# LIBERATION AND LIABILITY: DUTIES, CLAIMS AND DEFENSES REGARDING THE TRUSTEE'S OBLIGATION TO PROVIDE INFORMATION TO BENEFICIARIES

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*"[T]HE TRUTH WILL SET YOU FREE."[3]*

Trustees have varying duties to provide information, notices, and warnings to beneficiaries about the status of their beneficial interests. The failure to observe those duties can lead to liability and damages, both real and imagined. But many grantors also insist on limiting the availability of information to their beneficiaries, sometimes even requesting that a trust's very existence not be revealed. This article will explore the parameters of liability, the beneficiary's obligation to inquire, grantor directives, and the benefits and risks presented by defensive drafting.

**Default Disclosure Duties**

In Missouri, as in other Uniform Trust Code states, the large majority of code provisions are "default" in nature. That means that they apply in the absence of a specific term dealing with a particular issue in the terms of the trust instrument.[4] And so it is with the particular duty to report and give notice to beneficiaries. Section 456.8-813, RSMo provides the default rules for reporting:

> 1. (1) *A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests*. A trustee shall be presumed to have fulfilled this duty if the trustee complies with the notice and information requirements prescribed in subsections 2 to 7 of this section.
>
> (2) Unless unreasonable under the circumstances, a trustee shall promptly respond to a *beneficiary's request for information* related to the administration of the trust.
>
> 2. A trustee:
>
> (1) *upon request* of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument;
>
> (2) within one hundred twenty days after accepting a trusteeship, *shall notify the qualified beneficiaries* of the acceptance and of the trustee's name, address, and telephone number;
>
> (3) within one hundred twenty days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, *shall notify the qualified beneficiaries of the trust's existence*, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report as provided in subsection 3 of this section; and
>
> (4) *shall notify* the qualified beneficiaries in advance of any change in the method or rate of the *trustee's compensation*.
>
> 3. A trustee *shall send to the permissible distributees* of trust income or principal, and to *other beneficiaries who request it*, at least annually and at the termination of the trust, *a report* of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. *Upon a vacancy* in a trusteeship, unless a cotrustee remains in office, *a report must be sent to the qualified beneficiaries* by the former trustee. A personal representative, conservator, or guardian may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.
>
> 4. *A beneficiary may waive the right to a trustee's report* or other information otherwise required to be furnished under this section. A beneficiary, with respect to future

reports and other information, may withdraw a waiver previously given.

5. A trustee may *charge a reasonable fee* to a beneficiary for providing information under this section.

6. The request of any beneficiary for information under any provision of this section shall be with respect to a single trust that is sufficiently identified to enable the trustee to locate the records of the trust.

7. If the trustee is bound by any *confidentiality restrictions* with respect to an asset of a trust, any beneficiary who is eligible to receive information pursuant to this section about such asset shall agree to be bound by the confidentiality restrictions that bind the trustee before receiving such information from the trustee.

8. This section *does not apply to a trust created under a trust instrument that became irrevocable before January 1, 2005*, and the law in effect prior to January 1, 2005, regarding the subject matter of this section shall continue to apply to those trusts.[5]

Thus the statute requires a trustee to be responsive to many requests for information from beneficiaries and, separately, requires the trustee to affirmatively notify beneficiaries of events that may require action by a beneficiary to protect his or her interest. Provision of such information will protect the trustee from liability for the breach of trust that may arise absent such disclosure. Section 456.10-1005 provides that adequate disclosure of information sufficient to inform a beneficiary of a potential claim or to prompt him or her to inquire further will shorten the period for filing a claim against a trustee to one year.

**Default Rules for Pre-MUTC Trusts**

Note also that § 456.8-813.8 removes the application of these default provisions for trusts that were irrevocable prior to January 1, 2005. Many legacy or dynasty trusts long predate this benchmark date and will be in existence for years to come. This is an important carve-out since the applicable statute (§ 456.233, RSMo, repealed in 2014)[6] and the common law prior to enactment of the Missouri Uniform Trust Code ("MUTC") provided somewhat different duties in this regard. The Missouri comment to § 456.8-813 provides in pertinent part as follows:

> This section clarifies an area of Missouri law that lacks definition and authority. The requirement that first line remainder beneficiaries be given notice of various events and be supplied with specified information *without having to request that information* is probably a change of Missouri law, Siefert vs. Leonhardt, 975 S.W.2d 489 (Mo. Ct. App. E.D. 1998). This section is certainly a very substantial change from the present Missouri statutory provision that only requires an accounting to income beneficiaries, Section 456.233 R.S.Mo.[7]

The *Restatement (Second) of Trusts* approach to fixing a trustee's duty to inform and warn beneficiaries is indeed different from the current Missouri statute.[8]

> The trustee is under a duty to the beneficiary to give him *upon his request* at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust.[9]

But see Comment d. to this section:

> *Duty in the absence of a request by the beneficiary*. Ordinarily the trustee is not under a duty to the beneficiary to furnish information to him in the absence of a request for such information. As to his duty to render accounts, see § 172. In *dealing with the beneficiary on the trustee's own account*, however, he is under a duty to communicate to the beneficiary all material facts in connection with the transaction which the trustee knows or should know. See § 170(2). Even if the trustee is not dealing with the beneficiary on the trustee's own account, he is under a *duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person* with respect to his interest. Thus, if the beneficiary is about to sell his interest under the trust to a third person and the trustee knows that the beneficiary is ignorant of facts known to the trustee which make the interest of the beneficiary much more valuable than the beneficiary believes it to be the trustee is under a duty to the beneficiary to inform him of such facts.[10]

Thus the default affirmative duty to inform (warn) a beneficiary of material facts necessary for him or her to protect his or her interest in the trust is narrower and fact specific for pre-MUTC trusts. This distinction reduces the circumstances under which a trustee may be found liable for failing to reach out to beneficiaries, as opposed to waiting for the beneficiary to inquire.[11]

**Overriding the Default Rules By the Terms of the Trust**

The MUTC is supplemented by "[t]he common law of trusts and principles of equity," §§ 456.1-106 and § 456.1-105, which explicitly state that the provisions of the MUTC are default only and are subject to override by the terms of the trust, except in certain very limited statutorily defined circumstances.[12] For example, in *French v. Wachovia Bank, N.A.*,[13] "the terms of the trust instrument [gave the corporate trustee] broad discretion to invest trust property without regard to conflicts of interest, risk, lack of diversification, or unproductivity."[14] In that case, the U.S. Court of Appeals for the 7th Circuit found that the trust "language overrides the common-law prohibition against self-dealing and displaces the prudent-investor rule."[15] However, in *Twin Chimneys Homeowners Association v. J.E. Jones Construction Co.*,[16] the trustees of a real estate subdivision could not be exonerated by exculpatory language in the trust document purporting to shield them from liability for their own negligence. The case, however, applies general contract law and may be distinguishable on that basis. In Missouri, such exculpatory or exoneration clauses are generally strictly construed by courts and in some circumstances viewed with disfavor.[17]

Thus the obligation to notify and inform beneficiaries of a trust about events and developments affecting the trust can be modified by the terms of the trust. Careful drafting can greatly

narrow – but not eliminate – the scope of a trustee's duty to provide information to beneficiaries or even warn them of events that may impact their beneficial interest in the trust. Section 456.1-105 sets forth the list of "immutable" or bedrock principles of trust law that cannot be overridden by the terms of a trust:

> 1. Except as otherwise provided in the terms of the trust, sections 456.1-101 to 456.11-1106 govern the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.
>
> 2. The terms of a trust prevail over any provision of sections 456.1-101 to 456.11-1106 except:
>
> (1) the requirements for creating a trust;
>
> (2) the duty of a trustee to act in good faith and in accordance with the purposes of the trust;
>
> (3) the requirement that a trust and its terms be for the benefit of its beneficiaries;
>
> (4) the power of the court to modify or terminate a trust under section 456.4-410, subsection 3 of section 456.4B-411, and sections 456.4-412 to 456.4-416;
>
> (5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in sections 456.5-501 to 456.5-507;
>
> (6) the power of the court under section 456.7-702 to require, dispense with, or modify or terminate a bond;
>
> (7) the power of the court under subsection 2 of section 456.7-708 to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;
>
> (8) subject to subsection 3 of this section, the duty of a trustee of an irrevocable trust to notify each permissible distributee who has attained the age of twenty-one years of the existence of the trust and of that permissible distributee's rights to request trustee's reports and other information reasonably related to the administration of the trust;
>
> (9) the duty to respond to the request of a qualified beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of the trust;
>
> (10) the effect of an exculpatory term under section 456.10-1008;
>
> (11) the rights under sections 456.10-1010 to 456.10-1013 of a person other than a trustee or beneficiary;
>
> (12) periods of limitation for commencing a judicial proceeding;
>
> (13) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and
>
> (14) the venue for a judicial proceeding as provided in section 456.2-204.
>
> 3. For purposes of subdivision (8) of subsection 2 of this section, the settlor may designate by the terms of the trust one or more permissible distributees to receive notification of the existence of the trust and of the right to request trustee's reports and other information reasonably related to the administration of the trust in lieu of providing the notice, information or reports to any other permissible distributee who is an ancestor or lineal descendant of the designated permissible distributee.[18]

The MUTC thus still allows the trust terms to waive all of the trustee's affirmative reporting requirements except that it interposes a duty to notify certain "permissible distributee[s,]" in a representative capacity, "of the existence of the trust and [their] rights to request trustee's reports and other information reasonably related to the . . . trust" administration.[19] Although the trust terms can waive the duty to give any notice to qualified beneficiaries who are not permissible distributees, the trust terms cannot waive the trustee's "duty to respond" to their request "for trustee's reports and other information reasonably related to the . . . trust" administration.[20] Thus, the MUTC allows the terms of a trust to eliminate the majority of the reporting requirements otherwise required under Section 456.8-813, save for essentially the minimal rights that were formerly provided by the common law to request information under certain circumstances.

**Practical and Policy Considerations For and Against Withholding Information**

Many grantors have strong concerns about revealing to their loved ones the prospect of later inherited wealth. Many will steadfastly maintain that knowledge of an eventual substantial bequest will have a negative impact on a beneficiary's drive and initiative. Indeed, a study from the Boston College Center on Wealth and Philanthropy is credited with reporting "extensive anxiety about the risk for heirs of 'drifting' without a career or purpose."[21] It is no leap to assume that many grantors may also worry about what the mere anticipation of inherited wealth may do to their young loved ones' motivations.[22]

It is this philosophy that has driven many grantors to require that their trusts be fashioned as "quiet trusts" and that their existence and their potential benefits be kept from certain beneficiaries whom the grantor believes may be adversely affected if given the knowledge in question. While the lodestar of trust law has always been the primacy of the grantor's intent, there are risks associated with this lack of transparency. Trustees are held accountable for their actions as a result of others knowing about the trustee's decisions and transactions. And the trustee who is charged with keeping silent to one or more "shielded beneficiaries" may face the latter's wrath when they learn of their beneficial interest after years of austerity or even hardship. Protecting the trustee charged with keeping these secrets is a goal for many estate planners, as is the goal of holding such trustees reasonably accountable when their actions are going to be at least partially concealed.

**Sample Language Limiting a Beneficiary's Right to Information or Notice**

The sample language below authorizes, but does not require, the trustee to provide certain notices, reports and other information to trust beneficiaries and at the same time attempts to limit the trustee's potential liability. This language represents the high water mark for trustee exculpation in this area and may not be appropriate in many cases:

> *Notice Requirements*. Grantor relieves the Trustee, to the maximum extent permitted by applicable law, from any

duty to provide, or to respond to, any request to provide to any individual or entity, a copy of this Agreement (or any amendment to this Agreement), notices, reports, accountings, or other information, including descriptions of material facts concerning trust administration ("Trust Information"). It is grantor's specific wish that certain of his beneficiaries remain unaware of this Agreement, of its particulars and of the benefits afforded them hereunder. Notwithstanding any provision of this paragraph to the contrary, however, the Trustee may provide any Trust Information to any individual or entity in the Trustee's sole discretion without liability for breaching his or her trustee duties under this Agreement or any privacy rights of any beneficiary except as otherwise prohibited by law. In this regard, the Trustee may provide any Trust Information directly to a competent adult beneficiary or to a representative of a minor, incapacitated, unborn, or unascertainable beneficiary as the Trustee deems appropriate. The Trustee may designate such a representative regardless of whether that representative is also a designated representative for that beneficiary under applicable law. If a beneficiary or that beneficiary's representative fails to object to any action of the Trustee revealed by any Trust Information received from the Trustee within one year after the Trustee has delivered that information to that beneficiary, then that beneficiary shall be conclusively presumed to have approved and consented to all actions so revealed as far as the law allows. The limitation on the trustee's duty to provide information as set forth herein is intended to exculpate the trustee to the fullest extent allowed by law with respect to any trustee duty impacted by the provision of notice and information.

**Liability Issues When There is Discretionary Power to Provide Notice**

A court's control over a trustee's exercise of a discretionary power depends upon the extent to which the trustee was granted discretion in the controlling document. Thus, in the above sample trust provision, the trustee is substantially relieved of any duty to provide information or notice but then is given broad discretion to do so if he or she deems it appropriate. A grantor/settlor may "vest[] sole discretion of a matter in a trustee" without supplying any "objective standard by which to evaluate the reasonableness of . . . the exercise of [such] discretion."[23] An example of an objective standard would be language following the grant of discretion directing the trustee to limit distributions of income for specified purposes such as for medical or educational expenses or to meet the beneficiary's "necessary living expenses." But what if the grant of discretion to the trustee regarding beneficiary notice includes no objective standard? For example, what if the trustee is advised that it "may" give notice, but there is nothing more?

The Southern District Court of Appeals in *Heisserer* held that

> when a settlor vests sole discretion in a matter in a trustee, and supplies no objective standard by which to evaluate the reasonableness of his conduct, a court must not interfere unless the trustee, in exercising his power, willfully abuses his discretion or acts arbitrarily, fraudulently, dishonestly or with an improper motive.[24]

In the more recent *O'Riley* decision, the court elaborated further:

> Generally, where a grantor vests sole discretion of a matter in a trustee and supplies no objective standard by which to evaluate the reasonableness of its conduct, a court will not interfere in the exercise of that discretion unless the trustee willfully abuses its discretion or acts arbitrarily, fraudulently, dishonestly, or with an improper motive.[25]

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A trustee acts arbitrarily if he or she fails to consider or contemplate the exercise of their discretionary power even if only momentarily: "Thus, if the trustee *without knowledge of or inquiry into* the relevant circumstances and merely as a result of his arbitrary decision or whim, exercises or fails to exercise a power, the court will interpose."[26]

Other courts have commented further: "The alleged procedural irregularity must have some connection to the substantive decision reached by the administrator, and give rise to 'serious doubts' about whether the result reached was the product of 'an arbitrary decision' or 'whim,' before we vary from the usual standard of review."[27]

Of course, beyond the concept of arbitrary decision-making, claims asserted against trustees based on fraud, improper motive and dishonesty may survive a motion to dismiss, but they will require significant evidence for their ultimate support. If a trustee has acted fraudulently, with improper motive or dishonestly, severe sanction will usually result. Either way, claims in this regard are a prime area for scrutiny under § 456.10-1004, for both petitioners and respondents alike.

**Elements of a Claim for Breach of Trust**

As with all claims for breach of trust, the failure of a trustee to provide notice or information when required can subject a trustee to liability. But the failure to act in that regard is not the end of the inquiry for purposes of liability. "An adequately pleaded claim for breach of fiduciary duty consists of the following elements: '1) the existence of a fiduciary relationship between the parties, 2) a breach of that fiduciary duty, 3) causation, and 4) harm.'"[28] A breach of fiduciary duty by a trustee is a breach of trust and vice versa.[29]

Of the elements listed above, the existence of a duty – including its scope and application – is often the initial point of contention. As shown above, the careful practitioner must thoroughly review the applicable law and the terms of the trust to determine in the first instance whether a duty exists and has thus been breached. Beyond those determinations, however, the third and fourth elements of the claim also are important hurdles to address.

As discussed above, "harm or damages caused by the breach is an essential element of a breach of fiduciary duty claim."[30] The element of causation fails, and so too does the claim, if there is "no connection between a supposed [breach of] fiduciary duty . . . and any harm . . . suffered."[31] A lack of causation was the focus of *Robert T. McLean Irrevocable Trust v. Ponder*.[32] In that case, the trust, through its successor trustee, alleged that it had suffered economic harm as the result of the trust protector's failure to remove the trustee in violation of the latter's fiduciary duties. However, the Missouri Court of Appeals concluded that the claimant had failed to provide any specific evidence of loss to the trust that could have been prevented by a timely removal of the trustee by the trust protector. In a breach of fiduciary duty claim, "the element of harm or damages cannot 'rest upon guesswork, conjecture, or speculation beyond inferences that can reasonably decide the case.'"[33] As such, the trust had failed to prove that the trust protector's alleged breach of fiduciary duty caused harm or damage to the trust. Since there was no evidence of any damages to the trust as a result of the alleged breach of fiduciary duty by the trust protector, the Missouri Court of Appeals affirmed the lower court rulings dismissing the claims made against the trust protector.

**Other Defenses to Liability**

In the context of a claim for breach of trust relating to a failure to give notice or provide information, several other sections in the MUTC would appear to be relevant. First, there is the code definition of "knowledge" found in § 456.1-104:

> 1. Subject to subsection 2 of this section, a person has knowledge of a fact if the person:
> (1) has *actual knowledge* of it;
> (2) *has received a notice or notification* of it; or
> (3) from all the facts and circumstances known to the person at the time in question, *has reason to know it*.
> 2. An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the individual's regular duties or the individual knows a matter involving the trust would be materially affected by the information.[34]

This statutory definition of "knowledge," if not overridden by the terms of a trust, is significant because it allows a trustee to argue that its failure to provide explicit notice of a particular set of facts does not automatically support a beneficiary's claim if the latter could have reasonably deduced the material facts at issue. In effect, this definition equates knowledge of certain surrounding circumstances to "inquiry notice" as that term is utilized in other areas of law and places an obligation on the beneficiary to seek further information if a sufficient quantum of known information would lead a reasonable person to inquire. Under the Missouri Rules of Civil Procedure, this defense likely requires pleading as an affirmative defense.[35]

Likewise, § 456.1-109 of the MUTC provides default rules for the mechanics of and the waiver of notice that, if applicable, can underscore a trustee's breach or conversely undermine a claimant's threshold obligation to show a duty on the part of a trustee who has otherwise failed to act.

> **456.1-109. Methods and waiver of notice.** – 1. Notice to a person under sections 456.1-101 to 456.11-1106

or the sending of a document to a person under sections 456.1-101 to 456.11-1106 must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed electronic message.

2. Notice otherwise required under sections 456.1-101 to 456.11-1106 or a document otherwise required to be sent under sections 456.1-101 to 456.11-1106 need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.

3. Notice under sections 456.1-101 to 456.11-1106 or the sending of a document under sections 456.1-101 to 456.11-1106 may be waived by the person to be notified or sent the document.

4. Notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure.[36]

As with contract rights, a beneficiary may knowingly waive notice of certain events and information subject to termination of his or her waiver at a later point in time.[37] Waiver of notice may be appropriate under some circumstances, but the wise trustee will obtain such waiver in writing. Separate from waiver, the statute also provides default requirements for effecting notice which are softened by a rule of reason both with respect to the methodology for giving notice and the efforts required for ascertaining the identity or location of someone entitled to notice.[38] As any litigator knows, however, any duty that is qualified by a reasonableness standard may be fodder for battling expert witnesses and, regardless, may guarantee submission of the claim to a finder of fact at a trial on the merits. A draftsman's tighter specification on these points may give a clearer picture to both trustee and beneficiary of each other's rights and obligations and obviate the need for a trial by establishing either clear cut liability or a clear cut defense.

And, apart from representation that may be established by § 456.1-105.3 (designation of a lineal ancestor/descendant to receive notice for a permissive beneficiary), other representatives can arise by default who may bind a beneficiary vicariously in certain circumstances. Article 3 of the Missouri Uniform Trust Code provides for a number of such circumstances. Section 456.3-302 provides that "[t]he holder of a testamentary power of appointment may . . . bind persons whose interests . . . are subject to the power."[39] Section 456.3-303 provides for binding representation by conservators, conservators ad litem, guardians, parents, agents, trustees and personal representatives as the case may be, absent a conflict of interest on the part of the putative representative. The practitioner should be aware, however, that the question of whether a conflict of interest exists can sometimes be a pressure point after the fact if there is any basis to question the motivations of the fiduciary or agent in question. For that reason, it is wise to hold an evidentiary hearing if there is any question regarding a potential conflict of interest.

Likewise, pursuant to § 456.3-304.1, if not "otherwise represented, a minor, incapacitated or unborn individual, or person whose identity or location is unknown and not reasonably ascertainable, may be represented and bound by another having a substantially identical interest with respect to the" matter at hand so long as there is, once again, no conflict of interest. Subsection 2 of that section further provides in more specific circumstances that "a beneficiary who is not a qualified beneficiary may be similarly represented . . . by a qualified beneficiary having a substantially identical interest with respect to the particular question or dispute," assuming no conflict of interest, in certain selected proceedings. Those proceedings involve § 456.4-412.2 (modification in administrative terms of a trust), "[n]on-judicial settlement agreements" under § 456.1-111, and perhaps most importantly, actions for modification or termination of a trust pursuant to § 456.4-411A.[40]


Under § 456.3-305, "the court may [also] appoint a representative . . . on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown[,] . . . [i]f the court determines that an interest is not represented . . . or that the otherwise available representation [is] inadequate."

With respect to all of these modes of representation, § 456.3-301 provides guidelines for notice in such circumstances and its binding effect:

> 456.3-301. 1. *Notice to a person who may represent and bind another person* under sections 456.3-301 to 456.3-305 has the *same effect as if notice were given directly to the other person*.
>
> 2. The consent of a person who may represent and bind another person under sections 456.3-301 to 456.3-305 is *binding on the person represented unless the person represented objects* to the representation before the consent would otherwise have become effective. *Except that, such consent is binding* on the person represented regardless of whether the person represented objects under this subsection, if the person who may represent and bind is:
>
> (1) The holder of a testamentary power of appoint-

ment described in section 456.3-302 and the interests of the person represented are subject to the power;

(2) The conservator, conservator ad litem, or guardian described in subdivision* (1), (2), or (3) of section 456.3-303 and the person represented is disabled; or

(3) A parent described in subdivision (4) of section 456.3-303 and the person represented is a minor or unborn child of the parent.

3. Except as otherwise provided in sections 456.4A-411 and 456.6-602, a person who under sections 456.3-301 to 456.3-305 may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

4. A settlor may not represent and bind a beneficiary under sections 456.3-301 to 456.3-305 with respect to the termination or modification of a trust under section 456.4A-411.[41]

Finally, a specific form of notice that is routinely utilized by many professional fiduciaries and informed trustees is the notice of proposed distribution upon termination of a trust. Section 456.8-817 sets forth the requirements for this important protective notice:

1. Upon termination or partial termination of a trust, *the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection* within thirty days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.

2. Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

3. A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent:

(1) it was induced by improper conduct of the trustee; or

(2) the beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts relating to the breach.[42]

Here, if the trustee has sent the initial notice, it is the beneficiary who must then notify the trustee of an objection or be barred from asserting a claim to enforce his or her rights. As with other types of notice, both trustee and beneficiary should utilize a means of notice that will actually reach the intended recipient and likewise afford a ready means of proving that notice was sent and received. The history of the law is well familiar with cases where receipt of notice is disavowed, sometimes honestly, and sometimes as a convenient lie to breathe life into a claim that would otherwise be barred.

## Conclusion

The concept that knowledge is power is rarely more evident than in the context of a trustee-beneficiary relationship. The advantages of having material knowledge regarding a trust and the disadvantages attendant with ignorance thereof can make a substantial difference in many key life choices. The provision of information regarding a trust's existence and administration to a beneficiary has been a hallmark of trust law from its inception and the duties related to this have been a bedrock aspect of the trustee's fiduciary status. But countervailing considerations are also presented and the grantor's determination that notice or information should be withheld are also, rightly or wrongly, given significant deference under the law. The informed estate planner will strike an appropriate balance between the two competing value systems and will likewise counsel a grantor in a way that will best accomplish his or her ultimate objectives. The wise trustee will likewise be informed in advance of the obligations and risks regarding disclosure in this fiduciary setting and will act accordingly or face a risk of liability that may lead to a substantial economic impact on the trustee's personal financial circumstances.

## Endnotes

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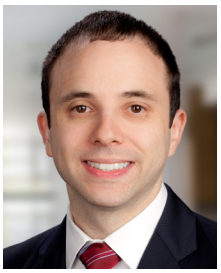

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3 *John* 8:32 (NIV).

4 Section 456.1-105.2, RSMo Supp. 2016.

5 Section 456.8-813, RSMo Supp. 2016 (emphasis added).

6 Section 456.233, L. 2004 H.B. 1511A (repealed 2014).

Unless the terms of the trust provide otherwise or unless waived in writing by an adult, competent beneficiary, the trustee shall deliver a written statement of accounts to each income beneficiary or his personal representative at least annually. The statement shall contain at least:

(1) A list of all receipts and disbursements since the last statement; and

(2) All items of trust property held by the trustee on the date of the statement at their cost basis, if known, and their market value, if readily ascertainable. *Id.*

7 4C Missouri Practice, Trust Code and Law Manual, § 456.8-813, Missouri Comment (2016-2017 ed.).

8 See Restatement (Second) of Trusts, § 173 (1959).

9 *Id.* (emphasis added).

10 *Id.* (emphasis added).

11 See also *O'Riley v. U.S. Bank, N.A.*, 412 S.W.3d 400, 412 (Mo. App. W.D. 2013) (Trustee not required to provide even annual statements to beneficiaries "where they did not request them."), citing *Engelsmann v. Holekamp*, 402 S.W.2d 382, 384 (Mo. 1966). *See also In re Marriage of Busch*, 310 S.W.3d 253, 261-62 (Mo. App. E.D. 2010) (Duty to provide information "upon request.").

12 Section 456.1-106, RSMo 2016. *See Barnett v. Rogers*, 400 S.W.3d 38, 48 (Mo. App. S.D. 2013). A trustee's duties, like the trustee's powers, may be affected *and even negated* by the specific terms of the trust agreement, and the terms of the trust can waive and/or modify a trustee's fiduciary duties. Restatement (Third) of Trusts, § 78 cmt. c(2) (2003) ("even the vital fiduciary duty of loyalty is a *default rule* that may be modified by the terms of the trust.").

13 722 F.3d 1079 (7th Cir. 2013).

14 *Id.* at 1081.

15 *Id. S*ee also *Precision Diversified Industries v. Colgate*, No. A03-2060, 2004 WL 2093532, *9 (Minn. App. Ct. Sept. 21, 2004) ("But where a trust agreement empowers a trustee to exercise discretion with conflicts of interest, the trustee's duty of loyalty can be modified by the trust agreement, and the trustee can act free of liability for breach of fiduciary duty.") citing *In re Irrevocable Inter Vivos Trust Established by R.R. Kemske by Trust Agreement dated Oct. 24, 1969*, 305 N.W.2d 755, 760 (Minn. 1981).

16 168 S.W.3d 488 (Mo. App. E.D. 2005).

17 4C Missouri Practice, Trust Code and Law Manual, § 456.10-1008, Author's Comment (2016-2017 ed.). Section 456.10-1008, RSMo Supp. 2016 provides that a trust term "relieving a trustee of liability for breach of trust is unenforceable to the extent that it: (1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. . . ."

18 Section 456.1-105, RSMo Supp. 2016.

19 Section 456.1-105.2(8), RSMo Supp. 2016. Query whether that representative beneficiary then takes on fiduciary duties. Some states, *e.g.* Florida and Delaware, address this issue by statute. *See* Fla. Stat. § 736.0306 (2016) and Del. Code Ann. tit. 12, § 3547, respectively.

20 Section 456.1-105.2(9), RSMo Supp. 2016.

21 Stanley H. Teitelbaum & Martin M. Shenkman, *Psychological Issues of Bequests*, Trusts & Estates 13 (June 16, 2016 *available at* http://www.wealthmanagement.com/estate-planning/psychological-issues-bequests-0.

22 But see the time-honored manual for defeating wealth malaise, *I Dare You*, by William H. Danforth. "I Dare You, heir of wealth and proud ancestry, with your generations of worthy stock, your traditions of leadership – I dare you to achieve something that will make the future point to you with even more pride than the present is pointing to those who have gone before you." Preface at p. x.

23 *O'Riley*, 412 S.W.3d at 406. See also *In re Heisserer v. Friedrich*, 797 S.W.2d 864 (Mo. App. S.D. 1990).

24 *In re Heisserer*, 797 S.W.2d at 870.

25 412 S.W.3d at 406; citing *First Nat'l Bank of Kansas City v. Hyde*, 363 S.W.2d 647, 655 (Mo. 1962); *Betty G. Weldon Revocable Trust ex rel. Vivion v. Weldon ex rel. Weldon*, 231 S.W.3d 158, 174–75 (Mo. App. W.D. 2007); *In re Heisserer v. Friedrich*, 797 S.W.2d 864, 870 (Mo. App. S.D. 1990).

26 Restatement (Second) of Trusts § 187 cmt. h (1959) (emphasis added). *See also Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 131 (2008).

27 *LaSalle v. Mercantile Bancorporation, Inc. Long Term Disability Plan*, 498 F.3d 805, 809 (8th Cir. 2007); citing *Chronister v. Baptist Health*, 442 F.3d 648, 654 (8th Cir. 2006).

28 *Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C.*, 283 S.W.3d 786, 792-93 (Mo. App. S.D. 2009), citing *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 411 (Mo. App. W.D. 2000).

29 *See Gray v. Ward*, 929 S.W.2d 774, 785 (Mo. App. W.D. 1996) ("a breach of fiduciary duty is a breach of trust…."); citing *Matlock v. Matlock*, 815 S.W.2d 110, 115 (Mo. App. S.D. 1991); and *Honsinger v. UMB Bank, N.A.*, No. 06-0018-CV-W-ODS, 2007 WL 4287683, at *3 (W.D. Mo. Dec. 4 2007) (Missouri courts, in treating a breach of trust and breach of fiduciary duty the same, recognize the elements for those causes of action are the same).

30 *Henry v. Farmers Ins. Co.*, 444 S.W.3d 471, 480 (Mo. App. W.D. 2014).

31 *Koger*, 28 S.W.3d at 411.

32 418 S.W.3d 482 (Mo. App. S.D. 2013).

33 *Id.* at 496; citing *Englezos v. Newspress & Gazette Co.*, 980 S.W.2d 25, 30 (Mo. App. W.D. 1998).

34 Section 456.1-104, RSMo Supp. 2016 (emphasis added).

35 *See* Mo. R. Civ. P. 55.08.

36 Section 456.1-109, RSMo Supp. 2016.

37 See § 456.8-813.4, RSMo Supp. 2016.

38 See also § 456.10-1007, RSMo Supp. 2016, pertaining to a trustee's lack of knowledge for key life events such as marriage, divorce and death and its duty to take reasonable care to ascertain the happening of such an event.

39 Section 456.302, RSMo Supp. 2016.

40 The Missouri Revisor of Statutes numbered this section incorrectly and, as a result, it is also sometimes cited as § 456.4A-411.

41 Section 456.3-301, RSMo Supp. 2016 (emphasis added).

42 Section 456.8-817, RSMo Supp. 2016 (emphasis added).

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must exude fairness and permanence, from the gavels, to the black robes, to the elevated benches, to the pomp and procedure, to the location and condition of our courthouses. It is fairness and permanence that enables Missourians to have faith in our system of resolving disputes in a peaceful way. Missouri inspires this fairness and permanence better than other states thanks to OUR Missouri Non-Partisan Court Plan.

The best lawyers care about justice and want fair and impartial, hard-working courts. The best lawyers want – and Missourians deserve – competent, punctual, practical, experienced, qualified, even-tempered, well-trained, and vetted judges who are all accountable to the voters. You will find these judges here in our state, thanks to the Missouri Plan, which keeps money and politics out of judicial selection in our metropolitan areas and the state's highest courts, while other areas of the state, where voters are more likely to know their candidates personally, can opt for either partisan or retention elections. In every instance, voters have the final say.

If we are inspired by the reality of competent, fair, and impartial courts, and want to have the best judiciary possible and we want to be among the best lawyers in our state, we can take steps to accomplish both.

Step one: Be generous with your time.

Step two: Be supportive of the Missouri Non-Partisan Court Plan and fair and impartial courts.

### Endnotes

1 Morry S. Cole is an attorney with the St. Louis law firm of Gray, Ritter & Graham, P.C.