



# A MATTER OF TRUST: CLAIMS OF TRUSTEE LIABILITY

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Billy Joel says, “It’s always been a matter of trust.”<sup>1</sup> After putting his trust in a lover, John Lee Hooker laments, “I couldn’t believe, I couldn’t believe you’d let me down.”<sup>2</sup> And the reggae legend Jimmy Cliff warns us, “Man to man is unjust; you don’t know who to trust.”<sup>3</sup> As it goes in love and songs, so it sometimes also goes in the legal world of trusts. Sometimes the trustee lets us down. When that happens, there may be a valid claim arising from the trustee’s breach of trust.

“Trust.” Black’s Law Dictionary defines a trust as, “A legal entity created by a grantor for the benefit of designated beneficiaries under the laws of the state and the valid trust instrument. The trustee holds a fiduciary responsibility to manage the trust’s corpus assets and income for the economic benefit of all of the beneficiaries.”<sup>4</sup> Stated differently, “A trust is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.”<sup>5</sup> These definitions show that a “trust” involves these key elements: (1) a grantor, (2) beneficiaries, (3) a trustee, (4) assets, and (5) a fiduciary relationship. In the most simple terms, then, a trust is a situation where a grantor entrusts assets to a trustee, and the trustee acts as a fiduciary in managing the assets for the beneficiaries.

A “fiduciary” is generally defined as “a person having duty, created by his undertaking, to act primarily for another’s benefit in matters connected with such undertaking” or “a term to refer to a person having duties involving good faith, trust, special confidence, and candor toward another.”<sup>6</sup> A “fiduciary duty” is “a duty to act for someone else’s benefit, while subordinating one’s personal interests to that of the other person. It is the highest standard of duty implied by law.”<sup>7</sup>

Under Alabama law, express trusts are governed by the Alabama Uniform Trust Code (the “Trust Code”).<sup>8</sup> The Trust Code grants broad powers to the trustee.<sup>9</sup> The trustee is granted all powers that are conferred upon him or her by the terms of the

trust.<sup>10</sup> Beyond that, the trustee (unless limited by the terms of the trust) is granted all powers that an owner of property would have plus any other powers that are appropriate to achieve the proper investment, management, and distribution of the trust property.<sup>11</sup> The Trust Code goes on to list numerous other specific powers of the trustee.<sup>12</sup>

After reviewing the grant of powers, it would be fair to conclude that a trustee has almost unlimited power. Indeed, the drafting committee states, “This section is intended to grant trustees the broadest possible powers.”<sup>13</sup> However, the exercise of the trustee’s power is held in check by the trustee’s fiduciary duties.<sup>14</sup> What does that mean? Fortunately, the Trust Code gives some specific definition of the many duties of a trustee, as follows:

- **Trustee’s Duty to Administer Trust in Good Faith.** The trustee must administer the trust in good faith, in accordance with the terms of the trust and its purposes, in accordance with the interests of the beneficiaries, and in accordance with the Trust Code.<sup>15</sup> “A primary duty of a trustee is to follow the terms and purposes of the trust and to do so in good faith.”<sup>16</sup> This includes the exercise of discretionary powers.<sup>17</sup>
- **Trustee’s Duty of Loyalty.** The duty of loyalty is “perhaps the most fundamental duty of the trustee.”<sup>18</sup> The trustee must administer the trust solely in the interests of the beneficiaries.<sup>19</sup> With some exceptions, a transaction involving the trustee’s personal interest is voidable by a beneficiary.<sup>20</sup> A trustee is presumed to be acting in a conflict of interest if engaging in transactions between the trust and the trustee’s spouse, relatives, or affiliates.<sup>21</sup> It is also presumed to be a conflict of interest if a trustee takes a trust opportunity for himself.<sup>22</sup>
- **Trustee’s Duty of Impartiality.** If the trust has more than one beneficiary, then the trustee must act impartially in investing, managing, and distributing the trust property.<sup>23</sup>

This duty applies to all aspects of trust administration.<sup>24</sup> This does not mean that the trustee must treat the beneficiaries equally, but rather must treat them equitably in light of the purposes and terms of the trust.<sup>25</sup>

- **Trustee's Duty of Prudent Administration.** The trustee must administer the trust as a prudent person would.<sup>26</sup> The trustee must exercise reasonable care, skill, and caution.<sup>27</sup>
- **Trustee's Duty to Avoid Unreasonable Costs.** In administering the trust, the trustee may incur costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.<sup>28</sup> By correlation, however, the trustee is under a duty not to incur unreasonable costs.<sup>29</sup>
- **Trustee's Duty to Use Special Skills.** If the trustee has special skills or expertise, then the trustee must use those special skills or expertise.<sup>30</sup> A professional trustee will be held to the standard of a prudent professional, while an amateur trustee will be held to the standard of a prudent amateur.<sup>31</sup>
- **Trustee's Duty of Care in Delegation.** The trustee may delegate duties and powers, but only if proper under the circumstances.<sup>32</sup> In delegating, the trustee must exercise reasonable care, skill, and caution in selecting an agent, establishing the scope of delegation, and monitoring the agent's performance.<sup>33</sup> An agent who accepts the delegation owes a duty to the trust of reasonable care, skill, and caution in complying with the terms of the delegation.<sup>34</sup>
- **Trustee's Duty to Control and Protect Trust Property.** The trustee must take reasonable steps to take control of and protect the trust property.<sup>35</sup> This duty is an aspect of the duty of prudent administration.<sup>36</sup> This duty includes the duty of a successor trustee taking reasonable steps to collect trust property from a former trustee and also to pursue a claim for any breach of trust by a former trustee.<sup>37</sup>
- **Trustee's Duty to Keep Records.** The trustee must keep adequate records of the administration of the trust.<sup>38</sup> This duty is implicit in the duty to act with prudence and the duty to report to beneficiaries.<sup>39</sup> A trustee that is a regulated financial institution must maintain records in accordance with applicable industry standards.<sup>40</sup>
- **Trustee's Duty Not to Commingle.** The trustee must keep trust property separate from the trustee's own property.<sup>41</sup> The trustee must also, to the extent feasible, cause trust property to be earmarked so that the interest of the trust appears in ownership records.<sup>42</sup>
- **Trustee's Duty to Enforce and Defend.** The trustee must take reasonable steps to enforce claims of the trust.<sup>43</sup> Likewise, the trustee must take reasonable steps to defend claims against the trust.<sup>44</sup> The question of reasonableness will

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defines a trust as, "A  
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grantor for the benefit of  
designated beneficiaries  
under the laws of the  
state and the valid trust  
instrument."

include factors such as the likelihood of recovery, the cost of suit and enforcement, and the benefit of settling rather than defending.<sup>45</sup> In other words, the trustee is granted some discretion, much like any party to litigation.

- **Trustee's Duty to Inform.** The duty to inform is a fundamental duty of a trustee.<sup>46</sup> The trustee must keep the beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests (including information needed to prevent or redress a breach of trust).<sup>47</sup> The trustee must promptly respond to a beneficiary's request for information, unless unreasonable under the circumstances.<sup>48</sup> Upon request, the trustee must promptly furnish a copy of the trust instrument to the beneficiary.<sup>49</sup> The trustee must notify the beneficiaries in advance of any change in the trustee's compensation.<sup>50</sup> At least annually, the trustee must provide the beneficiaries a report of the trust property, liabilities, receipts, disbursements, list of assets, and amount of trustee compensation.<sup>51</sup>
- **Trustee's Duty to Forgo Unreasonable Compensation.** If the terms of the trust do not specify the trustee's compensation, then the trustee is entitled to compensation that is "reasonable under the circumstances."<sup>52</sup> Even if compensation is specified in the trust or a written agreement, the court may adjust compensation if it is unreasonably low or high.<sup>53</sup> Relevant factors in determining proper compensation include the custom of the community; the trustee's skill, experience, and facilities; the time devoted to trust duties; the amount and character of the trust property; the degree of difficulty, responsibility and risk assumed in administering the trust, including in making discretionary distributions; the nature and costs of services rendered by others; and the quality of the trustee's performance.<sup>54</sup> The services actually performed and the responsibilities actually assumed should be closely examined.<sup>55</sup>

Each of the above duties is a limit on the trustee's powers. Each of the duties serves to protect the trust beneficiaries. The breach of any one of the duties may give rise to a claim against the trustee. A violation by the trustee of a duty owed to a beneficiary is a breach of trust.<sup>56</sup>

One remedy for an aggrieved beneficiary is to seek the removal of the trustee. The Trust Code grants to the beneficiary the right to request removal.<sup>57</sup> The court may remove the trustee if the trustee has committed a serious breach of trust.<sup>58</sup> A "serious" breach may be a single act which is flagrant or causes significant harm, or it may consist of a series of smaller breaches.<sup>59</sup> Other grounds for removal include where there is a lack of cooperation among co-trustees; there is unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively; or the court determines that removal best serves the interests of the beneficiaries.<sup>60</sup>

The court, if its jurisdiction is invoked, may play a significant



role in the administration of a trust.<sup>61</sup> A judicial proceeding involving a trust may relate to any matter involving the trust's administration.<sup>62</sup> This includes, but is not limited to, requesting instructions, determining the existence or extent of powers and duties, interpreting the trust, directing the trustee to act or refrain from acting, reviewing the trustee's actions, ordering the trustee to account, suspending the trustee, appointing a special fiduciary, determining the trustee's compensation, and determining the liability of the trustee.<sup>63</sup>

A trustee who commits a breach of trust is liable to the beneficiaries.<sup>64</sup> The trustee's liability for damages is the greater of the amount required to make the trust whole, or the profit the trustee made by the breach.<sup>65</sup> The trustee may also be held liable for any other measure of damage provided by law.<sup>66</sup> Even in the absence of a breach of trust, a trustee still is accountable for any profit made by the trustee from the administration of the trust (excluding reasonable compensation).<sup>67</sup>

The trustee may be protected from liability when the trustee acts in reasonable reliance on the terms of the trust.<sup>68</sup> The trust instrument may exculpate the trustee from liability in part, but it may not relieve the trustee of liability for breach of trust in bad faith or with reckless indifference.<sup>69</sup> The trustee generally is not liable for conduct to which the beneficiary consented or ratified.<sup>70</sup>

The Trust Code contains a two-year statute of limitations, but the trigger for the running of the statute is unique. First, the clock may start ticking by the trustee's disclosure of a potential claim. If the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust, then the beneficiary must commence a proceeding within two years of the date of the report.<sup>71</sup> If there has not been such a report, then a claim for breach of trust must be commenced within two years of the removal, resignation, or death of the trustee; the termination of the beneficiary's interest in the trust; or the termination of the trust.<sup>72</sup> Practically speaking, if there has been no disclosure of a potential claim, this latter standard means that the running of the statute of limitations may be tolled for a very long time so long as the same trustee remains in place.

In conclusion, a "trust" is given that name because of the amount of trust that is reposed in the fiduciary—the trustee. The trustee must act, at all times, with the highest duty of care. The trustee must be faithful, loyal, honest, candid, impartial, transparent, prudent, careful, competent, diligent, responsible, responsive, informative, and selfless. The trustee must always put the interests of the beneficiaries and the purposes of the trust above all else. When the trustee fails in any of these duties, the law provides recourse. The trustee may be removed by the court. The court may intervene in trust administration in any number of helpful ways. And, finally, the trustee may be held liable for damages.

In life and in love, there may be little help when someone proves untrustworthy. But, in the legal world of trusts, the Trust Code provides relief aplenty.

(Endnotes)

- 1 "A Matter of Trust," Billy Joel.
- 2 "I Put My Trust In You," John Lee Hooker.
- 3 "Trust No Man," Jimmy Cliff.
- 4 *Black's Law Dictionary* 1508 (6<sup>th</sup> ed. 1990).
- 5 Restatement (Third) of Trusts, § 2 (2012).
- 6 *Black's Law Dictionary* 625 (6<sup>th</sup> ed. 1990).

- 7 *Id.*
- 8 Ala. Code § 19-3B-101 et seq.
- 9 Ala. Code § 19-3B-815.
- 10 Ala. Code § 19-3B-815(a)(1).
- 11 Ala. Code § 19-3B-815(a)(2).
- 12 Ala. Code § 19-3B-816.
- 13 Ala. Code § 19-3B-815 (Committee Comment).
- 14 Ala. Code § 19-3B-815(b).
- 15 Ala. Code § 19-3B-801.
- 16 Ala. Code § 19-3B-801 (Committee Comment).
- 17 Ala. Code § 19-3B-814(a).
- 18 Ala. Code § 19-3B-802 (Committee Comment).
- 19 Ala. Code § 19-3B-802(a); *Regions Bank v. Lowrey*, 101 So.3d 210, 219 (Ala. 2012).
- 20 Ala. Code § 19-3B-802(b).
- 21 Ala. Code § 19-3B-802(c).
- 22 Ala. Code § 19-3B-802(d).
- 23 Ala. Code § 19-3B-803.
- 24 *Id.* (Committee Comment).
- 25 *Id.* (Committee Comment).
- 26 Ala. Code § 19-3B-804; *Regions Bank v. Lowrey*, 101 So.3d 210, 219 (Ala. 2012).
- 27 *Id.*
- 28 Ala. Code § 19-3B-805.
- 29 *Id.* (Committee Comment).
- 30 Ala. Code § 19-3B-806.
- 31 *Id.* (Committee Comment).
- 32 Ala. Code § 19-3B-807(a).
- 33 *Id.*
- 34 Ala. Code § 19-3B-807(b).
- 35 Ala. Code § 19-3B-809.
- 36 *Id.* (Committee Comment).
- 37 Ala. Code § 19-3B-812.
- 38 Ala. Code § 19-3B-810(a).
- 39 *Id.* (Committee Comment).
- 40 *Id.* (Alabama Comment).
- 41 Ala. Code § 19-3B-810(b).
- 42 Ala. Code § 19-3B-810(c).
- 43 Ala. Code § 19-3B-811.
- 44 *Id.*
- 45 *Id.* (Committee Comment).
- 46 Ala. Code § 19-3B-813 (Committee Comment).
- 47 Ala. Code § 19-3B-813(a).
- 48 *Id.*
- 49 Ala. Code § 19-3B-813(b)(1).
- 50 Ala. Code § 19-3B-813(b)(4).
- 51 Ala. Code § 19-3B-813(c).
- 52 Ala. Code § 19-3B-708(a); *Griffin v. Pringle*, 56 Ala. 486, 492 (1876).
- 53 Ala. Code § 19-3B-708(b).
- 54 Ala. Code § 19-3B-708 (Committee Comment).
- 55 *Id.*
- 56 Ala. Code § 19-3B-1001(a).
- 57 Ala. Code § 19-3B-706(a).
- 58 Ala. Code § 19-3B-706(b)(1).
- 59 Ala. Code § 19-3B-706 (Committee Comment).
- 60 Ala. Code § 19-3B-706(b)(2)-(4).
- 61 Ala. Code § 19-3B-201.
- 62 *Id.*
- 63 *Id.*; Ala. Code § 19-3B-1001(b).
- 64 Ala. Code § 19-3B-1002.
- 65 Ala. Code § 19-3B-1002(a)(1).
- 66 Ala. Code § 19-3B-1002(a)(2).
- 67 Ala. Code § 19-3B-1003(a).
- 68 Ala. Code § 19-3B-1006.
- 69 Ala. Code § 19-3B-1008.
- 70 Ala. Code § 19-3B-1009.
- 71 Ala. Code § 19-3B-1005(a).
- 72 Ala. Code § 19-3B-1005(c).



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