All doubts are resolved against the trustee who fails to keep adequate records, except in Texas.

As a general rule, all doubts are resolved against the trustee who fails to keep adequate records. See generally Loring and Rounds: A Trustee’s Handbook §6.2.9 [page 673 of the 2018 Edition], which section is reproduced in its entirety in the Appendix below. That having been said, in Kohlhausen v. Baxendale, No. 01-15-00901-CV, 2018 Tex. App. LEXIS 1828 (Tex. App.-Houston [1st Dist.] March 13, 2018), the executor of the estate of a deceased trustee who had “left behind scant records” successfully raised as a defense against allegations that the trustee had engaged in unauthorized acts of self-dealing the trust instrument’s exculpatory provisions: “Because the summary judgment evidence failed to raise an issue of material fact as to whether any of the …[trustee’s]…alleged acts or omissions forming the basis of the …[the plaintiff’s]…breach of fiduciary duty claims were taken in bad faith or gross negligence, …[the plaintiff]…failed to meet her burden of establishing the inapplicability of the exculpatory clause to such acts or omissions.”

Appendix

§6.2.9 Duty to Keep Precise, Complete, and Accurate Records [From Loring and Rounds: A Trustee’s Handbook (2018)]

Obscurity visits responsibility upon the trustee.⁷⁷⁶

An incident of the trustee’s duty to be generally prudent⁷⁷⁷ and to account (or report)⁷⁷⁸ to beneficiaries is the trustee’s duty to keep adequate records of the administration of the trust.⁷⁷⁹ “The performance of these record-keeping responsibilities is also essential to a trustee’s duty to collect and safeguard the trust property and to the beneficiaries’ right to enforce the trustee’s duty to act with prudence, loyalty and impartiality, as well as to the trustee’s duty regarding reasonable and appropriate costs of administration.”⁷⁸⁰ By adequate we mean precise, complete, and accurate.⁷⁸¹ The Restatement (Third) of Trusts is generally in accord calling for the maintenance of books and records that are clear, complete, and accurate.⁷⁸² The information, however, need not be arranged in any special format.⁷⁸³ On the other hand, any expenses occasioned by the inadequacy of the trustee’s records, e.g., the expenses of hiring a CPA, should be borne personally.

⁷⁷⁷ See §6.1.1 of this handbook (trustee’s duty to be generally prudent).
⁷⁷⁸ See §6.1.5 of this handbook (trustee’s duty to account to the beneficiary).
⁷⁷⁹ UTC §810(a) cmt. See generally Bogert §962; Scott on Trusts §172; Restatement (Second) of Trusts §172.
⁷⁸⁰ Restatement (Third) of Trusts §83 cmt. a.
⁷⁸² Restatement (Third) of Trusts §83.
⁷⁸³ Wylie v. Bushnell, 277 Ill. 484, 115 N.E. 618, 622 (1917). See also Restatement (Third) of Trusts §83 cmt. a.
It is critically important that the trustee keep a proper record of the tax basis/cost of each item of trust property. We explain why in Section 11.1 of this handbook.

In litigating a corporate trustee’s conduct in a given situation, whether it kept proper records could well have a bearing on whether it maintained an effective organizational structure, which in turn could have a bearing on whether it had exercised reasonable care and skill under the circumstances. A national bank is required to retain the records for a period of three years from the later of the termination of the trust or the termination of any litigation relating to the trust. But because allowed accounts generally may be reopened upon a showing of fraud or manifest error, the trustee is well advised to retain indefinitely materials that evidence the trustee’s due diligence and prudence.

The Prudent Man Rule and Prudent Investor Rule are rules of conduct, not performance. Accordingly, the trustee is well advised to keep meticulous permanent records of all investment research, deliberations, and decisions. At minimum, the trustee needs to create and place in a permanent file a writing that sets forth the circumstances and rationale behind a particular investment decision. In addition, any collateral materials that demonstrate due diligence and prudence on the part of the trustee in making the decision, e.g., investment committee minutes, recommendations of investment experts, legal memoranda, correspondence, and the paper trail from the persons or persons who made the investment decision to the person or persons who implemented the investment decision, should be retained.

There are practical reasons why one might want to retain indefinitely the entire trust file. Long after a trust has terminated, the trustee can expect tax basis/cost, genealogical, and land title inquiries, as well as inquiries from trustees administering related trusts. Even when an ex-trustee has no legal duty to respond to such requests, the ex-trustee may wish to in order to maintain good public relations, or out of simple courtesy. As reconstructing the file of a trust long terminated can be both time-consuming and expensive, it may be worth the cost of storage to keep the entire file extant indefinitely.

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784 Miller v. Pender, 93 N.H. 1, 34 A.2d 663 (1943).
785 See generally 3 Scott & Ascher §17.7 (Duty to Exercise Reasonable Care and Skill); §6.2.11 of this handbook (the institutional trustee’s duty to have an effective organizational structure).
787 For a case involving the reopening of allowed accounts for “constructive fraud,” see Nat’l Acad. of Sci. v. Cambridge Trust Co., 370 Mass. 303, 346 N.E.2d 879 (1976). This case involved a trustee’s good faith representation on its accountings that a widow had not remarried and thus was entitled to income payments when in fact she had remarried and under the terms of the governing instrument was not so entitled. The court found that the trustee had made “no reasonable efforts to ascertain the true state of the facts it … [had]… misrepresented in the accounts.” See generally 4 Scott & Ascher §24.31 (Liability for Incorrect Distributions).
788 See generally 4 Scott & Ascher §24.31 (Liability for Incorrect Distributions).
789 See §6.2.2.2 of this handbook (the prudent investor’s code of conduct).
790 See §6.2.2.2 of this handbook (the prudent investor’s code of conduct). See generally 3 Scott & Ascher §17.6 (Duty to Exercise Reasonable Care and Skill).
791 Lewin ¶26-67 through ¶26-68 (England).
792 See generally §11.1 of this handbook (tax basis/cost of trust property).
When there is a failure to keep adequate records, all doubts are resolved against the trustee. The Restatement (Third) of Trusts is generally in accord:

A trustee who fails to keep proper records is liable for any loss or expense resulting from that failure. A trustee’s failure to maintain necessary books and records may also cause a court in reviewing a judicial accounting to resolve doubts against the trustee. These failures by trustees may furnish grounds for reducing or denying compensation, or even for removal, or for charging the trustee with the costs of corrective procedures or of having to conduct otherwise unnecessary accounting proceedings in court.

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793 See generally §8.24 of this handbook (who has the burden of proof in an action for breach of trust brought by the beneficiary against the trustee); see, e.g., In re JP Morgan Chase Bank N.A. (Strong), 41 Misc. 3d 1231(A) (N.Y. Sur. Ct. 2013) (“Case law has repeatedly held that if a fiduciary ‘fails to maintain adequate records of its conduct and transactions, all doubts and presumptions are resolved adversely against it.’”).

794 Restatement (Third) of Trusts §83 cmt. a(1). See generally §7.2.3 of this handbook (types of equitable relief for breaches of trust).