

## **What's Happened to Fiduciary Duties?**

**Take-Away:** What does the future hold for trusts with the erosion of fiduciary duties?

**Background:** The recent Heckerling Institute had an interesting presentation on January 15, 2026, that seemed to conclude, at least to me, that many of a trustee's 'old-time' fiduciary duties are disappearing with the advent of the *modern* trust as states across the nation, update their trust laws to 'entice' trust business. Are we fast approaching a time when there are no fiduciary duties that constrain a trustee? Some observations from the sessions' speakers follow.

**Fiduciary Duties Disappearing:** Carol Harrington pointed out that while we have the Uniform Trust Code, it has not been uniformly adopted by the states. She noted that South Dakota, one of the most aggressive states in modifying (or *modernizing*) its laws to lure trust business, permits such deviations from the Uniform Trust Code that it might be possible to completely eliminate all fiduciary duties if a settlor can even eliminate "good faith" as a standard to govern trustees.

**Trustee Exculpation:** Ms. Harrington also pointed out how many states will permit exculpation of trustees, mentioning the Delaware *Mennen* decision that recognized limiting a trustee's liability to only 'willful misconduct.' She also noted a Tennessee trust law, where she observed that a trustee can apparently act in bad faith, speculating if that is the case, whether a trust even exists?

**Change of Situs:** Co-presenters Lauren Hunt and Stefanie Lipson remarked that just because a trust instrument contains a broad exculpation provision

does not mean that the trustee has a ‘get out of jail free’ card. That said, many of the states that have adopted the Uniform Trust Code have different provisions (or standards) regarding what is an acceptable exculpation provision to protect the trustee, which might encourage the trustee to forum-shop the trust.

The panelists also discussed a corporate trustee referring a client to an attorney, and how much ‘pushback’ the attorney should (or will) give to the corporate trustee on the scope of the trust’s exculpatory provisions, thus pitting the attorney’s ethical obligations to the client against the attorney’s economic interests. [See Comments to UTC 1008(b) which applies to trustee influence, where the trustee’s exculpation is based on language added to the trust by the settlor’s attorney at the settlor’s direction.]

**Silent Trusts:** Philip Hayes noted the dichotomy between trustees that want directed trusts, and settlors who want silent trusts. All the commentators noted the obvious ‘disconnect’ between wealthy individuals whose lifestyles clearly communicate their wealth, e.g., they own a private jet, yet they do not want their descendants to know about the existence of the trust- it’s no secret that they are wealthy. Or, what about the time when a silent trust finally makes a distribution to the beneficiary- it’s no longer a secret, and there is nothing to prevent the recipient beneficiary from talking to other beneficiaries of the same trust. If there is no duty to report, how will the trust beneficiary be in a position to hold the trustee accountable, or to answer questions that the trust beneficiary might have about the trust and/or its administration.

**Directed Trusts:** These panelists also addressed the groundswell of interest in amending state trust laws to permit directed trusts, noting the subtle difference between investment advisors, distribution advisors, and trust directors. In Delaware, a trust director does not have to be a fiduciary; if a

trust director is not a fiduciary, the ‘missing duty sticks with the directed trustee.’ There was also general speculation if someone is named as a trust director, are they fully aware of their fiduciary responsibilities, or did they agree to serve only as an accommodation for the family without fully understanding the scope of their responsibilities?

**Decanting:** If a trustee exercises a decanting power and moves the trust’s situs from a fairly normal jurisdiction to one of the ‘trust-haven’ states like South Dakota or Nevada, is the settlor’s intent being frustrated (moving the trust from a ‘normal’ jurisdiction with ‘normal’ trust laws to an ‘abnormal’ trust law jurisdiction? Anecdotally, the panelists talked about how attorneys in Florida and New York are frequently using Nevada’s decanting statute to make changes to their out-of-state trusts.

**Conclusion:** These panelists posed a few rhetorical questions regarding the future of trusts at the end of their presentation:

- (i) What’s behind this ‘race to the bottom’, e.g., DAPTs, silent trusts, decanting powers without notice, trust directors who are not fiduciaries? States that have intentionally decided to eliminate most fiduciary duties in order to attract trust business.
- (ii) Is one of these so-called *modern* trusts still considered a *trust* by the IRS if all of the trustee’s fiduciary duties have been eroded? This trend could create some serious problems for the trustee for income, estate, gift, and GST purposes if it looks more like ownership by the trustee without any constraints.

- (iii) If all types of bad trustee actions occur when trustees have fiduciary duties, what is going to happen when there are no fiduciary duties?

Mr. Hayes' conclusion is that 'the damage has been done.' What do you think?

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