Help! I think my trustee is ripping me off!

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I. **Introduction**:

This outline provides an overview of a trustee's fiduciary obligations and the many instances where a trustee may be ripping off a beneficiary. It will include examples from real cases of bad to criminal acts by a trustee and address how to protect the trust, preserve a beneficiary's rights, and prevent other trustees from making similar, dangerous mistakes.

II. **Help! I don't have any information about the Trust! Accountings and Information**

One of the most common ways that a trustee rips off a beneficiary, often without the beneficiary even being aware of that action, is through the failure to properly provide information and accountings of the trust to beneficiaries. While trustees are obligated to provide information to qualified beneficiaries related to irrevocable trusts, they occasionally are unaware of their obligations and beneficiaries learn, sometimes too late, of an improper distribution, or that they were entitled to a distribution they never received.

In Florida, a trustee is obligated to keep accurate records of the trust property. Fla. Stat. § 736.0810 (2020). The trustee is also required to keep qualified beneficiaries reasonably informed of the trust and to provide annual accountings from when the trust became irrevocable or from when the trustee took over in his fiduciary capacity. Fla. Stat. § 736.0813 (2020). The trustee has an obligation to communicate to the beneficiary all material facts in connection with the trust's administration. Restat 3d of Trusts, § 78 (2012). Due to the confidential nature of trusts, beneficiaries sometimes are unaware that they are a beneficiary or when they became entitled to trust information and occasionally have a very hard time getting the information they need from their trustees.

In a fairly recent case, *Landau v. Landau*, 230 So. 3d 127 (Fla. 3d DCA 2017), the decedent, Flois Landau, nominated her husband, David, as the personal representative of her estate and successor trustee of her trust. David was also the primary income beneficiary of her trust while her children were the remainder beneficiaries. Flois' children became nervous when David failed to transfer assets from Flois' estate to her trust, as required by her Will. The children requested information regarding the trust's assts and copies of the annual trust accounts pursuant to Sections 736.0813 and 736.08135, Florida Statutes. When David finally complied, he provided an unsigned, incomplete accounting that showed, without explanation, distributions far exceeding the trust's net income for the year. The children amended their lawsuit to include claims for breach of trust, removal, and to freeze the trust account. The trial court ordered the trust assets frozen until David completed the trust accountings and the Third District affirmed.

When a Special Needs Trust is in place, or when there are concerns related to the primary beneficiary's capacity, there may be questions as to the proper party to receive the accountings and trust information. There are no statutes that address accounting to incapacitated beneficiaries who are also the settlors of revocable trusts and subject to guardianship. There is, however, a representation statute that allows a person who represents a settlor lacking capacity to receive notice and give binding consent on the settlor's behalf. Fla. Stat. § 736.0301(3).

When the beneficiary is entitled to trust information but may not have the ability to thoroughly review it, a Guardian or Agent may be better suited to oversee the trustee's administration. The settlor may provide a third party the ability to receive and review information related to the trust's administration. A Guardian or Agent would be best suited to work with the trustee to oversee the trust's administration and distributions to the ward or principal. If you are planning on behalf of a special-needs client or incapacitated family member, be sure to address who will be reviewing the trust's administration information and overseeing the trustee's actions.

Encourage clients to ask questions if they believe they are beneficiaries of a trust. A trustee is obligated to answer a qualified beneficiary's request for trust information. If a beneficiary does not receive the accountings or information they are entitled to, bring a claim for accounting and get the court involved in the trust's administration. Civil courts, upon application by a beneficiary, have inherent jurisdiction to review the trust's administration and a trustee's actions. Fla. Stat. § 736.0201 (2020).

III. **Help! My trustee likes my sister more than me! Self-Dealing and Impartiality**

Another situation in which trustees find themselves in hot water is when they have acted in their own personal interests. This plays out in several ways. A trustee may take an exorbitant trustee fee that is not warranted given the size of the trust or the experience of the trustee. A settlor may identify the trustee's compensation in the governing document, or even note that a trustee is not entitled to compensation. When the settlor provides no guidance, there is no specific formula for calculating a trustee's compensation in the Florida Trust Code but it should be reasonable under the circumstances. Fla. Stat. § 736.0708 (2020).

Courts have identified factors that should be considered when assessing the reasonableness of a trustee's fee including: "The amount of capital and income received and disbursed by the trustee; the wages or salary customarily granted to agents or servants for performing like work in the community; the success or failure of the administration of the trustee; any unusual skill or experience which the trustee in question may have brought to his work; the fidelity or disloyalty displayed by the trustee; the amount of risk and responsibility assumed; the time consumed in carrying out the trust; the custom in the community as to allowances to trustees by settlors or courts and as to charges exacted by trust companies and banks; the character of the work done in the course of administration, whether routine or involving skill and judgment; any estimate which the trustee has given of the value of his own services; payments made by the cestuis to the trustee and intended to be applied toward his compensation." *West Coast Hospital Association v. Florida Nat'l Bank of Jacksonville*, 100 So.2d 807, 810 (Fla. 1958).

Courts have taken issue with substantial trustee fees, especially when a trustee has mismanaged trust assets and caused harm to the trust corpus. In *McCormick v. Cox*, 118 So. 3d 980, 987 (Fla. 3d DCA 2013), the Court concluded that the trustee's unilateral payment to himself of a seven-figure fee from trust assets, without prior disclosures of alleged entitlement and amount to the beneficiaries or the court, was a flagrant breach of his fiduciary duty. It did not help that the trustee had caused the trust to incur significant tax by utilizing a poor valuation of a trust asset. *See also West Coast Hospital Association v. Florida Nat'l Bank of Jacksonville*, 100 So.2d 807 (Fla. 1958) and *Robert Rauschenberg Foundation v. Grutman*, 198 So. 3d 685 (Fla. 2d DCA 2016).

The payment of a trustee's attorney's fees from the trust corpus is also a problem for many beneficiaries, especially when the beneficiary has alleged a breach of trust. Historically, a trustee was required to get court approval before utilizing trust assets to pay his attorney's fees in defense of a breach of trust. *See* Fla. Stat. § 737.403(2)(e)(2005)(repealed) and *Brigham v. Brigham*, 934 So.2d 544 (Fla 3d DCA 2006)(holding trustees could not utilize trust assets to pay their attorneys when they had a conflict and been sued for breach). Upon the adoption of the Florida Trust Code, and after amendments in 2016, Section 736.0802(10)(e), Florida Statutes, now requires a trustee who has been sued for breach of trust to send a notice to the qualified beneficiaries of his intent to use trust assets to pay for his defense. The beneficiary can then file a motion to prohibit payment of fees with trust assets and seek the reimbursement of any attorney's fees previously paid by the trust, with interest. The court must simply find a reasonable basis to conclude the trustee has breached the trust.

A trustee may also breach his fiduciary duty of loyalty by engaging in transactions in which he benefits more than the beneficiaries. A fiduciary with the power to sell trust property must not purchase property for himself as that would create a conflict between his interest, individually, and as a fiduciary. Restat 2d of Trusts, § 170 cmt(b) (2012). The duty of loyalty is considered stricter for trustees than for other fiduciaries. Restat 3d of Trusts, § 78 cmt(a) (2012). The trustee must also consider his personal interest in transactions when he is not personally purchasing trust property to ensure that his judgment is clear and not clouded by receipt of some tangential benefit. These conflicted transactions are considered voidable by a beneficiary affected by the transaction. *See* Fla. Stats. § 736.0802(2)-(5) (2020). When a trustee acts for himself in relation to trust property, and without court approval, he breaches his fiduciary duties and can be surcharged.

In *Keye v. Gautier*, 684 So.2d 210 (Fla. 3d DCA 1996), the trial court found that the trustee, Keye, breached his fiduciary duty by misappropriating trust assets for his own benefit. Keye lent funds from the trust to himself, without naming the trust on a mortgage document thereby leaving the trust without a means to recover on the loan should Keye default. The Third District explained, "When a trustee loans trust funds to himself, the transaction deserves special scrutiny due to the conflicting interests that a trustee has as a representative of the trust and as a debtor. These conflicting interests make it nearly impossible for a trustee's estimation regarding the adequacy of the security offered in exchange for the loan of trust funds to himself, for his own benefit, to be impartial." *Id* at 211 (citing Bogert & Bogert, "The Law of Trusts and Trustees", § 453(J) (2d ed.

1993). *See also Centrust Sav. Bank v. Barnett Banks Trust Co., N.A.,* 483 So. 2d 867 (Fla. 5th DCA 1986)(finding breach of trust when trustee secured personal debt with trust funds).

A trustee that acts in favor of one beneficiary, as opposed to another, breaches his fiduciary duty of impartiality. Fla. Stat. § 736.0803 (2020). A trustee is obligated to treat two or more beneficiaries the same and give due regard to all of their respective interests in the trust. This is true whether the beneficiary is a primary or a remainder beneficiary and even when there are different discretionary standards for different beneficiaries. *See* Restat 2d of Trusts, § 183, cmt (a) (2012). "The duty is important not only, for example, in balancing the naturally conflicting concerns of life and remainder beneficiaries but also whenever multiple income beneficiaries have significantly differing needs and tax positions, or when multiple remainder beneficiaries have significantly different objectives and risk tolerance." Restat 3d of Trusts, § 79, cmt (a) (2012). A trustee must deal impartially with trust beneficiaries and treat them even-handedly, thinking of the trust as a whole. *Friedman v. Friedman*, 844 So. 2d 789 (Fla. 4th DCA 2003).

In *Kritchman v. Wolk*, 152 So. 3d 628 (Fla. 3d DCA 2014), Lola Kritchman served as Co-Trustee with Wells Fargo over her own trust. Pursuant to Article I.A. of the trust, Lola had the authority to direct the trustees to make principal distributions. Pursuant to that direction, Lola directed Wells Fargo to pay her first cousin's grandson's, Hunter Wolk, tuition for seven years, including his high school education and undergraduate education at Yale University for his freshman and sophomore years. In 2010, Lola wrote a letter to Wells Fargo directing that they continue to make payments for Hunter's junior and senior years. Later that year, Lola passed away and her son took over as co-trustee and as Personal Representative of her estate. The son, who had an interest in his mother's estate and trust, countermanded his mother's written instructions to Wells Fargo and Hunter's remaining expenses at Yale went unpaid by the trust. The trial court granted final judgment in favor of Hunter on his breach of trust claim and awarded his unpaid tuition, room and board. The Third District reviewed and affirmed and held that the co-trustees failure to carry out the terms of the trust violated their duties to administer the trust in good faith, to act impartially, and to prudently administer the trust.

In a case from Nebraska (which also has a version of the Uniform Trust Code and a duty of impartiality statute), the Supreme Court of Nebraska reviewed the actions of a successor trustee related to his management of his mother's trust and against his sibling beneficiaries. *Sellon v. Abbott (In re Conservatorship of Abbott)*, 295 Neb. 510 (Neb. S.C. 2017). There, the evidence indicated that the trustee (who was also a trust beneficiary) harbored significant hostility towards his sibling beneficiaries. He accused his brother of stealing from their mother and accused his sister of murdering their aunt. He suggested he was going to "make even" the trust distributions so that he would ultimately receive a larger portion of the trust assets upon his mother's death. The Court determined his actions warranted his removal.

A trustee's obligation is to the trust and its beneficiaries. When a trustee believes there may be an opportunity for the trust by his own purchase of a trust asset, he should seek court approval and explain to the beneficiaries why proceeding in this manner is in the best interest of the beneficiaries. Without court authority, the trustee should not engage in any conflicted transactions and a beneficiary should be conscious of a trustee pursuing his own interest or treating other beneficiaries more favorably.

IV. **Help! My trustee invested in 100% Beanie Babies Stock! Prudent Administration**

The most expensive breaches by a trustee are often in the failure to prudently administer the trust and to prudently invest trust assets. Fla. Stat. §736.0804, §736.0901, and §518.11 (2020). A trustee is required to exercise the reasonable care, skill, and caution of a prudent person when exercising his duty to prudently administer the trust. The "prudent person rule" applies to all the fiduciary obligations of a trustee whereas the "prudent investor rule" applies only to the trust's investments. Kalish, William, "Administration of Trusts in Florida", §2.2.C.3 (2019). When assessing a trustee's actions, the court will look to what a prudent person would do in the situation, meaning someone who acts "sensibly, with good judgment, without serious delay, and with proper precautions." *Id.* The Florida Trust Code also requires co-trustees to ensure their fellow co-trustees are administering the trust diligently for the benefit of the beneficiaries as each are required to fully participate in the trust's administration. *See* Fla. Stat. § 736.0703 (2020) and *Anton v. Anton*, 815 So. 2d 768 (Fla. 4th DCA 2002)(holding a co-trustee liable for failing to oversee the other co-trustee's theft of trust assets).

A trustee is generally obligated to keep a diverse portfolio in order to manage the risk of the market and to invest in productive positions. "The trustee has a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust." Restat 3d of Trusts, § 90 (2012). A corporate trustee is held to a higher standard, particularly when investing, as "a trustee who has special skills or expertise, or is named trustee in reliance on the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise." Fla. Stat. § 736.0806 (2020). When a trustee fails to pay close enough attention to the investment of trust assets or takes a very risky position, a beneficiary may see serious damage to the trust corpus and the trustee may face personal liability for that damage.

There are several cases on this topic from all over the country that should be considered warnings to fiduciaries. In *Whittaker v. Whittaker*, 564 B.R. 115 (MA Bankruptcy Court 2017), the Massachusetts Bankruptcy Court reviewed a trustee's actions under Florida Law and the Prudent Investor Rule. There, the settlor gave the trustee the authority to invest the trust assets as he saw necessary and included the following language in the trust, "it being the intent hereof that the trustee shall have full power and authority to deal with the trust estate or estates in all respects as though it were the sole owner thereof, without order of court or other authority". The trustee took this language as blanket authority to do as he wished with the trust assets and decided to invest $200,000 in options. Years before the trustee invested the trust assets, he had lost a lot of his own money investing in options and yet believed that he had learned from those mistakes. He did not diversify the trust portfolio and when he lost the first $200,000, he began panic investing the rest of the trust corpus in options in an attempt to make up for the loss. He lost nearly $700,000 of trust assets through this investment strategy. The Court determined that the trustee's decision to invest in risky options, his knowledge of his prior failed investment strategy, his failure to diversify the investments, and his continued investment in options despite losing money, all constituted a breach of his fiduciary duties and the prudent investor rule.

A trustee does well to diversify the trust's portfolio to avoid potential market decline. In *Matter of Hunter*, J.P. Morgan Chase Co. served as trustee of two testamentary trusts established by the decedent. 100 A.D.3d 996 (N.Y. Appl. Div. 2d 2012). In 1977 the trusts were almost entirely funded with Eastman Kodak Company stock. The trustee maintained the concentration of Kodak stock for nearly twenty years as it continuously lost value. The trial court determined, based on expert testimony, that the trustee should have diversified at least 95% of the concentration by 1987 and surcharged the trustee $4,322,412 in damages. The appellate court affirmed. *See also In re Newhoff*, 107 A.D. 2d. 417 (N.Y. Appel. Div. 2d 1985)(holding trustee's investments in real estate were imprudent for the trust), *Uzyel v. Kadisha*, 188 Cal. App. 4th 866 (Cal. 2d. Appl. 2010)(affirming an award of $59 million in damages and $5 million in punitive damages for breach of trust based on imprudent investment), and *Jo Ann Howard & Associates, P.C. v. Cassity*, 395 F.Supp.3d 1022 (U.S.D.C. Missouri 2019)(awarding $72,287,615 in damages for breach of trust, including failing to supervise financial advisor and understand trust investments of pre-need trust assets).

On the other side of the coin, however, when a trustee diligently researches and retains a financial advisor to manage the trust assets, follows the professional's advice, and the assets nonetheless decline in value, the trustee has not breached his fiduciary duty of prudent investment. *See Parker v. Shullman*, 983 So.2d 643 (Fla. 4th DCA 2008). The review of whether a trustee has made a prudent investment decision is to be made at the time the trustee made the investment. The benefit of hindsight should not be considered. Restat 3d of Trusts, § 90 cmt(b) (2012). The governing document may waive the requirement to abide by the prudent investor rule as well. *See Van Gundy v. Van Gundy*, 292 P.3d 1201 (C.O. Appel, Div. 4 2012).

Trustees must also be cautious in the valuation, marketing, and sale of trust property. A trustee's duty is to maximize the value of the trust assets for the benefit of the beneficiaries. In *McCormick v. Cox*, 118 So. 3d 980 (Fla. 3d DCA 2013), an attorney, Arthur McCormick, prepared the last will and testament as well as a revocable family trust for his friend of many years, Robert Cox. Under the terms of the trust, McCormick became the trustee when the Grantor died. The Cox Trust owned only one asset – a 100 acre piece of property that operated as a nine-hole golf course. In early 2002, McCormick arranged for an appraisal of the property and reported a fair market value, as an operating golf course, of $2.5 million. That value was included on the federal estate tax return filed on behalf of the decedent. While the appraiser's report stated that the highest and best use of the property was for residential development, there was no evidence that McCormick made any effort to ascertain the market value of the property if developed in accordance with its best use. In May 2002, it became apparent that the Town of Lynnfield was interested in developing the property and they ultimately purchased it in 2005 for $12 million, resulting in significant capital gains tax. In addition to the failure to adequately appraise the property, McCormick did not provide a trust accounting until April 2005 and even then used the outdated value of the golf course. The beneficiaries filed suit on several counts including breach of fiduciary duties and surcharge. The trial court ultimately awarded the beneficiaries $5.3 million in damages and the Third District affirmed in all respects.

The damages awards in cases of imprudent administration are often substantial. A trustee's oversight of the trust's investments is crucial. If a trustee is uncomfortable with the investment side of the trust's administration, he should consider utilizing a financial advisor or investment manager to assist with what can be very complicated decisions. A trustee is always authorized to retain professionals to assist with the trust's administration and simply must exercise due diligence when interviewing, retaining, and overseeing agents. Fla. Stat. § 736.0807 (2020).

V. Help! I want to sue my trustee! Protecting the Trust and Beneficiaries

While trustees are obligated to enforce and defend claims related to the trust, they are often conflicted in cases involving breach or the beneficiary is the real party in interest. *See* Fla. R. Civ. Pro. Rule 1.210(a) and *Buerki v. Lochner*, 570 So. 2d 1061, 1062 (Fla. 2d DCA 1990). When a trustee is conflicted from raising a claim against himself but needs to collect and preserve trust assets, one approach is to request the appoint a special fiduciary pursuant to Section 736.1001(e), Florida Statutes (2020). The special fiduciary, with court approval, has the authority to bring claims against the trustee for improper distributions or for the return of trust assets.

A beneficiary also has the authority to sue a trustee for breaching his fiduciary obligations and to request the court surcharge him for the damages he caused to the trust. The court has the authority to review the trust administration and take several actions in relation to the trust including: requiring the trustee to account for his actions, ordering his removal, appointing a special fiduciary, reducing or denying compensation to the trustee, among many others. Fla. Stat. § 736.1001(2) (2020). If a breach has occurred, the court can also order that the trust be made whole by requiring the trustee to restore the value of the trust property to what it would have been, had the breach not occurred. Fla. Stat. § 736.1002(1) (2020).

The sticky point for breach of trust claims, especially in states with shortened statutes of limitations periods like Florida and Tennessee, is to be acutely aware of any notice provided by an accounting or trust disclosure document. In Florida, a trustee may shorten the timeframe for a beneficiary to raise claims based on matters adequately disclosed in a trust disclosure document or accounting from four years to six months when the document includes the statement: "An action for breach of trust based on matters disclosed in a trust accounting or other written report of the trustee may be subject to a 6-month statute of limitations from the receipt of the trust accounting or other written report. If you have questions, please consult your attorney." Fla. Stat. § 736.1008(4)(c) (2020). There are always questions related to when a matter is "adequately disclosed."

In *Woodward v. Woodward*, 192 So. 3d 528 (Fla. 4th DCA 2016), Mary Woodward established a trust for her grandchildren and named her son, Orator, as the trustee. In 1996, one of the beneficiaries, Gregor Woodward, filed a claim against Orator for breach of fiduciary duty for failure to account since the trust's inception, among other things. In 2003, Orator filed a motion to strike the complaint but also noted that he had distributed the Mary Woodward Trust assets into two new trusts, the El Bravo Trust and the Serena Woodward Trust. In October 2011, Orator served accountings for the Mary Woodward Trust, the El Bravo Trust, and the Serena Woodward Trust on Gregor and the other grandchildren beneficiaries. The Mary Woodward Trust accounting indicated a starting balance of $944,038.89 in January 2002 and a closing value of $0 on May 31, 2002. The accountings included a limitations notice that an action for breach of trust based on matters disclosed in the accountings may be barred unless the action was commenced within six months of receipt of the accounting.

In April 2012, Gregor filed another suit against Orator alleging that he breached his fiduciary duties in terminating the Mary Woodward Trust and assigning the assets to two new trusts. Gregor sought removal of Orator, an accounting, restoration of assets, and to surcharge Orator. Orator filed a motion for summary judgment alleging res judicata, laches, and that the statute of limitations notice barred Gregor's claims. While the trial court agreed, the appellate court reversed and noted that when a matter is not adequately disclosed, and a trustee has not issued a final trust accounting, a claim against the trustee for breach of trust does not begin to accrue until the beneficiary has actual knowledge of the facts upon which the claim is based. The Court noted that Orator terminated the Mary Woodward Trust in 2002 but did not provide accountings to the beneficiaries until October 11, 2011. As a result, the statute did not start to run until October 11, 2011 and Gregor filed suit within the six-months' notice period. *See also Turkish v. Brody,* 221 So. 3d 1206 (Fla. 3rd DCA 2016)(holding an accounting did not adequately disclose information when it failed to indicate a trust asset was virtually worthless), *Taplin v. Taplin,* 88 So. 3d 344 (Fla. 3d 2012)(holding a beneficiary's allegation in Complaint did not trigger statute of limitations) and *Harris Trust Co. of Florida v. Davis*, 668 So.2d 689 (Fla. 4th DCA 1996)(holding a beneficiary was barred from certain claims when they were fully disclosed by trustees).

Beneficiaries need to be conscious of trust account statements and the disclosures included in those statements. The best way that a beneficiary protects his interest in a trust is by paying very close attention to the documents received from the trustee and the matters disclosed. Sitting on an account statement received from a trustee for too long can result in the trustee really ripping off a beneficiary with a waiver of claims.

VI. <u>Summary</u>

In sum, there are a lot of ways a trustee may rip off a beneficiary. From failing to provide the required and statutory trust information and accountings, to investing in conflicted transactions, trustees are often blind to some of the most obvious ways they breach their fiduciary duties. A trustee does well by retaining competent trust administration counsel and consulting with experienced professionals including CPAs and financial advisors. Beneficiaries must pay attention to all the documents they receive related to the trust and do a thorough review to ensure that the trustee is prudently administering the trust pursuant to the terms of the governing document and

Florida law. A beneficiary should never be afraid to ask a question if he fears he is being ripped off – a quiet beneficiary can lead to the most trust damage.