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"A General Review of Fiduciary Liability and Litigation Management"

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The Advice to Trustee

Read the trust instrument(s) word for word.

Meet the beneficiaries and find out about the trust assets and any co-fiduciaries prior to accepting the trusteeship.

Review the accounts of the predecessor trustee and redress any breaches of trust.

Take possession of and protect the trust assets.

Communicate with the beneficiaries.

Be "loyal."

Be "impartial."

Be "prudent" with investments.

Proceed carefully when selling major assets of the trust.

Make the trustee's capacity clear when signing contracts.

Do not "commingle" the trust property.

As a corporate trustee, follow published internal manuals or procedures.

Keep a critical eye on any co-trustees.

Avoid complicated estate planning activities.

Try to avoid loans to beneficiaries.

If the trustee finds himself in a "no-win" situation, resign.

Advice to the Independent Executor

Read the Will and any codicil(s) word for word.

Meet the family.

Get a sense of the solvency of the estate.

Be aware that an independent executor's administration of a surviving spouse's community property interest is governed by the Probate Code, not the probably more liberal provisions of the decedent spouse's Will.

Gather assets, pay claims and debts of the estate, and promptly distribute the remaining assets according to the Will.

Be aware that trustee fiduciary standards apply to executors.

Be active.

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Broceed carefully when selling estate assets.

Where the administration will be lengthy and there are surplus funds not necessary to pay debts or operate a business of the estate, safely invest them to earn interest. Be sure the beneficiaries understand that your job executor is to gather the assets, pay claims and debts of the estate and promptly distribute the assets according to the Will and not to be the beneficiaries "money manager" in the interim.

Keep and render accurate accounts even if the instrument does not require that accountings be given. Tex. Prob. Code Ann. §§ 149A, 405 (Vernon 1980 & Supp. 1999).

Remember that a decedent may specifically relieve a corporate executor from certain duties relating to self-dealing (e.g., purchase of estate assets), while a corporate trustee may not be relieved.

An extension of time to pay estate taxes is a form of borrowing by the estate; be careful.

Do not insist on a release when distributing property.

Be aware of excessive executor's commissions, particularly if the executor is an individual without a set fee schedule.

Make the executor's capacity clear when signing contracts.

Be aware that a higher standard of care now applies to banks.

Litigation Management

Select the right attorney for the particular litigation at hand.

Seek independent counsel who is free of conflicts of interest.

Be aware that the attorney-client privilege may not always apply in a fiduciary context.

Document the duties and compensation arrangement of the attorney in writing.

Be involved in staffing decisions.

Retain control over out-of-pocket expenses.

Respond promptly to discovery requests, particularly requests for admissions.

Remember that the fiduciary has the burden of proof with respect to accounting issues, the duty of loyalty and the duty of full disclosure. *Gaynier v. Ginsberg*, 715 S.W.2d 749 (Tex. App.--Dallas 1986, writ ref'd n.r.e.).

Remember mediation and other forms of Alternative Dispute Resolution ("ADR") as an alternate to trial.

File a motion for summary judgment, whenever possible, to eliminate issues and predispose the judge.

Consider the advantages of a bench trial instead of a jury trial.

Check your insurance policies for coverage of the lawsuit.

Make a business judgment regarding guardian *ad litem* appointments.

Give notice to the Attorney General if a charitable trust is involved in the proceeding.

Remember "142" Trusts as a settlement option for minors. See Tex. Trust Code §142.005 (Vernon & Supp. 1999).

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If the litigation involves modifying a trust, be careful not to trigger tax problems. A General Review Of Fiduciary Liability And Litigation Management

The following is a general guideline for minimizing the bank's exposure to claims of fiduciary liability when the bank serves as a trustee or as independent executor, and for litigation management if the bank, as trustee or independent executor, becomes involved in a lawsuit with the beneficiaries.

I. Advice to the Trustee

Read the trust instrument(s) word for word.

The trust instrument may be tedious, but it is the guiding light and will be the trustee's best defense (and Plaintiff's Exhibit 1) at trial.

The terms of the trust instrument, no matter how strange, generally override the Texas Trust Code. Tex. Trust Code §§ 111.002, 113.059 (Vernon 1995). Exceptions to this rule are certain self-dealing provisions related to a corporate trustee's directly or indirectly loaning trust funds to itself, or purchasing or selling trust assets. Tex. Trust Code §§ 113.052 - 113.053 (Vernon 1995). Also, a trust instrument cannot override public policy.

Do not rely on memory.

When working with multiple trust instruments, confusion among trust provisions is inevitable.

Highlight special, non-boilerplate language, especially regarding: (a) sales or purchases of trust assets; (b) allocation of income and principal; (c) investments; and (d) restrictions on investments (for example: the grantor or beneficiary must approve in writing all or certain investments).

Make a summary sheet of important provisions for the file, including a distribution chart in order to remain aware of the interests of remaindermen, unborns, minors and contingent beneficiaries. Update the summary sheet and charts when there are amendments to the trust instrument, births, deaths, adoptions or marriages, etc.

Re-read the trust instrument periodically and especially when distribution requests are being evaluated.

Do not assume various trusts within a family are identical.

Do not be comforted by exculpatory language.

InterFirst Bank Dallas, N.A. v. Risser, 739 S.W.2d 882 (Tex. App.--Texarkana 1987, no writ) confirms that a trustee may not be relieved of: (a) self-dealing; (b) bad faith; or (c) acting intentionally adverse or with reckless indifference to beneficiaries' interests and, in fact, may be liable for exemplary damages for the same.

Exculpatory language will be strictly construed against the fiduciary — the more specific the language, the better protected the fiduciary. *Hoening v. Texas Commerce Bank, N.A.*, 939 S.W.2d 656 (Tex. App. --San Antonio 1996, no writ); *Neuhaus v. Richards*, 846 S.W.2d 70 (Tex. App.--Corpus Christi 1992), *judgm't set aside & remanded for settlement*, 871 S.W.2d 182 (Tex. 1994); *Langford v. Shamburger*, 417 S.W.2d 438 (Tex. Civ. App.--Fort Worth 1967, writ ref'd n.r.e.); *Corpus Christi Nat'l Bank v. Gerdes*, 551 S.W.2d 521 (Tex. Civ. App.--Corpus Christi 1977, writ ref'd n.r.e.); *Jewett v. Capital Nat'l Bank*, 618 S.W.2d 109 (Tex. Civ. App.--Waco 1981, writ ref'd n.r.e.).

Ambiguity is fertile ground for litigation. If confused:

talk to the grantor, if he is still living, and take notes of the conversation (the grantor's intent is the ultimate interest in any interpretation battle);

talk to the draftsman, remembering, however, that he may be defensive about any ambiguity;

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Talk to an attorney specializing in trust law; or

Seek a court interpretation.

Recent statutory changes to the Texas Probate Code make it clear that probate courts in Texas have jurisdiction to determine questions with respect to trusts. Tex. Prob. Code Ann. § 5A (Vernon Supp. 1999).

Be particularly cautious in determining the distribution rights of adopted family members and the validity of the exercise of a power of appointment.

The ever-evolving state of inheritance rights of adopted children has created a great deal of confusion in the construction of wills and trust instruments, and consequent litigation.

The exercise of a power of appointment is frequently botched, in which case a duty may arise to the takers-in-default of appointment.

If the trust instrument is overly burdensome on the fiduciary, consider declining the appointment.

The following areas typically affect trust administration with delays, expenses, stress, uncertainty and liability:

Multiple, out of state, uncooperative, or non-business oriented co-fiduciaries;

Multiple, out of state, irresponsible, antagonistic or non-business oriented beneficiaries;

Accounts of questionably small or overwhelmingly large size;

Unusual or illiquid assets (e.g., gold, rifles, record collections, worthless securities, non-income producing but sentimental real property [e.g., the family farm], etc.);

Closely-held businesses, particularly where the "keyman" is deceased;

Outside investment advisors (particularly "friends of the family");

Specified brokers; and

Personality or "people" problems (e.g. "sibling rivalry").

See Ellen Tipton, *Corporate Fiduciary Duties: A Trustee's Perspective*, Wills and Probate Institute, South Texas College of Law (Oct. 1989)

Meet the beneficiaries and find out about the trust assets and any co-fiduciaries prior to accepting the trusteeship.

A person named as trustee who does not accept the trust incurs no liability with respect to the trust. Tex. Trust Code § 112.009 (Vernon 1995).

An ounce of prevention is worth a pound of cure. Litigation costs almost always exceed the fiduciary fees earned. Do not allow yourself to be allured by the prospect of new business or the chance to be a "rainmaker" if the potential exists for trouble down the road.

Review the accounts of the predecessor trustee and redress any breaches of trust.

A successor trustee is liable for a breach of trust of a predecessor only if he knows or should know of a situation constituting a breach of trust committed by the predecessor and the successor trustee:

if improperly permits it to continue;

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ails to make a reasonable effort to compel the predecessor trustee to deliver the trust property; or

ails to make a reasonable effort to compel a redress of a breach of trust committed by the predecessor trustee. Tex. Trust Code § 114.002 (Vernon 1995); *see also*, Austin W. Scott & William F. Fratcher, *IIA The Law of Trusts* § 177 (4th ed. 1987); George W. Bogert, *The Law of Trusts And Trustees* § 583 (2d ed. rev. 1980 & Supp. 1991).

Breaches of trust by the predecessor may include:

misappropriation of trust funds, *see, e.g., McClure v. Middletown Trust Co.* 110 A. 838 (Conn. 1920);

Investments contrary to the terms of the trust instrument or that are otherwise improper, *State Street Trust Co. v. De Kalb*, 157 N.E. 334 (Mass. 1927);

Overpayment of inheritance taxes or other imperfect tax payments, *In re First Nat'l Bank of Mansfield*, 307 N.E.2d 23 (Ohio 1974);

Failure to properly divest, diversify or sell trust assets;

Unexplained distributions, *Estate of Townes v. Townes*, 867 S.W.2d 414 (Tex. App.--Houston [14th Dist.] 1993, writ denied); or

Failure to collect the assets belonging to the trust. *Hoening v. Texas Commerce Bank, N.A.*, 939 S.W.2d 656 (Tex. App. --San Antonio 1996, no writ).

The trust instrument may relieve the trustee from liability for the predecessor's acts. Also the beneficiaries may ratify the acts of the predecessor and agree to hold the successor trustee harmless from claims arising in the prior administration. Tex. Trust Code § 114.005 (Vernon 1995). Be sure any release from liability is in writing and the original is in the trustee's file and given after full disclosure of any wrongdoing to the beneficiary *Id.*

Caveat: An indemnity is only as strong as the indemnitor's financial condition.

If the trustee is not relieved from liability for the predecessor's acts, consider declining the appointment unless there is a judicial accounting of the predecessor's administration.

Take possession of and protect the trust assets.

A trustee who literally does nothing with respect to the trust may be liable for breach of trust because of his lack of diligence. *Jewett v. Capital Nat'l Bank*, 618 S.W.2d 109 (Tex. Civ. App.--Waco 1981, writ ref'd n.r.e.); *see also* Scott & Fratcher, *The Law of Trusts* § 175; Bogert, *The Law of Trusts And Trustees*, § 583; Restatement (Second) of Trusts § 175 (1959); *In re Estate of Kline*, 124 A. 280 (Pa. 1924).

Many fiduciary cases involve situations where an "independent" trustee (*e.g.*, the bank or a family friend) is serving as co-trustee with family members and has benignly allowed the family members to "run the show." When an investment goes bad or the family fortune runs out, the "deep pocket" fiduciary (*i.e.*, the bank or other outsider) is taken to court under the allegation that it should not have sat idly by and let its co-trustee or the beneficiaries take control.

Fiduciaries should avoid, however, taking possession of toxic or contaminated property unless and until it is completely cleaned up — environmental liability is an explosive new area of litigation for fiduciaries. Roy M. Adams, *Environmental Hazards For Fiduciaries: An Acid Test*, 131 *Trusts & Estates* 24 (1992); David O. Ledbetter, *Beware Fiduciaries The Toxic Bequest*, *Trusts & Estates* (1991).

Recent changes to the Texas Trust Code specifically address a trustee's powers, liability and reimbursement rights related to property which may have environmental problems. *See* Tex. Trust Code §§ 113.025, 114.001(d) and 114.063(a)(3) and (c) (Vernon 1995).

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Take steps to identify and limit any environmental exposure the trustee may have related to the trust property and make every attempt to avoid future environmental problems.

Keep trust property in good repair.

A trustee may have personal liability for persons injured on trust property. *Rauch v. Patterson*, 832 S.W.2d 57 (Tex. App.--Houston [14th Dist.] 1992, writ denied).

Obtain adequate and effective casualty and liability insurance for the trust property (e.g. rental property where the trustee has exposure as landlord). The purchase of insurance to protect the trustee and the trust property is a proper trust expense. Tex. Trust Code § 113.013 (Vernon 1995).

Take responsible steps to enforce claims that are due the trust estate and defend claims against the trust estate by third parties. See Scott & Fratcher, *The Law of Trusts* §§ 177, 178 (4th ed. 1987); Restatement (Second) Trusts §§ 177, 178 (1959).

For example, pursue the maker of a note to the trustee who is in default.

Communicate with the beneficiaries.

Stay in touch with the beneficiaries and find out about their situations and needs for distributions.

A trustee who fails to keep informed of the changing needs of a "support" beneficiary may be liable for abuse of discretion in failing to make distributions. *Penix v. First Nat'l Bank of Paris*, 260 S.W.2d 63 (Tex. Civ. App.--Texarkana 1953, writ ref'd).

Keep abreast of marriages, divorces, important birthdays, births, deaths, adoptions, and serious illnesses, etc., that may affect distribution rights under the trust instrument. For example, you may be able to shelter trust property from a community property claim by a beneficiary's soon-to-be ex-spouse by withholding discretionary income distributions during a divorce. See *Ridgell v. Ridgell*, 960 S.W.2d 144 (Tex. App. --Corpus Christi 1997, no pet.).

Return phone calls from beneficiaries immediately and respond to beneficiaries' inquiries promptly. Be especially diligent if you rely on voice mail. Most elderly clients are uncomfortable with voice mail and get frustrated by their inability to get a live human being on the telephone. If you communicate by e-mail with certain of your beneficiaries, be careful of what you put in writing. E-mail tends to invoke more informality and spontaneity of thought than other forms of written communication but may still end up as an exhibit at trial.

A beneficiary's feeling that the trustee is indifferent to his needs may prompt litigation. (A birthday or Christmas card may actually prevent litigation!)

Take time at the outset of the relationship with a beneficiary to explain the benefits of the trust arrangement and the limitations the trustee is under. Later, if the trustee has to reject a requested distribution, the beneficiary is more likely to understand and accept the reasons for the rejection.

Advise beneficiaries of all material facts and circumstances concerning dealings with trust assets, especially those regarding non-routine or sensitive matters.

The failure of a trustee to inform beneficiaries of the sale of a major trust asset was an important contributing factor in holding a trustee liable where the asset was sold at lower than market price. *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882 (Tex. App.--Texarkana 1987, no writ).

Make records of important conversations and communications, including telephone calls, voice mails and e-mails, in order to later show acquiescence by the beneficiaries.

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Routine memoranda to the file are discoverable, but often memories grow dim as trial approaches, and a beneficiary may "not recall" his approval of an investment that later went bad. If a beneficiary is a troublemaker, loose cannon or "out of touch with reality," take actual quotes of important conversations with him, instead of paraphrasing. Do not make disparaging or exaggerated remarks in your communications. Avoid internal memoranda between co-fiduciaries or within a bank (*i.e.*, from trust officer to trust officer). Internal memoranda may hurt the trustee in trial.

When a beneficiary is against the proposed transaction, do not accede to his wishes. Instead, make an independent judgment based on the best interest of the trust estate. The memorandum of the transaction should reflect that the trustee: (1) got the facts, (2) analyzed the transaction, and (3) exercised his discretion. If the grantor had wanted the beneficiary to be in charge, he would not have created the trust.

When a beneficiary insists on a questionable transaction, get appropriate releases and indemnities if there are contingent, minor or unborn interests. Be sure the trustee is released and indemnified against his own negligence. *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993); *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705 (Tex. 1987).

Keep and provide accurate accounts to the beneficiaries even if the trust instrument relieves you of this duty. Tex. Trust Code § 113.151 (Vernon 1995); *Montgomery v. Kennedy*, 651 S.W.2d 814 (Tex. App.--El Paso 1983), *rev'd on other grounds*, 669 S.W.2d 309 (Tex. 1984).

Review the trust instrument carefully to determine when and to whom the accountings should be given. The accounting requirements found within the instrument are frequently ignored and a ripe area for litigation.

Keep accurate and organized records and reports during the year to assist in the accounting and justification of discretionary decisions.

Complete and detailed accountings have the added benefit of putting a beneficiary on notice of questionable transactions for the purposes of a statute of limitations defense the trustee may later wish to assert.

Disclose significant, non-routine transactions on behalf of the trust in advance, never after the fact.

Be "loyal."

Always put the beneficiaries' interests first (*i.e.*, ahead of the trustee's own and any third party's interests). *Slay v. Burnett Trust*, 143 Tex. 621, 187 S.W.2d 377 (1945); Tex. Trust Code §§ 113.051-113.057 (Vernon 1995).

Know what the bank's commercial side is doing in order to avoid self-dealing and conflicts of interest.

Remember, corporate trustees may not be relieved of certain statutory self-dealing including:

the direct or indirect sale or purchase of trust assets, Tex. Trust Code § 113.053 (Vernon 1995); or

the direct or indirect loaning of trust assets to itself, Tex. Trust Code § 113.052 (Vernon 1995).

A corporate trustee bank may be guilty of common-law self-dealing where it sells trust property at a lower-than-market price to a purchaser who has borrowed from the bank. *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882 (Tex. App.--Texarkana 1987, no writ).

Communicate with the commercial side of the bank to identify situations in which it and the trust department have common dealings with the trust or the trust beneficiaries.

Before the commercial side releases information, seek guidance on confidentiality imposed by securities laws or loan agreements with customers.

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The commercial side of the bank (as a lender) and the trust department should not be involved in the same transaction to avoid appearances of conflict of interest.

Find out:

if a borrower is: (i) the trustee or an affiliate (a corporate trustee cannot self-deal); (ii) a director, officer or employee of the trustee or an affiliate; (iii) a relative of the trustee; or (iv) the trustee's employer, employee, partner or other business associate; and

if the proceeds of the loan will be used in a transaction involving the trust department.

Avoid such transactions.

Where the trust department makes a sale or lease contract find out:

if the purchaser or the lessee is: (i) the trustee or an affiliate; (ii) a director, officer or employee of the trustee or an affiliate; (iii) a relative of the trustee; or (iv) the trustee's employer, employee, partner or other business associate; and

whether the funds to be used for the contemplated transaction are secured through loans from the trustee or an affiliate of the trustee.

Be sure the purchaser of the trust property is not using the property as collateral for a loan from the commercial side of the bank.

A trustee should not lend money to the trust and secure the loan with trust assets.

If a corporate trustee purchases or bids at its own foreclosure sale, the trustee will be in a position of purchasing trust assets at a fraction of their value and will violate the statutory prohibition against a corporate trustee's buying or selling trust assets.

Remember, the bank is a single entity for purposes of determining its motivations in conducting a sale and, thus, for purposes of determining whether there is self-dealing and bad faith. *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882 (Tex. App.--Texarkana 1987, no writ). For example, a "cheap" sale to a bank's borrower puts the borrower in a better position to pay his loan.

Isolation of the trust department and its trust officers from the other activities of the bank (a "Chinese Wall") is not a defense to a trust violation. *Risser*, 739 S.W.2d 882.

Check credit ratings of any co-trustee or the borrower with the commercial side because a bank's knowledge may be imputed between departments. A trustee may be held liable for a breach of trust by his co-trustee with respect to investments if the commercial side was aware of the co-trustee's poor credit history. *Kirkbridge v. First Western Bank*, No. 58254 (Cal. App. May 26, 1981).

Beware of "business associates." *Risser* has defined a "business associate" for the purposes of the self-dealing provisions under the Texas Trust Code as a person whose relationship with the trustee is so intertwined that their goals with respect to the particular business venture are the same. *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882 (Tex. App.--Texarkana 1987, no writ).

If litigation against the bank, in its corporate capacity, where the bank has an affirmative claim in its fiduciary capacity, be aware during settlement negotiations that dropping the fiduciary claim in exchange for the other party's dropping his claim against the bank, in its corporate capacity, may be a form of self-dealing.

Never sell your beneficiaries short because of the prospect of additional bank business, especially from a potentially adverse party. Rainmaking at this expense of a beneficiary is virtually indefensible.

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Be "impartial."

Do not play favorites among the beneficiaries of the same class or beneficiaries of different classes. Tex. Trust Code § 113.101 (Vernon 1995); *Perfect Union Lodge No. 10 v. InterFirst Bank*, 713 S.W.2d 391 (Tex. App.--San Antonio 1986), *aff'd*, 748 S.W.2d 218 (Tex. 1988). Do not ignore the "black sheep" in the family just because he or she is unpleasant to deal with.

Consider the varying interests of both the income beneficiaries and the remaindermen. *DuPont v. Southern Nat'l Bank of Houston*, 771 F.2d 874 (5th Cir. 1985).

Nonproductive real estate may prejudice income beneficiaries.

The 1989 Amendments to the Texas Trust Code Section 113.110 clarify that there is no affirmative duty to sell under-productive property, but

where the trust instrument requires a trustee to sell under-productive property, or it is prudent to do so, a trustee must do so quickly.

Section 113.110 tells the trustee how to allocate proceeds from under-productive property between income and principal.

Likewise, junk bonds with a high yield, even if permitted by the trust instrument, may prejudice remaindermen.

It is easy to forget remaindermen, unborns, minors and contingent beneficiaries because the life tenant often has the loudest voice and the clearest presence.

Review Tex. Trust Code § 113.111. See Tex. Trust Code § 113.111 (Vernon 1995 and Supp. 1999).

When given discretion regarding allocation between income and principal, do not act arbitrarily.

A trustee who indiscriminately charges expenses to the income account or the principal account, based solely on the cash availability of the two accounts, may be held liable for failing to exercise his reasonable discretion. *Florida Coast Bank v. Mayes*, 437 So. 2d 160 (Fla. App. 1983).

If there are provisions for various generations and distributions are discretionary, do not assume the older generation will have greater needs.

Again, obtain information on *all* beneficiaries and update the information through periodic contact with them.

If one beneficiary of several family trusts is litigious or a troublemaker, do not arbitrarily over-allocate legal fees and costs to the troublemaker's trusts if the benefit of the legal counsel is shared by all the beneficiaries.

In the eyes of the law, each trust stands on its own. In reality, where the trustee is serving on identical family trusts, and a favored beneficiary's trust outperforms his sibling's trusts, or a "black sheep" beneficiary's trust under-performs his sibling's trusts, allegations of impartiality are sure to follow. Be sure to document the reasons for treating one trust differently than the rest.

To the extent possible and practical, administer small trusts with the same care as large trusts. The legal fees related to defending alleged breaches of trust are likely to be the same regardless of the size of the trust.

Be "prudent" with investments.

Do not speculate with trust funds.

A trustee must be more conservative with respect to trust investments than a businessman is with respect to his own investments. *Nathan v. Hudson*, 376 S.W.2d 856 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.).

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The burden of a trustee with respect to investments has been lightened to some degree by recent changes in the Texas Trust Code, which now measures prudent investment decisions in the aggregate rather than on an investment-by-investment approach. Tex. Trust Code § 113.056(a) (1992). A beneficiary's lawsuit, nonetheless, will typically be triggered by a single sour investment. Also, the court's interpretation of the statute may dilute its protection.

In 1992, the *Restatement of the Law of Trusts, Third*, was published with the goal of modernizing and/or clarifying the prudent man standard in light of modern portfolio theory. The *Restatement, Third's* general standard of prudent investment appears compatible with Tex. Trust Code § 113.056(a) and, thus, is likely to be relied on as a guideline for Texas courts.

The trustee should invest in risky assets only if he has the expertise to evaluate the risks, the time and ability to monitor them, and the trust instrument allows such investments.

Get-rich-quick schemes may violate the duty to prudently invest as well as the duty to be impartial (*i.e.*, seeking long-term capital gain at expense of income may prejudice the current beneficiaries) Forget day-trading!

Diversify.

A trustee may be held liable for doing nothing with respect to the trust. A trustee's failure to periodically review the trust and diversify the corpus may evidence such a lack of diligence that the trustee's negligence will be a breach of trust. Boilerplate language authorizing lack of diversity may not cover egregious situations of harm to a trust where the trustee failed to diversify. *Jewett v. Capital Nat'l Bank of Austin*, 618 S.W.2d 109 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.); Scott & Fratcher, *The Law of Trusts* § 228 (4th ed. 1989). Nonetheless, evaluate the capital gains exposure in diversifying a portfolio heavily-weighted in a particular asset and do a cost/benefit analysis. Fully inform the beneficiary of your conclusions.

Set up a review system.

Monitor.

Even when an investment sky rockets in value, a lawsuit may follow if breaches of trust are involved.

Diligently select an agent who is qualified to care for any unique asset, such as a family business, and then be sure to monitor his involvement.

A fiduciary may be held liable if he negligently selects an agent who mismanages the asset. *Dallas Tailors' Supply Co. v. Goen*, 25 S.W.2d 224 (Tex. Civ. App.—El Paso 1930, writ ref'd).

The trustee should not delegate his discretion to the agents.

The use of "family friends" as investment advisors or other agents will be particularly vulnerable to allegations of "improper delegation" or negligence in the selection of a "proper" agent. However, if the beneficiary has a preference for a certain attorney, accountant, or real estate agent, etc. and there is no good reason not to use the beneficiary's choice of agent, use the beneficiary's choice. If you do, the beneficiary is likely to be much more forgiving of the added fees and any minor mishaps of the agent.

If the asset is a closely-held stock or partnership, attend shareholders' meetings or partners' meetings to keep informed.

Make the trust property productive.

It is incumbent upon the trustee to put trust funds to productive use, and the failure to do so within a reasonable period of time can render the trustee personally chargeable with interest. *Langford v. Shamburger*, 417 S.W.2d 438 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.); Tex. Trust Code § 113.110 (1989).

Scrutinize the original assets of the trust.

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Section 113.003 of the Texas Trust Code provides that a trustee may retain, without regard to diversification of investments and without liability for depreciation or loss resulting from the retention, any property that constitutes the initial trust corpus or that is added to the trust.

This provision appears unambiguous on its face. However, it conflicts with Tex. Trust Code § 113.056, the "prudent man" standard for trust investments. Also, case law around the country prohibits a trustee from indiscriminately allowing an original trust asset's value to depreciate. Scott & Fratcher, *The Law of Trusts* § 231 (4th ed. 1988). The trust instrument may offer express relief from liability for the retention of original assets. Take comfort only if the instrument's language is unambiguous, mandatory and non-boilerplate or specifically addresses the assets at issue (e.g., certain heirlooms or "collectors' items," closely-held stock or the family ranch).

A recent Texas case confirms that the retention protection offered by Tex. Trust Code § 113.003 will be construed as narrowly as possible. *Neuhaus v. Richards*, 846 S.W.2d 70 (Tex. App.—Corpus Christi 1992, writ granted).

Get specific releases of liability for a bank's actions as trustee of a common trust fund.

A general release of the bank as the trustee may not be adequate to protect it against liability related to action involving a common trust fund. *First Alabama Bank of Montgomery, N.A. v. Martin*, 425 So.2d 415 (Ala.), cert. denied, 461 U.S. 938 (1983).

Inform beneficiaries about the provisions and restrictions regarding withdrawals, etc., of the common trust funds.

In *Shannon v. Frost Nat'l Bank*, 533 S.W.2d 389 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.), plaintiff sued because his inability to withdraw funds at will conflicted with his absolute right of revocation under trust agreement.

Use due diligence when dealing with life insurance held in trust.

Life insurance represents a new landmine for fiduciaries because of the weakening and failure of insurance companies and the life insurance industry's changing assumptions and product line. A trustee's purchase of life insurance from a particular company may be "imprudent" if the company goes under and proceeds are not paid.

To avoid potential liability when asked to purchase and/or accept life insurance contracts, take the following steps:

Use a process of due diligence before selecting a particular insurance company, and a particular contract, as an investment.

Develop a criteria upon which to update your due diligence annually.

In the event of a perceived risk, act to minimize the exposure to the beneficiaries. Seek the advice of well-qualified agents, where appropriate, but always retain the ultimate control.

If feasible, make sure the trust agreement affords no discretion to the trustee with respect to the initial selection of insurance company.

Proceed carefully when selling major assets of the trust.

Sales of trust property are a hot area of litigation.

Take every reasonable effort to obtain the best price for the trust asset.

Recent case law shows that the procedure used to obtain the most competitive sales price and disclosure to the beneficiaries of the proposed sale are equally if not more important than the actual price obtained. *Allard v. Pacific Nat'l Bank*, 663 P.2d 104 (Wash. 1983); *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882 (Tex. Civ. App.—Texarkana 1987).

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The procedure used is relative to the asset (*i.e.*, the type of asset and whether or not the asset is a significant part of the trust estate).

If the assets comprise a large portion of the trust estate:

inform the beneficiaries of the proposed sale;

If a beneficiary opposes the sale, make an independent, informed decision on the sale;

Seek an outside appraisal from a reputable independent appraiser;

Market the asset publicly if possible and practical:

advertise or promote sale to secure competitive bidding;

Beware of any delay factor in publicizing the sale. If a delay is detrimental to the asset's value, a public sale may not be prudent;

Real estate is easier to sell publicly than the stock of a closely-held business or assets subject to right of first refusal to third parties;

Select the proper agents (*i.e.*, broker, appraiser, seller's attorney) with the input of the beneficiaries if practical, and monitor their work; and

Be sure any sales agreement: (a) protects the trust principle (*i.e.*, with proper collateral); (b) has the best possible price; and (c) limits the trustee's exposure as to representations and warranties.

If the asset is closely-held stock in a family corporation:

Have investment personnel and an appropriate independent appraiser evaluate it,

seek the beneficiaries' advice on alternative markets for the stock, and

Obtain the proper approvals (*i.e.*, from the shareholders, board of directors, the court etc.)

Negotiate the sale.

Monitor the sales process and select the best offer.

Do not show favoritism to certain purchasers.

Do not jump at the first price (make a counteroffer).

Market real property through the real estate division or with a real estate broker.

Surround the sale with other facts showing that you caused the property to sell at the greatest advantage.

Consider if sale is really necessary to produce income.

Consider the appreciation value of the asset (if the appreciation value is great, inform the remaindermen of the sale).

Be wary of agreeing to any indemnities requested by the purchaser, particularly if no environmental study has been done.

Take a look at the "elephant." Go see the property so you can talk about it intelligently with the agents and beneficiaries.

Make the trustee's capacity clear when signing contracts.

Articles

A trustee is personally liable on contracts unless he expressly stipulates to the contrary. *Nacol v. McNutt*, 797 S.W.2d 153 (Tex. App.--Houston [14th Dist.] 1990, writ denied). The signature "trustee" or "as trustee" after the signature of a trustee who is the party to a contract is only prima facie evidence of the intent to exclude the trustee from personal liability. Tex. Trust Code § 114.084(b) (Vernon 1995). The burden of proof is on the trustee to exclude personal liability on a contract. *Nacol*, 797 S.W.2d 153; see also *Anzilotti v. Gene D. Liggin, Inc.*, 899 S.W.2d 264 (Tex. App.--Houston [14th Dist.] 1995, no writ). Ideally, the contract should contain a provision expressly limiting the trustee's personal liability.

Do not commingle the trust property with personal assets.

A trustee's commingling of trust funds with personal funds subjects the entire commingled fund to the trust. *Moody v. Pitts*, 708 S.W.2d 930 (Tex. Civ. App.—Corpus Christi 1986, no writ).

Money expended from a commingled fund is presumed to be the trustee's own. *Moody v. Pitts*, 708 S.W.2d 930.

As a corporate trustee, follow published internal manuals or procedures.

Make a written record explaining any departures from departmental policies (for example, not presenting a loan to the loan committee).

Be sure any "brochures" regarding the trust department's services are accurate to avoid potential Deceptive Trade Practices - Consumer Protection Act ("DTPA") claims.

Keep a critical eye on any co-trustees.

A trustee who basically is passive but signs documents as a "trustee" may be held liable for his active co-trustee's breaches of trust. *Blieden v. Greenspan*, 751 S.W.2d 858 (Tex. 1988). File a declination of acceptance of appointment or actively participate in the trust. Do not accept a trusteeship as an accommodation and then neglect the trust.

While the Texas Trust Code appears to relieve a truly passive co-trustee for breaches of another co-trustee, commentators suggest that the passive co-trustee is not completely immune.

Section 114.006 of the Texas Trust Code (1984) provides:

A trustee who does not join in exercising a power held by three or more cotrustees is not liable to a beneficiary of the trust or to others for the consequences of the exercise nor is a dissenting trustee liable for the consequences of an act in which the trustee joins at the direction of the majority trustees if the trustee expressed the dissent in writing to any of the cotrustees at or before the time of joinder.

This section does not excuse a cotrustee from liability for failure to discharge the cotrustee's duties as a trustee. Tex. Trust Code § 114.006 (1984).

Tex. Trust Code § 114.006 (Vernon 1995).

Note that Section 114.006(b) limits Section 114.006(a)'s relief by holding the non-joining trustee to his fiduciary obligations. Also, Section 114.006 does not address the most common multiple fiduciary arrangement — where there are only two co-fiduciaries.

Articles

Under general principles of trust law, where there are two or more trustees, a trustee is not liable for a breach of trust committed by his co-trustee unless he is himself guilty of a violation of a duty to the beneficiaries. Where there are two or more trustees and a breach is committed by one of them, a co-trustee is liable only if he himself violated a duty to the beneficiaries in relation to the breach. Such a violation occurs if the co-trustee: (a) participated in the breach of trust; (b) improperly delegated the administration of the trust to his co-fiduciaries; (c) failed to exercise reasonable care, thereby enabling the co-trustee to commit the breach of trust; (d) approved or acquiesced in or concealed the breach of trust; or (e) neglected to take the proper steps to redress the breach of trust. Scott & Fratcher, *The Law of Trusts* § 224 (4th ed. 1987); Restatement (Second) Trusts § 224 (1959).

The Trust Code appears to relieve a fiduciary of liability for the action specifically reserved for a co-fiduciary.

Section 114.003 of the Texas Trust Code provides:

If a trust instrument reserves or vests authority in any person to the exclusion of the trustee, including the settlor, an advisory or investment committee, or one or more cotrustees, to direct the making or retention of an investment or to perform any other act in the management or administration of the trust, the excluded trustee or cotrustee is not liable for a loss resulting from the exercise of the authority in regard to the investments, management, or administration of the trust.

Tex. Trust Code § 114.003 (1984).

While there is no case law in Texas construing Section 114.003, case law from other jurisdictions and some commentators have indicated that a fiduciary cannot abandon or delegate his duties even when his co-trustee has full authority to act regarding certain matters (for example, oil and gas or other specified investments). *Kirkbridge v. First Western Bank*, Opinion Number 58254 Cal. App. 2nd Appellate District, Division Three, May 26, 1981; Restatement of Trusts (Second) § 184 (1959); Scott & Fratcher, *The Law of Trusts* § 184 (4th ed. 1987). Even though authority is given to other trustees or entities, a trustee's obligations to the beneficiaries remain.

Blind reliance on a co-trustee because he happens to be a lawyer is no excuse, particularly if the lawyer/co-trustee does not specialize in trust and estate administration.

As a practical matter, when the money runs out, the beneficiaries will come knocking at the door.

Avoid complicated estate planning activities.

There is a growing trend in other states to hold an attorney liable to intended beneficiaries for negligently drafted or executed wills despite the absence of privity. However, Texas decisions currently hold that an attorney owes no duty to a third party in the absence of privity and is not liable to intended beneficiaries. *Barcelo v. Elliot*, (Tex. App.--Houston [1st Dist.] 1995) *aff'd*, 923 S.W.2d 575 (Tex. 1996); *see also Oliver v. West*, 908 S.W.2d 629 (Tex. App.--Eastland 1995, writ denied). Because an attorney is a fiduciary, the attorneys' liability for the negligent drafting or execution of a will or trust instrument may logically be extended to trustees who engage in estate planning activities.

Texas courts now recognize a cause of action for tortious interference in inheritance rights and will allow punitive damages for the same. *King v. Acker*, 725 S.W.2d 750 (Tex. App.—Houston [1st Dist.] 1987, no writ).

Such cause of action may logically be extended to trust and estate officers interfering with trust and estate administration.

Tortious interference with inheritance rights is currently one of the "hottest games in town" being played by aggressive litigators.

A recent case makes it clear that the courts will not tolerate nonlawyers dispensing legal advice in the area of trusts and wills. *See Fadia v. Unauthorized Practice of Law Committee*, 830 S.W.2d 162 (Tex. App.—Dallas 1992, writ denied).

Articles

Send the beneficiary to a well-qualified attorney for advice regarding the ramifications of a will, trust or other estate planning techniques.

Be aware that an "x" on a bank account signature cards creating survivorship rights can totally gut an estate plan and all the tax protection that went with it.

Try to avoid loans to beneficiaries.

The Texas Trust Code does not prohibit a loan by a trustee to a beneficiary of the trust if the loan is expressly authorized or directed by the instrument or transaction establishing the trust. See Tex. Trust Code § 113.052(b)(1) (Vernon 1995).

Properly evidence any note to a beneficiary and obtain an appropriate security agreement that is also properly evidenced.

If the beneficiary defaults, the trustee will have a duty to the other beneficiaries of the trust to pursue the default. If the trustee is forced to sue the beneficiary, a counterclaim of breach of fiduciary duty by the defaulting beneficiary is likely to follow.

If the trustee finds himself in a "no-win" situation, resignation is the best option.

Upon resignation or removal, fiduciary responsibilities continue until a successor trustee has accepted the assets of the trust.

A trusteeship does not terminate and fiduciary duties are not discharged until the bank is replaced by a successor trustee. *Ashmore v. North Dallas Bank & Trust*, 804 S.W.2d 156 (Tex. App.—Dallas 1990, no writ).

Get a receipt to show proof of delivery of the trust assets to the successor.

Where the trust instrument does not provide for a successor, resignation may be difficult and will require a court proceeding. Also, locating a successor who is willing to serve may be difficult, particularly if there is a high capitalization requirement for the successor and/or the trust assets are modest in size.

Do not get into a trusteeship unless you are sure you can get out. II. Advice to the Independent Executor

Read the Will and any codicil(s) word for word.

Outline the major distribution provisions and standards contained in the Will and any codicil carefully, noting how the codicil affects the Will.

Be wary of joint and mutual wills and contractual wills, particularly those signed before September 1, 1979. Such wills are fraught with danger for the executor and the subject of much litigation. See generally, Tex. Prob. Code Ann. § 59A (Vernon 1980).

Meet the family.

Be aware of the emotional state of the beneficiaries. Be kind and sensitive to avoid getting off on the wrong foot. Do not overlook the immediate or actual needs of the beneficiaries, in your effort to sell other products of the bank (e.g. investment management, trusts, or agency arrangements).

Get a sense of the solvency of the estate.

If the estate is insolvent, consider declining the appointment because of the potential conflict between the estate's creditors and the beneficiaries --- your duties are to both. Also, there may be no funds to cover your fees and expenses.

Be aware that an independent executor's administration of a surviving spouse's community property interest is governed by the Probate Code, not the probably more liberal provisions of the decedent spouse's Will.

Articles

Gather assets, pay claims and debts of the estate, and promptly distribute the remaining assets according to the Will.

The executor of an estate not only has the right of possession of the assets of the estate, but also has the duty to acquire such possession. The executor's right of possession of the assets of an estate is enforceable by court order. *Bloom v. Bear*, 706 S.W.2d 146 (Tex. App.—Houston [14th Dist.] 1986, no writ). Tex. Prob. Code §§ 230(a), 233, 233A (Vernon Supp. 1999).

Grief stricken family members may be reluctant to turn over property of the estate. Be sensitive to the emotions of the family. Seek a court order only as a last resort because the court's involvement typically will inflame the emotions of family members who feel they have a greater right to the property than the executor, particularly if a bank is serving in that position.

Be aware that there is a natural tendency to wish to avoid inheritance taxes (and consequent resistance to participating in the collection of estate property), yet payment of inheritance taxes is one of the primary roles as executor.

Where there are assets that the family claims are not part of the estate (*i.e.*, were gifted out by the decedent during his lifetime), but there is no other independent evidence of a gift (for example, no documents signed by the decedent or no gift tax returns), seek court approval for the inclusion of the "gifted assets" in the estate for tax purposes. Unfortunately, the jurisdiction of the probate court to determine administration of an estate is unclear with respect to an independent administration.

Make sure the classification of assets is consistent, *i.e.*, if assets are on the estate tax return be sure they are listed on the inventory. This will avoid a later claim by the beneficiaries of the estate that the executor bloated the assets of the estate by including non-estate assets in the estate tax return and caused an overpayment of estate taxes.

A suit against any beneficiary should only be considered as a last resort. Such a suit will almost inevitably draw a counterclaim for breach of fiduciary duty.

Do not overlook "non-probate" bank accounts when gathering the assets of the estate.

Check all signature cards related to joint bank accounts and life insurance contracts carefully for ambiguity as to ownership.

For instance, if the decedent and his joint tenant failed to check the appropriate signature box creating a joint tenancy with the right of survivorship, the survivorship rights fail and the decedent's beneficiaries have a claim to the account. *Kitchen v. Sawyer*, 814 S.W.2d 798 (Tex. App.—Dallas 1991, writ denied); *Ephran v. Frazier*, 840 S.W.2d 81 (Tex. App.—Corpus Christi 1992, no writ).

Chapter XI of the Texas Probate Code, entitled "Nontestamentary Transfers," was intended to facilitate the transfer of money in multiple-party bank accounts outside of probate, by allowing parties to agree to certain survivorship rights related to the accounts, and to reduce the years of confusion that have surrounded joint accounts. Instead, Chapter XI has resulted in a mushroom of confusion and litigation by joint owners and heirs who feel the testamentary intent of a non-surviving joint owner was betrayed by the survivorship provisions of the account. The confusion and litigation has led to a flurry of new case law under Chapter XI. *See e.g.*, *Allen v. Wachtendorf*, 962 S.W.2d 279 (Tex. App.—Corpus Christi 1998, pet. denied); *Haas v. Voigt*, 940 S.W.2d 198 (Tex. App.—San Antonio 1996, writ denied); *Evans v. First Nat'l Bank*, 946 S.W.2d 367 (Tex. App.—Houston [14th Dist.] 1997, writ denied); *Cweren v. Danziger*, 923 S.W.2d 641 (Tex. App.—Houston [1st Dist.] 1995, no writ).

Recent amendments to the Texas Probate Code establishing uniform deposit contract forms is intended to address the confusion created by Chapter XI and will ease the independent executor's determination of the type of account owned by the decedent and post-death ownership rights. *See* Tex. Prob. Code § 439(b) (Vernon Supp. 1999).

Be aware of bank set-off claims.

Articles

If the decedent owed money to the same bank where the decedent deposited money, the bank now has set-off right outside the normal claims procedure set forth in the Texas Probate Code. *Bandy v. First State Bank, Overton, Texas*, 835 S.W.2d 609 (Tex. 1992).

If the decedent's accounts are subject to set-off right, the independent executor should withdraw the funds and deposit them in another bank where they will be safe from set-off claims.

Upon appointment, determine if payment of joint accounts should be limited. If so, give *written* notice to the bank which clearly states that withdrawals in accordance with the account terms are no longer to be allowed.

If the bank has not received written notice, it has no liability for paying the balance of a decedent's joint account to the surviving joint party. *Bandy v. First State Bank, Overton, Texas*, 835 S.W.2d 609 (Tex. 1992); Tex. Prob. Code § 445 (Vernon Supp. 1999).

Be aware that trustee fiduciary standards apply to executors.

A recent Texas appellate case holds that trustee fiduciary standards apply to executors. *Ertel v. O'Brien*, 852 S.W.2d 17 (Tex. App.—Waco 1993, writ denied).

The "prudent man" standard of care that applies to the management and investment decisions of a trustee also applies to an independent executor with respect to the property of a decedent's estate. Tex. Prob. Code § 230(a) (Vernon Supp. 1999).

Be aware, however, that the Probate Code, unlike the Trust Code, does not have an "ordinary prudence" standard authorizing all types of investments.

Be active.

For example, do not let an inexperienced widow or son of the deceased take over the family business. If the business "goes south" during the administration of the estate, allegations that the executor abandoned his fiduciary responsibilities with regard to the business are sure to follow. *Dallas Tailors' Supply Co. v. Goen*, 25 S.W.2d 224 (Tex. Civ. App.—El Paso 1930, writ ref'd).

Proceed carefully when selling estate assets.

Evaluate the consequences.

Are adverse tax effects triggered?

If the estate has a cash need, consider alternatives to a sale (for example, borrowing the money).

The sale of stock to raise money is especially subject to second guessing since the market is uniquely suited to "20/20" hindsight. Be particularly sensitive where the bank's stock is part of the original assets of the estate and the bank is serving as executor.

Notify the beneficiaries if selling a major asset of the estate (for example, the family ranch). *In re Estate of Anderson*, 149 Cal. App. 3d 336, 196 Cal. Rptr. 782 (1983).

Be aware of any unique assets (for example, a business run by decedent). A refusal to sell the asset may cause liability if the type of business is risky or heavily dependent on skills of key personnel (decedent).

Progressive losses may cause liability if the executor was not qualified to run the business. *Fortune v. First Union Nat'l Bank*, 359 S.E.2d 801 (N.C. App. 1987), *rev'd on other grounds*, 371 S. E.2d 483 (N.C. 1988).

Articles

Where the administration will be lengthy and there are surplus funds not necessary to pay debts or operate a business of the estate, safely invest them to earn interest. Be sure the beneficiaries understand that your job as executor is to gather the assets, pay claims and debts of the estate and promptly distribute the assets according to the Will and not to be the beneficiaries "money manager" in the interim.

Keep and render accurate accounts even if the instrument does not require that accountings be given. Tex. Prob. Code Ann. §§ 149A, 405 (Vernon 1980 & Supp. 1999).

Remember that a decedent may specifically relieve a corporate executor from certain duties relating to self-dealing (e.g., purchase of estate assets), while a corporate trustee may not be relieved.

If the bank is wearing two hats (as a corporate trustee and as a corporate executor), a purchase of estate assets should be concluded during the estate administration phase and not after the trust is funded, and only if the probated Will authorizes such a purchase by the executor, if the court approves it under Section 352(d) of the Probate Code, or if there is a binding written executory contract entered into by the decedent prior to the decedent's death. Tex. Prob. Code § 352 (Vernon Supp. 1999).

An extension of time to pay estate taxes is a form of borrowing by the estate, be careful.

Do not insist on a release when distributing property.

An independent executor is not entitled to a waiver or release on termination of an estate as a *condition* for delivery of property to a distributee. Tex. Prob. Code § 151(d) (Vernon Supp. 1999). A receipt for the delivery of personal property may be requested. *Id*

In other instances, a release by a beneficiary will be upheld. *Womack v. Holley*, No. 14-94-00565-CV, 1995 WL 613068 (Tex. App.--Houston [14th Dist.] Oct. 10, 1995, writ denied) (not designated for publication).

It is also worth noting that a decedent's estate is not bound by the release of obligations by an executor when the executor is acting for his individual benefit. *Tinney v. Team Bank*, 819 S.W.2d 560 (Tex. App.—Fort Worth 1991, writ denied).

Be aware of excessive executor's commissions, particularly if the executor is an individual without a set schedule for compensation.

Overpayment of executor's commissions without just cause is now an actionable tort for which executors can be sued individually. *Weatherly v. Martin*, 754 S.W.2d 790 (Tex. App.—Amarillo 1988, writ denied); see also Tex. Prob. Code §§ 241 (Vernon Supp. 1999).

Make the executors capacity clear when signing contracts.

Make sure contracts entered into on behalf of the estate clearly show an intent to bind only the estate and not the executor, individually.

Designate the owner of the property as "Estate of [Decedent]" and sign any contract "[Name], Independent Executor." This will assist in shielding the Bank from personal liability related to a breach of the contract. *Ward v. Property Tax Valuation, Inc.*, 847 S.W.2d 298 (Tex. App.—Dallas 1992, n.w.h.).

Be aware that a higher standard of care now applies to banks.

A recent Texas case holds that a corporate executor is held to a higher standard of care and competency than an individual executor. As such, the corporate executor was individually liable for failure to pay claims against the estate as required by law. *Ertel v. O'Brien*, 852 S.W.2d 17 (Tex. App.—Waco 1993, writ denied).

III. Litigation Management

Articles

Select the right attorney for the particular litigation at hand.

Where trust or estate litigation is involved, the lawyer must have a thorough knowledge of the law of procedure, evidence and courtroom skills, as well as a solid background in the fundamentals of estate planning law. Coupling a commercial litigator with an estate planning attorney will not be near as cost-efficient or effective as hiring a litigator specializing the area of trusts and estates.

Seek independent counsel who is free of conflicts of interest.

Where the beneficiaries have grown at odds with one another or with the fiduciary, or if co-fiduciaries have grown at odds, seek independent counsel who is free of conflicts of interest.

A single attorney for the "trust" or "estate" may be all right until a feud begins among the parties. At that time, new counsel with independent judgment should be selected.

Independent counsel for the trustee and the beneficiaries is critical to preserving the attorney-client privilege. See *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 401-05 (Tex. App.--Houston [14th Dist.] 1997, writ dismissed by agreement).

Be aware that the attorney-client privilege may not always apply in a fiduciary context.

The Supreme Court has recently provided protection of the attorney-client privilege between a fiduciary and his lawyer. However, legal opinions and confidential correspondence with counsel may be discover