

Issues Arising From Trust Termination and Trustee Succession In Texas

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Introduction

- Trust relationships are often complicated.
- This is true both for the management and distribution of complex assets, but also due to emotions and personal relationships.
- There are a number of issues that arise when trusts terminate or a trustee wants to resign.
- This presentation will attempt to address the main legal issues that arise when trusts terminate or there is a successor trustee.

Areas of Discussion

- Trustee resignation
- Trustee removal
- Who can be successor trustee
- Co-trustee resignation issues
- Successor trustee duty to police
- Prior trustee duty to report
- Trust termination
- Impact of termination
- Wind-up power
- Claims against beneficiaries
- Trustee's duties
- Release agreement
- Refunding agreement
- Judicial relief

Trustee Resignation

- “You can keep the cheese, just let me out of this trap!”
- A trustee may resign in accordance with the terms of the trust instrument, or a trustee may petition a court for permission to resign as trustee. Tex. Prop. Code § 113.081.
- A trustee must strictly follow the trust document in effectuating a resignation.
- If the trust is silent on succession, then an interested party must seek appointment by a court.
- Whether a Trustee's resignation should be accepted is within the discretion of the trial court, and consideration must be given to the interests of the parties to be affected.

Trustee Resignation

- If the trustee does not follow the trust and does not obtain a court order allowing the resignation, then the trustee is still the trustee.
- Resignation is not effective until a new successor is appointed.
- Passing the baton.
- Potentially, current co-trustees may continue without replacing the resigning co-trustee and may even allow a sole trustee.

Trustee Removal

- “Don’t go away angry, just go away.”
- There are instances where a trustee may not want to resign, but a beneficiary wants to remove it.
- Where a trust has provisions for trustee removal, a beneficiary may remove a trustee in accordance with the terms of a trust. Tex. Prop. Code § 113.082(a).
- A beneficiary must follow the terms of the trust in terminating a trustee’s service.
- *Waldron v. Susan R. Winking Trust*, No. 12-18-00026-CV, 2019 Tex. App. LEXIS 5867 (Tex. App.—Tyler July 10, 2019, no pet.).

Trustee Removal

- If a trust document is silent on removal, or a beneficiary cannot comply with this terms, the Trust Code has a removal provision.
- On the petition of an interested person, a court may, in its discretion, remove a trustee if:
 - (1) the trustee materially violated or attempted to violate the terms of the trust and the violation or attempted violation results in a material financial loss to the trust; (2) the trustee becomes incapacitated or insolvent; (3) the trustee fails to make an accounting that is required by law or by the terms of the trust; or (4) the court finds other cause for removal.
- Tex. Prop. Code § 113.082(a).

Trustee Removal

- An action to remove a trustee, regardless of the underlying grounds on which it is brought, is not subject to a limitations analysis. *Ditta v. Conte*, 298 S.W.3d 187 (Tex. 2009).
- “Because a trustee’s fiduciary role is a status, courts acting within their explicit statutory discretion should be authorized to terminate the trustee’s relationship with the trust at any time, without the application of a limitations period.” *Id.*
- However, the Court noted that actions against a fiduciary for damages are still controlled by the statute of limitations analysis.

Who Can Be Successor Trustees

- “You like me, you really like me!”
- First look to trust document.
- A trial court should select a successor trustee in conformance with the intent of the settlor, and abuses its discretion in failing to do so. *Conte v. Ditta*, 312 S.W.3d 951 (Tex. App.—Houston [1st Dist.] 2010, no pet.).
- Texas statutes clarify that the settlor or a beneficiary can be a trustee. Tex. Prop. Code § 112.008.
- Other individuals can be a co-trustee; there is no felon limitation like there is for executors.
- Corporate trustees are allowed so long as they can exercise trust powers in Texas.
- The trial court has the discretion to alter the rights, powers, and authority of the successor trustee. Tex. Prop. Code § 113.084.

Who Can Be Successor Trustee

- If a person or entity named in the trust refuses to accept the appointment, then he, she, or it incurs no liability with respect to the trust. Tex. Prop. Code § 112.009(b).
- A person or entity named as a trustee has no obligation to accept the position.
- Once the person or entity named as trustee accepts the trustee position, he, she, or it incurs liability with respect to the trust.
- If the person or entity named as trustee exercises power or performs duties under the trust, he, she, or it is presumed to have accepted the trust. Tex. Prop. Code § 112.009(a).

Who Can Be Successor Trustee

- A settlor cannot create a trust with himself or herself as both the sole trustee and sole beneficiary: where there is a complete unity of title, there is no trust (merger doctrine).
- When a beneficiary is a trustee, that situation creates perceived conflicts of interest.
- Where the settlors expressly provide for a beneficiary being a trustee, there is a presumption that the settlors approved of the conflict situation and impliedly favored the beneficiary/trustee.
- Those presumptions, however, may not apply where the settlors did not expressly designate the beneficiary as a potential trustee and the beneficiary is appointed to that position in some other fashion.

Co-Trustee Succession Issues

- “Two’s company, three’s a crowd.”
- If a trust requires a certain number of trustees, and one no longer wants to act or is able to act, then the co-trustees and beneficiaries should follow the terms of the trust in selecting a successor co-trustee.
- However, if the trust allows the remaining co-trustees to continue acting without replacing the co-trustee, then they may do so.

Successor Trustee Duty To Police

- “You did what?!?!?”
- A successor trustee is liable for a breach of trust of a predecessor:
 - [O]nly if he knows or should know of a situation constituting a breach of trust committed by the predecessor and the successor trustee: (1) improperly permits it to continue; (2) fails to make a reasonable effort to compel the predecessor trustee to deliver the trust property; or (3) fails to make a reasonable effort to compel a redress of a breach of trust committed by the predecessor trustee.” Tex. Prop. Code § 114.002.

Successor Trustee Duty To Police

- A trust document may relieve a successor trustee of an obligation to raise claims against prior trustees. *Benge v. Roberts*, No. 03-19-00719-CV, 2020 Tex. App. LEXIS 6335 (Tex. App.—Austin August 12, 2020, pet. denied).
- Texas Trust Code Section 114.007 has an important provision that may impact a successor trustee's duty to police a prior trustee's actions.
- Powers clause is enforceable “except as provided in Section 111.0035 of the Trust Code,” which requires good faith.

Duty Of Prior Trustee To Report

- “If you want to keep a secret, you must also hide it from yourself.”
- Trust beneficiaries can face a difficult situation in understanding what has happened with their trust when the trustee of their trust resigns, dies, or becomes incapacitated.
- “Trustees and executors have a fiduciary duty of full disclosure of all material facts known to them that might affect [a beneficiary’s] rights.”
- In addition to the duty of disclosure, a trustee must maintain a complete and accurate accounting of the administration of a trust.

Duty Of Prior Trustee To Report

- 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.
- The leading case in Texas on this issue is *Corpus Christi Bank & Trust v. Roberts*, 587 S.W.2d 173 (Tex. App.—Corpus Christi 1979), *reformed in part on other grounds and aff'd in part*, 597 S.W.2d 752 (Tex. 1980).
- In the middle of litigation, the trustee died, and the trial court ordered the trustee's executor to prepare an accounting, and the court of appeals affirmed.

Duty Of Prior Trustee To Report

- 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.”

Duty Of Prior Trustee To Report

- More recently, an appellate court held that a former trustee's executor had to prepare an accounting and reversed a trial court's motion for protection on that issue. *See Estate of Erwin*, No. 13-20-00301-CV, 2021 Tex. App. LEXIS 10160 (Tex. App.—Corpus Christi 2021, no pet.).
- The court implied that this was appropriate as there had not been a successor trustee appointed.

Trust Termination: Event Triggering Termination

- “All good things must come to an end.”
- For the most part, that is also true for trusts.
- The termination of a trust and the distribution of its assets can be a ripe area for disputes.
- The most usual way for a trusts to terminate is due to their own language and limitations. The Texas Trust Code provides:
 - A trust terminates if by its terms the trust is to continue only until the expiration of a certain period or until the happening of a certain event and the period of time has elapsed or the event has occurred...
- Tex. Prop. Code § 112.052.

Trust Termination: Small Trusts

- If the trust property has a total value of fifty thousand dollars (\$50,000) or less, a trustee may terminate the trust after notice to all beneficiaries. Tex. Prop. Code § 112.059.
- Similarly, a trust document can allow a trustee to terminate a trust when the trust assets are depleted to some specific level or when the trustee, in its discretion, determines that the trust is not viable.
- Any such provision would be enforceable.

Trust Termination: Suit To Terminate

- A trustee or beneficiary may petition a court to modify or terminate the trust when either (a) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill or (b) because of circumstances not known to or anticipated by the trustor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of the purposes of the trust. Tex. Prop. Code § 112.054(a).

Trust Termination: Suit To Terminate

- Further, a court can terminate a trust if: “(A) continuance of the trust is not necessary to achieve any material purpose of the trust; or (B) the order is not inconsistent with a material purpose of the trust.” Tex. Prop. Code § 112.054(a)(5)
- Regarding this ground, the statute provides:
 - “The court may not take the action ... unless all beneficiaries of the trust have consented to the order or are deemed to have consented to the order.

Trust Termination: Decanting and Merger

- Texas allows a distribution of trust principal in further trust, a process called “trust decanting,” which provides a method for clients to change the terms of their irrevocable trusts.
- Texas also allows a trustee to merge multiple trusts together into one resulting trust without a judicial proceeding, if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of one of the separate trusts.
- A trust terminates if the legal title to the trust property and all equitable interests in the trust become united in one person. Tex. Prop. Code § 112.034(b).

Impact of Termination

- “Show me the money!”
- While a trust is in existence, the trustee holds legal title and the beneficiaries have equitable title.
- Courts have held that as soon as the trust terminates that the legal ownership of the trust’s property passes to the beneficiaries.
- Upon the termination of a trust, the estate of the trustee ceases, and the legal, as well as the equitable, title vests in the beneficial owner without the necessity of any act or intervention on the part of the trustee, unless the intention of the creator appears that the legal title should continue in the trustee.
- The termination of a trust leaves the trustee with a mere administrative title to the fund.

Impact of Termination

- This merger of interests may be accomplished by an express conveyance of the legal title to the beneficiaries by the trustee upon termination of the trust, or may occur automatically upon termination of the trust “where by the terms of the trust is provided that upon expiration of the period of duration of the trust the trust property shall vest in the beneficiary.”

Wind-Up Authority

- “Just when I thought I was out, they pull me back in.”
- Beneficiaries can become impatient when a trust terminates and demand that the trustee immediately transfer assets to them.
- Texas Trust Code Section 112.052 provides that a trustee may exercise the powers of a trustee after an event of termination:
 - A trust terminates if by its terms the trust is to continue only until the expiration of a certain period or until the happening of a certain event and the period of time has elapsed or the event has occurred. If an event of termination occurs, the trustee may continue to exercise the powers of the trustee for the reasonable period of time required to wind up the affairs of the trust and to make distribution of its assets to the appropriate beneficiaries. The continued exercise of the trustee’s powers after an event of termination does not affect the vested rights of beneficiaries of the trust.

Wind-Up Authority

- Texas courts have recognized that winding-up powers are subject to the terms of the instrument.
- Winding-up powers are a default provision that may only be denied to a trustee where the instrument affirmatively and expressly indicates that they are not contemplated after a specified termination date.
- Typically, a trustee can pay expenses and debts and pursue claims and litigation.
- Courts have held (depending on trust language) that a trustee cannot accept new assets, partition assets between beneficiaries, or bind trust property.

Claims Against Beneficiaries

- If the beneficiary causes harm to the trust due to his or her activities, a trustee may have a claim against the beneficiary.
- Texas Property Code Section 114.031 provides:
 - A beneficiary is liable for loss to the trust if the beneficiary has: (1) misappropriated or otherwise wrongfully dealt with the trust property; (2) expressly consented to, participated in, or agreed with the trustee to be liable for a breach of trust committed by the trustee; (3) failed to repay an advance or loan of trust funds; (4) failed to repay a distribution or disbursement from the trust in excess of that to which the beneficiary is entitled; or (5) breached a contract to pay money or deliver property to the trustee to be held by the trustee as part of the trust.
- Tex. Prop. Code § 114.031(a).

Claims Against Beneficiaries

- Beneficiaries may not have any assets, so suing the beneficiary may be a worthless exercise.
- The Texas Trust Code Section 114.031(b) allows a trustee to offset any distributions to the beneficiary due to a loss:
 - Unless the terms of the trust provide otherwise, the trustee is authorized to offset a liability of the beneficiary to the trust estate against the beneficiary's interest in the trust estate, regardless of a spendthrift provision in the trust.
- Therefore, if a trustee establishes a claim against the beneficiary, the trustee can then simply payoff that debt by offsetting distributions otherwise due to the beneficiary from the trust.
- A statute of limitations might bar a lawsuit against the beneficiary, but there is recourse to the beneficiary's interest in the trust.

Trustee Duties Upon Termination

- A trustee still owes fiduciary duties after termination and before the conclusion of winding up the trust.
- There are still the duties of loyalty, impartiality, disclosure, prudence, etc.
- The duty to manage and invest trust assets is greatly altered when a trust has terminated and is in wind-up.
- As one court has stated: “After termination the trustee has only the very limited authority given by statute, i. e., to “wind up the affairs of the trust and to make distribution.”
- After termination, the trustee should wind up the trust and distribute assets to the beneficiaries as per the terms of the trust.

Trustee Duties Upon Termination

- According to the Restatement (Third) of Trusts:
 - During the windup period the trustee has a duty: to determine and satisfy trust obligations, including those to taxing authorities; to ascertain the proper distributees and their shares, and plan and make distribution accordingly; and, unless waived by the beneficiaries, to prepare and submit an accounting or report to the court or the beneficiaries. In the meantime, the trustee has a duty to preserve and manage the trust property. These responsibilities are to be carried out with prudence and special attention to the fact that the trust is in the process of termination, and in accordance with the purposes of the trust and the interests of the beneficiaries.

Trustee Duties Upon Termination

- The trustee can properly exercise such powers as are reasonable and appropriate for the preservation of the trust property until the process of winding up is completed.
- The trustee should properly keep trust property productive, as reasonable in the circumstances. Sound exercise of fiduciary discretion in this respect requires not only that the trustee take account of the likely period until preliminary or final distribution can be made of the assets in question, but also that this consideration be balanced against the interest of distributees in receiving property that is unencumbered or readily marketable, on the duty of a trustee regarding leases that might extend beyond the duration of the trust.

Trustee Duties Upon Termination

- If the trust does not provide specifics on how assets are to be distributed, and a trust has one beneficiary, a trustee should normally transfer the assets in kind.
- If there are multiple beneficiaries, the trust terms determine whether and to what extent it would be appropriate for the trustee to convey trust property to the beneficiaries as tenants in common, or to divide and distribute property in kind, or to sell property and distribute the proceeds.
- Otherwise, the trustee(s) exercise discretion to determine the mode or modes of distribution to be employed in the interest of the beneficiaries and fair and reasonable under the circumstances.

Trustee Duties Upon Termination

- The trustee's duties of prudence and impartiality have particular importance in these situations, and the trustee has a duty to act fairly, with reasonable care, and in the interests of the various beneficiaries.
- Among the numerous factors that may be of significance to a trustee in developing an appropriate plan for distributions are: (a) the nature of the trust assets and the tax and other characteristics of specific properties; (b) the number of remainder beneficiaries and the size of their various shares; and (c) the preferences, concerns, and circumstances (tax and financial positions, legal capacity or skill level, etc.) of the various distributees.
- In planning distribution, the trustee should take into account, so far as practical, the likely transaction costs and tax effects to the beneficiaries and the trust.

Trustee Duties Upon Termination

- Of course, distributions in termination are subject to a trustee's duty to pay expenses and liabilities.
- The Restatement provides: "If the terms of the trust specify the method or methods by which distribution is to be made by the trustee, the provision is normally controlling... *specific provisions of these types may be subject to the trustee's duty to satisfy obligations of the trust.*"
- Best practice is to negotiate an agreement between the trustee and all beneficiaries regarding the termination of the trust, distribution of assets, refunding, release, etc.
- Absent an agreement, a trustee can seek judicial approval of a distribution plan.

Mistake of Fact Defense

- Trustees may make errors in the termination and distribution.
- Texas has a statute that expressly states that a trustee's mistake of fact can relieve it of liability. Tex. Prop. Code § 114.004.
 - “A trustee is not liable for a mistake of fact made before the trustee has actual knowledge or receives written notice of the happening of any event that determines or affects the distribution of the income or principal of the trust, including marriage, divorce, attainment of a certain age, performance of education requirements, or death.”
- Interestingly, this provision does not have any requirements that the trustee act reasonably or with diligence as does the Uniform Trust Code and other state statutes.

Continuing a Terminated Trust

- There is authority that parties to a trust can continue the trust after technical termination.
- “If the beneficiaries consent to the trustee holding and administering the trust property after the expiration of the trust term, the trust will be deemed extended and the powers and duties of the trustee continue unchanged.” Bogert’s, THE LAW OF TRUSTS AND TRUSTEES § 1010.
- Texas courts have acknowledged the continuation of trusts by agreement.

Release

- “Please release me, let me go.”
- Trustees and beneficiaries can enter into private agreements that provide protection for a trustee upon the termination of a trust or upon trustee succession.
- A trustee and beneficiary may want to enter into a release agreement.
- The trustee obviously wants the protection afforded by the release, and the beneficiary may be willing to enter into such a release because he or she is not aware of any egregious breach of fiduciary duty and entering into a private relief may avoid the expense involved in a judicial discharge and may also avoid delay in the distribution of the trust’s assets.

Release

- The Texas Trust Code expressly states that beneficiaries can release trustees.
- A beneficiary who has full capacity and acting on full information may relieve trustees from any duty, responsibility, restriction, or liability that would otherwise be imposed by the Texas Trust Code. Tex. Prop. Code § 114.005.
- To be effective, this release must be in writing and delivered to the trustees.
- The trustee should be careful to properly word the release or else certain conduct may be outside of the scope of the release.

Release

- Further, writings between the trustees and beneficiary, including releases, consents, or other agreements relating to the trustees' duties, powers, responsibilities, restrictions, or liabilities, can be final and binding on the beneficiary if they are in writing, signed by the beneficiary, and the beneficiary has legal capacity and full knowledge of the relevant facts. Tex. Prop. Code § 114.032.
- Minors are bound if a parent signs, there are no conflicts between the minor and the parent, and there is no guardian for the minor.
Id.
- The “full knowledge” requirement is a key issue in enforcing a release agreement between a fiduciary and beneficiary.

Release

- In *Austin Trust Co. v. Houren*, beneficiaries of a trust executed a family settlement agreement with the former trustee's estate. 664 S.W.3d 35 (Tex. 2023).
- After the settlement agreement was executed, one of the parties sued the former trustee's estate for a debt alleged over \$37 million.
- The trustee's estate filed a motion for summary judgment based on the release, which the trial court granted.

Release

- The Court then addressed whether the release was enforceable:
 - [W]hen the agreement purports to release claims against one who owes the other party a fiduciary duty, the policies of freedom of contract and encouragement of final settlement agreements must be balanced against the duties of care and loyalty owed by the released fiduciary. Under longstanding common law, trustees and executors owe the beneficiaries of a respective trust or estate a fiduciary duty of full disclosure of all material facts known to them that might affect the beneficiaries' rights. With respect to agreements releasing a fiduciary from liability, the duty includes ensuring that the beneficiary "was informed of all material facts relating to the release." The condition on release agreements involving trustees is reflected in the Texas Trust Code, which provides that "[a] beneficiary who has full legal capacity and is acting on full information may relieve a trustee from any duty, responsibility, restriction, or liability as to the beneficiary that would otherwise be imposed on the trustee by this subtitle, including liability for past violations."

Release

- The Court then turned to the breach of fiduciary duty claim by the trust beneficiaries against the former trustee's estate, which implicated the Trust Code's provisions concerning consent and releases.
- The Court held that such consent and releases were enforceable based on full knowledge.
- The Court seemingly rejected the court of appeals' reliance on a five factor test:
 - But we need not definitively answer that question in this case because (1) Section 114.005 of the Trust Code expressly enables beneficiaries to consent to the releases at issue when they have "full information" and (2) as discussed below, we hold that the Marital Trust's beneficiaries had such "full information" when they executed the Agreement.

Release

- The Court concluded:
 - In sum, while the sufficiency of disclosure will depend on the facts and circumstances of each case, the underlying legal principle remains constant: a beneficiary has full information when he is in a position to make a meaningful and informed decision about releasing a trustee from liability or, said differently, when he is informed enough to understand the nature and consequences of what he is releasing. Here, the Beneficiary Parties were fully aware that they were waiving the right to challenge the propriety of any of the prior distributions from the Marital Trust, even if they did not know the exact amount, in exchange for an expedited distribution of the trust's remaining assets.

Refunding Agreement

- A trustee can make partial distributions and/or a final distribution. In either event, the trustee is at risk that it may distribute assets that it may later need to pay debts or expenses in the winding up of the trust.
- Once the trustee distributes the assets, what recourse does it have to get them back from the beneficiaries if needed?
- The use of receipt, release, refunding, and indemnification agreements are common to remedy this situation.

Judicial Relief

- Sometimes, beneficiaries will not agree to a private release agreement, and a trustee may resort to judicial relief.
- The Texas Trust Code states that a court has jurisdiction to “determine the ... liability of a trustee,” “make determinations of fact affecting the administration, distribution, or duration of a trust,” “determine a question arising in the administration or distribution of a trust,” and “settle interim or final accounts.” Tex. Prop. Code § 115.001(a).
- The Texas Trust Code also authorizes the court to accept a trustee’s resignation and discharge the trustee from the trust on the terms and conditions necessary to protect the rights of other interested parties. Tex. Prop. Code § 113.081(b).

Judicial Relief

- The Texas Declaratory Judgment Act states that a trustee “may have a declaration of rights or legal relations in respect to the trust ... (3) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings; or (4) to determine rights or legal relations of an independent executor or independent administrator regarding fiduciary fees and the settling of accounts.” Tex. Civ. Prac. & Rem. Code § 37.005.
- For example, in *Cogdell v. Fort Worth Nat’l Bank*, the trustee settled claims and sought judicial approval of the settlement agreement. 544 S.W.2d 825, 829 (Tex. Civ. App.—Eastland 1977, writ ref’d n.r.e.).
- The court of appeals noted that the trustee sought court approval of a settlement agreement that released claims against trustee, because of potential conflict of interest, and holding that approval of settlement was a question for the court. *Id.*

Judicial Relief

- There is a difference between an approval of accounting and discharge and a finding of no-liability.
- Obtaining court approval of a final accounting alone is not or should not be an adjudication of claims by the beneficiaries. *Texas State Bank v. Amaro*, 87 S.W. 3d 538 (Tex. 2002).
- So, the trustee must plead for a release and no tort liability finding, and the court must conduct an evidentiary hearing regarding the trustee's actions.
- Many times trustees seek judicial relief in a “friendly” judicial proceeding. Can a trustee seek a no-tort liability finding when no one objects?
- If a court grants a no-liability finding, and no one preserves any error regarding that finding, then it will be res judicata and enforceable.

Conclusion

- There are many interesting and difficult issues that arise around the termination of a trust or the succession of trustees.
- This presentation was intended to provide guidance when a trust terminates, a trustee resigns, a trustee is removed, and/or a new trustee is appointed

Conclusion

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