to prove the elements of fraud and need not even prove that he “replied” on the fiduciary to disclose the information.²⁷⁸

However, there is an open question as to the extent that a fiduciary must make affirmative disclosures of information to beneficiaries.²⁷⁹ Texas case law suggests that an affirmative duty to disclose exists but only under limited circumstances, most often when the disclosure relates to the fiduciary’s self-dealing or information that significantly impacts a beneficiary’s interests.²⁸⁰ For example, the court in *InterFirst Bank Dallas, N.A. v. Risser*, held that the trustee violated its common law duty of full disclosure by failing to notify the beneficiaries of the sale of a major trust asset.²⁸¹ While Texas law does not require the consent of beneficiaries before selling trust assets, the fact that the property is in a trust does not require that the beneficiaries are to be kept in ignorance of the administration of the trust.²⁸²

273. See generally, RESTATEMENT (THIRD) OF TRUSTS: TRUST ADMINISTRATION Pt. 6 (AM. LAW. INST. 2003) (discussing trust administration).

274. See *id.* § 82.

275. See *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984).

276. *Id.*

277. See RESTATEMENT (THIRD) OF TRUSTS: DUTY TO FURNISH INFORMATION TO BENEFICIARIES § 82 (AM. LAW INST. 2003).

278. See *id.*

279. See *id.*

280. See *id.*

281. *InterFirst Bank Dallas, N.A. v. Risser* 739 S.W.2d 882 (Tex. App.—Texarkana 1987, writ dismissed).

282. See *id.* at 906 n. 28.

Omissions or misstatements in accountings have also been argued to violate the common law duty of disclosure.²⁸³ Even accountings which have been previously filed and approved by the court may be reexamined upon a final accounting.²⁸⁴ A trustee can be held liable if he knowingly discloses false information or knowingly fails to disclose harmful information regarding his dealings with trust or estate assets.²⁸⁵

The trustee's duty to disclose material facts is not altered by the existence of litigation between the beneficiaries and the trustee.²⁸⁶ This duty operates before and after litigation has been filed and is in addition to any obligations of disclosure imposed by the "discovery provisions of the Texas Rules of Civil Procedure."²⁸⁷

2. Common Sense Communications

Putting aside the question of whether a trustee must convey certain information to fulfill its fiduciary duty, a trustee should regularly communicate with trust beneficiaries to correctly and efficiently administer the trust.²⁸⁸ A trustee's role is to act in the best interests of the beneficiaries, and it is challenging to do so without regular dialogue.²⁸⁹ Likewise, it is difficult to understand how a trustee could make discretionary distribution decisions, monitor potential concerns about capacity, substance abuse, etc. and other trust administration matters without some form of regular, ongoing contact with beneficiaries.²⁹⁰

If a significant matter is at issue, a prudent course of action would be to promptly communicate with the beneficiaries and to state all relevant facts, in writing, so that a decision can be made in a timely manner.²⁹¹

If a settlor requests that disclosures about the trust be limited, it is important to carefully review the relevant state mandatory statutes to determine the age at which a beneficiary is entitled to information, which beneficiaries are included, and what must be disclosed.²⁹² Although some states allow trustees to administer a trust in secrecy, Texas is not one of them.²⁹³

283. See RESTATEMENT (THIRD) OF TRUSTS: DUTY TO FURNISH INFORMATION TO BENEFICIARIES § 82 (AM. LAW. INST. 2019).

284. See *id.*

285. See *id.*

286. See *id.*

287. See *id.*

288. See *id.*

289. See *id.*

290. See *id.*

291. See *id.*

292. TEX. PROP. CODE § 111.0035(c).

293. See *id.*

Texas Trust Code Section 111.0035(c) provides:

“The terms of a trust may not limit any common-law duty to keep a beneficiary of an irrevocable trust who is twenty-five (25) years of age or older informed at any time during which the beneficiary: (1) is entitled or permitted to receive distributions from the trust; or (2) would receive a distribution from the trust if terminated.”²⁹⁴

This language leaves some room for interpretation regarding what is necessary to keep a beneficiary “informed” and clearly precludes a settlor from mandating non-disclosure for a beneficiary age twenty-five or older.²⁹⁵

B. To Whom to Make the Distributions

Most trust instruments provide that distributions may be made “to or for the benefit of the beneficiary,” opening the door for the trustee to pay expenses of the beneficiary directly.²⁹⁶

1. Facility of Payment Clause

Section 113.021 of the Texas Trust Code authorizes the trustee to make distributions to an alternative recipient on behalf of a beneficiary or to expend the distribution for the benefit of a beneficiary “when the beneficiary is a minor or a person who in the judgement of the trustee is incapacitated by reason of legal incapacity or physical or mental illness or infirmity.”²⁹⁷

However, even if the beneficiary is not a minor or an incapacitated person, there may be situations in which the fiduciary does not feel comfortable making a distribution directly to a beneficiary.²⁹⁸ This may be the case when a beneficiary is easily influenced by others, has dependency or addiction issues, or is a spendthrift.²⁹⁹ A settlor may identify a concern regarding a particular beneficiary at the time of drafting, but if the trust is not created until the settlor’s death or the death of another beneficiary, the settlor’s may want the trustee to determine whether such concern is still relevant at the future date that the property would pass to the beneficiary.³⁰⁰ In other situations, it may just be easier for the fiduciary to expend funds directly on behalf of the beneficiary, rather than first distributing the funds to the beneficiary and then the beneficiary making payment to a third party.³⁰¹

294. *See id.*

295. *See id.*

296. *See* TEX. PROP. CODE ANN. § 111.0035(a).

297. *See id.* § 113.021.

298. *See id.* § 113.029.

299. *See id.*

300. 72 TEX. JUR. 3D *Trusts* § 23 (2020).

301. *See id.*

Without a broad facility of payment clause, most distribution standards authorize the trustee to distribute trust property “to or for the benefit of” a beneficiary, which can be interpreted to allow for alternative forms of payment.³⁰² However, if a settlor envisions such alternative payment methods being utilized, drafting attorneys should consider specific language releasing the trustee in making such determinations.³⁰³

2. Distributions to Pay Off Debt

Questions regarding if and when a trustee may distribute trust property to pay off debt for a beneficiary are likely to increase in the future if they have not already.³⁰⁴ The Federal Reserve reports that Americans over age fifty owed more than \$260 billion in student debt, up from \$36 billion in 2004.³⁰⁵ As life expectancy increases, the length of lifetime trusts do as well, meaning that remainder beneficiaries may not have access to such trust funds for a large portion of their lives.³⁰⁶ Spendthrift clauses may protect trust funds from seizure by creditors, but that does not mean that beneficiaries will not request distributions to pay down individual debt.³⁰⁷

If faced with this question, trustees should consider *Nations Bank of Virginia v. Grandy*, where the court held that, despite unfettered discretion to do so, trustees properly refused to invade a principal to pay a beneficiary’s debts when she had substantial assets outside the trust sufficient to pay.³⁰⁸ On the other hand, in *In re Family Trust of Windus*, the court held that an invasion of principal to pay credit card debt in excess of \$60,000 was permissible under the support standard.³⁰⁹

In both cases, the court was asked to determine if a beneficiary with assets outside of the trust could refuse to use such individually-held assets and instead rely on trust principal to the detriment of the remainder interests.³¹⁰ In each case, the court examined the language of the distribution provisions to determine whether the intent of the settlor was to create a support trust or “discretionary support trust” — a hybrid.³¹¹ The courts

302. See *id.* § 118.

303. See *id.*

304. See *id.*

305. Annie Nova, *Another challenge in retirement?*, CNBC: STUDENT LOANS, Nov. 14, 2018, <https://www.cnbc.com/2018/11/14/more-older-people-are-bringing-student-debt-into-their-retirement.html> [perma.cc/AB8B-9753].

306. 72 TEX. JUR. 3D *Trusts* § 23.

307. See *id.*; TEX. PROP. CODE ANN. § 112.035(a).

308. *Nations Bank of Va. v. Grandy*, 450 S.E.2d 140, 143–44 (Va. 1994).

309. *In re Family Trust of Windus*, No. 07-2006, 2008 WL 3916438, at *2 (Iowa App. 2008); *but see*, *In re Estate of Morgridge*, No. G036463, 2007 WL 1874332, at *5–7 (Cal. Ct. App. June 29, 2007) (holding that invasion of principal to pay a \$71,000 credit card debt was not within the “support standard”).

310. *Nations Bank of Va., N.A. v. Estate of Grandy*, 450 S.E.2d 140, 143–144 (Va. 1994); *In re Family Trust of Windus*, 2008 WL 3916438, at *2.

311. *Nations Bank Va., N.A.*, 450 S.E.2d at 143–144; *In re Family Trust of Windus*, 2008 WL 3916438, at *2.

reached opposite conclusions based on subtle nuances in the language of the provisions as well as differences in the intent of the settlor in these cases.³¹²

3. Considerations Regarding Distributions to Undesirable Persons

In most circumstances, a trust settlor will not have a problem with distributions being made to the guardian or other similar representatives of a beneficiary.³¹³ However, there may be situations in which the testator or settlor is fearful that a particular person may mishandle funds intended for the beneficiary.³¹⁴ One scenario where this can occur is when one parent of a minor child does not want the child's other biological parent to have unrestricted access to the minor child's assets.³¹⁵ If a client has these concerns about such an "undesirable person," a drafting attorney should make sure to modify the facility of payment clause to address the situation.³¹⁶ Language similar to the following can be included in the facility of payment provision to provide additional instructions to the fiduciary regarding the undesirable person.³¹⁷

Notwithstanding the foregoing, it is my desire that to the extent possible, the Fiduciary not make distributions directly to [Undesirable Person]. To that end, if [Undesirable Person] is serving as the guardian or other similar representative of the beneficiary, I desire that the Fiduciary make distributions by expending the same directly for the benefit of the beneficiary. With respect to any reimbursement to [Undesirable Person] if [he/she] has advanced funds for the benefit of the beneficiary, it is my desire that the Fiduciary require that [Undesirable Person] produce receipts or other evidence of expenditures on behalf of the beneficiary before reimbursement is made.³¹⁸

C. Keeping Records

A trustee has a duty to keep accurate, complete, and orderly books and records for the trust which, in addition to financial records, include information about the beneficiaries as well as any legal and business records regarding the trust estate.³¹⁹

312. *Nations Bank Va., N.A.*, 450 S.E.2d at 143–44; *In re Family Trust of Windus*, 2008 WL 3916438, at *2.

313. See RESTATEMENT (THIRD) OF TRUSTS: PURPOSES FOR WHICH A TRUST CAN BE CREATED § 27 (AM. LAW. INST. 2003).

314. See *id.*

315. See *id.*

316. See *id.*; TEX. PROP. CODE ANN. § 111.0035(a).

317. Author introducing following provision example.

318. Provision provided by Arielle Pragner.

319. See RESTATEMENT (THIRD) OF TRUSTS: DUTY TO KEEP RECORDS AND PROVIDE REPORTS § 83 (AM. LAW. INST. 2007); *Shannon v. Frost Nat'l Bank of San Antonio*, 533 S.W.2d 389, 393 (Tex. App.—San Antonio 1975, writ ref'd n.r.e.).

There is no statute specifically requiring a trustee to keep accurate books and records, but thorough documentation is implicitly necessary to properly administer a trust.³²⁰ For example, a trustee must have accurate books and records to comply with the trustee's duty to provide proper disclosure, prepare a statutory accounting upon request, determine trust income for distributions, and to prepare trust tax returns.³²¹

1. Financial Information

Keeping records includes, in part, knowing about the beneficiary(ies) of the trust, including their abilities and challenges insofar as financial matters, any third-party debts and obligations that exist, and their needs and personal finances.³²² While some beneficiaries may find some questions intrusive, the information is necessary since a trustee has a duty to be informed as to a beneficiary's needs and resources.³²³

Attorneys may want to inform their clients about this practice and solicit their intent regarding the trustee's duty to inquire.³²⁴ To this end, a trustee has discretion as to what documentation to request from beneficiaries, and many people would rather answer specific questions or prepare financial statements than provide tax returns because tax returns often fail to provide a clear picture of financial resources.³²⁵ However, some corporate trustees require beneficiaries to provide tax returns as internal bank policy.³²⁶

If applicable, a drafter should inform a client that, in many cases, court-ordered child support obligations will trump a trust containing a spendthrift clause, meaning that a court may order the trustees to make disbursements for the support of a trust beneficiary's child to the extent the trustees would otherwise be required to make payments to the beneficiary-parent who is required to make child support payments.³²⁷ In Texas, if disbursement is discretionary, the court may order child support payments from the income of the trust but not from the principal.³²⁸

320. *Id.* § 83.

321. *Corpus Christi Bank & Trust v. Roberts*, 587 S.W.2d 173, 187 (Tex. App.—Corpus Christi 1979), *reformed in part and aff'd in part*, 597 S.W.2d 752 (Tex. 1980).

322. *See id.*

323. GEORGE GLEASON BOGERT ET AL., *BOGERT'S THE LAW OF TRUSTS AND TRUSTEES* § 811 (2019).

324. *See id.*

325. Nancy S. Freeman, *Trust Me: Practical Advice for Drafting Florida Trusts*, 83 FLA. B.J. 20, 22 n.9 (May 2009) <https://www.floridabar.org/the-florida-bar-journal/trust-me-practical-advice-for-drafting-florida-trusts/> [perma.cc/CJT8-5USN].

326. *See id.*

327. *See id.*

328. TEX. FAM. CODE § 154.005.

2. Substance Abuse

It is an unfortunate fact in modern society that substance abuse is found at every age and every level of affluence.³²⁹ A standard of living clause may inadvertently lead to a scenario in which a trustee distributes trust funds to maintain a beneficiary's lifestyle while the beneficiary spends the trust assets on drugs or alcohol.³³⁰ However, addressing substance abuse in trust documents is a complicated topic to draft, and it is even more complicated to administer.³³¹ Trust terms which are too onerous for the trustee to carry out may result in trustees resigning, declining to serve, or breaching fiduciary duties by failing to carry out the requirements on the trust.³³² Failing to address substance abuse in a trust instrument or terms that are too lax may result in trust distributions supporting or encouraging a beneficiary's problems.³³³

a. Different Terms Depending on "Substance" Being Abused

Depending on the "substance" at issue and the degree to which it is being used, the trustee may be asked to make a very subjective determination.³³⁴ The drinking habits of a nineteen-year old beneficiary in college may not rise to the level of "abuse" whereas the same drinking patterns, if maintained by a forty-year old beneficiary with young children at home may be more problematic.³³⁵

Moreover, medical marijuana is legal in thirty-three states, and marijuana is legal for recreational purposes in ten states.³³⁶ If a twenty-five-year old beneficiary of a Texas trust regularly, but legally consumes marijuana in Colorado, would this be considered substance abuse?³³⁷ It may be prudent to include language advising the trustee to seek the opinion of a physician who, ideally at least, has examined the beneficiary at issue.³³⁸

329. See Kiplinger, *Selecting the Right Trustee and Protector for a Substance Abuse Trust*, www.kiplinger.com/article/retirement/T021-C032-5014-Selecting-Right-Trustee-For-Substance-Abuse-Trust.html [perma.cc/H7US-25V9] (last visited Jan. 21, 2020).

330. *See id.*

331. *See id.*

332. *See id.*

333. *See id.*

334. *See id.*

335. *See id.*

336. Jeremy Burke and Skye Gould, *States Where Marijuana is Legal*, BUSINESS INSIDER (Jan. 1, 2020, 7:41 AM), www.businessinsider.com/legal-marijuana-states-2018-1 [perma.cc/G8A4-TC45].

337. Wayne Buckwalter, *An Important Family Matter, Addiction Professional* (Feb. 1, 2011) www.psychcongress.com/article/important-family-matter [perma.cc/55C3-PAKB].

338. *See id.*

b. Optional Trust Terms

Possible options for addressing substance abuse in a trust agreement include the requirement that all beneficiaries submit a drug screening, regardless of whether the trustee suspected drug use.³³⁹ This may provide some protection for the trustee against claims of abuse of discretion, but it can also create additional problems and expenses.³⁴⁰ Another approach is to provide the trustee with the power to create a new trust in which to segregate the funds that might otherwise have been distributed to the beneficiary with the substance abuse problem.³⁴¹ Essentially, this provision empowers the trustee to decant an interest into a trust with drug testing and other provisions that allow the trustee further discretion to address the problem.³⁴²

D. Trust Protectors/Advisors

One method for injecting flexibility into a trust instrument mentioned earlier in this article is the appointment of trust protectors (also known as trust advisors, or if multiple persons are involved, a trust committee).³⁴³

Although definitions vary, a trust protector may be thought of as “a disinterested third party whom the settlor appoints to represent his or her best interests in the administration of the trust.”³⁴⁴ Trust protectors can be given a broad or narrow array of powers, depending on the situation.³⁴⁵ Among other things, these powers may be strictly administrative, relate to investment decisions, control distributions, or some combination thereof.³⁴⁶ Unlike trustees, trust protectors are not vested with title, and they do not assume day-to-day management and control over trust assets.³⁴⁷

Texas Trust Code Section 114.0031 is the statute that most directly addresses trust protectors.³⁴⁸ Subsection (d) outlines some of the powers that may be granted to a trust protector as follows:

- (d) A protector has all the power and authority granted to the protector by the trust terms, which may include:
 - (1) the power to remove and appoint trustees, advisors, trust committee members, and other protectors;

339. See Chris Fov, *Got a Substance Abuse Trust? Learn About the Benefits*, FHE HEALTH (Apr. 29, 2019), www.fherehab.com/learning/substance-abuse-trust-fund-benefits/ [perma.cc/65Z5-H5Y6].

340. See *id.*

341. See *id.*

342. See *id.*

343. Lee Financial, *What is a Trust Protector and Advisor?*, www.leeefin.com/what-is-a-trust-protector-and-advisor/ (last visited Jan. 21, 2020) [https://perma.cc/ATL2-FP8A].

344. See BOGERT ET AL., *supra* note 323, § 137.

345. See *id.*

346. See *id.*

347. See *id.*

348. See *id.*

- (2) the power to modify or amend the trust terms to achieve favorable tax status or to facilitate the efficient administration of the trust; and
- (3) the power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary by the trust terms.³⁴⁹

The most significant obstacle and reason why trust protectors are not used more regularly is that most clients do not have disinterested third parties to whom they would be willing to grant such broad powers.³⁵⁰ And when they do, such trusted friends or extended family members are often of the same or a similar generation as the settlor.³⁵¹

For a more thorough discussion of trust protectors, see Christian Kelso's article *Enter the Paladin: Using Trust Protectors to Solve Trust Problems*.³⁵²

IV. WRAPPING UP, TRUSTEE RESIGNATION AND REMOVAL

A. Trustee Resignation

A trustee may resign in accordance with the terms of the governing trust instrument or by petitioning a court for permission to resign.³⁵³ If resigning via court petition and if requested, the court may discharge the trustee on the terms and conditions necessary to protect the rights of other interested persons.³⁵⁴

To avoid the time and cost associated with a judicial proceeding, it is generally preferable to include a clear resignation procedure in the trust instrument.³⁵⁵ However, since a non-judicial resignation does not include the option for a judicial discharge, a savvy trustee may condition such resignation outside of the court on receiving a release agreement signed by the trust beneficiaries.³⁵⁶ The agreement would state that the beneficiaries approve of the trustee's administration of the trust, dismiss any claims, and release the trustee from liability for such trust administration.³⁵⁷

However, such an agreement is only binding if the beneficiary has legal capacity to sign the instrument, the beneficiary signs the instrument, and the beneficiary "has full knowledge of the circumstances surrounding the agreement."³⁵⁸ Therefore, it is important that any release agreement provide

349. TEX. PROP. CODE ANN. § 114.0031(d).

350. See BOGERT ET AL., *supra* note 323, § 137; see generally *In re Macy Lynne Quintanilla Tr.*, No. 04-17-00753-CV, 2018 WL 4903068, at *5-7 (Tex. App.—San Antonio Oct. 10, 2018) (showing an application of the Trust Protector's role).

351. See BOGERT ET AL., *supra* note 323, § 137.

352. Presented During the State Bar of Texas 2018 Estate Planning and Probate Drafting Course, in ST. B. OF TEX. 2018 EST. PLAN. & PROB. DRAFTING COURSE (Oct. 2018).

353. TEX. PROP. CODE ANN. § 113.081.

354. See *id.*

355. See BOGERT ET AL., *supra* note 323, § 511.

356. *Id.*

357. *Id.*

358. See *id.*; TEX. PROP. CODE ANN. § 114.032(a)(3).

a full description of any significant trustee actions or inactions taken during administration.³⁵⁹ Release agreements also often include language similar to the following:

Each Party, for himself or herself and on behalf of its, his or her Affiliates, expressly acknowledges, warrants and represents: . . . (ii) that to his or her best knowledge and belief, the Trustee has made full and complete disclosure to him or her of all material facts and information in the possession of the Trustee with respect to the Trust and the Transactions; (iii) that each Beneficiary has received monthly account statements from the Trustee and, to the extent requested and to his or her best knowledge and belief, he or she has had access to the books, records and other materials relating to the Trust (including all such materials relating to the Transactions which he or she has requested before executing this Agreement), has examined such books, records and materials or caused them to be examined on his or her behalf or has had the opportunity to do so, and as a result, he or she is in all respects thoroughly familiar with the Transactions as disclosed by such books, records and materials.

If a trust has a minor beneficiary, a written release agreement will nevertheless be final and binding on such minor beneficiary if:

- (1) the minor's parent, including a parent who is also a trust beneficiary, signs the instrument on behalf of the minor;
- (2) no conflict of interest exists; and
- (3) no guardian, including a guardian ad litem, has been appointed to act on behalf of the minor.³⁶⁰

Similarly, unborn or unascertained beneficiaries are bound by such an agreement if a beneficiary from whom such unborn or unascertained beneficiary descendants has a "substantially identical" interest and signs the agreement.³⁶¹

Additionally, many corporate trustees and some individual trustees, at least initially, request indemnification from trust beneficiaries in a non-judicial resignation, which is more protection than such trustees could receive in a judicial discharge.³⁶²

If a trust agreement provides for non-judicial resignation, but a trustee nevertheless desires a judicial resignation and discharge, a dispute can arise as to whether the trustee can be reimbursed for the cost of such judicial resignation and discharge.³⁶³

To avoid such potential conflict, the trust instrument may clarify the resigning trustee's right to seek a judicial discharge by expressly authorizing

359. See BOGERT ET AL., *supra* note 323, § 137; *see id.* § 114.032(a)(3).

360. TEX. PROP. CODE ANN. § 114.032(c).

361. TEX. PROP. CODE ANN. § 114.032(d).

362. See BOGERT ET AL., *supra* note 323, § 511.

363. *Id.*

it in the trust instrument and specifying whether expenses incurred in connection with such judicial discharge should be borne by the resigning trustee or the trust.³⁶⁴

B. Trustee Removal

As with resignation, trustee removal can take place in or out of the courtroom.³⁶⁵ This power to remove a trustee can be a vital tool when creating a balance between the powers of the trustee and protection of the beneficiaries as discussed further below.³⁶⁶ It also allows a settlor to expressly provide when the removal rights should be broader or more restrictive than the statutory grounds.³⁶⁷

If the option for non-judicial removal is desired, the trust instrument should include clear provisions on when and why a trustee may be removed.³⁶⁸ For example, whether removal may take place with or without cause, with or without advance notice to the trustee being removed, and whether it can occur as desired or is limited to taking place once every set number of years.³⁶⁹

In the absence of a removal right under the trust instrument, the beneficiary (or other interested person) will be forced to seek removal under the Texas Trust Code.³⁷⁰ This can be a long and expensive process if the trustee refuses to resign and forces a judicial removal.³⁷¹ It also limits the grounds for removal, and a beneficiary cannot remove a trustee because of hostility or ill will between them.³⁷²

Texas Trust Code Section 113.082 provides that a trustee may be removed upon the petition of an interested person if:

- (1) the trustee materially violated or attempted to violate the terms of the trust and the violation or attempted violation results in a material financial loss to the trust;
- (2) the trustee becomes incapacitated or insolvent;
- (3) the trustee fails to make an accounting that is required by law or by the terms of the trust; or
- (4) the court finds other cause for removal.³⁷³

364. *Id.* §§ 519–20.

365. *Id.*

366. *Id.*

367. *Id.*

368. *See id.*

369. *See id.*

370. TEX. PROP. CODE ANN. § 113.082; *see* Novak v. Schellenberg, 718 S.W.2d 822, 824–25 (Tex. App.—Corpus Christi 1986, no writ).

371. *Novak*, 718 S.W.2d at 824–25.

372. *Akin v. Dahl*, 661 S.W.2d 911, 913–15 (Tex. 1983), *cert. denied*, U.S. 938 (1984).

373. TEX. PROP. CODE ANN. § 113.082.

C. Balance Between Trustee and Beneficiary

In addition to these specified statutory grounds, a court may remove a trustee on any grounds that the court considers necessary and proper.³⁷⁴ For example, lack of business experience has been considered on the question of the removal of a trustee.³⁷⁵ The burden of proof is on the party who seeks to remove a trustee for dereliction of duty.³⁷⁶

The ability to remove a trustee without court intervention must be balanced with the desire for the trustee to serve as an independent gatekeeper.³⁷⁷

The following are some considerations when drafting removal provisions:

- Whether there should be a limit on when and how often a trustee may be removed, *i.e.*, not for 2 years after funding, only once every 2 years, etc.;
- Whether a corporate trustee may only be removed if a successor corporate trustee is appointed in its place;
- Whether the removal right should be limited to an independent trust protector or third persons;
- Whether a trustee's removal should only occur if good cause for such removal exists;
- Whether a beneficiary should reach a certain age prior to having the right to remove a trustee;
- Whether a majority of the adult current beneficiaries (and remainder beneficiaries) should agree on the trustee's removal; and
- Whether individual and corporate trustees should be subject to different removal standards.³⁷⁸

How broad or narrow trustee removal provisions are drafted may also tie back to the discussion of a settlor's intent when creating a trust in Section II.A.³⁷⁹ For example:

- If settlor would have distributed the assets outright to the beneficiary except for creditor or tax issues, an unlimited removal right may be appropriate;
- Institutions where the settlor wants to provide for different beneficiaries, protect a spendthrift beneficiary, etc., the removal right should be restricted to avoid retaliatory removals;
- If there is a primary or sole beneficiary of the trustee, he or she, acting alone, may have the right to remove a trustee whereas if the trust is a pot trust primarily for a single generation with similar resources and needs, they may have the right to remove a trustee, acting by majority;

374. *See Novak*, 718 S.W.2d at 822.

375. *See Moore v. Sanders*, 106 S.W.2d 337, 339 (Tex. Civ. App.—San Antonio 1937, no writ).

376. *See Novak*, 718 S.W.2d at 822.

377. *Id.*

378. Pacheco, *supra* note 95, at 22.

379. *See id.*; *supra* Section II.A.

- If a trust has or may have younger beneficiaries, limit a beneficiary's removal rights to a certain age. In this case, consider giving such rights to a parent or natural guardian of the beneficiary until the beneficiary reaches the specified age.³⁸⁰

D. Transition Between Trustees

Ideally, trustee resignation and removal provisions should lay the groundwork for a smooth transition from the current trustee to the successor trustee.³⁸¹ The beneficiaries, as well as the exiting and entering fiduciaries should be aware of the change, its timing, and expectations as to the transfer of the trust estate.³⁸²

1. Notice

When drafting these provisions, the following should be considered, noting that more advanced notice may be desirable for resigning trustees as opposed to those being removed:

- Who should receive notice: all beneficiaries, current beneficiaries, trust protector and/or advisor, parents or legal guardians of minor beneficiaries, etc.;
- How notice should be given;
- Means for delivery of notice;
- Time period before resignation is effective;
- Ability of certain persons or entities to waive the notice time period;
- What happens if no successor trustee is appointed at the time the resignation is effective;
- Right of resigning trustee to seek a judicial acceptance and/or settlement notwithstanding resignation provisions.³⁸³

If the trust does not have vested remaindermen, it may" be difficult for a resigning trustee to notice *every* potential beneficiary of a trust"; so, it may be prudent to limit notice requirements to current beneficiaries and possibly those remainder beneficiaries who have a vested interest, are readily ascertainable, and/or have a material interest in the trust.³⁸⁴

380. Pacheco, *supra* note 95, at 22.

381. *Id.* at 23.

382. *Id.*

383. *Id.*

384. *Id.*

2. *Acceptance by Successor Trustee*

Additionally, the effectiveness of the acceptance should be clarified by the agreement.³⁸⁵ Some trust agreements require the appointment of a new trustee prior to the resignation becoming effective.³⁸⁶ This ensures that the trust has a trustee at all times, but in certain cases, this has led to a trustee remaining an indentured servant for longer than he or she contemplated.³⁸⁷

Another issue arises if a trust instrument provides that the then-serving trustee may appoint a successor trustee of a trust upon the current trustee ceasing to serve.³⁸⁸ Such language is unclear whether the trustee may appoint a successor trustee in the present, although such successor trustee would not serve until a later date when the current trustee fails to do so.³⁸⁹ Similarly, if a trust instrument requires that any trustee appointment must contain an acceptance by the appointee, it is practically impossible to find an individual or corporate fiduciary willing to accept an appointment to administer a trust at one date, knowing that the trust estate, beneficiaries, and numerous other factors may be different at the later date when such appointee would begin to serve.³⁹⁰

3. *Transfer of Trust Estate*

The Texas Trust Code permits a trustee to wind-up the trust affairs.³⁹¹ However, it does not address “whether a resigning trustee can retain trust assets pending their release and discharge.”³⁹² This creates a problem if and when a successor trustee demands the trust assets.³⁹³ To avoid future disputes, attorneys should consider whether to expressly permit a trustee to retain trust assets, and if so, to what extent.³⁹⁴ An example of such language is below:

Notwithstanding any provision in this instrument to the contrary, any trustee may resign as trustee of any one or more trusts created under this instrument at any time, with or without cause, by filing a petition with any court having jurisdiction and venue of such trust seeking to resign, immediate or contingent upon such trustee’s release and discharge. Upon resignation, the trustee shall be entitled to pay from the trust assets and/or seek reimbursement for all costs, including legal and accounting fees and

385. *Id.* at 24.

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.*

expenses, related to the proceeding.

E. Trustee Exculpation and Indemnity

Exculpation provisions may initially seem solely for the benefit of the trustee, but since such language gives some degree of cover to the fiduciary, it can also provide a level of comfort to exercise their discretion which can benefit the trust beneficiaries as well.³⁹⁵ Providing a suitable level of exculpation may encourage a trustee to accept the trust, which is especially beneficial when dealing with foreseeably difficult beneficiaries.³⁹⁶ Exculpation also provides a “disincentive to a beneficiary seeking to threaten a trustee into making a distribution.”³⁹⁷

Texas Trust Code section 114.007 provides that a settlor may exculpate a trustee from liability other than for: “(1) a breach of trust committed (A) in bad faith; (B) intentionally; or (C) with reckless indifference to the interest of a beneficiary; or (2) any profit derived by the trustee from a breach of trust.”³⁹⁸ “Additionally, some settlors provide that an uncompensated trustee, either by choice or by instrument, shall be entitled to a higher level of exoneration than a compensated trustee.”³⁹⁹

However, a broadly-drafted exculpation clause may exonerate the trustee for acts other than those for which liability cannot be exculpated.⁴⁰⁰

This instrument shall always be construed in favor of the validity of any action or inaction by any trustee, and a trustee shall not be liable for any action or inaction except in the case of a breach of trust committed in bad faith, intentionally; or with reckless indifference to the interest of a beneficiary.

Alternatively, “an exculpation provision can stipulate other exclusions from exculpation.”⁴⁰¹ However, be sure to carefully draft these provisions “because an exception from exoneration can lead to unintended consequence.”⁴⁰² For instance, a trustee’s failure to disclose could be fraud.⁴⁰³

395. *Id.* at 33.

396. *Id.*

397. *Id.*

398. TEX. PROP. CODE ANN. § 114.007.

399. Pacheco, *supra* note 95, at 33.

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

V. CONCLUSION

Understanding the ins and outs of any given profession is important for those setting the rules and guidelines for performing the job.⁴⁰⁴ In order to best advise clients and prepare trust instruments, attorneys need to more fully appreciate and understand the role of trustee and the nitty gritty of trust administration to hinder intent, as well as how to work within the law to establish a trust that achieves a client's objectives.⁴⁰⁵

404. *See supra* notes 1–10 and accompanying text.

405. *See supra* notes 1–10 and accompanying text.