

Title

Information to which a trust protector or trust director is entitled

Text

A prospective trustee of a trust under which a non-beneficiary is to be granted a power to control certain actions of the trustee, think trust protector or trust director, should insist that the governing instrument clearly spell out what the trustee's duties shall be when it comes to furnishing the powerholder with accountings and other critical information about the trust's administration; so also should the prospective powerholder, for that matter.¹³² To complicate matters further, under default law the trustee has a countervailing duty to the beneficiaries of confidentiality.¹³³ The failure to sort all this out at the drafting stage is just asking for trouble, whether exercise of the power is to be permissive or mandatory.¹³⁴ When a protector's/director's power to control the trustee is mandatory and extensive, the powerholder's right to critical information about the trust, as well as the trustee's duty proactively to supply it, would seem self-evident.¹³⁵ Forcing protectors/directors to fly blind would hardly seem in the best interests of trust beneficiaries. Courts don't seem to be getting the message.

Take *In re the Macy Lynne Quintanilla Trust*, 2018 WL 4903068 (Tex. App. 2018). Though the trustee's mergers of substantially identical trusts had had the effect of removing the incumbent trust protector from the picture, who, ironically, had been vested with an express power to remove the trustee, the court found that the trustee had had no duty to furnish the protector with information pertaining to the mergers, or to otherwise account to the protector, the governing trust instrument being silent on the subject.

In one California case, a trust protector who had been expressly designated a fiduciary in the governing trust instrument was nonetheless denied the requisite standing to compel an accounting. See *Carberry v. Kaltschmid*, 2018 WL 2731898 (Cal. 2018). A fiduciary who is intentionally kept in the dark by the court is a fiduciary in name only.

The Uniform Directed Trust Act, discussed generally in §3.2.6 of *Loring and Rounds: A Trustee's Handbook*, would impose on a directed trustee a duty to keep the trust director or trust protector informed as to matters that are reasonably related to the "powers or duties of the trustee" and the "powers or duties of the director."⁹¹⁵ The trust director or trust protector would have a reciprocal duty to keep the directed trustee appropriately informed.⁹¹⁶

The trustee's countervailing duty of confidentiality is taken up generally in §6.2.3 of *Loring and Rounds: A Trustee's Handbook* [pages 626-628] of the 2019 Edition, which section is reproduced in its entirety in the Appendix below.

¹³²Restatement (Third) of Trusts §75 cmt. b(1).

¹³³See generally §5.4.1.1 of *Loring and Rounds: A Trustee's Handbook* (beneficiary's right to information and confidentiality) and §6.2.3 of this handbook (trustee's duty of confidentiality).

¹³⁴See generally 3 Scott & Ascher §16.7 (Effect of Power to Direct or Control Trustee).

¹³⁵See generally §5.4.1.1 of *Loring and Rounds: A Trustee's Handbook* (trust beneficiary's right to information and confidentiality) and §6.2.3 of this handbook (trustee's duty of confidentiality); 3 Scott & Ascher §16.7 (Effect of Power to Direct or Control Trustee).

⁹¹⁵Unif. Directed Trust Act §10(a).

⁹¹⁶Unif. Directed Trust Act §10(b).

Appendix

§6.2.3 *Trustee's Duty of Confidentiality* [from *Loring and Rounds: A Trustee's Handbook* (2019)]

*Moreover, since a fiduciary relationship exists even before the trust instrument is finally executed, if a settlor has imparted confidential information to the trustee, the fiduciary relationship will forbid its disclosure to anybody else. Indeed, it is wholly offensive to Equity's standards of integrity that the trustee could take personal advantage of the settlor's confidence.*⁴⁷⁸

The current trustee. Intentional breaches. A corollary of the trustee's general duty of loyalty is the specific duty to keep all the affairs of the trust confidential.⁴⁷⁹ The trustee's duty to act solely in the interest of the beneficiaries means that third parties are told only what the law requires the trustee to divulge, *e.g.*, information mandated by regulatory, supervisory, and taxing authorities,⁴⁸⁰ or what furthers the interests of all the beneficiaries, *e.g.*, information needed by executors of pour-over wills and trustees of related trusts.⁴⁸¹ "Even in providing information to or on behalf of beneficiaries, however, the trustee has a duty to act with sensitivity and, insofar as practical, with due regard for considerations of relevancy and sound administration, and for the personal concerns and privacy of the trust beneficiaries." Breach of confidence was one of three traditional bases for equity jurisdiction, the others being fraud and accident. The law of trusts, the law of agency, and the law governing lawyers are separate offshoots of the branch of equity that remedied breaches of confidence.⁴⁸² Unauthorized disclosure to third parties, at minimum, is grounds for removal.⁴⁸³

Negligent breaches. A breach of confidence need not necessarily implicate the trustee's duty of loyalty. The trustee who maintains in digital form confidential information pertaining to the terms of the trust, its settlor, its beneficiaries, and/or the subject property assumes a duty to keep that information secure.⁴⁸⁴ Thus, the trustee could be held personally liable for the consequences of negligently failing to protect such information from the predations of cybercriminals. The trustee's costs of prudently insuring against the quantifiable costs of cybercrimes, both avoidable but for the trustee's ordinary negligence and unavoidable, ought to be reimbursable from the trust estate.⁴⁸⁵

Liability of third parties. What about the liability of the third party who receives the confidential information? If the third party exploits the information in ways that are injurious to the trust, or if the third party and the trustee are somehow connected such that the trustee is in conflict of interest, then the third party may well share liability with the trustee, provided the third party knew of the trust's existence.⁴⁸⁶ In

⁴⁷⁸Paul-Jean Le Cannu, *Trusts and Money Laundering in English Law: The Duties of Confidentiality and Disclosure of Trustees and the Obligations Arising Out of Sections 93a, 93b and 93d of the Criminal Justice Act 1988*, 2 Global Jurist Topics No. 2, Article 4 (2002).

⁴⁷⁹See Restatement (Second) of Trusts §170 cmt. s. See also §5.4.1.1 of this handbook (the trust beneficiary's right to information and confidentiality) and §8.8 of this handbook (whom trust counsel represents).

⁴⁸⁰Restatement (Third) of Trusts §78 cmt. i.

⁴⁸¹See Restatement (Third) of Trusts §78 cmt. i; Restatement (Second) of Trusts §170. See also 2A Scott on Trusts §170.

⁴⁸²See generally Chapter 1 of this handbook.

⁴⁸³See Bogert §527. See generally §7.2.3.6 of this handbook (trustee removal).

⁴⁸⁴See generally Huw Thomas, *Defend your data*, Dec. 2014/Jan. 2015 STEP J. 55 (how trustees should approach information security).

⁴⁸⁵See generally §3.5.2.3 of this handbook (expenses reimbursable from the trust estate).

⁴⁸⁶See generally Lewin ¶20-49 through ¶20-50 (England).

England, a third party may incur liability if he, she, or it exploits confidential information pertaining to the trust in order to “dishonestly assist” the trustee in misapplying the trust property, or to induce him to do so.⁴⁸⁷ If the misapplication was for the third party’s benefit, then the third party might well be held accountable as a constructive trustee of the misapplied property.⁴⁸⁸ For a detailed discussion of third-party fiduciary liability of the trustee’s agents, see §7.2.9 of this handbook.

Keeping critical information from beneficiaries themselves. As to whether a trustee may keep information pertaining to the affairs of the trust secret not only from third parties but also from the beneficiaries themselves, see §5.4.1.1 of this handbook (right to information and confidentiality).

The former trustee. The trustee’s fiduciary duties to the beneficiaries (or to the trust’s charitable purposes, as the case may be) will not cease even upon the proper transfer of legal title to a qualified successor trustee. The transferor-trustee, for example, remains burdened with the duty of undivided loyalty, to include the incidental sub-duty of confidentiality.⁴⁸⁹ In the face of such residual trust-related burdens, divestiture of bare legal title, in and of itself, will not also divest the transferor-trustee of standing to litigate matters pertaining to the trust’s proper administration.⁴⁹⁰

⁴⁸⁷Lewin ¶20-49 through ¶20-50 (England).

⁴⁸⁸Lewin ¶20-49 (England).

⁴⁸⁹Not only is a former trustee-fiduciary saddled with such residual fiduciary duties, so also is the former agent-fiduciary. The attorney-at-law in the post-termination-of-the-representation period particularly comes to mind in this regard.

⁴⁹⁰*But see* Old Nat’l Bancorp v. Hanover Coll., 15 N.E.3d 574 (Ind. 2014) (the court apparently oblivious of maxim that equity exalts substance over form that is discussed in §8.12 of this handbook).