Tell Me More, Tell Me More:

Trustees' Duties to Inform and Account in Texas

By Christian S. Kelso

Most lawyers in Texas understand that trustees have a duty to share certain trust information with trust beneficiaries. This duty to inform comes from common law and has been largely codified in state law. The duty to provide formal accountings is a distinct subpart of the duty to inform. This article addresses the trustee's duty to both inform and account in Texas.

The nature and extent of the duty to inform is not well defined in the Texas Trust Code (TTC or the Trust Code)[i] and there is little case law on point. There is slightly more guidance with regard to the duty to account, although many questions remain.

Some assistance may be found in the Uniform Trust Code (UTC), both Restatements,[ii] and the Uniform Probate Code (UPC),[iii] although caution is advised when relying on these nonbinding sources that have not been formally adopted in Texas and have, in certain instances, been expressly rejected.

The Law in Texas

When considering a client's fiduciary duty as trustee, most practitioners turn to the Trust Code first. However, the thoughtful practitioner will notice that the common law duty to inform predates the Trust Code and is broader than the statutory duty to account. Also, the Trust Code directs trustees to "perform all of the duties imposed on [them] by the

common law,"[iv] so an examination that is limited to the Trust Code will generally be incomplete.

Under the common law, "[t]rustees and executors owe beneficiaries 'a fiduciary duty to full disclosure of all material facts known to them that might affect [the beneficiaries'] rights.'"[v]

As is made clear below, this duty is somewhat broader than the codified duty to account. The common law also recognized that the duty to inform could not be eliminated by a settlor[vi] but it has never been particularly instructive as to how this duty might be diminished.

Ancillary to a trustee's other duties is the common law duty to keep records. Without accurate records, a trustee cannot inform a beneficiary.

Books and records are also necessary for general trust management. Without them, a trustee cannot properly file tax returns, determine income and conduct other necessary business. The records a trustee must keep are assets of the trust, so it only stands to reason that a beneficiary should have reasonable access to them. Trustees should remember that the duty to keep records is separate from the duty to inform and may be grounds for a separate cause of action.

Statutory Framework

The accounting rules in the Trust Code are found primarily in three sections. The first, TTC § 111.0035, sets out trustee duties that may not be waived. It makes clear the extent to which a trustee's duty to account may not be limited. Note that the statute addresses both accounting demands as well as the common law duty to inform. This underscores the notion that the common law duty to inform is somehow different from the statutory duty to account.

The next section, TTC § 113.151, addresses accounting demands. This section is strangely worded and organized. It begins by stating that a beneficiary may demand an accounting, but it never directs a trustee to respond to that accounting. Instead, the section permits a court to order the accounting if it is not timely produced. Similarly, it permits an interested person to file suit to compel an accounting without even making a demand. Although not explicit, the implication of this section is that accountings will generally be produced on demand.

Note that TTC § 113.151 also implements some limitations on accountings. Under Subsection (a), demands appear to be limited in scope to the time period between the demand and the last accounting, if any, that the trustee provided. The statute also provides that, generally, a trustee is not obliged to account to beneficiaries more than once every 12 months. Interestingly, however, these limitations are not included in Subsection (b).

Finally, TTC § 113.152 sets out the required elements of a proper accounting. This section is somewhat more straightforward than § 113.151, but it still presents some questions. What is the difference between being "listed or inventoried?" Must a trustee include a *de minimis* initial contribution, such as a photocopied $10 bill in an accounting? What "other transactions regarding the trust property" must be included under Paragraph (2)? What constitutes an "adequate description" of trust assets under Paragraph (3)? Unfortunately, we lack answers to these questions.

Who is Entitled to an Accounting?

A broad array of people is generally entitled to trust information. Trust Code § 113.152 makes provisions for both beneficiaries and interested persons. TTC § 111.004(2) defines a beneficiary as "a person for whose benefit property is held in trust, regardless of the nature of the interest." TTC § 111.004(6) defines interest to mean "any interest, whether legal or equitable or both, present or future, vested or contingent, defeasible or indefeasible."

TTC § 111.004(7) defines *interested person* to mean "a trustee, beneficiary, or any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust."

On the other hand, the non-waivable provisions of TTC § 111.0035 relate only to so-called "first-tier beneficiaries." Under TTC § 111.0035(b)(4), first-tier beneficiaries include those who (i) are entitled or permitted to receive

Related CPE: For CPE on estate and trust accounting, go to the Education area of the TXCPA website and search online learning.

distributions from the trust or (ii) would receive a distribution from the trust if the trust terminated at the time of the demand.

TTC § 111.0035(c) is similar, but slightly different. It adds a requirement that first-tier beneficiaries be at least 25 years old. Also, when it qualifies beneficiaries who "would receive a distribution from the trust if the trust were terminated," it leaves out the words "at the time of the demand." This language is included in TTC § 111.0035(b)(4). The consequence of these differences is unclear.

By restricting the non-waivable provisions to first-tier beneficiaries of irrevocable trusts, settlors are presumably permitted to limit the duties to account and inform with regard to other beneficiaries and revocable trusts. This could prevent frivolous pestering by contingent remainder beneficiaries and the need to expend significant trust assets replying to their demands.

Consider, for example, the typical married couple with a run-of-the-mill revocable living trust where the husband and wife are grantors, co-trustees and primary beneficiaries. Does it really make sense to allow this couple's children, grandchildren and further descendants to demand an accounting of trust assets even though they will only take, if at all, under the trust terms after both of the parents have died? These people would not be able to demand an accounting of the settlors' non-trust assets, so denying them this privilege regarding assets held in a revocable trust seems rational.

But case law makes rules confusing in this area. In *Mayfield v. Peek*,[vii] a contingent beneficiary of a revocable trust was determined to have standing to bring an action against a trustee for breach of fiduciary duty. At trial, the court held that the beneficiary lacked standing because her interest was not vested. But on appeal, the court noted that the Trust Code allows a court to "intervene in the administration of a trust to the extent that the court's jurisdiction is invoked by an interested person."[viii]

As described above, an interested person includes a beneficiary, regardless of whether his/her interest is "present or future, vested or contingent, defeasible or indefeasible." Thus, the *Mayfield* court allowed the beneficiary to continue with her claim even though her interest was subject to defeasement by revocation of the trust. While *Mayfield* did not involve an accounting demand, its logic would seem to apply to accountings.

On the other hand, the court in *Berry v. Berry*,[ix] determined that a contingent beneficiary lacked standing to require an accounting, stating the claimant's "interest was no greater than that of an heir apparent or beneficiary of a person who is still alive."

At least one respected commentator has stated publicly that the case was incorrectly decided, noting that, "Unlike an heir apparent or beneficiary of a person who is still alive, a contingent beneficiary of a trust currently owns a contingent interest in the trust." It is worth noting that *Mayfield* involved alleged breaches by a trustee who was a child of the settlor and the settlor, who held the power to revoke the trust, may have lacked mental capacity at the time the alleged breaches occurred.

To minimize the potential for confusion on this issue, drafters may wish to include language in their revocable trusts expressly limiting the trustee's duty to inform or account to first-tier beneficiaries as provided in TTC §111.0035(b)(4) and (c). Such language could be particularly helpful where privacy is a major consideration.

The foregoing notwithstanding, it should go without saying that beneficiaries generally should not demand accountings from trustees of revocable trusts, especially where the people holding the right to revoke are competent. Such a demand is likely to raise the ire of powerholders and result in the demanding beneficiaries being cut out of their inheritances.

This same principle applies where a trust instrument grants someone a power to appoint property away from a beneficiary.

Release and Waiver

Another key question is whether a beneficiary (or other interested party) can waive their right to an accounting or release a trustee from their duty. This question evokes the policy considerations. How can a beneficiary release a trustee of a right to information without getting that information in the first place?

From a strictly academic perspective, this policy should clearly favor the position that waivers and releases of information and accounting rights should be unenforceable. However, from a practical perspective, the opposite is true. Trustees often desire waivers upon providing beneficiaries with accountings.

There is little guidance as to what constitutes a proper accounting under Texas law, so when trustees have, in good faith, attempted to provide proper accountings to beneficiaries, they want those beneficiaries to agree that the accountings are proper and waive any further demand for information for the period covered by the provided accounting.

The same holds true when a trust is wound up. Once all trust property is distributed, a trustee no longer has a "war chest" to expend in defense of frivolous claims of impropriety. Therefore, the trustee wants some assurances that such claims will not be brought up after the fact.

Facts very similar to these were present in the case of *Harrison v. Harrison Interests*.[x] In that case, the parties entered into an agreement to distribute property and disassociate themselves. Under the agreement, the fiduciaries were released and indemnified by the beneficiary. Despite the release and indemnity, the beneficiary later filed suit, arguing that the release was invalid. However, the court held in favor of the fiduciaries and upheld the release and indemnity.

Interestingly, the UTC allows parties to approve accountings (called "reports" in the UTC) in a non-judicial settlement agreement. The UTC also expressly allows beneficiaries to waive their accounting rights (albeit not irrevocably), but there is no analogous provision in the Trust Code.

Failure to Account

The Trust Code and the case history are rife with penalties for trustees who fail to account. TTC prescribes remedies for this failure directly in § 113.151 and breaches of trust generally in § 114.008. The Trust Code also addresses attorney's fees at § 114.064.

Failure to account can lead to some rather draconian consequences.

713.599.1777

INFO@GOODMANFINANCIAL.COM

This firm is not a CPA firm. Goodman Financial is a fee-only Registered Investment Adviser (RIA). Registration as an adviser does not connote a specific level of skill or training. More detail, including forms ADV Part 2A and Form CRS filed with the SEC, can be found at www.goodmanfinancial.com.

In *Corpus Christi Bank and Trust v. Roberts*,[xi] beneficiaries of a trust sued the trustee to account after the trust terminated by its provisions. The long-serving trustee had failed to keep good records. To make matters worse, the trustee and his accountant died shortly after the suit was filed, so the trustee's personal representative was substituted for him. In ruling against the trustee's estate, the court stated:

We sympathize with the executor's difficulty in making a full accounting because of the death of this non-professional 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.

According to another case, "The main purpose of forfeiture is not to compensate an injured principal… Rather, the central purpose…is to protect relationships of trust by discouraging agents' disloyalty." Furthermore, the "party seeking forfeiture need not prove damages as a result of the breach of fiduciary duty."

Benefits of Informing and Accounting

The primary benefit of providing trust information to beneficiaries is that it puts beneficiaries on notice with regard to the trustee's actions. In breach actions, the statute of limitations does not begin to run until a beneficiary learns the relevant facts for a cause of action. Thus, by providing information to beneficiaries, the trustee can begin running the statute of limitations, which is typically four years for breach of fiduciary duty claims.

The primary benefit of providing an accounting is that, under TTC § 113.151, a second accounting cannot generally be required until 12 months have passed. This prevents beneficiaries from pestering a trustee incessantly.

In either case, however, the benefit to the trustee cannot be realized until the duty is properly fulfilled. With regard to the duty to inform, this means all relevant information must have been passed on to the beneficiary. With regard to accountings, the requirements of TTC § 113.152 must have all been satisfactorily met.

The vagueness of the duties makes determining whether they have been properly fulfilled a likely topic of litigation.

'Informal' Accountings

Because they are so onerous and costly, many trustees wonder whether full-blown accountings are really necessary. When beneficiaries start asking questions, these trustees would like to produce only so much information as will make

Upcoming 2023 CPE Programs

TXCPA is here to connect you to the CPE programs to meet your learning needs in 2023. There are many live and online options available, so you can find the topics and dates that best fit your busy schedule.

Tax Programs
search the online catalog for the full lineup of programs to prepare you for tax season.

Business & Industry
Programs for:
Industry
Management accounting
Nonprofit organizations
Governmental accounting

Mark Your Calendar and Save the Date for TXCPA's 2023 Conferences
May 4, Technology Conference, Dallas
May 11, Audits of Employee Benefit Plans Conference, Webcast
May 15, Energy Conference, Webcast
May 22, Non Profit Organizations Conference, Dallas and Webcast
June 14-16, CPE by the Sea, Galveston

Free CPE for Members
Your membership includes at least 20 hours of FREE CPE! Click here for details on upcoming complimentary courses available to TXCPA members.

TXCPA Passport – With Newly Updated Courses
The TXCPA Passport is a one-year subscription to on-demand CPE that can help you more easily manage your time. **For only $199**, you'll have access to 179 CPE hours with programs of varying length. The programs cover a variety of topics, including accounting and auditing, tax, technology, ethics, finance, personal development, management services, fraud, and more.

To learn more and register for your CPE programs, go to the Education area of our website, search the online catalog or call the TXCPA staff at 800-428-0272 (972-687-8500 in Dallas) for assistance.

the beneficiaries go away. But while trustees are free to provide information whenever they please, there is no indication that an informal accounting will benefit the trustee unless it actually fulfills either the duty to inform or the duty to account.

Thus, informal accountings may be of some benefit to trustees, but that benefit will be limited, so the standard advice is to produce a full accounting when beneficiaries begin asking questions. At the very least, an accounting should obviate the need for another accounting for at least 12 months.

What Should an Accounting Really Look Like?

Notwithstanding the provisions of TTC § 113.152, many trustees remain unsure of exactly what information should be included on a Texas trust accounting. Although the guidance is limited, a few rules are available.

To begin with, the Texas Supreme Court seems to favor a plain-language interpretation of the statute. In *Roberts*, the court sympathized with the trustee's successor in interest but nonetheless found the trustee's estate liable for failing to account, even though there was no way to produce an accounting after the trustee died.

Where Discovery Meets the Duty to Inform

No discussion of a trustee's duty to inform in Texas would be complete without mentioning the seminal case of *Huie v. DeShazo*,[xvi] which dealt with the confluence of discovery and the duty to inform. In that case, the court ruled that a trustee's fiduciary duty to fully disclose all material facts, "exists independently of rules of discovery and applies even if no litigious dispute exists between trustee and beneficiaries."

In so holding, the court ruled that, whereas the communications between trustee and attorney are protected, the underlying facts are not, and the trustee cannot hide the underlying facts by communicating them to their attorney.

On the other hand, it is worth noting there is no guarantee that even a formal accounting will begin running the four-year statute of limitations on breach claims. Conceivably, an accounting could meet the requirements of TTC § 113.152 and still fail to provide enough information to fulfill the duty to inform.

This is why trustees should maintain good trust records for the duration of the trusts they oversee (and then some). This is also why accountings should not be limited to the items described in TTC § 113.152.

The court in *Texas State Bank v. Amaro* said that a trustee's investment strategy and potential tort liability were "not components of an accounting" because those items were not listed in TTC § 113.152.[xii]

Similarly, the court in *In re Estate of Dillard* found liability where a trustee failed to strictly adhere to the plain language of the statute and failed to include a bank account in the accounting.[xiii]

In addition to investment strategies and potential tort liabilities, several other elements are conspicuously missing from the language of TTC § 113.152. These include:

- Trustee compensation;
- Lists of beneficiaries or changes to beneficiary status;
- A copy of the trust instrument or even the parts thereof that impact the aggrieved beneficiary; and
- Any memorandum or "letter of wishes" a settlor might have drafted for the distribution of tangible personal property.

Two other cases are instructive with regard to accounting contents. In *Tolar v. Tolar*,[xiv] a trust beneficiary complained that certain assets were left off an accounting. The beneficiary contended that the property at issue was improperly left outside of the trust. But the court granted no relief on this issue because the property was never transferred to the trust, the trustee was not required to account for it.

Finally, in *Beaty v. Bales*[xv] a CPA's unaudited accounting and financial report was admitted in evidence, without original source documentation such as receipts, paid bills and invoices. But the court nonetheless held that, under the circumstances, the document produced complied with then-applicable statutory requirements for a proper court-ordered accounting.

Note, however, that the above cases dealt specifically with accountings and did not elaborate on the broader duty to inform. A trustee who is already going to the trouble to account might as well provide any other relevant information at the same time.

Best Practices

With the above rules in mind, the following best practices are suggested to various practitioners for consideration.

For Trustees

Provide information often and regularly to minimize exposure. There is no known penalty for over-disclosing information to trust beneficiaries and you do not need to wait until a beneficiary requests information to begin running the statute of limitations.

When providing information, include as much information as possible and admit to mistakes. Nobody is perfect. It is far better to ask for forgiveness than to be caught trying to hide something.

Do not limit accountings to the items listed in TTC § 113.152. Disclosures should include a narrative of relevant information and anything else that is material to a beneficiary.

An accounting is a trustee's opportunity to defend their actions. The trustee should take that opportunity to explain why something was done.

Anticipate accountings and other disclosures. Trustees should organize their business in anticipation of information requests.

In addition to statements, cancelled checks and other information, trustees should keep detailed notes of their business so that they can later explain it to the beneficiaries they serve (and their attorneys). They should also keep trust information systematically stored for easy access and retrieval.

For Trust Drafters

Limit the number of people who can demand information or accountings to the statutory minimum. This is particularly important with revocable trusts.

Be sure to include powers of appointment to discourage frivolous accounting demands.

Do not require periodic accountings in a trust instrument. There is a reason they call them trusts. If clients have so little confidence in their proposed trustee that they want to require periodic accountings, they should reconsider the appointment.

Accountings are costly and difficult to compile. Requiring them absent an interested party's demand is simply setting the trustee up for failure.

For Beneficiaries

Be very careful when making an accounting demand. If a trust is revocable or grants another person the power to appoint property away from you, there is a high likelihood that you will find yourself excised as a trust beneficiary.

> **Trustees should provide information often and regularly to minimize exposure. There is no known penalty for over-disclosing information to trust beneficiaries...**

About the Author: Christian S. Kelso (fghwlaw.com/kelso) is a Partner at Farrow-Gillespie Heath Wilmoth LLP in Dallas. He practices in the areas of estate planning, wealth preservation and transfer, probate, tax and transactional corporate law. His corporate practice is focused on avoiding legal problems before they materialize.

Kelso is a native Dallasite, having attended St. Mark's School of Texas for 12 years before moving on to the University of Texas at Austin. He received both his J.D. and LL.M. (Taxation) from SMU.

Footnotes

[i] *See* TEX. PROP. CODE ANN. § 113.152 (West 1984).
[ii] Reference is made to The Restatement (Third) of Trusts (the Restatement (Third)), which was promulgated in 2003 and followed the Restatement (Second) of Trusts (the Restatement (Second)), which dates to 1959. Texas has not adopted either of these Restatements, but they are nonetheless valuable here for context and guidance.
[iii] *See* Julia C. Zajac & Robert Whitman, *Fiduciary Accounting Standards for the 21st Century*, REPRESENTING EST. & TR. BENEFICIARIES & FIDUCIARIES (A.L.I. – A.B.A., Phila., Pa.) July 14-15, 2011 at 339.
[iv] TEX. PROP. CODE ANN. § 113.051 (West 2006). For other references to the common law, see TEX. PROP. CODE ANN. §§ 111.0035(c), 111.005, 112.054(f), 114.007(c) and 121.058 (West 2019).
[v] *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (citing *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984)).
[vi] *Hollenbeck v. Hanna*, 802 S.W.2d 412 (Tex. App.-San Antonio 1991, no pet,).
[vii] *Mayfield v. Peek*, 546 S.W.3d 253 (Tex. App.-El Paso 2017, no pet.).
[viii] *See* TEX. PROP. CODE ANN. § 115.001(c) (West 2017).
[ix] No. 13-18-00169-CV, 2020 WL 1060576 (Tex. App.-Corpus Christi-Edinburg Mar. 5, 2020, no pet. h.).
[x] Harrison v. Harrison Interests, Ltd., No. 14-15-00348-CV, 2017 WL 830504 (Tex. App.-Houston [14th Dist.] Feb. 28, 2017, pet. denied) (mem. op.).
[xi] *Corpus Christi Bank and Trust v. Roberts*, 597 S.W.2d 752 (Tex. 1980).
[xii] *Texas State Bank v. Amaro*, 87 S.W.3d 538, 543 (Tex. 2002).
[xiii] *In re Estate of Dillard*, 98 S.W.3d 386 (Tex. App.-Amarillo 2003, pet. denied). (The court also noted that the accounting was inaccurate because it included items that were part of a related estate but not the trust at issue.).
[xiv] *Tolar v. Tolar*, No. 12-14-00228-CV, 2015 WL 2393993 (Tex. App.-Tyler. May 20, 2015, no pet.) (mem. op.).
[xv] *Beaty v. Bales*, 677 S.W.2d 750 (Tex. App.-San Antonio 1984, writ ref'd n.r.e.).
[xvi] *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996).