

Title

When the centerpiece of a trustee's defense in a breach-of-fiduciary-duty action is an empty file cabinet and a general lack of recall

Text

An incident of the trustee's duty to be generally prudent, to account (or report) to beneficiaries, and to refrain from breaches of the duty of undivided loyalty, such as engaging in unauthorized self-dealing, is the trustee's duty to keep adequate records of the trust's administration. *The trustee who enters into a self-dealing transaction with a beneficiary assumes the burden of proving that the transaction was not the product of undue influence, there being a presumption of undue influence.* "The performance of these record-keeping responsibilities is...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." Restatement (Third) of Trusts §83 cmt. a. Adequate means precise, clear, complete, and accurate. *Id.* It goes without saying that a general lack of recall, or worse, a stonewalling of the finder of fact, will not relieve the trustee of this burden of proof. 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. See generally §6.2.11 of *Loring and Rounds: A Trustee's Handbook* (2025), which section is reproduced in the appendix below.

Obscurity visits responsibility upon the trustee. 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." *Id.*

An agent with administrative discretion, the holder of a general power of attorney, for example, who transacts with his principal is also saddled with a presumption of undue influence, and thus also "assumes the burden of developing a record sufficient to prove any benefits were not received without sufficient consideration or under undue influence." See *Durr v. Volden*, 10 N.W.3d 133, 137-

138 (N.D. 2024). As an aside, in *Durr* there is an unfortunate suggestion that a fiduciary, i.e., discretionary, power of attorney is fundamentally contract-based, which cannot be the case as an agency relationship with its enforceable rights and duties may arise even absent an exchange of consideration, gratuitously as it were. As to why the institution of the trust likewise is not fundamentally contract-based, see my Dec. 1, 2011 JDSUPRA posting, accessible below from the catalog of all my prior postings, or directly by clicking on to <https://www.jdsupra.com/legalnews/the-academics-are-just-plain-wrong-the-17604/>.

Appendix

§6.2.11 Duty (of Institutional Trustee) to Have an Effective Organizational Structure [from *Loring and Rounds: A Trustee's Handbook* (2025)].

*Some acts in the administration of a trust are of such importance that it may be improper for a corporate trustee to entrust them to mere employees. Instead, the board of directors, or a responsible committee or officer, should be in charge of these sorts of decisions. As to national banks, the Comptroller of the Currency has promulgated relevant regulations.*⁸⁴²

The public trust company. Because the obligations of an institutional trustee are at least as onerous as those of an individual trustee,⁸⁴³ a dysfunctional or ineffective internal organization is not a defense to an allegation of breach of fiduciary duty.⁸⁴⁴ To the contrary, it might be evidence of negligence, or even reckless conduct.⁸⁴⁵ The failure of the directors of the institutional trustee to put in place and maintain an effective organizational structure would constitute a breach of the institution's duty to administer the trust prudently.⁸⁴⁶ It may even constitute an improper delegation of their fiduciary duties, i.e., of those of their duties that run *to the trust beneficiaries*.⁸⁴⁷ Personal liability as well could attach to the directors

⁸⁴²3 Scott & Ascher §17.3.4 (Delegation by Corporate Trustees) (referring to Comptroller of the Currency Reg. §9.4, 12 C.F.R. §9.4).

⁸⁴³See generally §6.1.4 (discussing in part the principle that the professional or corporate trustee is held to a higher fiduciary standard than is an amateur trustee).

⁸⁴⁴See generally 3 Scott & Ascher §17.6.

⁸⁴⁵See generally 3 Scott & Ascher §17.6.

⁸⁴⁶See generally 3 Scott & Ascher §17.6; §6.1.1 (Trustee's Duty to Be Generally Prudent).

⁸⁴⁷See generally 3 Scott & Ascher §17.3.4 (Delegation by Corporate Trustees).

themselves.⁸⁴⁸ Proper record keeping is critical.⁸⁴⁹ Indenture trustees particularly should take note in this regard.⁸⁵⁰ The following are indicia of an effective fiduciary organization:

- “The organizational structure ... [is]... designed to promote an orderly flow of the daily work and ... [is]... sufficiently flexible to accommodate peak workloads without sacrificing efficiency or accuracy.”⁸⁵¹
- “Fiduciary committees ... [are]... so structured as to constitute flexible, workable entities. Functions ... [are]... clearly defined and effectively executed.”⁸⁵²
- “[T]he ... plan of organization ... include[s]... procedures for personnel recruitment, training, evaluation and salary administration.”⁸⁵³
- “Staff ... [is]... sufficient to handle the volume of work. Lines of authority, duties and responsibilities ... [are]... clearly defined and effectively communicated to all personnel to promote efficiency, productivity and the orderly execution of the ... [institution’s]... functions.”⁸⁵⁴
- “The organization plan ... facilitate[s]... the implementation of an adequate program of internal controls and a system of checks and balances designed to ensure proper administration of the ... [institution’s]... fiduciary business. Such controls ... include a procedure for management review of actions taken by all personnel.”⁸⁵⁵

⁸⁴⁸See generally §7.2.9 of this handbook (personal liability of third parties including the trustee’s agents).

⁸⁴⁹See generally 3 Scott & Ascher §17.6 (noting that it is “crucial” that a corporate trustee “keep detailed records of all aspects of the administration of each of its trusts, including, for example, the minutes of the proceedings of its investment committee”); §6.2.9 of this handbook (noting that all doubts are resolved against the trustee who fails to keep precise, complete and accurate records) and §8.24 of this handbook (noting that all doubts are resolved against the trustee who fails to properly account). See, e.g., Matter of JP Morgan Chase Bank N.A. (Strong), 41 Misc. 3d 1231(A) (N.Y. Sur. Ct. 2013) (“The ... [corporate trustee]... cannot argue that its own inability to preserve its own records (or those of its predecessors) for three Trusts of such high value forecloses the ability of the Objectants to challenge how those Trusts were administered.”).

⁸⁵⁰See generally §9.31 of this handbook (corporate trusts; trusts to secure creditors; the Trust Indenture Act of 1939; protecting bondholders).

⁸⁵¹Comptroller’s Handbook for Fiduciary Activities, Management Appraisal, Organizational Structure (Sept. 1990).

⁸⁵²Comptroller’s Handbook for Fiduciary Activities, Management Appraisal, Organizational Structure (Sept. 1990).

⁸⁵³Comptroller’s Handbook for Fiduciary Activities, Management Appraisal, Organizational Structure (Sept. 1990).

⁸⁵⁴Comptroller’s Handbook for Fiduciary Activities, Management Appraisal, Organizational Structure (Sept. 1990).

⁸⁵⁵Comptroller’s Handbook for Fiduciary Activities, Management Appraisal, Organizational Structure (Sept. 1990).

- “The organization plan ... include[s]... procedures for effective communication among all levels of management. Procedures ... facilitate the dissemination of information necessary to:
 - Inform all supervisory personnel of senior management’s policies and directives,
 - Apprise senior management of its subordinates’ activities in implementing such policies and directives, and
 - Effect the orderly execution of administrative details.”⁸⁵⁶
- “Authority to make discretionary decisions and the matters in which independent judgment may be exercised ... [are]... defined expressly and communicated to supervisory personnel. Sufficient flexibility ... [is]... allowed to permit expedient action where it would be essential to the best interests of ... [the beneficiary]....”⁸⁵⁷

The private trust company. In §8.6 of this handbook we discuss the private trust company (a.k.a. family trust company or exempt trust company). State-chartered private trust companies, while generally less regulated and more intimate than their public counterparts, should still have organizational structures with clear lines of authority and built-in systems of checks and balances for monitoring the activities of company personnel who have access to entrusted assets.⁸⁵⁸ There should be in place a written plan, approved and administered by the board of directors, for a truly independent and fully competent regular auditing of *fiduciary activity*.⁸⁵⁹ “A private trust company should also have a due diligence process for not only selecting third party service providers and advisors, but also for monitoring their performance.”⁸⁶⁰ Trust counsel should be competent, independent, proactive, and kept fully informed. He or she should have primary responsibility for the safekeeping, interpretation, and proper implementation of the terms of all governing trust instruments and associated documentation.

⁸⁵⁶Comptroller’s Handbook for Fiduciary Activities, Management Appraisal, Organizational Structure (Sept. 1990). *See also* 3 Scott & Ascher §17.6 (“Thus, when beneficiaries seek to surcharge a corporate trustee, it is important, in proving that it acted prudently, for the trustee to be able to show that it gave careful consideration to the decision at hand, in accordance with its own, internal procedures”).

⁸⁵⁷Comptroller’s Handbook for Fiduciary Activities, Management Appraisal, Organizational Structure (Sept. 1990).

⁸⁵⁸*See generally* Alan V. Ytterberg & James P. Weller, *Managing Family Wealth Through A Private Trust Company*, 36 ACTEC L.J. 623, 636–639 (2010).

⁸⁵⁹*See generally* Alan V. Ytterberg & James P. Weller, *Managing Family Wealth Through A Private Trust Company*, 36 ACTEC L.J. 623, 638–639 (2010).

⁸⁶⁰*See generally* Alan V. Ytterberg & James P. Weller, *Managing Family Wealth Through A Private Trust Company*, 36 ACTEC L.J. 623, 639 (2010).

The unincorporated family trust office. It is critical that an unincorporated family office of individuals and/or entities providing agency services to a constellation of family trustees have an effective organizational structure. In the absence of the corporate template to channel the lines of fiduciary authority and to allocate fiduciary responsibilities, it will fall to trust counsel to perform those channeling and allocation functions, to be the fiduciary traffic cop, as it were. A newly minted lawyer is simply not going to have the requisite experience to handle the legal, operational, and political complexities of the job, particularly as the legal titles to the constellation's assets will not be concentrated in one entity. In order to minimize the risk of a catastrophic blindsiding down the road, the prudent prospective "office" trust counsel will want to make the granting of such channeling and allocation authority a condition of his or her employment.

The multi-participant trust. A multi-participant trust is a single trust that is administered by a constellation of fiduciaries and quasi-fiduciaries in addition to the title-holding trustee, such as protectors, removers, appointers, and the like. The functions of the traditional "plenipotent" trustee are sliced, diced, and the pieces parceled out; a process we discuss in some detail in §3.2.6 of this handbook. The ACTEC article *Achieve the Promise—and Limit the Risk—of Multi-Participant Trusts* is all about making sure that critical fiduciary functions do not fall between the cracks along the way.⁸⁶¹ The authors lay out twelve requirements for a well-functioning multi-participant trust. Here is what they have to say about the UTC in this regard: "The UTC in the form recommended by the Uniform Law Commissioners not only fails to successfully address these twelve items, its recommended provisions may block effectively addressing some of them in the trust instrument."⁸⁶²

⁸⁶¹ John P.C. Duncan & Anita M. Sarafa, *Achieve the Promise—and Limit the Risk—of Multi-Participant Trusts*, 36 ACTEC L.J. 769 (Spring 2012).

⁸⁶² John P.C. Duncan & Anita M. Sarafa, *Achieve the Promise—and Limit the Risk—of Multi-Participant Trusts*, 36 ACTEC L.J. 769, 798 (Spring 2012).