FIDUCIARIES GONE WILD:
Fiduciary Risk Management for Individual Executors, Trustees and Other Fiduciaries

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ESTATE PLANNING AND PROBATE LAW

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T. Aaron Dobbs – Shareholder

T. Aaron Dobbs leads the firm's estate planning, probate and trust administration practice. He is board certified in estate planning and probate law by the Texas Board of Legal Specialization.

Aaron routinely advises clients on the development of estate plans to achieve their post-mortem objectives and to mitigate income and transfer taxes. Aaron also assists beneficiaries, fiduciaries, creditors, and nonprofit organizations in all aspects of estate and trust administration, probate, will contests, trust and fiduciary litigation, creditor claims, and guardianship disputes before trial and appellate courts across the state of Texas, and he is admitted to practice before the United States District Court, Southern District of Texas.

A seventh generation Texan, Aaron previously worked as a Legislative Aide to U.S. Senator Kay Bailey Hutchison of Texas and as a Legislative Counsel for the Texas Legislative Council. During his tenure with the Texas Legislature, Aaron was a member of the team of lawyers responsible for drafting the first installment of the new Estates Code, which replaced the Texas Probate Code on January 1, 2014.

Education
South Texas College of Law Houston, Houston, Texas
Juris Doctorate, Estate Planning and Probate emphasis, 2005
Associate Editor, *Corporate Counsel Review*

Texas A&M University, College Station, Texas
Bachelor of Science, Journalism and Political Science, 2001
Recipient, *Buck Weirus Spirit Award*

Bar Admissions
State Bar of Texas
United States District Court for the Southern District of Texas

Professional Affiliations
Houston Bar Association, Probate, Trusts and Estates Section
Council Member (2016 – present)

Fort Bend County Bar Association, Probate, Trusts and Estates Section
Founding Co-Chair (2016 – present)

Texas Bar Foundation, Fellow (2014 – present)

Disability and Elder Law Attorneys Association
Board member (2014 – 2016)

Planned Giving Council of Houston
Board Member (2017 – present)

Attorneys in Tax & Probate
Board member (2014 – 2016)

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Recent Publications and Presentations

"A Texas Estate of Mind: Tales, thoughts and tips about Estates and Trusts…from a Texas perspective" editor-in-chief and contributor, WWW.TEXASESTATEOFMIND.COM (2017 to present)

"Basics of Suing and Defending Fiduciaries" author and presenter, Houston Bar Association (2017)

"How to Avoid Accidentally Practicing Law in Gift Planning" and *"Making Charitable Bequests Stick"* author, Planned Giving Council of Houston (2017)

"Estate Planning in the Age of Litigation" presenter, RIA TRUST EDUCATION PROGRAM, BOKF, NA (2017)

"The Ins and Outs of Drafting Accountings for Trusts, Estates and Guardianships" author, ESTATE PLANNING & PROBATE DRAFTING COURSE, Texas Bar Association (2016)

"The Case of the Missing Trust Agreement: What To Do When A Written Trust Agreement Is Lost Or Cannot Be Located" co-author, REAL ESTATE, PROBATE AND TRUST LAW REPORTER (Vol. 54, No. 3)

"*How to Get Away with ~~Murder~~ Breaching Your Fiduciary Duties (satire)*" presenter, Disability & Elder Law Attorneys Association (2014)

"*It's Going to Be OK: Transition to the New Estates Code*" author and presenter, 28TH ANNUAL WILLS AND PROBATE INSTITUTE, South Texas College of Law (2013)

"*Powers of Attorney: Licenses to Steal*" author and presenter, 27TH ANNUAL WILLS AND PROBATE INSTITUTE, South Texas College of Law (2012)



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Kelley M. Bentley – Senior Associate

Ms. Bentley focuses her practice on elder law, estate planning, trust administration, probate and guardianship. Ms. Bentley is board certified in estate planning and probate law by the Texas Board of Legal Specialization, in addition to being a Certified Elder Law Attorney by the National Elder Law Foundation. Ms. Bentley is a VA accredited claims attorney.

Ms. Bentley regularly advises clients on the preparation of estate planning documents, with an emphasis on the special needs of the elderly and individuals with disabilities. Ms. Bentley assists individuals with the preparation and administration of special needs trusts, as well as advises individuals on long-term care planning needs, including qualification for Medicaid benefits and VA benefits. Ms. Bentley advises individuals regarding all issues surrounding estate and trust administration, including representation before the Medicaid Estate Recovery Program, as well as coordination of assets and lifetime gifts to reduce income and transfer tax liability.

Education
University of Houston Law Center, Houston, Texas
LL.M in Taxation, 2010

South Texas College of Law Houston, Houston, Texas
Juris Doctorate, 2005
Assistant Note & Comment Editor, *South Texas Law Review*

University of Houston, Houston, Texas
B.A. in Music, minor in French, 2001

Admissions
State Bar of Texas, 2005

Honors and Awards
Thomson Reuters *Super Lawyers* "Rising Stars" (2013 — 2017)
Thomson Reuters *Super Lawyers* "Up-and Coming 100" (2017)
Thomson Reuters *Super Lawyers* "Up-and-Coming 50 Women" (2017)

Affiliations
Certified Elder Law Attorney by the National Elder Law Foundation

Member, National Academy of Elder Law Attorneys, Texas Chapter

Member, Disability & Elder Law Attorneys Association (Board Member)

Member, Houston Business and Estate Planning Council

Member, Planned Giving Council of Houston

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Recent Professional Publications and Presentations

State Bar of Texas, Intermediate Estate Planning & Probate, "Planning for Beneficiaries With Special Needs: How Public Benefits Affect Planning, Guardianship and Litigation," San Antonio, June 2016

Disability and Elder Law Attorneys Association, "Financing Long-Term Care Without Breaking the Bank," Houston, May 2016

Fort Bend County Bar Association, Co-Presenter, "Corporate Trustees: Not Just for Probate Anymore," Richmond, March 2016

State Bar of Texas, How to Handle Your First (or Next) Medicaid Case, "Medicaid Estate Recovery Program," Austin, December 2015

Disability and Elder Law Attorneys Association, Co-Presenter, "Guardianship for the Medicaid Recipient," Houston, December 2015

University of Texas Probate, Elder Law and Guardianship Conference, Co-Presenter, "Guardianship for the Medicaid Recipient," Galveston, August 2015

Attorneys in Tax and Probate Law, "Hot Topics in Elder Law," Houston, March 2015

University of Texas Probate, Elder Law and Guardianship Conference, Co-Presenter, "Dealing With Non-US Applicants for Medicaid Benefits," Galveston, August 2014

Attorneys in Tax and Probate Law, "Top Ten Mistakes in Drafting and Administering Special Needs Trusts," Houston, March 2014

Texas Society of CPAs CPE Expo, "Financing Long Term Care," Houston, December 2013

FIDUCIARIES GONE WILD:
Fiduciary Risk Management for
Individual Executors, Trustees and Other Fiduciaries

I. Introduction

Executors, trustees and other fiduciaries owe the highest duties known to law and are held to strict standards of conduct. Serving as a fiduciary is not for the faint of heart, and one should give serious thought before agreeing to serve as a fiduciary. Do you have enough extra time to fulfill seemingly endless obligations? Are you organized and able to store massive amounts of data? Do whiney or entitled people annoy you? Do you shut down or withdraw in stressful or confrontational situations? Can you set aside personal difference and treat individuals impartially – even when it is undeserved?

This paper will explore the inherent risks of individuals (i.e. non-professionals) serving as an executor or trustee and will offer suggestions for risk management and defending breach of fiduciary duty claims and related causes of action. This paper also provides guidance when advising clients on the appointment of family members or other loved ones in a fiduciary role. Section II of this paper defines "fiduciary" and what it means to serve in such capacity. Section III discusses the duties of a trustee, while Section IV specifically discusses the duties of an executor. Section V discusses suggestions for mitigating the risks associated with serving as either an executor or trustee and offers suggestions for avoiding conflicts in the administration of a trust or estate. Section VI discusses aspects of defending fiduciaries in fiduciary litigation.

II. What is a Fiduciary?

Blacks Law Dictionary defines a "fiduciary" as "a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires. Thus, a person is a fiduciary who is invested with rights and powers to be exercised for the benefit of another person." *The Law Dictionary, available online at thelawdictionary.org*. Executors and trustees are both fiduciaries and owe a high duty of good faith, fair dealing, honest performance and strict accountability to both the individual who appointed them in such capacity, as well as to the beneficiaries of either an estate or trust. In other words, a fiduciary is held to a high and exacting standard, with no exceptions.

The duties for both an executor and a trustee are similar. The duties and responsibilities of a trustee are outlined in both the trust agreement as well as the Texas Trust Code. A grantor of a trust may expand or limit the duties and responsibilities of a trustee beyond those in the Code; however, the grantor cannot instruct a trustee to act illegally or contrary to public policy. The duties of an executor are outlined in both the Texas Estates Code, as well as the Last Will & Testament of the decedent. Although this paper does not specifically delve into the duties of an agent under a power of attorney or a guardian, the duties applicable to an executor or trustee are generally applicable to other types of fiduciaries.

III. Trustee's Duties

A trustee "shall administer the trust in good faith according to its terms and this subtitle." *Tex. Prop. Code §113.051*. Furthermore, "in the absence of any contrary terms in the trust instrument or contrary provisions in this subtitle, in administering the trust the trustee shall perform all of the duties imposed of the trustee by the common law. *Id*. Some of the specific duties imposed on trustees under the Texas Trust Code and common law are described in more detail in this section.

A. Duty of Loyalty. A trustee must administer the trust solely in the interest of the beneficiaries. *Tex. Prop. Code §117.007; See also Slay v. Burnett Trust*, 187 S.W.2d 377, 387-88 (Tex.1945). The trustee may not self-deal; meaning that the trustee "is accountable to a beneficiary for the trust property and for any profit made by the trustee through or arising out of the administration of the trust, even though the profit does not result in a breach of trust." *Tex. Prop. Code §114.001(a)*. This does not mean that a trustee is unable to receive compensation for services provided as the trustee, but that the trustee cannot profit at the expense of the trust. *Id*.

B. Duty to Deal Impartially with Beneficiaries. "If the trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries." *Tex. Prop. Code §117.008*. However, it is important to examine the terms of a trust, since the trust instrument can expressly permit the trustee to favor one or more of the beneficiaries at the expense of the other beneficiaries. *Tex. Prop. Code §116.004(b)*. For example, a grantor of a third-party special needs trust can provide in the trust instrument that the needs of the beneficiary with special needs are superior to those of the remainder beneficiaries and that the trustee may exhaust the entire corpus of the trust without regard to the interests of the remainder beneficiaries.

C. Duty to Exercise Reasonable Care and Skill. Under the common law, a trustee must administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust. Restatement (3d) of Trusts §77 (2007). The duty of prudence requires the exercise of reasonable care, skill, and caution. *Id.* If the trustee possesses, or procured appointment by purporting to possess, special facilities or greater skill than that of a person of ordinary prudence, the trustee has a duty to use such facilities or skill. *Id.*

D. Duty to Invest Prudently. Under the Texas Trust Code, "A trustee must invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust." *Tex. Prop. Code §117.004(a)*. The investment plan and management decisions are evaluated in the context of the trust portfolio and not as an isolated asset. *Tex. Prop. Code §117.004(b)*. To the extent relevant, the trustee is required to take into consideration the following: (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, (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, (8) an asset's special relationship or special value, if any, to the purposes of

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