STETSON UNIVERSITY

2025 National Conference on Special Needs Planning and Special Needs Trusts

Unique Asset Management

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Unique Asset Management

- May enhance PSNT's attractiveness to new clients
- Enhanced due diligence / potential liability
- Inherited / legacy assets

Types:

- Beneficiary-occupied real estate
- Vehicle Liens
- Mineral Interests
  - Working vs. non-producing
  - Oil & Gas
  - Surface rights vs. underlying rights
- Farm/Ranch Land
- Commercial Real Estate
- Promissory Notes
- Closely Held Interests
- Life Insurance
- Annuities
- IRAs

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Fiduciary Duties

Duty of Loyalty

- "[T]he essence of the fiduciary relationship" (J.C. Shepherd, *The Law of Fiduciaries 48l* (1981))

Duty of Care/Prudence

- Note: when a fiduciary has held themselves out as a professional in certain areas, a higher standard of care applies (esp. in litigation).
- *Harvard College v. Amory* 26 Mass. ((9 Pick.) 446 (1830)) - "Observe how [people] of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested."

Duty of Impartiality

- Treat all parties of the trust similarly and fairly, with no bias between class of beneficiaries (unless otherwise noted in the trust agreement)
  - Applies to remainderpersons
- UTC § 803: "if a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing and distributing the trust property, giving due regard to the beneficiaries' respective interests"
- *Restatement (Second)* § 183: "when there are two or more beneficiaries of a trust, the trustee is under the duty to deal impartially with them"

Duty to Account

Accountings/reportings to beneficiaries, remainder persons, interested parties, courts, public benefits agencies, etc.

fi·du·ci·ar·y (fi-dōō-shē-ĕr-ē): n. "One, such as an agent of a principal or a company director, that stands in a special relation of trust, confidence, or responsibility in certain obligations to others."

Latin: fiduciarius, from fiducia – "trust"

Ramsey v. Boatmen's First Nat'l Bank of K.C., N.A., 914 S.W.2d 384, 387 (Mo.App.W.D.1996) —

Trustees are fiduciaries "of the highest order" and are required to exercise "a high standard of conduct and loyalty in administration of [a] trust." The duty of loyalty "precludes self-dealing," which in most cases would be considered a "breach of fiduciary duty."

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Fiduciary Duties

Pitts v. Blackwell, No. M200-01733-COA-R3-CV 2011 (Tenn. App. Dec. 28, 2001)

"Nothing in the law of fiduciary trusts is better settled than that the trustee shall not be allowed to advantage [themself] in dealings with the trust estate."

- Blackwell, an undertaker, was appointed co-conservator of an elderly woman
- Protected person already held a prepaid burial plan with another funeral home prior to Blackwell's appointment
- Blackwell and co-conservator transferred prepaid burial policy to Blackwell's business
- Burial expenses after protected person's passing totaled more than $18,000
- Was Blackwell's most expensive funeral to date
- Court ordered only Blackwell's expenses could be paid (i.e., no profits) from the estate

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Uniform Prudent Investor Act (UPIA)

- UPIA §1 (a) – 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 [Act]" unless otherwise directed by the trust instrument.
- Found in the *Restatement (Third) of Trusts* (*Restatement of the Law Third, Trusts,* Am. Law Inst. © 2003) ("R3")
- *UPIA §2(a)* - "A trustee shall invest and manage trust assets as a prudent investor would, by considering the **purposes, terms, distribution requirements, and other circumstances of the trust.** In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution." [emphasis added]

UPIA § 9

- "a trustee may delegate investment and management functions"
- "trustee shall exercise reasonable care, skill and caution in selecting an agent"
- Relies on duties of loyalty and impartiality as well as audit and judicial oversight

UPIA § 9(a)(3)

- trustee has an ongoing duty to "periodically [review] the agent's actions in order to monitor the agent's performance and compliance..."

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UPIA - Prudence

- UPIA §1 (a) – 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 [Act]" ***unless otherwise directed by the trust instrument. [emphasis added]***
- *Uniform Probate Code §7-302 (1969)* - "The trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent [person] dealing with the property of another ..."
- UPIA §2 (b) – investments "must be evaluated not in isolation but in the context of the trust portfolio as a whole."
  - Unique assets' contribution or detriment to overall portfolio diversification
- UPIA §2 (b) - the tradeoff between risk and return "reasonably suited to the trust" should be among the trustee's chief considerations
- UPIA §2 (e) - removes category-specific restrictions previously found in the Prudent Man Rule
  - Allows consideration of unique assets

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UPIA - Diversification

Diversification
- UPIA §3 - "a trustee shall diversify the investments of the trust"
- Similarly correlated securities (e.g. Apple and Google) < mutual fund/ETF holding entire technology sector

Diversifying holdings:
- On average yields higher long term-term returns while mitigating risk
- Smoothes out unsystematic risk (risk specific to the security or the industry)
- Reduces risk as stock prices are not uniform (imperfect correlation)

How to diversify:
- Across capitalization (large cap, mid cap, small cap)
- Growth stocks (tech, biotech, discretionary) vs. value stocks (dividend paying, financials)
- ETF/mutual funds
- By geography (domestic vs. international)
- Fund manager
- Proprietary investment products

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Unique Asset Considerations:

General Liability:
- Lack of:
  - Transparency
  - Objective valuation
  - Readily available markets
  - Certainty in cash flow
- Operational responsibility
- Heightened administrative liability / bandwidth
- Specialized knowledge
- Prudence:
  - Non-financial factors: settlor intent, beneficiary welfare
  - Trust longevity
  - Portfolio risk profile
  - Remainderperson interests

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Unique Asset Considerations:

Liquidity Risk:
- Unique assets are generally illiquid / non-marketable
- Liability to courts or public benefits agencies / remainderpersons
- Ongoing funding requirements
  - Maintenance
  - Legal expenses
  - Capital calls

Valuation:
- Duty to report
- Lack of active markets
- Varying standardized pricing mechanisms
  - Fast sale = loss?
- Valuation frequency?
  - Tax issues

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Unique Asset Considerations:

Undue Influence:

- Beneficiary with diminished capacity
- Fraud / elder abuse
- Third-party involvement
  - Family / friends residing in trust-owned home
  - Live-in caregiver improvements
- Supported Decision-Making

Emotional Attachment:

- Beneficiary-occupied residence
  - Long-term security
  - Family home
- Collectibles
- Family company
- Legacy stock positions

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Unique Asset Considerations:

Trust Longevity:

- SNTs = wasting trusts
- Monte Carlo / Trust Longevity Simulations
  - Models probability of different investment outcomes
  - Systematic risk
  - Randomized market returns factoring in portfolio standard deviation
- Assists with trustee planning **and** beneficiary expectation setting

Beneficiary Profile	
True Link ID	475156
First Name	First Name
Last Name	Last Name
Trust	First Party Pooled Trust
Age	34
Market Value	$1,000,000
Average Monthly Expenses	$5,500
Estimated Monthly Annuity	$0.00
Annuity Start Date	No Annuity
Annuity End Date	No Annuity

How much you can withdraw monthly to make your current money last:	
Assumed Annual Growth Rate	6.00%
# of Years	Monthly Spend
5	$19,236.62
10	$11,046.82
20	$7,128.67
30	$5,965.68
40	$5,474.76
50	$5,237.86
60	$5,116.18
70	$5,051.67
80	$5,016.91
90	$4,998.00
SSA Life Expectancy (# of Years)	Monthly Spend
44.22	$5,354.74

Source: True Link Investment Advisors, LLC - for illustrative purposes only

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Beneficiary-Occupied Real Estate

- Beneficiary stability
  - Long-term beneficiary security, safety (e.g., location / proximity to services, etc.), independence and continuity of care
- Asset allocation: industry standard of 15-25% of corpus
  - Diversification issues
- Sustainability concerns:
  - Taxes, insurance, upkeep and maintenance, accessibility requirements, utilities
- Sole benefit
  - Undue influence
- SSI value cap
- Valuation
- Outside property management / oversight
- Eviction

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Beneficiary-Occupied Real Estate

Wispact, Inc: Unique Asset Policies and Procedures
(see Appendix for full Unique Asset Policies and Procedures)

- The real estate must be unencumbered (e.g., not pending sale, not mortgaged, not subject to land contract, etc.)
- The real estate must be 100% owned by the trust
- The real estate must not be unimproved or vacant
- If the real estate is a mobile home or trailer, they must be permanently affixed to real estate
- The real estate must not cost more than 25% of the liquid or readily available corpus of the trust
- Any retention of real estate is subject to analysis to demonstrate long-term sustainability
- A beneficiary or their legal representative must execute a Hold Harmless letter exonerating the trustee and Wispact from the real estate's ongoing retention and purchase
- The appraised real estate valuation or Comparable Market Analysis (which is routinely reassessed) is included in the trustee's administration fee (but not in the investment manager's fee)
- All costs (including routine property inspections) associated with the real estate are borne by the trust

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Vehicle Liens

- Protects trust's ownership interest
- Sole benefit
- Establishes clear legal control in event of disputes, accidents, or liability claims
- Insurance paid by trust
  - Named as additional insured / loss payee
- Undue influence
- Maintenance
  - How often to document?
- Appropriateness

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Farm / Ranch Land / Commercial Real Estate (CRE)

Farm / Ranch Land:

- Unmarketable / valuation issues
- Ongoing management of farming operations, leases, land-use regulations
- Crop / livestock market volatility
  - Drought / natural disasters
- Maintenance
- Insurance, oversight of tenant farmers
- Costly delegation to agricultural managers, attorneys, appraisers

Commercial Real Estate (CRE):

- Active management: leasing, tenant relations, zoning / building codes compliance, maintenance
- Risks: vacancies (see: COVID), market fluctuations, capital expenditures, building safety, environmental hazards
- Costly delegation to CRE managers, attorneys, appraisers
  - Tenant disputes / lease negotiations

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Mineral Interests

- Lease oversight
- Royalty payment processing
  - Past and present
- Operator accountancy
- Division orders
- Valuation fluctuation (commodity pricing)
- Environmental concerns
- Depleting asset
  - Remainderperson considerations
  - UFIPA depletion transfers

Wispact, Inc: Unique Asset Policies and Procedures
(see Appendix for full Unique Asset Policies and Procedures)

- "The illiquid nature of these unique assets complicates the pooled accounting ("unitization") of the Trusts, and can result in a lack of funds available to meet a beneficiary's needs which is contrary to the purpose of the Trusts, and presents administrative challenges that are beyond the scope of the Trusts."
- "These assets may not have a readily ascertainable current market value which hinders accurate valuation assessments potentially necessary for proper accountings and other administrative requirements."

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Closely Held Interests

- Liquidity risk
- Governance transparency
- Valuation issues
- Concentration risk
- Voting rights
  - Operational or strategic decisions
  - Profit reinvestment vs. payout
  - Company performance
  - Staff oversight
- Family owned businesses
- Exit strategies
  - Proactive planning to meet beneficiary needs
  - Buy-sell agreements
  - Staged divestiture
- Minority rights
  - Tag-along rights
  - Protection covenants

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Closely Held Interests

Wispact, Inc: Unique Asset Policies and Procedures
(see Appendix for full Unique Asset Policies and Procedures)

- They "may accept an irrevocable direct ownership interest in closely held business interests, nonmarketable securities, and land contract interests…", but, "at the discretion of the Trustee, [they] may instead accept an irrevocable assignment of proceeds rather than a direct ownership interest in closely held business interests."
- "Closely held business interests and nonmarketable securities are not able to be readily liquidated in full or in part on an organized securities exchange and have limited marketability."
- "If closely held business interests are accepted, beneficiary must specifically waive Trustee's obligation to comply with the prudent investor rule and allow Trustee to hold non-income producing interests."
- "Trustee does not have a duty to monitor financial conditions of the company and any loss of value associated with closely held business interests."
- "Trustee will not accept a general partnership interest or stock issued by a subchapter S corporation."
- "Trustee will not exercise any applicable voting rights and may retain outside professionals to do as such. The cost of said retention shall be borne by the beneficiary's sub account."

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Life Insurance

First Party SNTs

- Funeral / burial expenses
- Existing policy at joinder
- **POMS SI 01130.300**
  - Requires waiver of Cash Surrender Value (CSV)
  - $1,500 maximum face value
  - Beneficiary naming issues
- Premium payments / liquidity risk

Third Party SNTs

- Grantor as insured = funding mechanism
- Provides stability for beneficiary
- Premium payments / liquidity risk
- Diversification

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Life Insurance

Wispact, Inc: Unique Asset Policies and Procedures
(see Appendix for full Unique Asset Policies and Procedures)

- The policy or contract must be owned by, or is contemporaneously being transferred to, the Trust.
- The policy or contract must name the Trust as its sole beneficiary.
- They receive a Hold Harmless letter from the beneficiary, or the grantor or his/her legal representative.
- The beneficiary must consult his or her own tax advisor before transferring ownership of the policy to the trust.
- Variable life insurance policies shall only be accepted in third-party trusts.
- The trustee is not under any ongoing duty to monitor the investment allocation or performance of any variable life insurance policy.
- The trustee must determine that the beneficiary's trust account has sufficient funds to pay all premiums due on the policy for the life expectancy of the insured.
- The trustee is not responsible or liable for a lapse or termination of the life insurance policy due to non-payment of premiums.

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Annuities

Fixed Annuities

- Reliable income stream
- Structured settlement annuities: generally tax free
- Penalties for early surrender / withdrawal
- Verify titling / ownership
- Potentially complex and onerous fee structures
- Complex agreements
- Tax issues
- Duty to monitor?
- Remainderperson issues

Variable Annuities

- Potentially unreliable income stream
- Market value fluctuation
- Penalties for early withdrawals
- Liquidity restrictions
- Potentially complex and onerous fee structures
- Complex agreements
- Tax issues
- Limited investment options
- Duty to monitor

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Annuities

Wispact, Inc: Unique Asset Policies and Procedures
(see Appendix for full Unique Asset Policies and Procedures)

- "The policy or contract names the Trust as its sole beneficiary."
- They receive "a Hold Harmless letter from the beneficiary, the grantor or his/her legal representative…."
- "Factors in determining whether the Trustee may accept an annuity include whether the annuity can be liquidated (partially or in-full) at a reasonable cost in order to properly support the Beneficiary's spending needs and whether the fixed annuity fits within beneficiary's investment goals as determined by Trustee."
- "Beneficiary must consult his or her tax advisor before transferring ownership of the annuity to the Trustee."
- "Trustee is not responsible to determine when or best option to annuitize a contract."
- "Trustee not responsible to monitor investment allocation or performance under contract."
- "Beneficiary consents to an early withdrawal from the contract as determined by Trustee even if such withdrawal is penalized under the terms of the contract."
- "Only nonqualified annuity contracts are accepted under this annuity section."

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Inherited IRAs

Setting Every Community Up for Retirement Enhancement - SECURE Act

- Passed at the end of 2019
- Followed by the **SECURE Act 2.0 (passed 12/29/2022)**
  - **Securing a Strong Retirement Act of 2022**
  - **Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg Act (RISE & SHINE Act)**
  - **Enhancing American Retirement Now Act (EARN Act)**
- Eliminated RMD “stretch” for many beneficiaries
  - Generally, the inherited IRA was distributed over lifetime of IRA beneficiary
  - Now, most beneficiaries must withdraw all IRA funds (and pay applicable income taxes) within ten years of IRA owner’s death (with certain exceptions)
- New RMD dates:
  - SECURE Act
    - RMDs begin at age 72 (previously 70 ½) if account owner turned 70 ½ after Jan 1, 2020
  - **SECURE Act 2.0**
    - RMDs begin at age 73 (2022), and 75 (2033)
- Applies to IRAs inherited January 1, 2020 +

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Inherited IRAs

Eligible Designated Beneficiary (EDB):

- Spouse
- Beneficiary with a disability
  - **IRC § 401(a)(9)(E)(ii)(III)**
    - Over 18: “unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration”
    - Under 18: “a medically determinable physical or mental impairment that results in marked and severe physical or mental impairment and that can be expected to result in death or to be of long-continued and indefinite duration”
  - **IRC § 72(m)(7)**
    - Disabled per SSA (42 U.S.C. § 1382(a)(3)(A) and (B))
  - Documentation required by Oct 31 of year following account owner’s death (note: current regulations are unclear as to where to submit)
- Beneficiary who is chronically ill
  - **IRC § 401(a)(9)(E)(ii)(IV)**
    - Beneficiary who “if, without substantial assistance, (…) [is] unable to complete two or more of the activities of daily living….” and the illness is “reasonably expected to be lengthy in nature”
  - Documentation (including certification from licensed healthcare practitioner) required by Oct 31 of year following account owner’s death (note: current regulations are unclear as to where to submit)
- Individuals not more than 10 years younger than decedent
- Minor children of decedent **(during minority only!)**

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Inherited IRAs

Eligible Designated Beneficiary (EDB):

Eligible Designated Beneficiaries (EDBs) (cont’d)

- SNTs (IRC § 401(a)(9)(H)(iv))

“See-Through Trust” / “Qualified Trust”

IRC § 401(a)(9)(H)(iv)(II):

- Valid under state law
- Irrevocable
- Copy of trust must be provided to plan provider by Oct 31 of year following account owner’s death
- All countable beneficiaries must be identifiable
- **All countable beneficiaries must be individuals**
  - **SECURE Act 2.0: EDB trust remainder charities are now DBs!**

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Inherited IRAs

Eligible Designated Beneficiary (EDB):

Eligible Designated Beneficiaries (EDBs)

Withdrawal rules: life expectancy of beneficiary

Special Needs Trust Improvement Act

- **Page 915 of 1,653-page Consolidated Appropriations Act, 2023**
  - **a/k/a Section 337 of SECURE Act 2.0**

(a) In General.--Section 401(a)(9)(H)(iv)(II) is amended by **striking ``no individual'' and inserting ``no beneficiary".**
(b) Conforming Amendment.--Section 401(a)(9)(H)(v) is amended by **adding** at the end the following flush sentence:
``For purposes of the preceding sentence, in the case of a trust the terms of which are described in clause (iv)(II), any beneficiary which is an organization described in section 408(d)(8)(B)(i) shall be treated as a designated beneficiary described in subclause (II).''. (c) Effective Date.--The amendments made by this section shall apply to calendar years beginning after the date of the enactment of this Act."

Advantages for EDBs:

- **Continued qualification for means-tested public benefits**
- **More time for inherited IRA assets to grow tax-deferred**
- **Less likely to push beneficiaries into higher income tax bracket vs. 5-year or 10-year rule**

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Inherited IRAs

Required Minimum Distributions (RMDs)

- Minimum amounts a retirement plan account owner must withdraw annually
- Minimum amount inherited IRA beneficiary must withdraw annually
- Not applicable to Roth IRAs; **but is applicable to inherited Roth IRAs**
- If multiple accounts: may be taken from any account as long as full amount is withdrawn by Dec 31
- Calculated by dividing prior year's 12/31 value by IRS life expectancy factor

TABLES
IRS Publication 590-B, Distributions from Individual Retirement Accounts

Joint and Last Survivor Table II:

- for use if sole beneficiary is account owner's spouse (more than 10 years younger than account owner)

Uniform Life Table:

- for use if sole beneficiary is not the account owner's spouse of the account owner's spouse is less than 10 years younger than account owner

Single Life Expectancy Table I:

- for use if account owner is a beneficiary of an account (e.g., inherited IRA)

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Inherited IRAs

Wispact, Inc: Unique Asset Policies and Procedures

(see Appendix for full Unique Asset Policies and Procedures)

- "The IRA is an "inherited IRA" as defined by the Internal Revenue Code."
- "The beneficial interest in the IRA is irrevocably assigned to the Wispact, Inc. Trust sub- account by the IRA beneficiary…."
- "Beneficiary must consult his or her own tax advisor regarding the tax consequences of a transfer of an IRA to the trust. Trustee makes no representation that an assignment of a beneficiary's intent to transfer to the trust will not create adverse tax consequences to the beneficiary."
- "Trustee and Wispact have full discretion to determine annual withdrawals from the IRA account."
- "Beneficiary agrees to sign a hold harmless letter to the Trustee."

Consider IRA account size minimums?

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Promissory Notes

- Liquidity risk
- Value and performance dependent upon:
  - Borrower's creditworthiness
  - Repayment discipline
  - Note enforceability
- Operational burdens:
  - Payment monitoring and recording
  - Interest accrual
  - Note compliance
  - Collection actions / litigation
    - Potentially against a family member

Wispact, Inc: Unique Asset Policies and Procedures

(see Appendix for full Unique Asset Policies and Procedures)

- "Any special record keeping requirements, unique tax reporting, collateral interests, any requirement or likelihood for a legal enforcement action to compel payment, debtor's ability for repayment, debtor credit rating, interest rate assigned, amortization schedule, payment facility, and whether the promissory note provides for recovery of actual attorney fees and costs. New issuances of promissory notes shall be set with the appropriate interest rate as determined by the Trustee."
- "Trustee is not responsible to monitor payor, value of any collateral that secures the Promissory Note, or required to commence any legal proceedings against the payor in case of default."
- "Trustee is not responsible for amending or restructuring any promissory note already in existence, applicable to both current promissory notes administered by Wispact and in any such cases wherein Trustee and Wispact are considering acceptance of a successor trusteeship appointment or joinder."

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Delegation

- ***Restatement (Third) § 80***
  - Delegation is permitted, but only to the extent that "a prudent person of comparable skill" would
  - Ongoing duty to "supervise and monitor" delegated agent
- UTC § 807
  - Trustee must exercise reasonable care, skill and caution in:
    - Agent selection
    - Establishing scope of terms of the delegation
    - Periodically reviewing agent's actions
- OCC Risk Management Guidance in regards to Third-Party Relationships
  - OCC Bulletin 2013-29
  - Fiduciary "should ensure comprehensive risk management and oversight of third-party relationships…through the life cycle of the relationship…."
  - Some aspects to review (at onset and periodically):
    - Planning
    - Due diligence before third-party selection
    - Contract negotiation
    - Ongoing monitoring
    - Termination of third-party and contingency plan
    - Oversight and accountability
    - Documentation and reporting
    - Independent reviews

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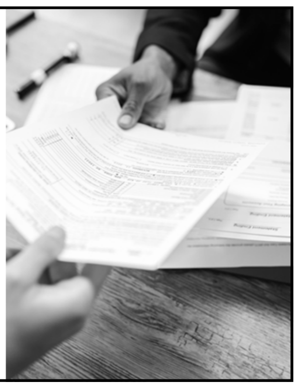
Taxation

- Real estate: income / depreciation
- Mineral interests: return of capital vs. income
  - Depletion deductions
- Closely held interests
  - Income on K-1s
  - Unrelated Business Taxable Income (UBTI)
- Valuations for final accountings / estate tax reporting
- "Late" K-1s
  - PSNT 1041 complications



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Thank You!

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