

**TRUST AND ESTATE
ADMINISTRATION ISSUES AND UPDATE FOR CPAS
INCLUDING OIL AND GAS MATTERS**

**TULSA CHAPTER OF THE OSCPA
NOVEMBER 18, 2015 3^{pm}**

PRESENTED BY

LINDA J. VAN ARKEL-GREUBEL AND PARRISH WHITAKER

MIDFIRST BANK

2200 EAST UTICA PLACE, SUITE 550, TULSA, OK 74114

(918) 293-6863

linda.vanarkel-greubel@midfirst.com

Parrish.whitaker@midfirst.com

WORDS OF WISDOM

- When I was young, I thought that money was the most important thing in my life, now that I am old, I know that it is.

-- Oscar Wilde

- Put not your trust in money, but put your money in trust.
-- Oliver Wendell Holmes

TABLE OF CONTENTS

- New Oklahoma Statutes
- New Federal Statutes and IRS Regulations
- Recent Oklahoma Case regarding Fiduciary Duties
- CPA as Advisor to Fiduciary -- Trends and Challenges

OKLAHOMA STATUTES

2015 Statutes

- HB 1965 Trooper Nicholas Dees and Trooper Keith Burch Act of 2015
- SB 109 Durable Power of Attorney
- HB 1772 Oklahoma Uniform Transfer to Minors Act
- SB 745 Transfer-on-death Deeds
- SB 774 Repeal the Rule Against Perpetuities

2014 Statutes

- SB 1904 Oklahoma Family Wealth Preservation Trust Act

Trooper Nicholas Dees and Trooper Keith Burch Act of 2015

- It shall be unlawful for any person to operate a motor vehicle while using a hand-held device to manually compose, send, or read an electronic text message while the motor vehicle is in motion.
- Punishable of a fine of not more than \$100.00.
- Effective November 1, 2015

SB 109 Durable Power of Attorney

- If, following the execution of a durable power of attorney, a court appoints a conservator, guardian of the estate, or other fiduciary charged with the management of all the principal's property or all except specified exclusions, the attorney-in-fact is accountable to the fiduciary as well as to the principal.
- The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if the principal were not disabled or incapacitated.
- Prior law terminated the durable power of attorney.
- Effective November 1, 2015

HB 1772 Oklahoma Uniform Transfers to Minors Act

- Minor is permitted to contact financial institution if the If the custodian fails to transfer property
- Custodian shall transfer the custodial property to the minor, minor's estate or minor's beneficiary upon the earlier of: minor's attainment of 18 years of age, minor's attainment of delayed majority age but not later than 21 years of age, or minor's death.
- To extent custodial property consisted of deposit accounts, if minor reaches age of release and custodian does not make timely transfer, minor may request financial institution to intervene.
- The financial institution may send a written demand to the custodian to transfer the funds to the minor.
- If custodian does not make the distribution within 30 days from the date of demand, the financial institution shall have the authority to close the account and pay out the funds to the minor without any liability or recourse from any parties.
- Effective November 1, 2015

SB 745 Transfer-on-death Deeds

- An interest in real estate may be titled in transfer-on-death form by recording a deed, signed by the record owner of interest, designating a grantee beneficiary or beneficiaries of interest.
- The deed shall transfer ownership upon the death of the owner.
- For deaths incurring after November 1, 2011, to accept real estate pursuant to a transfer-on-death deed, the grantee shall execute and record an affidavit with a copy of the record-owner's death certificate within 9 months of the grantor's death or the interest reverts to the deceased grantor's estate.
- Effective April 20, 2015

SB 774 Repeal of the Rule Against Perpetuities

- The absolute power of alienation shall not be suspended by any limitation or condition for a longer period than during the continuation of the lives of persons in being at the creation of the limitation or condition plus 21 years.
- This provision shall apply solely to real property not held in trust.
- The absolute ownership of a terms of years cannot be suspended for a longer period than the absolute power of alienation can be suspended.
- This rule shall apply solely to real property not held in trust.
- With respect to the absolute power of alienation of real and personal property, the absolute power of alienation is not suspended if there is any person in being who, alone or in conjunction with one or more others, has the power to sell, exchange or otherwise convey the real or personal property.
- If the terms of the trust do not suspend the absolute power of alienation of any trust property beyond the terms permitted, the trust may exist in perpetuity.
- Exceptions: charitable use; literary, educational, scientific, religious or charitable corporation; cemetery corporation or association; Department of Mental Health and Substance Abuse Services; or gifts for medical science.
- The common law rule against perpetuities shall not apply to a trust subject to the trust laws of this state.
- Effective November 1, 2015

Impact of the Repeal of the Rule Against Perpetuities

- Use of “Legacy Trust” or “Dynasty Trust.”
- Type of generation-skipping trust.
- Any trust that lasts perpetually.
- It has no fixed ending date.
- Why use a Legacy Trust?
- To provide extended relief from federal or state transfer taxes.
- As a long-term incentive for certain types of family behavior.
- To bring continuity in the operation of a closely held family business.
- Long-range purposes, i.e. ensure descendants can afford to go to college or buy a home.
- Provide flexibility for changing circumstances.
- Protect assets from unnecessary taxes and attack by creditors.

SB 1904 Oklahoma Family Wealth Preservation Trust

- Clarified the definition of “Oklahoma Assets.”
- Removed One Million Dollar limit on credit protection.
- Effective November 1, 2014

Oklahoma Family Wealth Preservation Trust

- 31 OS §§ 11 and 12
- (1) Established by grantor under Oklahoma law.
- (2) Having at all times as a trustee or co-trustee an Oklahoma-based bank that maintains a trust department or an Oklahoma-based trust company.
- (3) Having beneficiaries who are the grantor's spouse, lineal ancestors and descendants of grantor and grantor's spouse, 501(c)(3) organizations, or a trust settled for the sole benefit of one or more of the qualified beneficiaries.
- (4) Having a majority in value of assets comprised of "Oklahoma Assets."
- (5) Trust includes provisions that provide the income generated is subject to Oklahoma income tax.
- Trust can be revocable or irrevocable.
- Grantor can be resident or non-resident.

Oklahoma Assets

- stock, bond, debenture, membership interest, partnership interest, or other equity or debt interest issued by an Oklahoma-based company, without reference to assets owned by the Oklahoma-based company,
- a bond or other obligation issued by this state or an Oklahoma governmental agency,
- a bond or other obligation issued by a county of this state, by a municipal government located in this state, by a school district located in this state or by any public trust for the benefit of either this state or one or more political subdivisions of this state,
- an account in an Oklahoma-based bank. As used in this subparagraph, "account" means a demand, time, savings or passbook type of account or a certificate of deposit type of account,
- real or tangible personal property, or any interest therein, having a situs in this state, which shall include, but not be limited to: (1) mineral interests, or (2) promissory notes secured primarily by real or tangible personal property or both,

Oklahoma Assets

- any security backed exclusively by promissory notes, if at least a majority in value of such promissory notes are secured by real or tangible personal property having a situs in this state or both, and mutual funds, as defined pursuant to The Investment Company Act of 1940, 15 U.S.C., Section 80a-1 et seq. and The Securities Act of 1933, 15 U.S.C., Section 77a et seq., and common trust funds, as defined pursuant to Section 1010 of Title 6 of the Oklahoma Statutes, to the extent the assets within such funds meet one or more of the requirements listed in subparagraphs a through f of this paragraph.
- An "Oklahoma-based company" means a corporation, limited liability company, limited partnership, limited liability partnership or other legal entity formed or qualified to do business in this state and having its principal place of business in this state, which principal place of business shall be a physical location.

Oklahoma Family Wealth Preservation Trust

- The corpus and income of a preservation trust shall be exempt from attachment or execution and every other species of forced sale and no judgment, decree, or execution can be a lien on the trust for the payment of debts of a grantor, except a child support judgment
- Any incremental growth derived from income or an increase in value of the corpus of a preservation trust shall also be considered protected by this section.
- Transfer of an asset to a preservation trust does not affect any mortgage, security interest or lien to which that asset is subject.
- All transfers to a Family Wealth Preservation Trust are subject to the provisions of the Uniform Fraudulent Transfers Act. The UFTA refers to transfers made with the actual intent to hinder, delay or defraud any creditor.

Federal Statutes

- 2014 Annual Exclusion \$14,000.00
- 2015 Annual Exclusion \$14,000.00
- 2016 Annual Exclusion \$14,000.00

- 2014 Applicable Exclusion \$5,340,000.00
- 2015 Applicable Exclusion \$5,430,000.00
- 2016 Applicable Exclusion \$5,450,000.00
- 2015 Highest Estate Tax Rate 40%

- Estates of decedents survived by spouse may elect to pass any of the Deceased Spouse's Unused Exclusion (DSUE) to the surviving spouse.
- This election is made on a timely filed estate tax return for the decedent with a surviving spouse.
- Simplified valuation provisions apply for those estates without a filing requirement absent the portability election.
- The DSUE will not be indexed for inflation but frozen at its actual amount in the year of the decedent's death.

Internal Revenue Bulletin: 2015-36

- HR 3236 The Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 signed into law on July 31, 2015.
- Notice 2015-57 Effective August 21, 2015
- Law created Section 6035 which requires the executor of an estate required to file an estate tax return to also provide certain statements to the IRS and to beneficiaries receiving inherited property.
- Beginning on February 29, 2016, the IRS plans to begin accepting basis information with respect to property acquired from decedents.
- Law requires consistent basis reporting between an estate and the beneficiary receiving the property from a decedent.
- These changes apply to any estate tax return filed, and to property with respect to which an estate tax return is filed, after July 31, 2015.

Internal Revenue Bulletin: 2014-32

- Final regulations provide guidance on which costs incurred by estates or trusts other than grantor trusts (non-grantor trusts) are subject to the 2% floor for miscellaneous itemized deductions under I.R.C. § 67(a).
- Final regulations applied to any non-grantor trust created after May 8, 2014, the estate of any decedent who dies after May 8, 2014, and any existing fiscal-year estate with a taxable year beginning after May 8, 2014.
- Final regulations do not give fiduciaries sufficient time to design and implement the necessary program changes to determine the portion of bundled fees that are attributable to costs that are subject to the 2% floor versus costs that are not subject to the 2% floor.
- Final regulations are amended to apply to taxable years beginning on or after January 1, 2015.
- Fiduciaries of existing trusts and calendar-year estates would implement the rules beginning January 1, 2015.
- For taxable years before the date the final regulations are published, taxpayers were not required to determine the portion of a Bundled Fiduciary Fee that is subject to the 2% floor. Instead, for each such taxable year, taxpayers may deduct the full amount of the Bundled Fiduciary Fee without regard to the 2% floor.
- Payments by the fiduciary to third parties for expenses subject to the 2% floor are readily identifiable and must be treated separately from the otherwise Bundle Fiduciary Fee.

In the Matter of the Trust of Carolyn S. Burford
(Petition of JP Morgan Chase Bank, N.A.
successor in interest to Bank One Trust Company, N.A.
for Instructions and Construction of Trust)

- Tulsa County District Court; Case No. PT-2006-013
- October 9, 2012, Findings of Facts and Conclusions of Law
- Provides Guidance Regarding Fiduciary Duties including:
 - Oklahoma Uniform Prudent Investor Act
 - Duty to Diversify
 - Duty of Loyalty
 - Duty of impartiality
 - Duty to Comply with the Terms of the Trust
 - Oklahoma Uniform Principal and Income Act
 - Power to Adjust
 - Duties of Co-trustees
 - Duty to Inform Beneficiaries
 - Duty to Maintain Trust Records

Oklahoma Uniform Prudent Investor Act

- 60 OS 175.60 *et seq*
- A trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in the Oklahoma Uniform Prudent Investor Act.
- The Oklahoma Prudent Investor Rule is a “default” rule and “may be expanded, restricted, eliminated or altered by the provisions of a trust.

Standard of Care

- The standard of care applicable to the trustee in the Oklahoma Prudent Investor Rule is found in 60 O.S. § 175.62.
- A trustee shall invest and manage trust assets as a prudent investor would, by considering the purpose, terms, distribution requirements, and other circumstances of the trust.
- This is a standard of reasonable care, skill and caution evaluated in the context of an overall investment plan.
- A trustee's investment and management decisions respecting individual assets must be evaluated, not in isolation, but in 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.
- The duty of prudence is often summarized as a requirement that a trustee act "as prudently for the *cesti que trust* as he would have done for himself." *Phelps v. Harris*, 101 US 370, 383 (1879). Under the prudent investor standard, a trustee is required to act with the same prudence in investing trust funds that a prudent person would in investing his own funds.
- The duty of reasonable care includes that a trustee shall make a reasonable efforts to verify facts relevant to the investment and management of the trust assets. 60 OS § 175.62(D). Failure to adequately investigate investments and their risks is a breach of the duty of prudence. *Allison v. Bank one-Denver*, 289 F.3d 1232, 1238-39 (10th Cir. 2002).

Standard of Care

- A trustee with special skills or expertise has a duty to act in accordance with those skills or expertise. 60 O.S. § 175.62(F).
- The bank is a professional manager of trusts, has extraordinary facilities and skills and, therefore, is held to a higher standard of prudence.
- In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purpose of the trust and the skills of the trustee. 60 O.S. § 175.67.
- The power to incur expenses is limited by the Uniform Prudent Investor Act of 1994. “It is important for trustees to make careful cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio.” Uniform Prudent Investor Act, § 7, cmt quoting *Restatements (Third) of Trust*, § 227, cmt m.
- The compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of the decision or actions and not by hindsight. 60 O.S. § 175.68.

Duty to Diversify

- 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 or disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distributions and other circumstances of the trust and in compliance with the Oklahoma Uniform Prudent Investor Act.
- The Oklahoma Prudent Investor Rule mandates diversification of trust assets unless there are special circumstances showing that the trust purpose is better served by not diversifying. 60 O.S. § 175.63.
- Nonetheless, the duty to diversify is not absolute.
- It is not an absolute requirement that the trustee diversify. The intent of the Settlers, as expressed by the terms of the trust, represents a factor that may be considered when deciding whether and to what extent to diversify. *Atwood v. Atwood*, 2001 OK CIV APP 48, ¶ 29, 25 P.3d 936, 944; *Restatement (Third) of Trusts* § 92 comment d(2).

Duty to Diversify v. Duty to Retain

- A trustee may retain in trust any property originally received into the trust and any substitution therefor without liability for such retention. 60 O.S. § 163.
- The retention provisions in the Burford Trust recommended the retention of the original stock “regardless of whether or not such retention may appear to offend against what might ordinarily be considered a sound trust investment practice and the usual principles of investment diversification.”
- The intent of the grantors and express desire for retention of the original holdings was clear and unequivocal and excused the default rule to diversify.
- The trustee did not have an absolute duty to diversify because of the retention provision articulated by grantors in the Trust.

Duty to Diversify v. Duty to Retain

- Even when a trust authorizes the trustee to retain investments originally passed to the trust by the settlors, the trustee must exercise due diligence and prudence in deciding to retain such investments. Restatement (Third) of Trusts § 229(d).
- An authorization to retain investments enhances the trustee's discretion but does not wholly insulate it from liability for its exercise of a power to retain assets. *Robertson v. Cent. Jersey Bank & Trust Co.*, 47 F.3d 1268, 1274, 1995 WL 42847 (3d Cir. 1995).
- A trustee does not breach the terms of the trust by selling securities which the settlors merely authorized or requested to be retained. *Stevens v. Nat'l City Bank*, 45 Ohio St. 3d 276, 282, 544 N.E.2d 612, 618, 1989 WL 104421 (1989).
- Although both the Uniform Prudent Investor Act and the Uniform Principal and Income Act may be made inapplicable by the terms of a trust, the legislature did not make them the law to be loosely applied or ignored. The terms of a trust are subject to them unless such terms clearly express that they are not. However, the intent of the settlors, as expressed by the trust agreement, represents a factor that may be considered when deciding whether to make any investment or change in investment, including to what extent a prudent investor should sell assets held in the trust, or borrow or convert assets in some manner by involving them in a derivative structure. Thus, the prudent investor rule does not make it mandatory that a trustee depart from the clearly expressed intent of the trustor, but rather allows the intent to be considered in evaluation of the performance of the trustee.

Duty of Loyalty

- A trustee shall invest and manage the trust assets solely in the interests of the beneficiaries. 60 O.S. § 175.65.
- Oklahoma law prohibits trustees from directly or indirectly buying or selling any property for the trust from or to itself or an affiliate . . . 60 O.S. § 175.11.
- In *Sanders v. Hall*, 74 F.2d 399, 406 (10th Cir. 1934), the court held a trustee is not permitted to manage the affairs of the trust or to deal with the trust property so as to gain any advantage directly or indirectly for himself.
- In *Burford*, the Court found the following actions to be a breach of duty of loyalty by (1) self-dealing with respect to investments; (2) failing to inform income beneficiary and the remaindermen of the material facts in connection with the investments, (3) failing to encourage individual trustee to seek independent advice; (4) failing to obtain informed conflict waivers from the beneficiaries; (5) investing proceeds in its own investment products; and (6) allowing considerations other than the best interest of the trust and beneficiaries to influence its actions concerning diversification.

Duty of Impartiality

- If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interest of the beneficiaries. 60 O.S. § 175.66.
- The duty of impartiality is described fully in the *Restatement (Third) of Trusts* § 79. A trustee has a duty to administer the trust in a manner that is impartial with respect to the various beneficiaries of the trust and with due regard for the diverse beneficial interest and in a manner that fairly reflects the diversity of their concerns and beneficial interests.
- The duty of impartiality does not require an equal balancing of diverse interests; rather it requires “a balancing of those interest in a manner that shows due regard for . . . the beneficial interest and the terms of the trust.” *Restatement (Third) of Trusts* § 79 comment c.
- The duty of impartiality requires that in investing, protecting and distributing the trust estate, and in other administrative functions, the trustee must act impartially and with due regard for the diverse beneficial interests created by the terms of the trust.
- In consulting and otherwise communicating with beneficiaries, the trustee must proceed in a matter that fairly reflects the diversity of their concerns and beneficial interest.
- In *Burford*, the Court determined there was a breach of the duty of impartiality when investment strategies were pursued without regard to the negative tax consequences to a vested remainder beneficiary and the power to adjust resulted in the invasion of principal in favor of the income beneficiary.

Duty to Comply with the Terms of the Trust

- A trustee is required to comply with the terms of the trust. *May v. Oklahoma Bank and Trust Co.*, 2011 OK 52 ¶ 15, 261 P.3d 1138, 1142.
- The duty to comply with the terms of the trust includes compliance with the intention of the grantors as expressed in the terms of the trust. *Franklin v. Margay Oil Corp.*, 1944 OK 316, ¶ 36, 153 P.2d 486, 496, quoting *Hill v. Hill*, 1915 OK 338, 152 P. 1122, 1122. (“Any person having any interest in the trust or the trust property has a right to insist, in proper proceeding, that the trust shall be maintained and executed according to the wishes of the settlor, as expressed in the terms of the trust.”)
- Absent consent of all beneficiaries or authorization of the court, the trustee or the beneficiaries do not have the authority to modify the trust unless granted by such power by the terms of the Trust. *Reed v. JP Morgan Chase Bank, N.A.*, 2011 OK 93, 270 P3d 140; *Restatement (Third) of Trusts § 64(1)*. When the trust does not grant power to the trustees to modify the trust, the trustees should petition the court for modification of the terms of the trust.

Duty to Comply with the Terms of the Trust

- The court found the trustee violated its duty to comply with the terms of the trust when it sold the original stocks held in the Trust. Based on the retention provisions in the trust, it was the express intent of the grantors to retain the original stock unless there were unusual circumstances regardless of whether or not such retention may appear to offend what might ordinarily be considered a sound trust investment practice and the usual principles of investment diversification.
- The Court found the trustee breached its duty to comply with the terms of the trust when it distributed principal of the Trust to the income beneficiary. The Trust provided for the net income to be paid in monthly installments to the income beneficiary. This provision was intended to preserve the corpus or principal for the remaindermen upon the death of the income beneficiary.
- The court also held the trustee breached its duty to comply with the terms of the trust when it borrowed, pledged or otherwise encumbered assets. According to the *Restatement (Second) of Trusts § 191*, a trustee cannot borrow against the trust unless specifically authorized to do so by the terms of the trust.

Oklahoma Uniform Principal and Income Act

- The Oklahoma Uniform Principal and Income Act (OUIA) is found at 60 O.S. § 175.103 *et seq.*
- The OUIA governs how the receipts and disbursements are to be classified as between income and principal.
- In allocating receipts and disbursements to or between principal and income, a fiduciary shall administer a trust or an estate in accordance with the terms of the trust or the will, even if there is a different provision in this act.
- The fiduciary may administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or will, even if the exercise of the power produces a result that is different from a result required or permitted by this act.
- If the trust does not contain a different provision, the fiduciary shall administer the trust or estate in accordance with the terms of the OUIA.
- According to the OUIA, 60 O.S. § 175.103(B), a fiduciary shall administer a trust impartially, based on what is fair and reasonable to all the beneficiaries, except to the extent that the terms of the trust . . . clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries.

Power to Adjust

- The OUPIA governs a trustee's power to adjust in 60 O.S. § 175.104.
- A trustee may believe that the allocations between principal and income do not result in the appropriate level of fiduciary accounting income. A trustee investing as a prudent investor is authorized to make adjustments between income and principal so as to provide the income beneficiary with an appropriate degree of beneficial enjoyment where the income component of the trust portfolio's total return is too small or too large because of investment decisions under the prudent investor rule.
- A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust asset as a prudent investor and the terms of the trust describe the amount that may or must be distributed to a beneficiary referring to the trust's income. 60 O.S. § 175.104.
- The trustee has a duty to exercise a statutory adjustment power or a statutory unitrust election, except as the trustee's authority or duty is limited by statute, or to make an equitable adjustment, except as is preempted or precluded by statute, or as limited by the terms, objectives, or circumstances of the trust. *Restatement (Third) of Trusts § 111 (2012)*.
- In *Burford*, the trust gave the trustee the right, in its sole discretion, to determine the manner in which each receipt is to be allocated between principal and income, and to determine the manner in which each expense and loss and other deduction is to be allocated, as between principal and income, and the determination of the trustee shall be conclusive and binding upon the beneficiaries.
- Nonetheless, the Court determined the trustee used its power to adjust in a manner which favored one or more of the beneficiaries. It claims the trust did not provide clear manifestation that one beneficiary would be favored over another.

Powers and Liabilities of Co-Trustees

- 60 O.S. § 175.17 governs the powers and liabilities of co-trustees.
- Unless provided otherwise by the trust or court order, any power in three or more trustees may be exercised by a majority of the trustees but no trustee who has not joined in exercising a power shall be liable to the beneficiaries or others for the consequences of the exercise.
- A dissenting trustee shall not be liable for the consequences of an act which the trustee joins at the direction of the majority trustees, if the trustee expressed his dissent in writing to any of the co-trustees or before the time of joinder.

Powers and Liabilities of Co-Trustees

- Unless it is otherwise provided by the trust instrument, or an amendment thereof, or by court order, any co-trustee may give a power of attorney to another trustee or authorize a co-trustee to perform any act in the administration of the trust, but the trustee giving a power of attorney or authorizing an act to be performed by the co-trustee shall have the same liability and responsibility as if the trustee had performed the act done pursuant to the authorization.
- It also does not excuse a co-trustee from liability for inactivity in the administration of the trust, nor for failure to attempt to prevent a breach of trust.
- Where two or more trustees, none of whom is the settlor, have the power as trustees to make discretionary distributions of either principal or income to or for the benefit of one of them, the trustee beneficiary may only make discretionary distributions which provide for health, education or maintenance of the trustee beneficiary or to support the beneficiary in an accustomed manner of living.

Fiduciary Duty with Respect to Co-Trustees

- The Restatements do not generally find there is a fiduciary duty between co-trustees simply because of the co-trustee relationship.
- Unless otherwise provided by the terms of the trust, if there are two trustees, their powers may be exercised only by concurrence of both of them, absent an emergency or proper delegation. *Restatement (Third) of Trusts* § 39 (2003).
- Each trustee has a duty and right to participate in the administration of the trust; and each trustee has a duty to use reasonable care to prevent a co-trustee from committing a breach of trust and to obtain redress if a breach occurs. *Restatement (Third) of Trusts* § 81 (2007).
- When co-trustees are serving, “joint action or the concurrence of both trustees is required to exercise powers of the trusteeship.” *Restatements (Third) of Trust* § 81 comment c.

Fiduciary Duty with Respect to Co-Trustees

- In *Burford*, the Court described the fiduciary duty to include the duty to cooperate with its co-trustees, the duty to ensure the co-trustee was afforded the right to participate in the administration of the trust, and the duty to properly inform the co-trustee of all relevant material facts.
- The Court cites several examples where the corporate trustee should notify the individual co-trustees of significant decisions to be made and give adequate disclosure in order to prevent depriving the individual co-trustees of his or her right to participate in the trust administration.
- The Court found the corporate trustee had a fiduciary duty to prevent its individual co-trustee from committing a breach of trust because the individual co-trustee did not and could not understand the investments and she relied solely on the bank.
- It based its conclusion on 60 O.S. § 175.62 which states “A trustee with special skills or expertise, or is named trustee in reliance upon the trustee’s representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.”

Power to Delegate a Trust Power

- Case law states a trustee may delegate the exercise of a trust power but that does not give the trustee the right to abdicate his duty.
- “A trustee may delegate the exercise of a trust power to a fellow trustee, especially where the latter has an expertise in some particular aspect of the trust management; but that does not give a trustee the right to abdicate his duty to be personally active in the administration of the trust.” *Matter of Goldstick*, 177 A.D.2d 225, 238, 581 N.Y.S.2d 165, 1992 WL 35761 *opinion modified on reargument*, 183 A.D. 684, 586 N.Y.S.2d 490, 1992 WL 126966 (1992) (Bogert, Trusts § 92, at 331 [6th ed]).
- Where a fiduciary party has an obligation, he cannot prevail in a cause action against co-fiduciaries for breach of the same trust. *Zimmerman v. Pokart*, 242 A.D.2d 202, 203, 662 N.Y.S.2d 5, 1997 N.Y. Slip Op. 07080, 1997 WL 450255 (1997).

Duty to Inform Beneficiaries of Material Information and Events Concerning the Trust and its Administration

- In *Smith v. Baptist Foundation of Oklahoma*, the court stated “openness and disclosure are favored in situations where the trust is irrevocable – ‘beneficiaries are entitled not only to accounting information but also to relevant information concerning the bases upon which the trustee’s discretionary judgments have been or will be made.’”
- The *Restatement (Third) of Trusts* § 82 states as follows: Except as provided in § 74 (revocable trusts) or as permissibly modified by the terms of the trust, a trustee has a duty [to]: Promptly inform fairly representative beneficiaries of the existence of the trust, of their status as beneficiaries, and their right to obtain further information, and of basic information concerning the trusteeship; To inform beneficiaries of significant changes in their beneficiary status; and To keep fairly representative beneficiaries reasonable informed of changed involving the trusteeship and about other significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests.
- The *Restatements (Third) of Trusts* states the trustee’s duty with respect to providing information or to exercise reasonable judgment in determining what matters are significant to require disclosure. *Restatement (Third) of Trusts*, § 82 comment d (2007). The general duty of the trustee does not include providing contingent beneficiaries periodic reports of its administration. Bogert’s, *The Law of Trusts and Trustees* § 963.

Duty to Inform Beneficiaries of Material Information and Events Concerning the Trust and its Administration

- A court will not interfere with a trustee's exercise of its discretionary power (or discretion not to exercise the power) when that conduct is reasonable, not based on an improper interpretation of the terms of the trust, and not otherwise inconsistent with the trustee's fiduciary duties. Thus, judicial intervention is not warranted merely because the court would have differently exercised the discretion. *Restatement (Third) of Trusts*, § 87 (2007).
- The Court in *Burford* found violations of the duty to inform the beneficiaries holding the corporate co-trustee did not provide accurate and complete statements to the beneficiary. According to the Court, the statements contained omission and misleading statements. Furthermore, the corporate co-trustee failed to adequately inform the beneficiary when the beneficiary had limited capacity and the corporate co-trustee's reliance on the beneficiary to obtain her own independent counsel was unreasonable

Duty to Maintain Proper Trust Records

- A trustee is bound to keep clear, distinct, and accurate accounts. *Burford v. Stuart*, 1967 OK 3, ¶ 15, 422 P.2d 428, 431.
- A trustee has a duty to maintain clear, complete, and accurate books and records regarding the trust property and the administration of the trust, and, at reasonable intervals, upon request, to provide beneficiaries with reports or accountings. *Restatement (Third) of Trusts*, § 83.
- The accounting rendered by the fiduciary must be complete and must cover all transactions from the beginning of the relationship to the end.
- In *Burford*, the corporate trustee was unable to produce records of its trust administration from 1955 through 1998, due to a broken imaging system formerly used.
- The court found the records were incomplete and inadequate and the failure to amend such records caused the beneficiaries to incur substantial expense of discovery and trial in an attempt to understand the transactions that occurred.

CPA as Advisor to the Fiduciary

- Fiduciary Accounting
- Income Tax Return Preparation
- Income Tax Planning
- Valuations of Closely Held Businesses and other Special Assets held in Trust
- Managing Closely Held Businesses held in Trust
- Sales of Interests in Closely Held Entities
- Forensic Accounting

Challenges Facing CPAs Who Provide Services to the Fiduciary

- Lack of authoritative and consistent guidance relating to the accounting and reporting for estates and trusts.
- Lack of uniform presentation format that meets the needs, expectations and requirements of the users.
- Lack of consistency among the 50 states because each has its own statutes and legal interpretations
- Who is the client?
- Relationship of fiduciary accounting income, distributable net income and taxable income

• Source: Practice Guide for Fiduciary (Trust) Accounting AICPA Tax Division December 2007

Standards of Confidentiality

- CPA engaged to perform tax accounting services as well as other services for the fiduciary
- In this situation the fiduciary relationship is clearly identified.
- Rule 301 of the AICPA Code of Professional Conduct (AICPA 2006) prohibits CPAs in public practice from disclosing confidential client information without the consent of the client.
- Standards of confidentiality create potential problems when the CPA is the advisor to a fiduciary entity, and the standards involve the determination and identification of the client for the purposes of applying the confidentiality rules.
- Because of the duality of ownership between the fiduciary and beneficiaries, and among the income and remainder beneficiaries, the proper identification of the client for the duty of confidentiality becomes important.
- Who is the client, the fiduciary or the beneficiary?
- This can place the CPA in a difficult situation when problems arise between the fiduciary and the beneficiary.

The Relationship of Fiduciary Accounting Income, Distributable Net Income and Taxable Income

- Fiduciary Accounting Income and Taxable Income are not the same.
- Fiduciary Accounting Income is determined in accordance with the terms of the governing instrument.
- Distributable Net Income (DNI) is the amount of income to be taxed to the trust beneficiaries who receive distributions from the trust or estate and what amount will be deductible by the estate.
- Taxable Income is computed by subtracting from gross income all allowable deductions (whether they were charged to principal or income), the distribution deduction, and the allowable exemption.
- Power to Adjust and Certain Unitrust Distributions affect calculations
- Allocation of Gains to income affect calculations

In Conclusion . . .

Thank you for letting me speak today.
Please call me or email me if you have any questions.
Happy Thanksgiving!

**We must not cease from exploration
and the end of all our exploring
will be to arrive where we began
and to know the place for the first time.**
— T.S. Elliot