Trustee's Estate Duty to Account

December 27, 2023

Take-Away: When a trustee dies, the duty to inform and account passes to the trustee's estate representatives. This is why it might be wise to initially name a corporate trustee to avoid the later complications that arise when the deceased trustee's records cannot be located.

Background: One of the overlooked benefits of using a corporate trustee is that the trustee never dies or becomes disabled, which is not the case when an individual is named as trustee. Which leads to the question of who is charged with filing reports and accountings when the individual trustee later dies or becomes disabled? We know that the Michigan Trust Code (MTC) imposes a duty to inform and report on all trustees, whether corporate or individual. [MCL 700.7814(1)(2)(3).] Most of these duties to inform and report cannot be modified by the terms of the Trust instrument. [MCL 700.7105(2)(i)(j).] This duty to account is a fundamental duty of the trustee. A strained trustee-beneficiary relationship does not minimize the trustee's duty of full and complete disclosure to trust beneficiaries.

Trustee's Death or Disability: When a trustee becomes incapacitated or dies, his or her estate representative may have the duty to prepare the accounting during his or her tenure. A trustee, or his or her successor, is not allowed to complain that the accounting is for a long period of time. The duty to disclose reflects the information a trustee is duty-bound to maintain as he or she is required to keep records of trust property and his or her actions as trustee. One old, and a couple of relatively new, Texas appellate court decision reaffirm this continuing duty to inform and account that are placed on the fiduciaries of a deceased trustee.

- *Corpus Christi Bank & Trust v. Robert, 587 S.W.2d 173 (Texas Appeals, 1979:* The settlor created a Trust for her grandsons. This Trust terminated when the grandsons became 30 years old. After the Trust terminated, the beneficiaries requested that the trustee prepare an accounting, but the trustee refused to do so. The beneficiaries then sued the trustee and requested a court order to compel an accounting and damages. The trustee died before the trial. The trustee's executor, the Corpus Christi Bank, was substituted as a party defendant. The beneficiaries then filed a motion to compel the Bank on behalf of the trustee to render a full accounting. The trial court granted this motion. On appeal the Court of Appeals upheld the trial judge's decision stating:

  "One of the primary duties of a trustee is to keep full, accurate, and orderly records concerning the status of the trust estate and all facts performed thereunder....A trustee is charged with the duty of maintaining an accurate account of all the transactions relating to the trust property . He is chargeable with all assets coming into his hands, the disposition for which he cannot account.... In the event the trustee dies prior to the time he has rendered an account, ...his representative must render the account for the trust beneficiaries."

- *In re Ng, No. 09-17-00386-CV 2017 Texas App LEXIS 10129, October 27, 2017,* a successor trustee sued the estate of a former trustee and obtained the order to compel the accounting. The deceased trustee's wife then filed a writ of mandamus action and the successor trustee responded. The Texas Court of Appeals refused the requested mandamus relief and allowed the trial court's order requiring the accounting from the former trustee's estate representative to be operative.

- In *Estate of Erwin, No 13-20-00301-CV, 2021 Texas App LEXIS 10160, December 29, 2021,* the decedent former trustee's estate representative defended an accounting action on the grounds that the statute of limitations shielded her from rendering an accounting to the trust beneficiaries. She was held liable for the deceased trustee's breaches of fiduciary duty arising from his failure to render and account:

  "Although Redding [the trustee's executor] has not been appointed the successor trustee over C.E.'s testamentary trusts, as independent administrator for Bettye's estate [the decedent trustee], Redding assumes the responsibility of rendering an accounting. The trial court erred in granting Redding's motion for order of protection against producing an accounting of the trusts."

Restatement (Third) of Trusts: Section 83 of this *Restatement* describes the trustee's duty to maintain records necessary to fulfill its duties to inform and report. Because of this duty to maintain records, the trustee's Personal Representative would not have available the defense of an 'impossibility to perform, or account' due to the absence of critical information from which the accounting would be prepared:

> *A trustee who fails to keep proper records is liable for any loss or expense resulting from that failure. A trustee's failure to maintain necessary books and records may also cause a court in reviewing a judicial accounting to resolve doubts against the trustee. These failures by trustees may furnish grounds for reducing or denying compensation, or even removal, or for charging the trustee with the costs of corrective procedures or of having to conduct otherwise unnecessary account proceedings in court."*

Expense of Accounting: Another issue might be who pays for the accounting. In Michigan, if the court finds that there has been a breach of trust by the deceased trustee, it is likely that one of the remedies available to the trust beneficiaries is a court order that compels the deceased trustee's estate to pay for that accounting. [MCL 700.7901(2) and 700.7902(a).] A reported decision under the *Restatement* Section 83, *Miller v Pender, 93 N.H. 1, 34 A.2d 663 (1943)* affirmed a trial court's order that required a trustee to pay the expense of employing an accountant when the expenditures were made necessary by the inadequacy of the trustee's records. As such, the common law supports a court that enters an order requiring a trustee's estate to prepare an accounting since inception and that the estate representative pay for the same.

Conclusion: The death or disability of an individual trustee can present many practical problems for the Trust's beneficiaries. The death or disability of the trustee does not relieve the trustee, or more accurately the trustee's estate, of the continuing duty to inform and account. This is one of those hidden risks that individual trustees often overlook, and their failure to keep accurate records only adds to that potential risk exposure to their estate if they die or become disabled while acting as trustee.