

The Trust SIG News

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A Message from the Chair

By Patricia E.K. Dudek, Esq.

TRUST SIG STEERING COMMITTEE PROPOSES DISCUSSION ON DEVELOPMENT OF MODEL STANDARDS OF PRACTICES ON SPECIAL NEEDS TRUSTS

As you may already be aware, the Professionalism and Ethics Committee of NAELA is developing Aspirational Goals for the practice of elder law, including a commentary for each goal with examples. The areas that are being addressed are: (1) client identification; (2) conflict of interest; (3) confidentiality; (4) competency in representation; (5) client advocacy; (6) marketing; (7) client capacity; (8) client communication; and (9) ancillary and related services. The Trust SIG Steering Committee proposes that the Trust SIG and Tax SIG Membership start the dialog related to a similar type of Aspirational Goal(s) and/or Model Standards of Practices for the establishment, funding and administration of special needs trusts. This discussion will be the agenda for the breakfast in Hilton Head for the Trust and Tax SIGs.

This idea arose partly in response to the excellent work

of the Professionalism and Ethics Committee, and partly in response to the lack of standards in this rapidly growing area of practice. This high growth has led to three major areas of concern:

First, the use of "scare" tactics by some financial advisors. These high pressure sales methods, including but not limited to, seminars are often used as a method to scare families into creating (and funding) a Special Needs Trust. The Trust and Tax SIG Steering Committee(s) want to hear from our members about how they ethically work with financial advisors and insurance agents in drafting and funding Special Needs Trusts. The outcome of the discussion will hopefully result in some type of Aspirational Goal or Model of Practice. Although the goals being developed by the Professionalism and Ethics Committee in the areas of: 1) marketing; 2) conflict of interest; 3) ancillary and related services may touch on this issue, we are hoping for a more specific response related to special needs planning.

The *Second* issue of concern is attorney competency in drafting and advising those that administer Special Needs Trusts. The Aspirational Goals already developed by the Professionalism and Ethics Committee related to this are very specific to working with seniors, and we suggest it may be useful to develop one related specifically to Special Needs Trusts and core legal competencies required in the area. It is certainly not as simple as picking out a form from a book.

The *Third* issue of concern relates specifically to the administration of Special Needs Trusts by Trustees. Again, the Professionalism and Ethics Committee's goal on competency (as drafted) is narrowly focused on traditional elder law. As more of us begin to advise or even act as Trustees of a Special Needs Trust – what types of Aspirational Goals or core competencies should we aspire to?

Interested? Hope so! Please join the Trust SIG and Tax SIG in this lively discussion. As a loyal James Taylor fan I'm already "Goin to Carolina in my Mind!"

p.s. – Any comments, concerns, or questions related to this topic can be sent to me at pdudek@beierhowlett.com, and I will forward them to the Trust SIG and Tax SIG Steering Committee(s).

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REPORT FROM TRUST SIG BREAKFAST IN DALLAS

By Patricia E.K. Dudek, Esq.

I know it seems like this was such a long time ago! I finally found my notes on the comments from the Trust SIG Breakfast in Dallas in November 2003. To refresh your memory we broke out into discussion topics by table and then reported back to the group as a whole on what we discussed. . . . at long last here is the re-cap:

TOPIC: Pooled Trusts v. Stand Alone Special Needs Trusts

- Discussion regarding different States' treatment of transfers to a D(4)(c) for folks over 65.
- Outlining the benefit of D(4)(c) vs. D(4)(a) Trust, when to use one over the other option.
- There was a debate regarding National vs. State specific Trusts.
- Outlining creative options of D(4)(c) Trusts – i.e., gifting by grandparents to person with disabilities who then transfer it to D(4)(c).

TOPIC: Attorney As Fiduciary Why?

- Avoid liability of client-trustee being thief.
- Avoid accounts receivable.
- Efficiency (one-stop shopping).
- Profitability:
 - 1) Hourly for small trusts.
 - 2) Percent for larger.
- Satisfaction of work.
- Once started, self-feeding business built-in (other attorneys, banks, do not want this to work).

Why not?

- Investment risk – contract out to investment advisor for written opinion.
- Increased risk of not doing?
- Back office support:
 - 1) Someone to field calls.
 - 2) Accounting system software.
 - 3) Social worker support
- How to get out if client-beneficiary is violently psychotic? Unrealistically demanding.
- Need volume to make it good business (start-up barrier).
- 23-hour/day availability.

TOPIC: Discussed Pooled Trust and Provision for who Benefits after Death of Beneficiary Depends on – Term of Trust

- Who decides on distribution of excess of funds?
- Funding self-settled v. third party Special Needs Trust.
- What happens to money when client dies if it is in pooled trust?
- Who serves as Trustee of individual trust (i.e., professional, family or both)?
- Discussed who would be the best Trustee of a Special Needs Trust.
- Wants to protect house for family from estate recovery if child dies - a lot of variation state to state on these issues.
- Ohio still working doctrine of whether title to invalidate D(4)(c).
- Ohio – there is an old statute that provides for a “Supplemental Services Trust” for an individual with a disability, with a death time payback to the State agency of 50% of the balance in the trust at death.
- Difference between Virginia and Massachusetts in nursing home eligibility rules.
- How a Special Needs Trust might affect eligibility for non-Medicaid benefits, such as food stamps, or Section 8 Housing. (Note: This problem was outlined by a Hawaii lawyer. Is this state specific?)

TOPIC: Trust as IRA Beneficiary

- Trust as beneficiary of IRA to increase total in CST:
 - 1) Would be ok if worded correctly.
 - 2) Many used to seek judicial reformation to get language to read as regulations require.
 - 3) While wife would be able to take over her life expectancy then children would not get the stretch.
- Trust as beneficiary for benefit of grandchildren:
 - 1) Should we suggest separate IRA's to identify each grandchild? yes, is more prudent
 - 2) Or, keep as one IRA with separate beneficiary designations for each trust beneficiary as set forth in the John Smith RLT.
- Special Needs Trust as designated beneficiary of IRA:
 - 1) Very few have done this.
 - 2) If done, then:
 - a. Income tax would be at Trust level.
 - b. Be careful to make sure of trust language statute law regarding how much of distribution is considered as distributable an income.

REPRESENTING THE SLIGHTED BENEFICIARY: REMEDIES FOR BREACH OF TRUSTEES' DUTIES

By Richard A. Courtney, CELA

Trusts – an ancient method of conveying interests in property – have been modified over generations to meet myriad situations involving passage of such interests. Throughout the evolution of trusts, the principal focus has been on the intent of the trust creator (“grantor”) in the particular quantity, timing and duration of distributions of his or her property interests. In order to uphold a grantor’s specific intent in favoring the beneficiary of the trust with certain benefits flowing from the trust assets, the law has attached certain legal duties to the office of trustee. A trustee must comply with these “fiduciary duties” in faithfully carrying out the grantor’s intentions as expressed in the trust. These fiduciary duty standards to which trustees must adhere originated in common law and have been expanded and refined through case law and codified in statutes and uniform acts.

Adherence to fiduciary duties by a trustee is essential to ensure that the trust grantor’s intent is accurately translated into the desired benefits for the beneficiary. Trusts may be irrevocable by dictate of the grantor, and grantors may die – therefore, the trustee’s administration and control of a grantor’s trust property may (and often does) survive the grantor. In order to assure effectuation of an absent grantor’s intent, the beneficiary must have means by which to enforce the trustee’s compliance with the grantor’s intent. However, trusts are not always artfully drawn. Trust provisions may be ambiguous or subject to different interpretations, and the grantor’s intent may not be easily discernible.

Additionally, a trustee may not have the same closeness of relationship with the beneficiary as did the grantor. In short, the relationship between a

trustee and a beneficiary may become strained. A beneficiary must have adequate remedies with which to offset the inherent power of the trustee (as legal owner, possessor and controller of trust property) and enforce the proper administration of the trust.

This paper will review various remedies available to an individual beneficiary of an express trust in which there are no arbitration or third party “trust protector” provisions to deal with inappropriate acts or omissions of the trustee. The first section will outline certain types of trustee misfeasance and malfeasance that occur, and the second portion will describe certain legal remedies that may be employed on behalf of a beneficiary to redress such violations of fiduciary duties.

SOURCES OF FIDUCIARY DUTIES

Trustees’ duties arise from several sources: (A) the trust instrument; (B) federal law or administrative agency regulation (such reporting and tax-paying duties under ERISA and Treasury regulations and duties imposed on national banks by the Office of the Comptroller of the Currency); (C) state statute (including the Uniform Trust Code (UTC” herein), adopted in August 2002 by the National Conference of Commissioners on Uniform State Laws, where enacted); and (D) common law. Even in absence of express or statutory duties, a trustee is subject to the duties “which have evolved by courts of equity for the governing of the conduct of trustees.” Scott, A.W. and W.F. Fratcher, *The Law of Trusts* §164 (4th Ed 1987) (“Scott” herein). *The Restatement of the Law (Second) Trusts* (“Restatement” herein) describes seventeen duties imposed on

trustees by common law, some of which were revised as part of the *Restatement of the Law (Third) Trusts (Prudent Investor Rule)* adopted in 1990 (“Restatement 3d” herein). (See Rosepink, Robert J., “Punctilio of an Honor – A Trustee’s Duties,” 28 ACTEC Journal at 102.)

BREACHES OF FIDUCIARY DUTIES

A trustee may omit or commit actions that violate one or more of the fiduciary duties that follow, creating conflict with the beneficiary. Text of the pertinent Restatement and UTC sections establishing the various duties are included.

A. Failure to Administer the Trust.

- Restatement §169: **Upon acceptance of the trust by the trustee, he is under a duty to the beneficiary to administer the trust.**
- § UTC §801: **Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this [Code].**
- Restatement §182: **Where a trust is created to pay the income to a beneficiary for a designated period, the trustee is under a duty to the beneficiary to pay to him at reasonable intervals the net income of the trust property.**

A trustee who accepts appointment must administer the trust as long as s/ he continues as trustee, even though the trust instrument provides the trustee is to receive no compensation. By way

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Representing the Slighted...

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of illustration, assume that Grantor establishes a testamentary trust "for the use and benefit of Grantor's grandchild" to be funded with his savings funds, his residence and ten acres of adjacent unimproved land on which his 40-year-old divorced daughter and her 13-year-old daughter ("grandchild") live in a double-wide mobile home. The trustee named in the testamentary trust is Grantor's brother, Uncle John, and the trust expressly provides that no trustee shall be entitled to receive compensation for serving as trustee. The trust provides as follows:

"It is my intention that the Trustee allow my daughter and grandchild the use and occupancy of my residence property so long as either shall desire same. The Trustee shall distribute to or for the benefit of said grandchild, out of the Trust created for the benefit of said grandchild, when and if she should attend college, all college expenses that are reasonably incurred in the pursuance of a college degree. In the event that said grandchild does not elect to attend college, then the Trustee shall distribute to the said grandchild 5% of the balance of the trust on the twenty-first birthday of the grandchild. The Trustee, in his sole discretion, shall distribute funds to the grandchild for the purpose of obtaining reasonable transportation, housing, education, medical care and other costs of living. Upon the death of grandchild, prior to complete distribution of the trust assets, then the trust shall terminate and all remaining trust assets shall be paid over to Grantor's daughter, and if my said daughter shall predecease grandchild, then said assets shall

be paid over to and distributed outright to Grantor's siblings in equal shares."

The daughter seeks legal help following completion of Grantor's probate proceeding, stating that she is unemployed and receiving SSI benefits and complaining that Uncle John (1) told her immediately following the funeral three months ago that he "will handle it [the trust] his own way," (2) changed the locks on Grantor's home and has not allowed daughter and granddaughter to move into that home, and (3) has not responded to any of daughter's inquiries about potential distributions for granddaughter's orthodontic work, cheerleader camp/outfits and school clothes.

Such inaction by the trustee to reasonably effectuate the trust's directions likely constitutes a breach of the duty to administer the trust "in accordance with its terms and purposes and the interests of the beneficiaries." UTC §801. A breach of trust is "a violation by the trustee of any duty which as trustee he owes to the beneficiary." *Restatement* §201. "Where the trust estate includes land and the beneficiary by the terms of the trust is entitled to possession of the land but the trustee refuses to permit him to take possession, the remedy of the beneficiary is by a suit in equity to compel the trustee to permit him to take possession . . ." *Scott* §197.1.

B. Failure to Administer Trust Solely in Beneficiary's Interests (Breach of Duty of Loyalty).

- *Restatement* §170: **The trustee is under a duty to administer the trust solely in the interest of the beneficiaries.**
- UTC §802: (a) **A trustee shall administer the trust solely in the interest of the beneficiaries.**
(b) **Subject to the rights of persons dealing with or assisting the trustee as provided in Section 1012**

[Protection of person Dealing With Trustee], a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

- (1) the transaction was authorized by the terms of the trust;
 - (2) the transaction was approved by the court;
 - (3) the beneficiary did not commence a judicial proceeding within the time allowed by Section 1005 [Limitation of Action Against Trustee];
 - (4) the beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with Section 1009 [Beneficiary's Consent, Release, or Ratification]; or
 - (5) the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.
- (c) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected with a conflict between personal and fiduciary interests if it is entered into by the trustee with:
- (1) the trustee's spouse;
 - (2) the trustee's dependents, siblings, parents, or their spouses;
 - (3) an agent or attorney of the trustee; or

(4) a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

(d) A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

(e) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust ...

(i) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

In the illustration from section A above, assume that Uncle John has his closely-held construction corporation purchase the ten acres adjacent to Grantor's residence for the tax-assessed value (which is approximately seventy-five percent (75%) of the fair market value of that land), for the purpose of developing a trailer park or small subdivision. Or assume that Uncle John, as trustee, makes a loan of trust funds to his construction company at an interest rate higher than bank CD rates but below the lowest bank rate for such loans. Both transactions, if done without the consent of the

beneficiaries, are clearly voidable under the self-dealing provisions of UTC §802 and according to *Scott* §170.2. *Scott* notes that it is well settled in England and the United States "that a trustee who has power to sell trust property violates his duty to the beneficiaries if he sells the property to himself without their consent, even though the transaction is in other respects entirely unobjectionable." *Id.* Several possible remedies (set forth in *Restatement* §205 and comments to §206 and discussed below) avail themselves to the beneficiaries in such cases.

C. Failure to Exercise Reasonable Care and Skill, or Failure to Act as a Prudent Person in the Delegation of Duties.

- Restatement §174: **The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill.**
- UTC §804: **A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.**

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- UTC §806: A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.
- Restatement §175: The trustee is under a duty to the beneficiary to take reasonable steps to take and keep control of the trust property.
- UTC §809: A trustee shall take reasonable steps to take control of and protect the trust property.
- Restatement §176: The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property.
- UTC §809: A trustee shall take reasonable steps to take control of and protect the trust property.
- Restatement §180: While a trustee can properly make general deposits of trust money in a bank, it is his duty to the beneficiary in making such a deposit to use reasonable care in selecting the bank, and properly to earmark the deposit as a deposit by him as a trustee.
- Restatement §181 (as revised): The trustee is under a duty to the beneficiaries to use reasonable care and skill to make the trust property productive in a manner that is consistent with the fiduciary duties of caution and impartiality.
- Restatement 3d §228 (Investment Provisions of Trust Or Statute): In investing the funds of the trust, the

trustee (a) has a duty to the beneficiaries to conform to any applicable statutory provisions governing investment by trustees; and (b) has the powers expressly or impliedly granted by the terms of the trust and, except as provided in §§ 165 through 168, has a duty to the beneficiaries to conform to the terms of the trust directing or restricting investments by the trustee.

• Restatement §171: A trustee has a duty personally to perform the responsibilities of the trusteeship except as a prudent person might delegate those responsibilities to others. In deciding whether, to whom and in what manner to delegate fiduciary authority in the administration of a trust, and thereafter in supervising agents, the trustee is under a duty to the beneficiaries to exercise fiduciary discretion and to act as a prudent person would act in similar circumstances.

• UTC §807: (a) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

- (1) selecting an agent;
- (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
- (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

- (b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.
- (c) A trustee who complies with subsection (a) is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.
- (d) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

A trustee such as Uncle John in the above illustration may be guilty of breach of trust if he fails to act prudently in carrying out, or imprudently delegates, such duties as keeping and preserving trust property, prudently investing trust assets, or making trust property productive, thereby resulting in a loss to the trust estate. In such cases, the trustee may be: (1) subject to surcharge for the amount of loss suffered to the trust estate; (2) held accountable for any gain or profit made by him through the breach of trust; or (3) chargeable with the amount of gain that otherwise would have accrued to the estate but for the breach of trust. *Scott* §205; *Restatement* §205.

REMEDIES FOR BREACH OF FIDUCIARY DUTY

There are various processes by which a beneficiary may seek relief from a trustee who has breached a fiduciary duty. Remedies for breach of trust may arise pursuant to statute or common law. However, such remedies

of the beneficiary are exclusively equitable except for certain actions at law to recover money or chattels which the trustee is under a duty to transfer immediately to the beneficiary and which the trustee fails to so transfer. *Scott* §197.1. An equitable remedy is a remedy given by a court of chancery or a court having and exercising the powers of a court of chancery. A trustee who fails to perform his duties as trustee is not liable to the beneficiary for breach of contract. "The creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract. Moreover, questions of the administration of trusts have always been regarded as of a kind which can adequately be dealt with in a suit in equity rather than in an action at law, where questions of fact would be determined by a jury and not by the court. The mere fact that there may happen to be a promise in words by the trustee to perform the trust does not give the common-law courts concurrent jurisdiction over the administration of the trust." *Restatement* §197, comment b. In *Gump v. Wells Fargo Bank, N. A.*, 192 Cal. App. 3d 222, 237 Cal. Rptr 311, 331 (Cal. App. 1987), the income beneficiaries of a testamentary trust sued the successor trustee of the trust for intentional and negligent breach of a fiduciary duty, alleging that the trustee mismanaged the trust. The trial court awarded the plaintiffs compensatory and punitive damages; however it denied their request for a trial by jury on the ground that the proceedings were equitable in nature and therefore no right to jury trial existed. Although reversing and remanding, the court stated that the trial court did not err in striking the jury demand, explaining that the remedies of a beneficiary against a trustee were exclusively equitable, except that the beneficiary might maintain an action at law to enforce the trustee's immediate and unconditional duty to pay money or deliver a chattel.

The court reasoned that, since the plaintiffs' claim related to the administration of the trust and did not seek either a specific and known sum of money or delivery of a chattel, the plaintiffs had no action at law; therefore, no right to jury trial existed. In a 1990 Minnesota opinion, beneficiaries of a trust sued the trustee, among others, to obtain rescission of the sale of stock that had been part of the trust res, alleging, inter alia, that the trustee had breached its fiduciary duty and was negligent in selling the stock for less than its fair market value. After denying the plaintiffs' motion for a jury trial, the trial court returned a verdict for the defendant. Affirming in part, the court held that the plaintiffs were not entitled to a jury trial, since the plaintiffs' claims were either exclusively equitable or derivative in nature. *Uselman v. Uselman*, 464 N.W.2d 130, 137 (Minn. 1990). The inability of the beneficiary to bring an action at law for damages against the trustee does not, however, preclude such an action by a successor trustee. In *Deutsch v. Wolff*, 994 S.W.2d 561 (Missouri 1999), the beneficiaries of three trusts established by a will sued the trustee and the accountant for the trusts. The trial court removed the trustee, disqualified the successor trustee, ordered an accounting, and awarded several money judgments. The appellate court affirmed, holding, that the beneficiaries had standing to bring the claims, because although the claims for money damages should properly have been brought by a successor trustee, the trustee and accountant vigorously and successfully resisted appointment of a successor trustee "ad litem" for the purpose of pursuing the legal claims. *Id.* at 566.

TYPES OF REMEDIES FOR BREACH OF TRUST.

The types of enforcement procedures available to the beneficiary are outlined below.

A. Reformation of Trust.

A trust can be rescinded or reformed upon the same grounds as those upon which a transfer of property not in trust can be rescinded or reformed. *Restatement* §333. In *Schroeder v. Gebhart*, 825 So.2d 442 (Fla.App.2002), grandchildren who had been adopted out of the trust settlor's family sued grandchildren who had been adopted in to impose a constructive trust on certain trust assets, based, in part, on the claim that the trust agreement contained a drafting error. The trial court reformed the trust agreement to include plaintiffs as beneficiaries of the trust. The appellate court, in holding that the trust was subject to the equitable remedy of reformation to correct a unilateral drafting error that had the legal effect of excluding plaintiffs, stated:

Allowing a court to reform an inter vivos trust after the death of the settlor is consistent with general equitable principles well-established in Florida and other states. It has long been held that equity will reform an agreement so as to conform to the intent of the parties, when an agreement, which due to a mistake of the drafter, violates or fails to carry out the intention of the parties. Relief is given where, through a mistake of the scrivener, the instrument contains an error or fails to properly define the terms agreed to by the parties. *Steffens v. Steffens*, 422 So.2d 963, 964 (Fla. 4th DCA 1982). That principle, which applies generally to bilateral contracts supported by mutual consideration, should certainly apply to a unilateral trust agreement, not supported by consideration given by the competing beneficiaries. Other states have reached similar conclusions. In *Shoemaker v. Estate of Freeman*, 967 P.2d 871 (Okla. 1998), the Supreme Court of Oklahoma explained: ¶ 19 'An exception to the general rule requiring mutual mistake or unilateral mistake and fraud is where

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the trustor of a trust does not receive any consideration for creating the trust. Where there is no consideration for the creation of the trust, unilateral mistake on the part of the trustor is usually a sufficient ground for reformation.

Restatement (Second) of Trusts §333 cmt. e (1959); 4 Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* § 333.4 (1989)’

¶ 20 Even though a unilateral mistake is a sufficient ground for reforming a trust which was created without any consideration, the burden is nonetheless on the party seeking reformation to establish by clear-and-convincing evidence the mistake. Griffin [v. Griffin], 1992 OK 36, 832 P.2d [810] at 813. The purpose of reformation for a mistake is to assure that the intent of the trustor is carried out. *See id. at* ¶ 16, 832 P.2d at 813. Thus, the mistake must be material and the party seeking reformation must establish that the trust as written does not reflect the trustor’s intent or that the trustor would have used different terms but for the mistake. *Id.* at 445-446.

B. Specific Performance.

Restatement §199 provides that “[T]he beneficiary of a trust can maintain a suit (a) to compel the trustee to perform his duties as trustee. . . .”

It is immaterial that there is an adequate remedy at law. The beneficiary can, in a proper case, petition to have the court declare what the duties of the trustee are and to enforce them.

In *Tortorella v. Tortorella*, the plaintiff sued to enjoin the sale of a family domicile by the defendant, her sister, who held title to the property in trust for the family of which the parties were members. The court held that the lower court’s interlocutory order, entered before the plaintiff had been given the opportunity to complete the

presentation of her case, and which dissolved a preliminary injunction and ordered the sale of the property, deprived the plaintiff of her legal *right as a beneficiary of a trust to compel compliance with the terms of the trust*. The lower court was thus found to have exceeded its jurisdiction in making the order. 235 A.2d 336, 337 (R.I. 1967) (emphasis added).

C. Injunctive Relief.

The beneficiary can maintain a suit to enjoin a breach of trust, if there is a reasonable likelihood that the trustee will commit such a breach.

Restatement §199, comment b. Section 199 of the *Restatement* states that a beneficiary “can maintain a suit . . . (b) to enjoin the trustee from committing a breach of trust.” In *Triplett v. Williams*, 269 Cal.App.2d 135, 74 Cal.Rptr. 594 (Cal.App.1969), plaintiff, remainderman of a trust established by the will of a deceased wife, brought an action against the executrix of the will of her deceased husband on the ground that the husband had unduly influenced his wife into transferring a sum of money, which had been hers separately, to a joint bank account while she was of an unsound mind, which he thereafter unlawfully converted to his own use. In holding that the cause of action was barred by the three-year statute of limitations, the court stated that if the trustee cannot or will not enforce the cause of action which the trustee ought to bring against a third person, the beneficiary may seek judicial compulsion against the trustee. *Id.* at 596.

Where irreparable harm is likely to result to the beneficiary from the trustee’s action or inaction, the beneficiary may proceed in accordance with the particular state analog to Rule 65 of the Federal Rules of Civil Procedure pertaining to injunctions. This rule prescribes the notice, filing and security requirements and essential pleading and order elements for (1)

temporary restraining order relief, either with notice or *ex parte*, for an immediate stay of injurious actions by the trustee or others; (2) preliminary injunction to stay action until a hearing on the merits, and (3) permanent injunctive relief. Since injunctive relief is an extraordinary remedial form of action, the requirements of statute, case law and court rules pertaining to such proceedings must be followed strictly.

D. Action for Restitution or Redress from Trustee (Surcharge).

The beneficiary of a trust “can maintain a suit . . . (c) to compel the trustee to redress a breach of trust...” *Restatement* §199. If the trustee commits a breach of trust, the beneficiary may have three alternative remedies: (1) the option of pursuing a remedy which will put him in the position in which he was before the trustee committed the breach of trust; or (2) pursuing a remedy which will give him any profit which the trustee has made by committing the breach of trust; or (3) pursuing a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust. These three types of remedies are not always distinct and are not always all of them available. *Restatement* §205.

In the first option, if as a result of his breach of trust, trust property is destroyed or lost, the trustee is chargeable with the value of the property so destroyed or lost. If as a result of his breach of trust property depreciates in value, the trustee is chargeable with the amount of such depreciation. *Id.* at comment (c). Thus the trustee is subject to a surcharge if in breach of trust he invests trust funds in improper securities that fall in value, or if he negligently deposits trust funds in an insecure bank that fails, or if trust property is stolen as a result of his negligence. On the other hand, he is not

subject to a surcharge for a breach of trust that results in no loss. *Scott* §205.

Secondly, if the trustee commits a breach of trust that results in a gain, he is accountable for the gain. *Scott* §205. The trustee will not be allowed to profit through the breach of trust, even though the profit is not made at the expense of the trust estate. Thus if the trustee in breach of trust purchases securities that are not a proper trust investment, and these securities are sold at a profit, the beneficiaries are entitled to the profit. So also if the trustee uses trust funds in his own business, he is chargeable with any profit that he makes thereby.

Thirdly, if a breach of trust results in the failure to make a gain that would otherwise have accrued to the trust estate, the trustee is chargeable with the amount of the gain that would have accrued, even though there was no actual loss to the trust estate and no actual gain; it is enough that but for the breach of trust there would have been a gain. Thus where the trustee in breach of trust fails to purchase certain property that it was his duty to purchase for the trust, and the property rises in value, the beneficiaries are entitled to the profit that would have been made if the trustee had purchased the property. Similarly where the trustee in breach of trust sells or otherwise disposes of trust property that it was his duty to retain, and the property subsequently rises in value, the beneficiaries are entitled to the profit that would have been made if the property had been retained. *Scott* §205; *Restatement* §205.

In *Buder v. Sartore*, 774 P.2d 1383 (Colo. 1989), cash gifts given to two minor children by their grandfather were substantially depleted through high-risk investments by their father. The children sued their father, alleging that he breached the fiduciary duty he owed to them as custodian of their funds by failing to prudently invest the funds. The trial court and the intermediate appellate court determined

that the father had breached his fiduciary duty. The appellate court affirmed, determining that the trial court's assessment of damages was proper, including the awards for interest and loss of appreciation, which represented a realistic recognition of the opportunity costs associated with investing. The court in *Wheeler By and Through Wheeler v. Mann*, 763 P.2d 758 (Utah 1998) held that the duty of a trustee to act solely in the interest of the beneficiary was absolute. A trustee invested trust assets into his own companies and expended the funds in unsuccessful company enterprises. The minor beneficiary of a testamentary trust sued the trustee to recover the trust corpus and damages, alleging that the trustee had breached his duty of loyalty by self-dealing. The trial court granted the plaintiff's motion for summary judgment. Affirming, the appellate court rejected the defendant's argument that he was obeying the testator's wish by keeping the assets from the beneficiary's guardian. The court stated that the trustee could be held personally liable for the violation of this duty.

Scott and the *Restatement* acknowledge that, when the trustee sells trust property to himself without the consent of the beneficiary, various types of relief may be obtained to place the beneficiary in the position he would have been in without the trustee's breach. These include: (1) If the trustee has resold the property at a price greater than the price paid by him, the beneficiaries can compel him to account for the profit so made. (2) If the trustee has not resold the property, or has resold it to a person who is not a bona fide purchaser, the beneficiaries can insist on a reconveyance of the property, and the trustee is accountable for any income received by him from the property but is entitled to receive the amount that he paid for it, with interest, and, unless he was guilty of actual fraud, the value of

all improvements made by him. (3) The beneficiaries can, if they so elect, compel the trustee to offer the property again for sale; in which case the usual practice is to offer it at a minimum or upset price of the amount for which the trustee purchased it, and if no more is offered he will be allowed to retain the property, but if a greater price is offered it will be sold at that price. (4) Where the trustee has sold the property to himself at less than its value, the beneficiaries can permit him to keep the property but compel him to pay the difference between its value at the time of the sale and the price paid by him.

(5) If the price paid by the trustee was a fair price, the beneficiaries may affirm the sale, as they may well wish to do where the property has fallen in value after the sale; the sale is not void but voidable. In other words, where the trustee sells trust property to himself without the consent of the beneficiaries, he is not permitted to profit if the property goes up in value and is compelled to bear the loss if its value falls. *Scott* §170.2; *Restatement* §206.

E. Appointment of Receiver.

Restatement §199 states that "the beneficiary of a trust can maintain a suit . . . (d) to appoint a receiver to take possession of the trust property and administer the trust." A receiver will be appointed by the court to take possession of the subject matter of the trust and to administer the trust, if this is necessary for the protection of the interest of the beneficiary. If proceedings are brought for the removal of the trustee and it appears necessary or proper during the course of the proceedings that the trust should be administered under the supervision of the court, the court may appoint a receiver until it is determined whether the trustee should be removed and a new trustee appointed. The

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receivership will be terminated by the court when it is determined by the court that the trustee may properly continue as trustee, or when a new trustee is appointed and the title to the trust property is vested in him.

F. Action to Remove Trustee.

Restatement §199 concludes by stating that "the beneficiary of a trust can maintain a suit . . . (e) to remove the trustee." State statutes generally include sections pertaining to trusts and trustees, including prescribed requirements for discharge or removal of trustees. These statutory processes vary from state to state, but will generally include: (1) description of the types of trusts included, such as express or implied trusts, religious, charitable or educational trusts, etc.; (2) required elements of any pleading to be filed for such removal; (3) designation of the courts of jurisdiction for such actions; and (4) requirements as to the number of beneficiaries who must join in such an action.

Actions to remove trustees often include other demands for relief of the types set out in this paper. For instance, in Siefert v. Leonhardt, 975 S.W.2d 489 (Mo.App. 1998), beneficiaries with a future contingent interest in trust corpus brought a petition in equity against a trustee, alleging breach of fiduciary duties and seeking an accounting, restitution of principal withdrawn by trustee, and removal of defendant as trustee or appointment of a co-trustee. Reversing the trial court's dismissal of the petition and remanding, the appellate court held that plaintiffs had standing as beneficiaries of the trust to bring suit against defendant as trustee, given that defendant was a fiduciary of plaintiffs as a matter of law. Also, in Robinson v. Kirbie, 793 P.2d 315 (Okla.App. 1990), after making a demand on co-trustees, who were also residuary

beneficiaries, for an accounting and distribution of trust monies and receiving no response, the primary beneficiaries of a testamentary trust sued the co-trustees for an accounting of trust assets, their removal as co-trustees, appointment of a new trustee, restitution of fees wrongfully paid by the co-trustees to themselves, and actual and punitive damages for fraud and gross negligence. The trial court found that the defendants had embezzled and converted trust property to their own use and had paid themselves unreasonable fees. Moreover, they had intentionally misinformed one plaintiff regarding the existence of the trust and his status and/or rights as a beneficiary thereof. The court removed the defendants, appointed a successor, ordered restitution to the trust, and awarded actual and punitive damages against the defendants. Affirming, the court held that there was no reversible error of law and that the trial court's findings of fact were supported by sufficient competent evidence and noted that the defendants' profession of good faith and/or reliance on advice of counsel did not constitute a defense to the action.

G. Action at Law for Money or Property Payable.

Addressing the exception to the rule that actions for breach of trust must be brought in court of equity, *Restatement* §198 recognizes that if the trustee is under a duty to pay money or transfer a chattel immediately and unconditionally to the beneficiary and fails to do so, the beneficiary can maintain an action at law against the trustee to enforce payment or transfer. See Deutsch v. Wolff, and Gump v. Wells Fargo Bank, N.A., *supra*. In Whitt v. Goodyear Tire & Rubber Co., 676 F.Supp. 1119 (N.D. Ala. 1987), plaintiffs in three separate cases filed complaints in state court which involved the Employee Retirement Income Security Act

(ERISA), and each case was removed to federal court. The defendant in each case moved to strike the plaintiff's demand for a jury trial. Granting the motion, this court held that the plaintiffs were not entitled to a jury trial on claims that fall under ERISA. The court noted that the majority of cases involved equitable remedies of a beneficiary against a trustee, thus precluding a jury trial. However, an exception arose where a trustee was under a duty to pay money to the beneficiary immediately and unconditionally. In such a case, the beneficiary could maintain an action at law against the trustee to enforce payment. The court stated, however, that the contours of this exception were unclear.

H. Action on Trustee's Bond.

Liability of a surety on a trustee's bond is enforceable in an ordinary action at law, and in the absence of a statute to the contrary, that liability may be enforced in any court having jurisdiction of actions on contract for the amount sought to be recovered. As a general rule, the right of action on a bond accrues, and an action may be maintained, immediately upon the breach of the condition of the bond. An exception is an indemnity bond which indemnifies against damages incurred by the obligee, in which case the obligee must first pay such damages before proceeding on the bond. However, if the bond is conditioned against *liability* for damages or expenses as well as for actual damages, a right of action accrues when the obligee becomes legally liable for the damages or expenses, even though he has not actually paid them. Conditions precedent to liability that are inserted in the bond or incorporated in the statutory law requiring the bond must be first complied with or performed as a prerequisite to maintaining an action on the bond. 12 AmJur2d Bonds §37.

Also, the general rule requires the settlement of the accounts of a trustee before an action may be maintained on his bond. 76 AmJur2d Trusts §562. As with all court actions, the obligee must file the appropriate action within the prescribed statute of limitations period for such bond proceedings. The statute runs from the time that a cause of action accrues to the plaintiff/beneficiary, and therefore it ordinarily does not run against the beneficiary until the trust is terminated and the defalcation of the trustee is thereby established (i.e., until a final accounting by the trustee). The lack of a final accounting by the trustee may prevent the running of the statute on an action by the beneficiary against the trustee's surety. 76 AmJur2d Trusts §563.

I. Action to Impose Constructive Trust or Equitable Lien.

Where the trustee by the wrongful disposition of trust property acquires other property, the beneficiary is entitled at his option either to enforce a constructive trust of the property so acquired or to enforce an equitable lien

upon it to secure his claim against the trustee for damages for breach of trust, as long as the product of the trust property is held by the trustee and can be traced. *Restatement* §202. This rule is applicable where the trustee wrongfully sells trust property, or wrongfully uses trust funds in the purchase of property, or wrongfully exchanges trust property for other property, or wrongfully deposits trust funds in a bank. See Robinson v. Kirbie, supra.

Except for such a claim, the claim of the beneficiary against the trustee for breach of trust is that of a general creditor.

CONCLUSION

The remedies set out above are some of the arrows in the trust lawyer's quiver with which to attack a recalcitrant trustee on behalf of a slighted or oppressed beneficiary. A familiarity with these options will enable counsel to provide solutions for such a beneficiary and foster compliance with the intent of the trust grantor.

**Calling all Trust SIG members!
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We are in need of articles, short or long, for the Trust SIG Newsletter. Would you like to share your expertise with fellow members through the newsletter? Perhaps there is an article sitting in your files that would be fitting, or perhaps a budding author willing to review a book on related issues? We want to involve as many members of the Trust SIG that are willing and would really appreciate your assistance and input.

Don't delay!

All contributions and/or submissions should be forwarded to:

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