

Trust Advisors Forum

Regulatory & Fiduciary Law Update

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For Federated Hermes
2023 Trust Advisors Forum

Today's Topics

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- ▶ Congressional Revenue Raisers
 - ▶ Federal Transfer Tax Update: New 2023 Numbers
 - ▶ Biden Administration Green Book
 - ▶ Retirement Account Changes: The SECURE Acts 1 & 2
- ▶ Federal Regulatory Guidance
 - ▶ IRS Proposed Permanent Remote Witness Procedure
 - ▶ Section 2053 Estate Administration Deductions
 - ▶ Rev. Proc. 2022-32's Five Year Portability Extension
 - ▶ Updated Actuarial Tables
 - ▶ ABA & Industry June 23, 2022 ESG Letter
 - ▶ Digital Asset Update
 - ▶ Corporate Transparency Act
- ▶ Fiduciary Case Law Update

Federal Transfer Tax Exemption

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- ▶ 2023 Increases
 - ▶ Portable Estate/Gift Tax Individual Exclusion \$12.92m
 - ▶ \$25.84 b/w married couple
 - ▶ Non-Portable GST Individual Exclusion \$12.92m
 - ▶ Annual Gift Exclusion increase to \$17,000
- ▶ Recall 2026 Sunset
 - ▶ 2026 will sunset back to \$5m as adjusted for inflation
 - ▶ How likely is sunset to occur?

Biden Administration's Green Book

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- ▶ Greenbook not legislation but “wish list” with certain recurring themes
- ▶ Deemed Realization of Capital Gains upon Gift or Death
- ▶ Modification of Grantor Trust Rules
 - ▶ GRAT limitations
 - ▶ Would recognize transactions b/w Grantor and Grantor Trust
 - ▶ Note proposed application to transactions after enactment
 - ▶ Would treat Grantor's payment of income tax earned in Grantor Trust as gift
 - ▶ Note would apply to trusts created after enactment
- ▶ Private Foundation use DAF contributions to satisfy 5% annual distribution
 - ▶ \$5b to three major DAFs in 2022
 - ▶ DAFs have no obligation to make annual distribution and limited reporting requirements

The SECURE Act

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Acts 1 & 2

Secure 1.0 Proposed Regs: The “10-Year Rule”

- ▶ Secure 1.0's major change eliminated stretch but for Eligible Designated Beneficiaries, “EDBs”, who are:
 - ▶ Spouse, Minor Children, Disabled/Chronically Ill, Persons Not more than 10 years younger than owner
 - ▶ All other beneficiaries are now subject to the 10-year rule
- ▶ Proposed Treasury Regs Re: Implementation of RMDs
 - ▶ Uniform Definition of Minor
 - ▶ Regs set at 21 YO (10 years until age 31 to w/draw)
 - ▶ When trust beneficiaries are both EDBs and DBs, the one named non-EBD will cause a 10-year payout to apply
 - ▶ Need separate trusts for EDBs and DBs

Secure 1.0 Proposed Regs: Application of “10-Year” Rule

- ▶ Notice 2022-53 Treasury Notice
 - ▶ IRS implicitly confirms that you need to make RMDs in years 1-10 for owners who died after RBD
 - ▶ Under the prior rule, if named entity was as beneficiary then it had 5 years to withdraw without the requirement for annual distributions in 5 year period
 - ▶ Could have withdrawn all in year 5
 - ▶ New proposed regs deviate and provide if employee participant was taking out RMDs in year of death, then in year after death must make RMD in each of 10 years
- ▶ IRS says regs not final until 2023 and won't penalize failure to take RMDs in 2021 and 2022 (no make up 2021 or 2023)

Secure 2.0: Highlights

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- ▶ Broad bi-partisan support
- ▶ Revenue Neutral—Enhancement
 - ▶ Mainly via expanding Roth Contributions
- ▶ Increase age RMDs
 - ▶ Secure 1.0 increased to 72
 - ▶ Secure 2.0 increases RMDs from 72 to 73 (after 2023) and from 73 to 75 after (2032)
- ▶ Expanded Roth Contributions
- ▶ Rollovers from 529s (effective 2024)
 - ▶ If beneficiary doesn't exhaust, may be rolled from 529 to a Roth IRA for 529s in existence for 15 years
 - ▶ Maximum of \$35k per lifetime and normal Roth IRA Contribution limits apply
 - ▶ \$6,500 for 2023

Secure 2.0: Reduction in Excise Tax for Untimely RMDs

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- ▶ Reduced from 50%-25%, and possibly down to 10% if timely correction made

Secure 2.0: Increased Qualified Charitable Distributions

- ▶ An annual QCD of \$100,000 directly to charity has always been allowed
- ▶ Secure 2.0 allows one-time rollover of up to \$50k to Charitable Remainder Trust or Charitable Gift Annuity
 - ▶ \$50k for CRT not likely worth the effort
 - ▶ \$50k to CGA
 - ▶ Must take out 5% a year
 - ▶ Need to determine effectiveness

Secure 2.0: Impact on Roth Distributions from 401k Plans

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- ▶ Many employers allow employees to make Roth election
- ▶ Prior law required RMDs at RBD
- ▶ Secure 2.0 doesn't require lifetime distributions from Roth IRA during participant's lifetime when the Roth IRA is under a 401k plan

Secure 2.0: Impact on Disabled & Chronically Ill Beneficiaries

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- ▶ Secure 2.0 allows a charity to be a remainder beneficiary of SNT
 - ▶ SNT will still qualify as an EDB for lifetime distributions based on disabled/chronically ill beneficiary
- ▶ Secure 2.0 also increase the “disability onset” requirement for ABLE Accounts previously set at age 26 to 46 in 2026
 - ▶ May make \$6m more Americans eligible for ABLE Accounts

Federal Regulatory Update

IRS Proposes Permanent Remote Witness Procedures

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- ▶ IRS temporarily waived in-person witness requirements for retirement plan participant elections & spousal consents in 401k and other retirement plans during the pandemic
- ▶ American Bankers Ass'n and advocacy groups advocated for permanent waiver of in-person requirements for plan participants who have mobility issues or work/live remotely
- ▶ If finalized as proposed, the regulation would allow for electronic medium (live audio/visual) which would:
 - ▶ Ensure authentication
 - ▶ Retirement Investor Protections

Section 2053 Proposed Regs re: Estate Administration Expense Deductions 15

- ▶ Proposed rulemaking on 6/28/2022
- ▶ Will impact many estates for persons to die after date becomes final
- ▶ Proposed regulation:
 - ▶ Applies present value concept
 - ▶ If expense paid more than 3 years after DOD must discount using AFR back to DOD value
 - ▶ Should prepay big expenses?
 - ▶ Determine when interest deductible
 - ▶ Any interest more than 3 years after DOD, then must be discounted back to DOD to determine how much can be deducted
 - ▶ Determine when decedent's guarantee of debt is deductible
 - ▶ May disallow any deduction for interest
 - ▶ Can deduct expenses actually and necessarily occurred and necessary in admin of estate
 - ▶ Regs give 11 factors to determine if actually and necessarily occurred
 - ▶ Two of factors "self-created illiquidity" and if lender is a beneficiary or borrowing from family entity
- ▶ Appraisal requirement for certain claims

Rev. Proc. 2022-32: Five Year Portability Extension

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- ▶ To reduce PLR requests, the IRS updated the simplified method in Rev. Proc. 2017-34.
- ▶ Extended deadline for portability election from 2 to 5 years when 706 not otherwise required
- ▶ Under the simplified method in Rev. Proc. 2022-32, the executor makes the portability election by filing on behalf of the estate a complete and properly prepared (in accordance with Regs. Sec. 20.2010-2(a)(7)) Form 706, *United States Estate (and Generation-Skipping Transfer) Tax Return*, on or before the fifth anniversary of the decedent's date of death. The executor must state at the top of the Form 706 that it is "filed pursuant to Rev. Proc. 2022-32 to elect portability under Sec. 2010(c)(5)(A)."
- ▶ To be eligible to use the simplified method:
 - ▶ the decedent must have been a citizen or resident of the United States on the date of death;
 - ▶ the executor must not have been otherwise required to file an estate tax return under Sec. 6018(a), as determined based on the value of the gross estate and any adjusted taxable gifts; and
 - ▶ The executor also must not have timely filed the estate tax return within nine months after the decedent's date of death or extended filing deadline.

IRS Notice 2022-22: Updated Actuarial Tables

- ▶ Assign higher value to life interest, lower to remainder interest
- ▶ IRS is three years late with revision to the tables
- ▶ IRS relies on data from the CDC, so delayed in getting data due to pandemic
- ▶ New mortality tables will apply once regulations are finalized, which they aren't yet
- ▶ IRS confirmed you can use the new tables now even though not final

ABA & Industry ESG Letter

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- ▶ Background:
 - ▶ OCC & FDIC proposed climate risk management principles
 - ▶ SEC proposed ESG disclosure requirements for public companies and investment management industry
 - ▶ FHFA added resilience to climate risk to institutional assessments
- ▶ June 23, 2022 American Bankers Ass'n & 51 states released letter to Federal Reserve, OCC, FDIC, FHFA, SEC and CFTC proposing principles to use when developing guidance and regulations on ESG investing
- ▶ Industry Letter genesis is grown concern that ESG regulations will impede financial services ability to provide products and services

Industry ESG Letter's Five Principles

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1. Banks should be free to (i) lend to, invest in, and generally do business with any entity or activity that is legal without government interference and (ii) choose not to engage in lending, investing or other interactions so long as they do not violate fair lending or other antidiscrimination laws.
2. ESG risks should not be considered separate categories of risk but, rather, viewed as part of the existing risk categories/strips used by banking organizations.
3. Disclosure requirements should remain tied to the concept of materiality and focused on what is necessary to inform business and risk management decisions.
4. Regulatory efforts to ensure safety and soundness should be appropriately applied and not used intentionally or unintentionally to reallocate credit or carry out extra-prudential goals.
5. The federal financial regulators should work together closely to ensure that they use consistent definitions, do not exceed their statutory mandates, and avoid unintended consequences.

The Corporate Transparency Act

The Corporate Transparency Act

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- ▶ Part of National Defense Authorization Act
- ▶ US is being viewed by other countries as tax haven
- ▶ Two sets of Regulations
 - ▶ Final Regs:
 - ▶ Defines “Reporting Companies” and requires them to file report of Beneficial Ownership Information reports (BOI reports) with a yet-to-be-organized government agency overseen by the Financial Crimes Enforcement Network (FinCEN).
 - ▶ Defines “Beneficial Owners” as person who directly or indirectly exercises substantial control over the company or who owns 25% or more of interest of reporting company.
 - ▶ Express exclusions for companies under close federal regulation, large operating companies, inactive companies, charitable entities.
 - ▶ Person to directly or indirectly exercises substantial control over the company or owns 25.
 - ▶ Note Trusts are not “Reporting Companies”.
 - ▶ Proposed Regs pending on other topics.

What is a Reporting Company?

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- ▶ Any LLC, LP, LLP, PC, Delaware Business Trust (including foreign entitles) registered with Sectary of State or tribal area unless excepted from reporting
- ▶ 23 Exempted Entitles, which are generally heavily regulated entities including:
 - ▶ Nonprofits
 - ▶ Publicly traded companies
 - ▶ Entities that are already required to file reports with FinCEN
 - ▶ Entities that are already required to register with the SEC
 - ▶ Dormant companies that don't own any assets
 - ▶ Domestic companies with 20+ employees and \$5 million or more in annual gross revenue (aka Large Operating Companies)

Large Operating Company Exception

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- ▶ One relevant exception is large operating company
- ▶ Defined as company with:
 - ▶ Physical principal presence in US
 - ▶ \$5m of gross revenue in last two years return, and income can derive from subsidiaries
 - ▶ Must have 20 full time employees as defined under ACA (30 hrs week, 130 hrs month), and employees from subsidiary company don't count
- ▶ Large Operating Company exemption applies to subsidiaries as long as they are wholly owned
- ▶ Note:
 - ▶ Holding companies may meet revenue but not employee requirement
 - ▶ Annual review if close to \$5m re whether take revenue/expenses

Who is a “Beneficial Owner”?

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- ▶ Focus is just as much on where money flows as who is in control
- ▶ Categories of Beneficial Owners
 - ▶ 1) Individual who directly or indirect owns 25% or more of interest in reporting company
 - ▶ Regs address Class A/B interests and safe harbor process
 - ▶ No family attribution, instead individual by individual
 - ▶ Trust could be beneficial owner
 - ▶ Indirect interest will come from Trusts via their beneficiaries
 - ▶ 2) Individual who exercises substantial control over the Reporting Company
 - ▶ Officers, Directors, Majority Voting Power
 - ▶ In Trust context, could include Trust Protector, Trust Advisor, Investment Manager
- ▶ Note: Could be one legal owners but a multiple of other beneficial owners

Must also report information on “Company Applicants”

- ▶ Applies only to companies formed after 1/1/2024
- ▶ One time reporting, once report company applicant you are done
- ▶ Has implications for law firms, possibly family offices
- ▶ Regs say two persons must report:
 - ▶ Person who directly files (paralegal)
 - ▶ Person primarily responsible for directing the filing (atty)
- ▶ Atty, paralegal/admin should get FINCEN Identifier
 - ▶ Provide to clients to include in BOI report

Trust as “Beneficial Owner”

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- ▶ Trust constitutes beneficial owner when:
 - ▶ Owns 25% or more of reporting company
 - ▶ Exercise substantial control
- ▶ Trust beneficiaries are also considered beneficial owners when:
 - ▶ Sole permissible recipient of income or principal or can demand withdrawal of substantially all trust assts
 - ▶ Grantor who can revoke or withdraw substantially all of trust assts
- ▶ Trust Protectors, Trust Advisors, Investment Advisors may also be beneficial owners if they exercise substantial control
- ▶ What are the Trustee’s responsibilities?
 - ▶ Trust itself isn’t reporting company
 - ▶ Obligation to file BOI report files on reporting company
 - ▶ But Trustee may have relevant info only it knows, and a residual obligation

Updating Changes in Beneficial Ownership Interest

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- ▶ Reporting Company must update beneficial ownership interest within 30 days of any change
- ▶ Again, only Trustee may know of change in indirect beneficial ownership or substantial control

What Information Must be Provided?

- ▶ Reporting entity must submit:
 - ▶ Full name of the entity
 - ▶ The entity's trade names or DBA (doing business as) names
 - ▶ Street address of the business
 - ▶ Jurisdiction of company formation
 - ▶ Taxpayer Identification Number or Employer Identification Number (EIN)
- ▶ Reporting entity's beneficial owners & company applicants must submit:
 - ▶ Full legal name
 - ▶ Date of birth
 - ▶ Current address
 - ▶ Active government-issued ID, driver's license, or passport

Penalties?

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▶ Unlawful to:

- ▶ Willfully provide, or attempt to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document, to FinCEN in accordance with subsection (b); or
- ▶ Willfully fail to report complete or updated beneficial ownership information to FinCEN in accordance with subsection (b).

▶ Penalty for Violations:

- ▶ Civil penalty of not more than \$500 for each day that the violation continues or has not been remedied; and
- ▶ Criminal fine of not more than \$10,000, or imprisonment for not more than 2 years, or both.

What to do now?

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- ▶ Reporting requirements don't take effect until Jan 1, 2024
- ▶ Educate yourselves on rules
- ▶ Shut down inactive LLCs
- ▶ Set up new LLCs before 2024 to avoid reporting company applicants
- ▶ Establish protocol to manage the reporting requirements
 - ▶ Train staff
 - ▶ Adopt policies and procedures
 - ▶ Inventory existing Trust portfolios for beneficial ownership of reporting companies
 - ▶ Identify indirect beneficial owner trust beneficiaries or persons who exercise substantial control
 - ▶ Consider CYA letter to reporting companies confirming their obligation and providing relevant beneficial ownership information to them

Digital Assets

Hot Digital Asset Topics

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- ▶ Federal Regulation
- ▶ Crypto-Custodian Bankruptcy
- ▶ Valuation Issues
- ▶ Fiduciary Access-RUFADDA

Federal Regulation of Digital Assets

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- ▶ Security or commodity?
 - ▶ Security – Securities & Exchange Commission regulation
 - ▶ Commodity – Commodity Futures Trading Commission regulation
- ▶ Joint Action of FDIC, FRB, and OCC
 - ▶ Goal is to create interagency policies
 - ▶ Early goal – common vocabulary of digital assets
- ▶ OCC letters re: permitting banks to custody cryptocurrency
- ▶ Infrastructure Investment and Jobs Act (Nov. 15, 2021)
 - ▶ Expanded def'n of broker – probably includes crypto, digital wallet providers
- ▶ Executive Orders & proposed federal legislation

Biden Administration Initiatives

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- ▶ Executive Order No. 14067 on 3/9/2022 “Ensuring Responsible Development of Digital Assets” set six national policy priorities for digital assets:
 - ▶ consumer and investor protection
 - ▶ financial stability
 - ▶ illicit finance
 - ▶ U.S. leadership in the global financial system and economic competitiveness
 - ▶ financial inclusion, and responsible innovation
- ▶ Biden’s FY 2023 budget to Congress proposed \$10.9 billion (over 10 years) of new taxes on digital assets.

OCC Guidance on Custody of Cryptocurrency

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- ▶ Interpretive Letter 1170: national banks and federal thrifts may custody cryptocurrencies for customers
- ▶ “OCC concludes that providing cryptocurrency custody services, including holding unique cryptographic keys associated with cryptocurrency, is a modern form of traditional bank activities related to custody services. Crypto custody services may extend beyond passively holding ‘keys.’”
- ▶ Banks may use subcustodian to hold assets

Crypto-Custodian Bankruptcies

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- Coinbase Global, Inc. May 10, 2022 1st QTR SEC Report
- Voyager Digital, FTX, Celsius & BlockFi Bankruptcy Filings
- Investor Status in the Event of Bankruptcy Filings?
 - No federal regulations requiring that customer & corporate assets be kept separately
 - No FDIC coverage (\$250K)
 - No SIPC
- May depend on state law
 - NY State Law Crypto Custodians have no equitable interest in investors assets
 - Other States Silent
 - CA Gov Newsom Executor Order 5/7/2022 to develop regs

Digital Assets Valuation

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- ▶ Estate of Matthew Mellon
 - ▶ Died in 2018 unexpectedly
 - ▶ Case pending in tax court concerning crypto currency
 - ▶ Matthew was brand ambassador for Ripple (XRP) crypto
 - ▶ First case of an estate with major crypto holding
 - ▶ Estate went to Empire to ask for valuation, valuation was 40% discount for illiquidity
 - ▶ Now a fight as to whether discount is appropriate
 - ▶ Estate is arguing that discount should be greater than 40% because of Matthew's restrictions
 - ▶ IRS saying there is a market and should use FMV w/o discount
- ▶ IRS Notice 2014-21 addresses tax treatment of transactions using convertible virtual currencies and confirms that, for federal tax purposes, virtual currency is treated as property.

Revised Uniform Fiduciary Access to Digital Assets Act (RUFADDA)

- ▶ The ULC goes back drawing board, resulting in the 2015 RUFADAA, greatly reducing the authority of an executor to access digital assets.
 - ▶ ULA RUFADAA Goals:
 - ▶ 1) Grant fiduciaries legal authority to manage digital assets and electronic communications in the same way they manage tangible assets and financial accounts, to the extent possible.
 - ▶ 2) Grant custodians of digital assets and electronic communications legal authority to deal with the fiduciaries of their users, while respecting the user's reasonable expectation of privacy for personal communications.
- ** The general goal of the Act is to facilitate fiduciary access and custodian disclosure while respecting the privacy and intent of the user

Under RUFADDA:

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- ▶ Fiduciaries:
 - ▶ no longer have authority over the contents of electronic communications (private email, tweets, chats), unless the user explicitly consented to disclosure; and
 - ▶ can access to other types of digital assets upon petition the court with explanation as to why the asset is needed to administer the estate.
- ▶ Custodians may:
 - ▶ request court orders;
 - ▶ limit their compliance by providing access only to assets that are “reasonably necessary” for wrapping up the estate;
 - ▶ charge fees to comply with requests for access;
 - ▶ refuse unduly burdensome requests; and
 - ▶ may not provide access to deleted assets or joint accounts.

Who's Enacted RUFADDA?

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- ▶ 48 States & Virgin Islands have enacted some law on digital assets
- ▶ 46 States have adopted RUFADAA in some form
 - ▶ Delaware has enacted UFADAA
 - ▶ Massachusetts & Oklahoma has legislation based on RUFADAA pending

Fiduciary Case Law Updates

Private Letter Ruling 2022-06008

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- ▶ Family modified trust to add formula general power of appoint up to extent would not cause payment of federal estate tax
- ▶ Family requested PLR
- ▶ IRS said GPOA would not cause to lose GST exempt status because it doesn't extend time of vesting or benefits paid to younger under D safe harbor
- ▶ Only formula amount will be included in beneficiary's estate, not all trust assets
- ▶ Takeaway: Don't use this formula in PLR as template, add maximum amount that can be applied considering availability of marital or charitable deduction
 - ▶ Kerrs v Commissioner
 - ▶ Cover which assets are subject to GPOA

United States v. Allison (E.D. Cal.)

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- ▶ Real focus was on whether cashier's check was includable in decedent's estate
 - ▶ Estate would be taxed if includable and Estate was insolvent
 - ▶ This issue turned on state law as to completed gift and it did under CA law, which required donative intent, delivery and acceptance
- ▶ Normally liability falls on Executor of Estate under 3731 b Priorities Statute, but same liability can fall on Trustee of Revocable Trust
- ▶ Trustee held to be personally liable under Section 6324(a)(2) (but not 3713)
 - ▶ 6324 imposes personal transferee liability on persons who receive or "are in possession" of property included in decedent's taxable estate at time of death
 - ▶ Trustee was holding property includable under 2038 at time of death

Sander v. Commissioner (Tax Ct. 2022-104)

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- ▶ Mrs. Sander put all asset into Rev Trust before she died
- ▶ Daughter became sole Trustee after Mrs. Sander's death in 2016,
- ▶ Daughter also named as persona rep but no estate raised because no probate assets
- ▶ 20 days after death notice of income tax deficiencies for 2013 and 2014
 - ▶ Challenged them as daughter as trustee of rev trust
 - ▶ IRS said only a personal rep can stand in for decedent income tax deficiency
 - ▶ IRS procedure say challenge can be brought by person against who assessed or fiduciary who has control
 - ▶ State law controls
 - ▶ Normally under state law only duly appointed personal rep to act on behalf of decedent
 - ▶ Tax Court deferred ruling to 6 months until personal rep could be appointed and caption amended to reflect standing
 - ▶ Highlights that need change in code to allow any fiduciary to pursue income tax claims
- ▶ Takeaway: Trustee of decedent's living trust lacks authority to act for decedent in deficiency action

Matter of Najjar (NY)

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- ▶ Issue: How much delay is unreasonable delay in liquidating stock position.
- ▶ Trust created 1985 died when income beneficiary died in 2014 and had a 14% concentration of Exxon stock.
- ▶ One individual remainderman was the Trustee and after death:
 - ▶ On 11/10 beneficiary asked for liquidation
 - ▶ On 12/3 liquidation stated, liquidated 37 days later on 12/17
- ▶ During 37-day period stock declined value \$45k
- ▶ NY court held no negligence and in times of difficult markets trustees should receive leniency
- ▶ Takeaway: Prudent Investor Rule applies which doesn't judge with benefit of hindsight but rather whether conduct was reasonable at the time made
 - ▶ Note: This was individual trustee not a professional fiduciary who is held to a higher standard of care under the Prudent Investor Rule

Estate of Worrall v. JP Morgan (KY)

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- ▶ Held: Trustee breached duties for failure to follow statutory procedures to settle accounts.
- ▶ Trust under Will created 1958 to hold one stock position fbo daughter Phillis, and directed the distribution of the stock in kind to Phillis' Estate upon her death. Phillis died in 2018 survived by son who was named Executor and sole beneficiary of her Estate.
- ▶ Son delayed in seeking his appointment as Executor and sued to remove Trustee: however the Son requested distribution in-kind (per the Will) and provided account numbers for transfer.
- ▶ Due to the delay, the Trustee filed Motions to liquidate the Trust assets to pay fees on the basis that the Executor was refusing to sign an RRI and the son failed to appear at the Motion on the liquidation so the trial court ordered liquidation, the deposit of the proceeds (\$830,000) to a receiver pending son's appointment, and that JP Morgan be released.
- ▶ On appeal, the Kentucky Supreme Court held that the Order the trustee procured and relied on was not protective because the Trustee misled the lower court by failing to disclose that the son had asked for distribution in kind and the Trustee had failed to follow the KY UTC Procedures.
- ▶ Trustee's form agreement included indemnification and KY state says that no trustee shall request that a beneficiary indemnify against loss
 - ▶ Under Kentucky Section 817 UTC, which contemplates the release of a trustee upon termination with 45 days of statutory notice without an indemnification, and an indemnification is only allowed where a beneficiary objects to an information accounting and the matter is then settled.
- ▶ Kentucky appellate court said including the indemnification was a major breach and remanded it back to the trial court for damages.
- ▶ Takeaway: Know and follow applicable state law

Matter of NTB Bank (Stark Case) (NY)

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- ▶ Perpetual charitable trust with two charity distributees.
- ▶ One distributee lost the charitable status but it took the trustee three years to realize that it lost status, and in that period distributed \$12,000 to the disqualified charity.
- ▶ Trustee hired an attorney to seek return of funds, which was successful.
- ▶ AG compelled Trustee to file an accounting which reflected legal fees as follows:
 - ▶ \$1,000 to recover from the disqualified charity, which was not contested
 - ▶ \$4,000 for the accounting, which were not contested.
 - ▶ \$15,000 to try to reform the trust to deal with charity's exempt status so that it would not all go to the other charity, which was challenged.
- ▶ The court held that the Trust instrument was clear on the settlor's intent that one charity losing status would result in all distributions to the other, and surcharged the Trustee for the \$15,000
- ▶ Takeaway: Read and follow the Trust.

Trust u/a of Richard Wells (PA)

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- ▶ Bank president created perpetual charitable trust for VMI with his bank as Trustee.
- ▶ VMI sought to terminate the trust and add to its endowment.
- ▶ Court rejected VMI's attempt to break trust because the settlor had clearly wanted a perpetual trust and no evidence of excessive fees or other trust inefficiencies that would merit terminating the trust.
- ▶ Note: Fees were consistent with market rates.
- ▶ Takeaway: Charities shouldn't be greedy, and the court will follow the Settlor's intent and respect the Trust as long as fees are efficient and reasonable.

In re: Trust Established under Agreement of Sarah Mellon Scaife (PA.)

- ▶ Issue: whether the Trustees had breached their fiduciary duty to one of beneficiaries Jennie K. Scaife by not creating a separate trust for her benefit.
- ▶ Ms. Scaife's Estate filed a series of motions to compel, among other things, documents concerning the legal services provided to the Trust.
- ▶ The Orphans' Court ultimately ordered the production of various documents that were being withheld from production based on attorney-client privilege or the work product doctrine.
- ▶ Trustees appealed.
- ▶ The Appellants focused their arguments on the overall lack of a legal or statutory basis for a fiduciary exception in Pennsylvania and that most American jurisdictions do not recognize a fiduciary exception.
- ▶ The Superior Court noted that its prior ruling in the case of In re Estate of McAleer, which held that a trustee has a duty to share complete information concerning the administration of a trust with beneficiaries and would not condition application of the fiduciary exception on whether the trust paid counsel fees because the trustee's duty to disclose documents concerning trust management include the opinions of legal counsel hired to assist in administration of the trust.
- ▶ Takeaway: Know if your state applies the fiduciary exception, and where it does document the engagement and communication accordingly.

Benton Case (Missouri)

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- ▶ Heirs of artist Thomas Hart Benton sued bank Trustee for breach of duty and, allegedly, tried to compel resignation by a press campaign.
- ▶ Trustee alleged Benton's heirs made false accusations to media outlets concerning the lawsuit, including to the Wall Street Journal, regarding alleged failed to keep proper records, the sale of Benton artworks below their market value, improper self-dealing and in general mismanaged the Benton estate.
- ▶ The Trustee to file its own action in federal court accusing the heirs of civil racketeering under the Racketeer Influenced and Corrupt Organizations Act, or RICO.
- ▶ Chief U.S. District Judge Beth Phillips that Trustee failed to meet the elements of a racketeering case, saying its lawsuit was at bottom a malicious prosecution case.
- ▶ Takeaway: Don't sue your beneficiaries or do so with discretion.

Discretionary Distribution Case

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- ▶ Trust allowed independent trustee to distribute principal from marital trust to spouse for “any purpose with no ascertainable standard.”
- ▶ Trustee distributed 1.2 billion dollars to the spouse who already had 1.2 billion dollars of his own.
- ▶ Remainderman sued trustee and court dismissed on demure holding that the any purpose standard avoids legal scrutiny.
- ▶ However, that is not the standard, and on appeal the appellate court remanded for a finding by the lower court as to whether the fraud, bad faith, or in abuse of power.
- ▶ Take away: No discretion in the hands of trustee that is not reviewable by courts as a matter of equity.

Forfeiture Clauses

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- ▶ Cases where beneficiaries clearly intended to challenge the Trust but “mucked it up” and didn’t follow the proper procedures
- ▶ McDill Trust: Wyoming court held that trust contest dismissed on procedure grounds still triggers forfeiture clause
 - ▶ Phyllis McDill amended trust to modify gift of Cheyenne house to son Thomas, revoked that amendment, and then amended to add a no contest provision.
 - ▶ After Phyllis death the Trustee gave statutory notice on December 31 that an heir has 120 days to commence a judicial proceeding to contest the validity of the Trust
 - ▶ On May 15 an action challenging the Trust for duress and undue influence was lodged in Texas, which was dismissed
 - ▶ The Trustee was successful in enforcing the no context provision because procedural dismissal still triggers forfeiture clause
- ▶ Mary case. Trustee gave notice of 120 day limit to challenge a trust. On day 230 the beneficiary challenged the trust. The Court held that the challenge time barred challenge was still a challenge even though never and forfeiture clause invoked

Questions:

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