

Understanding Your Fiduciary Responsibilities

The Role of the Trustee

A trustee is also known as a “fiduciary”—loosely defined as a person who accepts responsibility to act for the benefit of someone else. The trustee, in that capacity as opposed to his or her individual capacity, becomes the legal owner of the trust property, sometimes called the “corpus”. The powers and authority which the trust provisions convey to you over the management, administration and distribution of the trust property are normally comprehensive and very significant. You may be required to, or otherwise choose to share this power or some aspect of this power with one or more co-trustees.

Responsibilities of the Trustee

Along with this power comes the burden of responsibility. The fiduciary is responsible for understanding the nuances of the language and to follow the requirements of the trust document. They must also consider and respond to the needs of the trust beneficiaries. In addition, a fiduciary must consider the tax consequences of their actions, prudently manage and invest the trust assets, and remain cognizant of the many fiduciary responsibilities set forth in statute and case law in the state of applicable jurisdiction.

State law generally determines the scope and extent of the duties that you have undertaken as trustee, and these will vary greatly depending on the language in the governing instrument, the nature of the trust properties and circumstances of the trust beneficiaries. Please keep in mind that state law is designed both to protect the individual acting as trustee from unnecessary liability, and also to protect the people who benefit from the trust from the actions of a negligent or unscrupulous trustee.

Speaking generally, a fiduciary has the responsibility to act with good faith and undivided loyalty in the administration of a trust. As trustee you are expected to:

- exercise reasonable and prudent levels of care in the fulfillment of your responsibilities
- act in good faith and be loyal to the persons for whose benefit you act
- comply with terms of the trust
- comply with orders of the court (if applicable) that controls the trust estate
- refrain from personal traffic in, or private use, application or appropriation of trust property, at least without specific authority in the document or the express consent of the beneficiaries.
- to refrain from self-dealing (not to deal with himself as an individual)
- to be fair in any dealings with the beneficiary



- take possession of and keep in his custody the trust property (without commingling with his own property) and manage it in accordance with the trust
- keep safe, safeguard, preserve and protect the trust property against loss, dissipation or diminution; and in order to accomplish this, to enter into proper contracts, incur debts and make expenditures, where necessary and proper, and to prosecute and defend suits and proceedings in proper cases
- carry on a business where required to do so by the trust
- insure the trust estate
- make improvements authorized by the trust
- invest (within specific restrictions, if any) and in doing so to exercise the care, diligence and skill of an ordinary prudent man in the making, retaining, disposing or changing of trust investments in accordance with the trust instrument and the applicable local law
- distribute all the trust property to the beneficiaries entitled to it
- keep and render a full and accurate record and accounting of the trusteeship to the beneficiary, and
- timely file federal and state tax returns for the trust.

Standard of Conduct

The expectations of a fiduciary are high. “A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this, there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the ‘disintegrating erosion’ of particular exceptions.”ⁱ

Investments

A fiduciary must understand his or her responsibilities managing the trust assets while under their control. New York State, for example, has enacted a statute providing guidelines for the fiduciary to follow entitled the *Prudent Investor Act*.ⁱⁱ This statute is to be used as a guideline and must be read in the context of the specific grants and limitations contained in the trust document. The statute states that when making investment decisions, the trustee is bound to employ such diligence and such prudence in its care and management as in general “*prudent men of discretion and intelligence in such matters employ in their own like affairs.*”ⁱⁱⁱ Briefly, the requirements of the statute provide that a trustee is required to consider:

- the size of the portfolio
- the nature and estimated duration of the fiduciary relationship
- the liquidity and distribution requirements under the governing instrument
- general economic conditions
- effects of anticipated inflation or deflation
- expected tax consequences
- the role of each investment in the portfolio as a whole
- the expected total return of the portfolio, and



- the needs of the beneficiaries for current and future distributions (to the extent the trustee knows of them).

The Trustee should also consider:

- related trusts
- the income and resources of the beneficiaries (to the extent the trustee knows of them)
- an asset's special value to some or all of the beneficiaries, if consistent with the trustee's duty of impartiality.^{iv}
- the intent of the settlor, as expressed in the governing instrument
- the assets held in trust
- the extent to which the assets consist of financial assets, interests in closely held businesses, tangible and intangible property, or real property
- the extent to which an asset is used by a beneficiary, and
- whether an asset was purchased by the trustee or received from the settlor^v
- the net amount allocated to income under the New York Principal and Income Act
- the increase or decrease in the value of the principal assets (the trustee may estimate if not readily available)^{vi}
- whether the trustee has an invasion power or the power to accumulate income and the extent to which the trustee has exercised such a power from time to time.

Liability of the Trustee

Trustees can be subject to surcharge for damages if they are negligent in the performance of their duties. This liability is personal to the individuals acting as trustee and they must always remain vigilant to avoid the possibility of such judgments against their own property. Trustees may be liable for the following:

- Breach of trust or duty (for positive acts and for omission or negligence constituting such a breach)
- Failure to carry out the terms of the trust
- Violating orders of the court that has control over the trust estate
- Any loss arising from unauthorized delegation of the trustee's powers
- Loss on commingling trust property and funds with his own, or using the trust property or funds in his own or some other person's trade, business or private affairs. Any gain resulting from such activity inures to the trust estate
- Negligent or willful failure to meet the required measure or standard of care, diligence and skill
- Losses due to failure to get the trust assets into his possession without unnecessary and unreasonable delay
- Loss or damage to the trust estate resulting from failure to act with reasonable care, diligence and skill in handling the trust estate



- On obligations incurred and contracts made by him in administering the trust, he is liable for goods and services, where the contract or transaction doesn't indicate to the provider that the trustee didn't intend to be held personally liable; there is authority to contrary that the trustee can in a proper case charge the estate directly without binding himself personally
- Losses on prolonged deposits of trust funds, unless authorized by the trust or by statute, and for allowing trust funds to lie dormant

All losses arising from an investment, including decline in value and loss of interest, where the trustee made investments in unauthorized and non-legal investments, failed to exercise

good faith, improperly dealt with himself, took an investment in his own name without indicating its trust character, failed to take adequate security for the investment or to exercise requisite care, diligence and skill (standards for permissible investments vary, i.e., the more liberal Massachusetts rule and the stricter New York rule; different statutory rules, etc.)

- Trust property that he fails to surrender to beneficiaries entitled to it, unless he accounts for, and justifies such failure
- Loss resulting from unreasonable delay in making distribution of the trust estate as required by a court order or decree
- Damages or injuries resulting from a tort committed in the administration of the trust
- The cost of an accounting and the expenses of an accountant where the trustee failed to keep clear and accurate accounts
- Any of the following items for which he fails to account: trust income; property or funds originally received by him; all rents, profits and gains arising from the trust estate; profits from a business operated as part of the trust administration; proceeds of sale of trust property, etc., and
- Legal costs and counsel fees in a proceeding where he is found guilty of misfeasance in administering the trust property and is indebted to it.

ⁱ Meinhard v. Salmon, 249 N.Y. 464, 164 N.E. 2d 546

ⁱⁱ New York State, Estates, Powers and Trust Law (EPTL) Article 11-2.3

ⁱⁱⁱ

^{iv} *Id.*
EPTL § 11-2.3(b)(4)(B)

^v EPTL § 11-2.3.(b)(5)(B)(i)

^{vi} EPTL § 11-2.3(b)(5)(B)(ii)

