

Title

The residual fiduciary duties of a removed trustee

Text

Unless a co-trustee remains in office or the court otherwise orders, an innocent trustee who has been removed retains the duties of a trustee and the powers necessary to administer and protect the trust property until such time as the trust property is delivered to a successor trustee or other person entitled to it. See generally §7.2.3.6 of *Loring and Rounds: A Trustee's Handbook* (2020). The innocent removed trustee is entitled to be compensated for administering and protecting the trust property pending transfer of title to and control of the trust property. See, e.g., *Susan R. Waldron v. Susan R. Winking Trust*, No. 12-18-00026-CV, 2019 Tex. App. LEXIS 5867 (Tex. App.—Tyler July 10, 2019, no pet. history). The beneficiary who is granted under the terms of the trust the power to remove the trustee without cause is taken up generally in §5.4.1.6 of the Handbook. The section is reproduced in its entirety in the Appendix below.

Appendix

§5.4.1.6 Non-Default Rights [of beneficiary] to Appoint, Remove, Direct, and Advise Trustee in the Absence of Fault [from *Loring and Rounds: A Trustee's Handbook* (2020).]

*While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.*⁸⁸

The trustee is not an agent of the beneficiary. Thus the beneficiary has no inherent common law right to appoint or remove the trustee, nor to direct the trustee or even have the beneficiary's advice considered by the trustee.⁸⁹ The beneficiary can bring an action to remove the trustee, but there must be grounds for removal,⁹⁰ and the ultimate decision rests with the court.

The settlor, however, may bestow on the beneficiary by express language in the governing instrument any one or more of these rights as against the trustee. These rights may be exercised even when the trustee is not at fault, if such is the wish of the settlor. The prospective trustee should be aware of all such common law derogations that may lurk in a governing instrument. The existence of certain ones—such as the right to give investment directions—may bear on how the trustee's services should be priced or on the advisability of even taking on the trusteeship at all.⁹¹ Directed trustees have not always been certain of their oversight responsibilities.⁹²

⁸⁸UTC §808(a).

⁸⁹See 2 Scott on Trusts §§107.3, 185.

⁹⁰UTC §706(a) (granting a beneficiary among others standing to petition the court to remove a trustee). See generally Bogert §527 (Grounds for Removal); §7.2.3.6 of this handbook (trustee removal). See also UTC §706 (providing that a court has the discretion to remove a trustee not only for serious breaches of trust but also for lack of cooperation among co-trustees; for “persistent failure of the trustee to administer the trust effectively;” because of a “substantial change of circumstances”; or in response to a removal request by all of the qualified beneficiaries).

⁹¹Bogert §122.

⁹²See §6.1.4 of this handbook (duty to give personal attention (not to delegate)). See also UTC §808(b) (providing that if the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee

The UTC endeavors to correct the situation: If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.⁹³ A trustee who is subject to a veto power would have heightened oversight responsibilities. “A trustee who administers a trust subject to a veto power occupies a position akin to that of a cotrustee and is responsible for taking appropriate action if the third party’s refusal to consent would result in a serious breach of trust.”⁹⁴

The UTC provides that a vacancy in a trusteeship required to be filled shall be filled by a person designated in the terms of the trust to act as successor trustee.⁹⁵ When there is no such designation, the vacancy shall be filled by a person appointed by unanimous agreement of the qualified beneficiaries.⁹⁶ If all else fails, the vacancy shall be filled by a person appointed by the court.⁹⁷ Of course, the court always possesses equitable powers to appoint an additional trustee or special fiduciary “whenever the court considers the appointment necessary for the administration of the trust.”⁹⁸

It goes without saying that a beneficiary who holds a power of appointment has constructive authority to remove the trustee. A living beneficiary who possesses a right of revocation or other form of general inter vivos power of appointment unilaterally may remove the trustee.⁹⁹ So also may the beneficiary who possesses a general testamentary power of appointment, but not during the beneficiary’s lifetime. This is because a will speaks at death.¹⁰⁰ Inherent in a general power of appointment, *e.g.*, the right to appoint property outright and free of trust to oneself or one’s estate, is the lesser right to remove the trustee. A beneficiary may effectively terminate a trustee’s tenure through the exercise of a limited/special power of appointment as well, either by an appointment of the property to another trustee in further trust if such an appointment is permitted by case law, statute, or the governing instrument, or by an appointment outright and free of trust to a third-party permissible appointee.

knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust).

⁹³UTC §808(b).

⁹⁴UTC §808 cmt.

⁹⁵UTC §704(c)(1).

⁹⁶UTC §704(c)(2). Qualified beneficiaries are essentially the current beneficiaries and the presumptive remaindermen. UTC §103(12) (defining the term *qualified beneficiary*).

⁹⁷UTC §704(c)(3).

⁹⁸UTC §704(d).

⁹⁹UTC §603(d).

¹⁰⁰UTC §602 cmt.