What’s Going On These Days?
And
Fiduciary Duties: An Overview

Free Seminar for Clients of
Anne M. McKinney, P.C.

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WHAT’S GOING ON THESE DAYS?

FIRST, LET’S TALK ABOUT TENNESSEE:
The biggest news is on the Tennessee front: In January, Governor Haslam announced his intention to push to “cut estate taxes” in Tennessee. (See the article at www.tennessean.com, “Haslam proposes reductions on grocery, estate taxes” dated January 11, 2012, and the later article by Chas Sisk of The Tennessean, “TN businesses press for end of estate tax,” found on www.wbir.com.)

The bill soon to be signed into law by the Governor raises Tennessee’s inheritance tax exemption as follows: $1,250,000 in 2013; $2,000,000 in 2014; $5,000,000 in 2015; and repeals the tax entirely in 2016.

At the end of the second article noted above is the following interesting chart, under the heading “Who pays the estate tax?":

<table>
<thead>
<tr>
<th>Estate size</th>
<th>No. of estates</th>
<th>Tax collections</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than $1.5 million</td>
<td>454</td>
<td>$6.3 million</td>
</tr>
<tr>
<td>$1.5 - $2.0 million</td>
<td>153</td>
<td>$8.6 million</td>
</tr>
<tr>
<td>$2.0 - $2.5 million</td>
<td>81</td>
<td>$8.6 million</td>
</tr>
<tr>
<td>$2.5 - $3.0 million</td>
<td>47</td>
<td>$7.2 million</td>
</tr>
<tr>
<td>$3.0 - $3.5 million</td>
<td>29</td>
<td>$5.9 million</td>
</tr>
<tr>
<td>$3.5 - $4.0 million</td>
<td>19</td>
<td>$4.7 million</td>
</tr>
<tr>
<td>$4.0 - $4.5 million</td>
<td>12</td>
<td>$3.6 million</td>
</tr>
<tr>
<td>$4.5 - $5.0 million</td>
<td>9</td>
<td>$3.1 million</td>
</tr>
<tr>
<td>Greater than $5 million</td>
<td>41</td>
<td>$35.6 million</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>845</strong></td>
<td><strong>$83.5 million</strong></td>
</tr>
</tbody>
</table>

Source: TN Dept. of Revenue


In an information brief prepared by a legislative analyst for the Minnesota House of Representatives (!) in November of 2011 entitled “Survey of State Estate, Inheritance, and Gift Taxes,” the following summary of the current status of state gift taxes was found: “Few states impose stand-alone gift taxes . . . . When EGTRRA was enacted in 2001, four states imposed true gift taxes. Louisiana repealed its gift tax in 2007 after it repealed its inheritance tax. North Carolina also repealed its gift tax in 2008. This leaves two states, Connecticut and Tennessee, with gift taxes.”
SO, WHAT ABOUT THE FEDS?

A. Here are the **federal estate tax free amounts** in effect from and after June 7th, 2001:

<table>
<thead>
<tr>
<th>Year</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977</td>
<td>$120,000</td>
</tr>
<tr>
<td>1978</td>
<td>134,000</td>
</tr>
<tr>
<td>1979</td>
<td>147,000</td>
</tr>
<tr>
<td>1980</td>
<td>161,000</td>
</tr>
<tr>
<td>1981</td>
<td>175,000</td>
</tr>
<tr>
<td>1982</td>
<td>225,000</td>
</tr>
<tr>
<td>1983</td>
<td>275,000</td>
</tr>
<tr>
<td>1984</td>
<td>325,000</td>
</tr>
<tr>
<td>1985</td>
<td>400,000</td>
</tr>
<tr>
<td>1986</td>
<td>500,000</td>
</tr>
<tr>
<td>1987-1997</td>
<td>600,000</td>
</tr>
<tr>
<td>1998-</td>
<td>625,000</td>
</tr>
<tr>
<td>1999-</td>
<td>650,000</td>
</tr>
<tr>
<td>2000-2001</td>
<td>675,000</td>
</tr>
<tr>
<td>2002-2003</td>
<td>1,000,000</td>
</tr>
<tr>
<td>2004-2005</td>
<td>1,500,000</td>
</tr>
<tr>
<td>2006-2008</td>
<td>2,000,000</td>
</tr>
<tr>
<td>2009-</td>
<td>3,500,000</td>
</tr>
<tr>
<td>2010-</td>
<td>$5 Million; unless an election is made for the tax-free amount to be UNLIMITED (but with carry-over basis)</td>
</tr>
<tr>
<td>2011-</td>
<td>$5,000,000 with a 35% rate on the excess</td>
</tr>
<tr>
<td>2012-</td>
<td>$5,120,000 with a 35% rate on the excess</td>
</tr>
<tr>
<td>2013-</td>
<td>$1,000,000 with a 55% rate (unless Congress takes action)</td>
</tr>
</tbody>
</table>

B. The **federal gift tax free amount** for all **taxable gifts** is a cumulative lifetime total of **$5,120,000 per donor**; each donor has a **$13,000 per person annual gift tax exclusion** (indexed for inflation).

C. The **unlimited marital deduction** for certain types of gifts to a spouse during lifetime and at death; and the **unlimited charitable deduction** for certain types of gifts to charitable organizations are both still applicable for gift tax purposes, and for federal death tax purposes.

D. The **exemption from the generation-skipping transfer (GST) tax** is **$5,120,000 as well**.

E. The **rate** of federal estate, gift and GST tax is **35% in 2012**.

F. If the executor of an estate chooses to use the special use valuation method for qualified real property, the aggregate decrease in the value of the property resulting from the choice cannot exceed $1,040,000, up from $1,020,000 for 2011.

G. What does the future hold? Is portability permanent? Could we get full repeal?
FIDUCIARY DUTIES

INTRODUCTION
Black’s Law Dictionary defines the term “fiduciary” as “[a] person having duty, created by his undertaking, to act primarily for another’s benefit in matters connected with such undertaking.” Similarly, the Free Online Law Dictionary defines a fiduciary as “a person who has the power and obligation to act for another under circumstances which require total trust, good faith and honesty.” A fiduciary “must avoid ‘self-dealing’ or ‘conflicts of interest’ in which the potential benefit of the fiduciary is in conflict with what is best for the person who trusts him/her/it.”

As you know, fiduciaries include those acting in the roles of executor, administrator, trustee, attorney-in-fact, guardian, conservator, agents, etc. While we acknowledge that there are numerous fiduciary roles, due to time constraints and the fact that our law practice primarily deals with three types of fiduciary positions, we have limited the scope of this presentation to trustees, executors/administrators, and attorneys-in-fact for financial and business matters (not health care). However, the principles that govern these three fiduciary types apply to others acting in a fiduciary role as well.

COMMON LAW
Common law provides us with the fundamental principles of fiduciary law, which apply any time one person acts in a trust relationship with another. Generally, common law principles require that a trustee “must do what his honest, disinterested judgment approves or ought to approve.” (Tennessee Jurisprudence, Vol. 24, p. 221, 2011.) The “trustee’s general duty is to protect the trust fund or estate from waste or misappropriation” (Id., p. 225) and “to do whatever may be necessary and proper to give effect to the purposes contemplated by the trust.” (Id., p. 226; citing, Third Nat’l Bank v. Brown, 691 S.W.2d 557 (Tenn. Ct. App. 1985).)

Moreover, common law concludes that “a trustee must act in good faith with due diligence and with more care and skill than a person of ordinary prudence would exercise in dealing with his own property.” (Tennessee Jurisprudence, p. 226; citing, Knox County v. Fourth & First Nat. Bank, 181 Tenn. 569, 182 S.W.2d 980 (1944).) “A trustee must keep the business of his trust separate and distinct from his own business,” and “in investing funds, a trustee is held to perfect good faith, and the exercise of such reasonable care in the execution of his trust, as would be given by a prudent man in his business. . . .” (Id., p. 227.)

Similarly, common law provides that the executor of an estate “is bound to perfect good faith, and to the exercise of that degree of diligence, prudence, and
caution which a reasonably prudent, diligent and conscientious businessman
would employ in the management of his own affairs of a similar nature.”
law states that “an executor has a duty to marshal and collect the estate’s assets
within a reasonable time, . . . discharge its statutory obligations in a timely
manner, . . . [and] distribute the estate in a timely manner and close its
administration as quickly as possible.” (Tennessee Jurisprudence, Vol. 12, p.
158, 2011.) “It is the duty of an executor to do and perform every act directed or
provided for in the will. . . .” (Id., p. 158.)

Common law with regard to agents confirms that “[a]n agent stands in a fiduciary
relationship to his principal and is under a duty to be careful, skillful, diligent and
loyal in the performance of his principal’s business. . . .” (Tennessee
Jurisprudence, Vol. 1, p. 451, 2010; see also, Carter v. Patrick, 163 S.W.3d 69
(Tenn. Ct. App. 2004.) When dealing with the principal, the agent cannot act
adversely with the principal or in any matter act for himself. (Id., p. 456.) To this
effect, “it is the duty of an agent to keep the property of his principal separate
from his own.” (Id., p. 458.)

Much of this common law has been codified over the years and is now reflected
largely in Volume 6, Titles 30-35 of the Tennessee Code. More specifically,
Exhibit A sets forth certain specific duties and responsibilities of one acting
under the authority of a power of attorney, as provided under Title 34, Chapter 6
of the Code. Exhibit B outlines the law as it applies to executors and
administrators, and Exhibit C chronicles Parts 7, 8, 9 and 10 of the Uniform
Trust Code, as they relate to the duties and responsibilities of a trustee. Exhibit
C also includes provisions from the Uniform Prudent Investor Act and the Uniform
Principal and Income Act, which apply to all fiduciaries. Included as Exhibits D,
E, and F are checklists that sum up many specific duties of an attorney-in-fact,
executor/administrator, or trustee.

CASE LAW
The following cases provide excellent reminders that fiduciaries do not always
understand their responsibilities, or in the alternative, their greed or some other
motivating factor results in the fiduciary’s failure to fulfill his or her fiduciary duty.

Executor’s Duties: In Re: Estate of W. Garnett Ladd involves the award of an
Executor’s fee to a Co-Executor for his services as the Co-Executor of Mr. Ladd’s
estate. The Co-Executor, Robert Marks (the attorney who prepared the Will),
was claiming a fee equal to 5% of the gross estate, stating that he was entitled to
such a fee based on the contractual arrangement that he made with the
decedent’s 94-year-old widow, who was Mark’s Co-Executor. (In Re: Estate of
02089-COA-R3-CV, April 30, 2007.) The Court of Appeals concluded that Marks
was not entitled to any fee for his services, confirming the Special Master’s report containing 43 findings of fact that Marks failed, after eight years, to administer the estate in accordance with his fiduciary duty. Not only must the executor deal with the beneficiaries in utmost good faith, exercising “the same degree of diligence and caution that reasonably prudent business persons would employ in the management of their own affairs” (In Re: Estate of W. Garnett Ladd, citing McFarlin v. McFarlin, 785 S.W.2d 367, 369-70 (Tenn.Ct.App. 1990)), but the executor also “owes a duty to marshal and collect the assets of an estate within a reasonable time; discharge his statutory duties and distribute the estate in a timely manner; and close his administration as quickly as possible.” (In Re: Estate of W. Garnett Ladd; see also, Doyle v. Hunt, 60 S.W.3d 838, 844-45 (Tenn.Ct.App.2001).) The Court also found that an executor “has a duty to communicate with beneficiaries and the court in a professional manner.” (In Re: Estate of W. Garnett Ladd; see also, Doyle v. Hunt.) “Faithful discharge of duty is necessary to demand rightfully any compensation. A dishonest or negligent executor . . . will not, as a general rule, be allowed anything for his services.” (In Re: Estate of W. Garnett Ladd; citing, 2 Pritchard §861, 532.) Agreeing with the Special Master’s conclusions, the Court found “that the [Co-Executor] did not perform and he did not carry out his fiduciary obligations and responsibilities”; therefore, he was not entitled to compensation.

Executor’s Duties: In the McFarlin case, the decedent’s grandson (who was also an attorney) was found to have breached his fiduciary duty as the named Executor of his grandmother’s estate. (McFarlin v. McFarlin, 785 S.W.2d 367 (Tenn.Ct.App.1990).) The Court determined that the Executor’s administration did not “pass muster” in three particular areas. First, the Executor encouraged two family members to file claims against the estate for their services to the decedent prior to her death; then, the Executor did not actively oppose the claims. The Court commented on the fact that the dissension in the family (the Executor was estranged from his father, who was one of the two residuary beneficiaries) served to increase (not decrease) the Executor’s “duty of undivided loyalty to the estate and impartial and just treatment to each of the beneficiaries.” (McFarlin at 370.) The Court ruled that “[b]y precipitating the claims and then not opposing them, [the Executor] breached his fiduciary duty to the recipients of the residuary estate who stood to receive less if the claims were allowed.” (McFarlin at 371.) Second, the Court focused on the Executor’s filing of accountings and state and federal tax returns. It determined that “during the six years [the Executor] administered his grandmother’s estate, every filing he made was either late, incomplete, or erroneous.” (McFarlin at 371.) It went on to rule that such conduct violated the Executor’s duty to “act with the same diligence that reasonably prudent men would have used in the conduct of their own affairs.” (McFarlin at 372.) Finally, the Court looked at the Executor’s conduct toward his aunt (one of the two residuary beneficiaries). He allowed his aunt to be in charge of the decedent’s house and the contents of the house, he agreed with his aunt’s
entering the decedent’s safe deposit box, and he did not question his aunt’s taking possession of three of the decedent’s bank accounts. The Court found that his conduct showed not only the Executor’s “failure to take control of [the decedent’s] estate but also inappropriate deference to the wishes of one of the beneficiaries when these wishes were clearly contrary to those of the other beneficiary.” (McFarlin at 372.) As a result of the Executor’s failure “to administer the estate in a competent manner,” the Court disallowed the Executor’s fee. (McFarlin at 372.)

Duties of Attorneys-in-Fact: In Estate of David Holt Ralston, Deceased, by John A. Ralston, Personal Representative v. Fred R. Hobbs, et al., David Ralston appointed his nephew, Fred Hobbs, as his attorney-in-fact. Using the power of attorney, Hobbs transferred all of Ralston’s real property interests to himself, his mother and another uncle of Hobbs. Mr. Ralston was not aware of the Deeds, and none of the Deeds were recorded until after Mr. Ralston’s death. Several years after Mr. Ralston’s death, the decedent’s brother, John Ralston, was appointed as the personal representative, and a month after being appointed, the personal representative filed an action on behalf of the estate against Hobbs and the other donees of the real property interests. The personal representative claimed that Hobbs’ transfer of the decedent’s property breached Hobbs’ fiduciary duty as attorney-in-fact. Hobbs contended that he had the authority to make gifts under the power of attorney; therefore, he did not breach his fiduciary duty. The court held that the fact that the power of attorney authorized Hobbs to make gifts “does not obviate the attorney-in-fact’s overriding fiduciary duties of loyalty, honesty, and to act with good faith for and on behalf of the principal.” (Ralston, 306 S.W.3d at 221.) The court goes on to say that “when an attorney-in-fact makes gifts of the principal’s assets to himself, a presumption arises that the transaction is invalid unless the attorney-in-fact can demonstrate by clear and convincing evidence the fairness of the transaction to the principal.” (Ralston at 227; citing Martin v. Moore, 109 S.W.3d 305, 309, 310 (Tenn.Ct.App. 2003); Richmond v. Christian, 555 S.W.2d 105, 108 (Tenn. 1977).) Despite Hobbs’ arguments regarding the relationship of the parties and the use of an attorney to prepare the power of attorney, the “court found that Hobbs failed to demonstrate the conveyances for no consideration were fair to the decedent,” confirming the trial court’s determination that Hobbs breached his fiduciary duty.

Duties of the Attorney-in-Fact / Executor: The attorney-in-fact turned Executor in In Re Estate of Viola B. Copas consistently used the principal’s funds for his own debts and living expenses, including payment of his Mercedes Benz automobile loan, payment of his income taxes, and payment of his daughter’s rent on her condominium in Savannah Shores. (In Re Estate Of Viola B. Copas, E2010-00877-COA-R3-CV, Crt. Ap., June 22, 2011.) After the principal’s death, the attorney-in-fact as the Executor of the principal’s estate, made numerous withdrawals from the estate account, but when asked to account for the same, he
was only able to produce one receipt which was for the principal’s funeral. After receiving all the proof, the court ruled that “this is the worst estate and power of attorney case I've seen come through my court.” (Id., p. 6.) The court ordered the Executor on three separate occasions to file an accounting, and on all three attempts to file such an accounting, the Executor’s accounting was incomplete, inaccurate and unacceptable, and upon the Executor’s comment that it is “impossible” to file the required accounting, the court replied, “Wait just a minute, he was in charge of the money, he was supposed to keep the records. He was supposed to keep the receipts. He was supposed to keep the debits. He was supposed to keep the credits and most importantly, he was supposed to keep his money separate from the estate money or from the account money that we have here and he never did do that.” (In Re Estate Of Viola B. Copas, p. 7.) The court went on to say that for “four years we've limped along and for four years [the Executor] has miserably failed in his fiduciary duty in regard to the estate and he’s failed miserably in his fiduciary duty in regard to the power of attorney that his mother gave him.” (Id., p. 9.) The court ruled that “every reasonable resolution as to which property is the beneficiary’s should be made against [the Executor] through whose fault the truth in this matter has become obscure.” (Id., p. 8.) The court found that the Executor “fraudulently took Viola Copas’s money that she had entrusted to him through the abusive use of the power of attorney and profited from this abuse. . . . [H]e took her money by commingling his money with her funds and by using her funds for his personal use and benefit to such an extent that neither this Court nor [the Executor] can untangle the mess. Further, [the Executor’s] record keeping and his refusal to provide a complete and accurate accounting makes it impossible for this Court to determine what belonged to [the Executor] or his mother or how much he took of her funds for his own use and benefit.” (Id., p. 10.) “So I find we’re dealing with a real rascal here” (Id., p. 9); the Executor, as “the dominant party, not only abused his fiduciary power to take these funds from Mrs. Copas but he is also a thief.” (Id., p. 10.) The court awarded a judgment of $2,040,276 for the beneficiaries against the Executor and assessed all court and discretionary costs against the Executor together with $106,000+ in attorneys’ fees.

**Duties of Trustees:** The *Estate of Effie S. Hooker v. SunTrust Bank of Nashville*, M1999-01479-COA-R3-CV, filed December 3, 1999, is one of our favorite cases on the subject of a trustee’s duty in the handling of a testamentary trust created by a husband for the benefit of his surviving wife. In the years between the death of testator John J. Hooker, Sr. on Christmas Eve of 1970 until the death of his wife, Effie, in September of 1997, the standard of living available to Mrs. Hooker declined severely, despite her husband’s mandate to his Trustee to encroach upon the principal of the trust “so as to permit her to live in the same standard of living to which she was accustomed at the date of my death . . . .” When she applied to SunTrust Bank as Trustee for a distribution of funds, instead of making an outright distribution to Effie, the Bank loaned her the money (which
benefited the remainder beneficiaries, who were Effie’s stepchildren). After Effie’s death, her Executor refused to pay the loan back; the Bank sued; and the Court of Appeals held: “The duty of the trustee is not to protect the remaindermen but rather to follow the orders of the testator. . . . The will of John J. Hooker, Sr. is plan, clear and unambiguous in expressing his predominant purpose that his wife is the primary object of his bounty, and he allows neither the trustee nor the court to deviate from his purpose. The remaindermen take only what is left after that predominant purpose is fulfilled.” The Court of Appeals did not go further (as Effie’s Executor urged) and find that SunTrust was guilty of a breach of fiduciary duty when it failed to make trust distributions and failed to advise her of the Bank’s conflict of interest in allowing the interests of the remaindermen to take precedence over Effie’s interests in contravention of the terms of the will, but the Court did include this tidbit: “Although the trial court primarily noted the ‘forthright’ nature of the testimony of … SunTrust’s Trust Accounts supervisor; that forthright testimony concerns actions by SunTrust which, if consistent with a Trustee’s fiduciary duty, challenge the determination of good faith.”

Summary: A look at these cases suggests that a fiduciary’s role is more complicated than most people realize. Before choosing someone as a fiduciary — or agreeing to serve as one — it’s important to consider these important, often uncomfortable, factors:

1. **Personality:**

   Often our clients want to name the child who has no problem getting things done, and typically this would be a good idea when you consider the *Ladd* case above, in which the Executor failed to get anything done in a timely manner. However, if your clients name a child who tends to be domineering or a bully as their fiduciary, that child may impose his will on the parents, as attorney-in-fact, or on the other beneficiaries, as trustee, despite the parents’ intentions regarding the purpose for the testamentary trust(s) or what would truly be in the beneficiaries’ best interest. There is a difference between a child who is well organized, self-motivated and a hard worker and a child who is pushy, opinionated and self-centered. The latter child will wield his appointed power, perhaps to the point of provoking others to take action against him.

   On the flipside, sometimes our clients name a child because she is the sensitive one and will listen to everyone before making a decision. This child may be too wishy-washy to make the decisions that she needs to make in the course of carrying out her duties. Sometimes this type of person becomes paralyzed by emotion, thus failing to do anything. We have seen this happen with regard to the task of going through a deceased parent’s house to distribute the decedent’s
tangible personal property or making a decision about whether to go forward with treatment for an elderly parent.

We need to discuss with our clients the effects that a fiduciary’s personality has on carrying out the responsibilities of his role, and this is especially true where co-fiduciaries are appointed to serve. Putting two children together who clash can lead to tension, miscommunication and a complete failure to fulfill the responsibilities of their role.

2. **Interests:**

When a child works in the family business or owns property with his parents, naming that child as a fiduciary immediately puts that child in a situation where the duty of loyalty comes into question. Suppose the client’s son is a fifty percent (50%) owner with client / Dad in ABC, Inc. Son is Dad’s attorney-in-fact, executor and trustee, and this makes good sense because the son understands all of Dad’s finances and the business — so he makes the best choice for these fiduciary roles (right?). The problem is that Dad has two other children, who have different needs than fiduciary son. If son makes business decisions that may further the business through reinvestment of profits, for example, but the other children need cash, those children may call into question the son’s duty of loyalty, pursuant to T.C.A. §35-15-802. Likewise, if daughter owns land that abuts Mom’s land, daughter’s decisions toward that land may be skewed by her personal proximity to the land, and what if the named executor lives in the decedent’s home? A reasonably prudent person would charge rent to a third party living on the decedent’s property, so if the executor does not pay rent to the estate for living on the decedent’s real property, the executor may be violating her fiduciary duty.

3. **Position:**

Another situation arises when the parents name a child as their fiduciary, and over the years, they decide to favor that child in their distribution plan because of her service or because she is the co-owner of the business, etc. Because the child is in a confidential relationship with the parents, as their attorney-in-fact for example, such favoritism gives rise to a presumption of undue influence. Of course, pursuant to T.C.A. §34-6-107, you could argue that a confidential relationship was not present because the daughter had not acted under the power of attorney yet, but this may be difficult to prove, or it may not be true in every case, especially as the parents age. The point is we must be cautious when naming one child as the sole fiduciary when we know (or perhaps should know) that child will be favored over our clients’ other children.
Likewise, conflicts result when you place a remainderman in the fiduciary role over a lifetime beneficiary. For example, the child of the decedent serves as Trustee over his stepmother’s lifetime trust. Even if the child is truly selfless and devoted to his fiduciary duties, the stepmother may not think that he is handling investments appropriately or making distributions properly. Thus, it is highly probable that bad feelings will occur, arguments will result, and potential litigation will develop.

4. **Accountability:**

The Uniform Trust Code gives Tennesseans significant latitude regarding the notice that they must give to the beneficiaries of a trust. Under the Code, the trustee has the duty 1) to keep beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests; 2) to respond in a reasonable amount of time to a beneficiary’s request for information on the trust administration; and 3) to furnish certain required notices (T.C.A. §35-15-813). Subparagraph (e) of §35-15-813 allows the Grantor to dictate what notice the trustee must give and to whom, and the Grantor may completely deny beneficiaries any information. While many of our clients might find the elimination of all notice requirements and waiver of the duty to inform requirements appealing, is the complete freedom from accountability helpful or harmful?

While a child might have been the perfect child while the parents were living, prompting the parents to appoint the child as trustee, the child may develop marital problems, drinking problems and/or business problems that might tempt him to start “borrowing” from the trust property. If the beneficiaries are not entitled to any information, it is unlikely that such “skimming” will be discovered until significant damage is done. Additionally, certain statutes of limitation regarding trustee liability will not begin to run as quickly because of the elimination of certain notice requirements. Likewise, under §35-15-1007, a trustee must exercise reasonable care to ascertain the happening of events that affect the administration or distribution of a trust; therefore, if the trustee has no duty to inform and/or give notice to the beneficiaries, he may have trouble keeping up with information that he needs to know about the beneficiaries to insure proper management of the trust assets.

Section 35-15-303(7) allows the Grantor to designate a person to represent and bind the beneficiaries of the trust; therefore, if your clients do not want their spendthrift children to receive information about the trust, they can designate a third party, like an accountant or an attorney, to receive that information for the beneficiaries. Be aware that if this person has the power to direct the trustee, he or she is presumptively a fiduciary, who must act in good faith with regard to the interests of the beneficiaries. (See T.C.A. §35-15-808(d).)
Remember that under *In Re: Estate of W. Garnett Ladd*, the court found that an executor “has a duty to communicate with beneficiaries and the court . . . .” Therefore, the ability to limit a trustee’s duty to communicate with trust beneficiaries does not necessarily limit the duty of your executor/administrator to communicate with your estate beneficiaries.

What if your clients, despite your advice, still want to name a child to serve as fiduciary while at the same time benefiting that child beyond his equal share? The clients can use *in terrorem* clauses in their estate planning documents to deter a beneficiary from bringing an action against the provisions of the document. Your clients can also include exculpation provisions in their documents. (See T.C.A. §35-15-1008.) For instance, where a child is the trustee of a trust which holds a business interest for the benefit of several beneficiaries, and the child is also an owner of the business, the Grantor can include exculpation clauses that hold the trustee harmless for certain actions and/or decisions regarding the business.

The use of Trust protectors, special trustees and independent advisors may also relieve the fiduciary of some of the problems that arise as a result of his dual roles – fiduciary and beneficiary. For example, if a child will be trustee and business partner, the Grantor could include provisions in the Trust Agreement that require the trustee to consult with a specified, independent third party before certain decisions are made about the business entity, or if decisions must be made about land abutting the trustee’s property, a special trustee can be designated to make such decisions.
EXHIBIT A
Selected Tennessee Statutes
Governing Attorneys-in-Fact

T.C.A. §§34-6-101 ff: Uniform Durable Power of Attorney Act

T.C.A. §34-6-102 contains the definition of a durable power of attorney: “a power of attorney by which a principal designates another as the principal’s attorney in fact in writing and the writing contains . . . words showing the intent of the principal that the authority conferred shall be exercisable, notwithstanding the principal’s subsequent disability or incapacity.”

Citing Stewart v. Sewell, No. M2003-01031-COA-R3-CV, 2005 Tenn. App. LEXIS 222, the following comment is provided in T.C.A.: “While the attorneys-in-fact had the authority, assuming it was in plaintiff’s stepmother’s best interest, to sell property under T.C.A. §34-6-102, they had a corresponding duty to invest the proceeds in assets of accounts solely in the name of the stepmother because the property was titled solely in her name when it was sold.” For those of you who may want to cite Stewart v. Sewell, however, take note of the Tennessee Supreme Court’s reversal of the Court of Appeals decision in this case at 215 S.W.3d 815 (Tenn. 2007); the Supremes opined that the agents using the power of attorney did not have the authority under the document to place the proceeds from the sale of the property into an account bearing their names, on the authority of T.C.A. §34-6-108(c)(1), (c)(6) (2001), but decided that they did so to make it easier to pay the stepmother’s bills, and no harm was done(!), so they upheld the right of survivorship feature of the account upon the death of the principal.

T.C.A. §34-6-103 tells us that all of the acts of an attorney-in-fact “have the same effect and inure to the benefit and bind the principal and the principal’s successor in interest as if the principal were competent and not disabled.”

However, several cases cited in the annotations illustrate that, even if the power of attorney document authorizes the agent to handle claims and litigation on behalf of the principal, the existence of the power of attorney does not mean that a disabled principal will lose the benefit of the tolling of a statute of limitation.

T.C.A. §34-6-104 provides that if the principal is adjudicated incompetent, the fiduciary appointed in the incompetency proceeding “has the same power to revoke or amend the power of attorney that the principal would have had if the principal were not disabled or incapacitated.” This is the statute which authorizes the principal to nominate, through the durable power of attorney, the conservator the principal wants to serve on his or her behalf in the event of disability, and confirms that the court will normally go along with the principal’s nomination “except for good cause or disqualification.”
In **T.C.A. §34-6-105** relates to the death of the principal, confirming that such death will not revoke or terminate the agency if the attorney-in-fact acts under the document in good faith, without knowledge of the death of the principal. In subsection (c), the remedy of an affidavit provided by the attorney-in-fact which confirms lack of actual knowledge of the death of the principal “is conclusive proof of the nonrevocation or nontermination of the power at that time.”

In the event of the incompetence of the principal, **T.C.A.§34-6-106** provides that the principal’s next of kin may petition the court to require the attorney-in-fact to provide a bond.

In **T.C.A. §34-6-107**, the statute confirms that the fiduciary relationship between the principal and the attorney-in-fact exists “only to the extent that the attorney in fact undertakes to act under the power of attorney.” This statute also provides that the attorney-in-fact has a duty “to adequately account to the principal, or to any legal representative of the principal appointed by the principal or by a court, for actions taken by the attorney in fact in the exercise of the power of attorney.”

**T.C.A. §34-6-108** is the statute which authorizes the principal to incorporate into his or her power of attorney the laundry list of powers found in **T.C.A. §34-6-109**; this is also the statute which clarifies that, if the principal does not authorize the attorney-in-fact to do the following things, then the attorney-in-fact does not have the authority:

1. To make gifts (with some exceptions);
2. To revoke, amend, or appoint income or principal in a trust;
3. To take over any fiduciary duties the principal had;
4. To exercise any incidents of ownership in any life insurance policies owned by the principal on the agent’s life;
5. To change beneficiary designations for life insurance, employee benefit plan or IRA death benefits;
6. To change, add or remove a “right of survivorship” designation on any real or personal property of the principal’s;
7. To disclaim gifted or inherited property interests;
8. To exercise or give up any right to claim an elective share in any estate; or
9. To make any decisions related to health care except as related to the principal’s property or finances.

Gift-giving by the attorney-in-fact may be authorized expressly in the power of attorney document. If no express authority is given, however, despite the provision cited above, the principal will have the authority under **T.C.A. §34-6-110** to make gifts, “in any amount, of any of the principal’s property, to any individuals, or to [certain charitable organizations], in accordance with the
principal’s personal history of making or joining in the making of lifetime gifts.” In fact, even if there is not such personal history, the principal can petition a court to authorize gift-giving in certain circumstances.

T.C.A. §34-6-111 relates to so-called “springing” powers of attorney which direct that no power is conferred upon the attorney-in-fact until the principal is determined to be incapacitated. This type of power of attorney presents obvious problems in light of the HIPAA rules; thus, this statute was enacted to provide that, regardless of the effective date set forth in the document, the power of attorney document will be deemed to be effective as of the date of its signing “for the limited purposes of authorizing the agent designated in the power of attorney to have access to the principal’s medical records, physicians, other medical personnel and to discuss the principal’s health situation and particularly to comply with the HIPAA rules,” all of which must be undertaken “for the limited purpose of determining whether the principal is disabled or incapacitated to the extent that the general provisions of the power of attorney become effective.”
EXHIBIT B
Selected Tennessee Statutes
Governing Executors and Administrators

Title 30 of the Tennessee Code Annotated covers administration of estates, and although there is no section explicitly defining the fiduciary role of executors and/or administrators [both statutorily referred to as personal representatives (PR) despite differing in definition (see, T.C.A. §31-1-101(8))], we can sift through statutory provisions and other, similar legal principles to clarify what responsibilities accompany these positions.

Beginning with §30-1-101 we see that an administration cannot simply be undertaken without the prerequisite that the person obtain letters of administration or letters testamentary.

Also worth noting is §30-1-111 which provides that one cannot act as administrator or executor until he takes an oath – if an executor, an oath for performing the will of the deceased, and if an administrator, an oath for the faithful performance of the administrator’s duty.

Once appointed, a PR who wishes to resign must petition the court having jurisdiction over the administration and pray to be permitted to resign; §30-1-112 and §30-1-113 outline the manner by which a PR may resign and the process for transferring the administration, if the PR is allowed to resign, to insure that as little harm as possible comes to the beneficiaries and creditors of the estate.

§30-1-117 sets forth the information required to be included in the petition and the documents required to be filed to initiate the probate process.

§30-1-151 provides that any PR may be removed in accordance with the procedures in §35-15-706, which covers the removal of a trustee; because the removal procedure for a PR is governed by the provision for the removal of a trustee, we can see how a breach of the same type of trust can result in the termination of each relationship. The removal process can be requested by a beneficiary or initiated by the court. The court may remove a PR, if the PR has committed a serious breach of trust and/or has failed to effectively manage the administration. Note that not all breaches of trust rise to the level of removal; the breach must be “serious.” A serious breach of trust may consist of a single act that causes significant harm or constitutes flagrant misconduct; this may also consist of a series of smaller breaches, none of which would individually give cause for removal, but taken in the aggregate meet that threshold. (Comment to §35-15-706.)
The **PR is required to file a bond** for the faithful performance of his duties, **unless one of the four exceptions listed in §30-1-201 exist.** “If the bond is required, the bond shall not be less than the value of the estate . . . subject to administration nor more than double the value of the estate §30-1-201(a)(2), and any interested person may petition the court to have the bond altered, if the PR is wasting, or likely to waste, the estate - §30-1-201(b). §§30-1-203 and 30-1-205 have recently been amended and deal with the form of the bond; §30-1-205 maintains the validity of the bond, even if §30-1-203 is not strictly followed, so long as the language of the bond includes “the obligation to pay all court costs, attorney’s fees, and other expenses reasonably incurred because of the failure of the [PR] to properly account for and utilize” the funds of the estate.

The PR, within sixty (60) days after entering on the administration of a testate or intestate estate, shall make a **complete and accurate inventory** of the probate estate of the deceased (§30-2-301). Where a testator excuses the requirement of making and filing an inventory in his will, or where all of the residuary distributees or legatees excuse the requirement for making and filing an inventory, no inventory shall be required of a solvent estate, unless demanded by any residuary distributee or legatee of the estate.

Except in unusual circumstances, §30-2-301(b) provides that the PR, within sixty (60) days after entering on the administration, shall notify:

(A) Each legatee or devisee under the will that that person or entity is a beneficiary by sending, by first class mail or personal delivery, a complete copy of the will to those beneficiaries sharing in the residue of the estate, and by sending a copy of the paragraph or paragraphs of the will containing the bequests to those beneficiaries only receiving bequests; and

(B) Each residuary distributee of an intestate deceased person by sending that person a copy of the letters of administration.

**Subsections (3) and (5) of §30-2-301** require the PR, within the sixty-day period, to file **affidavits with the court** that the required copies have been mailed or delivered to the beneficiaries or distributees, and that the Bureau of TennCare has been notified of the decedent's death pursuant to § 71-5-116.

§30-2-303 provides for the sale of the decedent’s effects, stating that “[u]nless otherwise directed by the will and unless the specific personal property is the subject of a bequest, the PR of a testate or intestate estate may, in the PR's discretion, sell the personal property of the decedent at public or private sale, for cash or on terms, in such manner and for such prices as the PR may deem advisable; but the **PR shall not make a private sale to the personal representative, to business associates, to members of the personal**
representative's immediate family or to their agents without court approval or the written consent of all residuary distributees of the estate.

Notice to creditors is outlined in §30-2-306, and in addition to the notice requirements placed on the court clerk, the PR has the duty, pursuant to §30-2-306(d), to provide actual notice to all creditors of the decedent of whom the PR has actual knowledge or who are reasonably ascertainable by the PR.

The process for filing claims is outlined in §30-2-307 through §30-2-310; the PR has the responsibility of filing an exception to any claim that the PR believes to be invalid, as set forth in §§30-2-313 and 30-2-315. Where no exception is filed, the court will enter judgment for the creditor against the estate. §30-2-316.

Section 30-2-311 permits a PR to pay any claim not exceeding $1,000, without a claim being first filed, if the PR determines the payment to be proper.

The PR has the responsibility to pay all valid claims in accordance with the priority set forth in §30-2-317, which provides that first priority goes to the costs of administration (which includes attorneys’ fees); second is the reasonable funeral expenses; third are taxes and assessments imposed by the federal and state governments (and this includes claims by the Bureau of TennCare); and finally, all other demands filed in accordance with the claims period outlined in §30-2-306.

The timing of paying claims is addressed in §30-2-318 and §30-2-319; §30-2-318 states in subsection (a) that prior to the expiration of the period fixed for the payment of claims, the PR may pay the preferred claims as provided in § 30-2-317 for which the estate may be liable, and upon order of court any debt of the decedent for which security may have been given that is in danger of being sold by way of foreclosure to the detriment of the estate. Additionally, subsection (b) provides that if the PR knows or is willing to undertake that an estate is solvent, he may pay debts prior to the expiration of the creditor period, but if the estate proves insolvent, the PR and the PR’s sureties shall be liable to each and every creditor for the creditor’s ratable share of the insolvent estate. Otherwise, §30-2-319 provides that the PR should pay claims as soon as practicable (not to exceed 90 days) after the expiration of five months after the date of the notice to creditors.

The law provides in §30-2-322 for the PR to continue the decedent’s business, when not contrary to the provisions of the will.

Unless contrary to the provisions of the decedent’s will, §30-2-323 authorizes the PR, but does not require the PR, to advance or to pay as an expense of administration for a period of up to four (4) months after the decedent's death the
reasonable costs of routine upkeep of any real property passing under the will of the decedent or by intestate succession. Such expenses include those for utility services, day-to-day maintenance, lawn service and insurance premiums, but they do not include mortgage note payments, real estate taxes, major repairs or other extraordinary expenses. Such limitations do not apply to any real property that is actually part of the probate estate being administered.

**Part 4 of Title 30, Chapter 2 provides for the sale of the decedent’s land** to pay debts; before any such sale, §30-2-404 requires the PR to prove to the satisfaction of the court that the personal estate has been exhausted and that the debts or demands for which the sale is sought are justly due and owing. If the heirs or devisees show that the PR wasted or concealed the personal estate, the heirs or devisees shall have execution not only against the goods and chattels of the deceased debtor, but also **against the proper goods and chattels, lands and tenements of the PR**! (§30-2-413.) See also, §30-2-504, waste or misappropriation of assets by PR.

Unless accountings are waived in the will or waived by all of the distributees of the residue, **within fifteen (15) months from the date of qualification, the PR must make an accounting with the court clerk. **§30-2-601(a). After the first accounting and until the estate is fully administered, the PR must make further accountings annually from the date of the first accounting. The accountings shall state all receipts, disbursements and distributions of principal and income for the accounting period and the remaining assets held in the estate.

To close an estate where all court accountings have been waived by the decedent’s will or by the distributees, the PR and the distributees, after all legitimate claims against the estate have been satisfied and the creditor period has expired, may file separate statements with the court clerk, which statement by the PR must include the facts set out in §30-2-601(b)(1) and which statement by the distributees must acknowledge that the estate has been properly distributed to them; no statement is required of a distributee who is also the PR. If such statements are filed, the PR is relieved from filing a detailed accounting. If a detailed accounting is not waived, the requirements for such accounting are set forth in §30-2-601.

If the PR fails to account as set forth in §30-2-601, the PR will receive **notice to appear and settle** the estate pursuant to §30-2-602. If the PR fails to respond to such notice, the PR will be held to be in **contempt of court** and punished accordingly.

§§30-2-603 through 30-2-613 outline the accounting process including the appeal process, which has recently been amended, and the penalty for failing to account.
The procedure for paying any federal estate tax and Tennessee inheritance tax due is set forth in §30-2-614, which states in part “so far as is practicable, and unless otherwise directed by the will of the decedent, the tax shall be paid by the PR, as such, out of the estate before its distribution, . . .” and “shall be prorated equitably among the beneficiaries and persons interested in the estate,” again, except as otherwise provided in the will.

Upon the payment of all claims, all expenses of administration, and all tax liabilities and assessments, the PR shall pay any balance remaining in the estate to the distributees or legatees entitled to it. §30-2-701. At such point, the PR shall make and file with the court a final settlement of the estate.

§30-2-702 provides direction to the PR, who is ready to settle the estate, when one of the distributees is incompetent or a distributee cannot be found or refuses to accept his or her inheritance (which sometimes happens when a testator leaves a beneficiary one dollar under his will). The PR should obtain a receipt from the distributee pursuant to §30-2-707.

After eighteen (18) months from the grant of letters, §30-2-710 provides that any distributee or legatee may apply to the court in which the administration is taking place to compel the payment of the distributee’s or legatee’s distributive share or legacy.

Chapter 5 of Title 30 outlines the duties and responsibilities of a PR where the estate of the decedent is or becomes insolvent.
EXHIBIT C
Selected Tennessee Statutes
Governing Trustees

While the provisions of the Uniform Trust Code deal with the actions and responsibilities of trustees, statutes like the Uniform Prudent Investor Act and the Uniform Principal and Income Act apply to all fiduciaries. The duty of loyalty and impartiality, along with the duty to act as a prudent person toward the trust administration, is codified for trustees within the Uniform Trust Code.

Part 7 of the Uniform Trust Code addresses the office of trustee in general:

§35-15-701 lets us know that a person can accept a trusteeship by accepting trust property, performing duties or powers as trustee, or “otherwise indicating acceptance of the trusteeship,” but before doing any of those things a person can reject the trusteeship. And if the trustee does nothing for too long (more than a reasonable time), he will be deemed to have rejected the trusteeship. §35-15-702 addresses the issue of bond and only requires one if the court finds a bond to be needed or if bond is required by the terms of the trust instrument.

§35-15-703 deals with cotrustees (no hyphen) and begins by stating that if cotrustees cannot reach a unanimous decision then a majority rules. This Section also covers vacancies (as does §35-15-704), delegation of duties, dissent among trustees, etc., and provides that generally “a trustee who does not join in an action of another trustee is not liable for the action.” §35-15-704 gives us an order of priority for filling vacancies for noncharitable and charitable trusts. §35-15-705 covers trustee resignations, and §35-15-706, trustee removal.

§35-15-708 addresses trustee compensation (reasonable, not set by percentages; except that “the fees set forth in the published fee schedule of a corporate trustee shall be presumed to be reasonable, unless otherwise provided by the terms of the trust”).

Part 8 of the Uniform Trust Code addresses the duties and powers of trustee:

§35-15-801 requires the trustee who has accepted the position to administer the trust until it terminates or a successor trustee is appointed and all assets have been delivered in good faith. According to §35-15-804, the trustee must administer the trust “as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution.” §35-15-802 deals with the duty of loyalty and considers conflict of interest situations, and §35-15-803 directs the trustee for two or more
beneficiaries to “act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries’ respective interests.”

According to §35-15-806, if a trustee has “special skills or expertise,” then the trustee “shall use those special skills or expertise.” And §35-15-807 authorizes a trustee to delegate duties and powers if such delegation would be prudent for a trustee with comparable skills; an agent who accepts the delegation submits to the jurisdiction of Tennessee courts.

§35-15-808 looks very much like a “trust protector” provision, authorizing a trust to confer upon a trustee or someone else a “power to direct the modification or termination of the trust,” and providing that a person who holds such power is a fiduciary required to act in good faith: “The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.” [Is this provision imposing fiduciary duty to a trust protector?]

§35-15-810 tells the trustee to keep adequate records and keep the trust property separate from his own. Look closely at §35-15-810(c) and (d).

§35-15-813 requires the trustee to keep the “beneficiaries of the trust who are current mandatory or permissible distributees of trust income or principal, or both,” reasonably informed about the trust’s administration “and of the material facts necessary for them to protect their interests.” The trustee “shall respond in a reasonable amount of time to a qualified beneficiary’s request for information related to the administration of the trust.” Unless the settlor directs the trustee in writing not to give notice, the trustee of an irrevocable “or non-grantor” trust must, within 60 days after acceptance and funding of the trust, “notify each current income beneficiary and each vested ultimate beneficiary of a remainder interest that the trust has been established.” Review §35-15-813(b)(1) and (2) for the details regarding the required notice (there’s a lot there!). A similar notice is required when the interest of a current income beneficiary terminates.


§35-15-814 tells the trustee that even if the trust authorizes “absolute” and “sole” or “uncontrolled” exercise of discretion, the trustee must still exercise his power “in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.”
§35-15-814(b)(1) carries over prior Tennessee law allowing a trustee/beneficiary to act with discretion for his own benefit only pursuant to an ascertainable standard, and §35-15-814(b)(2) prohibits a trustee from discharging his own personal legal obligation of support through the exercise of his discretion as trustee.

§§35-15-815 and 816 deal with trustees’ powers and incorporate into the new law the old T.C.A. §35-50-110 (grandfathering old incorporation-by-reference language). T.C.A. §35-15-816(b)(19) contains the 2005 amendment which clarifies that a beneficiary whose interest is subject to a spendthrift provision does not have the power to pledge trust property to guarantee loans made by others to the beneficiary.

§35-15-816(b), subsection (27) contains the so-called “decanting” provisions modeled after New York law: unless the trust expressly provides otherwise, if the trustee can invade the principal of the trust for a beneficiary, the trustee is authorized to appoint “all or part of the principal of the trust in favor of a trustee of a trust under an instrument other than that under which the power to invade is created.” See IRS Notice 2011-101 regarding recent activity in this area.

When a trust terminates in whole or in part, the trustee is authorized by §35-15-817 to send the beneficiaries a proposal for distribution to which a beneficiary must object within 30 days.

§35-15-901 of the Uniform Trust Code incorporates the provisions of T.C.A. §§35-14-101 ff.: The Tennessee Uniform Prudent Investor Act of 2002. §35-14-102 provides that the term “trustee” includes “all trustees, guardians, and other fiduciaries.” The conclusion is that executors would be covered under the terms of the Act, as well as conservators and attorneys-in-fact, etc.

§35-14-103 declares that a trustee “who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this chapter,” and recognizes that the prudent investor rule is a rule of default, meaning that a trust document may expand, restrict, eliminate or otherwise alter the prudent investor rule.

§35-14-104 sets forth the standard of care for trustees: that of a “prudent investor” who would consider “the purposes, terms, distribution requirements, and other circumstances of the trust” through the exercise of reasonable care, skill and caution. This section of the law spells out the circumstances the trustee “may consider in investing and managing trust assets,” and requires the trustee to verify through reasonable effort “facts relevant to the investment and management of trust assets.” Trustees are authorized to retain or invest in any assets, whether listed as acceptable under Tennessee code or not, if such investment is consistent with the prudent investor rule. The Act also provides
that any trustee “who has special skills or expertise, or is named trustee in reliance upon the trustee’s representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.”

§35-14-105 requires the trustee to diversify the trust’s investments. This provision also tells us, however, that a trustee may retain investments without diversification if the trust document does not forbid the trustee to do so, and if the trustee “in the exercise of good faith and reasonable prudence, discretion and intelligence, may consider that retention is in the best interest of the trust and its beneficiaries or in furtherance of the goals of the trustor as determined from that instrument.” The Section authorizes investments in insured bank deposits and life insurance contracts on the grantor or members of his family without the duty to determine whether the contract of insurance remains a proper investment as to certain characteristics of the policy.

§35-14-106 directs the trustee to review the trust assets and make investment decisions, which will bring the assets of the trust into compliance with the Act, and this must be done “within a reasonable time after accepting trusteeship or receiving trust assets.”

§35-14-107 requires the trustee “to invest and manage the trust assets solely in the interest of the beneficiaries” (the duty of loyalty); and §35-14-108 specifies that, if a trust has more than one beneficiary “the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.” §35-14-109 authorizes costs to be incurred only as appropriate and reasonable, and §35-14-110 confirms that the issue of whether the trustee has complied with the Act will be determined as of the time of the trustee’s decision or action “and not by hindsight.”

Under §35-14-111, a trustee is authorized to delegate to an agent those investment and management functions “that a prudent trustee of comparable skills could properly delegate under the circumstances” if the trustee exercises “reasonable care, skill, and caution” in selecting, directing and reviewing the performance of the agent.

§35-14-112 gives us suggested terms or language to be included in our documents to invoke the provisions of the Tennessee Uniform Prudent Investor Act: “investments permissible by law for investment of trust funds,” “legal investments,” “authorized investments,” . . . “prudent man rule,” “prudent trustee rule,” etc.

Continuing with the Uniform Trust Code, §§35-15-1001 to 1013 deal with trustee liability. §35-15-1001 provides that a breach of trust occurs when a trustee
violates a duty owed to the beneficiary and spells out remedies for the court to consider.

§35-15-1002 establishes the extent of trustee liability as the greater of the amount required to restore the status quo OR the profit the trustee made by reason of the breach. If more than one trustee is involved in the breach, this Section provides for contribution among trustees unless a trustee seeking contribution acted in bad faith or with reckless indifference.

In §35-15-1003, the trustee is protected if, absent a breach of trust, there is a loss or depreciation in value of trust property or a failure to make a profit.

But in §35-15-1004 we find that, in any judicial proceeding involving a trust controversy, the court has the power to “award costs and expenses, including reasonable attorney’s fees, to any party, to be paid by another party or from the trust . . . .” In a non-judicial proceeding, the trustee is permitted to pay fees and other reasonable costs and expenses from the trust assets if all parties to the proceeding agree in writing. Finally, a mediator or arbitrator is permitted to award fees and other reasonable costs and expenses against the assets of a trust.

Thankfully, §35-15-1005 sets a statute of limitation on trustee liability by providing that a beneficiary cannot commence a proceeding against a trustee for breach “more than one year after the date the beneficiary was sent a report that adequately disclosed facts indicating the existence of a potential claim for breach of trust.” If no report was sent, the beneficiary must bring an action within three years after the first to occur of: (1) the removal, resignation or death of the trustee; (2) the termination of the beneficiary’s interest in the trust; or (3) the trust’s termination.

Under §35-15-1006, a trustee “who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument” is protected from liability to the beneficiary to the extent that the breach resulted from the trustee’s reliance.

§35-15-1007 is a scary provision worth quoting in its entirety: “If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee’s lack of knowledge.” What is reasonable care? Does the trustee have to read the obits every morning? How is the trustee supposed to know if a beneficiary got married or divorced, and what steps would be considered reasonable care to find out? Perhaps an annual letter that catalogs all of the trust’s triggering events and cautions the
beneficiaries ("qualified"?) (all?) to inform the trustee immediately (by registered mail, return receipt requested?) of such changes in circumstance?

And suppose the settlor wanted to insulate the trustee from liability? §35-15 1008 tells us that a provision in the trust, which relieves the trustee of liability for breach, will be unenforceable if it relieves the trustee of liability for bad faith or recklessly indifferent actions or omissions. A provision “inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor” will likewise be unenforceable, and an exculpatory clause “drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship” unless the trustee proves fairness and adequate communication to the settlor.

What to do? §35-15-1009 suggests the remedy of a written consent by the beneficiary to the conduct or transaction, a release from the beneficiary to the trustee of liability, or a ratification by the beneficiary of the transaction (unless the trustee acted improperly in obtaining the consent, release or ratification, or the beneficiary did not know his rights or the material facts related to the breach).

§35-15-1010 covers trustee contracts and torts: If the fiduciary capacity was disclosed in a trustee’s contract, the trustee will not be personally liable on the contract, although a trustee will be personally liable for torts committed in administering the trust, but “only if the trustee was personally at fault on account of the trustee’s own willful misconduct proven by clear and convincing evidence.” Whether or not the trustee is personally liable in a contract, property ownership or tort dispute, a claim may nevertheless be asserted against the trustee in the trustee’s fiduciary capacity. (Nothing new here, right?)

§35-15-1011 deals with the liability of a trustee who holds an interest as a general partner in a general or limited partnership interest, affording immunity to the trustee unless the partnership interest was “held by the trustee in a capacity other than that of trustee.” §35-15-1011(d) says that when “the trustee of a revocable trust holds an interest as a general partner, the settlor is personally liable for contracts and other obligations of the partnership as if the settlor were a general partner.”

Tennessee’s Uniform Principal and Income Act contains an extensive set of rules for the administration of trusts and estates by fiduciaries in Tennessee.

§§35-6-101 to 35-6-107 contain definitions for the Act’s provisions and provisions related to fiduciary duties. A “beneficiary” includes “an heir, legatee, devisee and . . . an income beneficiary and a remainder beneficiary.” §35-6-102(2). An “income beneficiary” under §35-6-102(5) is “a person to whom net income of a trust is or may be payable.” A “remainder beneficiary” under §35-6-102(11) is “a
person entitled to receive principal when an income interest ends.” §35-6-102(12) defines the “terms of a trust” as “the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.”

§35-6-103 governs fiduciary duties and general principles of the Act: Subsection (a)(1) provides that the fiduciary must administer an estate or trust in accordance with the terms of the document, “even if there is a different provision in this chapter;” and subsection (a)(2) authorizes the fiduciary to administer the trust or estate by the exercise of a discretionary power conferred upon the fiduciary in the governing document “even if the exercise of the power produces a result different from a result required or permitted by this chapter;” but subsection (a)(3) provides that if the terms of the document do not have contrary provisions or do not give the fiduciary discretionary power of administration, then the fiduciary is required to administer the trust or estate in accordance with this chapter. Subsection (a)(4) directs that any receipt or charge is allocated to principal if neither the governing document nor this chapter provides a rule for allocating the receipt or charge otherwise. The fiduciary is required to administer the estate or trust “impartially, based on what is fair and reasonable to all of the beneficiaries, considering any terms of the trust or the will manifesting the trustors’ or testators’ intention that the fiduciary shall or may favor one (1) or more of the beneficiaries.” §35-6-103(b).

§35-6-104 governs the trustee’s power to adjust between principal and income if the trustee manages the trust assets “as a prudent investor,” the terms of the trust refer to the trust’s income in relation to the amount that is directed to be distributed to a beneficiary, and the trustee determines that he or she cannot otherwise administer the trust impartially, being fair and reasonable to all beneficiaries pursuant to §35-6-103(b). This section outlines the factors to be considered by the trustee in making adjustments between income and principal, and states that a trustee who is a trust beneficiary or who would benefit from the adjustment is disqualified from doing so (along with other situations in which the trustee may not make an adjustment).

§35-6-105 governs the notice a trustee may, but is not required to, give concerning any proposed action governed by the Act, and offers the trustee relief from liability if the notice is issued and the beneficiaries do not object in a timely manner. §35-6-106 states that the only remedy in connection with the trustee’s exercise or nonexercise of the power to adjust between income and principal is “to direct, deny, or revise an adjustment between principal and income.” §35-6-107 requires the trustee to keep only such records as may be appropriate or necessary to support the trustee’s determination.
§35-6-108 allows a trustee to convert a mandatory income trust to a unitrust with an annual payment between 3% and 5% of the value of the trust corpus, and
§35-6-109 allows a new trust to be established as a unitrust with an annual payment between 3% and 5% of the value of the trust corpus.

§§35-6-201 to 202: These two sections provide rules for the determination and distribution of net income upon a decedent’s death and after an income interest in a trust ends. Subsection (1) requires the fiduciary to determine the amount of net income and net principal received from property that was specifically given to a beneficiary under the governing instrument, and requires the fiduciary to distribute the net income and net principal to the beneficiary who is the designated recipient of the property specifically given. After this has been done subsection (2) directs the fiduciary to determine the remaining net income and furnishes rules for doing so.

Subsection (3) of §35-6-201 requires a fiduciary to distribute to a beneficiary who receives a pecuniary amount (set dollar sum) outright from net income or from principal to the extent that net income is insufficient.

§35-6-202 provides that each beneficiary who is entitled to share in the remaining net income is to receive a fractional interest in that income based on the beneficiary’s fractional interest in the undistributed principal assets of the trust or estate.

§§35-6-301 to 303: These sections provide rules for apportioning income over given periods; for example, §35-6-301(a) provides that an income beneficiary is entitled to receive net income beginning on the date the beneficiary’s income interest begins, which occurs on the date specified in the governing instrument or, if no date is specified, then on the date the asset becomes subject to the trust. Rules are established in §§35-6-302 and -303 for making these determinations.

§§35-6-401 to 415: This Part of the Act provides rules for the allocation of receipts during the administration of a trust, including receipts from entities, from trusts and estates, and from business and other activities conducted by the trustee; and furnishes rules for handling principal receipts by indicating which assets received by the trustee should be allocated to principal, with specific provisions for rental properties, obligations to pay money and receipts from insurance and similar contracts.

§35-6-408 authorizes the trustee to determine that an allocation otherwise required by the Act is insubstantial under certain circumstances.

§35-6-409 contains an important provision related to payments received by a trustee, including a payment made in money or property from the payer’s general
assets or from a separate fund created by the payer. To the extent the
distribution is characterized as interest or a dividend (or a payment made in lieu
of interest or a dividend) the trustee has to allocate the distribution to income;
and the balance of the payment is allocated to principal. If no portion of the
payment is characterized as interest, a dividend or an equivalent payment, the
trustee is required to allocate 10% of the payment to income and the balance to
principal.

Liquidating asset distributions are covered under §35-6-410; minerals, water, and
other natural resources under §35-6-411; and timber under §35-6-412.
Derivatives and options are covered under §35-6-414, and asset-backed
securities under §35-6-415.

§35-6-413 protects the marital deduction by making sure that nonproductive
property can be converted to property productive of income.

§§35-6-501 to 506: This Part governs the allocation of disbursements made
during the administration of a trust. For example, §35-6 501 directs the trustee to
make the following disbursements from income: One half of the trustee’s regular
compensation; one-half of all expenses for accountings, judicial proceedings or
other matters involving both income and remainder interests; all of the other
ordinary expenses incurred in connection with the administration, management or
preservation of trust property; and recurring insurance premiums.

§35-6-502 requires the trustee to distribute from principal the remaining half of
the trustee’s regular compensation and expenses for accountings, etc.; any fee
charged by the trustee for acceptance, termination or other items related to
principal; payments on the principal of a trust debt; expenses incurred in a
proceeding related to the principal assets of the trust, including a construction
suit; death and other transfer taxes; disbursements related to environmental
matters, etc.

§§35-6-503 and -504 authorize transfers from income to principal for
depreciation in certain circumstances and for reimbursement for other payments
made from principal because the distributions were unusually large, related to
capital improvements to trust assets, etc.

§35-6-505 provides that any tax required to be paid by the trustee on receipts
allocated to income must be paid from income, and tax imposed on receipts
allocated to principal must be paid from principal. There is a special provision
related to the allocation of income tax paid by a trustee on the trusts’ share of an
entity’s taxable income. §35-6-506 authorizes a fiduciary to make adjustments
between principal and income to offset shifting of tax benefits or economic
interests arising from elections and decisions made by the fiduciary; an income
tax resulting from a distribution from the trust; or the ownership by an estate or trust of an interest in an entity whose taxable income is includable in the taxable income of the estate, trust or beneficiary.
EXHIBIT D
Checklist for a New Attorney-in-Fact

☐ Do you really want to assume this responsibility? When you agree to serve under a power of attorney, you take on the duty to act in the highest good faith for the benefit of the “principal” (the word we use to refer to the person who gives you this power). Acting in the “highest good faith” means that you must act with care and diligence on behalf of the principal, and never take advantage of the principal or abuse the significant power you have been given.

☐ Read the power of attorney document thoroughly, and don’t hesitate to ask questions about it. You can only do those things that are authorized in the document.

☐ Confirm exactly when you are expected to assume your duties and responsibilities. Even if the power of attorney is immediately effective, the principal may not expect you to take any actions until he or she instructs you to, or until he or she is no longer able to function effectively.

☐ Remember that the principal does not suddenly give up the power to act on his or her own behalf, and he or she normally keeps the power to revoke the document at any time.

☐ Keep the original of the power of attorney document in a safe place and make several copies for you to use from day to day.

☐ Maintain careful records of all transactions you handle on behalf of the principal, because you have a duty to account to him or her for your actions at all times upon his or her request, and a court may require you to account for your actions at some point in the future. This means you must be able to document all of the principal’s income received, expenses incurred, assets sold or purchased, and how you have handled each item of income, expense and asset.

☐ Unless the power of attorney document forbids it, you are entitled to be compensated for the reasonable value of the services you performed as the attorney-in-fact for your principal. If the document sets your fee, you are bound to abide by the fee set out in the document. You are not required to charge a fee for your services; if you do charge a fee, the amount you charge must be included in your income tax return for the year in which you receive it. So long as the document permits it, you may receive reimbursement for the necessary out-of-pocket expenses you incur in carrying out your duties. If any dispute arises concerning your fees or expenses, a court has the power to decide what is fair compensation for the services you have rendered, and you could be forced to return funds the court decides to disallow.
When you are called upon to manage all of the principal’s assets when he or she becomes incapacitated:

□ Consider obtaining professional advice about your duties and responsibilities, because your level of responsibility is significant.

□ You will need to prepare a listing of all of the principal’s assets and take steps to protect those assets and manage the property for the principal’s benefit.

□ You will likely be paying bills on behalf of the principal, so you will need to notify any banks, brokerage firms, credit unions and other financial institutions holding assets of the principal that you have been appointed, and provide a copy of the power of attorney for their files.

□ It is a good idea to review the principal’s most recent personal income tax returns and consider meeting with the principal’s accountant to be sure that all of the principal’s tax obligations are being met appropriately.

□ If the principal ran a business or an interest in any closely-held business entity, you may be required to take steps to maintain and protect that business and participate in the management of the closely-held entity.

□ You may engage the services of an attorney, accountant or other professional advisor or assistant in carrying out your duties, and the fees for such consultations will in most instances be paid from the funds of the principal.

□ If the principal had a safe deposit box, you should inventory the contents of the box, maintain an exact record of its contents, and continue to safeguard the items in the box as appropriate.

□ You should make certain that the assets of the principal are insured and safeguarded, especially if he or she must leave home for a stay in the hospital or a nursing home; and you should explore whether the principal maintained liability insurance and if so, you should continue to do so.

□ If the principal is the victim of an accident or some other incident which would normally require the filing of a lawsuit on his or her behalf, you should consult with an attorney to determine what obligation you may have to file on behalf of your principal. By the same token, if the principal is sued for any reason, you should consult an attorney concerning the manner in which to respond to the lawsuit.
If the power of attorney authorizes gift-giving or charitable donations, you may make gifts strictly as specified in the document, and if you have any questions about gift-giving under the power of attorney you should consult an attorney before making gift transfers in any amounts.

You should explore whether and to what extent the principal may qualify for any insurance or governmental benefits, and take steps to make all appropriate claims for such benefits on the principal’s behalf. These benefits include, but are not limited to, Social Security, Medicare, Veterans’ and Medicaid benefits.

Things you should never do:

Never put money or property belonging to the principal into your own bank account or any other investment or account that belongs to you; this is called “commingling” and is not permissible.

Never put your name onto an account or asset belonging to the principal “with right of survivorship” or as a co-owner, payee or beneficiary upon the death of the principal.

Never do anything that does not clearly benefit your principal.

Your authority to act on behalf of your principal ends:

When the principal revokes the power of attorney (assuming the principal is mentally competent to do so); or

When the document states that your authority is over; or

If the document is silent as to termination, then your authority ends upon the death of the principal.

Your authority will also end if a court terminates your power, or if a court appoints a conservator to act on behalf of the principal, and the conservator then revokes your authority.

You are free to resign at any time, but if you do resign you must notify the principal and, especially if the principal is disabled, you must notify the successor attorney-in-fact named in the document (if any). If the principal is disabled and there is no successor agent named in the document, you should continue to serve until appropriate arrangements are made to safeguard the interests of the principal.
EXHIBIT E

Checklist of duties for the person(s) named as executor or administrator of a decedent’s estate (the generic name for an executor or administrator is a “personal representative” or PR):

☐ If necessary, notify Social Security and any applicable pension plan that the decedent has died. The funeral home may handle this as part of its services, or a family member may handle this task. Depending on the date of the death, Social Security may reclaim a pro rata portion of the month’s benefit. If there is a surviving spouse, he or she may need to work with Social Security on adjusting benefits in light of the death.

☐ If the decedent’s family has not already done so, secure the residence and tangible property. If the decedent lived alone, the PR may decide to change the locks to prevent heirs — or people who think they should be heirs — from helping themselves to items. Likewise, a family friend or neighbor should stay at the home during any funeral services to help discourage theft. Notify the homeowner’s insurance carrier of the death and, if the home will be empty, let them know the specific steps taken to secure and monitor the residence.

☐ It is part of the PR’s fiduciary responsibility to preserve and protect the assets of the estate. This includes continuing homeowner’s insurance, utility payments and other essential, asset-protecting expenses; securing valuables such as jewelry and firearms from theft or damage; supervising and managing the operation of any rental properties or other business interests; and working with the decedent’s financial advisor (if any) to make sure that investments don’t lose value.

☐ Request 8-10 death certificates. These are essential for any legal business of the estate. The funeral home often will request these as part of its services; otherwise, they are available from the Health Department.

☐ Locate and read the will. This is the only way to know for sure who is appointed to be executor, whether the executor can serve without bond and other important details. The will may be stored in a safe deposit box, a fireproof safe at home or (though not recommended) in a filing cabinet. Some people even keep their wills in the freezer or other “hidey holes.” Also check for and read any related estate planning documents, such as a revocable living trust or an irrevocable trust. Often, a revocable living trust can make probate unnecessary on its own; in addition, a trust may name successor trustees (after the deceased person) who will need to work closely with the PR.
Consult the decedent’s attorney, accountant and/or other professional advisors to solicit their input, and consider engaging a qualified professional to provide advice in fulfilling your duties.

Don’t rush to probate. Even if the decedent left assets that do not automatically pass to another person, a full, formal probate may not be necessary. Depending on the assets and their value, it may be possible to administer the estate without a full probate. However, once you start a probate, you can’t “un-start” one.

Determine what assets the decedent owned and how he or she owned them. Depending on the assets and their titling, a probate of the estate may not be necessary. Assets that were owned jointly with right of survivorship go to the co-owner (if he or she survives the decedent). Assets with a designated beneficiary — such as life insurance, retirement accounts or “Payable On Death” bank accounts or CDs — pass as directed in the beneficiary paperwork.

Finding all of the assets and how they are owned can take some detective work. Look through old tax returns, bank and brokerage statements, files, the safe deposit box and any other sources to make sure you have found all of the assets. Don’t forget the decedent’s computer and his or her email account; many of us handle our financial lives online, and these can be a treasure trove of information. After determining the decedent’s passwords, make sure to check the browser bookmarks and history as well as any financial software.

If there are assets that will require a probate of the estate, file the appropriate paperwork with the probate court to be appointed the PR of the estate. If it will be a small-estate probate or muniment of title, a simple court order can appoint the PR; if a full probate is necessary, Letters Testamentary will be issued. These documents will authorize the PR to act on behalf of the estate to collect the assets; determine the proper debts, expenses and taxes; carry out the wishes of the person who has died and complete the estate settlement process.

Notify the heirs of the estate, either by sending them a copy of the will or (when there is no will) by sending them a copy of the Letters of Administration. This is an excellent time to let the heirs know about the probate process, particularly the facts that 1) they must usually survive the decedent for a certain period of time in order to inherit, and 2) the debts and taxes of the estate must usually be settled before any significant distributions are made.

Open a bank account for the estate and transfer funds from the decedent’s account(s) into this account to cover expenses of the estate. You must have a death certificate and Letters Testamentary (or court order) in order to take care of
this. Track any expenses you pay yourself for reimbursement by the estate; also track your mileage and time spent, in the event you apply for compensation as PR.

☐ Notify the creditors of the estate that the probate process has begun. An official notice is published in the newspaper, but the PR must also send actual notice to any known or reasonably known creditors, such as doctors, hospitals, credit card companies, etc. If a creditor files a claim which the PR believes is not correct or appropriate, it is the PR's responsibility to take exception to the claim within a short period of time to avoid having to pay for a “debt” of the deceased that may not be legitimately due.

☐ In addition to paying the debts of the deceased, the PR must also pay any taxes owed by the deceased, and the list of possible tax obligations can be long. For example, the PR must file (and pay from the estate) any past income tax return the deceased failed to file; the final income tax return(s) for the year of death; a Tennessee inheritance tax return (if the estate is worth more than $100,000); and in some cases a federal estate tax return. If interest, dividends or other income is earned by the estate before the settlement is complete, then a separate federal income tax return (Form 1041) must be filed in the name of the estate. And, if the decedent made large gifts during his or her lifetime, the PR may need to file state and possibly federal gift tax returns for prior years.

☐ Collect any money owed to the decedent, whether it is an income tax refund, a pro rata refund on health insurance or nursing home expense, a personal loan to a family member, etc. If the decedent made personal loans to heirs of the estate, such as children, it may be possible to have those assets (the loans) allocated to that heir’s share of the estate.

☐ Determine that all of the assets of the estate have been located and that all of the estate’s debts have been paid before making distributions to heirs. There have been cases in Tennessee in which a PR “over-distributed” before settling all of the debts and was held personally liable for part of the shortfall. When settling a legitimate claim against the estate, be sure to have the satisfied creditor sign a release that confirms payment.

Also make sure to pay all of the legitimate expenses of the estate, including accountants’ fees, attorneys’ fees, appraisers’ fees, etc. The PR should also apply to the court for reimbursement of his or her expenses and, if the PR wishes to be paid, he or she should request compensation for serving as PR. Such compensation is based primarily on the time spent serving as PR, billed at a reasonable rate.
Once the PR knows that the debts are paid, the expenses are paid (including an estimate for the PR’s time to finish settling the estate) and the assets are all found and taken care of, it is time to make distributions to the heirs. As with creditors of the estate, the PR must get a signed release from each heir receiving a distribution. If an heir wishes to disclaim his or her inheritance, such disclaimer also must be properly executed and filed with the probate court and with the PR within nine months after the date of death.

When testamentary trusts are created pursuant to the decedent’s will, it is a good idea to meet with the attorney, accountant and financial advisor for the trust to determine the tax effects of funding the trusts, the income tax basis and possible capital gains or losses on funding, the potential growth in the assets of the various trusts in the future, etc., before final funding decisions are made.

Finally, after all the debts, taxes, funeral bills, attorneys’ fees, accounting fees, appraisal costs and PR’s fees are paid, the balance of the assets in the estate must be distributed to the heirs as directed in the Will. If there is no Will, then this balance of property is paid to the heirs of the estate as determined by Tennessee law. The PR must file a receipt and release from each estate beneficiary with the probate court before the PR can be released from the duties of the estate administration.
EXHIBIT F

Checklist of duties for the person(s) named as trustee of a decedent’s trust:

- Locate and read thoroughly the trust agreement to determine the grantor’s expectations and purposes with regard to creating the trust. The named trustee should also review the decedent’s Will to determine how it relates to the trust administration.

- Consult the decedent’s attorney, accountant and/or other professional advisors to solicit their input, and consider engaging a qualified professional to provide advice in fulfilling your duties.

- You may need a “Declaration of Trust” or similar document to confirm your appointment as Trustee or successor Trustee and the facts giving rise to your appointment. This document is typically notarized and prepared in proper form for recordation.

- Ascertain the assets that will fall under the trustee’s control and management. This requires review of all known asset information, including, but not limited to, bank statements, brokerage statements, life insurance policies, stock certificates, bond certificates, and business documentation. The trustee should review the decedent’s past Forms 1040, noting in particular assets that have generated income for the decedent in the past (i.e., rental income, royalties, interest, dividends, capital gains, and business related income reported on K-1s).

  This step may require the trustee to send letters to various account holders to determine if the holder is still holding an account for the decedent, and if so, how many accounts, how was the account titled, what was the account worth on the decedent’s date of death, and what steps need to be taken to claim the account. The trustee should also look for and inventory the decedent’s safe deposit box(es), tangible personal property and real estate.

- As assets are found and determined to be under the trustee’s management, the trustee must secure the assets, preserving their value for the beneficiaries. This may include changing the locks on the decedent’s home, contracting with insurance companies to make sure the real properties and vehicles are adequately covered, moving tangible personal property to more secure location(s), and working with account holders to decide if any of the decedent’s investment funds should be liquidated to avoid a loss in the market.

- If the decedent owned a business or farm, the trustee should take all necessary steps to insure that the grantor’s wishes regarding the business or farm are carried out (i.e., is the business to be appraised and liquidated using a
particular broker, is the business or farm to be operated under the direction of the
trustee or another named person, etc.), and that the value of the asset is
maintained for the beneficiaries.

☐ The trustee also needs to determine what liabilities of the decedent remain
outstanding and whether or not such liabilities are valid. To this end, the trustee
should cancel the decedent’s credit cards, and stop cell phone and cable/satellite
service. The trustee should make a list of the decedent’s last medical providers
and make sure that the decedent’s health insurance fully satisfies outstanding
balances as appropriate.

☐ The trustee also needs to contact providers who may owe the decedent a
refund (i.e., long-term care and/or health insurance companies for premiums paid
in advance, magazine subscriptions, and other pre-paid service providers).

☐ The trustee should complete claim forms to obtain payment of life
insurance policies that name the trust as the beneficiary. The trustee may need
to complete claim forms for retirement accounts and annuities that name the trust
as beneficiary.

☐ If there is no estate administration, the trustee is responsible for filing the
decedent’s final income tax return for the year in which he or she died.

☐ The trustee normally obtains a tax identification number for the trust, and
the trustee will be responsible for filing all fiduciary income tax returns to report
the income of the trust.

☐ Again, if there is no estate administration, the trustee will be responsible
for filing the decedent’s federal estate tax return and/or Tennessee inheritance
tax return. These returns are due nine (9) months after the date of death.

☐ The trustee may also be responsible for filing gift tax returns for the
decedent, if the decedent made taxable gifts prior to his death. Such a return
may be required for gifts made by the decedent in years past for which the
decedent did not file a return. This is sometimes the case where the decedent
transferred her real property to her children at the death of her spouse years prior
to the decedent’s death.

☐ After ascertaining that all of the decedent’s assets are under the trustee’s
control, the trustee must manage those assets in the name of the trust, using the
trust’s tax identification number. This means that bank accounts, brokerage
accounts and other investments are managed by the trustee in the name of the
trust.
☐ The trustee should keep meticulous records regarding the trust assets, noting receipt of income and other funds and payment of debts and expenses.

☐ Unless the trust agreement says otherwise, the trustee must provide each beneficiary of the trust with a copy of the trust agreement, and the trustee may also need to provide an accounting to the beneficiaries, as the same is provided for in the trust agreement, or if silent, in the Tennessee Uniform Trust Code.

☐ After all of the assets have been ascertained and brought under the trustee’s control, after all of the decedent’s debts have been satisfied, after all of the tax returns have been filed, and after all the administration expenses have been paid, the trustee can make distributions to the beneficiaries in accordance with the terms of the trust agreement. This may require the trustee to establish further trusts by obtaining tax identification numbers and opening accounts in the name of such further trusts or it may require the trustee to make distributions directly to the beneficiaries in kind or in cash, depending on the circumstances and the terms of the trust agreement.

When further trust are created, it is a good idea to meet with the attorney, accountant and financial advisor for the trust to determine the tax effects of funding the trusts, the income tax basis and possible capital gains or losses on funding, the potential growth in the assets of the various trusts in the future, etc., before final funding decisions are made.

☐ It is a wise idea to obtain receipts and releases from the beneficiaries at the time that distributions are made.

☐ Unless the trustee handling the administration is also the trustee managing the testamentary trusts created under the trust agreement, the trustee’s duties are complete once all of the trust assets have been distributed to the beneficiaries of the trust.