



Fiduciary Litigation

Seminar Topic: This material provides an will discuss the scope of a trustee's fiduciary duties and ways to help protect individual and corporate trustees from beneficiary aggression.

This material is intended to be a guide in general. As always, if you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.



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Disclaimer: The views expressed herein are not a legal opinion. Every fact situation is different and the reader is encouraged to seek legal advice for their particular situation.

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About The Author

David M. Lutrey is the managing partner of the Lake Forest law firm of Lesser Lutrey McGlynn & Howe, LLP. For the past 19 years, Mr. Lutrey has counseled individuals and corporate fiduciaries as a seasoned litigation attorney in the areas of trusts, estates, probate and guardianships. He appears regularly in the trial courts of Lake, Cook and McHenry Counties. Among his many appeals, he argued before the Second District Court of Appeals in the *Estate of Weiland* (2003), establishing the standard of proof for pay on death accounts in Illinois and in the *Estate of Walsh* (2012), establishing presumptions regarding claims in a decedent's estate.

Mr. Lutrey spends equal time assisting individuals in the creation of wills, trusts and other estate planning documents that preserve and transfer meaningful legacies. Mr. Lutrey's approach to estate planning includes participating in hand-picked professional networks that offer a complete estate planning perspective integrated with the client's financial, insurance and accounting representatives. In addition to using creative and proven tax planning strategies, Mr. Lutrey draws on his firm's considerable experience with trust and estate litigation and administration to prepare reliable and flexible plans to meet client needs.

In April of 2014, the Illinois State Bar Association (ISBA) appointed Mr. Lutrey to his sixth term on the Trusts and Estates Section Council's Legislation Committee. In this capacity, Mr. Lutrey has worked with the Chicago Bar Association, the Illinois Bankers Association and other professional groups in the development of Illinois statutes affecting the areas of probate, trusts, estates, guardianships and elder law. Most recently, Mr. Lutrey participated in the drafting of Illinois statutes relating to Trust Decanting and Directed Trusts both of which were signed into law in August of 2012 and is now involved in the Chicago Bar Association's creation of a proposed Illinois Trust Code that would modernize the law of trusts in our state.

Mr. Lutrey is a fellow of the American College of Trust and Estate Counsel ("ACTEC") and Litigation Counsel of America ("LCA"), is an adjunct professor at Loyola Law School in Chicago and serves on the legal education and outreach committees of the Illinois Institute of Continuing Legal Education's Estate Planning Short Course, the ISBA's Trusts and Estates Section Council and the Chicago Estate Planning Council. He is a Past President of the Lake County Estate Planning Council and is currently serving his fifth consecutive term as Chair of the Lake County Bar Association's Trusts and Estates Committee. In these capacities, Mr. Lutrey has organized a number of seminars designed to educate lawyers on matters pertaining to trusts, estates, probate and guardianships.

In addition, Mr. Lutrey is himself a frequent speaker as shown below on topics related to estate planning, administration and litigation for the Illinois Institute of Continuing Legal Education ("IICLE"), the Chicago Bar Association, the Chicago Estate Planning Council, the Illinois State Bar Association and the Lake County Bar Association as well as numerous financial institutions.

Mr. Lutrey is rated "AV" by Martindale Hubbell, has been named as one of the Top Lawyers in Illinois for the past five years and was selected by Thompson Reuters as a "Super Lawyer" for the years 2014 and 2015.

Mr. Lutrey earned his Juris Doctorate from DePaul College of Law and his Master's Degree in Business Administration from the Kellstadt Graduate School of Management in 1996 with an emphasis in financial investments, tax and other areas related to wealth planning.

Author's Email Address: lutrey@llmhlegal.com

Author's Website: WWW.LLMHLEGAL.COM

Author's Mailing Address: 191 E. Deerpath, Suite 300
Lake Forest, Illinois 60045

Author's Phone Number: 847.295.8800



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I. INTRODUCTION

A. The range of trust and estate litigation is deceptively vast and it is impossible to fully address the topic in a single one-hour presentation. By way of limitation, this outline focuses primarily on examples of (a) the scope of a trustee's fiduciary duties and (b) ways to help protect individual and corporate trustees from beneficiary aggression. Other actions involving trusts and trustees are more briefly discussed at the end of the outline.

II. FIDUCIARY DUTIES OF THE TRUSTEE

A. A Trustee's Fiduciary Duty, Generally. Trustees stand in a fiduciary relationship with all beneficiaries as a matter of law.

1. A trustee owes a fiduciary duty to the trust's beneficiaries and is obligated to carry out the trust according to its terms and to act with the highest degrees of fidelity and utmost good faith. *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill.App.3d 605 (1 Dist. 2007); *Jefferson Nat'l Bank of Miami Beach v. Central Nat'l Bank in Chicago*, 700 F.2d 1143 (7 Cir. 1983).

2. Nevertheless, the trustee's fiduciary duty requires the trustee to follow the terms of the trust instrument, putting the wishes of the beneficiaries below the intent stated by the settlor. Restatement (Second) of Trusts §164, cmt a (1959).

B. Duty to Account. From a practical standpoint, beneficiaries are often frustrated when trying to protect their interests under a trust. This is particularly true when the trustee fails or refuses to reveal enough information for the beneficiary to evaluate the trustee's performance or the stability of the beneficiary's interest. As a result, one of the most important beneficiary protections provided under the law is the trustee's duty to account, which is designed to reveal the trust's activity to the beneficiaries on an ongoing basis so that a beneficiary is afforded the opportunity to take immediate action if and when problems are identified.

1. A trustee is required to furnish an accounting at least annually to the beneficiaries eligible to receive income, or if none, then the remaindermen. 760 ILCS 5/11(a) (2011).

2. No particular form of accounting is required, as long as the accounting fairly shows the true state of the trust assets and can be fairly held to the original records. *Wylie v. Bushnell*, 277 Ill. 484, 115 N.E. 618 (1917).

3. The information must be sufficient to show the beneficiaries what assets came in, what was distributed and what remains in the trust. *McCormick v. McCormick*, 118 Ill.App.3d 455, 455 N.E.2d 103 (1 Dist. 1983).

a) A trustee's annual accounting must show the trust's receipts, disbursements and inventory. 760 ILCS 5/11(a) (2011).

b) A trustee's final accounting must show the same items as annual accounts plus the final distributions to the remaindermen. 760 ILCS 5/11(b) (2011).

4. The beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust. *Wallace v. Malooly*, 4 Ill.2d 86, 122 N.E.2d 275 (1954).

5. If the trustee cannot provide a full accounting, the trustee is substantially at risk. *Woolard v. Woolard*, 574 F.3d 755 (7 Cir. 2008). The trustee is under a duty to the beneficiary to render clear and accurate accounts with respect to trust administration. If he does not, all presumptions are against him. *Nonnast v. Northern Trust Co.*, 374 Ill. 248, 29 N.E.2d 251 (1940).

6. Often, the trustee's statutory duty to account will be specifically altered in the trust instrument and in most cases, the document will control. (760 ILCS 5/3(1)) (2011). However, provisions of a trust allowing a majority of income beneficiaries to approve accountings "with the same effect as if a court" approved the accountings was unenforceable because it deprives individual beneficiaries of the ability to enforce his or her rights and gives the trustee too much control of the process of releasing his accounts and seeking approval. *Vena v. Vena*, 387 Ill.App.3d 389, 899 N.E.2d 522 (2 Dist. 2008).

C. Duty to Properly Invest. Unlike probate estates, where the objective is to collect and distribute assets as quickly as possible, many trusts are created to hold assets for a prolonged period and are designed to separate control from the beneficial interest. In these cases, the trustee's duty to properly invest the trust assets is of critical importance to both the current beneficiaries and the remainder beneficiaries. The standard of Illinois trustee investment is that of a "prudent investor."

1. **Prudent Investor Rule.** "The trustee has a duty to invest and manage assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust. This standard requires the exercise of reasonable care, skill and caution and is to be applied to investments not in isolation, but in the context of a trust portfolio as a whole and as a part of an overall investment strategy that should incorporate risk and return objectives reasonably suitable to the trust." 760 ILCS 5/5(a)(1) (2011).

a) No specific investment is automatically considered prudent or imprudent. 760 ILCS 5/5(a)(2) (2011).

b) The trustee has a duty to diversify, unless the trustee believes, under the circumstances, it is in the best interests of the beneficiaries not to diversify. 760 ILCS 5/5(a)(3) (2011).

c) The trustee has a duty to review assets and make and implement decisions regarding retention and disposition. 760 ILCS 5/5(a)(4) (2011).

d) The trustee has a duty to pursue an investment strategy considering the production of income and the safety of capital. 760 ILCS 5/5(a)(5) (2011).

e) The trustee can consider many circumstances in making investment decisions, including:

(1) general economic conditions;

(2) possible effects of inflation;

(3) expected tax consequence;

(4) role each circumstance plays in the overall portfolio;

(5) expected total return; and

(6) duty to incur only reasonable and appropriate costs. 760 ILCS 5/5 (a)(6) (2011).

f) Modification of the Prudent Investor Rule by the Trust Document. The trust document may expand, restrict, eliminate or otherwise alter the Prudent Investment Rule. 760 ILCS 5/5(b) (2011). *Hatfield v. First National Bank of Danville*, 317 Ill.App. 169, 46 N.E.2d 94 (1943). *See Also, Field v. Dunn*, 77 Ill.App.2d 274, 222 N.E.2d 129 (3 Dist. 1966). (Trustees were not liable for making loans and receiving forged notes in return when they could not have foreseen that notes were forgeries. Trustees were justified in making the loans on security of trust deeds because the transaction was performed in a manner similar to prudent business persons in the area.). Trustees are not liable for loss on investments when they have invested within the scope of their authority and exercised utmost good faith and reasonable prudence.

D. Duty not to Delegate. Generally speaking, the trustee cannot delegate any powers requiring the exercise of judgment or discretion. *In re Hartzell's Will*, 43 Ill.App.2d 118, 192 N.E.2d 697 (2 Dist. 1963). However, there are two significant exceptions to this rule.

1. Delegation of Investment Decisions. The Trusts and Trustees Act specifically authorizes the delegation of investment decisions. 760 ILCS 5/5.1 (2011).

a) To delegate investment decisions, the trustee must exercise reasonable care, skill and caution in selecting the agent, establishing the terms of the delegation and reviewing the agent's actions. 760 ILCS 5/5.1(b)(1) (2011).

b) The trustee must look into the agent's background, including experience, performance history, licensing and financial stability. 760 ILCS 5/5.1 (b)(2) (2011).

c) The investment agent is liable to the beneficiaries and to the trustee as if the agent was a trustee and the agent is subject to the same standards as a trustee. 760 ILCS 5/5.1 (b)(5) and (6) (2011).

d) The trustee must send written notice of the delegation to the income beneficiaries. 760 ILCS 5/5.1 (b)(6) (2011).

2. Delegation of Ministerial Duties. A trustee may employ agents or attorneys or others to perform ministerial duties connected with the trust. *In re Hartzell's Will*, 43 Ill.App.2d 118, 192 N.E.2d 697 (2 Dist. 1963). A trustee cannot, however, simply delegate all administration to his attorney and expect to walk away from liability. *Id.* The standard is whether a reasonably prudent trustee would have done the same thing in a similar situation. *Id.*

E. Duty of Loyalty – No Self Dealing. Trustees must make sure to avoid actual conflicts of interest or better yet, the mere appearance of conflicts of interest, with the trust and its beneficiaries. Even where a transaction between the trustee and the trust or beneficiaries appears very reasonable and the parties freely consent, the trustee's fiduciary duty may be grounds for rescission of that transaction, or worse.

1. A trustee has a duty not to deal with the subject matter of the trust for his own benefit. *NC Illinois Trust Company v. First Illini Bancorp, Inc.*, 323 Ill.App.3d 254, 752 N.E.2d 1167 (3 Dist. 2001); *Moss v. Elofsson*, 194 Ill.App.3d 256, 550 N.E.2d 1228 (1 Dist. 1990); *Home Federal Savings and Loan Association of Chicago v. Zarkin*, 89 Ill.2d 232, 432 N.E.2d 841 (1982).

2. Trustees have a duty not to put themselves in a position where their own interest will be in conflict with the beneficiaries' interests. *Rubin v. Laser*, 301 Ill.App.3d 60, 703 N.E.2d 453 (1 Dist. 1998).

3. If the trustee discovers a conflict during the trust's administration, the trustee has a duty to resign or remove the conflict. Bogerts Trusts and Trustees §543 (2010).

4. Good faith is not a defense to a trustee's self-dealing. Bogert's Trusts and Trustees §543 (2010).

F. Duty to Disclose. A fiduciary has a duty to reveal facts to the beneficiary. *Bangert v. Northern Trust Co.*, 362 Ill.App.3d 402, 839 N.E.2d 640 (1 Dist. 2005); *Obermaier v. Obermaier*, 128 Ill.App.3d 602, 470 N.E.2d 1047 (1 Dist. 1984).

1. The trustee is under a duty to beneficiaries to give them, upon their request at reasonable times, complete and accurate information as to the administration of the trust. *Continental Illinois National Bank & Trust Co. of Chicago v. Phelps*, 392 F.Supp. 313 (D.C. 1975).

2. A fiduciary can breach its fiduciary duty by failing to disclose something when he should inform the beneficiary of a fact or circumstance. *Hagney v. Lopeman*, 147 Ill.2d 458, 590 N.E.2d 466 (1992).

G. Duty of Impartiality. Unless the document provides otherwise, a trustee cannot favor one beneficiary over another. A trustee's risk of violating the duty of impartiality most often arises in one of two ways: (a) investment decisions affecting either income or remainder beneficiaries; or (b) litigation where beneficial interests are at odds.

1. The trustee has a duty to deal impartially with all beneficiaries and protect their interests. *Bangert v. Northern Trust Co.*, 362 Ill.App.3d 402, 839 N.E.2d 640 (1 Dist. 2005); *Northern Trust Co. v. Heuer*, 202 Ill.App.3d 1066, 560 N.E.2d 961 (1 Dist. 1990).

2. The creator of the trust can waive the rule of undivided loyalty by express language in the trust. *Estate of Halas*, 209 Ill.App.3d 333, 568 N.E.2d 170 (1 Dist. 1991). Where the duty of impartiality has been waived by the settlor, the fiduciary will not be held liable for his conduct unless he has acted dishonestly, in bad faith or has abused his discretion. *Estate of Halas*, 209 Ill.App.3d 333, 568 N.E.2d 170 (1 Dist. 1991).

3. A trustee who argues that a trust document should be interpreted in a manner favorable to one beneficiary and detrimental to another has breached his duty, and the trustee's attorney fees and costs may not be paid from trust principal. *Northern Trust Co. v. Heuer*, 202 Ill.App.3d 1066, 560 N.E.2d 961 (1 Dist. 1990).

4. When there are conflicting claims to trust funds, a trustee should file an interpleader action and avoid making a determination on his own of the rights of the respective claimants. *Bangert v. Northern Trust Co.*, 362 Ill.App.3d 402, 839 N.E.2d 640 (1 Dist. 2005).

H. Duty to Allocate Income and Principal. There is a classic conflict between the interests of a trust's income beneficiaries and remaindermen. Careful segregation of income and principal is a key element of the trustee's duties to each.

1. Balancing Investments between Income and Growth. A trust shall be administered with due regard to the respective interests of income beneficiaries and remaindermen. 760 ILCS 5/3(b) (2011).

a) A trust shall be deemed to be so administered if income and expenses are charges as follows:

(1) In accordance with the terms of the trust;

(2) In accordance with the Principal and Income Act;

(3) If the trustee determines that, in his or her discretion, the provisions of the Principal and Income Act result in some inequity, then in accordance with what is reasonable and equitable. 760 ILCS 15/3(b) (2011).

b) A person establishing a trust may make provisions for the determination of income and principal and the apportionment of receipts and expenses between income and principal or may give the trustee discretion to make those decisions. Any such provision in a trust instrument shall control. 760 ILCS 5/3(a) (2011). If the trust gives the trustee discretion, there is no inference of imprudence or partiality arising from a trustee's decision to make an allocation other than in accordance with the provisions of the Principal and Income Act. 760 ILCS 15/3(c) (2011).

2. Income Defined. Income is the return in money or property derived from the use of principal. 760 ILCS 15/4(a) (2011). Income includes:

a) Rent;

b) Interest;

c) Income earned during administration of a decedent's estate;

d) Corporate distributions;

e) Accrued increment on bonds or other obligations issued at a discount;

f) Receipts from business or farming; and

g) Receipts from disposition of natural resources.

3. Principal Defined. Principal is the property which has been set aside to be held in trust and eventually delivered to a remainderman. 760 ILCS 15/4(b) (2011). Principal includes:

- a) Consideration received on the sale or transfer of principal;
- b) Repayment of a loan;
- c) Refund, replacement or change in the form of principal;
- d) Proceeds of property taken by eminent domain;
- e) Insurance proceeds from property forming the part of principal;
- f) Stock dividends, receipts on liquidation of a corporation and other corporate distributions;
- g) Receipts from disposition of bonds or other obligations;
- h) Receipts from disposition of natural resources;
- i) Receipts from other principal subject to depletion;
- j) Allowances for depreciation; and
- k) Receipts from granting of options.

I. Duty to Perform Tax Filings. A trustee has the duty to file all income and estate tax returns and to pay all appropriate taxes from the trust.

1. Fiduciary Income Tax Returns.

- a) The trustee must file a Form 1041 for a trust if: 1) there was any taxable income for the tax year; 2) there was gross income of \$600 or more (regardless of taxable income); or 3) a beneficiary is a nonresident alien.
- b) A decedent's 1041 is due on or before the 15th day of the 4th month following the close of the taxable year. In filing the first return, the estate may choose a calendar year or elect fiscal year (the election remains effective for the later of 2 years after Decedent's death or 6 months after final determination of liability for estate tax if 706 filed)

2. Estate Tax Return.

- a) A Form 706 must be filed for the estate of every U.S. citizen or resident whose gross estate, plus adjusted taxable gifts and specific exemption, is more than the applicable exclusion amount (currently \$5,000,000 for 2010 and 2011).

b) The 706 must be filed by the executor, personal representative or administrator, if one is appointed. If no executor, personal representative or administrator is appointed, the person in actual or constructive possession of any property of the Decedent (the trustee) is considered to be the “executor” and must file Form 706.

c) The Form 706 is due within 9 months after the date of the Decedent’s death unless you receive an extension.

(1) The “executor” can obtain an automatic six-month extension of time to file Form 706, but cannot request additional extension of time to file unless the executor is out of the country.

(2) The automatic extension is a filing extension only, but the executor can request an extension of time to pay estate tax as well if due cause exists.

J. Duty of Confidentiality. The trustee-beneficiary relationship is one of confidentiality. Restatement (Second) of Trusts §2, cmt *b* (1959). Unauthorized disclosure of trust or beneficiary information may be grounds for removal. See Bogert’s Trusts and Trustees §527 (2010).

III. ACTIONS FOR BREACH OF FIDUCIARY DUTY

A. General Trust Litigation Issues.

1. Jurisdiction.

a) General Jurisdiction over Illinois Trust Matters. Illinois courts have equity jurisdiction to hear cases involving the establishment and enforcement of a trust. *Steven v. Falese Land Co.*, 50 Ill.App.3d 231, 365 N.E.2d 967 (2 Dist. 1977); *Truman’s Estate v. Gentz*, 32 Ill.App.3d 886, 336 N.E.2d 766 (2 Dist. 1975). This jurisdiction is inherent and extends to all questions relating to the establishment, enforcement, protection and preservation of the trust. *Village of Hinsdale v. Chicago City Missionary Soc.*, 375 Ill. 220, 30 N.E.2d 657 (1940); *Board of Educ. Of City of Rockford v. City of Rockford*, 372 Ill. 442, 24 N.E.2d 366 (1939).

(1) This includes the power to appoint and exercise supervisory control over the trustees. *Ohlheiser v. Shepherd*, 84 Ill.App.2d 83, 228 N.E.2d 210 (1 Dist. 1967).

(2) With limited exceptions, the circuit court, being a court of general jurisdiction, need not look to any particular statute to derive jurisdiction over “justiciable matters” (in the context of trust litigation). *Estate of Pellico*, 394 Ill.App.3d 1052, 916 N.E.2d 45 (2 Dist. 2009); Ill. Const.1970, art. VI, Section 9.

b) Jurisdiction over Non-Resident Trustees.

(1) Jurisdiction over the parties is essential to an Illinois court’s power to determine controversies with respect to the establishment and enforcement of trusts. *Ohlheiser v. Shepherd*, 84 Ill.App.2d 83, 228 N.E.2d 210 (1 Dist. 1967). This jurisdiction may be acquired in accordance with general rules. *Id.*

(2) In determining whether jurisdiction is proper over a foreign defendant, the court evaluates (a) whether the facts of the case satisfy the requirements of the long-arm statute, and (b) whether jurisdiction is permissible under notions of due process. *Rollins v. Ellwood*, 141 Ill.2d 244, 565 N.E.2d 1302 (1990).

(a) Long Arm Statute. Any person, whether or not an Illinois citizen or resident, who in person or through an agent does any of the following thereby submits such person to the jurisdiction of Illinois courts as to any cause of action arising from the doing of any such acts: (a) the breach of any fiduciary duty within this state; (b) the ownership of an interest in any trust administered within this state. 735 ILCS 5/2-209 (2011). Where a trust is administered in Illinois, the Illinois courts have jurisdiction over the trust and the designated trustee. *Sullivan v. Kodsi*, 359 Ill.App.3d 1005, 836 N.E.2d 125 (1 Dist. 2005). In determining whether a trust is administered in Illinois, courts are to consider:

- (i) the provisions of the trust instrument,
- (ii) the residence of the trustee,
- (iii) the residences of the beneficiaries,
- (iv) the location of the trust assets, and
- (v) the location of where the trust business is to be conducted. *Sullivan v. Kodsi*, 359 Ill.App.3d 1005, 836 N.E.2d 125 (1 Dist. 2005).

(b) Notions of Due Process.

(i) An Illinois court may exercise jurisdiction over a foreign defendant where the defendant has minimum contacts with Illinois such that requiring the defendant to litigate in Illinois would not offend traditional notions of fair play and substantial justice. *Sullivan v. Kodsi*, 359 Ill.App.3d 1005, 836 N.E.2d 125 (1 Dist. 2005) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945)).

(ii) Illinois jurisdiction over a nonresident defendant accords with federal due process where the defendant has purposefully directed his activities at residents of Illinois and the litigation results from those activities. *Sullivan v. Kodsi*, 359 Ill.App.3d 1005, 836 N.E.2d 125 (1 Dist. 2005) (citing *Burger King v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174 (1985)).

(iii) The minimum contacts requirement is met where the nonresident defendant deliberately engages in significant activities within Illinois or has established continuing obligations with Illinois residents. *Id.*

(3) Once a court obtains jurisdiction over a trust, it retains the power to require that all acts done thereafter by the trustee be done with the court's direction or with the court's sanction. *Ohlheiser v. Shepherd*, 84 Ill.App.2d 83, 228 N.E.2d 210 (1 Dist. 1967). Thus, a trustee acting under court supervision cannot step across the state line with the portable trust assets in his pocket and defy the supervising court to remove him. *Id.* (dealing with a court-appointed successor trustee of a testamentary trust situated in the State of Illinois).

c) Personal Service on Non-Resident Trustees or Beneficiaries. Personal service of summons may be made upon any party outside Illinois, and if the person served has submitted to the jurisdiction of Illinois courts, it shall have the same force and effect of personal service of summons within Illinois; otherwise, it will have the same force and effect as service by publication. 735 ILCS 5/2-208(a) (2011). The manner of service shall accord with Illinois rules. 735 ILCS 5/2-208(b) (2011).

2. Necessary Parties. Generally, in trust litigation, all persons having a legal or beneficial interest in the trust property should be joined as parties. *Hartshorne Motors v. Kennedy*, 340 Ill.App. 371 92 N.E.2d 194 (1 Dist. 1950); *Tegtmeyer v. Tegtmeyer*, 348 Ill. 434, 181 N.E. 297 (1932).

a) All Trustees. All currently acting trustees should be joined as parties. *Lurie v. Rupe*, 51 Ill.App.2d 164, 201 N.E.2d 158 (1 Dist. 1964).

(1) A written trust has a distinct legal existence that is recognized by statute and can sue or be sued through its trustee in a representative capacity on behalf of the trust. *Sullivan v. Kodosi*, 359 Ill.App.3d 1005, 836 N.E.2d 125 (1 Dist. 2005).

(2) The trustee's liability is not personal in nature, but for matters pertaining to trust administration within the trustee's authority, the other party must look solely to the trust. *Just Pants v. Bank of Ravenswood*, 136 Ill.App.3d 543, 483 N.E.2d 331 (1 Dist. 1985). *Field v. Dunn*, 77 Ill.App.2d 274, 222 N.E.2d 129 (3 Dist. 1966).

b) All Beneficiaries. All beneficiaries should be joined as parties (*Giese v. Terry*, 388 Ill. 188, 57 N.E.2d 462 (1944); *Dubs v. Egli*, 47 N.E. 766 (1897)), unless their interests are represented by others so that they receive actual and efficient representation, or the beneficiaries are so numerous that delay and expense of naming them are oppressive and burdensome. *Schlosser v. Schlosser*, 218 Ill.App.3d 943, 578 N.E.2d 1203 (1 Dist. 1991).

B. Legal Requirements for Actions for Breaches of Fiduciary Duty.

1. The trust beneficiary has the right to bring an action against the trustee based on a breach of fiduciary duty. *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill.App.3d 605, 863 N.E.2d 743 (1 Dist. 2007). To state a cause of action for a breach of fiduciary duty, a plaintiff must prove (1) a fiduciary duty existed, (2) a breach of that duty, (3) damages and (4) proximate cause between the breach and the damages. *Alpha School Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 910 N. E. 2d 1134 (1 Dist. 2009); *Herlehy v. Marie V. Bistersky Trust*, 2010 WL 5487547 (1 Dist. Ill. 2010).

2. The five year statute of limitations applies to a claim for breach of fiduciary duty. 735 ILCS 5/13-205 (2011); *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill.App.3d 605, 863 N.E.2d 743 (1 Dist. 2007); *Anderson v. Doss*, 133 Ill.App.2d 798, 271 N.E.2d 109 (4th Dist. 1971).

3. Special Rules for Breaches of Duty to Account.

a) Limitations on Accounting Actions. Statutory accountings are final and binding on all beneficiaries receiving the accounting three years after delivery. 760 ILCS 5/11 (2011). However, claims are only barred to the extent that they are founded on the accuracy or validity of information provided in the accounting. *Walker v. Northern Trust Co.*, 2008 U.S. Dist. LEXIS 31632 (Apr. 17, 2008).

b) Burden of Proof for Accounting Actions. Where an account is presented, the objecting party has the burden of giving evidence to substantiate his objections, and if there is evidence establishing inaccuracy or illegality of any item in the accounting, the burden then shifts to the trustee, who must establish the accounting's validity. *Conant v. Lansden*, 341 Ill. App. 488, 94 N.E.2d 594 (4 Dist. 1950).

c) Legal Basis for Accounting Action. If trustee fails to account, the beneficiaries may file suit in Circuit Court demanding an accounting in one of two ways.

(1) Trusts and Trustees Act. Current beneficiaries are entitled to an accounting by statute and can file under the statute. 760 ILCS 5/11(a) or (b) (2011). There is no corresponding right for remainder beneficiaries.

(2) Common Law. Illinois courts have held that as long as his purpose is proper, a beneficiary has the right to inspection on demand to see that the trust is properly executed. *Wallace v. Malooly*, 4 Ill.2d 86, 122 N.E.2d 275 (1954). When a beneficiary seeks an accounting from the trustee, the trial court must make two separate and distinct determinations, that an accounting is required and that a sum certain is due. *McCormick v. McCormick*, 118 Ill. App.3d 455, 455 N.E.2d 103 (1 Dist. 1983). The trial court must make both determinations in separate hearings with separate discovery phases. *Id.*

(a) Therefore, Remainder beneficiaries may have a right to accountings based on common-law accounting actions. *In re Estate of Thompson*, 139 Ill. App.3d 930, 487 N.E.2d 1193 (4 Dist. 1986).

(i) Vested remainder beneficiaries may be entitled to an accounting on demand (1) where beneficiaries purpose is proper and (2) to see that the trust is properly executed. *Corsi v. Corsi* 302, Ill.App.3d 519, 706 N.E.2d 956 (1 Dist. 1998); *Whalen v. Whalen*, 217 Ill.App.3d 557, 577 N.E.2d 859 (3 Dist. 1991); *Bullis v. DuPage Trust Co.*, 72 Ill.App.3d 927, 391 N.E.2d 227 (2 Dist. 1979).

(ii) Contingent remainder beneficiaries have no right to an accounting absent a showing of mismanagement or facts from which the court can infer waste, mismanagement or dissipation of assets. *Baum v. Continental Ill. Nat. Bank & Trust Co. of Chicago*, 230 F.2d 377 (7 Cir. 1956); *Bullis v. DuPage Trust Co.*, 72 Ill.App.3d 927, 391 N.E.2d 227 (2 Dist. 1979) (citing *Barnhart v. Barnhart*, 415 Ill. 303, 114 N.E.2d 378 (1953)).

(iii) In fact, not even equitable estoppel will require a former trustee to provide an accounting to contingent trustees based on the fact that the trustee provided the accountings in the past, unless the contingent beneficiaries can show a prejudicial change in their position in reliance on the promise. *Godfrey v. Kamin*, 19 Fed. Appx. 435 (7 Cir. 2001).

(3) A successor trustee may require an accounting from his predecessor or a deceased predecessor's estate, and may even have a duty to do so. *Conant v. Lansden*, 341 Ill.App. 488, 94 N.E.2d 594 (4 Dist. 1950); *Bullis v. DuPage Trust Company*, 72 Ill.App.3d 927, 391 N.E.2d 227 (2 Dist. 1979).

d) Pleading Requirements for Accounting Actions.

(1) The complaint must set forth facts sufficient to establish a right to an accounting, but need not set forth a specific sum due the plaintiff. *Huston v. Weed*, 242 Ill.App. 495 (2 Dist. 1926).

(2) Complaint must allege that an accounting is due and that the complaining party asked for and was denied an accounting or provided with inadequate records. *Chicago City Bank and Trust Co. v. Lesman*, 186 Ill.App.3d 697, 542 N.E.2d 824 (1 Dist. 1989).

4. Special Rules for Breaches of Duty of Loyalty.

a) Examples of Breaches of Duty of Loyalty.

(1) Where a trust agreement provided that the trustee should apply income from the trust property to the first mortgage and any excess to a second mortgage, the trustee's application of all trust income to partially discharge its own second mortgage was a breach of trust. *Northwestern Mutual Life Insurance Company v. Wiemer*, 96 Ill.App.3d 549, 421 N.E.2d 1002 (3 Dist. 1981).

(2) A trustee's purchase of trust property for his own account is a breach and is voidable at the beneficiary's option. *Home Federal Savings and Loan Association of Chicago v. Zarkin*, 89 Ill.2d 232, 432 N.E.2d 841 (1982); *Ford City Bank & Trust Co. v. Ford City Bank & Trust Co.*, 110 Ill.App.3d 123, 441 N.E.2d 1192 (1 Dist. 1982).

(3) The prohibition of dealings between trustee and beneficiary encompasses all transactions involving trust assets and those which have a connection with the trust. *Brown v. Brown*, 62 Ill.App.3d 328, 379 N.E.2d 328 (1978); *Obermaier v. Obermaier*, 128 Ill.App.3d 602, 470 N.E.2d 1047 (1984). Courts have extended this rule, finding a breach of duty where a trustee proposed a transaction regarding non-trust assets to a beneficiary, resulting in the trustee becoming a creditor of the beneficiary. *Smith v. First National Bank of Danville*, 254 Ill.App.3d 251, 624 N.E.2d 899 (4 Dist. 1993).

b) Presumption of Fraud. Transactions entered into by the trustee with either the trust or the beneficiaries are presumed to be fraudulent. *Home Federal Savings and Loan Association of Chicago v. Zarkin*, 89 Ill.2d 232, 432 N.E.2d 841 (1982); *Ford City Bank & Trust Co. v. Ford City Bank & Trust Co.*, 110 Ill.App.3d 123, 441 N.E.2d 1192 (1 Dist. 1982). However, this presumption can be overcome. *Id.*

(1) Overcoming the Presumption of Fraud.

(a) A beneficiary can consent to a transaction otherwise prohibited by the duty of loyalty, but the transaction will be subject to special scrutiny and the burden is on the trustee to prove the transaction was fair. *Home Federal Savings and Loan Association of Chicago v. Zarkin*, 89 Ill.2d 232, 432 N.E.2d 841 (1982); *Ford City Bank & Trust Co. v. Ford City Bank & Trust Co.*, 110 Ill.App.3d 123, 441 N.E.2d 1192 (1 Dist. 1982).

(b) A fiduciary can overcome the presumption that a transaction between a trustee and beneficiary was a breach of fiduciary duty by showing:

(i) The fiduciary made a free and honest disclosure of all relevant information in his possession;

(ii) The consideration was adequate; and

(iii) The beneficiary had competent and independent advice in the transaction. *Brown v. Brown*, 62 Ill.App.3d 328, 379 N.E.2d 634 (2 Dist. 1978).

IV. REMEDIES FOR BREACHES OF FIDUCIARY DUTY.

A. Damages (“Surcharge”). Generally, a trustee is liable for any loss or damage to trust property by his failure to exercise reasonable care, prudence and diligence. *Hartzell v. Parr*, 43 Ill.App.2d 118, 192 N.E.2d 697 (2 Dist. 1963); including:

1. loss or depreciation in the value of trust property;
2. profit to the trustee resulting from the breach; and
3. profit which would have accrued to the trust absent the breach. *Grot v. First Bank of Schaumburg*, 292 Ill.App.3d 88, 684 N.E.2d 1016 (1 Dist. 1997).
4. a trustee will not be surcharged for matters where there is not fault and no loss or damage is suffered. *First Midwest Bank/Joliet v. Dempsey*, 157 Ill.App.3d 307, 509 N.E.2d 791 (3 Dist. 1987).

B. Reduction or Denial of Trustee’s and Attorneys’ Fees.

1. A trustee’s compensation cannot be based on fee schedules alone. *Gregory v. First Nat. Bank & Trust Co.*, 84 Ill.App.3d 957, 406 N.E.2d 583 (2 Dist. 1980). Trustees are entitled to reasonable compensation (760 ILCS 5/7 (2011)) for services performed in the management and protection of the trust, but not for personal services (*Lampe v. Pawlarczyk*, 314 Ill.App.3d 455, 731 N.E.2d 867 (1 Dist. 2000)), unless:

- a) The terms of the trust provide otherwise;
- b) The trustee agrees to waive compensation; or

c) The trustee commits a breach of trust. *Jones v. Heritage Pullman Bank and Trust Co.*, 164 Ill.App.3d 596, 518 N.E.2d 178 (1 Dist. 1987); *Sauvage v. Gallaway*, 335 Ill.App.35, 80 N.E.2d 553 (4 Dist. 1948).

(1) Courts will consider the following in determining whether a trustee who has committed a breach of trust should be denied compensation or receive reduced compensation:

- (a) whether the trustee acted in good faith;
- (b) whether the breach of trust was intentional, negligent or without fault;
- (c) whether the breach related to the management of the whole trust or only to a part of the trust property;
- (d) whether the breach occasioned any loss; and
- (e) whether the trustee's services were of any value to the trust. *Jones v. Heritage Pullman Bank and Trust Co.*, 164 Ill.App.3d 596, 518 N.E.2d 178 (1 Dist. 1987).

(2) Failure to make and preserve records may be grounds for removal, denial of compensation and surcharge. *Bogert's Trusts and Trustees* §962 (2010).

d) Trustees should keep careful records proving the nature and value of their services so that the court can determine a fair and proper amount of compensation. *Lampe v. Pawlarczyk*, 314 Ill.App.3d 455, 731 N.E.2d 867 (1 Dist. 2000); *Rogers v. Belt*, 317 Ill.App. 81, 45 N.E.2d 511 (2 Dist. 1942). Failure to make and preserve records may be grounds for removal, denial of compensation and surcharge. *Bogert's Trusts and Trustees* §962 (2010).

2. Even when there is no breach of fiduciary duty, the court has power to reduce or eliminate compensation of trustee. Courts will consider the following in determining whether compensation is reasonable:

- a) Amount of assets and income received by the trust;
- b) Usual and customary fees for similar trustee services;
- c) Success or failure of the administration of the trust;
- d) Any unusual skills or experience of the trustee;
- e) Fidelity or disloyalty of the trustee;

f) Character of the work done. *Rogers v. Belt*, 317 Ill.App. 81, 45 N.E.2d 511 (2 Dist. 1942).

C. Trustee Removal. The petitioner has the burden of showing the grounds for removal. A trustee is presumed to have acted in good faith and to have performed his duties properly. The burden of proving a breach of trust rests upon the one who asserts it. *Elmhurst Nat'l Bank v. Glos*, 99 Ill.App.2d 74, 241 N.E.2d 121 (2 Dist. 1968); 35 Ill. Law and Prac. Trusts §78 (2011).

1) A trustee may be removed by the beneficiaries, absent court order, if the trust so provides and removal is done according to the trust provisions. 76 Am Jur 2d, Trusts § 132; Restatement (Second) of Trusts § 107(b) (1959).

a) If beneficiaries have power under trust instrument to remove and the trustee also has power to resign or remove a co-trustee, the beneficiaries right of removal takes precedence. *Mucci v. Stobbs*, 281 IllApp.3d 22, 666 N.E.2d 50 (5 Dist. 1996).

b) Courts will generally decline to act where the trust document provides a mechanism for trustee removal. Bogert's Trusts and Trustees §519 (2010).

2) Courts tend to give deference to the voluntary appointments made by those creating trusts and are reluctant to remove a representative absent good cause. *Elwood v. Kuhn*, 87 Ill.App.2d 411, 231, N.E.2d 97 (2 Dist. 1967). The Court's power to remove is an extraordinary remedy and should only be exercised when clearly necessary. *Brown v. Brown*, 62 Ill.App.3d 328, 379 N.E.2d 634 (2 Dist. 1978). *Chicago Title & Trust Co. v. Rogers Park Apartments Building Corp.*, 375 Ill. 599, 32 N.E.2d 137 (1941).

3. A trustee's efforts to comply with the terms of the trust will be regarded in the light most favorable to the trust. *Matter of Trusteeship of Pray*, 72 Ill.App.3d 943, 391 N.E.2d 545 (4 Dist. 1979).

4. Grounds for Removal. Not every instance of mistake or neglect on the trustee's part is grounds for removal; only if the trustee endangers the trust assets is it clearly necessary to remove a trustee to protect the trust fund. *Durdle v. Durdle*, 141 Ill.App.3d 12, 489 N.E.2d 1142 (4 Dist. 1986).

a) The sole fact that the terms of a trust instrument have not been strictly followed does not necessarily require the removal of the trustee. *Matter of Trusteeship of Pray*, 72 Ill.App.3d 943, 391 N.E.2d 545 (4 Dist. 1979).

b) As a general rule, a trustee will not be removed absent acts or circumstances endangering trust funds, such as mismanagement, incompetency or dishonesty. *Durdle v. Durdle*, 141 Ill.App.3d 12, 489 N.E.2d 1142 (4 Dist. 1986); *Cohen v. Central Republic Trust Company*, 282 Ill.App. 569, 1935 WL 3757 (1 Dist. 1935) (citing *Wylie v. Bushnell*, 277 Ill. 484, 115 N.E. 618 (3 Dist. 1917)).

(1) Personal Hostility, Ill Will, Disagreements. Personal hostility between a trustee and beneficiary is not per se grounds for trustee removal, the hostility must actually interfere with the administration of the trust. *Laubner v. JP Morgan Chase Bank, N.A.*, 386 Ill.App.3d 457, 898 N.E.2d 744 (4 Dist. 2008); *Rennacker v. Rennacker*, 156 Ill.App.3d 712, 509 N.E.2d 798 (3 Dist. 1987); *Suffolk v. Leiter*, 261 Ill.App. 82 (1 Dist. 1931); *Jones v. Bryan*, 204 Ill.App. 609 (3 Dist. 1917).

(2) Distance of Trustee. Non-residence or absence from the state alone is not sufficient, but if the trustee lives so far away that the distance causes mismanagement or negligence to create a breach of trust, there may be grounds for removal. *LaForge v. Binns*, 125 Ill.App. 527, 1906 WL 1767 (3 Dist. 1906); *Busch v. Schuttler*, 216 Ill.App. 212 (1 Dist. 1919); *Bergman v. Bergman*, 323 Ill. 73, 153 N.E. 735 (1926).

(3) Failure to perform. Failure to perform duties, including negligence in managing the estate and unnecessarily long delay in liquidating or distributing trust property, are grounds for removal. *Nevitt v. Woodburn*, 190 Ill. 283, 60 N.E. 500 (1901); *Knight v. Wacaser*, 317 Ill.App. 162, 46 N.E.2d 176 (3 Dist. 1942).

(4) Mistake. Mistakes in judgment so serious that removal is necessary to save the trust property, but not mere mistakes in judgment, are proper grounds. *Richards v. Barrett*, 5 Ill.App. 510 (3 Dist. 1879).

(5) Mismanagement of Assets. Failure, neglect or impropriety in investing the trust estate is grounds for removal. *Bold v. Mid-City Trust and Savings Bank*, 279 Ill.App. 365, 1935 WL 3534 (1 Dist. 1935). However, courts have held that the mismanagement must be so severe that it impairs or jeopardizes trust property to be grounds for removal. *Richards v. Barrett*, 5 Ill.App. 510 (3 Dist. 1879); *Chicago Title & Trust Co. v. Chief Walsh Co.*, 368 Ill. 146, 13 N.E.2d 153 (1938).

(6) Incapacity of the Trustee. If a trustee becomes incapacitated, he should be removed. Restatement (Second) of Trusts §107, cmt b (1959); Bogert's Trusts and Trustees § 527 (2010).

(7) Breach of Duty of Impartiality. Showing of favoritism to certain beneficiaries is grounds for removal. Restatement (Second) of Trusts §107, cmt b (1959).

(8) Failure to cooperate with co-trustees is grounds for removal. Restatement (Second) of Trusts §107, cmt b (1959).

(9) Failure to Account. Refusal to account is grounds for removal. *Bold v. Mid-City Trust and Savings Bank*, 279 Ill.App. 365, 1935 WL 3534 (1 Dist. 1935).

(10) Being found guilty of a crime or other conduct involving dishonesty. Restatement (Second) of Trusts §107, cmt b (1959); Bogert's Trusts and Trustees §527 (2010).

(11) Bankruptcy or insolvency of the trustee is grounds for removal. Restatement (Second) of Trusts § 107, cmt d (1959); Bogert's Trusts and Trustees §527 (2010).

(12) Failure to comply with a court order regarding court administration. Bogert's Trusts and Trustees §527 (2010).

(13) Failure to follow directions in trust instrument. Bogert's Trusts and Trustees §527 (2010).

D. Accountings. An accounting is, in itself, a remedy available to trust beneficiaries. Ordinarily, in a suit for accounting, the objective is first to obtain information and second, to trace or recover money.

E. Other Equitable Remedies. Since the rights of beneficiaries are equitable in nature, equitable remedies such as injunctions and specific performance are available. However, punitive damages are generally not allowed for equitable claims, though there have been a few courts outside Illinois that have assessed punitive damages against corporate fiduciaries in extreme cases. See Bogert's Trusts and Trustees §862 n.34 (2010).

F. A Trust Officer's Personal Liability. Generally, a trust officer working for a corporate fiduciary is not liable for breaches of trust that do not rise to the level of a tort. However, there is at least some precedent for a trust officer being sued individually for breaches of trust. See Bogert's Trusts and Trustees §901 n.10 (2010). A trust officer should make sure that the trust company provides employee liability insurance or indemnification and should monitor the financial health of his employer. Rounds, Charles E., Jr., *A Trustee's Handbook*, §7.2.9 (1999).

V. PROTECTING THE TRUSTEE FROM CLAIMS OF BREACH OF FIDUCIARY DUTY

A. Liability Insurance. Even for individual trustees, it is possible to obtain trustee liability insurance that covers many risks associated with serving as trustee, although intentional or grossly negligent breaches of fiduciary duty are usually not covered. Unless limited in the trust instrument, a trustee has the authority to pay for this insurance out of the trust estate. 760 ILCS 5/4.19 (2011).

B. Compliance with Fiduciary Duties. The most effective way to avoid or defend against fiduciary litigation is for the trustee to achieve or maintain full compliance with fiduciary duties.

1. Education of the Trustee. It is easy for the inexperienced individual trustee (and sometimes even corporate trustees) to get into trouble. A critical element of representing individual trustees is education. A trustee's best defense against actions for breaches of fiduciary duty is to have a firm grasp on the trustee's fiduciary duties and ways to avoid pitfalls. The trust and estates lawyer should take the time to fully educate the trustee at the outset of the engagement. Handouts, outlines, conversation, and book recommendations are things to consider.

2. Diligence and Adherence to the Terms of the Trust Agreement and Applicable Law. By accepting a trust, the trustee becomes bound to administer it, or execute it, in accordance with the provisions of the trust instrument. *In re Hartzell's Will*, 43 Ill.App.2d 118, 192 N.E.2d 697 (2 Dist. 1963). To the extent not altered by the trust instrument, the terms of the Trusts and Trustees Act apply to all Illinois trusts. 760 ILCS 5/3(1) (2011).

a) Investment. As discussed above, a trustee's investment decisions are of critical importance to his performance. Ordinarily, the trust instrument will address what investments are permissible. To the extent that it is not inconsistent with the trust instrument, the Trusts and Trustees Act applies to determine what investments are proper. See the Prudent Investor Rule, 760 ILCS 5/5 (2011). In addition, there are two main areas that can give rise to trustee liability:

(1) Self-Dealing. Self-dealing extends to anything of value received by the trustee. There are many, many ways in which even a well-intentioned trustee can run afoul of the duty of loyalty. Here are a few that have come up in our practice several times.

(a) Corporate Trustees – Proprietary Funds. A corporate fiduciary should avoid investing in its proprietary funds, regardless of the fund's performance.

(b) Individual Trustees – “Borrowing.” Individual trustees should avoid borrowing from the trust, even if the loan is for a market rate of interest, is secured or is consented to by the beneficiaries.

(2) Balancing Investments - Income Beneficiaries v. Remaindermen. The trustee must make sure not to show favoritism (intentionally or unintentionally) to any class of beneficiaries unless directed to do so by the trust instrument. Due care must be taken to balance the investments to provide an appropriate level of income for the income beneficiaries and growth for the remainder beneficiaries. Communication and record keeping are important elements to covering the trustee from liability.

b) Tax Reporting. Filing income and estate tax returns are a key element to trust administration. In this arena, liability flows to the trustee from two principal directions.

(1) Liability to Beneficiaries. The trustee must answer to the beneficiaries for its tax reporting of the trust. That means that the returns must be correctly filed in a timely fashion, taking advantage of all reasonable deductions and tax planning and reporting strategies.

(2) Preparer Liability to IRS. In addition, the trustee may suffer personal liability for his tax reporting errors if the trust estate is distributed prior to the satisfaction of all reasonably known tax liability.

(3) Other Potential Tax Reporting Issues. Here are a few other issues that we have seen in our office relative to a trustee's estate settlement:

(a) Estate Tax Alternate Valuation Date. The trustee filing a Federal Estate Tax Return may use the lower of the date of death value and the value six months after the date of death (the "alternate valuation date") for a specific asset. However, if an asset is liquidated or distributed prior to six months after the date of death, the value as of the liquidation or distribution is used as the alternate valuation. In an uncertain market, the trustee must determine whether to sell trust assets prior to the alternate valuation date and be protected against market risk, or to hold the assets for the full six months in order to preserve the trust's ability to use a potentially lower value for the asset on the estate tax return. For unsophisticated trustees, it is important to understand this concept to avoid distribution to beneficiaries in kind prior to the alternate valuation date, thereby potentially losing a significant reduction in estate tax.

(b) Characterization of Claims. A Federal Estate Tax Return is a sworn statement. Thus, a trustee's characterization of a claim against the decedent or the decedent's estate may be used as evidence against the estate or trust in the proof of that claim. This can give rise to breach of trust allegations.

(c) Apportionment/Contribution. Care must be taken when paying estate tax to follow the terms of the will (even if the trustee is filing the estate tax return) regarding apportionment and/or contribution. Apportionment allocates the tax to the interests of the named beneficiaries under the will and/or trust according to their relative interests. Contribution allows the representative paying the tax to collect contribution from other sources (life insurance, IRAs, annuities, other trusts, etc.) for their fair share of the estate tax. Failure to properly follow these rules can result in potential liability for the trustee.

4) Standards of Distribution. Most trust instruments contain standards of distribution to current beneficiaries. Standards of distribution are designed to give the trustee some guidance or limitation on the trustee's discretion in making distributions. A common example of a standard of distribution is "so much or all of the principal as the trustee determines necessary for the maintenance, health in reasonable comfort and education of..." In this instance, the trustee cannot simply make distribution for any purpose he chooses, but is restricted to those three principal types of distributions. If the trustee should deviate from this standard of distribution, he violates his duty to faithfully follow the terms of the document, even if the trustee feels that it would be in the beneficiary's best interests to do so. This issue is so important, corporate fiduciaries use a committee to determine the propriety of any distribution to be made from a trust.

3. Adequate Record Keeping. A trustee's actions will not be judged in hindsight. Thus, it may become important for a trustee to demonstrate the circumstances as they were at the time of any given decision in order to give a court context in which to evaluate the trustee's action. The trustee should keep careful records of its periodic review of trust assets, the needs of beneficiaries, its reasons for developing and maintaining the specific portfolio and beneficiary communications. 760 ILCS 5/5(a)(2) (2011). See *Herget National Bank of Pekin v. Lampitt*, 133 Ill.App.3d 418, 478 N.E.2d 904 (3 Dist. 1985).

4. Communication with Beneficiaries.

a) Accountings.

(1) Annual Accountings. Absent fraudulent concealment, annual accountings provided by a trustee shall be binding on all beneficiaries receiving the accounting if no objection is filed by those beneficiaries within three years from the date the accounting was furnished. 760 ILCS 5/11(a) and (f) (2011). Thus, it is important that the trustee provide annual accountings on a timely basis in order to continually run the three-year limitations period.

(2) Final Accounting. On termination of the trust, the trustee shall furnish to the beneficiaries entitled to distribution of the trust estate a final accounting and shall also deliver any prior annual accountings not already given. 760 ILCS 5/11(b) and (f) (2011); *Whalen v. Whalen*, 217 Ill.App.3d 557, 577 N.E.2d 859 (3 Dist. 1991). Absent fraudulent concealment, the final accounting is binding on all beneficiaries receiving the final accounting if an action is not filed by those beneficiaries within three years of delivery. *Id.*

(a) Unfortunately, this three-year limitations period can be a trap for the unwary trustee. For example, if the trustee gives a final accounting and makes final distribution prior to the expiration of the three-year limitations period, the trustee is at risk of a suit on the final accounting from the beneficiaries, but at the same time will have retained none of the trust estate to finance the trustee's defense. Even if the trustee is exonerated, he will still have had to pay his attorneys' fees in the defense from his own funds. Thus, for all final accounts, it is recommended that the trustee obtain a signed approval of the final account from all beneficiaries before making final distribution to any. Also, see below for a discussion of beneficiary releases.

(b) Also, under 760 ILCS 5/11(b), it appears that although remaindermen are not entitled to annual accountings during the income beneficiary's lifetime, they are entitled to receive all annual accountings upon the income beneficiary's death. It is not expressly stated in the statute, but it appears that the remainder beneficiaries may have a viable cause of action on any prior annual accounting even beyond the three year limitations period because the remaindermen are not the beneficiaries having received the annual accountings when they were originally prepared, according to 760 ILCS 5/11(a). Consequently, it may be advisable for a trustee to send annual accountings to all remainder beneficiaries as prepared despite the fact that the trustee is not obligated to do so under 760 ILCS 5/11(a) in order to run the three-year limitations period on the remainder beneficiaries. 760 ILCS 5/11(a) and (b) (2011).

(3) Dealing with the Proper Person with Accountings. Where the beneficiary entitled to an accounting is under a legal disability, the proper recipient of the accountings is the guardian of the estate. 760 ILCS 5/11(e) (2011).

(a) If there is no guardian of the estate, then a proper recipient of the accountings would be a spouse, parent, adult child or guardian of the person. *Id.* The recipient of the accounting must file an action within three years of receipt or the beneficiary is barred. *Id.*

(b) However, the statute does not list an agent on a power of attorney as a proper recipient of the accounting.

(4) Receipt an accounting is presumed as long as the trustee has a procedure in place requiring the mailing or delivering of accounts. 760 ILCS 5/11(g) (2011).

b) **Striking a Balance.** Although each case is different, there often comes a point where the trustee must make a judgment call as to whether or not it is a good idea to meet every demand of a beneficiary. Being a good trustee (and a good trustee advisor) includes being able to handle situations where beneficiaries are asking for more than is reasonable, more than the beneficiary is entitled to, or the same thing over and over. Often, a sophisticated trustee's worst problem is an unsophisticated beneficiary. The trustee must strike a balance between satisfying the trustee's fiduciary obligations while also limiting the time and expense of administration due to excessive beneficiary demands. The reality is that it is possible for a trustee to say "no." The trustee's fiduciary duty requires the trustee to follow the terms of the trust instrument, putting the wishes of the beneficiaries below the intent stated by the settlor. Restatement (Second) of Trusts §164, cmt a (1959).

5. Other Common Administrative Pitfalls. Because a trustee's fiduciary duties are broad and varied, there are more potential pitfalls than can be enumerated here. However, the following are a few very common potential pitfalls that an inexperienced trustee should keep in mind.

a) **Real Estate and Tangible Personal Property.** Many corporate fiduciaries conducting estate settlement are reluctant to spend too much time dealing with real estate or a decedent's tangible personal property. The decedent's home and personal effects are often viewed as being a family matter that should be resolved without a trustee's involvement. Ironically, however, real estate and tangible personal property can be a considerable source of conflict between trustee and beneficiaries.

(1) Upon a decedent's death, the trustee should change the locks on all real estate as soon as possible to protect both the real estate and its contents. The principal difficulty here is that there will inevitably be some relatives who view this act as hostile to the family.

(2) The reality is that the trustee can never know in advance whether one family member will enter onto the premises and begin removing items or damaging the property. Once it happens, it is often too late for the trustee to do anything to rectify it.

(3) Once the real estate is secured, the trustee must make sure that the property continues to be properly insured. This may be a challenge in that many insurance companies decline to insure unoccupied real estate. However, there are companies who do offer it. The trustee needs to shop around.

(4) The tangible personal property should be inventoried immediately if the trust (or will) calls for a division of the property. This is true even if there is no possibility of there being an estate tax return filed.

(5) It is advisable that a representative of the trustee be present at all times when one beneficiary enters onto the real estate or there is to be a division of the tangible personal property.

(6) The trustee should appraise the real estate prior to sale to ensure that the sale price is consistent with market prices.

b) Fees. Once the trustee has accepted the office as trustee, it becomes difficult for the trustee to later negotiate trustee's fees with the beneficiaries because of the trustee's duty of loyalty. Thus, it is important that the trustee negotiate current and future fees and fee rates ahead of time and to have that agreement memorialized in writing. Also, it is important for the trustee to make sure that the trust document does not limit trustee's fees in an unexpected manner.

C. Agreements with Beneficiaries.

1. Consents. A beneficiary who consents to an act of a trustee cannot subsequently object to the act. *McCormick v. McCormick*, 180 Ill.App.3d 184, 536 N.E.2d 419 (1 Dist. 1988).

a) A consent allowing the trustee to deviate from the trust's terms is binding if the beneficiary is shown to have acted freely, deliberately and advisedly, with the intention of confirming a transaction which he knew or should have known to be impeachable. *In re Hartzell's Will*, 43 Ill.App.2 118, 192 N.E.2d 697 (1963).

2. Releases. Beneficiary releases are enforceable in Illinois. The intent of the parties, determined from the release's express language as well as the surrounding circumstances, control the scope and effect of a release. *Fuller Family Holdings, LLC v. The Northern Trust Company*, 371 Ill.App.3d 605, 863 N.E.2d 743 (1 Dist. 2007). The party opposing release bears burden of attacking validity.

- a) Reasons release would be ineffective include:
 - (1) fraud in the execution;
 - (2) fraud in the inducement;
 - (3) mutual mistake;
 - (4) mental incompetence. *McCormick v. McCormick*, 118 Ill.App.3d 455, 455 N.E.2d 103 (1 Dist. 1983); *Janowiak v. Tiesi*, 402 Ill. App.3d 997, 932 N.E.2d 569 (5 Dist. 2010).
- b) Releases are, however, strictly construed against the benefiting party, and releases between a trustee and a beneficiary are subject to the closest scrutiny. *Fuller Family Holdings, LLC v. The Northern Trust Company*, 371 Ill.App.3d 605, 863 N.E.2d 743 (1 Dist. 2007); *McCormick v. McCormick*, 118 Ill.App.3d 455, 455 N.E.2d 103 (1 Dist. 1983); *Janowiak v. Tiesi*, 402 Ill. App.3d 997, 932 N.E.2d 569 (5 Dist. 2010).
- c) A release will not defeat a valid claim that was not within the contemplation of the parties at the time the agreement was executed. *Fuller Family Holdings, LLC v. The Northern Trust Company*, 371 Ill.App.3d 605, 863 N.E.2d 743 (1 Dist. 2007).
- d) General words of release are inapplicable to unknown claims. *Janowiak v. Tiesi*, 402 Ill. App.3d 997, 932 N.E.2d 569 (5 Dist. 2010).
 - (1) Where the releasing party is unaware of other claims, general releases are restricted to the specific claims contained in the release agreement. *Janowiak v. Tiesi*, 402 Ill. App.3d 997, 932 N.E.2d 569 (5 Dist. 2010).
 - (2) Knowledge of a possible claim by one party, but not the other, when parties sign a release does not bring the claim within the contemplation of the parties. *Janowiak v. Tiesi*, 402 Ill. App.3d 997, 932 N.E.2d 569 (5 Dist. 2010).

3. Family Settlement Agreements. To avoid the time and expense of litigation, trustees and beneficiaries should consider using a Family Settlement Agreement. Such an Agreement usually contains some sort of compromise regarding the final distribution of the property. The parties should obtain court approval of a plan under a Family Settlement Agreement and distribute the property accordingly.

- a) Public policy favors the settlement of disputes among family members by agreement rather than by litigation. *Altemeier v. Harris*, 403 Ill. 345, 86 N.E.2d 229 (1949).

- b) A family settlement agreement requires the following:
 - (1) a reasonable or substantial basis for believing that litigation will result if an agreement is not entered into;
 - (2) that the trust will be materially depleted if no agreement is entered into;
 - (3) that family relationships will be injured if no agreement is reached;
 - (4) that the parties are entitled to enter into a settlement agreement;
 - (5) that the settlement agreement is impartial;
 - (6) that the settlement agreement is obtained without fraud or deception. *Anderson v. Anderson*, 380 Ill. 488, 44 N.E.2d 43 (1942); *Wolf v. Uhlemann*, 325 Ill. 165, 156 N.E. 334 (1927).
- c) Family settlement agreements also require consideration. Mutual promises not to litigate claims are valid consideration, but said claims must have a reasonable or substantial basis in order to serve as consideration. *Anderson v. Anderson*, 380 Ill. 488, 44 N.E.2d 43 (1942).

4. Virtual Representation Agreements. Virtual Representation Agreements are governed by 760 ILCS 5/16.1 (2011).

- a) An agreement between a trustee and all primary beneficiaries of a trust construing a trust provision or making an agreement regarding any duty, power, responsibility or action of the trustee is binding as if ordered by a court.
- b) Primary beneficiaries include beneficiaries who are either:
 - (1) Currently entitled or eligible to receive any portion of the trust income or principal; or
 - (2) Assuming nonexercise of all powers of appointment, will receive or be entitled to withdraw a portion of the principal of the trust, if that beneficiary survives to the termination date.
- c) In certain cases, minor or disabled beneficiaries may be represented by another individual. See 760 ILCS 5/16.1 (2011).
- d) A virtual representation agreement cannot be used to accelerate the termination of a trust. 760 ILCS 5/16.1 (2011).

D. Using the Courts.

1. Election to Offer the Estate for Probate. There are many advantages to sending an estate through probate, not the least of which are the limitations periods imposed for challenges and claims.

a) There does not appear to be a specific statute of limitations on filing challenges to the validity of a trust instrument after the grantor dies if no probate estate is opened. Accordingly, laches may be the only way to limit the time period.

b) However, if there is probate, actions to set aside or contest the validity of revocable trusts that receive a benefit under a probated will must be commenced within the time provided for a will contest. In Illinois, the timeline is 6 months after the admission of the will to probate. 755 ILCS 5/8-1(a) (2011).

2. Petitions for Construction. When there is a genuine doubt as to the meaning and intent of a trust provision, the trustee is entitled to obtain, at the expense of the trust estate, a judicial construction of the trust. *Continental Illinois Nat. Bank & Trust v. Sever*, 393 Ill. 81, 65 N.E.2d 385 (1946); *Bangert v. The Northern Trust Co.*, 362 Ill.App.3d 402, 839 N.E.2d 640 (1 Dist. 2005); *Stone v. Baldwin*, 331 Ill.App. 421, 73 N.E.2d 635 (1947).

a) The determination of whether ambiguity exists is a question of law. *Estate of Steward*, 134 Ill.App.3d 412, 480 N.E.2d 201 (2 Dist. 1985).

b) The purpose of judicial construction is to determine the grantor's intent, not to modify or create new terms or to consider the justice or propriety of the disposition made in the instrument. *National City Bank of Michigan/Illinois v. Northern Illinois University*, 353 Ill.App.3d 282, 818 N.E.2d 453 (2 Dist. 2004); *Rapp v. Bank of Naperville*, 5 Ill. App.3d 767, 283 N.E.2d, 910 (2 Dist. 1972).

c) Intent should be determined, if possible, from the document itself. *Trackman v. Ringer*, 174 Ill.App.3d 1093, 529 N.E.2d 647 (1 Dist. 1988);

d) Attorney fees are payable from the trust estate for a action for construction of a trust, if an honest difference of opinions as to the proper construction exists. *Herlehy v. Marie V. Bistersky Trust dated May 5, 1989*, 347 Ill.Dec. 190, 942 N.E.2d 23 (1 Dist. 2010).

3. Petitions for Instructions. When there is a genuine doubt as to the actions a trustee should take, the trustee is always entitled to obtain directions as to how to proceed at the expense of the trust estate. *Continental Illinois Nat. Bank & Trust v. Sever*, 393 Ill. 81, 65 N.E.2d 385 (1946); *Bangert v. The Northern Trust Co.*, 362 Ill.App.3d 402, 839 N.E.2d 640 (1 Dist. 2005); *Stone v. Baldwin*, 331 Ill.App. 421, 73 N.E.2d 635 (1947).

a) Once the trustee receives a court order with judicial instructions, he will not be held liable for following those instructions. *Bangert v. The Northern Trust Co.*, 362 Ill.App.3d 402, 839 N.E.2d 640 (1 Dist. 2005).

b) Petitions for instructions can be used to get court authority for sale, or the terms of sale, of trust property. *Schoellkopf v. Gallagher*, 316 Ill.App. 380, 45 N.E.2d 58 (1 Dist. 1942).

c) It has been held that a trustee who properly and reasonably seeks instruction from the court is insulated from the consequences of his refusal to act until he receives instructions. *First Nat. Bank of Chicago v. ACCO USA, Inc.-IBT Retirement Plan*, 1998 WL 525806 (N.D. Ill. 1998).

d) The trustee is not entitled to instructions unless there is a reasonable doubt as to the extent of his powers or duties. *Bangert v. The Northern Trust Co.*, 362 Ill.App.3d 402, 839 N.E.2d 640 (1 Dist. 2005).

(1) Where the trust instrument vests discretion in the trustee, the court will not interfere with that discretion in the absence of fraud, bad faith or abuse of discretion. *Taxy v. Worden*, 181 Ill.App.3d 97, 536 N.E.2d 901 (1 Dist. 1989).

(2) The court will not instruct the trustee on the distribution of property before the time for distribution arrives. *Bangert v. The Northern Trust Co.*, 362 Ill.App.3d 402, 839 N.E.2d 640 (1 Dist. 2005).

4. Interpleader.

a) When there are conflicting claims to trust funds, a trustee should file an interpleader action and avoid making a determination on his own of the rights of the respective claimants. *Bangert v. Northern Trust Co.*, 362 Ill.App.3d 402, 839 N.E.2d 640 (1 Dist. 2005).

b) Interpleader is the proper action to initiate for trusts when there is a dispute between beneficiaries and/or claimants. *Bornstein v. First United*, 232 Ill.App.3d 623, 597 N.E.2d 870 (1 Dist. 1992).

(1) Unless provided otherwise by the terms of the trust, a trustee has a fiduciary duty to deal impartially with all beneficiaries and is precluded from favoring one party over another. Restatement (Third) of Trusts § 79 (2007); *Northern Trust Company v. Heuer*, 202 Ill.App.3d 1066, 560 N.E.2d 961 (1 Dist. 1990).

(2) Therefore, when there are conflicting claims to trust funds, the trustee is not required to make a determination as to the rights of the beneficiary claimants, but should file interpleader action to avoid acting at the trustee's peril. *Northern Trust Company v. Heuer*, 202 Ill.App.3d 1066, 560 N.E.2d 961 (1 Dist. 1990); *Chicago Title and Trust Company v. Czubak*, 42 Ill.App.3d 349, 359 N.E.2d 118 (1 Dist. 1976); *Comtrade, Inc. v. First National Bank of Highland Park*, 146 Ill.App.3d 1069, 497 N.E.2d 527 (2 Dist. 1986).

c) The word "claim" does not refer to a lawsuit. There is no requirement that the defendants assert their "claims" by filing lawsuits before an interpleader action may lie. *Bornstein v. First United*, 232 Ill.App.3d 623, 597 N.E.2d 870 (1 Dist. 1992).

d) There is no requirement that the conflict between beneficiaries must arise from the same incident. Instead, the fact that there could be multiple liabilities payable from the same fund is the controlling factor in determining whether an interpleader action should lie. *Lowe v. Norfolk & W. Ry. Co.*, 96 Ill.App.3d 637, 421 N.E.2d 971 (5 Dist. 1981).

e) Procedure for Interpleader. Interpleader actions are governed by Section 2-409 of the Code of Civil Procedure.

(1) The principal role of the court in an interpleader action is to determine if, and the extent to which, the named defendants have a right to the funds at issue and if those rights conflict, to determine which defendant has a superior right. *Amalgamated Trust & Sav. Bank v. Silha*, 121 Ill.App.3d 1033, 460 N.E.2d 372 (1 Dist. 1984).

(2) The proper procedure in interpleader is established by case law. First, the court makes a preliminary ruling as to whether the plaintiff has met its burden of establishing in good faith that adverse claims have been presented. *Aetna Life Ins. Co., Inc. v. Strickland*, 33 Ill.App.3d 52, 337 N.E.2d 285 (1 Dist. 1975).

(3) Second, the court orders the plaintiff to pay the money at issue into the registry or to the clerk of the circuit court and the court discharges the plaintiff, with costs, as to the disputed amount. *City Nat. Bank & Trust Co. of Chicago v. Dunham*, 306 Ill.App. 354, 28 N.E.2d 812 (1 Dist. 1940).

(4) Third, the court sets the matter for evidentiary hearing to determine who is in right title to the deposited funds and awards the funds to the proper party. *City Nat. Bank & Trust Co. of Chicago v. Dunham*, 306 Ill.App. 354, 28 N.E.2d 812 (1 Dist. 1940).

5. Trust Modification or Reformation. Generally, the trustee and beneficiaries only have such power to change the terms of a trust as granted by the terms of the trust. A trust must be administered according to its terms, so that the grantor's intentions are carried out and the trust property is not used for unintended purposes. *Hinckley v. Beardsley*, 28 Ill.App.2d 379, 171 N.E.2d 401 (2 Dist. 1961).

a) It is not the function of the court to modify the document or create new terms. *In re Estate of Ierulli*, 167 Ill.App.3d 595, 521 N.E.2d 654 (3 Dist. 1988). The court will not modify a trust if the language is unambiguous. *Llyod v. Sears Bank and Trust Co.*, 67 Ill.App.3d 141, 384 N.E.2d 742 (1 Dist. 1978). See also, *Herlehy v. Marie V. Bistersky Trust*, 2010 WL 5487547 (1 Dist. Ill. 2010) (where a trustee did not have a duty to appoint or consult with an attorney to amend a trust or to communicate with the settlor regarding amending a trust.).

b) If the method of trust modification is set forth in the instrument, the power to modify may only be exercised in that manner. *Parish v. Parish*, 29 Ill.2d 1421, 193 N.E.2d 761 (1963). A trust instrument will not be judicially modified where the trust instrument precludes modification. *Estate of Steward*, 134 Ill.App.3d 412, 480 N.E.2d 201 (2 Dist. 1985).

c) However, judicial trust modification is possible. In such instances, the party seeking reformation must prove the grounds for reformation by clear and convincing evidence. *Mortimer v. Mortimer*, 6 Ill.App.3d 217, 285 N.E.2d 542 (1 Dist. 1972).

(1) There must be an emergency or unforeseen circumstance requiring the granting of relief. *Dyer v. Paddock*, 395 Ill. 288, 70 N.E.2d 49 (1946); *Chicago Title & Trust Co. v. Schwab*, 341 Ill.App. 233, 106 N.E.2d 857 (1 Dist. 1952).

(2) The emergency or unforeseen circumstance need not be financial. *Thorne v. Continental Illinois Nat. Bank & Trust Co. of Chicago*, 18 Ill.App.2d 163, 151 N.E.2d 398 (1 Dist. 1958).

d) The fact that no precedent can be found allowing judicial modification under similar circumstances is not reason enough to refuse modification. *Thorne v. Continental Illinois Nat. Bank & Trust Co. of Chicago*, 18 Ill.App.2d 163, 151 N.E.2d 398 (1 Dist. 1958).

e) A trustee must be mindful of his duty of impartiality and should not take a position that favors one beneficiary over another. The trustee must be careful to remain neutral. *Northern Trust Co. v. Heur*, 202 Ill.App.3d 1066, 560 N.E.2d 961 (1 Dist. 1990) (addressing suits for construction, modification or rescission).

E. Effect of Exculpatory Clauses in the Trust Instrument.

1. Illinois courts enforce exculpatory clauses. *First Nat. Bank of Chicago v. Edgeworth*, 94 Ill.App.3d 873, 419 N.E.2d 372 (1 Dist. 1981). A trust instrument cannot, however, entirely insulate the trustee from court review of his or her actions. *Vena v. Vena*, 387 Ill.App.3d 389, 899 N.E.2d 522 (2 Dist. 2008).

2. Generally, trustee will be liable for acts committed in bad faith, intentionally, or with reckless indifference to the beneficiaries' interests, regardless of any exculpatory language in trust. Trust provisions that exculpate a trustee for serious misconduct raise public policy concerns. *Vena v. Vena*, 387 Ill.App.3d 389, 899 N.E.2d 522 (2 Dist. 2008) (citing *Axelrod v. Gianbalvo*, 129 Ill.App.3d 512, 472 N.E.2d 840 (1 Dist. 1984)). Exculpatory clauses are not effective with respect to breaches of trust committed in bad faith, intentionally or with reckless indifference to the beneficiaries' interests. *Vena v. Vena*, 387 Ill.App.3d 389, 899 N.E.2d 522 (2 Dist. 2008) (citing *Axelrod v. Gianbalvo*, 129 Ill.App.3d 512, 472 N.E.2d 840 (1 Dist. 1984)).

3. Exculpatory clauses cannot relieve trustees from liability for self-dealing. Restatement (Second) of Trusts §222(2) (1959).

VI. OTHER ACTIONS AGAINST THE TRUST OR TRUSTEE.

A. Trust Contests.

1. Grounds.

a) Mental Incapacity. If the trustor lacks capacity, the trust is void or voidable. *Bogert's Trusts and Trustee* §44 (2010).

b) Mistake. An instrument cannot be set aside due to mistake unless there is clear and convincing evidence of the mistake. Generally, if the instrument is written as the parties intended or believed it to be written at the time the instrument was signed, the instrument will not be set aside. *Pernod v. American Nat. Bank & Trust Co. of Chicago*, 8 Ill.2d 16, 132 N.E.2d 540 (1956). Failure to read a document is normally no excuse for a party who signs it. *Prueter v. Bork*, 105 Ill.App.3d 1003, 435 N.E.2d 109 (1 Dist. 1982).

c) Undue Influence. Any improper persuasion whereby the will of a person is over-powered and he is induced to do something he would not do or refrain from an act which he would do if left to act freely, thereby destroying his freedom. *Kuster v. Schaumberg*, 276 Ill.App.3d 220, 658 N.E.2d 462 (4 Dist. 1995); *Estate of Hoover*, 155 Ill.2d 402, 615 N.E.2d 736 (1993); *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill.2d 452, 448 N.E.2d 872 (1983).

(1) Even kindness and affection can result in undue influence if such kindness and affection seeks to control the will of the decedent such that the document expresses the intent of the beneficiary and not the decedent. *Kelley v. First State Bank of Princeton*, 81 Ill.App.3d 402, 401 N.E.2d 247 (3 Dist. 1980); *Pollock v. Pollock*, 328 Ill. 179, 159 N.E. 305 (1927).

(2) Undue influence invalidates the entire instrument, not just the provisions benefitting the person guilty of the undue influence, unless contrary findings are made with respect to the other provisions. *Kelley v. First State Bank of Princeton*, 81 Ill.App.3d 402, 401 N.E.2d 247 (3 Dist. 1980).

(3) Presumption of Undue Influence in Fiduciary Relationships. To raise the presumption, it must be shown that (a) a fiduciary relationship existed between a beneficiary or trustee and the settlor, (b) that the fiduciary was the dominant party and (c) using unfair tactics, induced the settlor to enter into a transaction where the dominant party appears to gain at the settlor's expense. *Brown v. Commercial National Bank of Peoria*, 42 Ill.2d 365, 247 N.E.2d 894 (1969) (citing *Boryca v. Parry*, 24 Ill.2d 320, 181 N.E.2d 124 (1962)); *Nemeth v. Banhalmi*, 125 Ill.App.3d 938, 466 N.E.2d 977 (5 Dist. 1984).

(4) The presumption of undue influence can be rebutted if fairness is proven by clear and convincing evidence, such as showing that the dependent party was represented by independent counsel, that the fiduciary made a full disclosure of all relevant information, that consideration was adequate or any other clear and convincing showing that the fiduciary acted in good faith. *Brown v. Commercial National Bank of Peoria*, 42 Ill.2d 365, 247 N.E.2d 894 (1969) (citing *Works v. McNeil*, 1 Ill.2d 47, 115 N.E.2d 320 (1953)).

(5) The existence of a fiduciary relationship alone is insufficient to prove undue influence. *Herbolsheimer v. Herbolsheimer*, 46 Ill.App.3d 563, 361 N.E.2d 134 (3 Dist. 1977).

(6) The mere fact that an attorney or other confidential agent is named as trustee and receives compensation as such does not alone raise a presumption of undue influence. He must receive a substantial benefit as beneficiary. *Brown v. Commercial National Bank of Peoria*, 42 Ill.2d 365, 247 N.E.2d 894 (1969); *Williams v. Ragland*, 307 Ill. 386, 138 N.E. 599 (1923); *Kuster v. Schaumburg*, 276 Ill.App.3d 220, 658 N.E.2d 462 (4 Dist. 1995).

(7) A marital relationship alone does not raise the presumption of undue influence. There must be additional facts for finding a fiduciary relationship. The presumption of undue influence must be applied with caution to marital relationships, to respect the unique relationship between spouses. *Estate of Glogovsek*, 248 Ill.App.3d 784, 618 N.E.2d 1231 (5 Dist. 1993).

(8) A claim of undue influence may be based on fraud or coercion, and if these charges are proven, undue influence may be established even though no fiduciary relationship exists. *Estate of Berry*, 277 Ill.App.3d 1088, 661 N.E.2d 1150 (5 Dist. 1996).

d) Fraud, Duress and Forgery.

(1) Fraud. Fraud is present where the trustor is led into making a trust different from that he would have otherwise made by any trick or deception inducing him to sign under the impression that he is signing something else. *Estate of King*, 91 Ill.App.2d 342, 235 N.E.2d 276 (1 Dist. 1968).

(2) Duress. Any wrongful act or threat which actually compels the victim to act against his or her will is duress. *Shelnsky v. Shelnsky*, 369 Ill. 179, 15 N.E.2d 694 (1938); *Zack Company v. Sims*, 108 Ill.App.3d 16, 438 N.E.2d 663 (1 Dist. 1982); *Slade v. Slade*, 310 Ill.App. 77, 33 N.E.2d 951 (1 Dist. 1941). Duress can include threats against a person's safety or liberty, property or family members. *Slade v. Slade*, 310 Ill.App. 77, 33 N.E.2d 951 (1 Dist. 1941).

(3) Forgery. In considering whether a trust is a forgery, the court looks at the veracity of any attesting witnesses, the possibility that the settlor was present at the time the document was signed, the expressed intentions of the settlor and the signature of the settlor. *Sellers v. Kincaid*, 303 Ill. 216, 135 N.E. 429 (1922).

2. Trustee's Duties with Respect to Trust Contests.

a) The Trustee has no statutory duty to defend, but case law shows that there is a duty to defend in some circumstances.

b) The trustee has a duty to defend the integrity of the trust, if there are reasonable grounds to believe the attack is unjustified or there is a reasonable doubt about the validity of the attack. If it is clear that the attack is invalid, the trustee does not have a duty to defend. Bogert's Trusts and Trustees § 581 (2010).

3. Trustee's Fees. Generally, a fiduciary's defense of a trust document, absent undue influence by the fiduciary, entitles the fiduciary to recover attorney fees from the estate. *Patterson v. Northern Trust Co.*, 286 Ill. 564, 122 N.E. 55 (1919). (*But see, NC Illinois Trust Company v. Madigan*, 286 Ill.Dec. 23, 812 N.E.2d 1038 (4 Dist. 2004), holding that a trustee is not entitled to attorney fees in appealing a decision to terminate a trust where the trustee may be the only entity benefitting from continuing the trust and is not entitled to trustees fees during the pendency of the appeal).

4. Standing. Successor beneficiaries have a present interest in the trust during the settlor's life, and thus may be able to contest the trust during the settlor's life. *Estate of Michalak*, 404 Ill.App.3d 75, 934 N.E.2d 697 (1 Dist. 2010).

a) The principal distinction between a will (where there is no standing to contest until the death of the testator) and a trust is that in a will, the beneficiary has no interest until the death of the testator. *Estate of Michalak*, 404 Ill.App.3d 75, 934 N.E.2d 697 (1Dist. 2010).

b) A beneficiary of an inter vivos trust, however, has a vested interest. A vested remainder beneficiary is one ready to come into possession upon the termination of the prior estate. *Estate of Michalak*, 404 Ill.App.3d 75, 934 N.E.2d 697 (1 Dist. 2010).

c) The fact that a trust beneficiary's actual enjoyment of the trust res is contingent upon the settlor's death does not negate the existence of a present interest in the beneficiary during the settlor's lifetime. *Estate of Michalak*, 404 Ill.App.3d 75, 934 N.E.2d 697 (1Dist. 2010).

5. *In Terrorem* Clauses. Some trusts contain provisions reducing or forfeiting the interest of a beneficiary if he contests the trust's validity. Most courts acknowledge the enforceability of *in terrorem* clauses, but most courts elect not to enforce them or construe them narrowly under the rule that equity does not favor forfeitures. e.g., *Oglesby v. Springfield Marine Bank*, 25 Ill.2d 280, 184 N.E.2d 874 (1962).

B. Rescission. According to the Third Restatement of Trusts, if no consideration is involved in creating a trust, it can be rescinded or reformed upon the same grounds as those upon which a gratuitous transfer of property can be rescinded or reformed. Restatement (Third) of Trusts, Part 5 §62 (2007). (Please note: The Third Restatement of Trusts has not been formally adopted by Illinois courts.)

C. Trustee Liability for Torts.

1. No recovery can be made from a trust estate by a third party based on a tortious act by the trustee. When a trustee commits a tort, relief must be had against the fiduciary as an individual. *Matter of Shugart's Estate*, 81 Ill.App.3d 538, 401 N.E.2d 611 (3 Dist. 1980).

2. This theory is based on the following reasoning:

a) Trustee is the only legal person who had something to do with the tort.

b) Trust assets should not be depleted for claims arising from the personal fault of the trustee.

c) Even if tort was a natural consequence of the trust administration, better policy to place liability on the trustee and require him to seek reimbursement from the trust.