PROTECTING INDIVIDUAL TRUSTEES WHO PROTECT BENEFICIARIES

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I. INTRODUCTION

Agreeing to serve as a trustee is not a decision that should be taken lightly and/or made without the benefit of due consideration and wise counsel. Simply being named to serve as a trustee in a trust instrument does not make a person a trustee. More specifically, Section 112.009 of the Texas Property (Trust) Code provides that a person (as well as an entity for that matter) does not become a trustee, and therefore cannot be liable with respect to a trust, until and unless the person (or the entity) agrees to be a trustee by accepting the appointment. Acceptance of a trustee appointment can be shown, per Section 112.009(a) of the Texas Property (Trust) Code, by a signature from the person named as trustee on an acceptance document, or by a performance of duties by the designated trustee.

A trustee can be described as a manager of assets (for other persons) in a trust. Upon accepting an appointment as trustee, the trustee becomes bound to the beneficiary(ies) and commits to engaging in on-going tasks for the benefit of the beneficiary(ies). As discussed in more detail below, a trustee is required to adhere to and abide by fiduciary duties which are imposed by Texas law. As such, a trustee can be accurately described as a fiduciary.

In 1928, (then future) U.S. Supreme Court Justice Benjamin N. Cardozo, writing for the majority in the case of *Meinhard v. Salmon*, famously described the fiduciary duty of loyalty as being "something stricter than the morals of the marketplace. Not honesty alone, but the punctilio[1] of an honor most sensitive, is then the standard of behavior." *See Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928). Justice Cardozo's description of the fiduciary duty of loyalty still holds true today and has been cited in numerous judicial opinions addressing fiduciary duty.

In today's litigious society, an uninformed trustee, who accepts a trustee appointment without due consideration and wise counsel, is inviting a lawsuit from a beneficiary. In the author's experience and opinion, ignorance is a precipitating cause for a breach of fiduciary duty lawsuit (against a trustee) more often than willful malfeasance (on the part of a trustee). Often times, an attorney does not have the opportunity to meet with an individual trustee until after he or she has been sued by an unhappy beneficiary. To those of you who prepare trust instruments for clients, and by extension select trustees, you should – respectfully – advise a trustee in very general terms of the responsibilities (and liabilities) that accepting a trustee appointment causes and also advise the trustee to seek immediate legal representation and advice from qualified counsel to the extent that he or she chooses to accept the appointment.

II. THE PARTIES

Trusts are a relationship between at least three different types of participants: the settlor, the trustee, and the beneficiaries.

[1] Webster's Dictionary characterizes "punctilio" as "careful observance."

A. Settlor (a/k/a the "Grantor" or "Trustor")

The settlor is the original owner of the trust property. Any person who contributes property to the trust will be considered a settlor to the extent of the contribution.[2] This generally occurs by the settlor executing a trust instrument and transferring legal title of trust property to the trustee. The trust instrument provides the trustee with a set of instructions to follow in administering the trust.

B. Trustee

The trustee is the individual or entity that holds the trust property for the benefit of the trust's beneficiary, and must have the legal capacity to take, hold, and transfer the trust property.[3] Except in limited cases where a merger of interests occurs (Section 112.034 of the Property Code), a beneficiary may also be a trustee of a non-self-settled special needs trust.[4] The settlor of a trust may be the trustee of a trust.[5] If more than one trustee is appointed, they may serve together as co-trustees. Once the trustee accepts the trust, the trustee has legal ownership. It is then the trustee's responsibility to manage the property for the benefit of the trust beneficiaries.

C. Beneficiaries

The beneficiaries hold equitable, or beneficial, ownership of the trust property.[6] There are a wide variety of beneficial interests that can exist in the trust relationship. These include, but are not limited to, current interests, future interests, and contingent interests. A person with any of these types of interests is a beneficiary, even if he or she does not have a present interest that entitles them to distributions from the trust. The Trust Code defines a beneficiary as "a person for whose benefit property is held in trust, regardless of the nature of the interest."[7]

D. The Same Individual Can Fill More Than One Role

Often, as mentioned above, the same person or people will fill more than one of the roles. For example, a settlor or beneficiary may also be the trustee. However, the same person cannot exclusively occupy all three roles. If the settlor is also the sole trustee and sole beneficiary, the trust is no longer a trust.[8] Instead, the settlor/trustee/beneficiary owns all of the trust property

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[2] TEX. PROP. CODE ANN. § 112.001.

[3] TEX. PROP. CODE ANN. § 112.008(a).

[4] See TEX. PROP. CODE ANN.§ 12.008(b); however, a beneficiary cannot serve as the trustee of a self-settled special needs trust.

[5] TEX. PROP. CODE ANN. § 112.008(c).

[6] *City of Mesquite v. Malouf*, 553 S.W.2d 639, 644 (Tex. Civ. App – Texarkana 1977, writ ref'd n.r.e.).

[7] TEX. PROP. CODE ANN. § 111.004(2).

[8] TEX. PROP. CODE ANN. § 112.034.

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