THE ETHICS OF RELEASES, AND OTHER SELF-SERVING STUFF
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1. Introduction

There is a natural tension for fiduciaries between the execution of their routine responsibilities and discretionary actions, and their understandable desire to not expose themselves to personal liability during their tenure as fiduciary -- and especially beyond when the resources of the estate or trust may no longer be available to defend the fiduciary. To a certain extent, this traditional tension is heightened by modern trust statutes which provide trustees with greater power to modify the trust by agreement of all interested parties or to decant the trust, and thus call upon the trustee to consider actions not expressly authorized by the trust instrument. *See* Delaware Code Title 12, Decedent's Estates and Fiduciary Relations Sec. 3528; *see* also N.H. Rev. Stat. Ann. § 564-B:4-418. The possibility that a fiduciary's routine and extraordinary discretionary actions might later be challenged can inhibit practical decision making. Moreover, a failure to act -- even a failure to modify the governing instrument -- may itself be a breach of trust. Herein lies the tension: no matter how well the fiduciary executes his or her responsibilities in accordance with the trust document and governing law, current and/or future beneficiaries may still challenge the fiduciary's actions. Under these circumstances, trustees understandably seek to reduce their exposure to personal liability for administration of the trust.

Traditionally, fiduciary liability to beneficiaries may be foreclosed in three ways (1) statutory limitations on actions against trustees; (2) formal adjudication by the Court; and (c) the consent, ratification, or release by the beneficiaries. In many cases, however, the statute of limitations provides insufficient comfort for a fiduciary concerned about future liability. Among other things, until the statute of limitations has run, the fiduciary remains exposed to liability arising from his or her administration of the trust. Moreover, some statutes provide for equitable tolling under certain circumstances. Formal adjudication by the Court may involve considerable delay, and creates added expense and a loss of privacy. For these reasons, trustees and other fiduciaries often seek to foreclose future liability be requesting that beneficiaries execute a consent, release, or other instrument to end trustee liability.

A trustee's request for a release, however, creates a conflict between the trustee's interests as a fiduciary and his or her personal interests. Almost by definition, a trustee who receives a release obtains an advantage from the beneficiary. As discussed below, the trustee's request for a release is an act of self-dealing, which if not accompanied by proper disclosures will render the release invalid and, moreover, may by itself constitute a breach of the duty of loyalty. Proper disclosure requires communication of all material facts and, in some jurisdictions, requires that the beneficiary be made aware of all legal rights.

Disclosure to beneficiaries also raises ethical issues for attorneys serving as trustees as well as for attorneys serving as counsel to trustees. At the threshold, an attorney representing a fiduciary who wears multiple hats must identify whom the attorney represents. Similarly, in communicating with a beneficiary, fiduciary counsel should make it clear that the attorney represents the trustee and not the beneficiary. This is particularly important where trustee counsel seeks to explain to the beneficiary, as required in some jurisdictions in connection with the execution of a release, the beneficiary's legal rights with respect to the claims being relinquished through the release. Counsel should also determine whether a beneficiary is represented by an attorney. If so, counsel should take care to communicate through the attorney.

Our discussion this afternoon will focus on ways that fiduciaries can mitigate the risk of future litigation, and how some mitigation strategies overreach and can have the unintended consequence of exposing the fiduciary to increased liability. We will first summarize areas of potential liability for fiduciaries, and common ways to mitigate that liability. Then, we will review more closely consent in various contexts, focusing on the level of disclosure required, and whether the consent binds future beneficiaries. As part of our discussion, we will focus on *Ferri v. Powell-Ferri*, 476 Mass. 651 (2017), a recent Massachusetts case involving discretionary decanting. We also will address ethical concerns raised by the proposed action or inaction, relevant to attorneys serving as fiduciaries and attorneys as they represent fiduciaries. References will be to the ABA Model Rules of Professional Conduct.

2. Areas of Potential Fiduciary Liability

A. Liability relating to the decedent or donor's actions

(i) Debts, Administrative Expenses, Taxes

(1) Obligation to determine what is due, creditors' claim period(s)

(2) How to foreclose creditors' claims at the earliest date

(ii) Decedent/donor as obligor on debt, including as guarantor

(iii) Lender may seek substitute guarantor, with threat of calling loan

(1) Business decision whether to subject estate or trust to future liability

(iv) Decedent/donor's actions in contract and tort

(1) Understanding risk

(2) Is claim is ripe.

B. Potential liability for premature distribution of assets

(i) Statutory creditors' claims period and short statutes under trust code

(ii) Federal and state estate tax closing letters

(iii) Exercising reasonable care in investigating facts

(1) By statue in some jurisdictions, a trustee who has exercised reasonable care to ascertain the happening of the event or change of statue shall not be liable for a loss resulting from the trustee's lack of knowledge. *See, e.g.,* Mass. Gen. Laws. Ch. 203E, § 1007.

(2) Identifying beneficiaries; obtaining an accurate family tree, copies of shareholder agreements, copies of prenuptial and postnuptial agreements.

(iv) Successor fiduciary issues

(1) Why is a successor coming on;

(2) What are the responsibilities of the successor, and are those obligations excused

C. Potential liability incurred with respect to the fiduciary's own actions

(i) routine administration (investment, discretionary distributions, equalization formulae, discretionary termination of trust, conversion to unitrust, decanting, non-judicial settlements)

(ii) claims for malfeasance (fiduciary fees, self -dealing, other breaches of fiduciary duty)

(iii) trustee's refusal to discharge responsibilities

3. Protection from Fiduciary Liability

A. Statutory Methods (closing letters; judicial discharge; formal closing of Estate)

(i) Estate tax closing letters

(ii) Required judicial accounting to close an Estate Administration

(iii) Formal account allowance proceeding even when not required

(iv) IRS ruling requests

(v) IRS requests for statutory relief

B. Agreements

(i) informal agreements regarding distributions directed in governing documents (tangible person property, equalization, what assets will be distributed to beneficiaries who receive shares)

(ii) formal agreements

(iii) delegation of power (directed trusts and delegation pursuant to power in the document), which may or may not have statutory protection

(iv) fiduciary resignation vs. removal

4. Ways to Discharge Fiduciary Liability

A. Statutes of limitations:

(i) The UTC creates two limitation periods for actions by beneficiaries against a trustee, a one-year period (applying to matters adequately disclosed in trustee's report) and a five-year period (providing an "ultimate statute of repose.")

(1) <u>One Year</u>: "A beneficiary may not commence a proceeding against at trustee for breach of a fiduciary duty more than one year after the date the beneficiary or representative of the beneficiary was sent a report or an accounting that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing the proceeding," UTC § 1005(a).[1]

a. A report adequately discloses the existence of a potential claim for breach of trust "if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence." UTC § 1005(b).

b. This relatively short statute of limitations bars both the beneficiary and the "representative" of the beneficiary who receives the report. The representative referred to in subsection (a) is the person who may represent and bind a beneficiary under the principle of "virtual representation" provided for under UTC Article 3. UTC § 1005 cmt.

c. Subsection (a) applies only if the trustee has furnished a report. The statute of limitations does not begin to run against a beneficiary who has waived the furnishing of a report as provided in UTC § 813(d).

(2) <u>Five Years</u>: If the trustee does not provide an accounting, or if an accounting does not disclose all matters that might give rise to a cause of action against a trustee, Section 1005(c) provides that actions against a trustee must be brought within 5 years after termination of the trust relationship, either through the resignation, removal or death of the

[1] Some states have adopted this provision of the UTC, but have shortened the time period. Under the Massachusetts version of § 1005(a), for example, the beneficiary has 6 months after receipt of a proper final accounting to bring an action against the trustee for breach of fiduciary duty. MUTC, § 1005. Massachusetts also provides for an intermediate statute of limitations – 3 years – under MUTC § 1005 as follows: "Any claim against a trustee for breach of trust shall be barred in any event and notwithstanding lack of full disclosure, against a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of the location and availability of records for examination by the beneficiary after 3 years."