

Statement of Amy Morris Hess
Before the ERISA Advisory Council
On the subject of
Common Law Trustees' Duties Concerning Uncashed Checks Payable to Beneficiaries
August 28, 2019

Good morning. My name is Amy Morris Hess. I am the UTK Distinguished Service Professor Emeritus at the University of Tennessee College of Law, where I have taught trusts and estates, property, and taxation since 1981. Before joining the Tennessee faculty, I practiced law in New York City with the firm of Kelley, Drye & Warren and in Charlottesville, Virginia, where I was the co-founder of a transactional law firm. In both locations, I concentrated my practice in the areas of estate planning and administration and taxation. I continue to do some private consulting in these fields. Since 1994, I have been the successor author of the multi-volume treatise, *BOGERT, THE LAW OF TRUSTS AND TRUSTEES*.

Thank you for the opportunity to speak to you today and especially for arranging for me to speak from Knoxville. Before I begin I want to make clear that I make my remarks this morning as an individual; I do not speak for the University of Tennessee or any of the firms with which I practiced in the past.

You asked me to discuss two topics:

- First, what is the difference between property that escheats to a state and property that is held in a perpetual custodianship by a state under the Unclaimed Property Act?
- Second, what are the common law duties of a trustee of a private express trust when the trustee issues a check to a beneficiary of the trust in payment of a distribution from the

trust, but the check is never cashed and the trustee has tried unsuccessfully to locate the beneficiary?

I. Escheat versus Custodianship under the Unclaimed Property Act

Escheat is a concept from the law of intestate succession, which is statutory law that directs to whom property is distributed when someone dies without a will. Statutes on intestate succession provide that a decedent's property passes to close relatives, e.g., spouse, children, grandchildren, siblings, etc. If a decedent is not survived by any close relatives (usually at least as close as lineal descendants of the decedent's grandparents), the intestate succession statute usually provides that the decedent's property "escheats" to the state.¹ Under the common law, property that escheated became the property of the state, and was added to the state treasury, sometimes after a fairly lengthy period during which the decedent's relatives had the right to assert a claim to it.² Today, however, although many intestate succession statutes still provide for property to "escheat," most states now have a procedure whereby personal representatives who discover that a decedent has no intestate successors must transfer the decedent's property to a custodian under the state's unclaimed property act.³ In some cases, the custodian is the state

¹ See e.g., Tenn. Code Ann. § 31-2-110; Unif. Probate Code § 2-105. Today, most states have such a statute, although some states still provide for unlimited inheritance, which requires the personal representative of the estate to continue searching for even more remote relatives until someone can be found to whom the decedent's property may be distributed.

² Thomas E. Atkinson, *The Law of Wills* §§ 12, 26 (2d ed. 1953).

³ See, e.g., Tenn. Code Ann. § 31-6-116, requiring property that escheats under Tenn. Code Ann. § 31-2-110 to be turned over to the unclaimed property custodian to be held in accordance with Tenn. Code Ann. §§ 66-29-101 *et seq.*, which is Tennessee's enactment of the Uniform Unclaimed Property Act.

treasurer but the property remains in custodianship in perpetuity so that the owner may come forward to claim it at any time.⁴

II. Duties of Trustees Regarding Uncashed Distribution Checks

All trustees of private express trusts have a duty to administer the trust as a prudent person would in the exercise of reasonable care, considering the purposes, terms, distributional requirements, and other circumstances relevant to the trust.⁵ In addition, trustees have a duty to protect the trust assets.⁶ As part of these duties, a trustee has a duty to keep reasonably informed of facts concerning the trust assets and trust beneficiaries that affect the administration of the trust or distributions of trust assets.⁷

As applied to a trustee's duty to make distributions to beneficiaries, this duty is generally construed to require the trustee to stay informed of a beneficiary's whereabouts and to make distributions only to the beneficiary personally, unless there is a court-appointed representative of the beneficiary, such as a conservator of an incompetent beneficiary or the personal

⁴ The Uniform Probate Code no longer uses the word "escheat;" it provides that such property "passes" to the state. Like the Tennessee Code, the Uniform Probate Code requires a personal representative to transfer property for whom no intestate taker can be found to the state's unclaimed property custodian. *See* Unif. Prob. Code § 3-914. *See also*, Helene S. Shapo, George G. Bogert, George T. Bogert, & Amy Morris Hess, *The Law of Trusts and Trustees* § 187 (3d ed. 2012) (stating that the custodianship under the unclaimed property acts continues in perpetuity).

⁵ Unif. Trust Code § 804. Although the Advisory Council asked me to discuss the common law duties of trustees, the law governing trustees' duties is largely statutory in the United States today. More than thirty states have adopted the Uniform Trust Code and a number of others have enacted their own statutes governing trustees' duties. For the most part, these statutes codify the common law as it applies to the question I was asked.

⁶ Unif. Trust Code § 809.

⁷ *See e.g.*, *First Union National Bank of South Carolina v. Soden*, 333 S.C.554, 511 S.E.2d 372 (S.C.App. 1998); *Restatement (Third) of Trusts* § 76, cmt f (2007).

representative of the estate of a deceased beneficiary.⁸ A trustee is generally held to be absolutely liable for misdelivery of trust assets, absent language in the trust instrument imposing a lower standard.⁹ Thus, a trustee who distributes trust assets to the wrong beneficiary (or to someone on a beneficiary's behalf who is not entitled to receive the distribution) may be liable to replace the funds from his or her own assets, even if the trustee did not know that the distribution was made in error.

Because of the possibility of personal liability for misdelivery, trustees of private express trusts generally proceed with caution before making any distribution of trust assets. A trustee usually will request instructions from a court before making a distribution, particularly in a situation where a beneficiary cannot be found and the question arises to whom that beneficiary's share should be paid.¹⁰ Courts may respond to this request by directing the trustee to pay the distributions into an escrow fund to be held by the trustee for a fixed period of time, or to pay the distribution into court; they might require the trustee to turn over the money to the state's unclaimed property custodian; they might direct distribution to the personal representative of a deceased beneficiary's estate; or they might direct distribution of the funds to other beneficiaries.¹¹

⁸ George G. Bogert, George T. Bogert, & Amy Morris Hess, *The Law of Trusts and Trustees* § 814 (rev. 2d ed. 1981; supplemented annually).

⁹ *Id.*; Unif. Trust Code § 604, cmt; Restatement (Second) of Trusts § 226 (1959); Restatement (Third) of Trusts § 76, cmt f. (2007). The Comment to the Restatement (Third) of Trusts, notes, however, that a trustee will not be held liable for misdelivery of trust funds if the misdelivery results because the trustee was unable to obtain accurate information, despite diligent, good-faith efforts to do so.

¹⁰ In fact, the comments to the Restatement (Third) of Trusts recommend requesting instructions. *See* Restatement (Third) of Trusts § 76, cmt f. (2007). Restatement (Third) of Trusts § 71 (2007) states that a trustee or a beneficiary may request court instructions concerning trust administration "if there is reasonable doubt about the powers or duties of the trusteeship . . ."

¹¹ *See* George G. Bogert, George T. Bogert, & Amy Morris Hess, *The Law of Trusts and Trustees* § 814 (rev. 2d ed. 1981; supplemented annually).

The specific question of the duty of a trustee of a private express trust when a beneficiary's distribution check remains uncashed for a substantial period of time has rarely been litigated. I am going to suggest several reasons for this that may assist the Advisory Council in its deliberations on what rules should apply to ERISA plan fiduciaries. The Advisory Council should understand, however, that these suggestions come from my more than forty-five years of experience with how trusts are administered; they are not the result of rigorous empirical study.

First, private express trusts generally last for a finite and relatively short period of time. Doctrines such as the Rule Against Perpetuities limit the period during which property can be held in a private express trust. Although many states have extended the perpetuities period substantially and some have even abolished it, most property owners do not place property in trust for longer than a generation or two. After that, the trust terminates, and the trustee's job ends.

Upon the trust's termination, trustees customarily account for their actions and request to be discharged from their duties. They request discharge in order to end possible disputes about their administration of the trust.¹² Trustees may be discharged either by private agreement with the beneficiaries or by court proceeding. In order to be discharged, a trustee must distribute all of the trust property. Because of the rule imposing absolute liability on a trustee who misdelivers trust assets, a trustee who knew of outstanding uncashed distribution checks likely would require a court proceeding for discharge and would request instructions from the court as to what to do with the uncashed checks. Unless a beneficiary objected to the decision of the court, the order would be final and the trustee would distribute in accordance with it.

¹² See, e.g., Unif. Trust Code § 1005, providing that a beneficiary may not begin an action to sue a trustee for breach of trust more than one year after receiving a report that adequately disclosed the existence of the potential claim.

Another reason that private trustees rarely encounter this question is that private express trusts usually have a relatively small number of beneficiaries most of whom are members of the same family. A beneficiary whom no one in the family can find is quite rare.

Finally, a third reason may be that private trustees believe that they should turn over uncashed checks to the state unclaimed property custodian, perhaps even without a court order. There is support for this course of action in the literature.¹³

I hope that you have found this information helpful. I will be happy to answer any questions that you have.

¹³ See, e.g., Helene S. Shapo, George G. Bogert, George T. Bogert, & Amy Morris Hess, *The Law of Trusts and Trustees* § 187 (3d ed. 2012) (stating that the law of unclaimed trust property is now generally covered by unclaimed property acts and similar statutes).