Title

Individual trustee delegates to financial institution the job of taking custody and keeping track of income and principal: The fiduciary considerations

Text

While PC software programs are a practical improvement over the trustee's hard-copy ledger book, when it comes to keeping track of trust income and principal these programs still require serious clerical monitoring on the part of the individual trustee. There is much to be said for the individual trustee piggy-backing on the internal operations of a regulated financial institution, such as a bank, via a ministerial agency agreement pursuant to which the institution takes custody of a portion or all of the trust estate, receives the interest and dividends, generates disbursement checks, prices the investments, and does the accounting. Absence of delegation of investment discretion is what makes this a ministerial agency rather than a fiduciary agency.

The fiduciary considerations. Assume that baked into an individual trustee's fiduciary compensation is the cost of ministerial delegation. In other words, the agent's fees in the first instance are a direct personal obligation of the individual trustee. Assume the financial institution rendering the ministerial agency services proposes to the individual trustee that if the individual trustee will invest trust assets in certain financial products of an affiliate of the financial institution, there will be a cap on, or even a reduction of, the agency fees that the financial institution will charge the individual trustee. The trustee proceeds to reconstitute the portfolio as proposed, but without an appropriate downward adjustment of his trustee fee. Informed consent of all the beneficiaries is either unobtainable or has not been sought. If the economic performance of the reconstituted portfolio surpasses what would have been the portfolio's performance had it not been reconstituted, then, as a practical matter, the trustee is off the hook. No harm; no foul. But if the economic performance of the portfolio subsequently goes south, the trustee can expect that efforts will be made to have loss of economic value attributed to the trustee's unauthorized self-dealing, and if those efforts prove successful to have the trustee held personally liable for the loss. See generally §§6.1.3 & 6.1.3.4 of *Loring and Rounds: A Trustee's Handbook* (2025). If agency fees are instead a direct obligation of the trust estate such that the element of trustee self-dealing is facially lacking, then the trustee may be called upon to prove that a prudent investor faced with the opportunity on behalf of the trust estate to cap or reduce agency fees would have similarly reconstituted the portfolio. Had the custodian been prudently delegated investment discretion as well (which would make it an agent fiduciary and not a mere ministerial agent), and in the exercise of that discretion had so reconstituted the portfolio, it is the custodian and not the trustee who might well be on the hook, at least nowadays. See generally §6.1.4 of the Handbook, Uniform Trust Code §807(c), and Uniform Prudent Investor Act §9(c). The relevant portion of §6.1.4 of the Handbook is reproduced in the appendix below

Appendix

§6.1.4 *Duty to Give Personal Attention (Not to Delegate)*[from *Loring and Rounds: A Trustee's Handbook* (2025)].

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When the trustee's agent acts improperly. A trustee who exercises reasonable care, skill, and caution in delegating his duties is not liable to the beneficiaries or the trust for an improper action of the agent to whom the performance of a particular function was delegated.[647] That liability has been shifted by the UTC and Uniform Prudent Investor Act onto the shoulders of the agent: "In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation."[648] The trustee who prudently delegates is not liable to the beneficiary for the improper acts of the agent.[649] As between the trustee and the beneficiary, the beneficiary now would bear the loss.[650] The beneficiary must look to the agent for satisfaction.[651]

Prof. Stewart E. Sterk explains the politics behind the liability-shift, a shift which he emphatically does not endorse: "… [B]ecause modern portfolio theory requires a financial sophistication that many trustees—especially family members—do not possess, both the Restatement (Third) and the UPIA reversed the traditional rule that prohibited trustees from delegating investment functions," and then complemented this reversal with the aforementioned liability-shift.[652] First, there has been no such equitable blanket prohibition against delegation since well before the UPIA was even on the drawing board.[653] Second, no one has proffered a serious explanation for why it makes good public policy to shift the burden of loss in the case of a delegation gone awry from the shoulders of the innocent fiduciary, who did the delegating, onto the shoulders of the innocent nonfiduciary-beneficiary, who did not do the delegating.

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[647]UTC §807(c); Unif. Prudent Investor Act §9(c); 4 Scott & Ascher §24.30 (Liability for Acts of Agents).

[648]UTC §807(b); Unif. Prudent Investor Act §9(b). *See also* Rest. (Third) of Trusts §80 cmt. g (noting that in "accepting the delegation of a trust function from a trustee, an agent assumes a fiduciary role with fiduciary responsibilities").

[649]UTC §807(c); Unif. Prudent Investor Act §9(c).

[650]UTC §807(c) cmt.

[651]*See generally* 3 Scott & Ascher §17.3.2.

[652]*See* Stewart E. Sterk, *Rethinking Trust Law Reform: How Prudent is Modern Prudent Investor Doctrine?*, 95 Cornell L. Rev. 851, 863 (2010).

[653]*See* Scott on Trusts §171.2.