

Administering Closely-Held Assets in Trust

Rebecca Schroer and Morgan Wiener

When does
this issue
arise?

Estate Planning

Trust and Estate Administration

Trust and Estate Litigation

What does Colorado law say about this issue?

Uniform Trust Code

- Trustee can take any action that may be taken by a shareholder, member, partner, etc., including changing the form of business
- Duty of loyalty/conflict of interest

Fiduciary Powers Act

- Trustee can participate in or operate a business existing at the inception of the estate or trust
- Fiduciary Interests in Entities
 - Power to become a partner, enter into a partnership agreement, accept assignment or otherwise acquire, hold and dispose

Standard of Care

Fiduciary Standard

vs.

Corporate Standard

Fiduciary Standard

- Highest standard under the law
- Trustee duties
 - Good faith, in accordance with trust terms and purposes, in the interests of the beneficiaries, in accordance with the law. CRS § 15-5-801
 - Loyalty. CRS § 15-5-802
 - Impartiality. CRS § 15-5-803
 - As a prudent person, exercising reasonable care, skill, and caution. CRS § 15-5-804
 - Duties under common law, Colorado law, principles of law and equity. CRS § 15-5-106

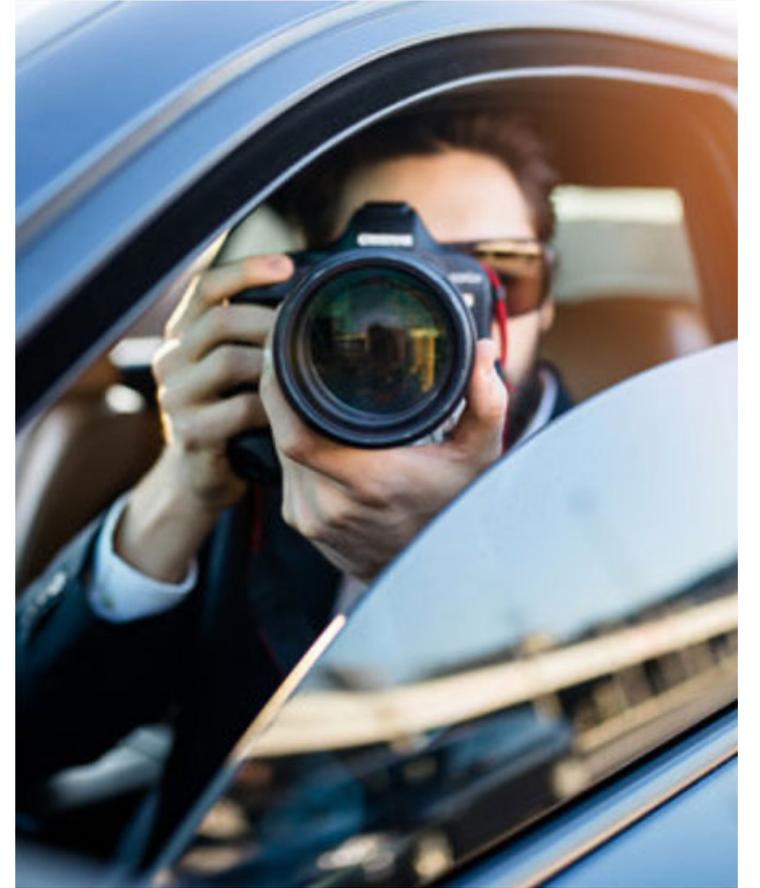
Corporate Standard

- Business judgment rule
 - More lenient than fiduciary standard
 - More protective of officers and directors
 - Courts typically won't second guess business decisions, more concerned with decision making process
- General standard for officers and directors
 - Discharge duties in good faith, with care, in a manner reasonably believed to be in the best interests of the business
 - Can rely on information from certain advisors
 - No duties owed to creditors
 - CRS § 15-5-802

What standard applies?

New York	Georgia	Colorado
<p data-bbox="191 588 749 654">Fiduciary standard</p> <ul data-bbox="191 702 825 896" style="list-style-type: none"><li data-bbox="191 702 825 896">• <i>Matter of Shehan</i>, 285 A.D. 785 (N.Y. App. Div. 1955)	<p data-bbox="919 594 1513 659">Corporate standard may apply if:</p> <ol data-bbox="919 773 1544 925" style="list-style-type: none"><li data-bbox="919 773 1437 839">1. Settlor intent<li data-bbox="919 862 1544 925">2. Minority interest <ul data-bbox="919 976 1528 1096" style="list-style-type: none"><li data-bbox="919 976 1528 1096">• <i>Rollins v. Rollins</i>, 780 S.E.2d 328 (Ga. 2015)	<ul data-bbox="1656 594 2288 1159" style="list-style-type: none"><li data-bbox="1656 594 2288 753">• Unknown, no law on point<li data-bbox="1656 776 2099 839">• No caselaw<li data-bbox="1656 862 2288 1011">• Statutes touch on the issue<ul data-bbox="1753 1033 2109 1159" style="list-style-type: none"><li data-bbox="1753 1033 2109 1096">• § 15-5-802<li data-bbox="1753 1105 2109 1159">• § 15-1-702

Duty to Monitor



When should the trustee intervene?

- Trustee may have a duty to intervene in management of business to protect interests of beneficiaries
 - *Wilbourn v. Wilbourn*, 106 So.3d 360 (Miss.Ct.App. 2012) – Removal of co-trustee upheld where he took action in his own interests and used trust to ensure position on board of directors.
 - *In re Koretzky's Estate*, 86 A.2d 238 (N.J. 1951) – Trustee should not allow beneficiary to serve in corporate position if not in the best interests of the trust. Removal of PRs upheld where they did not make sufficient investigation into management of business.
 - *In re Hearthside Baking Co.*, 402 B.R. 233 (Bkrtcy. N.D.Ill. 2009) – Trustees breached by ignoring concerns about company management and failing to investigate.

Duty to Inform and Report

- When does this arise?
 - Colorado is generally beneficiary friendly
- General duty to inform and report C.R.S. 4-10-813
- Trust language
 - Who entitled?
 - To what? “all records”

Closely- Held Assets

What is
disclosed?

- Financials: profit and loss?
- Internal corporate documents?
- Personnel files?

Disclosure
vs.
protection
of the
company

- Type of company
- Loss of buyer
- Violation of securities law
- Confidentiality issues (e.g., employment/HR records)

Minority
Interest vs.
Wholly
Owned

right to a dividend



economic interest



limited partnership interest



general partnership interest



wholly owned



Evidence of Wrongdoing or Conflict

Trustee occupies a role or roles in company

Trustee occupies other relevant roles

Evidence of trustee misconduct

Facts and circumstances analysis

Court has equitable power



Duty to Diversify

Colo. Rev. Stat. § 15-1.1-102: (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.



Trust Language

Colo. Rev. Stat. § 15-1.1-101(b): The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

Estate Planning Tips

- Will the trust hold specific closely held assets?
- Settlor's intent and acknowledgment of potential conflicts/dual roles?
- Scope of prudent investor rule and duty to inform and report?
- Trustee powers?
 - ability to occupy different roles? compensation? standard of care? waiver of conflicts of interest? exculpatory clauses?
 - power to retain the asset? sell? borrow against?
 - standard of care to apply to trustee's corporate actions?
 - powers or duties relating to supervision of management of the company if trustee is not acting as manager?

Estate/Trust Administration Tips

- Nature of the business and related management considerations
- What percentage of the company is owned by the trust/estate?
- Identify officers, directors, shareholders, etc.
- Identify a valuation process
- Consider the duty to inform and report to beneficiaries
- Prudent investment
- Standard of care

Thank you

Rebecca Schroer
Holland & Hart LLP
303.295.8586
rkschroer@hollandhart.com

Morgan Wiener
William Weese Pepple & Ferguson
303.861.2828 ext. 2524
mwiener@williamsweese.com