NORTHERN TRUST

THOUGHTFUL AND EXPERIENCED TRUSTEES: GUIDING FAMILIES THROUGH THE UNCERTAINTY OF COVID-19

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The Covid-19 pandemic is said to be the most severe global crisis since World War II. Trusts and trustees have served as strong foundations for families as they navigate difficult personal, social, and financial challenges during great cataclysmic events of recent history, whether the Spanish Flu, two World Wars, the Great Depression, or the Financial Crisis. In such a circumstance, trusts and trustees will once again demonstrate they have purposes extending beyond the orderly transfer and management of wealth, and can offer enduring, but flexible frameworks, to deliver expert counsel.

Trusts are the cornerstone of wealth transfer plans, achieving the twin goals of protecting family members and preserving family wealth. In particular, grantors who establish long-term trusts recognize that they cannot predict the challenges their descendants may face in the future. Experienced trustees will look to history and data for guidance and recognize that Covid-19 presents unparalleled challenges which will require not only the exercise of the traditional duties of loyalty, care, and prudence, but also must encompass the skill to be compassionate and thoughtful advisors for families.

The Covid-19 pandemic has caused large numbers of people to create or update their estate plans. Trustees should pause and reflect on their fiduciary duties in the context of the current environment: fulfillment of the grantor's intent, adherence to the terms of the trust, and the exercise of their discretion in an impartial manner.[1] In addition, trustees should consider how they will utilize the flexibility afforded by modern trust laws with respect to trust administration and investments to effectuate grantor intent and serve beneficiaries' best interests.

Periods of uncertainty highlight the need for trustees to have inclusive discussions regarding family wealth and well-being, familial expectations and values. If trustees' meetings with families have not previously included in depth discussions of the role of trusts, and how and when family members can access trust assets, now is the time for trustees to engage with families to promote clear understanding and alignment.

TRUSTEE DISCRETIONARY DISTRIBUTION POWERS: A POWERFUL TOOL[S2] [UC]

When trustees exercise discretion to distribute income and principal to beneficiaries they must do so in accordance with the standard set forth in the trust, consistent with their duties of loyalty and of impartiality.[2] The duty of impartiality requires that trustees do not favor one beneficiary or class of beneficiaries over another unless the trust expressly states that one or more beneficiaries should be prioritized over other beneficiaries (e.g., surviving spouse is named as the "primary beneficiary"). Whether trustees are investing trust assets or making distributions they must consider not only the needs of current beneficiaries, but also the future needs of successor or remainder beneficiaries.[3] Absent specific authority in the trust, trust assets should not be exhausted to meet the needs of

1. Unif. Trust Code §801, §803 (2010); Unif. Prudent Investor Act §6 (1994)
2. Unif. Trust Code §801, §803 (2010); Unif. Prudent Investor Act §6 (1994)
3. Restatement (Third) of Trusts §227 (1992); *Feibelman v. Worthen Nat'l Bank, N.A.*, 20 F.3d 835 (8th Cir. 1994) (trustee acted with reckless disregard for rights of remindermen with regard to distributions of principal to income beneficiary).

current beneficiaries at the expense of successor or remainder beneficiaries.[4] Where a trustee holds multiple trusts for the same beneficiary, a trustee must exercise its duty impartially in making distributions among the trusts and consider the distribution standard of each trust. Where the trusts have different remainder beneficiaries, the risk of trustees breaching their duty of impartiality is heightened.[5] Restatement (Third) of Trusts is clear that in consulting and otherwise communicating with beneficiaries, trustees must proceed in a manner that fairly reflects the diversity of their concerns and beneficial interests.[6]

The risk of beneficiaries challenging trustees' discretionary distribution decisions could increase during the current period of market uncertainty. Generally, courts will uphold trustees' distribution decisions if they are made in good faith, impartially and in accordance with the distribution standard in the trust.[7] Restatement (Third) of Trusts provides that whether a trustee's action constitutes an abuse of discretion "depends upon the terms of the discretion, including the proper construction of any accompanying standards, and on the settlor's purposes in granting the discretionary power and in creating the trust."[8] Even where trustees have broad discretion to make distributions in their "sole discretion," courts will not permit trustees to act in bad faith or for some motive other than to accomplish the purposes of the trust. If a court finds that a trustee has abused its discretion, it may remove the trustee, require a disgorgement of trustee fees and order payment of damages to the beneficiaries.[9] Trustees should remember that a failure to exercise discretionary distribution powers can be as problematic as exercising distribution powers imprudently or without regard to the trustee's duty of impartiality.[10]

During periods of widespread distress, trustees often receive both unusual and increased requests for trust distributions. Trustees should undertake a review of the discretionary distribution standards and other related trust provisions, taking into consideration any past history of requests and payments. This is particularly important for successor trustees who may not have been serving when patterns of distribution were established or where accumulation of trust income may have occurred for long periods of time. Both the trustees and beneficiaries will benefit from context on how the trust has served the family's needs over time, including during earlier periods of crisis or economic uncertainty. Discussions with beneficiaries regarding the trust terms and the potential effect of distributions on the growth or decline in value of the trust over time should not be new conversations, but should occur with greater frequency during this turbulent time.

Discretionary distributions are complicated when a trust has multiple discretionary beneficiaries from different generations. Congress enacted the Generation-Skipping Tranfer Tax (GST) to prevent families from avoiding the estate tax for one or more generations by making gifts or bequests directly to grandchildren or great-grandchildren. The GST tax effectively imposes a second layer of tax (using the exemption and the top tax rate under the federal estate tax) on wealth transfers to recipients who are two or more generations younger than the donor.[11] Trustees should be mindful of the generation-skipping tax status of trusts when evaluating potential distributions to beneficiaries. In the current climate, trustees may decide that changes to existing distributions, including to beneficiaries in a different generation, is both

4. Restatement (Second) of Trusts §235, cmt. b (1959).
5. *Wiggins v. PNC Bank, Kentucky, Inc.*, 988 S.W.2d 498 (Ky. Ct. App. 2014) (holding PNC Bank breached its fiduciary duty of loyalty where it acted as trustee of two trusts held for the same income beneficiary because it failed to seek court instructions on distributions of principal from the trusts. The court determined that the trustee could not exercise its authority to make distributions in an impartial manner because of its conflict of interest as trustee of two trusts with different remainder beneficiaries).
6. Restatement (Third) of Trusts §227 (1992).
7. *First Republic Trust Company v. Lund*,o. No. B258224 consolidated with Case No. B258380, 2017 BL 435788 (Cal. App. 2d Dist. Dec. 06, 2017); *Hearst v.Ganzi*, 145 Cal.App.4th 1195 (2d Dist.2006).
8. Restatement (Third) of Trusts §50 (2) (2003).
9. Unif. Trust Code §1001(a)(7), §1002 (a)(1), (2) (2010); *Gearhart v. Gearhart*,No. 1-19-0042, 2020 (Ill. App. Ct. 1st 2020).
10. *Marsman v. Nasca*, 573 N.E.2d 1025 (Mass. App. Ct. 1991) (court found that trustee had a fiduciary duty to inquire into a beneficiary's resources to recognize his needs where trustee had power to invade principal for beneficiary's comfortable support and maintenance); *Kolodney v. Kolodney*, 503 A.2d 625 (Conn. App. Ct. 1986) (trustee's failure to inquire into beneficiary's needs was an abuse of discretion).
11. Tax Policy Center, Key Elements of the U.S. Tax System: Wealth Transfer Taxes, available at https://www.taxpolicycenter.org/briefing-book/how-do-estate-gift-and-generation-skipping-transfer-taxes-work.

prudent and consistent with the purposes of the trust. GST exempt trusts generally would be the preferred source for distributions to grandchildren or remote descendants (skip persons).[12] Conversely, GST non-exempt trusts should be the first source of funds for distributions to children (non-skip persons).[13]

For discretionary spray trusts, trustees should determine if all eligible members fully understand the resources available to them, even if distributions historically have not been made to one of more eligible beneficiaries. Consider whether members of the senior generation would consider a reduction in their distributions to allow for distributions to the next generation who may have young children, student loan debt, or are less established in their careers. Perhaps one of more family members has started a business or recently purchased a home. Do family members need additional resources for the business to weather the current pandemic?

Initiation of these next generation conversations also ensures that all parties are informed about the trust and its administration. A trustee's duty to inform includes successor and remainder beneficiaries in addition to current beneficiaries.[14] Courts will enforce a trustee's duty to keep beneficiaries informed in order to allow them to protect their interests in trusts.[15]

RECONSIDERATION OF HEMS AND OTHER STANDARDS FOR DISTRIBUTION

Courts will defer to trustees' discretionary decisions as long as trustees make distributions in accordance with the standard in the trust. The most common discretionary standard found in trusts is health, support, maintenance, and education. This standard, sanctioned under the Treasury regulations, is used principally for tax reasons, to keep trust assets out of beneficiaries' estates for Federal estate tax purposes.[16] Trustees should analyze distribution standards in relation to the purposes of the trust and reflect upon contemporary interpretations of boilerplate distribution standards.

A modern understanding of the term "health" is a good example. The World Health Organization defines health as "a state of complete physical, mental and social well-being; not merely the absence of disease or infirmity."[17] There is no doubt that trustees will be making more distributions for beneficiaries' health needs during the current pandemic, but trustees should not view health needs as limited to beneficiaries who have been diagnosed with Covid-19. Trustees also should focus on the well-being of other beneficiaries who may require counseling or other assistance to maintain their emotional health during the current crisis.

It is well settled trust law that support and maintenance standards encompass distributions for basic living expenses such as housing, clothing, medical care, and food. The inclusion of the words "comfortable" and "welfare" authorize distributions beyond the mere maintenance and support of beneficiaries. Courts have interpreted "comfortable support and maintenance" as the equivalent to "station in life."[18] According to the Restatement (Third) of Trusts, the terms maintenance and/or support allow a beneficiary to maintain the standard of living to which they were accustomed at the time the trust was created.[19] Support and maintenance may not authorize distributions to enlarge the beneficiary's personal estate or to enable the beneficiary to make extraordinary gifts absent specific language in the trust.[20]

12. §2613(a). All section references herein are to the Internal Revenue Code of 1986, as amended (the "Code"), or the Treasury regulations promulgated thereunder, unless otherwise indicated.
13. §2613(b).
14. Unif. Trust Code § 813 (2010).
15. Austin W. Scott, *The Law of Trusts and Trustees* §961 (Rev. 2d ed.1983) (If the beneficiary asks for relevant information about the terms of the trust, its present status, past acts of management, the intent of the trustee as to future administration, or other incidents of the administration of the trust, and these requests are made at a reasonable time and place and not merely vexatiously, it is the duty of the trustee to give the beneficiary the information for which he has asked); Restatement of Trusts (Third), §82(2007).
16. Reg. §20.2041-1(c)(2).
17. World Health Organization, Frequently Asked Questions, available at https://www.who.int/about/who-we-are/frequently-asked-questions.
18. *In re Benjamin F. Haddad Trust*, Nos. 302734, 302813, (Mi. Ct. App., Aug. 13, 2013).
19. Restatement (Third) of Trusts § 50(d)(2) (2003).
20. Restatement (Third) of Trusts § 50(d)(2) (2003).

Trustees may be faced with the prospect of prioritizing distributions for beneficiaries with Covid-19 related needs over distributions for the comfortable support of other beneficiaries if consistent with the grantor's intent and the trust's terms. For example, many family trusts allow for distributions to the surviving spouse and descendants in the trustee's discretion. A frequent pattern of distributions from family trusts is to make distributions for spousal support and supplemental support for children. In the current environment, trustees will face situations where one or more beneficiaries' health needs or loss of employment may disrupt the established pattern of distributions within families. Trustees may need to limit the class of beneficiaries receiving distributions for some period of time or distributions may need to increase or decrease in the wake of Covid-19.

Many estate planners include a "best interests and welfare" standard in trusts to allow trustees greater flexibility to meet both the beneficiaries' needs and to accumulate or to distribute income among beneficiaries to achieve certain tax savings. This standard does not, however, permit a complete distribution of and termination of a trust.[21] Often trustees interpret this standard as broad enough to permit distributions to beneficiaries for gifting to family members or charity, but some courts have disagreed with this interpretation.[22]

In the wake of Covid-19, trustees may want to reconsider the impact of continuing distributions to enable beneficiaries to make personal or charitable gifts from trusts with broader discretionary standards. Discretionary requests to enable the beneficiary to make gifts for tax planning purposes or even for charitable gifting must be scrutinized carefully. It may be prudent to pause, but not necessarily abandon, distributions to allow beneficiaries to engage in personal tax planning. Trustees could encourage beneficiaries to revisit their personal charitable gifting in light of increased Federal income tax charitable deductions for individuals.[23] If beneficiaries have established donor advised funds, now may be the time for beneficiaries to make grant recommendations in favor of their preferred charities.

Many trust instruments attempt to grant unlimited discretion to the trustee either by omitting a standard of distribution or by granting the trustee "sole, absolute or uncontrolled" discretion. The use of terms such as "absolute, sole, or uncontrolled" requires a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.[24] Such broad discretionary language gives trustees the latitude that may be required to deal with unusual or larger requests from beneficiaries during the current crisis.

Trusts with extremely narrow standards for discretionary distributions such as "emergency," "hardship" or "health or medical needs" can be challenging to administer and often frustrating for beneficiaries with living expenses that do not fall within these restrictive standards for distribution.[25] The Covid-19 crisis is the time to revisit trusts with narrow distribution standards. Trustees may determine that distributions are not only permissible, but that trusts with less flexible distribution standards are an untapped source of funds to meet the critical needs of beneficiaries impacted by Covid-19.

CONSIDERATION OF BENEFICIARIES RESOURCES

The trust's standard for distribution may require investigation of the beneficiaries' financial status, behavior, employment, family situations, or other matters before distributions can be made. Typically, trustees accomplish this by a review of budgets, financial statements, or income tax returns. A comparison of the

21. Austin W. Scott and William Franklin Fratcher, *The Law of Trusts*, §187.2 (4th ed. 1987).
22. *Kemp v. Paterson*, 4 A.D.2d 153, 163 N.Y.S.2d 245 (N.Y. App. Div.,1st Dep't. 1957) (holding that distributions to the income beneficiary under a "best interests" standard for gifts to the "natural objects of her bounty" to avoid estate taxes were unauthorized under the terms of the trust); *Siegel v. J.P.Morgan Trust Co., N.A.*, 71 So. 3d 935, (Fla. Dist. Ct. App. 2011) (holding that the trust agreement gave trustee no power to make gifts where the trustee had the power to invade the principal for the welfare of the settlor).
23. H.Rep. No. 748, §2204.
24. Unif. Trust Code §814 (a) (2010).
25. *Warner v. Trust Company Bank*, 250 Ga. 204 (1982) (holding that use of term "any emergency," such as prolonged illness" authorized an invasion of corpus, but would not permit invasion for "any" emergency).

beneficiaries' income tax situations and projected estate tax situations is important when distributing from trusts with multiple beneficiaries.

It is critical for trustees to ascertain whether a beneficiary's other resources must be considered or whether trustees may consider other resources but have some discretion.[26]

In the absence of specific language, the Restatement (Third) of Trusts provides that the trustee has the discretion to consider a beneficiary's other resources. It sets forth several qualifications to this general rule: (1) Where the beneficiary is entitled to part or all of the income or to an annuity or unitrust amount, in that case the trustee must take the mandatory distributions into account before making discretionary distributions. (2) Where the beneficiary is entitled to payments from another trust created by the same settlor or as part of a coordinated estate plan, required distributions from the other trust and the purposes of the trusts must be considered. (3) Where the beneficiary was probably not expected to be self-supporting the trustee should not reduce or deny payments because of a beneficiary's personal resources.[27]

When families are facing unexpected illness, loss of employment, and a decline in the values of personal assets, a trustee's request for information about personal resources may be viewed as insensitive. Trustees have an opportunity to demonstrate their empathy and exercise discretion to refrain from requesting onerous documentation of a beneficiary's outside resources. Trustees are permitted to rely upon a beneficiary's representations and on readily available and minimally intrusive information supplied by a beneficiary unless the trustee has reason to suspect that the information is inaccurate or incomplete.[28]

LOANS AS AN ALTERNATIVE

In some instances, loans may be preferable to distributions as long as a beneficiary is likely to have the ability to repay the loan to the trust. Trustees have a duty to protect and preserve trust assets and, generally, to make assets productive.[29] The Restatement (Third) of Trusts states that loans do not have to be prudent investments if the trust document permits discretionary distributions to the beneficiary seeking the loan.[30] Trustees should exercise caution; however, where there are multiple beneficiaries of a trust in light of a trustee's duty of impartiality.[31]

Trustees should consider several issues before making loans to beneficiaries. A trustee's duty to account to beneficiaries requires that loans are documented with promissory notes and reflected on trust statements.[32] Loans should provide for commercially reasonable terms (interest rate, collateral, etc.) unless the trust expressly permits loans on a basis that is different from the marketplace. Trustees must monitor interest and principal payments.[33]

Trustees could grant beneficiaries Covid-19 related deferrals of payments for existing loans. Such deferrals should be documented as Covid-19 hardship deferrals. Payments could be deferred for a defined period, such as 90 days, and added to the end of the loan term, giving much needed relief to beneficiaries without adversely impacting the trust and other beneficiaries over the long term. Trustees may want to explore intra-family loans given that applicable federal rates are at historic lows.[34]

26. Restatement (Third) of Trusts §50 cmt. e (2003); *O'Riley v. U.S. Bank, N.A.*, 412 S.W.3d 400 (Mo. Ct. App. 2013).
27. Restatement (Third) of Trusts §50 cmt. e (2003).
28. Restatement (Third) of Trusts §50 cmt. e (2003).
29. Restatement (Second) of Trusts §176, §181 (1959)
30. Restatement (Third) of Trusts §§50 cmts. d, f; §90 (2003).
31. Acorn v.Moncecchi, 386 P.3d 739 (Wyo. 2016) (trustee found to have violated duty of impartiality in making loan to beneficiary who had previously defaulted and calling loan to another beneficiary who made timely payments).
32. Restatement (Third) of Trusts §78 (2007).
33. Restatement (Third) of Trusts §76 (2007).
34. Rev. Rul. 2020-11.

EQUITABLE ADJUSTMENTS AND TOTAL RETURN CONVERSIONS

In 2018, the Uniform Fiduciary Income and Principal Act (the "Act") was adopted to reflect changes in the design and use of modern trusts and give trustees greater flexibility to make equitable adjustments and unitrust conversions. The Act recognizes that the historical distinction between income and principal is now less important where many trusts allow for discretionary distributions of both income and principal.[35] Many states have enacted equitable adjustment or unitrust conversion statutes to allow trustees to take a total return approach to investing and making discretionary distributions.[36]

Total return trusts provide for a distribution of a fixed percentage of the net value of the trust assets, typically between three and five percent, determined from time to time, regardless of how much income is produced by the trust assets or the growth of the trust assets. As the value of the trust assets increases, the unitrust amount increases. As the value of the trust decreases, the unitrust amount decreases.[37] Trustees can deploy a total return unitrust conversion to allow for fixed distributions where income beneficiaries are experiencing either a decline in income or income fluctuations in the current environment. A unitrust conversion may be less attractive where a majority of the trust's portfolio consists of nonmarketable assets given the challenges in valuation of these assets. In addition, some states prohibit inclusion of nonmarketable assets in the unitrust calculation absent compelling reasons to the contrary considering all relevant factors including the best interests of the beneficiaries.[38]

Trustees can make equitable adjustments between income and principal that may be necessary if the income component of a portfolio's total return is too small or too large because of investment decisions made by the trustee under the prudent investor rule. The Act lists 11 factors trustees must consider when making adjustments between income and principal. Two of these factors are particularly relevant during volatile market conditions: (1) "the increase or decrease in the value of principal assets, reasonably determined by the fiduciary;"and (2) "the effect of current and reasonably expected economic conditions."[39] Generally, trustees should contemplate equitable adjustments when trusts have generated capital gains. In the case of trusts that have experienced losses, it may not be advisable to make equitable adjustments.

The paramount consideration for trustees when making unitrust conversions or equitable adjustments is to act in good faith, based on what is fair and reasonable to all beneficiaries and to administer trusts impartially, except to the extent the terms of the trusts manifest intent that the trustee shall or may favor one or more beneficiaries.[40] Trustees must evaluate the intersection of asset allocation, permissible distributions under the trust and tax consequences when contemplating unitrust conversions or equitable adjustments.

EXERCISE OF POWERS OF APPOINTMENT

Powers of appointment have been used for centuries to allow for changes to the disposition of trust assets. The Restatement (Third) of Property (Wills and Other Donative Powers) defines a power of appointment as "a power that enables the powerholder to designate recipients of beneficial ownership interests in or powers of appointment over the appointive property".[41] An exercise of a power of appointment can be used to change who will receive trust property, the amount of property beneficiaries will receive or the conditions under which beneficiaries can receive trust distributions.

Typically, the exercise of a power of appointment is subject to certain limitations, primarily for tax reasons. The differences between general and limited powers of appointment are beyond the scope

35. Uniform Fiduciary Income and Principal Act, Prefatory Note (2018).
36. Uniform Fiduciary Income and Principal Act §301, cmts. (2018).
37. Uniform Fiduciary Income and Principal Act §301, cmts. (2018).
38. 760 ILCS 3/§1106(a), 760 ILCS 3/§1106 (d) (2020).
39. Uniform Fiduciary Income and Principal Act §201(e)(7), §201(e)(10)(2018).
40. Uniform Fiduciary Income and Principal Act §201(a)(1), §201(a)(2)(2018).
41. Restatement (Third) of Property: Wills & Donative Transfers §17.1 (2011).

of this article.[42] Trustees may want to review with beneficiaries whether powers of appointment could be exercised differently in light of the economic impact of the current pandemic on families' wealth plans. Beneficiaries' life circumstances may have changed dramatically. For example, where powers of appointment currently are exercised in favor of grandchildren or more remote descendants, beneficiaries may decide to exercise powers of appointment in favor of children, who may require greater resources due to illness or unemployment. On the other hand, beneficiaries may want to exercise their powers of appointment to maximize resources for future generations given the risk of future health crises that cannot be predicted even by the world's best medical experts.

SPECIAL ASSETS AND BUSINESS INTERESTS IN TRUST

Almost three-quarters of aggregate household assets in the Unites States are in the form of financial assets-namely stocks and mutual funds, retirement accounts, and closely-held businesses. Real estate makes up the vast majority of nonfinancial assets.[43] It is not surprising then that closely-held businesses and real estate comprise a significant share of assets placed in trust, either due to deliberate succession planning or because of the death of the owner. Numerous issues arise for trustees managing these assets during the Covid-19 pandemic: from an assessment of the effectiveness of business continuity plans to the pandemic's impact on the value and potential sale opportunities for trust-owned businesses.

Trustees have both a duty to preserve assets and to make them productive.[44] If a trust is a majority owner of a business, it is prudent to hold a seat on the Board of Directors or a management position for proper oversight. The Uniform Trust Code takes the position that a trustee's responsibility is heavier if the trustee holds a large proportion of shares in a corporation or is in control or substantially in control of the corporation.[45]

The Covid-19 pandemic is a stark illustration of the need for trustees to oversee closely-held businesses. Trustees are in an excellent position to share insights with management and participate in tactical and strategic assessments coming out of the Covid-19 crisis. For example, Covid-19 is the first real test of business continuity plans for many companies. As a first step, an analysis of how the business continuity plan and technology platform functioned during the pandemic will be required:

- Was the company able to operate effectively with employees working remotely?
- Does the company have the right technology to conduct virtual meetings with customers and suppliers?
- Did the company encounter cybersecurity issues?
- How well did the social distancing plan work to protect employees and customers?
- What preventive measures will be taken in the future and how will this impact employee privacy concerns?
- Does the company want to reconsider its real estate footprint?

Trustees should participate in critical planning for the company to protect and enhance the value of trust assets for the benefit of beneficiaries. Tactical steps may include renegotiating existing loans, postponing large-scale capital expenditures that are not critical to ongoing business operations, or curtailing distributions to shareholders. Longer term, trustees will need to assess whether customer demand is likely to return and if the supply chain of the business has been disrupted permanently.

42. Bekman, S.V. & Buchar, K.E., *A Practical Guide Administering Powers of Appointment*, Issue No. 608 American Bankers Association, 1, 15-19 (2016).
43. Isabel V. Sawhill & Christopher Pulliam,*Six facts about wealth in the United States*, Brookings (June 25, 2019), available athttps://www.brookings.edu/blog/up-front/2019/06/25/six-facts-about-wealth-in-the-united-states.
44. Restatement (Second) of Trusts §176, §181 (1959).
45. Unif. Trust Code §802, cmt. (2010).

RELIEF UNDER CARES ACT

Trustees will want to consult with management and the company's legal and tax advisors on the availability of loans and tax relief under the CARES Act or any other similar legislation enacted by Congress in the future. For example:

- Could the closely-held business qualify for the Paycheck Protection Program (PPP) to provide payroll support?
- PPP loan amounts are based upon a payroll formula, with loans of up to $10 million. The loan proceeds can be used to cover certain payroll, mortgage, rent, and utility expenses over the eight-week period after the loan is made. Loans may be forgiven as long as prescribed employee and compensation levels are maintained; and
- Is the company eligible for an Economic Injury Disaster Loan?

REAL ESTATE IN TRUST

For commercial real estate held in trust, trustees are likely to face requests from tenants for rent concessions. During this period of extreme market disruption, trustees well may determine that entering into rent concessions to secure existing tenants is prudent especially when the alternative would be an increase in vacancies. Trustees must weigh protection of the value of the property and production of income over the long term against a short-term reduction in income from the property.

Trustees should exercise due diligence and explore what steps tenants have taken to bolster their balance sheets before agreeing to rent concessions. Trustees should document the approval process for rent concessions, the cash flow analysis undertaken and retain all lease modifications in the trust's records.

Beneficiaries should have a clear understanding of how a decline in the productivity of the portfolio will impact their individual distributions over the short and the long term. Trustees may want to disclose these arrangements to beneficiaries and, in some cases, may want to seek beneficiaries' consent to rent deferrals. Trustees can be protected from liability where beneficiaries consent to their actions, provided trustees have fully disclosed all of the facts.[46]

For beneficiary occupied residential real estate held in trust, trustees may receive requests for rent concessions or for relief from payment of property taxes, insurance or other expenses usually paid by beneficiaries. Trustees should make every effort to avoid tax liens or other adverse consequences of a beneficiary's inability to pay these costs. Trustees adherence to a formal process will be the best defense should beneficiaries challenge trustees' decisions in the aftermath of the Covid-19 crisis.

EXERCISING THE SWAP POWER IN IRREVOCABLE GRANTOR TRUSTS

Sometimes wealthy individuals transfer assets to irrevocable trusts considered "grantor" trusts, meaning that the grantor is treated as the owner of the trust assets and the trust is disregarded for income tax purposes. This is an often used estate planning technique to shift the liability for the trust's income taxes to the grantor, allowing the trust investments to grow free of income tax consequences outside of the grantor's estate. One of the ways the grantor can be taxed as the owner is if the grantor has the right to substitute assets of the trust for non-trust assets. This "swap" power is authorized under §675(4).

During the Covid-19 crisis, grantors who have previously created these grantor trusts may desire to substitute assets gifted to that trust with assets they own individually that have future growth potential but are depressed due to the current crisis. This allows those individuals to further shift appreciation out of their estate. Each trust is unique in its authorization to swap or substitute assets, so a trustee should initiate a complete review of the trust instrument and the assets. Depending on the language in the swap power, exercise could create a concentration issue for the trustee where one didn't exist before.

46. Unif. Trust Code §1009 (2010).

In order to ensure that the swap power does not cause estate tax inclusion issues for the grantor, the trustees often have additional fiduciary responsibilities and obligations over the swap power. In Rev. Rul. 2008-22, the IRS ruled that, when a grantor has a power of substitution and such power is held in a non-fiduciary capacity, the trust power will not be included in the grantor's estate under §2015 (transfers with retained life estate) or §2038 (revocable transfers), so long as the trustee has a fiduciary obligation (provided either in the trust agreement or under local law) to ensure that the property acquired and substituted by the grantor are, in fact, of equivalent value. In addition, the trustee must determine that the power cannot be exercised in a manner that would shift benefits among the beneficiaries of the trust.

Thus, the trustee must ensure that the transaction does not leave beneficiaries of the trust in a better or worse economic position. Under the terms of some documents, the trustee may be required to "certify" that the assets substituted have an equivalent value to the ones returned to the grantor. The trustee should document the value of the transferred assets to show they are of equivalent value for each swap transaction. If the swap includes nonmarketable assets, this can be a complicated task. The methodology that is used to move assets in and out of a grantor trust for substitution purposes should be consistent on both sides of the transaction, where feasible.

If the trustee is a directed trustee with no investment responsibility over the assets in the swap transaction, the value of the assets must be provided by the investment advisor having investment responsibility for the asset. To minimize trustee liability, the trustee may want to request written instructions on the valuation of the assets involved and follow any other instructions required by the trust instrument.

FIDUCIARY LIABILITY WITH RESPECT TO INVESTMENTS DURING COVID-19

On February 12, 2020, the Dow Jones Industrial Average, the NASDAQ Composite, and S&P 500 Index all finished at record highs. Less than two weeks later, primarily due to the Covid-19 pandemic, stock markets worldwide reported their largest one-week declines since the 2008 financial crisis, thus entering a market correction. After peaking at 29,000 in February, the Dow Jones Industrial Average fell below 21,000 by mid-March – a nearly 30% drop.

Beneficiaries watch the news and the markets and they are not only worried about their own portfolios, they may take stronger interest in, and even be critical of, trustee decisions that they believe may have impacted investment performance. Early in the crisis, there were several instances where beneficiaries' fear drove them to demand that trustees liquidate holdings and "go to cash," right before the market rebounded. These massive swings in the market followed diverging trajectories of so-called growth stocks, on one hand, and value stocks, on the other. The Russell 1000 Growth Index—tilted toward economically resilient information technology, healthcare and consumer staples stocks – in mid-April was just 3% below year-end 2019 levels. At the same time, the Russell 1000 Value Index – skewed toward financials, industrials, energy and materials companies – was still down 20% in this same time period. Trustees overseeing trusts that held concentrations in these downtrodden stocks are subject to the most scrutiny.

Although trustees must make decisions based on the information available at the time the decision is made, those decisions are often heavily scrutinized during times of massive market fluctuations similar to those occurring during Covid-19.[47] It is important that trustees meet their fiduciary obligations by being stewards of the process, not the guarantors of success. The Uniform Prudent Investor Act (UPIA) confirms that decisions are judged by the facts and circumstances that exist at the time of the decision "and not by hindsight."[48]

47. See *Ditmars v. Camden Trust Co.*, 76 A.2d 280, 291 (N.J. Super. Ct. Ch. Div. 1950) (dismissing the argument that the trustee should have prevented losses caused by the Great Depression).
48. Uniform Prudent Investor Act (UPIA) §8 (1995).

It can be a challenge for fiduciaries to demonstrate that they have met their obligations, as financial crashes are often subject to "hindsight bias:" the psychological phenomenon in which individuals become convinced that one could have accurately predicted an event before it occurred.[49] Hindsight bias also causes overconfidence in one's ability to predict other future events.[50] This belief leads some beneficiaries to become increasingly vocal about their views on future investment decisions. During this time of financial stress, trustees can mitigate their fiduciary liability by ensuring they are following a consistent process that relies on assembling current data, communicating frequently with beneficiaries, and documenting this thought process and communications.

THE IMPORTANCE OF PROCESS AND ADHERING TO THE PROCESS

The UPIA is the uniform statute adopted in most states[51] that sets out guidelines for trustees to follow when investing trust assets. The UPIA favors diversification as a default[52] and, unless the trust provides otherwise, requires a trustee to invest trust funds in compliance with the Prudent Investor Rule.[53] This rule is an update to the previous "Prudent Man Standard," which created category restrictions on different types of investments.[54] The Prudent Investor Rule applies the "Modern Portfolio Theory," which means that fiduciary investment and management decisions will be evaluated on the basis of the portfolio as a whole as a part of an overall investment strategy, rather than judging individual investments.[55] It urges trustees to invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust.[56]

In making investment and management decisions, a trustee is required to consider the following:

- General economic conditions;
- The possible effect of inflation or deflation;
- The expected tax consequences of investment decisions or strategies;
- The role that each investment plays within the overall trust portfolio;
- The expected total return from income and the appreciation of capital;
- Other resources of the beneficiary;
- Needs for liquidity, income and preservation or appreciation of capital; and
- An asset's special relationship or special value, if any, to the trust or a beneficiary.[57]

A trustee with special skills or expertise has a duty to use those special skills or expertise.[58] To protect trustees from liability, trustees need to demonstrate that they considered these factors when making decisions. A prudent trustee often memorializes their considerations in a written plan called an Investment Policy Statement, which serves as a framework for all investment decisions to follow. Failure to have a written plan and failure to follow a written investment policy statement may subject the trustee to liability if the trustee fails to document the reasons for its deviation.[59]

49. Michael M. Pompian, *Behavioral Finance and Wealth Management*, 199-207 (2006).
50. Michael M. Pompian, *Behavioral Finance and Wealth Management*, 199-207 (2006).
51. *See* www.uniformlaws.org. The UPIA has been enacted in 45 states, with modifications. The Illinois Prudent Investor Act predates the UPIA
52. UPIA §3.
53. UPIA §1(a).
54. UPIA §1(a), cmt. (Prior Legislation).
55. UPIA §2(b).
56. UPIA §2(a).
57. UPIA §2(c)(1)-(8).
58. UPIA §2(f).
59. *In re Matter of Knox*, No. 52234U 2010 N.Y.S. Slip Op., 30 Misc. 3d 1201(A) (February 24, 2010); *In re Matter of Knox*, No. 52251U 2010 N.Y.S. Slip Op., 30 Misc.3d 1203(A) (November 24, 2010); In re Matter of Hunter, No. 50548U 2010 N.Y.S. Slip Op., 27 Misc.3d 1205(A) (March 31, 2010); *In re Hunter*, 955 N.Y.S.2d 163, 165 (N.Y. App. Div. 2d Dep't 2012).

During periods of extreme market volatility and uncertainty such as occurred during the Great Recession of 2008, and more recently during the Covid-19 crisis, the settlors' and beneficiaries' anxiety is often increased. A trustee is not immune from losses as a matter of law merely because the losses correlate with a widespread market decline, as the conduct of the trustee is a factual determination that depends on the facts and circumstances of each case.[60] Regular communication with co-trustees and beneficiaries is paramount to mitigate the risk of fiduciary liability, as failure to personally meet with beneficiaries is repeatedly listed as a factor in litigation.[61] Secrecy and lack of communication breeds distrust and further elevates anxiety. Strong communication during times of crisis not only helps diffuse emotions and mitigates the trustee's risk, it is good client service.

IMPACT OF BENEFICIARY CONCERNS DURING EXTREME MARKET FLUCTUATIONS

The uncertainty surrounding the economic impact of Covid-19 causes many beneficiaries to take a stronger interest in the investment performance of trust assets. Although a prudent trustee should be responsive to a beneficiary's concerns, a trustee's duty of loyalty does not require it to abdicate its responsibility to exercise its discretion in determining which investments are in the best interests of any one or more beneficiaries.[62] Beneficiaries should be reminded that the trustee's duty of impartiality requires it to consider both the income beneficiaries and any remainder beneficiaries when determining the asset allocation.[63] Consequently, the trustee must make sure that the trust principal produces a reasonable income while being preserved for the remainder beneficiaries.

During the Covid-19 pandemic, fear may cause some beneficiaries to request their investments be liquidated, or even "brought to cash." In making such determination, the trustee is guided by the language of the trust document and the short-or long-term needs of all the beneficiaries. The trustee should remind the beneficiary that there is a real risk of not staying invested during times of excessive volatility – selling at the bottom of a market downturn, and then missing out on the market rebound. A portfolio that misses out on the best days will underperform, and will compound significantly less dollar wealth over time. Attempting to time the market is always tempting, whether it is selling in anticipation of further drawdown, or just going into preservation mode. These decisions tend to be driven by powerful emotions, most notably fear.

As beneficiaries may request changes driven by emotion, a prudent trustee should rely upon data. Data often reinforces the dangers of market timing, made more perilous in periods of extreme volatility. For example, over the last 30 years, an investor who missed the 10 best days of returns would have earned just 6.20% instead of 8.84% annualized over the 30-year period. If the investor missed the best 30 days, she would have earned only 2.95%. In missing the 30 best days, a dollar would have grown to just $2.39 instead of to $12.67 if the funds had stayed fully invested. Trustees possess a general duty to invest prudently and, if they fail to do so, the trustee may be charged with the amount of the funds the trustee failed to properly invest, adjusted for the amount of the total return that would have accrued to the trust had the trust been invested.[64]

Trustees should strive to assess market panics with professional detachment.[65] Trustees can minimize their fiduciary liability by communicating with an empathetic understanding of the beneficiary's current needs and fears along with providing guidance on the long-term strategy. Beyond staying the course, trustees should demonstrate what they are actively doing to weather the storm such as rebalancing assets and

60. *Greenberg v. JP Morgan Chase Bank, N.A.*, No. 652347-2011, 2014 N.Y. Slip Op. 31122 (N.Y. Sup. Ct. 2014).
61. *Greenberg v. JP Morgan Chase Bank, N.A.*, No. 652347-2011, 2014 N.Y. Slip Op. 31122 (N.Y. Sup. Ct. 2014).
62. *In re Trust of Phyllis Gene Jones*, No. A18-0021, 2018 BL 287773(Minn. Ct. App. August 13, 2018).
63. *Hasty v. Castleberry*, 749 S.E.2d 676 (Ga. 2013).
64. UPIA §2, cmt.; Restatement (Third) of Trusts § 90 cmt. e (1) (noting "[b]eneficiaries can be disserved by undue conservatism as well as by excessive risk-taking").
65. Mark L. Ascher, A.W. Scott, and W.F. Fratcher, *Scott and Ascher on Trusts* §19.4, Investments That Subsequently Become Inappropriate (5th ed. 2019).

tax-loss harvesting. They should proactively be ready to hear the beneficiary's concerns. However, they also should remind the beneficiary of the purpose of the trust and how the long-term investment strategy ties to this purpose.

IMPACT OF CONCENTRATIONS IN A TRUST

Holding concentrations in a trust comes with increased risk of liability and more scrutiny by beneficiaries, especially in times of crisis. Covid-19 caused some industries to lose tremendous value in a very short period of time. Travel and entertainment equities lost over half their value in just a month, and the future of those sectors is uncertain. Other industries, such as remote working and streaming platforms, home fitness and delivery services, and pharmaceutical companies, fared much better. Trustees overseeing trusts that have concentrations in industries that are suffering the most may be subject to second-guessing of the trustee's decisions not to diversify, especially when beneficiaries can point to the fact that they would have been better off had the trustee diversified. Some experts are now predicting that the crisis will last far into 2021. With this information, the trustee decisions may be criticized if no actions are taken to determine the need to further mitigate any losses.

Generally, the UPIA favors diversification, but it authorizes the Trustee to abridge this duty in special circumstances in which the purpose of the trust is better served without diversification.[66] The extent of the fiduciary's risk of liability with respect to a drop in value of a concentrated position depends upon whether the trustee is serving as (1) sole trustee with full investment responsibility; (2) co-trustee with shared investment responsibility; or (3) a directed trustee with no investment responsibility.

LIABILITY CONSIDERATIONS OF A SOLE TRUSTEE WITH FULL INVESTMENT RESPONSIBILITY

A trustee who has sole investment responsibility over a concentration that lost tremendous value may run a greater risk of being sued for failure to diversify. Beneficiaries generally do not sue when trust values increase, but a beneficiary is more likely to be litigious when asset values decline, especially with such severity. The relative risk is dependent upon many factors, including the language of the trust document that protects the trustee, and the governing state law. Generally, under the UPIA, the appropriate justification for not diversifying falls into two categories: (1) if the terms of the trust instrument override the UPIA duty to diversify; and/or (2) if there are "special circumstances, such as tax considerations or special value to the family such as the wish to retain a family business."[67]

The case law across the jurisdictions is not uniform and each case is informed by unique facts and circumstances. The size of the concentration relative to the size of the other assets in the trust is a factor courts will scrutinize. In addition, modern fiduciary law draws a distinction between trust language that requires a trustee to invest in a certain manner and that which merely permits such conduct. Mandatory directions "are ordinarily binding on the trustee in managing the trust assets, thus often displacing the normal duty of prudence."[68] In contrast, a permissive or precatory provision "does not relieve the trustee of the fundamental duty to act with prudence."[69]

The more specific and exculpatory the language included in the trust agreement, the more likely the court is to find that the grantor has relieved the trustee of the duty to diversify.[70] With respect to the language that merely authorizes the retention of a concentrated position, the courts are generally looking not just

66. UPIA §3.
67. UPIA §3.
68. Restatement (Third) of Trusts §228(e) (2003); *In re Trust of Ray D. Post*, No. A-0929-16T1 (N.J. Super. August 15, 2018) (*noting the duty to diversify is subordinate to an express provision in the trust instrument that directs a trustee to retain an investment*).
69. Restatement (Third) of Trusts §228(f) (2003).
70. *McGinley v. Bank of America, N.A.*, 279 Kan. 426 (2005); *Americans or the Arts v. Ruth Lilly Charitable Remainder Annuity Trust #1*, 855 N.E.2d 592, 603 (Ind. Ct. App. 2006); *In re Peter Martin Wege Trust*, No. 271244, 2008 BL 355629 (Mich. Ct. App. June 17, 2008); *Wood v. U.S. Bank*, N.A., 828 N.E.2d 1072 (Ohio Ct. App. 2005).

for authority to retain inception assets but for language that recognizes that such direction to retain will cause a lack of diversification and indemnifies the trustee from loss in value for holding the asset and not diversifying.[71]

Even with language to protect the trustee for failure to diversify, or the presence of special circumstances, the trustee's duty of prudence requires that trustees have an ongoing duty to evaluate whether or not it is prudent to continue to retain the concentrated position. Trustees that blindly follow directions in the trust document during times of severe market instability, such as those presented by Covid-19, may find themselves subject to court scrutiny. For example, in a much discussed case involving Kodak stock, a corporate fiduciary was named trustee of a trust that had a portfolio that consisted of 95% of Kodak stock. The trust contained a clause that prohibited the sale of Kodak stock, unless there was a "compelling reason" other than diversification for doing so.[72] Despite a significant decline in value, the trustee held the stock for approximately 34 years.[73]

The court pointed out that a clause authorizing retention of the Kodak stock "cannot trump the application of prudence" upon the fiduciary.[74] The "compelling reason" clause was interpreted to mean that the trustee was not to sell simply in order to diversify even if the stock was performing well, but was to sell the stock if there were some other compelling reason, such as poor performance. The following language of the trial court is a good warning signal to trustees who stand on the sidelines during a crisis such as Covid-19 where the financial uncertainties have no definable end:[75]

> [T]he bank never attempted to prospectively define any triggering criteria which would raise a red flag for the trust officer in charge to raise a necessity of an immediate and more in-depth review. **Good practice would dictate that upon the occurrence of a pre-determined significant event (such as a precipitous decline in stock value) the trust would undergo some form of intensive review to make sure that fiduciary duty is being properly upheld.** Good practice would dictate a before-fall type of analysis to attempt to identify proper triggers which would call for such review. Good practice would dictate complete documentation of all these processes.

Cases like the case involving Kodak stock and others like it are quite instructive on the fact that the courts find that trustees are not permitted to put the trusts in a drawer and rubber stamp the asset retention under any circumstances.[76] Understanding the document terms, analyzing the asset and the market both for that asset and for other possible investments, and knowing the needs of the beneficiary, are paramount. Also critical is the trustee's ability to demonstrate what information it had and relied upon in making the decisions it made, who was involved in making the decisions, and why those individuals were qualified to do so.

In case of market declines, trustees that were treated the most favorably by the courts were those that:

- Actively evaluated with the assistance of trained professionals the concentration they held and the language in the document that guided them;
- Considered the nature of the asset and its relationship to the trust and the family and whether the grantor's intent with respect to the retention of the stock could be discerned from the terms of the trust or the circumstances surrounding its creation;
- Regularly reviewed the situation and updated their information and analysis, including during periods of market corrections;

71. *Schartz. V. Barker*, 291 P.3d 1073 (Kan. Ct. App. 2013); *Fifth Third Bank v. Firstar Bank, N.A.*,2006-Ohio-4506 (Ohio Ct. App. Sept. 1, 2006); *Durden v. Citicorp Trust Bank*, No. 3:07-CV-974-J-34JRK, (M.D. Fla. 2010).
72. *Matter of Dumont*, 2004 NY Slip Op 50647(U) (Surrogate's Court, June 25, 2004), rev'd, 809 N.Y.S.2d 824, 26 A.D.3d 824 (2006)..
73. *Id*.
74. *Id*.
75. *Id*.
76. *In the Matter of the Estate of Janes*, 681 N.E.2d 332, 659 N.Y.S.2d 165 (N.Y. 1997); *In re Hunter*, 27 Misc. 3d 1205, 910 N.Y.S.2d 405 (Sur Ct 2010) ; *In re Estate of Kettle*, 73 A.D.2d 786, 423 N.Y.S.2d 701 (N.Y. App. Div. Fourth Dep't 1979).

- Carried out the plans they adopted; and
- Considered all relevant factors, including liquidity, taxes, beneficiary needs, yields, and not just what investment they would sell but what the replacement property would be and why that would be more appropriate.

Conversely, those trustees most likely to be found to have breached their duties:

- Had conflicts of interest (for example, the concentrated position was in the stock of the corporate trustee) or ulterior (personal) motives for retaining the stock;[77]
- Could not articulate their investment policy or plan; [78]
- Could not produce documentation of their decision making processes and what was considered in reaching conclusions;
- Made plans to diversify but did not carry them out or did not follow their own internal policies; and
- Did not take into account the long- and short-term needs of all of the beneficiaries in making decisions about diversification or retention of shares.

A trustee who has sole investment responsibility over a concentrated asset during the Covid-19 crisis, with the appropriate processes in place, should not be subject to fiduciary liability for the drop in value that even the best economists didn't predict. However, as information unfolds and economists and investment advisors change their predictions, a prudent trustee should document its decisions as to whether additional action may be appropriate in situations with single stock concentrations, especially where the tax costs in making a sale have diminished due to market conditions, or where stock performance consistently has underperformed the relevant benchmark. The trustee should also ensure that it has recent documentation of the decision not to diversify, the facts and circumstances that justify the decisions, communication informing the beneficiaries of the decision and the impact that it may have on the trust's portfolio, and the beneficiary's knowledge, acceptance, and agreement with that decision.

LIABILITY CONSIDERATIONS OF A CO-TRUSTEE WITH SHARED INVESTMENT AUTHORITY

There are special considerations when a trustee shares investment authority with a co-trustee. With respect to these trusts, it is important to realize that simply going along with the views of the other co-trustees is not protective. Rather for those trusts, the trustee has an obligation to exercise the investment responsibility it has been granted and to make recommendations to the co-trustees. In the event that the acting trustee is not persuaded by the positions asserted by the individual trustees, protection is generally available if a formal dissent is entered into the trust's records.[79]

Even with a dissent, a co-trustee is not protected if the other trustee commits a serious breach. In this instance, the trustee may be required to exercise reasonable care to prevent the co-trustee from committing a serious breach and take steps to redress it.[80] Whether such dissent needs to be in writing is dependent on state law,[81] but a written dissent may be a best practice regardless of the governing law so that the trustee can, if challenged, provide evidence of the actions taken with respect to a particular decision. In some states, co-trustees must act unanimously as a default.[82]

77. *Wood v. U.S. Bank, N.A.*, 160 Ohio App.3d 831, 828 N.E.2d 1072 (Ohio Ct. App.1st Dist. 2005); *Robertson v. Central Jersey Bank & Trust Co.*, 47 F.3d 1268 (3d Cir. 1995), *First Alabama Bank of Huntsville, N.A. v. Spragins III*, 475 So. 2d 512, 515-16 (Ala. 1985).
78. *O'Riley v. U.S. Bank, N.A., 412 S.W.3d 400 (Mo. Ct. App. 2013).*
79. Unif. Trust Code §703 (c), (h).
80. *See, e.g.*, 760 ILCS 3/§703.
81. *See, e.g.*, 12 Del.C. §3323 (requiring that the dissent be in writing).
82. *See, e.g.*, Cal. Prob.Code §15620.

LIABILITY CONSIDERATIONS OF A DIRECTED TRUSTEE WITH NO INVESTMENT RESPONSIBILITY

If the trustee is directed on stock concentrations, investment decisions, and the associated liability, is assigned to a third-party investment advisor named in the trust instrument. The directed trustee is said to have no investment responsibility as it is required to act solely upon the investment advisor's direction. The fiduciary liability of the directed trustee is lessened as long as there is a clear bifurcation delineated in the trust document and the trustee protection is buttressed by a strong applicable state directed trust statute that defines the standards of liability for the trustee and the third-party investment advisor.

To truly mitigate the trustee's liability with respect to the trust concentration for directed trustees, the direction provisions in the trust and the applicable state directed trust statute must be structured with the following:

- The trustee should only be liable for willful misconduct when following directions;
- The trustee must be required to follow the direction and act solely at direction; and
- The trustee should have no duty to monitor the investment advisor.[83]

Without these protections, the trustee may still have some monitoring requirements over the concentrated asset.[84] The trust document must be clear that the trustee must act solely at the investment advisor's direction and the trustee cannot have any independent discretion to decide whether to execute this direction.

If there is clear bifurcation in the trust document and the underlying state statute, the trustee should be careful not to advise, monitor or participate in the decisions with the investment advisors during the Covid-19 crisis. The trustee will want to avoid an argument that the directed trustee eroded the protection afforded it by the document or statute by undertaking the investment advisor's obligations by providing investment consultations to the investment advisor.[85] To that end, a trustee may mitigate its liability during the Covid-19 crisis simply by ensuring that its actions are limited to dutifully following the direction of the investment advisor and that it has recent documentation of (1) a description of the value of the asset; (2) the fact that the investment advisor still directs the trustee to hold the asset; and (3) confirmation that the investment advisor is still in that role.

CONCLUSION: COMMUNICATE, ALIGN BENEFICIARIES WITH THE TRUST'S PURPOSE AND DOCUMENT COMMUNICATION

Trustees should proactively communicate often with co-trustees and beneficiaries, especially during times of crisis. Covid-19 has brought many challenges and uncertainties, but the shelter-in-place lifestyle has also given many people something they may have lacked for years, the gift of time. Trustees should take this time to educate beneficiaries on the purpose of the trust and align the beneficiaries to this common vision.

Documentation of communication is also important as it demonstrates that the trustee acted with careful, skillful and impartial judgement and minimizes hindsight bias. This documentation should demonstrate the rationale for decisions, even if those decisions resulted in no action taken. Trustees should be careful what they put in casual communication such as emails. During a crisis, emails provide immediate communication, but are often created with less forethought. In litigation, emails are as discoverable as is any other document.

The planning before the creation of a trust is done over a much shorter timeframe than the longevity of the typical trust. The reality of the administration of the trust may be very different than what the settlor envisioned when he or she created the trust. During the Covid-19 crisis, trustee must make decisions in the face of unprecedented uncertainty while navigating beneficiaries' fears and emotions. Trusts provide

83. *See* David A. Diamond & T. Flubacher, *The Trustee's Role in Directed Trusts*, Trust & Estates (December 2010).
84. *R. Leigh Duemler v. Wilmington Trust Co., N.A.*, No. 20033 (Del. Ch. Ct. Oct. 28, 2004).
85. *D. Diamond & T. Flubacher, above* at Note 13.

a reliable framework to make decisions based upon facts and data, and experienced trustees, who focus on the fundamental fiduciary duties and the trust's purpose, serve as reliable and empathetic stewards to steer beneficiaries through the crisis.

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