



A Trustee's Duty To Disclose

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Introduction

- Trustees possess, manage, and control assets for beneficiaries – usually for compensation.
- This is significant authority and power.
- There are many corresponding duties: one of the most important duties is the duty to disclose information.
- This presentation is intended to provide the current legal authority in Texas dealing with a Trustee's duty to disclose.

Introduction

- Bogert, Trusts & Trustees, Second Edition Revised, §961 explains the reason for this duty as follows:
 - “The beneficiary is the equitable owner of the trust property, in whole or in part. The trustee is a mere representative whose function is to attend to the safety of the trust property and to obtain its avails for the beneficiary in the manner provided by the trust instrument. That the settlor has created a trust and thus required that the beneficiary enjoy his property interest indirectly does not imply that the beneficiary is to be kept in ignorance of the trust, the nature of the trust property and the details of its administration. If the beneficiary is to be able to hold the trustee to proper standards of care and honesty and to obtain the benefits to which the trust instrument and doctrines of equity entitle him, he must know of what the trust property consists and how it is managed.”

- This presentation will address:
 - A trustee’s duty to inform and a beneficiary’s right to information at common law and under the Uniform Trust Code;
 - The trustee’s duty to account and responding to request for accountings;
 - Silent or quiet trusts;
 - Avoiding claims for breach of fiduciary duty; and
 - Potential remedies for breaches of duty.

Sources For Duty To Disclose

- There are four independent sources for a duty to disclose in Texas:
 - The Trust Document;
 - Texas Statutory Law;
 - Texas Common Law; and
 - Litigation Rules.

Trust Document's Duty To Disclose

- A trust document may have express provisions regarding the disclosure of information to beneficiaries that are more onerous than statutory or common law.
- Generally, the trust document governs and should be followed. Tex. Prop. Code §111.0035(b). UTC 105 (“*Except as otherwise provided in the terms of the trust, this [Code] governs the duties and powers of a trustee, relations among trustees, and rights and interests of a beneficiary.*”).

Trust Document's Duty To Disclose

- “The trustee shall administer the trust in good faith according to its terms and the Texas Trust Code.” *Tolar v. Tolar*, No. 12-14-00228-CV, 2015 Tex. App. LEXIS 5119 (Tex. App.—Tyler May 20, 2015, no pet.).
- “The powers conferred upon the trustee in the trust instrument must be strictly followed.” *Id.*
- If a trust instrument provides additional disclosure requirements, a trustee should follow them or else risk a breach of duty claim.

Trust Document's Duty to Disclose

- In *Alpert v. Riley*, the trusts required the trustee to notify the beneficiaries annually of their right to withdraw an amount equal to the aggregate amount contributed by each donor for that calendar year or \$20,000, whichever is less. 274 S.W.3d 277 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).
- Based on the terms of the trust, the court concluded that a rational trier of fact could conclude that the trustee breached his fiduciary duty by failing to communicate the amount the beneficiaries could withdraw.

Trust Document's Duty To Disclose: Silent Trusts

- A settlor may want to limit the duty to disclose.
- For example, the “silent trust” where the trust document instructs the trustee to not disclose the existence of the trust.
- There are practical reasons why a fiduciary would not want to be involved in a silent trust.
- This creates an awkward position where a trustee is required to keep the trust a secret, which may mean he has little interaction with the beneficiaries, but may still have the discretion to make distributions where he does not know their circumstances.
- It probably increases risk of fiduciary claims.

Trust Document's Duty To Disclose: Silent Trusts

- Majority of states do not allow silent trusts.
- Some states allow but with requirements that may make a silent trust cumbersome.
- While a silent trust can alleviate a trustee's duties to provide information to a beneficiary, a trustee may not be altogether relieved of the duty to inform and report.

Trust Document's Duty To Disclose: Silent Trusts

- For example, in Ohio, the settlor must appoint a “beneficiary surrogate” to receive required notices, information, and reports on behalf of the beneficiary.
- The settlor has broad discretion in selecting a beneficiary surrogate and may select any person other than the trustee.
- The beneficiary surrogate must act in good faith to protect the interests of the beneficiary for whom the notices, information, or reports are received.
- A person who agrees to serve as beneficiary surrogate should be well-informed about the role and the risks associated with it.

Trust Document's Duty To Disclose: Silent Trusts

- There may be reasons that the parties may want to silence a noisy trust.
- Most states allow a beneficiary to release a trustee from duties.
- Parties can also potentially file suit to modify a trust to provide limitations on a duty to disclose.
- In a revocable trust, a settlor can amend the trust document to provide limitations on a duty to disclose.

Trust Document's Duty To Disclose

- Can a settlor limit disclosure obligations?
- A settlor may limit disclosure obligations in a revocable trust – the settlor can always revoke it or change beneficiaries.
- Some limited precedent in other jurisdictions that would support a duty to disclose to beneficiaries in revocable trust situations.
- Also, duty may arise if the settlor becomes incompetent.
- However, in an irrevocable trust, statutes limit what a settlor can do regarding limiting the duty of disclosure.

Trust Document's Duty To Disclose

- A trust document may not limit a trustee's duty to respond to a demand for an accounting if the demand is from a beneficiary who is entitled or permitted to receive distributions or would receive a distribution if the trust terminated at the time of the demand. Tex. Prop. Code §111.0035(b)(4).
- A trust document may not limit a trustee's common-law duty to keep a beneficiary who is 25 years of age or older informed at any time during which the beneficiary is entitled or permitted to receive distributions or would receive a distribution if the trust terminated at the time of the demand. *Id.* at §111.0035(c).

Trust Document's Duty To Disclose

- Other than these two exceptions, a settlor may restrict or eliminate the right of any other beneficiary to demand an accounting or otherwise have common laws rights to disclosure.
- Example: Beneficiaries under 25 and contingent remainder beneficiaries
- Accordingly, a trustee should carefully review a trust document to see if there are any changes regarding the duty to disclose.

Trust Document's Duty To Disclose

- UTC 105(b)(8) states that a trust cannot limit a trustee's duty to notify qualified beneficiaries of an irrevocable trust who are 25 of the existence of the trust, the identity of the trustee, their right to request trustee's reports.
- This provision allows settlors to limit disclosure obligations to young beneficiaries.
- However, this provision does not distinguish between the type of interest of the beneficiaries.
- Some states do take into account the beneficiaries' interest (contingent, etc.).

Trust Document's Duty To Disclose

- UTC 105(b)(9) states that a trust cannot limit the duty to respond to a request for reports and other information reasonably related to the administration of the trust.
- If a young beneficiary learns of the trust, the trustee must make disclosures.
- Other than these exceptions, a settlor may restrict or eliminate the duty to disclose or the beneficiary's right to information.

Statutory Duty to Disclose

- After reviewing the trust document, a trustee should be aware of statutory duties of disclosure.
- “A trustee shall administer the trust in good faith according to its terms and this subtitle. In the absence of any contrary terms in the trust instrument or contrary provisions of this subtitle, in administering the trust, a trustee shall perform all of the duties imposed on trustees by the common law.” Tex. Prop. Code §113.051.

Statutory Duty to Disclose

- In 2005, the Texas Legislature enacted Texas Property Code Section 113.060 that imposed on trustees a duty to keep beneficiaries reasonably informed concerning the trust's administration and "the material facts necessary for the beneficiaries to protect [their] interests."
- This created certain problems regarding whether this displaced the common law and whether it imposed higher burdens than required by the common law.

Statutory Duty to Disclose

- So, in 2007, the Texas Legislature repealed Section 113.060 stating:
- “The enactment of Section 13.060 was not intended to repeal any common-law duty to keep a beneficiary reasonably informed, and the repeal of this Act of Section 113.060 does not repeal any common-law duty to keep a beneficiary informed. The common-law before January 1, 2006, is continued and in effect.”

Statutory Duty to Disclose

- There is no specific statutorily defined duty to disclose in Texas.
- Rather, the statutes state that a trustee has to act in good faith and consistent with all common-law duties – including the common-law duty to disclose.

Statutory Duty to Disclose

- After reviewing the trust document, a trustee should be aware of statutory duties of disclosure.
- UTC 813(a) provides: “A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.”
- UTC 103(12) provides: “Qualified beneficiary” means a beneficiary who, on the date the beneficiary’s qualification is determined:
 - (A) is a distributee or permissible distributee of trust income or principal;
 - (B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated on that date; or
 - (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

Statutory Duty to Disclose

- UTC 813(a) further states: “[u]nless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary’s request for information related to the administration of the trust.”
- This provision provides a different standard if a beneficiary, whether qualified or not, makes a request for information. In that event, the trustee must promptly comply with the beneficiary’s request unless unreasonable under the circumstances.

Statutory Duty to Disclose

- UTC 813(b) provides that:
 - (1) upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument;
 - (2) within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number;

Statutory Duty to Disclose

- (3) within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report as provided in subsection (c); and
- (4) shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.

Statutory Duty to Disclose

- UTC 813(d) provides: “A beneficiary may waive the right to a trustee’s report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.”
- However, a waiver of a trustee’s report or other information does not relieve the trustee from accountability and potential liability for matters that the report or other information would have disclosed.

Demand for Accounting

- The Texas Property Code provides for a right of beneficiaries to demand an accounting. See Tex. Prop. Code §113.151.
- A beneficiary may give a written demand for accounting, and a trustee has 90 days to provide a written accounting covering all transactions since the last accounting or the creation of the trust, whichever is later.

Demand for Accounting

- If the accounting is not provided in 90 days (or the court does not allow an extension), the beneficiary can bring suit to compel.
- “The court *may* require the trustee to deliver a written statement of account to all beneficiaries on finding that the nature of the beneficiary’s interest in the trust or the effect of the administration of the trust on the beneficiary’s interest is sufficient to require an accounting by the trustee.”
- A court may award attorney’s fees and costs to the beneficiary as against the trustee (individually or against trust).
- Trustee cannot be compelled to do an accounting more than once a year, unless a court orders otherwise.

Demand for Accounting

- In *Grinnell v. Munson*, a court of appeals affirmed a trial court's summary judgment on a beneficiary's claim that a fiduciary had failed to prepare an accounting on demand when the fiduciary had previously provided a detailed accounting less than a year before. 137 S.W.3d 706, 721-22 (Tex. App.—San Antonio 2004, no pet.).

Demand for Accounting

- An “interested person” can seek an accounting.
- An “interested person” means a trustee, beneficiary, or any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust.” Tex. Prop. Code §111.004(7) (emph. added).
- A “beneficiary” means a person for whose benefit property is held in trust, regardless of the nature of the interest. *Id.* at §111.004(2).
- Absent a contrary provision in the trust instrument, a trustee must respond to any demand for an accounting by any beneficiary, including contingent beneficiaries.

Demand for Accounting

- Interested person includes “any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust.”
- Does this include co-trustee?
- Does this include trust advisor/protector?
- Does this include a non-beneficiary settlor?

Demand for Accounting

- Absent a request or other term of the trust instrument, a trustee is under no duty to prepare an accounting.
- In *Malone v. Malone*, the court of appeals held that a trustee did not breach a duty by failing to provide accountings to a beneficiary where the evidence did not indicate that the beneficiary ever requested one and the trust document did not otherwise require it. No. 02-08-157-CV, 2009 Tex. App. LEXIS 6589 (Tex. App.—Fort Worth August 20, 2009, pet. denied).
- However, a trustee is under a duty to maintain adequate records to be able to prepare an accounting at any time.

Demand for Accounting

- The accounting should include:
 - All assets that belong to the trust (whether in the trustee's possession or not);
 - All receipts, disbursements, and other transactions, including their source and nature, with receipts of principal and interest shown separately;
 - Listing of all property being administered;
 - Cash balance on hand and the name and location of the depository where the balance is maintained; and
 - All known liabilities owed by the trust.
- Tex. Prop. Code §113.152

Demand for Accounting

- In *Beaty v. Bales*, a beneficiary wanted an audited or verified accounting, which the trial court did not require. 677 S.W.2d 750 (Tex. App.—San Antonio 1984, no writ).
- Court of appeals held that the trial court did not abuse discretion in determining that an unaudited accounting was sufficient.
- The trial court was concerned with the financial burden on the trust corpus and a CPA testified that unaudited accountings were sufficient with banks and IRS.
- Court held that it could interfere with a trial court's discretionary powers only in cases of fraud, misconduct, or a clear abuse of discretion.

Demand for Accounting

- A beneficiary may simply be impossible to please, no matter the accountings and disclosures given.
- Repeated and detailed requests for accountings can be a substantial cost to the trust – a cost that may impact other beneficiaries.
- Accordingly, a trustee should consider the cost in responding to difficult beneficiaries.
- Further, a trustee may seek protection from a court via a declaratory judgment suit from unreasonable requests for information. See Tex. Civ. Prac. & Rem. Code §37.005 (court may declare rights to any question arising from administration of trust).

Demand for Accounting

- Texas Property Code 115.001(9) provides that a district court has jurisdiction to require an accounting, review trustee fees, and settle interim or final accounts.
- This provision allows trustees to file suit for a final accounting and judicial discharge, which can usually be avoided if the beneficiaries will sign an adequate receipt, release, and refunding agreement.

Demand for Accounting

- What if the trustee dies or is incapacitated?
- Former trustees and their representatives have a duty to create and produce accountings in Texas.
- The leading case in Texas on this issue is *Corpus Christi Bank & Trust v. Roberts*, 587 S.W.2d 173 (Tex. Civ. App.—Corpus Christi 1979), *reformed in part on other grounds and aff'd in part*, 597 S.W.2d 752 (Tex. 1980).
- Despite expressing sympathy for the deceased trustee's executor, the Texas Supreme Court upheld the requirement for the accounting, stating: "We sympathize with the executor's difficulty in making a full accounting because of the death of this nonprofessional trustee as well as the death of his accountant before either could give testimony in this case. Nevertheless, this difficulty does not discharge the Trustee's obligation to make a full accounting of all funds belonging to the trust estate."

Demand for Accounting

- A recent bill (H.B. 1552) provides:
 - “(b) If a beneficiary, or the beneficiary's guardian if applicable, does not object, in writing to the trustee or a court, to an accounting made under this subchapter before the 180th day after the date a copy of the accounting has been delivered to the last known address of the beneficiary: (1) the beneficiary is considered to have approved the accounting; and (2) absent fraud, intentional misrepresentation, or material omission, the trustee is released from liability relating to all matters in the accounting.”

Demand for Accounting

- UTC 813(c) provides:
 - A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values.
 - Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, [conservator], or [guardian] may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

Demand for Accounting

- The UTC employs the term “report” instead of “accounting” in order to negate any inference that the report must be prepared in any particular format or with a high degree of formality.
- The reporting requirement might even be satisfied by providing the beneficiaries with copies of the trust’s income tax returns and monthly brokerage account statements if the information on those returns and statements is complete and sufficiently clear.
- The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests.

Demand for Accounting

- Uniform Trust Code Section 1005, which provides:
 - “A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding. A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.”

Demand for Accounting

- For example, in *In re Goar*, a beneficiary complained that a trustee did not provide an adequate statutory report. 2012 Ariz. App. Unpub. LEXIS 1541 (Ct. App. Ariz. December 31, 2012).
- The court held that the trustee's trust statements were sufficient to comply with the statutory report requirement:
 - “Contrary to Myers’s assertion, Bossé’s proposed trust distribution meets the reporting requirements of § 14-10813(C). The document provides detailed information about the trusts; the assets held therein and their respective values; the previous and proposed distributions; and a holdback for administrative expenses. In addition, Bossé attached to that document a recent account statement listing the trust assets with more specificity and reflecting the income, deposits, withdrawals, expenses, purchases, and sales. The proposed distribution submitted by Bossé thus includes the ‘receipts and disbursements’ that Myers had specifically requested.”

Common-Law Duty To Disclose

- Texas precedent on the common-law duty to disclose has not been particularly clear.
- The Texas Supreme Court has stated that “trustees and executors have a fiduciary duty of full disclosure of all material facts known to them that might affect [the beneficiaries’] rights.” *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996). *See also Valdez v. Hollenbeck*, 465 S.W.3d 217 (Tex. 2015).
- The existence of strained relations between parties does not minimize the fiduciary's duty of full and complete disclosure. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984).

Common-Law Duty To Disclose

- In *Estate of Benson*, court affirmed an appointment of a receiver over trust assets where the trustee had violated his duty to disclose. No. 04-15-00087-CV, 2015 Tex. App. LEXIS 9477 (Tex. App.—San Antonio September 9, 2015, pet. dism'd. by agr.).
- Section 114.008(a)(5) of the Texas Property Code authorizes a court to “appoint a receiver to take possession of the trust property and administer the trust” if the court finds that “a breach of trust has occurred or might occur.”
- “[The trustee’s] abrupt severance of all communications with the Trust beneficiaries, his undisclosed transfer of funds that could have negatively impacted the market value of [trust assets], ... and his concealment of the Trust bookkeeper from the Trust beneficiaries constitute some evidence ... of a failure to disclose material facts that might have affected the rights of the beneficiaries.”

Common-Law Duty to Disclose

- Does a plaintiff have to have expert testimony to prove a breach of a duty to disclose?
- No. In *Wells Fargo Bank, N.A. v. Crocker*, the court held:
 - “We cannot conclude that expert testimony is necessary to establish a breach of this simple and straightforward duty. The disclosure of details concerning the Crocker sisters' interest in their father's estate, including the \$ 230,000 from the disputed account, is not outside the common experience and understanding of the average layman. An expert was not required to testify that Wells Fargo, having the fiduciary duty to disclose material facts, should have disclosed information to the beneficiaries concerning the disputed account.”
- No. 13-07-00732-CV, 2009 Tex. App. LEXIS 9791 (Tex. App.—Corpus Christi December 29, 2009, pet. denied).
- Further, testimony from an attorney/expert on the scope of a duty to disclose may be inadmissible. See *Greenberg Traurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56 (Tex. App.—Houston [14th Dist.] September 30, 2004, no pet.).

Common-Law Duty To Disclose

- The specific information that should be disclosed may vary depending on the terms of the trust, state law, and other factors such as the nature of the beneficiary's interest, age, capacity, and sophistication, the nature of the trust assets and transactions, and the identity of the trustee.
- Disclosure may include the trust instrument, information about the trustee, trustee compensation, conflicts-of-interest, expenses, trust assets and investment policies or strategies, performance, liabilities, receipts, disbursements, discretionary actions by trustee, tax matters, and other items.

Common-Law Duty To Disclose

- Is there an affirmative duty to disclose?
- The answer is unclear in Texas.
- Caselaw is inconsistent.
- The Restatement provides that there may not be a duty to disclose routine trust activities.
Restatement (Third) Trusts, §82(1)(b), cmt. d.

Common-Law Duty To Disclose

- The Restatement (Third) of Trusts, Section 82(1) provides that a trustee has a duty to:
 - Promptly inform beneficiaries of the existence of the trust, their right to obtain further information, and basic information concerning the trusteeship;
 - Inform beneficiaries of significant changes in their beneficiary status; and
 - Keep beneficiaries reasonably informed of changes 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.

Common-Law Duty To Disclose

- Who is entitled to disclosure?
- Certainly, any active beneficiary that currently may receive a distribution is entitled to information.
- Whether remote beneficiaries are also entitled to information is not entirely clear.
- Once again, the Texas Property Code would seem to indicate that remote beneficiaries are entitled to information absent a trust provision to the contrary.
- Restatement (Third) of Trusts, Sec. 82 cmt. a(1) would indicate that disclosure to remote beneficiaries is not required.

Common-Law Duty To Disclose

- What if the beneficiary has capacity issues?
- Unfortunately, there is not a lot of precedent in Texas on this issue.
- The Restatement of Trusts Section 82 is very helpful and provides as follows:
 - A duty to provide information to a beneficiary who is under a disability may be satisfied for purposes of Subsection (1), by providing the information to the beneficiary's conservator, agent under a durable power of attorney, legal or natural guardian, or other suitable person(s), such as one or more trust beneficiaries whose concerns can be expected reasonably to coincide with those of the disabled beneficiary.
- In many Texas Supreme Court cases addressing trusts, the Court cites the Restatement and uses it as guidance.

Common-Law Duty To Disclose

- On a related issue, the Texas Trust Code allows the parent of a minor child to bind the child/beneficiary to a judgment if there is no conflict of interest between them (Tex. Prop. Code Sec. 115.013(c)(3)).
- Also, a minor child can be bound to a release agreement or other agreement with a trustee where the child's parent signs it and there is no conflict of interest (Tex. Prop. Code Sec. 114.032(c)).
- So, these provisions, would support a trustee providing disclosures to parents or those with powers of attorney where there is no conflict between the minor/disabled beneficiary and his or her representative.

Common-Law Duty To Disclose

- A trustee does not have a duty to disclose:
 - Non-material facts;
 - Facts about a trustee's non-trust related activities;
 - Negotiations concerning the purchase or sale of trust assets (if disclosed, possible cure is a confidentiality agreement);
 - Private information (financial, medical, etc.) about other beneficiaries; and
 - Attorney/client communications.

Common-Law Duty To Disclose

- In *Estate of Sloan*, No. 02-15-00198-CV, 2016 Tex. App. LEXIS 6426 (Tex. App.—Fort Worth June 16, 2016, pet. denied), the court held that a trustee did not have a duty to disclose to the beneficiaries when he purchased estate/trust property at “market value” because the will allowed the trustee to do so.

Common-Law Duty To Disclose

- In *Wood v. Victoria Bank & Trust Co., N.A.*, a court held that a trustee did not breach fiduciary duties (including the duty to disclose) by utilizing statutes that allowed the transfer of fiduciary appointments without court intervention. 170 S.W.3d 885 (Tex. App.—Corpus Christi 2005, pet denied) (opinion on rehearing).
- This would also apply to mergers, acquisitions, name changes, etc.
- Superseded opinion reversed summary judgment for the bank held that there was fact issue on the duty to disclose: “Appellants argue that TCB breached this duty by failing to disclose information regarding the purpose for which TCB was transferring the fiduciary accounts to its subsidiary, its conflict of interest, and its financial interest in the transaction.”

Common-Law Duty To Disclose

- In *Punts v. Wilson*, executor did not breach duty to disclose to beneficiaries regarding assets in P.O.D. accounts that were not a part of the estate. 137 S.W.3d 889 (Tex. App.—Texarkana 2004, no pet.).
- “However, it is axiomatic that Wilson did not owe any fiduciary duty to Punts with regard to funds not included in Kelly's estate.”

Common-Law Duty To Disclose

- Where a trust owns stock or partnership interests in closely held businesses, may a beneficiary obtain access to the businesses' information?
- Yes, if the business is wholly owned by the trust.
- Maybe, if the business is only partly owned by the trust (may set up a conflict situation for the trustee – duty to business versus duty to beneficiaries).

Common-Law Duty To Disclose

- In *Benge v. Thomas*, a trust owned a limited partnership interest. No. 13-18-00619-CV, 2020 Tex. App. LEXIS 6888 (Tex. App.—Corpus Christi August 27, 2020, no pet.).
- The beneficiary alleged that the trustee breached duties by not disclosing documents of the limited partnership.
- The court of appeals disagreed:
 - “[T]o the extent that Benge argues that Missi had a duty to maintain records of AFT Minerals’ transactions because AFT Minerals is a trust asset, we conclude that argument is without merit. Therefore, without more, we are unable to conclude that Missi had a duty in her capacity as trustee of the 2012 Trust to make an accounting of AFT Minerals’ transactions to Benge and that Benge in her capacity as a remainder beneficiary of the 2012 Trust can demand such an accounting of AFT Minerals’ transactions.”

Common-Law Duty To Disclose

- Texas draws a line between the actions and duties of a trustee and the actions of a representative of another entity owned all or in part by the trust even where the same person wears both hats. *Adam v. Harris*, 564 S.W.2d 152 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).
- The actions of the entity representative will not be subject to fiduciary duties.
- The books and records of an entity in which a trust owns an interest may be discoverable in litigation to the extent such records are within the trustee's possession, custody, and control. *In re Vance*, No. 10-10-00137-CV, 2010 Tex. App. LEXIS 5940 (Tex. App.—Waco July 21, 2010, original proceeding); *In re Rogers*, 200 S.W.3d 318, 322 (Tex. App.—Dallas 2006, original proceeding).

Common-Law Duty To Disclose

- A trustee is required to keep full, accurate, and orderly records concerning the status of the trust estate and all acts performed thereunder. *Beaty v. Bales*, 677 S.W.2d at 754.
- Potentially, a trustee has a duty, upon demand, to allow a beneficiary on a reasonable basis to inspect the non-privileged books and records of the trust. Restatement of the Law of Trusts 3rd §82.
- No Texas case addresses this duty of inspection.

Disclosure In Litigation

- Texas Property Code Section 115.012 states that all actions are to be governed by the Texas Rules of Civil Procedure and other statutes and rules that are applicable in civil actions generally.
- So, if a trustee is in litigation with a beneficiary, it will have to follow the normal rules of disclosure of information that litigants have to follow.

Disclosure In Litigation

- Rules generally provide for disclosure via:
 - Requests for disclosure;
 - Requests for production (documents and things);
 - Interrogatories;
 - Depositions and pre-suit depositions;
 - Physical and mental examinations; and
 - Access to real property.

Disclosure In Litigation

- The harm in not disclosing information in litigation is that a court may sanction a party for failing to disclose when there is an obligation to do so.
- These sanctions can be severe and case dispositive. *See, e.g., Polos v. Polos*, No. 01-04-0048-CV, 2005 Tex. App. LEXIS 3853 (Tex. App.—Houston [1st Dist.] May 19, 2005, pet. denied) (court struck trustee’s pleading after repeated violations of discovery rules).

Disclosure In Litigation

- There is an issue as to whether a trustee's common-law duty to disclose is in addition to discovery during litigation, such that a trustee only has to respond to discovery and not informal requests for information.
- Multiple authors have different views on this issue.
- The safest course is to disclose all material facts that may impact a beneficiary's interest – whether requested in discovery or via informal means.

Disclosure In Litigation

- Texas Rule of Civil Procedure 172 allows a court to appoint an auditor to state the accounts between the parties and to make a report thereof to the court.
- The auditor shall verify the report via an affidavit.
- Court will award compensation to the auditor to be taxed as costs.

Avoiding Claims

- Prepare regular statements that provide accurate picture of material facts of the trust and provide to all beneficiaries or their representatives.
- Where appropriate, copy beneficiaries on third-party reports.
- Have regular meetings with beneficiaries to discuss management of the trust.
- Document the delivery of statements and meetings.
- Provide disclosure letters on other material issues as they arise in trust administration.
- Private release agreements.
- Court orders limiting disclosure obligations.

Ramifications For Failure To Disclose

- There are many potential ramifications for a trustee breaching a duty to disclose.
 - Court order requiring trustee to act.
 - Compensation forfeiture.
 - Claim for damages by beneficiaries.
 - Attorney's fees.
 - Removal of trustee.
 - SOL may be tolled.
 - Inability to rely on equitable defenses, like waiver, estoppel and ratification.
 - Rescind transactions.
 - Void releases.

Conclusion

- Trustees take on significant duties when they accept the position.
- One of the most important duties is the duty of disclosure.
- Due to the potentially extreme consequences for failing to meet this duty, trustees should be very cautious.
- The Author hopes that this presentation was helpful in analyzing the duty to disclose.