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Trustees and Their Duties

What does it mean to be a trustee? It means you have chosen to serve as a trustee and to accept all of the responsibilities that come with that position. You have entered into a formal arrangement in which you will hold legal title to property for the benefit of one or more persons – the trust beneficiaries. As a trustee, you need to know the following:

1. Fiduciary Responsibility. You have serious obligations to the beneficiaries of the trust – both current beneficiaries who might be entitled to distributions now and "remainder" beneficiaries who will or may have rights in the trust in the future. In general, you have a duty to the current beneficiaries to make the trust property productive of income and an equally important duty to the remainder beneficiaries to preserve trust principal. As a fiduciary, you must act honestly and in good faith and must exercise reasonable care and prudence in the administration of the trust, including avoiding any sort of self-dealing. You also have duties regarding information about the trust – e.g., to keep beneficiaries informed about the trust when appropriate and to keep information regarding the trust and beneficiaries confidential. Appropriate communication to the beneficiaries and transparency in your actions can prevent many problems.

2. The Trust Provisions. The trust you are administering will be either a testamentary trust (i.e., a trust created under a Will) or a trust created under a separate trust agreement. It is your responsibility to know exactly what the provisions of the trust require you to do and not to do. The guidelines for trustee conduct provided here are general and might be overridden or made even more restrictive by specific provisions in the trust instrument. If there is some uncertainty about what any trust language means, you can hire legal counsel (to be paid for by the trust) to advise you and, if necessary, ask an appropriate court for advice and instructions.

3. Investment Standards. As a trustee, you must perform your investment duties with the care expected from a "prudent investor" – i.e., you must use reasonable skill and caution when making and implementing decisions for the trust. Your goal as a trustee-investor is to achieve an acceptable rate of return without incurring a significant amount of risk based on the facts and circumstances applicable to the trust, taking into account general economic conditions, inflation, taxes, total return, liquidity, etc.

The prudent investor standard requires you to:

- Pursue an overall investment strategy to allow for appropriate present and future distributions to the beneficiaries in accordance with risk and return objectives reasonably suited to the entire trust portfolio.

- Consider the size of the portfolio, nature and estimated duration of the trust, liquidity and distribution requirements, general economic conditions, possible effect of inflation and deflation, expected tax consequences of investments and distributions, the role that each investment decision plays within the overall portfolio strategy, the expected total return and the needs of the beneficiaries for present and future distributions as authorized or required.

- Diversify assets, taking into account the purposes and terms of the trust (except in certain limited and unusual circumstances, when lack of diversification might be appropriate).

The prudent investor standard authorizes you to:

- Invest in any type of investment, since no particular investment is inherently prudent or imprudent.

- Consider related trusts, the other income and resources of the beneficiaries and an asset's special relationship or value to the beneficiaries.

- Delegate investment and management functions – e.g., hire an investment firm to manage the trust assets – which can alleviate some risks to the trustee. However, you must exercise care, skill and caution in selecting and overseeing the person or firm to which you delegate any investment or management functions.

4. Distributions. In making decisions regarding discretionary distributions (i.e., those permitted but not required by the trust terms), you must consider what is appropriate in light of the needs and wishes of the beneficiaries, the terms of the trust, the value of the trust assets, the grantor's intent and the tax implications. For example, if you are trustee of a trust that --is exempt from the generation-skipping transfer tax and a trust that is not exempt from that tax and the beneficiaries of those trusts are the same, you should consider from which trust distributions should be made to any particular beneficiary in order to get the best overall tax result.

5. Record Keeping and Tax Reporting. The trust must have its own separate bank and brokerage accounts – with no co-mingled assets that do not belong to the trust – and a taxpayer identification number. You must maintain accurate records about your activities, including distributions, expenses paid and investments (both purchases and sales). If those records are properly maintained, you will be able to prepare a detailed accounting of your activities as trustee, if and whenever required (and it may be required at some point). That accounting would serve as a basis for the beneficiaries or the court to release you from liability for your actions as trustee. In addition, you are responsible for all federal and state tax filings for the trust and for arranging the payment of any taxes owed by the trust. As such, you may wish to retain an accountant for general tax advice and to prepare trust income tax returns.

6. Compensation. As a trustee, you are generally entitled to compensation for your services, based on rates set by state law. That compensation may be reduced if you delegate certain of your trustee duties or (less likely) increased owing to special services you are called on to perform.

Finally, if in doubt about any possible trustee action (or inaction), consider consulting your tax or legal advisor and then document any advice you receive in the trust records.

Practice:

Estate Planning & Administration