

TRUSTEE DECISION MAKING

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I. INTRODUCTION

The role of a trustee is complicated.¹ The trustee, while not typically an attorney, must have a thorough understanding of the trust document (which is typically lengthy and full of legalese) and an understanding of the powers and duties of a trustee under both the Texas Trust Code and common law.² “Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior” by which a trustee’s actions are measured.³

When a trustee fails to live up to the required standards, the trustee can be personally sued, removed, forced to pay back compensation, found liable for damages, and potentially have to pay not only their own attorney’s fees out of pocket, but in the worst-case scenario, those of the complaining parties.⁴

The situation sounds dire, and it would seem like nobody in their right mind would voluntarily agree to serve as a trustee.⁵ However, the truth is that the courts loathe intervening and second-guessing a trustee’s decision making, especially when, as in many cases, the trust instrument gives the trustee broad discretion.⁶

This Article aims to provide guidance to drafting attorneys, attorneys advising trustees, and trustees themselves as to why and when courts

1. Cf. *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 735 (Tex. App.—Corpus Christi 1994, writ denied); TEX. PROP. CODE ANN. § 113.051; TEX. PROP. CODE ANN. § 111.0035 (illustrating that the role of trustee is a complicated one, because a trustee, who is often not an attorney, must navigate lengthy and technical trust documents while also understanding and fulfilling fiduciary duties imposed by both statute and common law).

2. See also *Herschbach*, at 735; TEX. PROP. CODE ANN. § 113.051; TEX. PROP. CODE ANN. § 111.0035 (emphasizing that trustees, though often not attorneys, must understand complex trust instruments and the fiduciary powers and duties imposed by statutes and common law).

3. *Johnson v. Peckham*, 120 S.W.2d 786, 788 (Tex. 1938) (quoting *Meinhard v. Salmon*, 249 N.Y. 458, 546 (1928)).

4. TEX. PROP. CODE ANN. §§ 113.082(a), 114.001(c), 114.061; 4 KENNETH McLAUGHLIN, JR. & TERRI LYNN HELGE, TEX. PROB., EST. AND TR. ADMIN. § 84.05 (2024).

5. E.g., TEX. PROP. CODE ANN. §§ 113.082(a), 114.001(c), 114.061; 4 McLAUGHLIN & HELGE, *supra* note 4, at § 84.05.

6. See *Lesikar v. Moon*, 237 S.W.3d 361, 366 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (“The court may not substitute its discretion for that of the trustee, and may interfere with the trustee’s discretionary powers only in the case of fraud, misconduct, or clear abuse of discretion.”).

typically intervene in a trustee's administration, so that trust instruments can be drafted and trustees can take actions in a manner that could help keep trustees out of the courtroom.⁷

II. TRUSTEE DECISION MAKING

A. Trustee Powers and Duties Generally

The trustee may exercise any powers conferred by the terms of the trust, any powers conferred by statute, and any other powers that are necessary or appropriate to carry out the purposes of the trust, except as limited by the terms of the trust.⁸ There are many trustee powers enumerated in Subchapter A of Chapter 113 of the Texas Property Code, but the powers, duties, and responsibilities under the Subchapter do not exclude other implied powers, duties, or responsibilities that are not inconsistent with the Subchapter.⁹

Although the trustee may have the power to take certain actions, that power is not unfettered.¹⁰ In all instances, the trustee must exercise their powers in accordance with their fiduciary duties.¹¹

Subchapter B of Chapter 113 of the Texas Property Code addresses the trustee's statutory duties, the general rule states that the trustee:

“[S]hall administer the trust in good faith according to its terms and [the Texas Trust Code]. In 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.”¹²

For example, although the trustee may have the power to sell trust property, the trustee's power to sell is constrained by certain common law duties: the duty to disclose the sale and material information about the sale to the beneficiaries, the duty not to self-deal by selling the property to themselves, the duty of loyalty in negotiating the terms of the sale, and the duty to exercise reasonable care and skill in making the sale.¹³

7. Author's original thought.

8. TEX. PROP. CODE ANN. §§ 113.001, 113.002.

9. *Id.* § 113.024.

10. RESTATEMENT (SECOND) TRS. § 186 cmt. f (A.L.I. 1959).

11. *Id.*

12. TEX. PROP. CODE ANN. § 113.051.

13. *Id.*

Understanding the interplay between the powers and duties is key to understanding why and when a court might intervene with the trustee's action or inaction.¹⁴

B. Mandatory Powers

The trustee's powers are as extensive as the trustee's duties.¹⁵ The Restatement (Second) of Trusts states that when the trustee has a duty to act, they can properly perform the act, and when the trustee is under a duty not to act, they can properly refrain from such an act.¹⁶ In situations where the trustee has a duty to act or not act, the trustee has a mandatory power, and the trustee can be liable for failing to exercise this power.¹⁷

When a power is mandatory, the court does not need to make a finding of fraud, misconduct, or abuse of discretion before intervening and requiring the trustee to fulfill the duty.¹⁸ The court has the power to order the trustee to exercise a mandatory power or to remove the trustee who is unwilling to exercise a mandatory power.¹⁹

Even when there is a duty for the trustee to exercise a mandatory power, the trustee may have discretion regarding the time, manner, and extent of the exercise.²⁰ For instance, when a trust instrument directs the trustee to sell realty before a certain date (i.e., within one year after the settlor's death), the court should allow the trustee the authority to exercise discretion as to the exact date of sale, if it is done by the prescribed deadline.²¹

C. Discretionary Powers

Settlors often grant trustees discretionary powers rather than directing the trustee on when and how to exercise their powers under all changing and unforeseeable future conditions.²² "Such discretion gives the trustees flexibility in managing the trust property to best achieve the goals of the

14. See *Id.*; *Lesikar v. Moon*, 237 S.W.3d 361, 366 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (explaining that although trustees are granted powers in administering trusts, courts may intervene when those powers are exercised improperly, dishonestly, or in violation of fiduciary duties).

15. See TEX. PROP. CODE ANN. § 113.051

16. RESTATEMENT (SECOND) OF TRS. § 186 cmt. e (A.L.I. 1959).

17. *Id.*

18. *Lesikar*, 237 S.W.3d at 367.

19. AMY MORRIS HESS, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *BOGERT'S THE L. OF TRS. & TRS.* § 558 (2025).

20. RESTATEMENT (SECOND) OF TRS. § 187 cmt. a (A.L.I. 1959); RESTATEMENT (THIRD) TRS. § 87 cmt. a (A.L.I. 2007); HESS, BOGERT & BOGERT, *supra* note 19, at § 552.

21. See *Bolles v. Boatmen's Nat. Bank of St. Louis*, 255 S.W.2d 725, 736 (Mo. 1953); see also *Matter of Myers*, 845 N.Y.S.2d 510, 512 (N.Y. App. Div. 2007).

22. HESS, BOGERT & BOGERT, *supra* note 19, at § 558.

settlor and accommodate the changing situations of the beneficiaries over time.”²³

The trustee’s powers are discretionary when the trustee has the privilege but not the duty to do an act or has the privilege but not the duty to refrain from doing an act.²⁴ When the trustee is given a discretionary power, the trustee has the duty to employ their discretion in good faith, but no duty to exercise the power.²⁵

D. Mandatory vs. Discretionary Powers

Whether a power is mandatory or discretionary depends on the settlor’s intent.²⁶ The settlor may grant the trustee full or partial discretion or may leave nothing to the trustee’s judgment and require the trustee to perform specified acts in a certain manner.²⁷

The trustee generally has discretion regarding the exercise of their powers; thus, the default is that a power is discretionary unless the terms of the trust or the trustee’s fiduciary duties dictate otherwise.²⁸

A phrase using the word “may” tends to express the desire to grant a discretionary power, whereas the words “direct,” “order,” “shall,” or “must” indicate the intent to grant a mandatory power.²⁹ If a trust document provided that a co-trustee “shall” divide the trust into equal shares for themselves and a sibling upon the settlor’s death, the language would be mandatory and leave the trustee with no discretion to do anything other than to fund an equal trust for their sibling.³⁰

Although the words “direct,” “order,” “shall,” or “must” tend to indicate a mandate, it is important to consider the language of the trust as a whole in determining whether the trustee has been given a mandatory or discretionary power.³¹

In *In re Carr’s Estate*, the court made it clear that the language in the testamentary trust could have been interpreted either way without context, but in the specific trust’s context, the settlor intended the trustees to have a mandatory power.³² The settlor in *Carr* devised funds in trust to the trustees to provide for the support of his widow by paying the widow the net income.³³ The language at issue was the following:

23. *Id.*

24. RESTATEMENT (SECOND) TRS. § 186 cmt. e (A.L.I. 1959).

25. HESS, BOGERT & BOGERT, *supra* note 19, at § 552.

26. *Id.*

27. *Id.*

28. RESTATEMENT (THIRD) OF TRS. § 87 cmt. a (A.L.I. 2007).

29. HESS, BOGERT & BOGERT, *supra* note 19, at § 552.

30. *Lesikar v. Moon*, 237 S.W.3d 361, 367 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

31. *In re Carr’s Est.*, 28 N.Y.S.2d 12, 14–15 (Sur. Ct. 1941).

32. *Id.*

33. *Id.* at 13–14.

I do hereby *specifically authorize and empower* my . . . Trustees, . . . if the net rents, issues, income and profits from said fund shall not in any year be sufficient to pay . . . the monthly sum of One Thousand Dollars, to advance and pay to [spouse] out of the principal of the said fund so held in trust, *whatever amount may be required* . . . to give her in the aggregate a monthly allowance of One Thousand Dollars.³⁴

The court noted that the phrase “authorize and empower” had been interpreted in other cases to grant mere permission rather than a duty.³⁵ However, “[t]he testamentary intent must be gathered from the will as a whole,” and “[w]e still take each document on its own merits.”³⁶ In the specific will at issue in *Carr*, the court noted that the widow was dependent upon the testamentary provisions and that the trust fund was intended to provide her principal support and maintenance.³⁷ Furthermore, the term “specifically authorize and empower” modified a grant of authority to pay whatever amount may be required to provide her with the stated allowance.³⁸

In other parts of the trust, the settlor used “authorize and empower” (without the word “specifically”), coupled with phrases such as “in their judgment and discretion” or “as they shall deem wise, expedient and proper,” indicating he intended to vest discretion as to the other matters.³⁹ Thus, although the testator used “authorize and empower” throughout the will, the manner in which he employed the phrase, with regard to the distributions to the widow, clearly indicated that the trustees had a mandatory power to distribute \$1,000 per month to the widow.⁴⁰

If the trust language does not clearly and explicitly indicate the character of the power, the court may determine the issue by considering the relationship between the settlor and trustee, the circumstances of the beneficiary, the type of property involved, the impact of the power being discretionary or mandatory, the purposes of the trust, and other factors.⁴¹

E. Permissible Deviation from Mandatory Powers

On occasion, the mandatory administrative terms of the trust put the trustee in a quandary: strictly abide by the settlor’s directions and put the trust corpus at risk or breach the trust by disregarding the settlor’s directives.⁴²

34. *Id.* at 14 (emphasis added).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 15–16.

40. *Id.*

41. HESS, BOGERT & BOGERT, *supra* note 19, at § 552.

42. *See* TEX. PROP. CODE ANN. § 112.054.

“Insistence on obedience to all the administrative provisions will prevent the trustees from securing for the beneficiaries the advantages that the settlor intended them to have.”⁴³ However, when the court directs the trustee to disregard an administrative term, the trustee is arguably acting beyond their powers by altering the terms of the trust.⁴⁴

In that situation, most courts have held that when a conflict exists between the dispositive and administrative provisions of the trust, the former should prevail.⁴⁵ In most circumstances, the settlor’s primary objective is to secure certain advantages of having the property held in trust for the beneficiaries, such as living in comfort or having an education provided to them.⁴⁶ The terms of the trust detailing the manner in which the trustee secures those objectives are secondary.⁴⁷ Thus, courts interpret the power to enforce trusts to include the ability to disregard some of the details of administration set forth by the settlor so the trustee can fulfill the objectives the settlor intended.⁴⁸

In most cases when courts have determined the administrative directive should yield, “the clause in question was unwise and obstructive at the time of the creation of the trust,” or it became impractical later due to a change in circumstances.⁴⁹ For example, the court determined the following administrative provision should yield a trust provision directing the trustee to “invest the trust funds entirely in a specific type of investments, such as first mortgages bearing six [percent] interest, when [such investment does not later exist.]”⁵⁰ As another example, when a trust provides that a beneficiary is to be supported at a rate of \$6,000 per year from the income, with the remainder of the income to accumulate until the child reaches age 30, but greatly increased costs of living made it impossible to support a person on \$6,000 a year, and the trust income was substantially greater than \$6,000 per year.⁵¹

In those cases, courts usually do “not permit a deviation [in] the administrative terms unless two elements [are present]: (1) unforeseeable change in circumstances and (2) a frustration of the settlor’s [primary purpose for the trust] by this change,” if the trustee were to strictly abide by the administrative directives.⁵²

Under the Texas Trust Code, the trustee or beneficiary may seek judicial modification of the trust terms if there are circumstances not known to or

43. HESS, BOGERT & BOGERT, *supra* note 19, at § 561.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* (citing *In re Hartenstine’s Est.*, 54 Pa. D. & C. 280 (Orphans’ Ct. 1946)).

51. *Id.*

52. *Id.*

anticipated by the settlor, the modification will further the purposes of the trust, or if modification of administrative, non-dispositive terms of the trust is necessary or appropriate to prevent waste or impairment of the trust's administration.⁵³ Importantly, if the trustee believes a mandatory power or duty in the trust should be modified because of an unforeseeable change in circumstances or frustration of the settlor's primary purpose for the trust, the trustee must seek judicial modification under Section 112.054 rather than simply ignoring the mandatory power or duty in the trust, even if it is common sense that the trustee deviate from the trust directives.⁵⁴ When a power is mandatory, the court does not need to make a finding of fraud, misconduct, or abuse of discretion before intervening and requiring the trustee to fulfill the duty or a finding that the trustee breached their duties and should be removed or subjected to a damages claim.⁵⁵

F. Court Intervention in Exercise of Discretionary Powers

Courts tend to be, and should be, very reluctant to interfere with a trustee's exercise of discretionary powers.⁵⁶ Regarding discretionary powers, courts typically assume that the settlor appointed the trustee whom the settlor has confidence in, and that the settlor intends for the trustee to use their own wisdom when acting in a particular matter.⁵⁷ Most settlors, in granting discretionary powers, wish that the trustee, rather than the court, should decide when and how to exercise the powers.⁵⁸ After all, the trustee is typically more familiar with the beneficiaries, the settlor, and the trust's circumstances than a court would be.⁵⁹

By statute and common law, the trustee has broad discretion in the prudent operation of the trust.⁶⁰ Most courts will not interfere with the trustee's discretionary power unless there is a clear abuse of discretion, even if the court might have made a different decision than the trustee.⁶¹ A court is likely to find an abuse of discretion only when a trustee acted in a manner that is extraordinarily imprudent or unreasonable.⁶²

In determining whether the trustee abused their discretion in exercising or failing to exercise a power, the following circumstances may be relevant:

53. TEX. PROP. CODE ANN. § 112.054.

54. *Id.* §§ 113.051, 112.054.

55. *Lesikar v. Moon*, 237 S.W.3d 361, 367 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

56. *In re XTO Energy, Inc.*, 471 S.W.3d 126, 131–32 (Tex. App.—Dallas 2015, no pet.)

57. HESS, BOGERT & BOGERT, *supra* note 19, at § 558.

58. *Id.*

59. *Roca v. Westbury Transp., Inc.*, 19 F.Supp.2d 44, 50 (E.D.N.Y. 1998).

60. *Tomlinson v. Tomlinson*, 960 S.W.2d 337, 339 (Tex. App.—Corpus Christi-Edinburg 1997, writ denied).

61. HESS, BOGERT & BOGERT, *supra* note 19, at § 558; RESTATEMENT (THIRD) OF TRS. § 87, cmt. b (A.L.I. 2007).

62. HESS, BOGERT & BOGERT, *supra* note 19, at § 558.

1. the extent of the discretion conferred upon the trustee by the terms of the trust;
2. the purposes of the trust;
3. the nature of the power;
4. the existence or nonexistence and the definiteness or indefiniteness of any external standard by which the reasonableness of the trustee's conduct can be judged;
5. the motives of the trustee in exercising or refraining from exercising the power; and
6. the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries.⁶³

Cases in which the court will interfere with the trustee's exercise of their discretionary power usually involve cases of bad faith, dishonesty, or arbitrary action.⁶⁴

1. Extent of Discretion Conferred

In reviewing the trustee's discretionary decision, the court must determine the level of discretion that the trustee has been granted to exercise a specific power.⁶⁵ Often, the settlor grants the trustee "absolute," "uncontrolled," "complete," or "full" discretion, thereby avoiding the need to direct trustees on when and how to exercise their powers under all conditions.⁶⁶ In other cases, the settlor may grant the trustee any discretion.⁶⁷

The extent of the trustee's discretion depends primarily upon the manifestation of the settlor's intent.⁶⁸ The court is to construe the settlor's language to effectuate the trust's purposes.⁶⁹ Typically, a mere grant of discretion to the trustee does not authorize the trustee to act beyond the bounds of reasonable judgment.⁷⁰ However, the settlor may manifest an intention to grant greater than ordinary latitude in the trustee's discretionary decision making.⁷¹

Notwithstanding the broad discretion given to the trustee in the trust instrument, including terms like absolute, sole, or uncontrolled, the trustee

63. RESTATEMENT (SECOND) OF TRS. § 187, cmt. d (A.L.I. 1959); RESTATEMENT (THIRD) OF TRS. § 87, cmt. b (A.L.I. 2007).

64. HESS, BOGERT & BOGERT, *supra* note 19, at § 558.

65. *Id.*

66. *Id.*

67. *Id.*

68. RESTATEMENT (SECOND) OF TRS. § 187 cmt. j (A.L.I. 1959).

69. *Id.*

70. RESTATEMENT (THIRD) OF TRS. § 87 cmt. d (A.L.I. 2007).

71. *Id.*

must exercise any discretionary power in good faith and in accordance with the trust's terms, purposes, and the interests of the beneficiaries.⁷²

Bogert's Law of Trusts and Trustees (Bogert) notes that the difference in court determinations between a mere discretionary power and an absolute discretionary power tends to be a matter of degree rather than of kind.⁷³ "Courts seem more likely to find an abuse of discretion under a mere discretionary power than under an absolute discretionary power, although the factors for determining abuse are largely the same."⁷⁴ Even in the "mere discretion" cases, courts are reluctant to interfere absent a clear abuse of the trustee's discretion.⁷⁵

When words like absolute, unlimited, or uncontrolled are used, the trustee's authority is never completely absolute or uncontrolled.⁷⁶ If interpreted literally, such a grant of authority could be deemed to confer outright ownership of the trust property to the trustee, thereby defeating the settlor's purpose and intent in placing the property in trust.⁷⁷ "Even under the broadest grant of fiduciary discretion, a trustee must act honestly and . . . 'in a state of mind contemplated by the settlor.'"⁷⁸

When absolute, unlimited, or uncontrolled discretion is used, courts typically apply one of two standards to determine whether to interfere with the exercise of the trustee's decision.⁷⁹ Under the first approach, the court will not interfere unless the trustee acted dishonestly or in bad faith.⁸⁰ Under this approach, the court will uphold the trustee's discretion as long as the trustee acted "honestly and in a state of mind contemplated by the settlor."⁸¹ The trustee's actions do not have to be reasonable.⁸² However, the trustee cannot act "arbitrarily without an exercise of his judgment" or in a state of mind not contemplated by the settlor.⁸³ This is the approach of the Restatement (Second) and (Third) of Trusts.⁸⁴

Under the second approach, the courts require that, even if the trustee is granted absolute discretion, the trustee's exercise of that discretion must be reasonable under the circumstances.⁸⁵ Bogert notes that under either approach, the courts often reach the same result.⁸⁶ Under both approaches,

72. TEX. PROP. CODE ANN. § 113.029(a).

73. HESS, BOGERT & BOGERT, *supra* note 19, at § 558.

74. *Id.*

75. *Id.*

76. RESTATEMENT (THIRD) OF TRS. § 87 cmt. d (A.L.I. 2007).

77. *Id.*

78. RESTATEMENT (THIRD) OF TRS. § 87 cmt. d (A.L.I. 2007).

79. HESS, BOGERT & BOGERT, *supra* note 19, at § 558.

80. *Id.*

81. *Id.*

82. *Id.*; RESTATEMENT (SECOND) OF TRS. § 187 cmt. j (A.L.I. 1959).

83. *Id.*

84. HESS, BOGERT & BOGERT, *supra* note 19, at § 558.

85. *Id.*

86. *Id.*

even when the trustee is given absolute discretion, they cannot disregard the trust's purposes or alter the beneficial interests of the income and remainder beneficiaries.⁸⁷

The Restatement (Third) of Trusts notes that “[e]xamination of the overall tenor of language granting powers and other terms of trusts may lead to diverse, refined interpretations on a case-by-case basis.”⁸⁸ For instance, based on the language of the extended discretion in the trust and other evidence, the court may find that the language shows a settlor's intention to authorize a particular trustee to act with a lesser degree of caution (accepting a greater degree of compensated risk), not a lesser degree of care, than is normally required for the particular trust under the duty of prudence.⁸⁹

Many Texas cases address the courts' interference with the exercise of a trustee's discretionary powers.⁹⁰

2. External Standards by Which the Reasonableness Is Judged

When there is a standard by which the reasonableness of the trustee's judgment can be tested, the court will interfere with the trustee's decision if the trustee acts beyond the bounds of a reasonable judgment.⁹¹

This rule applies when the trustee has discretion in managing the trust.⁹² For instance, if the trustee fails to exercise proper care and skill in administering the trust, the court can interfere with the trustee's discretionary decisions.⁹³ Other external standards the court can use to measure the

87. *Id.*

88. RESTATEMENT (THIRD) OF TRS. § 87 cmt. d (A.L.I. 2007).

89. *Id.*

90. *In re XTO Energy, Inc.*, 471 S.W.3d 126, 131–32 (Tex. App.—Dallas 2015, orig. proceeding) (court will not interfere with trustee's discretionary decision except in cases of fraud, misconduct or clear abuse of discretion); *DeRouen v. Bryan*, No. 03-11-00421-CV, 2012 WL 4872738, at *4 (Tex. App.—Austin Oct. 12, 2012, no pet.) (mem. op.) (trustee could not be held liable for failing to exercise a discretionary decision, absent bad faith or an abuse of discretion); *Di Portanova v. Monroe*, 229 S.W.3d 324, 330 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.); *Corpus Christi Bank & Trust v. Roberts*, 597 S.W.2d 752, 754 (Tex. 1980); *Nations v. Ulmer*, 122 S.W.2d 700, 703 (Tex. Civ. App.—El Paso 1938, writ dismissed) (quoting 42 Tex. Jur. 96) (“In the absence of evidence of mala fides, the courts are disinclined to interfere when the trustee has been given discretionary powers The court will refuse to review his decision in the absence of a showing that he did not exercise his discretion in good faith or that his decision was unreasonable; for the trustee in such case stands in the position of an arbitrator.”); *Brown v. Scherck*, 393 S.W.2d 172, 184 (Tex. Civ. App.—Corpus Christi 1965, no writ) (“It is undoubtedly the general rule that a court will not interfere with trustees in the exercise of a discretionary power except when proper grounds are pleaded and proved.”); *State v. Rubion*, 308 S.W.2d 4, 9 (1957) (court will interfere when the trustee subverts the intent of the settlor).

91. RESTATEMENT (SECOND) OF TRS. § 187 cmt. i (A.L.I. 1959); RESTATEMENT (THIRD) OF TRS. § 87, cmt. c (A.L.I. 2007).

92. RESTATEMENT (SECOND) OF TRS. § 187 cmt. i (A.L.I. 1959).

93. *Id.*

trustee's conduct include the standards set forth in the Uniform Prudent Investor Act (UPIA) or the Uniform Principal and Income Act.⁹⁴

When the trust's terms do not specify a standard for evaluating the reasonableness of the trustee's actions, the court will usually intervene only if the trustee is acting dishonestly or from an improper motive.⁹⁵ For instance, if the trustee is given the power to "appoint income or principal in favor of a particular beneficiary if he so chooses, without any reference to the needs of the beneficiary, the court will not interpose if the trustee acts honestly and from proper motives."⁹⁶

However, the Restatement (Third) of Trusts takes a different approach, and notes that when there is no "objective standard by which the reasonableness of the trustee's conduct can be measured . . . , [the] court may apply what has been called 'a general standard of reasonableness,' taking account of other terms and purposes of the trust."⁹⁷ According to the Restatement (Third) of Trusts, "expressed standards are not necessary in order for a good-faith decision of a trustee to be found unreasonable."⁹⁸ Under this approach, a court may intervene if it finds the trustee's exercise of the discretionary power "fails to satisfy the applicable standard of care, skill, and caution."⁹⁹

Under any circumstance, "judicial intervention on the ground of abuse [of discretion] is called for not because the court would have exercised the discretion differently, but because the trustee's decision is one that would not be accepted as reasonable by a person of prudence."¹⁰⁰

3. Motive of the Trustee, Intent of the Settlor, and Conflict of Interest

Courts will interfere with the trustee's exercise of a discretionary power when the trustee acts dishonestly or "from an improper even though not a dishonest motive, [such as when] he acts from a motive other than to further the purposes of the trust."¹⁰¹

The trustee acts from a dishonest motive, for instance, "if the trustee receives a bribe [in exchange] for exercising or failing to exercise a [discretionary] power."¹⁰²

94. TEX. PROP. CODE ANN. § 116.001–117.012.

95. RESTATEMENT (SECOND) OF TRS. § 187 cmt. i (A.L.I. 1959).

96. *Id.*

97. RESTATEMENT (THIRD) OF TRS. § 87 cmt. c (A.L.I. 2007).

98. *Id.*

99. *Id.*

100. *Id.*

101. RESTATEMENT (SECOND) OF TRS. § 187, cmts. e, f, g (A.L.I. 1959); RESTATEMENT (THIRD) OF TRS. § 87, cmt. c (2007); 3 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE L. OF TRS. § 187.2 (4th ed. 1988).

102. RESTATEMENT (SECOND) OF TRS. § 187, cmt. f (A.L.I. 1959). *See, e.g.,* Beatson v. Bowers, 174 Ind. 601, 604 (1910).

The trustee acts from an improper motive if the trustee's action or failure to act is done out of malice, spite, or "to further some interest of his own or of a person other than a beneficiary."¹⁰³ Of course, if the trustee takes a discretionary action with the intent to disadvantage a beneficiary, that information would also be relevant to the court's decision to intervene.¹⁰⁴

If the trustee acts in bad faith, commits fraud, or subverts the intent of the settlor, the court is more likely to intervene in the trustee's discretionary decision.¹⁰⁵

In *State v. Rubion*, the Texas Supreme Court held that the trustee's subversion of the settlor's intent was an abuse of discretion.¹⁰⁶ The trustee's discretion "must be reasonably exercised to accomplish the purposes of the trust according to the settlor's intention."¹⁰⁷ The court determined that the settlor intended to provide for the beneficiary's present and future support and maintenance, but the trustee refused to make any payments for the beneficiary's support and maintenance while she was in a state hospital.¹⁰⁸ Such refusal was an abuse of discretion.¹⁰⁹

When the "trustee has an interest conflicting with that of the beneficiary," the court will consider such conflict in determining whether the trustee was acting from an improper motive.¹¹⁰

4. Failure to Exercise Discretion

The court may intervene when the trustee is granted discretion to exercise certain powers but acts arbitrarily or capriciously, such as when the trustee claims to have "gone through the formality of exercising the discretion without deliberately considering the circumstances" necessary to form an informed decision.¹¹¹

The author once had a case in which the trustee, a father, was annoyed at his children, who were the beneficiaries, for questioning the trust's

103. RESTATEMENT (SECOND) OF TRS. § 187, cmt. g (A.L.I. 1959).

104. HESS, BOGERT & BOGERT, *supra* note 19, at § 558.

105. *Id.*; SCOTT & FRATCHER, *supra* note 101; RESTATEMENT (THIRD) OF TRS. § 87, cmt. c (A.L.I. 2007).

106. *State v. Rubion*, 158 Tex. 43, 51–52 (1957).

107. *Id.* at 51.

108. *Id.*

109. *Id.* at 51–52.

110. RESTATEMENT (SECOND) OF TRS. § 187, cmt. g (A.L.I. 1959).

111. HESS, BOGERT & BOGERT, *supra* note 19, at § 558; RESTATEMENT (SECOND) OF TRS. § 187 cmt. h (A.L.I. 1959); RESTATEMENT (THIRD) OF TRS. § 87 cmt. c (A.L.I. 2007); *see In re Briggs' Est.*, 27 A.2d 430, 432 (Pa. Super. Ct. 1942) (When trustee had discretion to pay to a beneficiary the trust corpus when it is in her best interest, and the trustee makes the payment without a request from the beneficiary and at a time she is in bad health and her husband is amply able to support her, the payment does not benefit the woman, but rather the husband, and the trustee abused its discretion); *In re Murray*, 45 A.2d 636, 637 (Me. 1946) (court interfered when trustee, who had absolute discretion to make principal distributions to life beneficiary for her support, paid principal to the life beneficiary without investigating the need for the funds, and the funds were not needed).

management after their father remarried.¹¹² The father's attorney sent the beneficiaries a letter that stated, in part: If this matter cannot be resolved, Trustee will cease making discretionary distributions to you from the trusts during his lifetime, but will use the resources from the trust for his health, support, and maintenance.¹¹³

The trust granted the trustee absolute discretion to make discretionary distributions.¹¹⁴ Although it was wholly permissible for the trustee to make distributions to himself (the primary beneficiary) for his health, support, and maintenance—to the exclusion of his children if the circumstances warranted—the trustee was required to at least consider those circumstances from time to time.¹¹⁵ By stating that he would cease making discretionary distributions to the beneficiaries during his lifetime, the trustee expressly admitted that he did not intend to exercise any discretion in the future, constituting a breach.¹¹⁶ Further, the trustee's motive (such as his hostility towards the children's questioning and his personal interest in receiving more of the trust) indicates that court intervention was appropriate.¹¹⁷ In this case, the trustee was removed on summary judgment.¹¹⁸

If the trust agreement directs the trustee to distribute among A, B, and C a certain amount of the trust's principal and income as is necessary for each of their health, maintenance, and support, but the trustee makes distributions only to A and never inquires into the needs of B or C, the court could intervene because the trustee is failing to exercise discretion as to distributions for the benefit of all beneficiaries.¹¹⁹

Courts have also intervened when the trustee exercises or fails to exercise a discretionary power under a mistaken understanding of the law, a trust term, or the nature of the power.¹²⁰

III. TRUSTEE INVESTMENT DECISIONS

As mentioned in Section II.F above, one of the factors a court should consider in determining whether the trustee abused its discretion is "the existence or non-existence, the definiteness or indefiniteness, of [any] external standard by which the reasonableness of the trustee's conduct can be

112. Author's original thought.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. Author's original thought.

119. *Id.*

120. HESS, BOGERT & BOGERT, *supra* note 19, at § 558; RESTATEMENT (SECOND) OF TRS. § 187 cmt. h (A.L.I. 1959); *see* Colton v. Colton, 172 U.S. 300, 315 (1888) (When trustee denied the trust existed and alleged the words in the instrument were merely precatory, the trustee is refusing to use a discretionary power that he holds in trust, and the court will intervene).

judged.”¹²¹ When reviewing the trustee’s investment decisions, courts typically start with the language of the trust and consider that language in light of the provisions in the UPIA, which provides general standards for evaluating a trustee’s decisions.¹²²

This section provides a general overview of the UPIA, the elements courts consider to determine whether a trust’s terms have abrogated or modified the UPIA’s provisions, and whether the trustee has complied with investment duties.¹²³

A. UPIA Generally

The UPIA is set forth in Texas Property Code Chapter 117 and applies to all trusts in existence on or created after January 1, 2004.¹²⁴ The UPIA is a default rule that may be “expanded, restricted, eliminated, or otherwise altered by the provisions of a trust.”¹²⁵

Under the prudent investor rule, the trustee has a duty to “invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust.”¹²⁶ To satisfy the prudent investor standard, the trustee must exercise reasonable care, skill, and caution.¹²⁷

“If a trust has two or more beneficiaries, the trustee must act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.”¹²⁸ Unless the trust instrument shows a clear preference for one beneficiary over another, the trustee must take special account of the “conflicts between the interests of beneficiaries interested in income and those interested in principal.”¹²⁹

“[The] trustee’s investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.”¹³⁰

The trustee is required to consider all of the following non-exclusive circumstances in investing and managing trust assets, as they are relevant to the trust or its beneficiaries:

121. RESTATEMENT (SECOND) OF TRS. § 187 cmt. d (A.L.I. 1959); RESTATEMENT (THIRD) OF TRS. § 87 cmt. b (A.L.I. 2007).

122. See TEX. PROP. CODE ANN. §§ 117.001–117.012.

123. *Id.*

124. *Id.*

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

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

127. *Id.*

128. TEX. PROP. CODE ANN. § 117.008.

129. *Id.*

130. TEX. PROP. CODE ANN. § 117.004(b).

- (1) General economic conditions;
- (2) The possible effect of inflation or deflation;
- (3) The expected tax consequences of investment decisions or strategies;
- (4) The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;
- (5) The expected total return from income and the appreciation of capital;
- (6) Other resources of the beneficiaries;
- (7) Needs for liquidity, regularity of income, and preservation or appreciation of capital; and
- (8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.¹³¹

The trustee also has a continuing duty for "oversight of the suitability of investments already made as well as . . . new investments."¹³² As the Act notes, "[c]ompliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight."¹³³

B. Duty to Diversify

Under the UPIA, the trustee must diversify the investments of the trust "unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying."¹³⁴ The duty to diversify "requires a trustee to dispose even of 'otherwise proper investments' if they 'are improper because not properly diversified.'"¹³⁵ The purpose of diversification is to minimize risk in case one investment fails.¹³⁶

There are two situations in which the duty to diversify can be altered or abrogated: (1) when the terms of the trust alter the duty, and (2) when there are special circumstances.¹³⁷

131. TEX. PROP. CODE ANN. § 117.004(c).

132. *Id.* at § 117.004.

133. TEX. PROP. CODE ANN. § 117.010.

134. TEX. PROP. CODE ANN. § 117.005.

135. RESTATEMENT (THIRD) OF TRS. § 90 cmt. g (A.L.I. 2007) (citing *Stevens v. Nat'l City Bank*, 544 N.W.2d 612, 617 (Ohio 1989)).

136. TEX. PROP. CODE ANN. § 117.005 cmt. 3.

137. *See* RESTATEMENT (SECOND) OF TRS. § 228(c) (A.L.I. 1959).

1. Mandatory Trust Terms Regarding Investment Authority

In analyzing the trustee's decision-making powers regarding investments, the first step is to determine whether the trustee has a mandatory or discretionary investment power.¹³⁸ The terms of a trust prevail over any provisions in the Texas Trust Code, with a few exceptions.¹³⁹ The UPIA provisions, including the duty to diversify, are default rules that may be altered or abrogated by the settlor.¹⁴⁰

Mandatory trust provisions related to investment authority may narrow it through restrictions or directions that pertain to investment objectives, policies, and techniques.¹⁴¹ The trust terms may also prohibit or require the retention or acquisition of certain types of investments or property.¹⁴²

When the trust terms are mandatory regarding investments, the trustee should seek court permission before deviating from them, even if, as a result of circumstances not anticipated by the settlor, doing so will further the trust's purposes.¹⁴³ For instance, if a trust instrument mandates that the trustee retain all of the stock contributed to the trust, the trustee should seek court permission to deviate from the trust provision if it is clear that the stock value is tanking and the entire trust corpus could be lost.¹⁴⁴

2. Discretionary Investment Authority and the Duty to Diversify

While it is possible to impose mandatory trust terms governing the investment of trust assets, the default is that the trustee's investment powers are permissive or discretionary.¹⁴⁵ Where trust language is permissive, the trustee is not under a duty to retain the permitted investments.¹⁴⁶ A trustee is also not relieved of the duty to act with prudence when the language is permissive rather than mandatory.¹⁴⁷ Thus, the fiduciary must exercise skill, care, and caution when deciding whether to retain or acquire a trust

138. See generally RESTATEMENT (THIRD) OF TRS. § 91 cmt. a (A.L.I. 2007) ("The terms of trusts often restrict, otherwise alter, or guide the trustee's common law or statutory authority and responsibilities in investment matters, in either general or specific ways. These provisions sometimes leave important questions of interpretation to be dealt with by courts, trustees, and beneficiaries.").

139. TEX. PROP. CODE ANN. § 111.0035(b).

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

141. RESTATEMENT (THIRD) OF TRS. § 91 cmt. c (A.L.I. 2007).

142. *Id.*

143. *Id.*

144. *Id.*

145. RESTATEMENT (THIRD) OF TRS. § 87 cmt. a (A.L.I. 2007) (citing J. Langbein, "The Supreme Court Flunks Trusts," 1990 SUPREME CT. REV. 297 (1991)).

146. RESTATEMENT (THIRD) OF TRS. § 91 cmt. f (A.L.I. 2007).

147. *Id.*

investment.¹⁴⁸ Permissive trust provisions are strictly construed against abrogating the duty to diversify.¹⁴⁹

Although permissive provisions do not abrogate the duty to diversify, courts often hold that certain permissive provisions relax the degree of diversification required.¹⁵⁰ For instance, language in trust instruments that grant the trustee absolute, sole, or uncontrolled discretion has been interpreted to broaden the trustee's latitude in investments, but such discretion is not unlimited.¹⁵¹ Such language is usually interpreted as lessening the degree of caution ordinarily required of the trustee and as permitting greater-than-normal latitude in developing an investment strategy.¹⁵² However, even the language of extended discretion is strictly construed so as not to relieve the trustee of duties of loyalty and care, or of general responsibility for risk management.¹⁵³ Further, discretion and extended discretion ordinarily do not have the effect of an exculpatory clause.¹⁵⁴

Often, permissive investment provisions authorize, rather than require, the trustee to do something they might not otherwise be able to do.¹⁵⁵ A provision may allow the trustee to invest in a specific security or type of investment that would otherwise be impermissible because of the trustee's duty of loyalty.¹⁵⁶ For instance, there are often provisions that authorize a corporate trustee to invest trust assets in its own stock.¹⁵⁷ Such permissive terms should not be interpreted as abrogating the duty to diversify.¹⁵⁸ Rather, the terms are intended to allow such investments if, in the exercise of discretion, such investments would be prudent.¹⁵⁹

Thus, unless the terms of the trust are mandatory, in reviewing the trustee's investments decisions, the factors listed above in Section II.F are relevant to a determination of whether the trustee abused its discretion, with the standards set forth in the UPIA (as modified by the trust) serving as the external standard by which the reasonableness of the trustee's conduct can be judged.¹⁶⁰

148. *Id.*

149. *Id.*

150. *Id.*

151. RESTATEMENT (THIRD) OF TRS. § 91, cmt. g (1) (A.L.I. 2007).

152. *Id.*

153. *Id.*

154. *Id.*

155. RESTATEMENT (THIRD) OF TRS. § 91, cmt. f (A.L.I. 2007).

156. *Id.*

157. TEX. PROP. CODE ANN. § 113.053(c).

158. RESTATEMENT (THIRD) OF TRS. § 91, cmt. f (A.L.I. 2007)

159. *Id.*

160. *See supra* Section II.F.

3. Special Circumstances

Special circumstances may excuse diversification if the trust's language is insufficient to override the duty to diversify.¹⁶¹ "Departure from an ordinarily suitable, diversified portfolio may be justified by special circumstances or opportunities of a particular trust or by peculiar risks facing its beneficiary families."¹⁶² Departures might also be justified by the beneficiaries' special interests or the settlor's objectives, including particular asset holdings preferred or encouraged by the trust's terms.¹⁶³

Special circumstances may arise in which holding an asset is important to a family or trustee, for instance, when the trust owns a family business.¹⁶⁴ Another example is when a tax-sensitive trust owns an under-diversified block of low-basis securities.¹⁶⁵ The tax costs of recognizing the gain from selling the stock may outweigh the advantages of diversifying the holding.¹⁶⁶ Several cases have recognized that stock can hold special meaning to a family, such as when a trust settlor worked their entire life for a company in which they owned stock, and the stock made up the majority of the trust corpus.¹⁶⁷

Special circumstances may also include the benefit of deferring the liquidation of an asset to defer income tax payments, or the anticipated capital appreciation from retaining an asset, such as undeveloped real estate, for a long period.¹⁶⁸ The greater the departure from a diversified portfolio, the heavier the trustee's burden to justify the strategy.¹⁶⁹

The Commentary to Texas Property Code Section 117.002 stated the Uniform Prudent Investor Act has been enacted in a substantial majority of states.¹⁷⁰ With this admonition that the Act is to be applied and construed to promote uniformity in the laws of the enacting states, we can expect to see, in briefs and court opinions, greater reliance than in the past on decisions from other jurisdictions dealing with trust investment issues.¹⁷¹

161. TEX. PROP. CODE ANN. § 117.005.

162. RESTATEMENT (THIRD) OF TRS. § 90, cmt. f (A.L.I. 2007).

163. *Id.*

164. See Wood v. U.S. Bank, 828 N.E.2d 1072, 1078–79 (Ohio App. 2005).

165. TEX. PROP. CODE ANN. § 117.005.

166. *Id.*

167. See Warmack v. Crawford, 195 S.W.2d 919, 925 (Mo. Ct. App. 1946); Baldus v. Bank of Cal., 530 P.2d 1350, 1351–53 (Wash. Ct. App. 1975); *In re HSBC Bank USA, N.A.*, 947 N.Y.S.2d 292, 295 (2012).

168. TEX. PROP. CODE ANN. § 116.005.

169. RESTATEMENT (THIRD) OF TRS. § 90, cmt. f (A.L.I. 2007).

170. *The Uniform Prudent Investor Act of Texas*, THE TEX. PROB. WEBSITE (June 2003), <https://texasprobate.net/articles/prudentinvestorwithcomments.htm#Sec.%20117.002> [<https://perma.cc/UH7T-SFYG>].

171. *Id.*

Thus, Texas courts can and should give precedential weight to decisions from other jurisdictions when the UPIA or similar statutes have been adopted, especially when Texas courts have not yet addressed the issue.¹⁷²

In *Brackett v. Tremaine*, the Nebraska Supreme Court held that special circumstances existed when the primary asset in the trust was a piece of farmland with special meaning to the family, thereby modifying the duty to diversify.¹⁷³ Inman executed a trust naming his daughters and grandchildren as beneficiaries.¹⁷⁴ One of the grandchildren, Brackett, became the successor trustee on Inman's death.¹⁷⁵ The trust consisted of 189 acres of farmland.¹⁷⁶ One of Inman's daughters received rental income from fifty-five acres of the land during her life, and upon her death, Brackett was to receive the income.¹⁷⁷

Brackett, as trustee, sought court approval of the sale to himself of a forty-two-acre tract out of the 189 acres owned by the trust on the basis that he owed a duty to diversify the trust.¹⁷⁸ Brackett argued that by selling a portion of the ranch, he could invest the proceeds and earn more money for the income beneficiary.¹⁷⁹ Most of the other beneficiaries objected on the basis that the property had special meaning to them and should stay in the family.¹⁸⁰ The income beneficiary testified that she was satisfied with the amount of income she was receiving and did not want the property sold.¹⁸¹ The trust instrument gave the trustee the power:

*[T]o retain any property, whether consisting of stocks, bonds, other securities, . . . without regard to the proportion such property or property of a similar character so held may bear to the entire amount of the trust, whether or not such property is of the class in which trustees generally are authorized to invest by law or rule of court; intending thereby to authorize the Trustee to act in such manner as will be for the best interest of the trust beneficiaries, giving due consideration to the preservation of principal and the amount and regularity of the income to be derived therefrom.*¹⁸²

The court noted that the prudent investor rule requires the trustee to diversify the trust investments, "unless the trustee reasonably determines

172. *Id.*

173. *In re Tr. Created by Inman*, 269 Neb. 376, 383 (2005).

174. *Id.* at 376–77.

175. *Id.* at 377.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 378.

180. *Id.* at 379.

181. *Id.*

182. *Id.* at 383.

that, because of special circumstances, the purposes of the trust are better served with-out diversifying.”¹⁸³

The court held that under the facts, there was no absolute duty to diversify the trust assets, because special circumstances were involved.¹⁸⁴ Several factors were persuasive to the court.¹⁸⁵ The court noted that the duty to diversify can be modified when the assets at issue were originally placed in the trust by the settlor, and the trust terms authorize the trustee to retain the non-diversified assets if retention is in the best interests of the beneficiaries.¹⁸⁶

Additionally, the duty to diversify is subject to the prudent investor standard of care, which requires the trustee to consider circumstances, including the asset’s special relationship to the trust’s purposes or to one or more beneficiaries.¹⁸⁷ In this case, all of the beneficiaries, including Brackett, testified to the sentimental value of the farmland.¹⁸⁸

Finally, the court opined that Brackett intended to sell the property for purely personal reasons—a factor clearly weighing against authorization of the sale.¹⁸⁹

4. Retention of Assets

The former Texas Trust Code Section 113.003 authorized a trustee to retain property constituting the initial trust corpus (inception assets), without regard to diversification.¹⁹⁰ However, that section was repealed, effective January 1, 2004.¹⁹¹ In its place is current Section 117.006, which provides:

Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements [of the UPIA].¹⁹²

At the inception of the trust, and “with the trust’s investment objectives in mind, the trustee must review the original investments, and . . . formulate a plan for restructuring the portfolio to achieve a suitable level of risk and

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 384.

188. *Id.*

189. *Id.* at 382.

190. *See* TEX. PROP. CODE ANN. § 117.006.

191. *See id.*

192. *Id.*

expected return with appropriate degrees of diversification and income productivity.”¹⁹³ The trustee must decide which of the inception assets to retain and how much.¹⁹⁴ “If adjustments are to be made, [the trustee must determine] when and in what order assets should be sold or exchanged.”¹⁹⁵ These decisions determine whether the trust terms direct retention or disposition of any of the inception assets.¹⁹⁶

The terms of a trust may require the retention of investments that would otherwise be impermissible due to the type of investment or the lack of diversification.¹⁹⁷ Unless a mandatory direction or restriction on the retention of inception assets violates public policy, it is ordinarily binding on the trustee, displacing the normal duty of prudence.¹⁹⁸

If the trust directs the trustee to retain investments that are inception assets, the trustee is not liable for keeping them in the trust, except when retention would be impossible or unlawful.¹⁹⁹ However, a trustee is not under a duty to comply with a mandatory investment provision “if a court order directs or authorizes noncompliance because, as a result of circumstances not anticipated by the settlor, deviation from or modification of the provision will further the purposes of the trust.”²⁰⁰ However, absent those circumstances, the trustee will be held liable if the trustee fails to retain inception assets when directed to do so.²⁰¹

Even when the trustee is directed to retain inception assets, the trustee must continue to “exercise reasonable prudence in watching the trust, and they must make changes in investments whenever it appears that it is necessary to do so.”²⁰²

Importantly, “a *general authorization* . . . in the terms of the trust to retain investments received as part of a trust estate does not ordinarily abrogate the trustee’s duty [of] diversification or . . . to act with prudence in investment matters.”²⁰³

When a trust permits, but does not direct, the trustee to retain investments in inception assets, “the trustee is not liable for retaining them when there is no abuse of discretion in doing so.”²⁰⁴ The authorization (as opposed to directive) to retain typically does not allow the trustee to retain the inception assets “if, under the circumstances, retention would be

193. RESTATEMENT (THIRD) OF TRS. § 92 cmt. a (A.L.I. 2007).

194. *Id.*

195. *Id.*

196. *Id.*

197. RESTATEMENT (THIRD) OF TRS. § 92 cmt. c (A.L.I. 2007).

198. *Id.* at § 91 cmt. e.

199. *Id.* at § 92 cmt. d.

200. *Id.* at § 91 cmt. e.

201. *Id.* at § 92 cmt. d.

202. *Clark v. Clark*, 144 S.W. 787, 791–93 (1928).

203. RESTATEMENT (THIRD) OF TRS. § 92 cmt. d(2) (A.L.I. 2007) (emphasis added).

204. *Id.* at § 92 cmt. d.

imprudent.”²⁰⁵ Authorization to retain inception assets, without more, does not usually modify the duties of loyalty or impartiality.²⁰⁶

There are a number of cases addressing whether an authorization to retain inception assets is an authorization for the trustee to retain assets that involve a conflict of interest, such as a corporate trustee retaining stock in the trustee itself.²⁰⁷ Relevant factors to consider in these cases include “whether the authorization to retain was general or specific; whether the conflict of interest was foreseeable by the settlor; and the purposes underlying authorization.”²⁰⁸

When a trust provision grants the trustee absolute, sole, or uncontrolled discretion to retain inception assets, or expressly exculpates the trustee from liability for retaining such assets, the trustee is usually not “insulate[d] . . . from judicial intervention or liability for abuse of discretion” completely.²⁰⁹ However, most courts consider such language to confer on the trustee greater latitude in exercising judgment regarding the retention of the inception assets.²¹⁰

There are considerations that may properly affect the trustee’s decision on whether to retain inception assets, including “the suitability of an existing investment to the needs and the contemplated portfolio and strategy of the particular trust.”²¹¹ Also relevant are “transaction costs and the tax consequences of sales or retentions.”²¹² For instance, when a trust asset acquires a new tax basis due to the death of the settlor, it is often desirable to sell the trust assets that, under the prior basis, would have resulted in large capital gains upon sale.²¹³ In determining whether to retain certain assets, “the trustee should consider whether (or to what extent) [selling inception assets] will allow the trust to realize and retain the full value of the property in question, [considering] factors ranging from tax consequences to special value the particular holding may have to the [trust, its beneficiaries],” or some objective of the settlor that may be inferred from the circumstances.²¹⁴

Whether and to what extent a trust instrument authorizing the trustee to retain inception assets dispenses with or modifies the trustee’s duty to diversify is a matter of interpretation.²¹⁵ Factors to consider in making this determination include whether the settlor intended to encourage or merely authorize retention of inception assets; whether the “authorization to retain

205. *Id.*

206. *Id.*

207. *Id.*

208. RESTATEMENT (THIRD) OF TRS. § 92 cmt. d (A.L.I. 2007).

209. *Id.* at § 92 cmt. d(1).

210. *Id.*

211. *Id.* at § 92, cmt. a.

212. *Id.*

213. *See id.* § 92 reporter’s note to cmt. a.

214. *Id.* § 92 cmt. a, d(2).

215. *Id.*

applies to specific assets, to particular types of investments, or to all of the property received” by the trustee at the inception; “the character of the original trust property;” the purpose of the trust generally; and any identifiable purpose for the particular grant of authority.²¹⁶

5. Diversification and Retention Cases

Commentary on the Texas Property Code Section 117.002 provides that the UPIA has been enacted in a substantial majority of states.²¹⁷ With this admonition that the UPIA is to be applied and construed to promote uniformity in the laws of the enacting states, we can expect to see, in briefs and court opinions, more reliance on decisions from other jurisdictions addressing trust investment issues.²¹⁸ Thus, Texas courts can and should give precedential weight to decisions from other jurisdictions when the UPIA or similar statutes have been adopted.²¹⁹

In *Wood v. U.S. Bank, N.A.*, the settlor was the initial trustee, and on his death, Firststar Bank became the successor trustee.²²⁰ The trust agreement authorized the trustee:

*[t]o retain any securities in the same form as when received, including shares of a corporate trustee [], even though all of such securities are not of the class of investments a trustee may be permitted by law to make and to hold cash uninvested as they deem advisable and proper.*²²¹

At its inception, almost “80 percent of the trust assets were invested in Firststar stock” (i.e. in the corporate trustee’s stock), with the remaining investments in stock of another bank.²²² The Firststar stock had the strongest earnings.²²³ To raise funds to pay debts, Firststar, as trustee, sold two-thirds of the other bank’s stock and only 10% of Firststar’s stock.²²⁴ As of October 1998, Firststar stock was at \$21 per share, and it rose to almost \$35 per share in early 1999.²²⁵ In April 1999, a beneficiary and her financial advisor requested that the trustee diversify, but the trustee failed to do so.²²⁶ The stock plunged, and by

216. *Id.*

217. See Glenn M. Karisch, *The Two UPIAs, The Uniform Prudent Investor Act and The Uniform Principal and Income Act—How They Will Change the World*, <https://www.texasprobate.net/articles/two-upias.pdf> [http://perma.cc/Z68N-VXY4] (last visited Sept. 22, 2025).

218. Author’s original thought.

219. *Id.*

220. *Wood v. U.S. Bank, N.A.*, 828 N.E.2d 1072, 1074 (Ohio Ct. App. 2005).

221. *Id.* at 1074–75 (emphasis added).

222. *Id.* at 1074.

223. *Id.* at 1075.

224. *Id.* at 1075–76.

225. *Id.* at 1076.

226. *Id.*

mid-2000, it was worth only \$16 per share.²²⁷ Firststar's failure to diversify cost the trust over \$770,000.²²⁸

The court considered whether the trust terms that permitted retention of the inception assets eliminated the trustee's duty to diversify.²²⁹ The court noted the rule that "[a] trustee shall diversify the investments of a trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying."²³⁰ Although such a duty may be altered by the trust instrument, the court held that the language in this specific trust did not modify the duty.²³¹

The court noted that without a trust provision expressly allowing the trustee to hold stock in its own company, the trustee would breach the duty of loyalty.²³² The clause authorizing the trustee to retain the securities in the same form as when received, "even though all of such securities are not of the class of investments a trustee may be permitted by law to make," is a common clause intended to authorize a corporate trustee to continue to hold investments in themselves without breaching the duty of loyalty.²³³ However, the trustee still has the duty to act prudently, and diversification is still normally required.²³⁴ The clause's failure to explicitly mention diversification was important in determining that the duty to diversify was not modified.²³⁵

The court also noted that the settlor, who was the initial trustee, faced "significant tax consequences that precluded [him] from diversifying by selling the Firststar stock during his lifetime, but that hurdle was removed upon his death."²³⁶ Had the trustee "wanted to eliminate Firststar's duty to diversify, he could simply have said so[, and he] could have mentioned that duty in the retention clause[, or] he could have included another clause specifically lessening the duty to diversify[, but he did not."²³⁷ The court held that "the language of a trust does not alter a trustee's duty to diversify unless the instrument creating the trust clearly indicates an intention to do so."²³⁸

Finding that the clause at issue was the type of general authorization to retain investments mentioned in the Restatement (Third) of the Law of Trusts, the clause did not give the necessary authorization, direction to eliminate, or reduce the duty to diversify.²³⁹

227. *Id.*

228. *Id.*

229. *Id.* at 1077.

230. *Id.* at 838.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 840.

In *Americans for the Arts v. Ruth Lilly Charitable Remainder Annuity Trust*, an Indiana court held that the language used in the trust was “precisely the type of language . . . [that] explicitly lessen[s] the duty to diversify.”²⁴⁰ “Ruth was the sole surviving great-grandchild of Eli Lilly, the founder of Eli Lilly & Company.”²⁴¹ A conservator was appointed for Ruth’s estate, and the conservator petitioned the probate court to “draft a new estate plan for Ruth.”²⁴² All the beneficiaries of the existing estate plan were involved in drafting the plan, which created two trusts.²⁴³ The trusts granted the trustee the following powers and rights:

*To retain indefinitely any property received by the trustee and invest and reinvest the trust property in stocks, bonds, mortgages, notes, shares of stock of regulated investment companies or other property of any kind, real or personal, including interests in partnerships . . . and any investment made or retained by the trustee in good faith shall be proper despite any resulting risk or lack of diversification or marketability and although not of a kind considered by law suitable for trust investments.*²⁴⁴

The trusts were funded on January 18, 2002, entirely with Lilly stock, which was valued at \$75 per share on the date of funding, for a combined value of \$286 million.²⁴⁵ “By October 2002, most of the Lilly stock . . . had been sold and the [trusts] were fully diversified.”²⁴⁶ However, the value of Lilly stock declined significantly between January 2002 and October 2002, and some beneficiaries alleged that the trustee breached their fiduciary duties by waiting too long to diversify.²⁴⁷

Citing the Restatement (Third) of Trusts, the beneficiaries argued that the provisions in the trusts were merely general authorizations to retain investments and that such language did not abrogate the trustee’s duty to diversify.²⁴⁸ The court of appeals disagreed, noting that the Restatement (Third) of Trusts recognizes “that the terms of the trust ‘may permit the trustee to retain all of the investments made by the settlor, or a larger proportion of them than would otherwise permitted,’” leaving the opportunity open for a settlor to “lessen the trustee’s duty to diversify by including a clause to that effect in the trust instrument.”²⁴⁹

240. *Americans for the Arts v. Ruth Lilly Charitable Remainder Annuity Tr.*, 855 N.E.2d 592, 600–01 (Ind. App. 2006).

241. *Id.* at 594.

242. *Id.*

243. *Id.* at 594–95.

244. *Id.* at 595.

245. *Id.*

246. *Id.*

247. *Id.* at 596.

248. *Id.*

249. *Id.*

The court considered some of the other factors mentioned in Section II.F in determining whether the trustee abused its discretion, noting there were “no allegation[s] that the [trustee] acted in bad faith” or that the trustee had breached the duty of loyalty.²⁵⁰ The court expressly differentiated the trust in *Wood*, noting the trusts in *Lilly* “explicitly eliminate the duty to diversify and exonerate the trustee for its failure to do so.”²⁵¹ Under the circumstances, the court in *Lilly* held “that the general [r]etention [c]lause. . .combined with the clause explicitly lessening the trustee’s duty to diversify was sufficient to except the [trustee] from the default duty to diversify trust assets.”²⁵²

In *Jewett v. Capital Nat. Bank of Austin*, the settlor “delivered 2000 shares of Tracor, Inc. stock worth \$44,000 (\$22.50 per share)” to the trustee in 1970.²⁵³ “The stock had been [declining] since 1968; and continued to go down until 1975, when it was worth less than \$2000 (\$1.87 per share).”²⁵⁴ “The stock never paid a dividend prior to 1976, when it paid a 10 cent per share dividend.”²⁵⁵ The trustee distributed the corpus and income of the trust according to the trustee’s determination within their discretion of what was reasonably necessary for the support, maintenance, or education of the beneficiaries.²⁵⁶ The corporate trustee never sold any of the stock except to pay its own attorneys’ fees and on two occasions to provide educational support for a beneficiary.²⁵⁷ The trustee’s bank had “no established procedure whereby a trust is reviewed by the Investment Department of the Bank.”²⁵⁸

The trustee had the power to “invest and reinvest in property of any kind,” even assets of a “speculative nature, which promise to yield the greatest return and result in maximum appreciation of corpus,” and the trustee was “relieved from all liability for any loss of the trust funds resulting from the investment and reinvestment of the trust funds in any speculative business or venture.”²⁵⁹

The court of appeals held that a fact issue existed as to whether the trustee breached its fiduciary duties.²⁶⁰ The court stated that the “trustee can exercise his fiduciary duty in such a negligent manner that his lack of diligence will result in a breach of his fiduciary duty.”²⁶¹ The “trustee is under a duty . . . to distribute the risk of loss by a reasonable diversification

250. *Id.* at 601.

251. *Id.*

252. *Id.* at 601–02.

253. *Jewett v. Capital Nat’l Bank of Aus.*, 618 S.W.2d 109, 111 (Tex. Civ. App.—Waco, writ ref’d n.r.e.).

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 111.

260. *Id.* at 112.

261. *Id.*

of investments, unless under the circumstances it is not prudent to do so.”²⁶² While the trust instrument relieved the trustee of liability for investing in speculative assets, the trustee was not relieved of its negligence in failing to review the trust periodically or in failing to diversify the trust’s corpus.²⁶³

In *Warmack v. Crawford*, 90% of the trust assets at its inception consisted of stock in International Shoe Company.²⁶⁴ The trust provided that the “trustees, without accountability for loss, may retain as investments of the trust estate, any and all real estate, or bonds, stocks, loans, and other securities received in trust hereunder.”²⁶⁵ The settlor worked for International Shoe for years.²⁶⁶ The court held that the trustees did not have to sell any stock unless it appeared to them that the stock was not a prudent investment, maintaining consideration for the preservation of the estate and income generation.²⁶⁷

In *Baldus v. Bank of California*, the court listed three factors to consider when determining whether the trust instrument negated the duty to diversify:

- (1) [W]hether the settlor has directed, recommended, or merely authorized the retention of the investments; (2) whether an authorization to retain is applicable generally to property included in the trust at the time of its creation, or is applicable to specific securities or types of securities; or (3) the character of the trust property and the purposes of the trust.²⁶⁸

The beneficiary in *Baldus* sued the trustee for failure to diversify.²⁶⁹ Stock in National Lead Company originally comprised 99% of the trust corpus, and the settlor worked for the company for years.²⁷⁰ The trust specifically authorized the trustee to retain the stock and provided that there “shall be no criticism or complaint of trustee’s action in retaining said stock should it deem it advisable.”²⁷¹ The settlor also gave the trustee “absolute management and control of the trust estate.”²⁷² The court held that the trustee had discretion to retain or sell the stock, and in the absence of any abuse of discretion for failure to diversify, there was no basis for imposing liability on the trustee.²⁷³

262. *Id.*

263. *Id.*

264. *Warmack v. Crawford*, 195 S.W.2d 919, 925 (Mo. Ct. App. 1946).

265. *Id.* at 925.

266. *Id.* at 920.

267. *Id.* at 925.

268. *Baldus v. Bank of Cal.*, 530 P.2d 1350, 1355 (Wash. Ct. App. 1975).

269. *Id.* at 1351–52.

270. *Id.* at 1351.

271. *Id.* at 1352.

272. *Id.* at 1356.

273. *Id.* at 1352.

In *W.A.K. ex re. Karo v. Wachovia Bank, N.A.*, Toney and Wachovia were co-trustees of a trust established in 1966 for the benefit of Toney and his son, Drew.²⁷⁴ The trustees began acquiring Wachovia stock, and by 2007, the Wachovia stock comprised 65% of the trust assets.²⁷⁵ Wachovia repeatedly recommended that the trustees diversify the trust assets, but Toney and Drew did not agree.²⁷⁶ “Toney and Drew signed ‘Letters of Retention’ (‘LORs’) that acknowledged Wachovia’s advice” and its conflict of interest in buying its own stock.²⁷⁷ The LORs stated that Toney and Drew wanted to “preserve the Trusts’ ownership of the . . . stock.”²⁷⁸ After the stock declined substantially in value, the beneficiaries sued Wachovia for failing to diversify.²⁷⁹

“The trust empower[ed] the [t]rustees to take actions ‘as they in their uncontrolled discretion may deem advisable,’ subject to certain conditions.”²⁸⁰ Additionally, the trust allowed the trustees “[t]o retain as permanent any now existing investments (including stock of the corporate Trustee or in any of its affiliated and holding companies) of the trust property and any investments hereafter transferred” to the trustees.²⁸¹ The trust also authorized the trustees “to invest the trust property and from time to time alter, change, or vary such investments and reinvestments thereof without being confined to investments lawful through statute or otherwise for fiduciaries in the State of Virginia.”²⁸² The court held that this language abrogated the requirements of the Prudent Investor Rule.²⁸³ The court also upheld the LORs signed by Toney and Drew.²⁸⁴

In *In re HSBC Bank USA, N.A.*, HSBC Bank was the trustee of a trust created in 1957.²⁸⁵ The settlor’s family co-founded Woolworth Company, and the settlor served on the board and owned significant stock in The Marine Trust Company of Western New York (Marine), which was the initial trustee of the trust and a predecessor-in-interest of the trustee.²⁸⁶ The purpose of the trust was to generate income for the beneficiaries.²⁸⁷ The trust was initially funded with Woolworth and Marine stock, and the trust gave the trustee the power to invest and reinvest trust funds “without regard to diversification or

274. *W.A.K. ex re. Karo v. Wachovia Bank, N.A.*, 712 F. Supp. 2d 476, 479 (E.D. Va. 2010).

275. *Id.* at 479–80.

276. *Id.* at 480.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 481.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.* at 486.

285. *In re HSBC Bank U.S.A., N.A. (Knox)*, 947 N.Y.S.2d 292, 292–93 (App. Div. 2012).

286. *Id.* at 296.

287. *Id.* at 304.

to limitations or restrictions of any kind.”²⁸⁸ The beneficiaries objected to the trustee’s investment decisions and the lower court awarded \$21.5 million in damages plus attorneys’ fees.²⁸⁹ On appeal, the court examined whether the trustee acted imprudently in retaining the Woolworth shares and in holding overweight concentrations in certain other securities.²⁹⁰

Though the standard of care has changed over time, the court noted that the following principles applied under all such standards: (a) “[I]t is not sufficient that hindsight might suggest that another course would have been more beneficial; nor does a mere error of investment judgment mandate a surcharge”; (b) “retention of securities received from the creator of the trust may be found to be prudent even when purchase of the same securities might not”; (c) “[r]egardless of the applicable standard of care, we recognize those standards of care have always been deemed to be subordinate to the provisions of the governing instrument”; and (d) “[i]n order to warrant a surcharge, ‘the objectant must show that a financial loss resulted from the trustee’s negligence or failure’ to act prudently.”²⁹¹

Based on concessions from the trustee’s own portfolio manager, the court determined that the trustee acted imprudently in retaining the Woolworth shares.²⁹² Further, in light of the trust’s purpose to generate income for the income beneficiaries, the trustee should have divested the Woolworth shares on the date when those shares ceased to pay dividends.²⁹³

The beneficiaries also alleged that certain positions of the trust’s stock violated the duty to diversify.²⁹⁴ However, the court disagreed, finding that the mere presence of overweight concentrations at various times during the trust’s existence did not constitute a breach of the duty to diversify.²⁹⁵ Additionally, the beneficiaries had not proved that the trust sustained a financial loss due to these overweight concentrations.²⁹⁶ Further, even if the beneficiaries had proven financial loss, that alone was not sufficient to find a breach, because “the mere fact that a trust might have been able to earn more money through other investments ‘does not establish a breach of duty which would warrant a surcharge.’”²⁹⁷

Further, to the extent the over concentrations consisted of Woolworth or Marine stock, the court found that because those stocks were in overweight positions when the “trust was established, the retention of those securities ‘may be found to be prudent even when purchase of the same securities might

288. *Id.* at 296–97.

289. *Id.* at 298.

290. *Id.* at 299.

291. *Id.* at 300–01 (citations omitted).

292. *Id.* at 301.

293. *Id.*

294. *Id.* at 305.

295. *Id.*

296. *Id.* at 317.

297. *Id.* at 317 (citations omitted).

not.”²⁹⁸ “[The] special relationship between the Knox family and both Woolworth and Marine, and Knox III indicated a preference to retain stock in those family businesses.”²⁹⁹ Finally, the overweight holdings of Woolworth were justified in light of the fact that the purpose of the trust was to generate income and the Woolworth stock was the main source of income to the trust for the entire time it was retained.³⁰⁰

IV. DECISIONS TO ASSERT TRUST CLAIMS

As mentioned in Section II.F, one of the factors a court should consider in determining whether a trustee abused its discretion is the “existence or non-existence, the definiteness or indefiniteness, of any external standard by which the reasonableness of the trustee’s conduct can be judged.”³⁰¹ The prior section covered trustee decisions when there is an external standard by which the reasonableness of the trustee’s conduct can be judged, under the UPIA.³⁰² This section examines trustee decisions when there is no external standard by which the reasonableness of the trustee’s conduct can be judged, namely, decisions regarding whether to file a lawsuit on behalf of a trust to pursue trust claims.³⁰³

A. Trustee’s Determination to Enforce Claims Is a Discretionary Act

Under the Texas Property Code, “[a] trustee may compromise, contest, arbitrate, or settle claims of or against the trust estate or the trustee.”³⁰⁴ The Code Construction Act provides that the term “may” “creates discretionary authority or grants permission or a power.”³⁰⁵ On the other hand, the term “shall” imposes a duty.³⁰⁶ “When a trustee is granted the authority to commence, settle, arbitrate, or defend litigation on behalf of a trust, the trustee is authorized, but not required, to pursue litigation.”³⁰⁷ The trustee’s duties almost “universally require them to take into their possession” real property and tangible personal property and to “reduce choses in action to evidence or enforceability possession.”³⁰⁸ This duty of obtaining both

298. *Id.* at 306 (citations omitted).

299. *Id.*

300. *Id.*

301. RESTATEMENT (SECOND) OF TRS. § 187 cmt. d (A.L.I. 1959); *see also* RESTATEMENT (THIRD) OF TRS. § 87 cmt. b (A.L.I. 2007).

302. *See supra* Part III.

303. *See infra* Sections IV.A–IV.F.

304. *See* TEX. PROP. CODE ANN. § 113.019; *In re XTO Energy, Inc.*, 471 S.W.3d 126, 130 (Tex. App.—Dallas 2015, orig. proceeding).

305. TEX. GOV’T CODE ANN. § 311.016.

306. *Id.*

307. *In re XTO Energy, Inc.*, 471 S.W.3d at 131.

308. HESS, BOGERT & BOGERT, *supra* note 19, at § 583.

physical possession of the asset comprising the trust estate and the documents representing them is a trustee's primary obligation.³⁰⁹

"If a trustee unreasonably abandons trust property . . . , [even in good faith, he will] be liable for its value."³¹⁰ The trustee is required to use reasonable diligence to discover trust property and to take control of it without unreasonable delay.³¹¹

"A trustee's [power] to determine whether to pursue litigation on behalf of a trust is a discretionary decision that is not to be interfered with by courts or beneficiaries without a showing of abuse."³¹²

"A trustee is under a duty . . . to take reasonable steps to enforce any claim[s] which [it] holds as trustee against [a] predecessor trustee"³¹³ In the case of a testamentary trust, the trustee has a duty to compel the executors of the estate to transfer to the trustee "property which they are under a duty to transfer, or to redress any breach of duty committed by [the executors]."³¹⁴

If it appears to the trustee that a claim is reasonably uncollectible, the trustee is not under a duty to incur the expense of bringing suit to collect it.³¹⁵ It is not the duty of the trustee to bring an action to enforce a claim that is a part of the trust property if it is reasonable not to bring such an action.³¹⁶ The trustee should consider the probable expense involved in the action, the probability that the action would be unsuccessful, and that, if successful, the probability that the claim would be uncollectible due to the insolvency of the defendant or otherwise.³¹⁷

B. Beneficiaries Can Direct Trustee to Abstain from Filing Suit

Under Texas Property Code Section 113.028(a), the trustee may not prosecute or assert a claim for damages in a cause of action against a party, who is not a beneficiary of the trust, if each beneficiary of the trust provides written notice to the trustee of the beneficiary's opposition to the trustee's prosecuting or asserting the claim in the cause of action.³¹⁸ The trustee is not

309. *Id.*

310. *Id.*

311. *Id.*

312. RESTATEMENT (THIRD) OF TRS. § 87 cmt. a (A.L.I. 2007); *In re XTO Energy, Inc.*, 471 S.W.3d at 126, 130; *Alpert v. Riley*, 274 S.W.3d 277, 296 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (the trustee retained discretion to continue the prosecution of a lawsuit); *DeRouen v. Bryan*, No. 03-11-00421-CV, 2012 WL 4872738, at *4 (Tex. App.—Austin Oct. 12, 2012, no pet.) (mem. op.).

313. RESTATEMENT (SECOND) OF TRS. § 177 cmt. a (A.L.I. 1959); RESTATEMENT (THIRD) OF TRS. § 177 (A.L.I. 2007).

314. RESTATEMENT (SECOND) OF TRS. § 177 cmt. a (A.L.I. 1959).

315. *Id.*

316. *See id.*

317. *Id.* § 177 at cmt. c.

318. TEX. PROP. CODE ANN. § 113.028(a).

liable for failing to prosecute or assert a claim in a cause of action if the beneficiaries prohibit such action in accordance with Section 113.028(a).³¹⁹

In *Alpert v. Riley*, the purported trustee, Riley, filed suit against Alpert, who was the settlor of the trusts and the father of the trust beneficiaries.³²⁰ Texas Property Code Section 113.028 became effective in 2005, during the course of the litigation.³²¹ The court held that, before Section 113.028 became effective, the trustee, Riley, retained discretion to continue his suit against Alpert despite the beneficiaries' objections.³²² However, the Legislature removed such discretion by enacting Section 113.028.³²³ After the statute was enacted, the beneficiaries filed a written notice of opposition.³²⁴ "Accordingly, when Riley received that opposition, he had no choice but to heed their wishes and stop prosecuting the claims against Alpert."³²⁵ The court determined that "[a]ny attorneys' fees or legal expenses incurred in prosecuting the damages claims against Alpert after the beneficiaries' written notice of opposition are not authorized by the Trust Code, and are not reasonable or necessary as a matter of law."³²⁶

Texas Property Code Section 113.028(a) is a useful tool that beneficiaries can use to stop a trustee from suing a third party.³²⁷ The trustee can also protect themselves by asking the trust beneficiaries to sign a document that prohibits the trustee from pursuing claims against a third party.³²⁸ Before asking the beneficiaries to sign such a document, the trustee should disclose to them all material facts related to the claim, including any potential conflicts of interest for the trustee.³²⁹

If the trustee is in a situation where one beneficiary wants the trustee to file suit but the other beneficiaries object, the objecting beneficiaries can still sign a document objecting to the trustee's pursuit of the lawsuit.³³⁰ Although such a document does not invoke Section 113.028's prohibition against the trustee filing suit, such a document can be useful in other ways.³³¹ For instance, if the beneficiary later sues the trustee for failing to file suit, the trustee may use the document to justify their decision not to sue.³³² Additionally, if the trustee expends trust funds defending against the beneficiary's suit, such a document can be used by the objecting beneficiaries

319. *Id.* § 113.028(b).

320. *Alpert v. Riley*, 274 S.W.3d 277, 295–96 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

321. *Id.*

322. *Id.* at 296.

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *See* TEX. PROP. CODE ANN. § 113.028(a).

328. *See id.*

329. Author's original thought.

330. *Id.*

331. *See* TEX. PROP. CODE ANN. § 113.028(a).

332. Author's original thought.

and the trustee to argue that the beneficiary suing the trustee should be responsible for the trustee's attorneys' fees, rather than the trust estate.³³³ The beneficiaries and the trustee can argue that the trust estate—and thereby the objecting beneficiaries—should not be responsible for attorneys' fees incurred solely due to the actions of one beneficiary who acted over the objection of the others.³³⁴ Such an argument could also be used if the beneficiary pursues a derivative action on behalf of the trust and is unsuccessful.³³⁵ The objecting beneficiaries could argue that the beneficiary pursuing the derivative claim acted over the objection of the other beneficiaries, and should be solely responsible for attorneys' fees.³³⁶

C. Cases Related to a Trustee's Decision Whether to Assert a Claim

There are not many Texas cases addressing situations in which a trustee exercises their discretion to file suit, other than *DeRouen v. Bryan*.³³⁷ There are numerous cases outside Texas addressing this issue, and Bogert and the Restatement (Second) of Trusts thoroughly cover it.³³⁸ A review of these cases and authorities may be helpful in advising a trustee on whether to file suit, or in advising a beneficiary on whether to sue the trustee for failure to file suit.³³⁹

In *DeRouen*, the plaintiff sued the trustee for failing to pursue litigation against a third party.³⁴⁰ The court determined that the trustee was authorized, but not required, to pursue litigation against the third party, and absent bad faith or an abuse of discretion, the trustee could not be held liable for refusing to file suit.³⁴¹ The court held that there was no evidence that the trustee's refusal to pursue legal action to recover the funds was in bad faith or an abuse of discretion; thus, there was no error in the trial court's grant of summary judgment on the breach of fiduciary duty claim.³⁴² The trustee testified in a deposition that they decided not to pursue litigation after considering

333. See generally Stimmel, Stimmel & Roeser, *Who Pays Trustee's Legal Fees in Trust Litigation?*, STIMMEL L., <https://stimmellaw.com/en/articles/who-pays-trustees-legal-fees-trust-litigation> [https://perma.cc/4TGP-2Q2K] (last visited Sept. 16, 2025) (explaining that when a beneficiary sues the trustee, it is typical for the trustee to utilize trust assets to pay the attorney to defend themselves).

334. Author's original thought.

335. See generally Albert Oosternott, *Derivative Actions in Estate Litigation*, WEL PARTNERS BLOG (Dec. 20, 2021), <https://welpartners.com/blog/2021/12/derivative-actions-in-estate-litigation> [https://perma.cc/E3LU-WV3D] (explaining that derivative actions are a convenient way for a beneficiary to sue an estate that the executor does not want to take on).

336. Author's original thought.

337. See cases cited *infra* Section IV.C; *DeRouen v. Bryan*, No. 03-11-00421-CV, 2012 WL 4872738, at *2 (Tex. App.—Austin Oct. 12, 2012, no pet.) (mem. op.).

338. See cases cited *infra* Section IV.C; HESS, BOGERT & BOGERT, *supra* note 19, at § 558; RESTATEMENT (SECOND) OF TRS. § 186 (A.L.I. 1959); RESTATEMENT (THIRD) OF TRS. § 87 (A.L.I. 2007).

339. Author's original thought.

340. *DeRouen*, 2012 WL 4872738 at *2.

341. *Id.* at *4.

342. *Id.* at *5.

counsel's advice, discussions with the settlor, and the potential costs of litigation.³⁴³

In *Richards v. Midkiff*, the plaintiff sued his co-trustees, alleging that they breached their fiduciary duties in failing to sue for a judicial interpretation of a lease.³⁴⁴ The court stated:

Trustees are under a duty to the beneficiaries to take all reasonable steps to realize claims held in trust. However, they have no duty to bring an action to enforce a claim pertaining to the trust property if it appears unreasonable to do so either because the action might be unsuccessful or would involve an expense disproportionate to the possibility of success The best interests of the trust estate is the criteria in all cases.³⁴⁵

The court examined the lease and found it was unambiguous.³⁴⁶ The trustees also retained two different attorneys to analyze the situation, and both concluded that the lease was unambiguous and enforceable.³⁴⁷

It is well established that trustees may rely on the opinion of reputable counsel in determining the possibility of success in legal proceedings in order to arrive at a judgment whether or not to pursue such a course of action To seek and follow the advice of competent counsel is certainly indicative of prudence in the exercise of discretion.³⁴⁸

As the court noted, the “determination of the trustees not to bring suit against the [lessee] to reform the lease is not subject to review in the absence of a showing of an abuse of discretion.”³⁴⁹

The record in this case reveals at most a claim of doubtful validity which was thoroughly reviewed by the trustees, their regular counsel and special counsel In good faith they determined that no action for reformation should be brought and no abuse of discretion has been shown. The trustees simply chose not to pursue a frivolous claim.³⁵⁰

In *In re Hartje's Estate*, the trust beneficiaries sued the trustee for failure to collect sums owed by the settlor.³⁵¹ The trustees explained that pursuing claims against the settlor would have resulted in the forfeiture of the settlor's property and would have destroyed the settlor's ability to make further

343. *Id.*

344. *Richards v. Midkiff*, 396 P.2d 49, 62 (Haw. 1964).

345. *Id.* (citing RESTATEMENT (SECOND) OF TRS. § 177 cmt. c (A.L.I. 1959)).

346. *Id.*

347. *Id.* at 60.

348. *Id.* (internal citations omitted).

349. *Id.* at 62.

350. *Id.*

351. *In re Hartje's Est.*, 181 A. 497, 499 (Pa. 1935).

payments.³⁵² The trustee demonstrated that they consistently considered how to handle the situation, and the trust officers—who were well-informed on real estate issues—determined that it was inadvisable to enter judgment against the settlor and that such a judgment would not be helpful to the trust.³⁵³ The court found it unlikely that the settlor had sufficient funds to pay the defaulted amounts.³⁵⁴ The court stated:

The administration of such a trust as this depends upon the judgment and discretion of the trustee. Had it pursued [the settlor] by judgment execution the estate would probably have suffered more, the beneficiary, Mrs. Hartje, received less than has been paid her, and ultimately the remaindermen get a smaller amount than they are likely to receive.³⁵⁵

The court determined that the trustees administered the trust with care and prudence.³⁵⁶ In *In re Carter's Estate*, the trustee held mortgages on three properties.³⁵⁷ The obligors on the mortgages defaulted.³⁵⁸ The trustee took back the properties but did not sue for a deficiency judgment on the amount the borrowers owed.³⁵⁹ The trial court surcharged the trustee for failing to institute deficiency proceedings against the borrowers.³⁶⁰ On appeal, the trustee argued that under the law at the time, it was almost impossible to prevail on a deficiency judgment; therefore, they were not liable.³⁶¹ The appellate court agreed, recognizing that any suit would have been expensive and would have required a reversal of the law at the time.³⁶² The court held the trustee should not be surcharged.³⁶³

In *Estate of Stetson*, the trustee entered into negotiations to sell stock owned by the trust.³⁶⁴ The buyer submitted an offer, and the trustee accepted, but before the trustee delivered the acceptance, one of the trust beneficiaries threatened to sue the buyer and the trustee if the deal was consummated.³⁶⁵ The trustee notified the buyer of the beneficiary's threat, and the buyer withdrew their offer, saying they would not buy unless there was an assurance that the beneficiary would not sue.³⁶⁶ The trustee immediately

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. *In re Carter's Est.*, 78 A.2d 904, 911 (N.J. 1951).

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.* at 914–15.

364. *Est. of Stetson*, 345 A.2d 679, 682 (Pa. 1975).

365. *Id.*

366. *Id.*

retained counsel to determine whether they had grounds to sue for specific performance.³⁶⁷ The attorney advised against suing, opining that the claim was questionable, the trustee would have difficulty proving damages, and litigation would be costly.³⁶⁸ The trustee decided not to sue the buyer.³⁶⁹ The trust beneficiaries sued the trustee for failing to sue the buyer when the buyer withdrew their offer to buy the stock.³⁷⁰ The court held that the trustee's failure to institute litigation against the buyer was not a failure to exercise skill, prudence, or diligence.³⁷¹

While reliance on the advice of counsel does not provide a fiduciary with a blanket immunity in all circumstances, . . . it persuasively rebuts a claim for breach of duty when the decision concerns a matter so dependent on legal expertise as whether to institute litigation. The trustee was fully justified under the situation here in acting upon counsel's advice not to bring suit.³⁷²

In *Frederick and Dorothy Westling Family Trust v. Westling*, three siblings and their mother were co-trustees of a family trust.³⁷³ One of the siblings borrowed money from the trust to buy a home; he defaulted on the loan, and the home was lost in foreclosure.³⁷⁴ Two of the co-trustees sued the debtor co-trustee.³⁷⁵ The mother intervened, claiming that the two co-trustees were acting without authority because, under the trust, the mother had final say on trustee decisions and did not agree to the lawsuit.³⁷⁶ The court stated that although recovery of the funds owed by the co-trustee would benefit the trust and its beneficiaries, the mother feared that litigation would further deplete the trust's funds because of the unlikelihood of recovering anything from the debtor co-trustee, and the trustees could be reimbursed for their attorney's fees out of the trust estate.³⁷⁷

It is not the duty of the trustee to bring an action to enforce a claim which is a part of the trust property if it is reasonable not to bring such an action, owing to the probable expense involved in the action or the probability that the action would be unsuccessful or that, if successful, the claim would be uncollectible owing to the insolvency of the defendant or otherwise.³⁷⁸

367. *Id.*

368. *Id.* at 684.

369. *Id.*

370. *Id.* at 686.

371. *Id.*

372. *Id.*

373. *Frederick & Dorothy Westling Fam. Tr. v. Westling*, 242 P.3d 805, 806 (Utah Ct. App. 2010).

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.* at 807.

D. Factors Relevant to Determination of Whether to File Suit

The case law addressed above shows that the following are some of the important factors the trustee should consider in determining whether to file suit:

1. Viability of the claim.³⁷⁹
2. Potential recovery to the trust if successful.³⁸⁰
3. Ability to recover on a judgment, including solvency of the defendant.³⁸¹
4. Estimated cost to bring suit.³⁸²
5. Size of the trust estate and whether it can support attorney's fees.³⁸³
6. Beneficiaries' support for, or opposition to, bringing claim.³⁸⁴
7. Advice of legal counsel on viability of claim.³⁸⁵
8. Statute of limitations and other affirmative defenses available to defendant.³⁸⁶
9. Whether the law is settled on the issue.³⁸⁷

E. Remedies When a Trustee Fails to Pursue Trust Claims

According to the Restatement (Second) of Trusts, when the court controls the exercise of a power by the trustee, it may direct the trustee to act or refrain from acting by setting aside a transaction in which the trustee has already acted, or by holding the trustee liable for action or inaction.³⁸⁸ Occasionally, the court removes a trustee or denies or diminishes the trustee's compensation when they have abused their discretion.³⁸⁹

When the trustee fails to pursue a claim, the beneficiary could file a declaratory judgment action asking the court to direct the trustee to file the lawsuit under Texas Civil Practice and Remedies Code Section 37.005.³⁹⁰ But if the trustee is already reluctant to file suit, they are unlikely to be the best advocate for the trust.³⁹¹ In some situations, the beneficiary may be able to bring a derivative suit on behalf of the trust estate against the third party.³⁹²

379. See RESTATEMENT (SECOND) OF TRS. § 187 cmt. d (A.L.I. 1959).

380. Est. of Stetson, 345 A.2d 679, 686 (Pa. 1975).

381. *Westling*, 242 P.3d at 807.

382. *Id.*

383. *Id.* at 806.

384. *Id.*

385. *Richards v. Midkiff*, 396 P.2d 49, 60 (Hawaii 1964).

386. See RESTATEMENT (SECOND) OF TRS. § 219 cmt. b (A.L.I. 1959)

387. Author's original thought.

388. RESTATEMENT (SECOND) OF TRS. § 187 cmt. b (A.L.I. 1959).

389. *Id.*

390. TEX. CIV. PRAC. & REM. CODE § 37.005.

391. RESTATEMENT (SECOND) OF TRS. § 177 (A.L.I. 1959).

392. See Oosternott, *supra* note 335.

The beneficiary could seek removal of the trustee and appointment of a successor trustee who is willing to bring the claim.³⁹³ However, removal can take time, and the statute of limitations on the claim against the third party may run while the removal proceeding ensues.³⁹⁴

If the beneficiary is unable to bring an action against the third party before the limitations have run or before the third party becomes insolvent, the beneficiary may seek damages against the trustee for failing to file suit.³⁹⁵

The measure of damages is unclear when a trustee fails to file suit, and what the beneficiary must establish to make such a recovery.³⁹⁶ Is the beneficiary required to prove a suit within a suit (i.e., that the trustee would have prevailed in the underlying action and the amount of damages he would have recovered for the trust estate) similar to what is required in a legal malpractice context?³⁹⁷

Are damages available if the limitations on the claim against a third party have not yet run?³⁹⁸ It would appear that if a cause of action against a third party remains viable, the beneficiary could not recover damages from the trustee.³⁹⁹ Otherwise, if the trustee were removed and the successor trustee pursued claims against the third party, the trust could achieve a double recovery—one from the trustee and one from the third party.⁴⁰⁰ Such a result would be inequitable.⁴⁰¹

According to Bogert, when the trustee fails to proceed with reasonable speed and skill to collect the trust property, the measure of damages is the difference between the value of the property actually received and what would have been obtained by the use of ordinary care and diligence, plus income lost.⁴⁰² For example, if the trustee finds realty that belongs to the trustee, but it is in the hands of an adverse possessor, and they delay bringing suit to recover possession until the adverse possession period has run, the trustee is liable for damages to the extent of the value of the realty, as it was when it could have been recovered, with interest or rents as representing lost use value.⁴⁰³

393. See RESTATEMENT (SECOND) OF TRS. § 107 (A.L.I. 1959)

394. *Id.* §§ 107 cmt. b, 214 cmt. d.

395. *Id.* at § 205 illus. 1–2.

396. See generally *id.* (highlighting how the Restatement does not provide clear guidance).

397. Author's original thought.

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

402. HESS, BOGERT & BOGERT, *supra* note 19, at § 869.

403. *Id.*

F. Cases Demonstrating Remedies When a Trustee Fails to Pursue Trust Claims

There is little Texas case law on the issue of damages, but cases from outside of Texas may be instructive.⁴⁰⁴

In *In re Kline's Estate*, attorney Jacobs served as executor of the estate, and a bank served as the testamentary trustee.⁴⁰⁵ Jacobs turned over a portion of the estate to the trustee, but not the entire estate.⁴⁰⁶ After Jacobs died, it was discovered that he had misappropriated estate funds that should have been transferred to the trust.⁴⁰⁷ Jacobs' estate was insolvent.⁴⁰⁸ The trust beneficiaries sued the trustee for the loss caused by the executor's misappropriation, contending that the loss resulted from the trustee's gross negligence.⁴⁰⁹

The "trustee took no steps to obtain the property for four years, nor any steps to ascertain what had been or was being done with it."⁴¹⁰ The trustee argued that the beneficiaries were not entitled to relief because they "lack[ed] proof that timely action by the trustee would have saved the estate."⁴¹¹ The court held that when "there is a reasonable probability that a debt has been lost by the neglect of a guardian, [they are] responsible."⁴¹² According to the court, all that the beneficiary is required to do is show that "as a reasonable probability, timely action by the trustee would have averted the loss."⁴¹³ The trustee was surcharged for the entire loss, denied compensation, and required to pay their own attorneys' fees related to the lawsuit.⁴¹⁴

In *In re Wanamaker's Trust*, the trustee refused to file suit, so the beneficiary filed suit against a third party.⁴¹⁵ The beneficiary ultimately prevailed in their suit against the third party.⁴¹⁶ Then, the beneficiary sought damages against the trustee, alleging the trustee breached their duties by failing to sue the third party.⁴¹⁷ The beneficiary sought damages from the trustee because of the trustee's refusal to sue, including additional income taxes the beneficiary was compelled to pay "due to the award to [them] having been paid in a single year instead of having been paid each year as the

404. See generally *In re Kline's Estate*, 124 A. 280 (Pa. 1924) (describing cases outside of Texas that are instructive).

405. *Id.* at 281.

406. *Id.*

407. *Id.* at 282.

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.* at 283.

415. *In re Wanamaker's Tr.*, 17 A.2d 380, 381 (Pa. 1941).

416. *Id.* at 381.

417. *Id.*

payments accrued.”⁴¹⁸ The court denied a surcharge of the excess income taxes the beneficiary had to pay, stating:

Such a claim is too uncertain and speculative. Moreover, if the trustee had itself brought the suit and recovered, it is not at all certain that the litigation would not have run a course long enough to cause the sum recovered to have been paid at the time and in the amount it was.⁴¹⁹

In *Donovan v. Bryans*, two co-trustees of a corporation’s employee benefits plan approved unsecured loans to one of the trustees and the corporation Finest.⁴²⁰ Under the terms of the loan to Finest, the plan was to grant a security interest in Finest’s equipment.⁴²¹ Although the security agreement was executed, the trustees failed to file the financing statements.⁴²² When Finest defaulted on the loan, the trustees did nothing for two years, and Finest filed for bankruptcy.⁴²³ The loan was discharged in bankruptcy.⁴²⁴ The court held that under the law of trusts, “the fiduciary has a duty to take reasonable steps to act on claims held in trust.”⁴²⁵ The court concluded that when Finest’s obligations were discharged in bankruptcy, the balance of \$26,222 became uncollectible.⁴²⁶ The court held that “the burden shifted to the co-trustees to establish that the loss to the Plan would have occurred even if they had not failed to perfect the security agreement and if they had not failed to make reasonable efforts to obtain repayment.”⁴²⁷ The court ultimately held the co-trustees personally liable, jointly and severally, for \$26,222, awarding interest at the rate of 9%, which was the interest rate on the loan.⁴²⁸

V. TAKEAWAYS

The purpose of this Article is to review how the trustee’s decision making is analyzed by courts and how the language in trust instruments impacts those decisions.⁴²⁹ This is not a black-and-white area of the law, and the facts and circumstances are often case determinative.⁴³⁰ However, for the

418. *Id.* at 421.

419. *Id.* at 422–23.

420. *Donovan v. Bryans*, 566 F. Supp. 1258, 1260 (E.D. Penn. 1983).

421. *Id.*

422. *Id.*

423. *Id.* at 1261.

424. *Id.*

425. *Id.* at 1262.

426. *Id.* at 1261–62.

427. *Id.* at 1265.

428. *Id.* at 1265, 1269.

429. Author’s original thought.

430. *See Tr. Agreement of Westervelt v. First Interstate Bank*, 551 N.E.2d 1180, 1182 (Ind. Ct. App. 1990).

estate planning attorney drafting a trust, the attorney advising the trustee in exercising trust powers, the attorney defending a trustee's decisions, or the attorney representing a beneficiary who is questioning the trustee's exercise of powers, there are some helpful takeaways.⁴³¹

A. Say What You Mean and Mean What You Say

For the estate planning attorney drafting language that gives power to the trustee to make certain decisions, careful consideration must be given to the settlor's purpose and intent.⁴³² If there are trust assets that have special meaning to the settlor that the settlor intends the trustee to retain, the language authorizing such retention should be very specific to give the trustee sufficient coverage.⁴³³ If the settlor wants to relax or eliminate the duty to diversify, then the language of the trust should expressly mention the duty to diversify and the settlor's intent that the duty be eliminated or modified.⁴³⁴ The more mandatory powers a settlor grants, the less flexible the trust will be, and the greater the risk that the trustee will not be able to fulfill the trust's purposes without seeking court authority in the case of an unanticipated event.⁴³⁵ However, depending on the settlor's wishes, that may be a tolerable risk, considering the facts and circumstances facing the settlor.⁴³⁶

B. When in Doubt, Possibly Seek a Declaratory Judgment

The Declaratory Judgment Act may be a useful tool to trustees and beneficiaries of trusts when a fiduciary is in doubt about the proper course of action to take.⁴³⁷ Under Texas Civil Practice and Remedies Code Section 37.005, a person interested "in the administration of a trust or . . . estate of a decedent, infant, mentally incapacitated person, or insolvent," including an independent executor, administrator, "trustee, guardian, other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust . . . , may have a declaration of rights or legal relations in respect to the trust or estate":

(1) to ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;

(2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

431. Author's original thought.

432. See *Fox v. Fox*, 873 S.E.2d 653, 663 (N.C. 2022).

433. See *Stevens v. Nat'l City Bank*, 544 N.E.2d 612, 615–16 (Ohio 1989).

434. See *Americans for the Arts v. Ruth Lilly Charitable Remainder Annuity Tr.*, 855 N.E.2d 592, 601 (Ind. App. 2006).

435. *Id.*

436. Author's original thought.

437. See TEX. CIV. PRAC. & REM. CODE ANN. § 37.005.

(3) to determine any question arising in the administration of the trust or estate including questions of construction of wills and other writings.⁴³⁸

Section 37.004(a) provides in part that:

A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute . . . [or contract] may have determined any question of construction or validity arising under the instrument, statute, [or contract] . . . and obtain a declaration of rights, status, or other legal relations thereunder.⁴³⁹

One benefit of filing a petition for declaratory judgment is that the “court may award costs and reasonable and necessary attorney’s fees as are equitable and just.”⁴⁴⁰

In addition to filing an action under the Declaratory Judgment Act, a trustee can file an action under Texas Property Code Section 115.001(a)(1–8) to

construe [the] trust instrument; determine the law applicable to [the] trust instrument; . . . determine the powers, responsibilities, duties and [liabilities] of [the] trustee; make determinations of fact affecting the administration, distribution, or duration of a trust; determine a question arising in the administration or distribution of a trust; [and] relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or [Trust Code].⁴⁴¹

The fiduciary and beneficiary must keep in mind that a declaratory judgment is available only when a justiciable controversy exists between the parties.⁴⁴² The Declaratory Judgments Act does not empower a court to render an advisory opinion or rule on a hypothetical fact situation.⁴⁴³ Thus, in order to seek a declaratory judgment, there must be a real controversy between the parties, and the judicial declaration sought must determine the controversy.⁴⁴⁴

As noted above, courts will rarely advise the trustee in regard to a discretionary power.⁴⁴⁵ “If the terms and the extent of the power are clear, the

438. *Id.*

439. TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a).

440. *Id.* § 37.009.

441. TEX. PROP CODE ANN. § 115.001(a)(1–8).

442. *See Brooks v. Northglen, Ass’n*, 141 S.W.3d 158, 163 (Tex. 2004).

443. *See id.* at 164.

444. *See id.* at 163–64; TEX. CIV. PRAC. & REM. CODE ANN. § 37.008.

445. HESS, BOGERT & BOGERT, *supra* note 19, at § 558.

court will not do the work of the trustee,” but will leave it to the trustee to exercise its judgment as was intended when the settlor granted the trustee discretionary powers.⁴⁴⁶

For example, there is no justiciable controversy when a beneficiary seeks to compel a trustee to exercise their discretion in a certain manner.⁴⁴⁷ A court does not have the authority to issue a declaratory judgment to compel the trustee to exercise their discretion in a certain way when the trust instrument grants the trustee absolute discretion.⁴⁴⁸

Instead, to present a justiciable controversy, the suit must involve a real controversy that will be resolved by the judicial relief sought.⁴⁴⁹ “[T]here must be a real and substantial controversy involving a genuine conflict of tangible interest, rather than a theoretical one.”⁴⁵⁰ Further, “if a factual dispute is the only issue to be resolved, a declaratory judgment is not the proper remedy.”⁴⁵¹

C. Seek Beneficiary Consent/Release

In some situations, it may be appropriate for the trustee to seek the beneficiary’s consent to the fiduciary’s proposed action in advance.⁴⁵² In such case, the fiduciary must fully disclose all material facts to the beneficiary before seeking the beneficiary’s consent.⁴⁵³

If the fiduciary is sued for breach of fiduciary duty after the beneficiary signed a consent or release, the fiduciary can raise the affirmative defenses of estoppel, waiver, consent, release, or ratification.⁴⁵⁴

In some instances, a beneficiary’s acceptance of a benefit can also preclude a beneficiary’s claim.⁴⁵⁵ However, before a beneficiary’s “acceptance of a benefit can be established as estoppel, [ratification, or

446. *Id.*

447. *Di Portanova v. Monroe*, 229 S.W.3d 324, 331–32 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

448. *Id.*

449. *See, e.g., State Bar v. Gomez*, 891 S.W.2d 243, 245–46 (Tex. 1994) (district court did not have authority to compel State Bar or Supreme Court to implement mandatory pro bono).

450. *Mims-Brown v. Brown*, 428 S.W.3d 366, 377 (Tex. App.—Dallas 2014, no pet.).

451. *Emmco Insurance Co. v. Burrows*, 419 S.W.2d 665, 671 (Tex. Civ. App.—Tyler 1967, no writ) (declaratory relief not appropriate when only issue was whether finance company acted in concert with defendant, and contract was not in dispute).

452. *See Austin Tr. Co. v. Houren*, 664 S.W.3d 35, 45 (Tex. 2023).

453. *Id.*

454. *See W.A.K. ex rel. Karo v. Wachovia Bank, N.A.*, 712 F. Supp. 2d 476–81 (E.D. Va. 2010); *Burnett v. First Nat’l Bank of Waco*, 536 S.W.2d 600 (Tex. Civ. App.—Eastland 1976, writ ref’d n.r.e.) (A beneficiary may, by his consent, acquiescence or ratification, be estopped to complain of a trustee’s failure to diversify if the beneficiary had full knowledge of all material facts); *see also* TEX. PROP. CODE ANN. § 114.005.

455. *See McAdams v. McAdams*, No. 07-99-0082-CV, 2000 WL 329578, at *3 (Tex. App.—Amarillo 2000, no pet.) (citing *Frazier v. Wynn*, 472 S.W.2d 750, 753 (Tex. 1971)).

waiver,] it must be shown that the benefit was accepted with knowledge of all material facts.”⁴⁵⁶

Consents or releases should be updated periodically to ensure the beneficiary continues to agree to the fiduciary’s actions.⁴⁵⁷ It would be prudent for the fiduciary to request renewed consents or releases at least annually, or more often if circumstances change.⁴⁵⁸ The fiduciary should also update the information disclosed each time it seeks a consent or release.⁴⁵⁹

Under Texas Property Code Section 114.005, “a beneficiary who . . . has legal capacity and is acting on full information may relieve a trustee from any duty, responsibility, restriction, or liability as to the beneficiary that would otherwise be imposed on the trustee . . . , including liability for past violations.”⁴⁶⁰ Also, under Section 114.0032:

[A] written agreement between a trustee and a beneficiary, including a release, consent, or other agreement relating to a trustee’s duty, power, responsibility, restriction, or liability, is final and binding on the beneficiary and any person represented by [the] beneficiary . . . if: (1) the instrument is signed by the beneficiary; (2) the beneficiary has legal capacity to sign the instrument; and (3) the beneficiary has full knowledge of the circumstances surrounding the agreement.⁴⁶¹

Situations in which a consent might be particularly helpful include times when a trustee determines it would be appropriate to retain specific trust assets that might, in other circumstances, be prudent to sell or when the trustee chooses not to diversify a trust portfolio.⁴⁶² Often, there are special circumstances that would warrant such retention or failure to diversify, such as when the trust owns a farm that has been in the family for 150 years, or when the trust is comprised almost entirely of stock in a company in which the settlor worked for 50 years.⁴⁶³ In such situations, courts have held that it may be reasonable for the trustee to retain such assets.⁴⁶⁴ Although there may be case law supporting such decisions, a trustee would be prudent in seeking the beneficiaries’ written consent before taking action.⁴⁶⁵

456. *Id.*

457. *See* Tibble v. Edison Int’l, 711 F.3d 1061, 1069 (9th Cir. 2013).

458. *See id.*

459. *See* TEX. PROP. CODE ANN. § 114.005.

460. *Id.*

461. TEX. PROP. CODE ANN. § 114.0032.

462. Author’s original thought.

463. *See* Brackett v. Tremaine (*In re* Trust Created by Irman) 269 Neb. 376, 383–84 (Neb. 2005).

464. *See id.* at 383–85.

465. *See* Tibble v. Edison Int’l, 711 F.3d 1061, 1069 (9th Cir. 2013).

D. Disclose, Disclose, Disclose!

The trustee owes the beneficiaries a duty to disclose all material facts known to the fiduciary that might affect the beneficiaries' rights.⁴⁶⁶ The duty to disclose exists even if there is no litigious dispute between the fiduciary and the beneficiaries.⁴⁶⁷

It is vital that a fiduciary disclose material information to a beneficiary for many reasons.⁴⁶⁸ First, the mere failure to disclose constitutes a breach of fiduciary duty.⁴⁶⁹ Such a breach could be the basis for removing the fiduciary.⁴⁷⁰ Second, disclosure starts the running of limitations.⁴⁷¹ If a fiduciary does not disclose material facts, then a beneficiary can argue that the discovery rule applies, potentially extending limitations for years.⁴⁷² Third, the beneficiary's response to the disclosure may give rise to an affirmative defense of waiver, estoppel, ratification, or other.⁴⁷³

E. Seek Judicial Modification

If there are mandatory rules requiring the trustee to act or refrain from acting in a manner that no longer makes sense for the purposes of the trust, then the trustee can and should seek modification of the trust to allow the trustee to deviate from the mandatory powers.⁴⁷⁴ In the context of mandatory powers, it is a breach of the trustee's duties not to follow the trust mandate; thus, only a court order authorizing deviation will protect the trustee.⁴⁷⁵ If the trustee fails to seek such modification and continues to act under the mandatory powers, to the detriment of the trust and its beneficiaries, the trustee may be liable.⁴⁷⁶

The trust modification statute allows modification when, "because of circumstances not known to or anticipated by the settlor," modification will further the purposes of the trusts, or when "modification of administrative, non-dispositive terms of the trust is necessary or appropriate to prevent waste or impairment of the trust's administration."⁴⁷⁷ A court may also modify if

466. Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996) (citing Montgomery v. Kennedy, 669 S.W.2d 309, 313 (Tex. 1984)).

467. *Id.*

468. *See id.*

469. *Id.*

470. *See* 29 U.S.C. § 1109.

471. *See* Dernick Resources, Inc. v. Wilson, 312 S.W.3d 864, 878 (Tex. App.—Houston [1st District] 2009).

472. *See id.* at 878–79.

473. *See* MCLAUGHLIN & HELGE, *supra* note 4, at § 84.06

474. TEX. PROP. CODE ANN. § 112.054(a)(3).

475. *Id.* § 112.0054(a).

476. *Id.* § 114.001(c).

477. *Id.* § 112.054(a)(2)–(3).

modification is not “inconsistent with a material purpose of the trust.”⁴⁷⁸ However, if a modification is sought under Texas Property Code Section 112.054(a)(5), all beneficiaries must consent to the modification.⁴⁷⁹

F. Review the Governing Instrument and Fiduciary Decisions Often

When dealing with issues related to a fiduciary’s decision making, the first place to start is to look at the provisions in the instrument governing the fiduciary’s powers and duties to determine whether the settlor provided guidance to the fiduciary on how to exercise discretionary decisions.⁴⁸⁰ The fiduciary should consider the amount of discretion granted for certain decisions.⁴⁸¹

It is also important to frequently reevaluate fiduciary decisions because conditions can change rapidly.⁴⁸² What was once a reasonable decision may quickly become unreasonable depending on the circumstances.⁴⁸³ The fiduciary will want to document when and how they have reconsidered such decisions.⁴⁸⁴

The trustee has a continuing duty to assess the suitability of prior investments and new investments.⁴⁸⁵ Certain investments or the retention of an asset may be appropriate at this time; however, the trustee should continue to monitor the asset and assess whether continued retention is appropriate.⁴⁸⁶ The trustee should document that they have regularly reviewed their investment decisions.⁴⁸⁷

G. Gather Relevant Information and Document Decisions

The fiduciary should gather and retain relevant information for their fiduciary decisions.⁴⁸⁸ If a trustee is to make discretionary determinations of distributions to a beneficiary for their health, education, maintenance, and support, at a minimum the trustee should have records establishing the beneficiary’s needs.⁴⁸⁹ The trustee should ask the beneficiary to provide an annual budget demonstrating the beneficiary’s annual needs.⁴⁹⁰ The trustee

478. *Id.* § 112.054(a)(5)(b).

479. *Id.* § 112.054(d).

480. *Myrick v. Moody Nat’l Bank*, 336 S.W.3d 795, 802 (Tex. App.—Houston [1st District] 2011, no pet.).

481. 1 WILLIAM H. BYRNES, TEXAS EST. PLAN., § 34.06 (2024).

482. TEX. PROP. CODE ANN. § 117.004.

483. *See id.*

484. TEX. EST. CODE ANN. § 751.101.

485. TEX. PROP. CODE ANN. § 117.004.

486. *Id.*

487. TEX. EST. CODE ANN. § 751.101.

488. *Id.*

489. *Id.*

490. *See* TEX. PROP. CODE ANN. § 113.029.

should meet frequently with the beneficiary and discuss the beneficiary's needs.⁴⁹¹ In some cases, a beneficiary will inflate their stated needs to obtain more money from a trust.⁴⁹² If there is any doubt about the veracity of the beneficiary's representations, it is important for the trustee to exercise due diligence and verify the information provided by the beneficiary.⁴⁹³

If the trust requires consideration of a beneficiary's outside resources, the trustee can and should request information about the beneficiary's other resources.⁴⁹⁴ The trustee should request information regarding the beneficiary's wages and income from other sources, including other trusts.⁴⁹⁵ In some instances, a spouse's income could be relevant.⁴⁹⁶

If the fiduciary intends to sell property, they should obtain an appraisal of the property to determine the property's fair market value.⁴⁹⁷ It is important for the fiduciary to be able to show that they conducted some analysis or review of the information before exercising their discretion.⁴⁹⁸ The fiduciary must keep good books and records to show how and why decisions were made.⁴⁹⁹ The fiduciary should retain meeting minutes, correspondence, analysis performed, notes, and all information considered in making a decision.⁵⁰⁰

In most instances, a fiduciary will be given deference in their decision making by a court.⁵⁰¹ However, the beneficiary could attack the fiduciary by showing that the fiduciary failed to exercise their discretion or relied on improper information in making their decision.⁵⁰² For instance, if a beneficiary is contesting the amount of distributions made to another beneficiary, the plaintiff beneficiary could show that the fiduciary failed to gather any information on the distributee's needs and made an arbitrary decision on the amount of distributions to make.⁵⁰³ Likewise, if a beneficiary complains that the fiduciary failed to make any distributions to the complaining beneficiary, persuasive evidence against the fiduciary could include the fact that the fiduciary did nothing to determine whether to make a distribution or not and then simply denied the request.⁵⁰⁴

491. TEX. EST. CODE. ANN. § 751.101.

492. See TEX. PROP. CODE. ANN. § 113.029.

493. *Id.* at § 113.029(a).

494. See *id.* § 113.029.

495. See *id.*

496. See *id.*

497. See TEX. EST. CODE. ANN. § 2001.201(a)(2).

498. *Id.* § 751.101.

499. *Id.*

500. *Id.*

501. TEX. PROP. CODE. ANN. § 116.004(a)(3).

502. McLAUGHLIN & HELGE, *supra* note 4, at § 84.02.

503. *Id.*

504. *Id.*

The fiduciary should be careful with the language they use when documenting fiduciary decisions.⁵⁰⁵ Derogatory comments about a beneficiary in internal correspondence or memoranda will come back to haunt the fiduciary and cast doubt on the reasons for an otherwise justifiable decision.⁵⁰⁶ While maintaining all documentation to support decision making is important, a fiduciary should remain cognizant of broad discovery rules.⁵⁰⁷

H. Seek Legal Advice

While a fiduciary's reliance on legal advice is not determinative, it can support the fiduciary's claim to have done their due diligence before making a decision.⁵⁰⁸ When in doubt, the fiduciary can and should seek legal advice.⁵⁰⁹ While a fiduciary's decision may ultimately be challenged, no matter how careful or prudent they acted, good legal counsel and advice can greatly reduce the impact of the challenge on them personally and on the trust.⁵¹⁰

505. TEX. EST. CODE. ANN. § 2001.201(a)(2).

506. *See id.*

507. *Id.* § 751.101.

508. McLAUGHLIN & HELGE, *supra* note 4, at § 84.02.

509. *Id.*

510. *Id.*