

# Retirement Ruminations Of A Fiduciary Litigator: What Are Recurring Problems For A Fiduciary And How You Can Avoid Them

**Sean Murphy**

**Retired Partner**

McGuireWoods LLP

3605 Orlando Place

Alexandria, VA 22305

(703) 864-3521

[sfmurphy774@gmail.com](mailto:sfmurphy774@gmail.com)



# Today's Topics

- Inadequate Intake and Review of
  - New Trust Accounts
  - Inherited Accounts
- Failure to Address Changed Circumstances
- Institutional Challenges
- Ineffective Communication
- Lack of Documentation
- Lack of Disclosure
- Damaging documents
- Working With Co-Trustees
- Investment Diversification
- Trust Termination
- ADR Alternatives

# Key Factors To Growth In Fiduciary Litigation



- Greater Transfers of Wealth
- Increased Concentration of Wealth
- Trust and Estate Administration Has Become More Complex and More Demanding
- Divorce Rate Has Not Significantly Decreased
- More Aggressive Plaintiffs' Attorneys
- Significant Increase in Fiduciary Class Actions
- Many Sources on Financial Planning and Investment Readily Available, Making Everyone an Instant Expert on Investments

# Trustee's Fiduciary Duties In Administering A Trust

- Duty to Administer Trust By its Terms
- Duty of Loyalty
- Duty to Avoid Conflict of Interests
- Duty to Give Full Disclosure
- Duty to Give Notices
- Duty to Furnish Information
- Duty to Communicate With the Beneficiaries
- Duty to Invest/Prudent Investor Rule
- Duty to Exercise Reasonable Care and Skill
- Duty to Keep and Render Accounts
- Duty to Enforce and Defend Claims
- Duty to Preserve Trust Property and Keep That Property Separate
- Duty of Impartiality
- Duty Not to Delegate

# Inadequate Screening Of New Business Opportunities

- Two Major Concerns
  - New Trust Accounts
  - Inherited Accounts through Mergers and Acquisitions



# Inadequate Screening of New Business Opportunities

## **MUST LOOK FOR THESE POSSIBLE ISSUES:**

- **Ambiguous Trust Terms**
  - Beneficiary disputes
  - Costly litigation
  - Tax issues
  - Restricts ability to efficiently administer trust
- **Problematic Trust Assets**
  - Lack of sufficient liquidity to maintain unique asset or real estate
  - Often ill equipped to handle unique assets
  - Over concentration in one trust asset
- **Inexperienced or Untrained Co-Trustees**
  - Co-Trustee vested with powers inconsistent with corporate fiduciary's policies and procedures
  - Co-Trustee is also a trust beneficiary
  - Co-Trustee lacks fiduciary training or experience

# Inadequate Screening Of New Business Opportunities

## MITIGATING RISKS

- **Review of Trust Instrument to Identify Problems that Need Fixing**
  - A. Ambiguities / Need for Modification
  - B. Should Look At, Or For, These Provisions:
    1. Executor or Trustee Restrictions
      - Are there limits on their fiduciary powers?
    2. Trustee Removal Provisions
      - How can trustee be replaced?
      - Who can replace trustee?
    3. Exculpatory Clauses
    4. Executor or Trustee Fees / Commissions
    5. Waivers of Duties / Bond Requirement
    6. Arbitration/Mediation Clauses
    7. Choice of Law Provision



# Inadequate Screening Of New Business Opportunities

## **OTHER REVIEWS/QUESTIONS TO HELP MITIGATE RISKS**

- Are There Unique Assets That Will Require Special Handling?
  - Real estate
  - Tangible Personal Property
  - Closely-held Business Interests (Partnership or LLC)
  - Oil & Gas or Mineral Interests
- Review liquidity requirements and portfolio allocation
- Review and evaluate appointment documents (Order, Release of Predecessor Trustee)
- Discussion of expectations with Co-Trustee/Grantor/Beneficiaries



# Documenting Your Work To Mitigate Risk

- Comply With and Follow Company's Intake Procedures and Risk Analysis
  - Document Your Compliance With Them
- If Accept or Decline Trustee Position, Document What Was Done and Why
- Document Discussions and Communications With Grantor and Beneficiaries
- Document Discussions With Any Advisors or Third Parties
- Document Transfers of Trust Assets

# Potential Problems Due To Merger/Acquisition Or Change In Trustee

## POSSIBLE PROBLEM: Inheriting Potential Trust Liabilities

- Mergers
- Acquisitions
- Trustee Replacement or Resignation



# Risk Assessment After Merger/Acquisition Or Change In Trustee

- **Risks of Inherited Liabilities**

- Did the former trustee have adequate records?
- Did the former trustee properly administer the trust pursuant to its terms?
- Did the former trustee file appropriate tax returns?
- If problems are identified, what should be done to address these problems?
  - Assistance of outside counsel necessary?
  - Disclosure
  - Releases
  - Court Order

# Risk Review After Merger/Acquisition Or Change In Trustee

## **CHECKLIST FOR POST-MERGER/ACQUISITION TRUST REVIEW**

**Establish Review Threshold Amounts and Significant Risk Factors. Then:**

- Review the trust documents
- Review all trust assets including miscellaneous assets
- Review any pending litigation
- Review all pending audits and disputes with IRS
- Review all income, gift and estate tax returns for trusts and estates
- Review all recent bank examiners' reports
- Determine all possible threats from beneficiaries and others

# Operating On Auto-Pilot Can Lead To Administration Problems

**PROBLEM:** Failure to address changed circumstances

Operating on auto-pilot leads to:

- Improper and even unauthorized distributions
- Failure to meet the needs of the beneficiaries
- Insufficient liquidity
- Beneficiary disputes
- Litigation
- Adverse tax consequences



# Failure To Respond Effectively To Institutional Challenges And Changes Creates Problems

Institutional challenges and changes lead to more of these problems if not address properly and promptly.

## **Examples:**

- Change of relationship manager
- Trust officer turnover
- Changes in organizational structure
- Increased geographic footprint
- Growth in trusts to administer due to merger/acquisition

# Favoring Income Beneficiaries and Ignoring Remainder Beneficiaries Leads To Trouble

**PROBLEM:** Trustee favors or focuses on income beneficiary and ignores remainder beneficiaries

- Breach of the duty of impartiality to favor one group over the other
- Most often it is remainder beneficiaries who sue Trustee not the income beneficiary

## **SOLUTIONS:**

- Trustee should treat them equally where possible
- Trustee should send statements and disclosures to remaindermen
- Trustee should alert remainder beneficiaries to significant changes and developments involving trust
- Trustee should copy both current and remainder beneficiaries on significant correspondence

# Do Not Let Grantor Or Beneficiaries Control Trustee's Decisions In Administering Trust

## **PROBLEM:** Treating the Grantor and the Beneficiaries as Clients

- Trustee has non-delegable fiduciary duties
- Trustee cannot let the Grantor or the Beneficiaries dictate or control trustee's decisions
- Trustee must control disclosure and investment decisions
- Trustee can consider the requests of Grantor/Beneficiaries but cannot blindly follow them
- Trustee must always be mindful of the interests of remainder beneficiaries



# Poor Or Non-Existent Trustee Communications With The Beneficiaries

**PROBLEM:** Beneficiary Complaints about Lack of Timely and Responsive Communications (Most common beneficiary complaint)

## Trust Administration Relationship With Beneficiaries

- To Avoid Problems, Trustee Should Communicate Regularly With Beneficiaries
  - Respond Promptly to Beneficiary E-Mails, Letters and Telephone Calls
  - Have Periodic Meetings With Beneficiaries
  - Provide Status Reports
  - Send Annual Statements
  - Provide Regular Accountings
  - Provide Prompt Disclosure and Description of Any Significant Event

# Trust Recordkeeping And Documentation

## **Must Maintain Good Records**

- Need to Provide Adequate Accountings
- Need to Explain/Defend Prior Decisions or Distributions



# Lack Of Complete And Adequate Trust Records

**PROBLEM:** Missing or Incomplete Trust Records Often Leads to Trustee Liability, Bank Pay and Trustee Surcharge

Trustee has a duty to keep complete and accurate records.

- Failure to do so is a per se breach of trust.

A lack of good trust records also causes other problems:

- Inability to justify decisions after the fact
- Allegations of unfair treatment of beneficiaries
- Inability to prove compliance with applicable law and trust requirements

Failing to document prior communications, changes and decisions can also lead to costly mistakes in administration of the trust.

# Inaccurate and Incomplete Trust Records Lead To Trustee Liability

## EXAMPLES:

The Trustee cannot argue that its own inability to preserve its own records (or those of its predecessors) for [these] Trusts of such high value forecloses the ability of the Objectants to challenge how those Trusts were administered. This argument is contrary to well-settled case law that a trustee must maintain accurate records. The records were insufficient. [T]he Portfolio manager testified that “there was very little paperwork that came with the trusts” when he inherited them in 1997. Also, many of the internal review records that were present were clearly never completed in the first instance, with entire pages left blank and unanswered.

*Matter of JP Morgan Chase Bank, N.A. (Strong)*, 981 N.Y.S.2d 636; 2013 N.Y. Misc. LEXIS 5447 (2013)

The Bank has produced inaccurate and incomplete records for the Trust and has not produced accounting records prior to 1998. These accounting deficiencies fail to track the changes in the value in the Trust over time and do not fully identify the costs associated with the [investment]. The Bank’s records do not justify the fees charged and/or refunded.

The Bank owed a fiduciary duty to maintain proper Trust records. A trustee is bound to keep clear, distinct, and accurate accounts. The Bank breached its fiduciary duty to maintain proper trust records as demonstrated by its inability to produce accounting information for the period of October 11, 1955 to January 1, 1998. While the Bank produced some records for that period, there is little evidence of the funds received by the Bank during that time and no evidence of amounts paid to beneficiaries or for other items. The Bank’s accounting is incomplete and inadequate.

*In re Burford*, 2012 WL 6777389 (Trial Order) (Okla. Dist. Ct. Oct. 9, 2012)

# Trustee Obligation To Provide Certain Disclosures/Information To Beneficiaries

## PROBLEM: Failure to Provide Adequate Disclosures/Information to Trust Beneficiaries

- Failure to disclose or provide material information subjects trustee to closer scrutiny with the benefit of hindsight
- Certain disclosures are required under the Uniform Trust Code:
  - Must receive notice of a new trustee
  - Must receive notice that a trust has become irrevocable
  - Must receive advance notice of a change in the trustee's compensation
- But the trust instrument can **waive** disclosure requirements
  - E.g., Can waive requirement for trustee to provide an annual report

# Benefit Of Trustee Providing Disclosures/Information To Beneficiaries

- Effect of Proper/Required Disclosures
  - Disclosure starts the clock running on statute of limitations periods.
  - Under the Uniform Trust Code § 1005, a trustee may foreclose possible claims and shorten the statute of limitations periods.
  - To do that, trustee must send a notice to the beneficiaries that adequately discloses the existence of a potential claim for breach of trust and informs the beneficiary of the time period for making a claim.
  - A proper notice/disclosure can combat hindsight allegations that the trustee's actions were improper.

# Damaging Documents: Emails That Can And Do Cause Problems

## PROBLEM: Prior emails that can lead to liability:

- Bank paid all net income from trust to only one of 17 beneficiaries from 1970 onward and ignored means test requirement of trust for income distributions. In 1998, new trust officer assigned to administer the trust reviewed how the bank had handled the issue of income distribution from the trust.
- This trust officer described this situation in an internal memorandum as

**“a debacle ... well documented in the file”**

but then said

**“It is best to leave this issue as is.”**

- Another example: Former Chicago Public Schools Chief on taking kickbacks:

**“I have tuition to pay and casinos to visit.”**



# Working With Co-Trustees

**PROBLEM:** Many trust instruments name a family member or other individual, who may be a trust beneficiary, as a co-trustee but who is not an experienced or knowledgeable fiduciary.

- Co-trustees need to communicate and operate together.
  - Can the trustees act by majority rule, or must the trustees act unanimously? How does this affect investment decisions?
  - Are there tiebreaker provisions for resolving co-trustee disputes?
  - What if beneficiaries prefer the individual co-trustee's investment philosophy?
  - Can a co-trustee or successor trustee review discussions with outside counsel?



## Working With Co-Trustees (Cont'd.)

- State law often provides tools to mitigate risks of co-trustee disputes.
  - State law provides several tools to modify irrevocable trusts
  - Delegations, consent agreements (NJSAs), directed trusteeships
  - Planning is important (avoiding issues on the front end)

# Investment Diversification: A Litigation Magnet

- Uniform Prudent Investor Act (“UPIA”) – 1994
  - UPIA Prudent Investor Rule – Section 2(a)
    - [a] trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.
  - UPIA Diversification Requirement – Section 3
    - [a] trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

# Investment Diversification: A Litigation Magnet

- **Other Sources That Require Asset Diversification:**
  - Internal Policies That Limit Asset Concentration
  - Bank Regulatory Requirements
    - Federal and State Bank Regulators/Auditors may question or challenge an asset holding of over 10%.

# Investment Diversification: A Litigation Magnet

## Possible Exceptions to Rule:

1. Retention of appreciated assets to defer or minimize capital gains
  - For example, if a tax-sensitive trust owns an underdiversified block of low-basis securities, the tax costs of recognizing the gain **may** outweigh the advantages of diversifying the holding.
  - *See* Uniform Prudent Investment Act, § 3, comment.
2. Inability to obtain full value in an asset sale (i.e., existing market conditions)

# Investment Diversification: A Litigation Magnet

## **Possible Exceptions to Rule (con't.):**

3. Ownership of stock in or to retain a family or closely held business
  - The wish to retain a family business is another situation in which the purposes of the trust sometimes override the conventional duty to diversify.
4. To invest in a type of asset that is thought to be a sound investment such as real estate
5. To have the trust hold a life insurance policy

# Investment Diversification: A Litigation Magnet

## **Waiver of the Prudent Investment Rule:**

- The Grantor can waive the diversification requirement by including an express waiver in the trust agreement. The UPIA provides that:  

[t]he prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in a reasonable reliance on the provisions of the trust.

Uniform Prudent Investor Act, § 8.

# Investment Diversification: A Litigation Magnet

## Trustee In Trouble For Failure to Diversify

### Example No. 1:

However, testimony demonstrated a pattern of negligence within the institution requiring no special or additional evidence to identify. On numerous occasions, the Trustee's employees reviewed the highly concentrated holdings of the subject Trusts, recognized the need to diversify, and then failed to follow any cohesive plan for divestiture. Any sales of [the] stock that had occurred were simply due to the Trustee "needing cash to pay expenses." The evidence demonstrates that the Trustee did not meet its own internal guidelines, and when the sporadic and cursory internal reviews of the Trust holdings did occur, the Trustee did not act upon its own recommendations.

# Investment Diversification: A Litigation Magnet

## Example No. 2:

The foregoing proof demonstrates that at no time during the administration of the trust did the Bank formulate any investment plan, let alone establish a plan to diversify its concentration of [this stock]. The Bank acted contrary to its internal policies to restrict its holding of any one stock to certain circumstances, none of which were presented here. The Bank failed to consider the best interests of the persons interested in the trust. The proof establishes that the Bank paid limited attention to the needs of the income beneficiary and virtually no attention to the remainder interests. The record is devoid of any proof that the Bank was proactive by assessing the volatility resulting from the concentration of [this stock] and the benefit to selling and diversifying the portfolio, obtaining [Beneficiary's] written consent to retaining [the] stock, ascertaining the tax consequences, if any, to [Beneficiary] and determining whether the concentration jeopardized the remainder interest. Notably absent here is any proof that the Bank considered the increased risk to the trust portfolio by its continued concentration of one security in the portfolio. The record here establishes that the Bank: 1) failed to undertake a formal analysis of the trust by creating an investment plan; and 2) failed to conduct more than a superficial review of its holding of [these] shares and consider alternative investments.



# Investment Diversification: A Litigation Magnet

## Example No. 3:

Bank trustee maintained a concentrated position in its own stock which at times reached 90%. Income beneficiary sued and bank trustee invoked trust retention clause that authorized it:

“To retain any securities in the same form as when received, including shares of a corporate Trustee ... even though all of such securities are not the class of investments a trustee may be permitted by law to make and to hold cash uninvested as they deem advisable or proper.”

Court ruled bank trustee could not rely on this clause to avoid its duty to diversity, holding “... that to abrogate the duty to diversify, the trust must contain specific language authorizing or directing the trustee to retain in a specific investment a larger percentage of the trust assets than would normally be prudent. The authorization to ‘retain’ here was not sufficient – it only authorized the trustee to retain its own stock – something it could not otherwise do.”

# Investment Diversification: A Litigation Magnet

## Trustee Liable for Diversifying Trust Assets

### Example No. 4:

The Retention Provision found in Article II, ¶ 2 of the Trust specifically authorizes retention of the original stockholdings, absent “unusual circumstances.” While the term “unusual circumstances” is not defined in the Trust terms, the Court finds that the Bank’s recommendation to diversify assets does not constitute an unusual circumstance. A request by an income beneficiary to increase payments is also not an unusual circumstance justifying the deviation from the intent of the Retention Provision in the Trust.

The Bank breached its fiduciary duty to comply with the terms of the Trust by selling the Trust’s ... stock in 1999. The terms of the Trust “specifically recommend that, except for unusual circumstances,” the trustees retain the stocks originally placed in the Trust, “regardless of whether or not such retention may appear to offend against what might ordinarily be considered a sound trust investment practice and the usual principles of investment diversification.” Neither [the beneficiary’s] requests for additional income, nor the Bank’s desire to diversify the Trust investments, constituted an unusual circumstance, as intended by the ... as grantors of the Trust. There was no “unusual circumstance” justifying the sale of the .... stock, nor did the Bank make an adequate inquiry or determination that an “unusual circumstance” existed.

# Investment Diversification: A Litigation Magnet

## Successful Trustee Decision Not to Diversify

[Bank] made a reasonable determination that it was in the interests of the beneficiaries not to diversify the stock. First, [Bank] considered the liquidity of stock in making its decision not to diversify. ... Several experienced trust officers from [Bank] testified that, because ... is a closely held corporation, there was no market for its stock and, as a result, it would only be possible to sell the stock at a speculative price. The stock did not attract buyers; in fact ... [the company] itself was not interested in purchasing the stock, except in small quantities at less than book value. Representatives from [Bank] held meetings with various financial advisors, including investment bankers and brokerage houses, and determined that a fair price for the stock could only be obtained via a sale of the entire company.

Additionally, [Bank] determined not to diversify upon consideration of other factors, such as the general economic situation of the trust assets, the expected tax consequences of investment decisions and the needs of the beneficiaries. [Bank] regularly reviewed the financial condition of the trusts' assets based on a variety of internal reports and audits. As to tax consequences, [Bank] assessed that the ... assets incurred a low tax cost. Compared to the high capital gains taxes that would result from a sale of the stock, [Bank] determined that the retention of the stock was the most advantageous means of maintaining the trust.

Finally, [Bank] concluded that the needs of the beneficiaries militated against diversification. The stock paid out considerable dividends such that selling the shares at a discounted price, for the sake of diversification, may have been imprudent. More importantly, there is an indication that the settlors of the trust wanted the ownership of ... to remain in the family and the trusts were used as vehicles to achieve such result. [Bank] partially based its determination not to diversify on the family nature of the corporation, a material consideration.

# Investment Diversification: Guidelines For Asset Review

- Review at Least Annually
- Consider Settlor's Intent
- Consider Bank's Own Policies/Requirements
- Consider Tax Consequences of Possible Asset Sale
- Determine Liquidity of Asset
- Determine Market Conditions for Possible Asset Sale
- Obtain Third Party Opinions/Valuations if Needed
- Consider Interests of Both Income and Remainder Beneficiaries

# Investment Diversification: Guidelines For Asset Review

## **Upon Completion of Asset Review:**

- Document Decisions/Plans
- Implement Decisions/Plans
- Communicate Decisions/Plans to Beneficiaries
  - Gives Them Knowledge of Trustee's Actions
  - Can Use These Communications to Obtain Beneficiary Acceptance and Approval
  - Starts Statute of Limitations on Possible Claims Against Trustee

# Investment Diversification: How Trustees Can Protect Themselves From Liability

- **Initial Drafting to Avoid the Problem**

- If the initial drafting is clear about grantor's intention and purpose regarding these assets, easier to avoid the problem from the beginning.
- As Court said in *Wood v. U.S. Bank, N.A.*, “fuzzy drafting can create problems.”
- While there are many approaches to drafting appropriate language, here are a few things to consider:
  - Do not rely on boilerplate language – Be specific on what should be retained in trust.
  - Specifically state trustee's duties. Waivers of duties are strictly construed.
  - If trustee only authorized to sell “for a compelling reason,” provide settlor examples of compelling reasons. State reasons the settlor wants to retain this asset.

# Investment Diversification: How Trustees Can Protect Themselves From Liability

- **Exculpatory/Exoneration Provisions in Trust:**
  - E.g., Trustee's Liability Limited to Acts of Fraud, Gross Negligence, or Willful Misconduct.
  - Not allowed or limited in certain states like New York.

# Investment Diversification: How Trustees Can Protect Themselves from Liability

## **Amend the Instrument To Authorize Retention of Specific Trustee Assets and Explicitly Waive Duty to Diversify**

- **Two Methods Trustee Can Use:**

- 1. Execute Non-Judicial Settlement Agreement**

- Interested parties “may enter into a binding non-judicial settlement agreement with respect to any matter involving a trust.” Court approval is not necessary. UTC § 111.
- Interested persons are persons whose consent would be required in order to achieve a binding settlement if Court had to approve the settlement.
- The representation provisions apply, thereby making it possible to bind minor and unborn beneficiaries to a settlement agreement without a court proceeding.
- A nonjudicial settlement is valid only if:
  - » It does not violate a material purpose of the trust; and
  - » Includes terms that the court could properly approve.



# Investment Diversification: How Trustees Can Protect Themselves From Liability

## 2. Court Actions to Modify Trust

- With consent of settlor and all beneficiaries?
  - a) Determinative court standards will vary depending on who participates and consents.
  - b) To Further the Purposes of the Trust.
    - » Modification permissible if “because of circumstances not anticipated by the settlor, modification... will further the purposes of the trust.” UTC § 412(a).
  - c) Correcting Mistakes.
    - » “May reform the terms of a trust, even if unambiguous, to conform the terms to the settlor’s intention if it is proved by clear and convincing evidence that both the settlor’s intent and the terms of the trust were affected by a mistake of law or fact.” UTC § 415.

# Investment Diversification: How Trustees Can Protect Themselves From Liability

- **Agreement of Beneficiaries.** All beneficiaries sign a written agreement or letter that resolves any diversification issue or question.
  - Can all potential beneficiaries be found and do they all consent?
  - Is there virtual representation in governing state?
- **Indemnification Agreement.** If all beneficiaries agree on diversification issue, then trustee can request beneficiaries indemnify trustee on these issues.
  - Need consent of all potential beneficiaries.
  - If virtual representation permissible, makes indemnification agreement easier to obtain
- **Creation of A Directed Trustee Arrangement.** Trust instrument, court order or state statute authorizes a third party to direct the action of the trustee and protects trustee from liability for following those directions.
  - Holder of a power to direct becomes liable for any loss that results from breach of fiduciary duty. *See* UTC § 808.
  - Now also have Uniform Directed Trust Act that some states have adopted.
    - Under this Act a directed trustee is liable only for the trustee's own willful misconduct.

# Investment Diversification: How Trustees Can Protect Themselves From Liability

- **Attorney's Opinion.** Creates advice of counsel defense.
  - Relying on advice of counsel is waiver of attorney-client privilege.
  - How extensive waiver may be often disputed requiring court determination.
- **Court Order.** Where there is doubt or uncertainty concerning trustee power or duties:
  - Obtain a court order through a suit for advice and guidance that protects the trustee's retention of a certain asset and/or relieves the trustee from any duty to diversify.
- **Resignation.** A trustee's resignation is the last option to consider, but resignation may be the final effective means of escaping future liability.

# Diversification Success Stories

1. The Trust provides in its own terms that [Trustee] 1) may maintain the initially invested securities, 2) had no duty to diversify and 3) would only be liable for willful misconduct. These three provisions further insulate him from liability for the decline in the stocks during 2009 and 2010. Each provision reinforces the other and demonstrates an intent that [Trustee] could maintain the securities as they were without subjecting himself to any potential liability.

*Tyler v. Tyler*, 2013 Conn. Super. LEXIS 1901 (Conn. Super. Ct. Aug. 22, 2013)

2. Beneficiary signed LORs approving the Trust's retention of [Bank] stock in 2004, 2005, and 2007. Beneficiary signed them each as a beneficiary and signed the 2007 LOR additionally on behalf of his father, pursuant to a durable power of attorney. Beneficiary's signature on these letters was significant because a beneficiary can authorize a trustee to engage in an otherwise prohibited transaction.

*W.A.K. v. Wachovia Bank, N.A.*, 2010 U.S. Dist. LEXIS 72289 (E.D.Va. July 19, 2010)

3. In his will, [Testator] expressed a desire that the Trust retain [the] stock, and he provided the trustees with the authority to

Hold and retain any bonds or shares of stock or other securities or other properties held or owned by me at my death, *if in their discretion they shall deem it prudent and for the best interest of my estate so to do, notwithstanding the fact that the retention of such investments might, except for this express direction, be in violation of the laws of this State governing trust investments.*

The probate court properly determined that this language creates a “safe harbor” protecting the Bank “from the diversification requirement that ordinarily would be deemed prudent.

*In Re Wege Trust*, 2008 Mich. App. LEXIS 1259 (Mich. Ct. App. June 17, 2008)

# Trust Termination

## Can Arise From:

Trustee Removal

Trustee's Resignation

Trust Ending By Its Terms

Trust Assets Exhausted



# Trust Termination: Protecting Yourself Post-Termination

- **Approval of Accounts**
- **Full Releases**
  - From All Beneficiaries
    - How Do You Handle Children and Unborn Heirs?
    - Is there virtual representation in governing state?
  - From Successor Trustee
- **Indemnification From Future Liability if Possible**
- **Agreement on Transfer of Trust Assets and Records**
  - Be mindful of UTC § 707(b): “A trustee that resigned or has been removed shall proceed expeditiously to deliver the trust property to the co-trustee, successor trustee or other person entitled to the trust property.”
- **Payment of Trustee’s Fees and Attorneys’ Fees**
- **To Avoid Court Involvement If Possible**

# ADR Alternatives: Arbitration

## **Possible Benefits:**

- Can Take Less Time Than Litigation
- Can Be Less Costly Than Litigation
- Typically Results in Decision That Binds All Parties

# ADR Alternatives: Arbitration

## Potential Problems:

- Can Be More Time-Consuming and Expensive Than Anticipated
- So far only a few states have specific statutes authorizing and enforcing arbitration clauses in trusts.
- Arbitration provisions in other states will only be enforceable if contained in “written agreement” or “contract”
  - Most courts have ruled that because trust is not contract, arbitration provision not enforceable
- Some courts have ruled that where beneficiary is accepting some of the benefits of trust, beneficiary must accept everything in trust, including arbitration requirement.



# ADR Alternatives: Mediation

## Benefits:

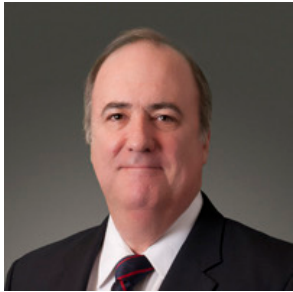
- Much Faster Process
- Significantly Less Expensive
- Completely Confidential Process
  - No Public Filings
- Neutral Third Party Serves as Mediator
- Parties Involved Control The Process With Assistance of Neutral Mediator
- Resolution of Dispute Comes Only Through Voluntary Agreement of All Participants
- Can Include Mediation Requirement in Trust

# ADR Alternatives: Use Of Trust Protector

- Trust Can Designate Someone As Trust Protector
- Trust Can Require Submissions of Disputes to Binding Decision of Trust Protector

**Questions or Comments?**

# Sean F. Murphy



**Sean Murphy** was a litigation partner in the Private Wealth Services Group of McGuireWoods LLP with nearly forty years of litigation experience. Sean regularly represented high net worth individuals and families, executors, guardians, conservators, beneficiaries and trustees in sensitive fiduciary matters in courts throughout the United States. Now retired, Sean is available to act as a mediator, consultant and expert witness in fiduciary disputes.