

Trusts & Estates

The newsletter of the Illinois State Bar Association's Section on Trusts & Estates

Grantor trust administration in Illinois: A primer

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This is part two in a three-part series. Stay tuned for Part 3.

Preface to Part 2

This article, published in installments, outlines the role and duties of the acting successor trustee in Illinois trust administration of a self-declaration of trust where the grantor/settlor has become disabled or is deceased. Accordingly, it instructs you as the attorney on how to advise and assist the trustee in carrying out those duties.

Here are a couple of topics relevant to Part 1:

1. **TRUST AMENDMENTS AND RESTATEMENTS.** Make sure you have the most recent Trust Amendments or Restatements before you begin trust administration.
 - Amendments change portions of the previous trust and refer back to the previous trust;
 - Restatements typically revoke and replace the previous trust in its entirety;
 - Changes in either amendments or restatements could include but are not limited to successor Trustees, beneficiaries, amounts, pay on death provisions, springing trusts, etc.
2. **DISABILITY OF GRANTOR.**

For trust administration during the grantor's disability, review the trust language for:

- **The definition of and determination of disability of the grantor or trustee for purposes of the trust.** Often, disability may be determined by a physician, or the majority of living and competent successor trustees, or both; or by certain family members or named persons.

Who are the successor trustees?

- **What documentation is required for the successor to step in if the grantor who is the initial trustee becomes disabled?** Typically, it is either a physician's written determination or a written determination by the majority of named persons in the trust, along with a written acceptance of acting trustee by the successor trustee.
- **How trust funds are to be used for purposes of the grantor's disability** (pay on death provisions are not effective until the death of the grantor and accordingly, beneficiaries under the pay on death clause do not have a vested interest until the death of the grantor.

Now, let's pick up from Part 1 of this

article with marshaling trust assets.

MARSHAL TRUST ASSETS, continued from Part 1.

- Digital Assets.
- **What are digital assets?** Digital assets could include the decedent's sent and received emails, email accounts, digital music, digital photographs, digital videos, gaming accounts, software licenses, social-network accounts, file-sharing accounts, financial accounts, domain registrations, Domain Name System (DNS) service accounts, blogs, listservs, web-hosting accounts, tax-preparation service accounts, online stores and auction sites, online accounts, and any similar digital asset that currently exists or may be developed as technology advances. It could refer to digital assets that may be stored on the cloud or on the decedent's own digital devices. Digital devices include desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar

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hardware that currently exists or may be developed as technology advances.

- How to marshal digital assets:
 - **Trust Language.** The Trust itself may contain language giving the Trustee authority and power to access, modify, control, archive, transfer, and delete the trust's digital assets. It may authorize the Trustee to access, use, and control the grantor's digital devices in order to access, modify, control, archive, transfer, and delete the trust's digital assets.
 - **The Revised Uniform Fiduciary Access to Digital Assets Act** (eff. Aug. 12, 2016) provides for the procedure for fiduciaries to gain authority over digital assets at the owner's incapacity or death.
 - A comprehensive explanation including graphs summarizing how to obtain authority over a disabled person's or decedent's digital assets can be found in the November, 2016 edition of the Illinois Bar Journal entitled, "**Estate Planning: Managing Your Electronic Estate: The New Digital Assets Act,**" by Mary D. Casino.

Marshal Assets Not Owned by the Trust (If Possible)

Most decedents die leaving assets with mixed forms of ownership: trust-owned, jointly held, named beneficiaries, and/or assets in the decedent's name alone. The most common assets left outside of trust ownership are: insurance policies or annuity contracts lacking any beneficiary designation or having a predeceased beneficiary; nursing/retirement home refund checks (buy-in arrangements); stock(s) in certificate form; U.S. Savings Bonds; small bank accounts or credit union accounts; valuable personal property; vehicles; final pension payments or final social security checks; and refund checks (anything from canceled newspaper subscriptions to automobile insurance

refunds).

- **Unfunded Trust.** Often, the Settlor of a Trust will establish the trust but neglect the critical step of funding the trust. "Funding" the trust means re-registering the ownership name of each of grantor's assets into the name of the trust or naming the trust as beneficiary.
- **Typical reasons for unfunded or partially funded trusts:**
 - The estate planning attorney may not have assisted with asset transfer (beyond drafting a deed for real estate);
 - The grantor/settlor may not have recognized the importance of asset transfers, which is, unfortunately, all too common;
 - Estate planning shortcuts were used instead (i.e. Joint Tenancy);
 - The grantor's assets may have been moved around or sold and the grantor forgot to name the trust in the re-titling process.
- **The trust only governs what it owns. The trustee cannot marshal and distribute assets which are not owned by the trust.** Your client may erroneously believe that they as Trustee have authority to marshal and dispose of assets outside trust ownership. They do not unless they are also the nominated Estate Representative pursuant to the decedent's will (or unless they are a named beneficiary). Even with a "pour-over will," which names the Trust as residuary beneficiary, the Estate representative (or affiant of a small estate affidavit) must *first* marshal the Estate asset and then distribute it to the trust.
- **Trust references an asset it does not own.** Sometimes, a living trust may contain language directing the trustee to distribute specific personal or real property to a certain beneficiary which is not owned by the living trust. It may have had subsequent

beneficiary designations, been sold or conveyed into joint tenancy, to a third party, into a land trust, or into decedent's name alone. FIRST, discover out how all assets are titled and whether or not the trust has authority to marshal and distribute those assets.

- **Assets governed by the will.** These include any asset in decedent's name alone. These include any asset where the decedent failed to name a beneficiary. In that event, that defaults to the estate.
- **Probate proceedings.** Assets which are over the threshold for probate (currently \$100,000 in the aggregate) must be marshaled via probate proceedings. For a probate checklist which can also be used as a condensed primer, see my article, "**Become More Efficient Using a Probate Checklist,**" in the **Illinois State Bar Association's Trusts and Estates newsletter** in the September, 2015, vol. 62, no. 3 edition.
- **Small Estate Affidavit (aka S.E.A.).** Illinois law provides that an estate may avoid court probate proceedings via a Small Estate Affidavit if the gross value of the decedent's personal estate (not real estate) does not exceed \$100,000.00 in the aggregate.¹
 - The will governs how assets may be marshaled and distributed. **First, file the will in the county where the decedent died, obtain a certified copy of the will and attach it with a certified death certificate to the S.E.A.**
 - **The S.E.A. CANNOT BE USED FOR REAL PROPERTY!**
 - **A common misconception is that each asset requires its own corresponding S.E.A. form.** This is incorrect. Rather, one form is meant to encompass all information

regarding the decedent's personal estate, including ALL assets and debts.

- **The S.E.A. should be drafted by an attorney, although the average client believes they can draft it on their own.**
- Unfortunately, because the S.E.A. form is readily available at the offices or the websites of the Illinois Secretary of State, the Illinois Treasurer, or “draft-it-without-a-lawyer” websites, **clients believe the S.E.A. is a means to an end, and they question why they need to pay an attorney for assistance.** To the contrary, it is not to be used lightly and without hesitation. **There are serious liabilities associated with signing a Small Estate Affidavit.**
- **The S.E.A. form must provide statements about entitlement to statutory spousal awards, minor children awards, heirship and legatees and any disabled or adult dependent children.** A non-lawyer will not understand statutory awards or heirs vs. legatees.
- An “affidavit” is a sworn statement; accordingly, a **fraudulent statement made under the penalties of perjury is perjury**, as defined by the Illinois Criminal Code.
- **It is prudent to wait to prepare the S.E.A. until all the decedent's total assets and creditors/expenses/debts are completely known.** This may take a few months. It takes time to discover assets, and creditors can arise (usually by way of bills being received in the mail) after an affidavit has been completed. **If an asset becomes known after the fact, it could cause the total personal estate to exceed \$100,000 in value and the S.E.A. was not proper or**

applicable in the first place.

- Illinois law provides that the affiant must list all the decedent's known, unpaid debts and classify them in order of priority; must **swear and affirm that all valid claims will be paid by the affiant from the decedent's estate before any distribution is made to any heir or legatee;** and swear and affirm that there is no known, unpaid claimant or contested claim against the decedent.²
- **The S.E.A. carries risks and obligations with it that last for 2 years after the decedent's date of death,** and could even be longer if a creditor can prove their identity was easily ascertainable but they were never notified. **If an overlooked, legitimate creditor comes along after the S.E.A. has been signed, then the affiant may be personally liable to pay that creditor.**
- **The affiant must swear or affirm that they are not aware of any dispute or potential conflict as to the heirship or will of the decedent.**
- **The S.E.A must contain the following indemnification language in bold and not less than 14 point font:** “I understand that the decedent's estate must be distributed first to satisfy claims against the decedent's estate as set forth in paragraph 7.5 of this affidavit before any distribution is made to any heir or legatee. By signing this affidavit, I agree to indemnify and hold harmless all creditors of the decedent's estate, the decedent's heirs and legatees, and other persons, corporations, or financial institutions relying upon this affidavit who incur any loss because of reliance on this

affidavit, up to the amount lost because of any act or omission by me. I further understand that any person, corporation, or financial institution recovering under this indemnification provision shall be entitled to reasonable attorney's fees and the expenses of recovery.”³

- **Assets in joint ownership.** Joint assets which have a surviving joint tenant are outside the authority of both the Trust and the Will. Assets owned in joint tenancy will result in the **surviving joint tenant automatically becoming the sole owner at the death of the deceased joint tenant (without any court proceeding).** To prove sole ownership by the surviving joint tenant of personal property, provide a death certificate. **REAL ESTATE: A surviving joint tenant of real property should complete and record a surviving joint tenant affidavit with an attached, certified, death certificate.**
- **Assets with beneficiary designations.**
 - Assets with beneficiary designations are outside the authority of both the Trust unless the beneficiary designation is the Trust. If the asset owner failed to name any beneficiaries, then it defaults to the estate. It may also default to the estate if all designated beneficiaries predeceased the owner.
 - Typical assets include life insurance proceeds or tax-sheltered accounts such as IRAs, 401(k)s, etc.
 - The beneficiary designation form acts like a contract in which the asset manager is directed to pay the beneficiary on the decedent's death.
 - Typically, all that is required is a certified death certificate and the filing of a “claim” which entails submitting a form to the asset manager.

- Assets with Payable on Death or Transfer on Death instruments/designations (P.O.D. or T.O.D. assets). Assets with beneficiary designations are outside the authority of both the Trust. Bank accounts such as Certificates of Deposit or Money Market Accounts, and portfolio accounts with financial brokerage firms typically offer T.O.D. or P.O.D. options. Upon the account owner's death, the institution maintaining the account may pay the beneficiaries directly upon presentation of a certified death certificate. See Illinois Trust and Payable on Death Accounts Act.
- "Sec. 10. Distribution by institution. Upon the death of the last surviving trustee or holder of the account, the institution that maintains the account shall distribute the proceeds to the beneficiary or beneficiaries designated in the agreement controlling the account without further liability. No institution, however, shall be required to distribute the account proceeds until the institution receives (i) legal evidence of death of all trustees or holders of the account, (ii) identification from each beneficiary then living, or business records evidencing the lawful existence and parties authorized to collect on behalf of each beneficiary not a natural person, and (iii) written direction from each beneficiary to close the account and distribute the proceeds in a form acceptable to the institution."⁴
- **T.O.D.I.** Real property having a valid Transfer on Death Instrument is outside the governing trust and will documents. If the T.O.D.I. is valid and not amended or revoked, it will bypass probate and transfer ownership to the beneficiaries named in the instrument. For details, **Illinois Residential Real Property Transfer on Death Instrument Act**
- **Real estate owned in land trust.**

Real property owned in a land trust is outside the governing trust and will documents. The land trust company will have survivorship provisions for the transfer of beneficial interest in the real property after death. Contact the land trust company to discover the beneficiary/beneficiaries and provide a certified copy of the death certificate.

- See statutes:
 - 765 ILCS 405/ Land Trust Beneficial Interest Disclosure Act
 - 765 ILCS 407/ Land Trust Beneficiary Rights Act.
 - 765 ILCS 410/ Land Trust Successor Trustee Act.
 - 765 ILCS 415/ Land Trustee as Creditor Act.
 - 765 ILCS 420/ Land Trust Recordation and Transfer Tax Act.
 - 765 ILCS 425/ Building Law Violation Ownership Disclosure Act.
 - 765 ILCS 430/ Sale of Residential Property Subject to Land Trust Act.
 - 765 ILCS 435/ Land Trust Fiduciary Duties Act.
- **Assets owned by a separate trust**, such as a special needs trust, an Illinois ABLE account, a pooled income trust such as an OBRA, an Irrevocable Life Insurance Trust (ILIT), a Qualified Terminable Interest Property (QTIP), a Grantor Retained Income Trusts, Grantor Retained Annuity Trusts, and Grantor Retained Unitrusts (GRITs, GRATs, and GRUTs), etc. are outside the ownership and authority of the decedent's grantor trust and will.

If the Trustee is Not Nominated Estate Representative

Often, the trustee is the same person as the nominated estate representative in the decedent's will, but in some cases, it may be a different person. **The trustee must work alongside the representative of the decedent's probate estate to consider source of payment of expenses of decedent's death (trust funds or estate funds, depending on**

what the trust and will language direct), and other overlapping administration issues.

Sec. 4. Powers of Trustee. The trustee has the powers specified in the Sections following this Section and preceding Section 5.⁶

Sec. 4.15. To deal with the Executor, trustee or other representative of any other trust or estate in which a beneficiary of the trust estate has an interest, notwithstanding the fact that the trustee is an Executor, trustee or other representative of the other trust or estate.⁷

If Trustee Is Also the Estate Representative

You will often encounter a client who is named as Successor Trustee in a decedent's Trust to also be the nominated Executor of that decedent's pour-over will. When the **acting Trustee is the same person as the appointed Estate Representative**, stress the importance of separating Trust Administration from Estate Administration, and separating the two distinct fiduciary roles of Trustee and Estate Representative.

Trust Administration and Estate Administration:

- **Will often have a common decedent:** the decedent will be grantor/settlor of the trust and also the testator/testatrix of the decedent's will.
- Are **governed by different laws.** The Estate is governed by the Illinois Probate Act and the Trust governed by the Illinois Trust and Trustees Act.
- Are **subject to different procedure and timeframes.**
- **May each have different beneficiaries.** Often, a trust may name beneficiaries while the pour-over will names the trust as the sole, residuary beneficiary.
- **Must each have their own FEIN** (Federal Employer Identification Numbers) aka Tax I.D. numbers assigned to them (one for the Trust and one for the Estate).
- **May have separate tax filings** unless you have notified the IRS in writing that the trust is to be treated as an estate.

- **Public vs. Private.** Decedent's Estate Administration and the Last Will are subject to probate court proceedings and thus the documents and proceedings are typically open to the public. By contrast, Trust Administration is not subject to the court proceedings or governance and the Trust document(s) and administration are private (unless a suit is filed).
- **Must keep funds separate:**
 - Set up Trust Bank account using Trust EIN. Deposit trust assets and pay trust expenses from this account.
 - Set up Estate Bank account using the Estate EIN. Deposit estate assets and pay estate expenses from this account.
 - If there is a pour-over will which names the Trust as the residuary legatee, then when appropriate, distribute funds from the Estate account into the Trust Bank account.
- **Must keep separate records,** including, but not limited to:
 - Separate check registers;
 - Separate expenses (unless the trust states that it may pay expenses that the estate lacks funds to cover); and
 - Separate time-keeping records of all actions taken by the Trustee and the Representative.
- **Clarify Fiduciary role with Third Parties (Trustee or Executor):**
 - The Trust gives the Trustee authority to act in Trust Administration.
 - Court appointment (shown with Letters of Office) gives the Estate Representative authority in Estate Administration.
 - Clarify which role in communications or dealings with third parties.
 - Clarify the signature line in all correspondence, e.g., **for Trust: "Jane Doe, Trustee of John Doe Trust dated month/date/year"; or for Estate: "Jane Doe, Independent Executor of the**

Estate of John Doe, deceased."

- Clarify which role when completing forms to marshal assets.

Trustee Is Also a Beneficiary

The Trustee may act even though they are a named beneficiary. But it invites self-dealing and a potential for a conflict of interest. The Trustee must adhere to the fiduciary duty of no self-dealing and duty of loyalty to the beneficiaries.

Here are some common scenarios:

- The trust names the decedent's surviving 3 adult children as beneficiaries. The Trustee is the eldest child and a beneficiary of the trust. The decedent gave the youngest child a significant sum of money during decedent's lifetime which was never repaid. It is presumed a gift, since there is no written proof of the money being a loan (e.g. a Note, a promise to pay, or recorded mortgage). The Trustee believes, based on case law or other facts, that the youngest child's distribution from the Trust should be reduced by the amount of the alleged "loan." **Either the Trustee should obtain written consent from the youngest child that the child will agree to the reduction, or the Trustee should bring the issue to the Court to decide.**
- The Trustee believes they can get "first dibs" on an in-kind distribution from the Trust, such as a valuable oil painting or an automobile. **Unanimous, written consent by all beneficiaries agreeing to the in-kind distribution to the Trustee is prudent.**
- The law or Trust language is unclear on a certain issue at hand, and the Trustee finds case law which would result in a favorable outcome to the Trustee in their capacity as a Trust beneficiary. **The Trustee should not use specific case law in their favor to gain personally without a Court determination or full consent by all beneficiaries.**

Preserve and Maintain Trust Assets

- **REAL ESTATE:**
 - **NOTIFY TENANTS (LEASED REAL ESTATE OWNED BY THE TRUST)** to make rental payments to the Trustee at the Trustee's address (or attorney's address).
 - **Enter into new leases** to maintain or bring in rental income. To enter into leases for any period of time, though extending beyond the termination of the trust.⁸
 - **Timely pay real estate related bills** to avoid trouble down the road:
 - Timely pay the mortgage, equity loan or credit line to avoid foreclosure proceedings;
 - Timely pay property taxes to avoid a tax sale;
 - Pay hazard insurance to avoid gaps in coverage or inability to make a claim if necessary;
 - Pay contractors to the risk of them filing a Mechanic's lien;
 - Pay utility bills to avoid late charges or utilities being shut off, such as water or heat in winter which could lead to property damage;
 - Association assessments to avoid a lien on the property.
 - **MAINTAIN INSURANCE** on real estate or personal property (such as vehicles or valuable collections or artwork, etc.) (liability, hazard, etc.). To purchase and keep in force insurance of an appropriate nature and form and in a reasonable amount for the protection of the trust estate or the ownership thereof.⁹
 - **MANAGING/RUNNING A BUSINESS.**
 - Maintain any Business owned by the Trust
 - Keep the business running and employees paid
 - Participate in its management

- (with appropriate compensation)
- Enter into new partnership agreements, incorporate the business, etc.^{10 11}
- INVESTMENTS:
 - Prudent Investor Rule. Sec. 5. Investments. “(a) Prudent Investor Rule. A trustee administering a trust has a duty to invest and manage the trust assets as follows: (1) The trustee has a duty to invest and manage trust 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 the 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.”¹²
 - The trustee has a duty to diversify. Sec. 5. Investments. “The trustee has a duty to diversify the investments of the trust unless, under the circumstances, the trustee reasonably believes it is in the interests of the beneficiaries and furthers the purposes of the trust not to diversify.”¹³
 - **Compile a List of Trust Assets** and contact the asset holders within a reasonable time after the acceptance of the trusteeship. Make and implement decisions concerning the retention and disposition of original pre-existing investments (invest, retain, liquidate, transfer, etc.). The Trustee’s decision to retain or dispose of an asset may properly be influenced by the asset’s special relationship or value to the purposes of the trust or to some or all of the beneficiaries, consistent with the trustee’s duty of impartiality.
 - **The Trustee has a duty to pursue**

an investment strategy

Sec. 5. Investments. “The trustee has a duty to pursue an investment strategy that considers both the reasonable production of income and safety of capital, consistent with the trustee’s duty of impartiality and the purposes of the trust. Whether investments are underproductive or overproductive of income shall be judged by the portfolio as a whole and not as to any particular asset.”¹⁴

- **Liquidate any Trust Assets to pay expenses** and to eventually make trust beneficiary distributions.
- **Consider avoiding tax penalties** by not liquidating tax sheltered assets and instead rolling over IRAs if in accordance with the trust.

Keep Good Records

- **A CHECK REGISTER** for the Trust Bank Account. Log all expenses paid, the amount, to whom, & for what purpose. Log all deposits made and from whom (for example, company name for liquidated accounts, insurance/tax refunds, etc.).
- **TRUSTEE SERVICES RECORDS – LOG TASKS AND HOURS.** The trustee is entitled to reasonable compensation for work as Trustee. Sec. 7. Compensation. “The trustee shall be reimbursed for all proper expenses incurred in the management and protection of the trust and shall be entitled to reasonable compensation for services rendered.”¹⁵ If the trustee chooses not to be compensated, it’s advised to keep a handwritten or typed log of the hours of Trustee services anyway: for each entry, write the date, what you did, how long it took you, etc.
- **TRUSTEE FUNDS ADVANCED FOR TRUST EXPENSES TO BE REIMBURSED** (if applicable). **RETAIN RECEIPTS.**
- **ON A MONTHLY BASIS, PROVIDE THE ATTORNEY**

WITH:

- COPIES OF TRUST BANK STATEMENTS & CHECK REGISTER
- COPIES OF TRUSTEE’S LOG WITH TRUSTEE’S HOURLY WORK
- COPIES OF RECEIPTS FOR ANY REIMBURSEMENTS TO TRUSTEE

Distributions to Beneficiaries

Beneficiaries will often ask the Trustee when distributions will be made. The beneficiaries do not understand that the trust must first marshal all assets and pay all expenses before significant and final distributions can be made. Trust administration is a process. **And the Trustee can be held personally liable if trust funds are mismanaged or doled out before trust expenses are paid in full.**

General rule of thumb: even with a refunding agreement signed by the beneficiaries, it’s more prudent and less painful to wait to distribute trust assets than to have to ask for the beneficiary or beneficiaries to refund the trust so an overlooked expense can be paid.

WAIT TO DISTRIBUTE SIGNIFICANT MONIES/ASSETS until AFTER ALL THE BELOW are completed:

1. Any creditor disputes have been resolved/paid;
2. All assets are collected;
3. All future expenses are either paid or accounted for;
4. The accountant has estimated all final Federal and State tax liabilities for the decedent’s final return, any potential estate tax, and the fiduciary returns for the estate and trust as applicable;
5. The Attorney has prepared and the Trustee has signed the Final Account, with copies sent to the beneficiaries (you may NOT skip this step as it is required by IL law, and is binding on the beneficiaries and thus protects the Trustee); and
6. The Attorney has drafted, mailed & received back signed Final Receipts, Approval of Final Account and Refunding Agreements from all the

beneficiaries.

- **PARTIAL DISTRIBUTIONS**
Trusts with large assets may be able to afford to make partial distributions.
 - First, ACCOUNT FOR FUTURE TRUST EXPENSES, such as:
 - Attorney fees.
 - Accountant's fees.
 - Appraisal or other valuation fees.
 - Decedent's final return and trust tax liabilities.
 - Funeral, cremation, burial and related expenses.
 - Decedent's final medical bills.
 - Legitimate creditors who must be paid in order of priority.
 - Ongoing real estate maintenance and expenses (insurance, property taxes, mortgage(s), utilities, property repair/maintenance, management, assessments, contracts such as laundry leases, and other liens such as public aid liens or mechanic's liens, etc.). If the property cannot be sold or a disposition achieved within a certain time, the trust and/or estate will need to account for these expenses.
 - Costs of any potential real estate sale.
 - Loss of securities due to potential market conditions and/or deferred taxes which must now be paid.
- **INCOME**
 - Trusts may distinguish between payment of trust income and trust principal.
 - Trusts may distinguish between income and principal beneficiaries, and those beneficiaries may be different from each other.
 - There may be different timelines for payment of trust income and principal. Payment of trust income may be discussed in the trust; terms should be followed as provided by the trust.
 - For a beneficiary who at the time of distribution is under legal disability or in the opinion of

the trustee is unable properly to manage his affairs because of illness, physical or mental disability or any other cause.¹⁶

- **REAL ESTATE**
 - Have all real estate appraised for date of death value for tax purposes.
 - Convey with a Trustee's deed and properly record it as directed by the trust or agreed upon by trust beneficiaries.
 - **IN KIND DISTRIBUTIONS** Sec. 4.16. "To make equitable division or distribution in cash or in kind, or both, and for that purpose to value any property divided or distributed in kind."¹⁷ If one beneficiary wants a particular asset, such as a vehicle, then the asset may be given as agreed by the other beneficiaries, with equitable distribution of other assets to the remaining beneficiaries.
- ANNUAL ACCOUNTING
- **INCOME BENEFICIARIES ARE ENTITLED TO AN ANNUAL ACCOUNTING. PREPARE AND SEND AN ANNUAL ACCOUNTING TO ALL INCOME BENEFICIARIES.** Sec. 11. Accounts. "(a) Every trustee at least annually shall furnish to the beneficiaries then entitled to receive or receiving the income from the trust estate, or if none, then those beneficiaries eligible to have the benefit of the income from the trust estate a current account showing the receipts, disbursements and inventory of the trust estate. A current account shall be binding on the beneficiaries receiving the account and on such beneficiaries' heirs and assigns unless an action against the trustee is instituted by the beneficiary or such beneficiary's heirs and assigns within 3 years from the date the current account is furnished."¹⁸

FINAL ACCOUNTING AND RECEIPTS

- **FINAL ACCOUNT:**
 - **PREPARE A FINAL ACCOUNT FOR TRUSTEE TO SIGN.** The accounting should show trust income, receipts, expenses,

disbursements and distributions.

- **SEND A COPY OF THE FINAL ACCOUNT TO ALL TRUST BENEFICIARIES.**
 - **THE FINAL ACCOUNTING IS BINDING UPON THE BENEFICIARIES AND ALL PERSONS CLAIMING THROUGH THEM, AND THEY HAVE 3 YEARS TO BRING AN ACTION THEREAFTER if they have not signed a receipt approving the final account.**
 - **RECEIPT, APPROVAL AND REFUNDING AGREEMENT.** Prepare and send to all Trust Beneficiaries a Receipt of Final Distribution stating they received their share from the Trust in full, that they approve of the Final Account and agree to refund any excess distribution made in error by the fiduciary. Obtain their signatures **BEFORE ANY DISTRIBUTIONS ARE MADE.**
 - Sec. 11. Accounts. "Every trustee shall on termination of the trust furnish to the beneficiaries then entitled to distribution of the trust estate a final account for the period from the date of the last current account to the date of distribution showing the inventory of the trust estate, the receipts, disbursements and distributions and shall make available to such beneficiaries copies of prior accounts not theretofore furnished. Such final accounting shall be binding on the beneficiaries receiving the same and all persons claiming by or through them, unless an action against the trustee is instituted by the beneficiary or person claiming by or through him or her within 3 years from the date the final account is furnished."¹⁹
- FINAL DISTRIBUTIONS ONLY AFTER:**
- Any springing trusts have been funded and accounted for;
 - Any creditor disputes have been resolved/paid;
 - All known assets are collected;
 - All future expenses are either paid or accounted for;

- Final Account completed & copies sent to beneficiaries;
- The Attorney has received back signed Receipts and Approval of Final Account and Refunding Agreement from all the beneficiaries;
- Trustee retains monies in the bank account to pay future estate expenses.

TRUST TAX FILINGS AND LIABILITIES

There will be a more detailed follow up to this article concerning trust tax returns, but generally speaking:

- The Trustee must follow up with the Attorney or CPA to file all final Federal and State fiduciary and estate tax returns as applicable and necessary, including 1041 Fiduciary Return, any 709 and 706 Estate Tax return.
- The trust assets are considered part of the decedent's total estate regarding the applicability of Federal and State estate taxes. Coordinate with the Estate Representative of the estate to ensure that all trust assets are accounted for in the decedent's total estate.
- Always have the Trustee set aside trust funds for potential tax liabilities (both Federal and State). As stated earlier, it is far easier to hold back funds and wait to distribute the trust's assets to beneficiaries than to try to get them back once you discover that a significant chunk of money is owed for taxes.
- Consider making a section 645 election with the IRS which allows a qualified revocable trust to be treated as an estate. This can be done initially by checking the appropriate box when you apply online for an EIN for the trust, or filed later on using form 8855. In his article, "[Small Estate Administration Primer](#)," Gary Gehlbach states, "However, since estates may file their initial income tax returns on a fiscal year basis beginning with the date of the decedent's death and ending no later than one year later, it is often helpful to treat the trust as an estate

to allow a longer period of time for the taxable year. In applying for the taxpayer identification number for a trust, an election can be made on the Form SS4 to treat the trust as the estate under Internal Revenue Code Section 645. Alternatively, when filing the fiduciary income tax return (IRS Form 1041), the box can be checked in the upper left-hand corner of the return to treat the trust as the decedent's estate."

Summary of Trustee's Fiduciary Duties

This article covered a number of the fiduciary duties of a trustee, including:

- Duty to review and gain authority over (marshal) Trust assets.
- Sec. 5. Investments. "Prudent Investor Rule. The trustee has a duty, within a reasonable time after the acceptance of the trusteeship, to review trust assets and to make and implement decisions concerning the retention and disposition of original pre-existing investments in order to conform to the provisions of this Section. The trustee's decision to retain or dispose of an asset may properly be influenced by the asset's special relationship or value to the purposes of the trust or to some or all of the beneficiaries, consistent with the trustee's duty of impartiality."²⁰
- Duty to uphold and carry out the terms of the trust agreement, and to know and understand its terms.
- Duty to act in good faith, using care, skill and diligence.
- Duty to maintain and preserve trust assets (including keeping proper insurance).
- Enforce claims due to the trust, and to defend the trust against claims brought against it.
- No self-dealing. Pitfall: when trustee is also a beneficiary, be sure they do not make distributions to themselves.
- No commingling of trust assets with personal assets, estate assets, or assets of another entity or trust.

- Duty to invest and manage assets according to the Prudent investor rule 760 5/5(a).
- **Duty to keep adequate books and records, duty to provide notice including an annual accounting to income beneficiaries, to produce a final accounting, and to make distributions to the beneficiaries of their proper shares of trust income, and ultimately the trust principal in conformity with the provisions of the trust.**
- **Duty to inform and communicate with beneficiaries, to act in their best interest, and to not show favoritism between the beneficiaries, except if it conforms to the terms of the trust, or is properly exercised discretion to distribute income or principal.**
- **Duty not to Delegate, but for investment functions.** Duty Not To Delegate. "The trustee has a duty not to delegate to others the performance of any acts involving the exercise of judgment and discretion, except acts constituting investment functions that a prudent investor of comparable skills might delegate under the circumstances. The trustee may delegate those investment functions to an investment agent as provided in subsection (b)."²¹
- **Duty of Loyalty.** Attorney Cary Lind states, "The duty of loyalty requires the fiduciary's devotion to the beneficiaries, that is, the fiduciary must act solely in the interest in the beneficiaries and not in the interest of the fiduciary." And the court held in *Fuller Family Holdings, LLC, vs. The Northern Trust Company*, 371 Ill. App.3d 605, 863 N.E.2d 743, 309 Ill. Dec. 111 (Ill.App. 1st Dist. 2007) that "The fiduciary obligation of loyalty flows not from the trust instrument but from the relationship of trustee and beneficiary, and the essence of this relationship is that the trustee is charged with equitable duties toward the beneficiary."²²

- **NO Duty to inquire into the acts or doings of a predecessor trustee.**²³

Discharge of Trustee and Trust

- Unlike in probate, where a decedent's estate must be formally "closed" by having a probate Judge enter an order to discharge the estate's representative and close the estate, there is no formal court order in Trust Administration.
- In private trust administration, the trustee is either discharged by the beneficiaries, or can resign. No formal "closure" or "discharge" occurs in private Trust administration (unless it is being litigated in court).
- When Signed Receipts on Final Distribution and Approval of Final Account and Refunding Agreements have been obtained from all beneficiaries, and all distributions made (or in lieu of same, funds have been deposited with the State Treasurer for those

beneficiaries who are recalcitrant or their whereabouts are unknown), then the Trustee is in effect released from fiduciary duties and the trust is "closed"

- If all distributions have been made, then the trust ceases to exist because a trust must have assets to be valid.
- Finally, the Trustee can close the Trust Bank Account once all final expenses have been paid, and no further income is expected.■

1. See 755 ILCS 5/25-1(b)6.
2. 755 ILCS 5/25-1.
3. *Id.*
4. 205 ILCS 625/10.
5. 755 ILCS 27.
6. 760 ILCS 5/4 (Source: P.A. 86-1475).
7. 760 ILCS 5/4.15.
8. 760 ILCS 5/4.02 (Source: P.A. 86-1475).
9. 760 ILCS 5/4.19 (Source: P.A. 86-1475).
10. 760 ILCS 5/4.23.
11. 760 ILCS 5/4.24.
12. 760 ILCS 5/5.
13. *Id.*
14. *Id.*
15. 760 ILCS 5/7 (Source: P.A. 78-625).
16. 760 ILCS 5/4.20.
17. 760 ILCS 5/4.16 (Source: P.A. 86-1475).
18. 760 ILCS 5/11.
19. *Id.*
20. 760 ILCS 5/5.
21. 760 ILCS 5/5.1.
22. *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 615, 863 N.E.2d 743, 754 (1st Dist. 2007).
23. 760 ILCS 5/14.

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