Disclose - Disclose - Disclose - Longmeyer Distorts the Trustee's Duty to Inform Trust Beneficiaries

David M. English
University of Missouri School of Law, englishda@missouri.edu

Berry T. Turney

Dana G. Fitzsimons Jr.

Follow this and additional works at: https://scholarship.law.missouri.edu/facpubs

Part of the Estates and Trusts Commons

Recommended Citation
David M. English et al., Disclose - Disclose - Disclose - Longmeyer Distorts the Trustee's Duty to Inform Trust Beneficiaries, 24 Probate and Property 12 (2010).
Available at: https://scholarship.law.missouri.edu/facpubs/778

This Article is brought to you for free and open access by the Faculty Scholarship at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Missouri School of Law Scholarship Repository. For more information, please contact bassetcw@missouri.edu.
Disclose. Disclose! Disclose?

Longmeyer Distorts the Trustee's Duty to Inform Trust Beneficiaries

By Turney P. Berry, David M. English, and Dana G. Fitzsimons Jr.
Facing a Frustrating Fiduciary Patchwork

For an issue so fundamental to the daily life of a trustee, the law concerning communication with trust beneficiaries ideally should be consistent from state to state. Unfortunately, state law is a patchwork of common law and statutory provisions drawn (but not consistently) from the Uniform Probate Code, the Uniform Trust Code, or laws that are unique to the state. The common law is especially unsatisfying, relying almost entirely on the various Restatements of Trusts, because of the dearth of reported cases. The Uniform Trust Code, despite being enacted in 23 states, has failed to achieve uniformity on this issue because of disagreements in the enacting jurisdictions. For a discussion of the numerous and inconsistent disclosure standards around the country, see Dana G. Fitzsimons Jr., Navigating the Trustee’s Duty to Disclose, Prob. & Prop., Jan./Feb. 2009, at 40; see also Thomas P. Gallanis, The Trustee’s Duty to Inform, 85 N.C. L. Rev. 1595 (2007).

Despite the variations in state law, practitioners assume they can rely on a few principles, including this one: while the trust is revocable by the settlor and the settlor has capacity, the trustee’s duties—including the duties to inform and account—are owed only to the settlor. This is, after all, the position of both the Restatement (Third) of Trusts § 74 cmt. e and the Uniform Trust Code § 603. The position makes sense because the interests of the beneficiaries are subject to the settlor’s power to revoke and reclaim the property. Several UTC states have gone further and provided that the trustee’s duties are owed exclusively to the settlor regardless of the settlor’s capacity.

But the recent decision of the Kentucky Supreme Court in JP Morgan Chase Bank, N.A. v. Longmeyer, 275 S.W.3d 697 (Ky. 2009), suggests that this fundamental principle may not be on as solid a footing as was assumed. Before discussing the possible legal implications of the decision, an analysis of the case’s interesting and tragic facts is necessary.

Oh, What a Tangled Web We Weave

Ollie Skonberg, a wealthy but frugal widow, was a long-time customer of Bank One (predecessor to JP Morgan Chase Bank) and named the bank as trustee of her revocable trust. The trust, which was drafted by Ms. Skonberg’s attorney in 1984 and later amended at the grand cost of $100, provided income to Ms. Skonberg for life and the remainder to various charities at her death. Beyond these bare details, the convoluted facts resemble a bar review question and provide a sober look at the type of case that will more commonly occur in an aging population with a significant accumulation of wealth and increased exposure to dementia and other frailties.

In 1997, Ms. Skonberg was nearly bedridden at 93 years old. Her caregiver, Vicki Smothers, arranged for attorney John M. Longmeyer, who had no prior contact with Ms. Skonberg, to make changes to Ms. Skonberg’s estate plan. The new estate plan outlined by the caregiver included the drafting of a new revocable trust that inflated the bequest to the caregiver from $20,000 to $500,000, appointed Longmeyer himself as trustee with annual compensation of $100,000 in place of Bank One, and removed the charities as beneficiaries of the trust. The rewriting of the estate plan was a family affair—Longmeyer delegated the drafting of the documents to his son-in-law (an out-of-state lawyer), his wife and secretary witnessed the signing, and his physician brother-in-law spent less than an hour with Ms. Skonberg to assess her testamentary capacity.

Bank One, after being informed of its removal as trustee and the other changes to the trust agreement, entered into an agreement with Longmeyer enabling Bank One to serve as investment agent for the trust, but the bank at that time did not question the circumstances of the new estate planning documents. Six weeks after the new documents were signed, Ms. Skonberg died and Longmeyer promptly terminated the investment agency with the bank. The bank, on the advice of counsel, then notified the charities that they had been removed as trust beneficiaries and of the other circumstances surrounding the revision of Ms. Skonberg’s estate plan. The charities challenged the new estate plan, alleging undue influence. Ultimately, the charities’ claims were settled on the brink of trial for $1.875 million.

Longmeyer then sued Bank One to recoup the $1.875 million settlement payment, alleging breach of fiduciary duty on the bank’s part on the basis that the charities would not have discovered their ouster as beneficiaries (and challenged the new estate plan) had the bank kept quiet. The trial court granted summary judgment in favor of the bank, concluding that it had a fiduciary duty as trustee of the original revocable trust to inform the adversely affected beneficiaries of its suspicions concerning the estate plan revisions. The case was ultimately appealed to the Kentucky Supreme Court.

The Supremes Are a Little Out of Tune

The Kentucky Supreme Court ruled in favor of Bank One, holding that the bank was protected from liability for giving the notice, and more broadly holding that the bank had an affirmative duty to inform the charities of their removal. The court’s rationale was simple: the Kentucky statute (drawn from Uniform Probate Code § 7-303) requiring a trustee to “keep the
Supreme Court does not distinguish obligations of the trustee, the Kentucky opinion is that for the disclosure of a trust, if any, must be provided sorts of information about the opera-
of the trustee to notify beneficiaries. agreement eliminate or reduce the duty the trust instrmnent may in capabe of revoking the trust. The court trust while the settlor is still living and vocable trust and those of a revocable between the beneficiaries of an irre-
right to notice was absolute. Instead, the court concluded that the uncleang hands were a bar to his claims. settlment payment or that his own "harmed" by making a voluntary action and having benefited from the agency agreement with Longmeyer, or perhaps the court preferred an absolute rule of law that would allow it to avoid having to deal with difficult facts, such as the proof or lack of proof in the trial court record concerning Ms. Skonberg's capacity. The court could also have decided the issue on other grounds unrelated to the duty to disclose—for example, that Longmeyer was not "harmed" by making a voluntary settlement payment or that his own unclean hands were a bar to his claims. Instead, the court concluded that the right to notice was absolute.

The most troubling part of the decision is the court's refusal to distinguish between the beneficiaries of an irre-
vocable trust and those of a revocable trust while the settlor is still living and capable of revoking the trust. The court did not address whether a settlor in the trust instrument may in the trust agreement eliminate or reduce the duty of the trustee to notify beneficiaries. Nor does the opinion discuss what sorts of information about the opera-
tion of a trust, if any, must be provided to the beneficiaries. The easiest reading of the opinion is that for the disclosure obligations of the trustee, the Kentucky Supreme Court does not distinguish between revocable trusts and irrevo-
cable trusts.

A lone dissenter, Justice Schroeder, would have created a limited carveout for revocable trusts and remanded the case to determine whether the trustee was liable for disclosing confidential trust information.

What's the Best Policy?

Despite the sweeping statements of the court, it is possible that other courts will choose the sensible approach of limiting Longmeyer to its unusual facts. Although it may be difficult to digest the ease by which the court stepped around principles of trust law and the nature of revocable trusts, the question must be asked—does the Longmeyer decision represent bad policy?

The majority opinion certainly contains sufficient standout facts to facilitate such a limitation. Although it may be difficult to digest the ease by which the court stepped around principles of trust law and the nature of revocable trusts, the question must be asked—does the Longmeyer decision represent bad policy? We are in the early stages of what has been called the largest inter-generational transfer of wealth in the nation's history (albeit diminished because of recent economic difficulties). Much of that wealth is in the hands of an aging population. As a result of improvements in medical technology, the lives of many will be extended, which will also widen the exposure to dementia and elder abuse. The Brooke Astor elder abuse situation in New York, although rare in the amount of money at issue, is unfortunately becoming all too common. The current high unemployment rate and severe market losses will no doubt tempt others to try to drain resources from the elderly through abuses of powers of attorney and positions of confidence. We are likely to see an increasing number of cases concerning challenges to dramatic deathbed or post-incapacity changes to wills and trusts. In view of these developments, should the policy of the law encourage or require a trustee to alert beneficiaries—present or future, vested or contingent, subject or not to revocation—of suspicious circumstanc-
es concerning a change to a trust and protect the trustee when it discloses such information?

There are competing policy concerns. On one side is the importance of recognizing the freedom to change a revocable trust without unnecessary hindrances and without having to give notice to persons whose interests re-
main revocable. A revocable trust, after all, is a will substitute. On the other side are the risk of abuse and the argument that, although an inconvenience or a nuisance in the ordinary circumstance, in the abusive situation the expanded notice obligation can help expose bad actors earlier before assets are improp-
erly squandered or put beyond the practical reach of court orders and the court's enforcement powers.

Regardless of how one views that policy debate, it is worthwhile to con-
sider an alternative approach, suggested in the dissent, that might have been taken by the bank. A trustee presented with a doubtful or uncertain situation, including the validity of a trust instrument purporting to remove the trustee, could seek the aid and direction of the court. A petition for instructions would have required notice to the charities as well as Longmeyer and arguably would have brought the issues and the parties before the court in a way that was less risky for the trustee. Also, it could have avoided turning assets over to a potential bad actor while the court sorted through everything. Although the litigation would have been messy, it would be difficult for any court to
find fault with a trustee taking such an approach. Furthermore, by the nature of a petition for instructions the trustee would not have taken a position in favor of either the charities or Longmeyer. Because Ms. Skonberg died mere weeks after the signing of the new trust, a petition for instructions in this case would have been short-lived and would have been replaced quickly with the traditional will and trust contest litigation. If Ms. Skonberg had lived longer, however, a petition for instructions would have insulated her assets for her benefit while the court sorted through the situation.

**What Do We Do Now, Ollie?**

As mentioned earlier, the *Longmeyer* court has encouraged the Kentucky legislature to address the issues raised in the opinion. The Kentucky legislature heard the call and quickly responded. The Kentucky disclosure statute at issue in *Longmeyer*, Ky. Rev. Stat. § 386.715, has been amended to add a new subsection (4) that provides: "While a trust is revocable by the settlor and, in the reasonable belief of the trustee, the settlor has capacity to revoke the trust, the trustee's duties under this section extend only to the settlor."

This statutory correction should eliminate the need for Kentucky clients to consider potentially unattractive options, such as creating an out-of-state trust or opting out of Kentucky law governing trust administration. But, because the statutory correction turns on the settlor's capacity (or at least the trustee's reasonable belief of that capacity), this correction may not have actually resolved the situation in *Longmeyer* in which the settlor's capacity was a key issue. In reality, the new statute has made the situation in Kentucky more complex. Not only must a trustee ascertain when a settlor has capacity—an issue that otherwise would not arise unless the settlor wanted to change the trust instrument—but also must determine what constitutes a "reasonable belief." To illustrate, must the corporate trustee advise all beneficiaries of mom's revocable trust when a child tells a trust officer that "mom is very forgetful, we are paying her bills, and she is not doing very well"? Or what if a bank both administers dad's revocable trust and regularly allows an attorney-in-fact to handle financial transactions in dad's checking account? Does the existence of an active attorney-in-fact require a trustee to investigate dad's capacity? Further legislation, or eventual litigation, will be required to resolve these issues.

Kentucky is not a Uniform Probate Code state generally, but the statutory provision in *Longmeyer* was copied verbatim from UPC § 7-303. The UPC has been enacted in about 20 states. Not all of these states enacted this particular section of the UPC, however, and those that did are repealing it on enactment of the more modern and increasingly popular Uniform Trust Code. Had Kentucky enacted the full UPC, *Longmeyer* might have been decided differently. UPC § 1-108 provides that the holder of a general power of appointment, including one in the form of a power of amendment or revocation, is deemed to act for beneficiaries whose interests are subject to the power. This statute has been applied to deny a remainder beneficiary of a revocable trust access to information concerning the trust. *Montrone v. Valley Bank & Trust Co.*, 875 P.2d 557 (Utah Ct. App. 1994). The court in *Montrone* noted that the intent of the UPC drafters was to allow the holder of a power to revoke to negate the duty the trustee otherwise would have to keep the beneficiaries informed. The issue of capacity was not before the court in *Montrone*. But had the settlor in *Montrone* been incapacitated, the court's rationale suggests that because the settlor would not have been able to negate the duty to disclose, the trustee would have had to keep the remainder beneficiaries informed. One should be hesitant, however, to draw too definitive a conclusion based on a single case. But even if *Montrone* correctly read the UPC, a rule turning on whether the settlor has capacity would not have resolved the situation in *Longmeyer*, in which the settlor's capacity was a key issue. The simplistic decision of the Kentucky Supreme Court at least provides certainty.

The Uniform Trust Code has been enacted in 23 states. Regarding the issues raised in *Longmeyer*, resolution of those matters under the UTC also turns on whether the settlor has capacity. UTC § 603(a) provides that while a trust is revocable and the settlor has capacity, the duties of the trustee are owed exclusively to the settlor. Consequently, if the settlor has capacity, the trustee is prohibited from giving notice to the remainder beneficiaries. But if the settlor has lost capacity, the disclosure duties under the UTC kick in. UTC § 603(a), however, does have one significant difference from its UPC predecessor and also from Restatement (Third) § 74 cmt. e, which, like the UTC, adopts the rule that while a trust is revocable and the settlor has capacity, the duties of the trustee are owed exclusively to the settlor. The UTC drafters, recognizing that states were taking a diversity of approaches on the question, placed the language relating to the settlor's capacity in brackets, meaning that states are free, if they wish, to amend UTC § 603(a) to provide that the trustee's duties are owed exclusively to the settlor regardless of whether the settlor has capacity. About half of the UTC states have made this change. In those states, the bank trustee in *Longmeyer* would have been prohibited from contacting the remainder beneficiaries, although one wonders how enforceable such a restriction would be if the trustee has well-founded concerns of undue influence, which appears to have been the case.

A couple of state variations are of interest. Missouri has enacted a middle alternative. Although Missouri law provides that the settlor's control over trustee disclosure terminates on the settlor's incapacity, the statute adds a procedure for determining capacity, derived from its guardianship and conservatorship law. Mo. Rev. Stat. § 456.6-603. If the procedure has not been implemented, the settlor is presumed to have capacity, and all duties of the trustee continue to be owed exclusively to the settlor.

Alabama is a UTC jurisdiction. The Alabama Supreme Court recently dismissed claims of children against a corporate trustee for breach of fiduciary duty with respect to the trust agreements revocable by the parents, on the basis that under the Alabama UTC the
trustee’s duties were owed solely to the parents as settlors. See Raines v. Synovus Trust Co., No. 1080100, 2009 WL 5173510 (Ala. Dec. 30, 2009).

California is not a UTC state, but its provisions on revocable trusts were one of the models for the UTC. California provides that a trustee need not account or report during any period while the trust is revocable. Cal. Prob. Code § 16064. California also provides that the settlor, and not the beneficiary, has the rights otherwise afforded beneficiaries under the trust law. Cal. Prob. Code § 15800. Had a California court been presented with the Longmeyer facts, it would have started from the assumption that the remainder beneficiaries were not entitled to disclosure.

**Practice Suggestions for the Estate Planning Lawyer**

Practice suggestions for the instrument drafter fall into three categories. First, in UTC states where waiver is permitted, the settlor of a revocable trust can in the governing instrument limit otherwise required disclosures. Even in states that make some notice provisions mandatory, UTC § 105, which lists the mandatory duties, applies only to irrevocable trusts. UTC § 603, relating to the duties of a trustee in the case of a revocable trust, is subject to override by the settlor. This override approach may not be available in UPC and common law states. The extent to which an otherwise required notice can be waived under UPC § 7-303, the provision at issue in Longmeyer, has never been pinned down. For common law states, under the Restatement (Second) of Trusts, and, using slightly different language, the more recent Restatement (Third) of Trusts, the settlor’s right to waive is limited. A settlor may not limit the beneficiary’s right to information reasonably necessary to enable the beneficiary to enforce the beneficiary’s rights to prevent or redress a breach of trust. Restatement (Second) of Trusts § 173 cmt. c; Restatement (Third) of Trusts § 74 cmt. e.

Second, if the client resides in a state with undesirable law, the instrument could include a choice of law provision adopting “better” law in line with the client’s wishes. Such a provision is most likely to be effective if the trustee is located in the state with the desirable law so that the choice of law clause has a relationship to the trust and the validity of the provision would likely have to be litigated in that state.

Finally, the settlor can attempt to limit the class of beneficiaries entitled to notice. For example, the settlor might provide in a revocable trust for the distribution of the assets at the settlor’s death to the settlor’s probate estate, unless the settlor exercised a general power of appointment. In this instance, there may not be any beneficiary with a sufficient interest in the trust to be entitled to notice. In considering such an approach, care must be taken so that there is a sufficient separation of legal and equitable title.

**The evolution of the law concerning the trustee’s duty to disclose information to the trust beneficiaries creates new risks for trustees who are unaware of their obligations.**

The evolution of the law concerning the trustee’s duty to disclose information to the trust beneficiaries creates new risks for trustees who are unaware of their obligations. Although it can be a difficult decision to make under pressure, a trustee should give strong consideration to policies that favor prompt and complete disclosure even in difficult circumstances. Also, trustees should remember that the courts are available for their protection when confronted with genuine doubt and difficulty in the administration of the trust. When a trust is dramatically amended under questionable circumstances, it is hard to imagine any court finding fault in a trustee who seeks clarification and confirmation from the court through a petition for instructions or similar action.

**Conclusion**

The evolution of the law concerning the trustee’s duty to disclose information to the trust beneficiaries, through cases like Longmeyer, creates new risks for trustees who are unaware of their obligations. Trustees will also face an increasing number of difficult situations as in Longmeyer as a result of an aging and increasingly infirm population. Although it can be a difficult decision to make under pressure, a trustee should give strong consideration to policies that favor prompt and complete disclosure even in difficult circumstances. Also, trustees should remember that the courts are available for their protection when confronted with genuine doubt and difficulty in the administration of the trust. When a trust is dramatically amended under questionable circumstances, it is hard to imagine any court finding fault in a trustee who seeks clarification and confirmation from the court through a petition for instructions or similar action.