

Guidelines For Trustees

You have been named as trustee of a living trust. Your appointment is an honor but also means that you have duties. The Settlor (maker of the trust) has shown supreme confidence in you to handle the Settlor's affairs. On the other hand you have duties and liability to perform your trusteeship obligations correctly. This memorandum summarizes some of your responsibilities.

I. THE NATURE OF A TRUST

A Trust Agreement is merely a contract between the Settlor (maker of the trust) and Trustees. It creates an imaginary entity (trust) to hold and own assets contributed to it by the Settlor. Generally speaking, the purpose of the trust, the duties to use and distribute trust assets and the persons to be benefitted thereby are stated in the Trust Agreement. Your first job as a Trustee is to read and understand the trust agreement. A "living" trust merely is one made to take effect and be used during the lifetime of the Settlor. In most cases it will be "revocable" so that the Settlor may change or cancel the trust provisions by amendment. In a few cases a trust may be "irrevocable" so that it can't be changed or canceled except in various circumstances.

II. PARTIES TO A TRUST

- A. Settlor. The Settlor (also known as a Grantor or Trustee) is the maker of the trust and, in most cases, the person who contributes assets to trust ownership and control. Most often the Settlor is also a Trustee and the prime (or sole) beneficiary of the trust during the Settlor's lifetime. There may be more than one Settlor.
- B. Trustee. A Trustee (or Co-Trustee) is an administrator of a trust and does not own the assets comprising the trust corpus (or principal). The Trustee carries out the duties outlined in the Agreement and law to use the trust assets for the benefit of the beneficiaries of the trust. Since the Trustee is only an administrator, and not an owner, the judgment creditors of a Trustee cannot get to trust assets (unless the Trustee is also the Settlor). Since the Trustee is charged with administering assets for beneficiaries, duties and liabilities are imposed on Trustees.
- C. Beneficiary. Most often the Settlor is the sole (initial) beneficiary of the trust during the Settlor's lifetime. However, a Settlor could name other lifetime beneficiaries and, if so, that designation would appear in the Agreement. The

Settlor also names beneficiaries to receive income and/or assets after the death of Settlor or the death of the initial beneficiary and those beneficiaries (heirs) are as stated in the Agreement. The trust agreement also explains how to handle, apply and distribute funds during the lifetime of the initial beneficiary, and how to handle, apply and distribute funds to the heirs and the lifetime beneficiary.

III. PURPOSE OF A TRUST

There are many reasons for someone to create a trust and a trust is one of the prime estate planning tools used by attorneys to meet the needs and wishes of clients. Not all of the reasons listed below may be the cause for your Settlor to create the trust you administer.

- A. **Support Mechanism.** The main reason for any living trust is to build support mechanisms, in advance of need, so that someone can step-in and handle financial affairs of the initial beneficiary (usually the Settlor) if the initial beneficiary cannot do so himself or herself. A person (a Trustee) esteemed by the Settlor is picked to handle affairs so that, in most cases, should the Settlor become incompetent, there would be no need for a court to appoint a guardian. Every person, someday, for a short or long period, will need that support mechanism and the trust provides that with built-in security measures to protect the initial beneficiary (the Settlor in most cases). However, a Trustee should not act or do transactions when the Settlor (initial beneficiary) can do so himself or herself unless the Settlor tells the Trustee to do so.
- B. **Avoid Probate.** The Trustees have immediate access to the assets after the death of the initial beneficiary and can then hold, manage, invest, apply or distribute assets as set forth in the Agreement. Thus, there is no need for probate court proceedings as to all assets placed in the trust ownership except in relatively rare circumstances. Avoiding probate saves the estate and the heirs money, time, red-tape and aggravation.
- C. **Stops Nursing Home Confiscation.** In rare circumstances in states other than Florida, a nursing home can demand all of a patient's assets up front and go to court to obtain them. A trust can stop that although, if the initial beneficiary is a nursing home patient, all daily and monthly bills still need to be paid. A normal living trust does not help in qualifying a person for Medicaid benefits either.

- D. Keeping Matters Private. Probate is a public record so other persons, strangers, could know of the size and nature of the estate and the disposition thereof to heirs. A trust avoids probate and the only persons who must know about the estate and its dispositions are the Trustees and heirs.
- E. Probate Litigation. A person who is unhappy with an inheritance or lack of inheritance can easily tie-up a probate estate for months or years, even without chance of winning and merely to be vindictive. However, in a trust situation, where probate is avoided, the errant heir has no forum in which to present objections unless such person commences a lawsuit and the burden of proof is on that litigant. Due to the cost and meager chances of success trust litigation is relatively rare. Therefore, when a person wishes to disinherit someone or give less to one heir than another, a trust would be a protection.
- F. Tax Planning. In some cases revocable or irrevocable trusts are used to protect against estate taxes. If the Settlor's estate is more than the applicable exclusion amount (exemption) allowed by the Federal Estate Tax Law, there could be estate taxes to pay. There are numerous trust forms that can be utilized to avoid such taxation.
- G. Planning For Disabled Heirs. A special needs trust form could be used to provide for a disabled heir and yet still preserve that heir's entitlement to government benefits. If a person receives certain government benefits due to disability an inheritance could ruin receipt of further benefits. A "special needs" trust can protect against that.

IV. MAIN DUTIES OF TRUSTEES

Every Trustee is held to a high standard of performance, considerably higher than the performance acceptable for one's own affairs. As a Trustee you are a "fiduciary" and have certain main duties:

- A. Carry out the terms of the trust agreement.
- B. Be loyal to the beneficiary.
- C. Act and invest prudently.
- D. Do not delegate your responsibility.
- E. Maintain good books and records and keep beneficiaries reasonably informed of the trust administration.

Your duty as a Trustee was eloquently described by Chief Justice Benjamin Cardozo in 1928:

"Many forms of conduct permissible in the workday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of honor, the most sensitive, is the standard of behavior."

When you have any doubt, act conservatively. It is best to err on the side of virtue than to take risks.

V. GENERAL RESPONSIBILITIES OF A TRUSTEE

- A. A Trustee should be like a boy scout--honest, thrifty, wise and prudent.
- B. A Trustee should contact an expert, an attorney, accountant or financial consultant, should any question arise, to get counsel and expert advice.
- C. A Trustee should be able to step in when and if the initial beneficiary (usually the Settlor) cannot handle affairs but should be trusted to allow the Settlor to do for himself or herself when the Settlor can do so. This may mean that a Trustee may have to pay bills and oversee investments and accounting of the Settlor when the Settlor is ill. That may entail a Trustee coming to Florida to obtain checkbooks and other records and deal with banks, et cetera, for a short time. However, after a short initial visit those trust duties can be performed long distance in the Trustee's locale. *You should contact this office for assistance and guidance.*
- D. A Trustee should not be a meddler. While the Settlor is able to handle his or her own affairs the Trustee should stand aside and let the Settlor do so. We wish to keep the Settlor in control, independent and in charge.
- E. A Trustee should be "like Caesar's wife"--above suspicion. Trustees should keep accurate and detailed records of all they do and report same to the Settlor and other Trustees at least monthly. When in doubt submit a report. After the death of the initial beneficiary the Trustees must provide accountings, at least annually, to the beneficiaries (heirs) named in the Agreement. A Trustee should do no act or omission to act that would cause someone to suspect improper activity.
- F. Never, ever mix trust monies with your own.
- G. Never, ever, make investments of trust assets into a business or venture in which you have a direct pecuniary interest.

VI. DUTIES DURING LIFETIME OF INITIAL BENEFICIARY (OR BENEFICIARIES)

- A. The trust agreement states your duties during the lifetime of the initial beneficiary (most often the Settlor).
- B. Mainly you should be able to step-in to handle the initial beneficiary's financial affairs when and if the initial beneficiary cannot do so. *Contact this office for guidance or assistance.*
- C. The Settlor must contribute assets to the trust ownership. That is called "funding" the trust. It will mean that bank accounts, securities, title to real estate interests, and beneficiaries on life insurance, and, sometimes, Keogh plans and IRA's, may need to be re-titled. This office will give the Settlor a written instruction sheet to explain how to fund the trust and will aid the Settlor in doing so. However, when retitling bank accounts it will be necessary for you, as Trustee, to sign and return new signature cards that will be sent to you by Settlor or the banks.
- D. Account for your activities. The Agreement explains your accounting requirements. When in doubt--Account.
- E. Should you be handling investments for the Settlor, you must be a "prudent investor" whether during or after the lifetime of the initial beneficiary. That duty imposes liability on you for mismanagement but all that is required is good, common sense:
 - 1. Create an overall investment strategy. Usually a Settlor will prefer that investment plans follow the lifetime pattern of the Settlor. Don't invest in risky programs such as commodities, "puts" and "calls", "margin" transactions and the like unless the Settlor expressly authorizes you to do so in writing and the trust agreement so provides. Don't invest in businesses in which you have a direct pecuniary interest.
 - 2. Balance risk and return reasonably suited to the nature of the Settlor's need and goals.
 - 3. Use any special skills you may possess.
 - 4. Diversify investments unless it is in the interest of the Settlor or other beneficiaries not to do so. Don't put all your eggs in one basket. However, if the Settlor had a favorite stock or there is a family business, you may wish to preserve that investment.
 - 5. Act within a reasonable time after you must step-in, to review the investment portfolio and make and implement decisions.

6. Consider economic conditions, tax consequences, return and roles of each investment within the overall portfolio, and costs. Those factors change and should be periodically reviewed.
- F. Record-keeping is a must. Keep accurate records of all your activities and expenses and report same to the Settlor and other Trustees and/or beneficiaries as stated in the Agreement.
- G. The Florida law sets forth duties and powers of a Trustee. Those are summarized in the Trust Agreement and you should adhere to same.
- H. When there are multiple Trustees it is your duty to see that the others are performing their responsibilities honestly and correctly. If you believe a Trustee is doing something or had done something wrong, fraudulent, negligent, criminal or otherwise contrary to the provisions and intent of the Agreement you must inform the Settlor and other Trustees and seek correction. If such action is not corrected you should commence suit in the Florida court to correct the action. If you believe that nothing illegal, negligent or fraudulent was done but you are still unhappy with the act and the other trustee refuses to take corrective steps, you should resign if you think you would have liability for a wrongful act. It is your duty to make sure that the goals of the Settlor and the need of the beneficiaries are honored.

VII. DUTIES AFTER DEATH OF INITIAL BENEFICIARY

The Trust Agreement states your responsibilities after the death of the initial beneficiary (who is usually a Settlor). **An estate administration via a revocable trust is similar to an administration through probate, with less paperwork involved. Because important decisions need to be made during the administration it is important for you to have the advice of an attorney and accountant during the process.** Contact this office at that time. We have other, more detailed instructions than shown below, for you to follow and aid you.

- A. Pay all just bills of the Settlor.
- B. Collect and amass all assets and income.
- C. File a personal income tax return for the deceased Settlor.
- D. Obtain an Employer's Identification Number (EIN) from the Internal Revenue Service as to the Trust, since the Trust is now irrevocable, and file annual

income tax returns in behalf of the trust using the EIN. Use the services of a certified public accountant, at least initially, to file the income tax returns.

- E. File estate tax returns on behalf of the Settlor if the Settlor's estate was subject to Federal or State estate taxes. See this office at that time.
- F. As quickly as possible distribute or apply the trust assets and income to the rightful beneficiaries, reserving an amount to cover costs, fees, taxes and expenses and creditor claims. Once all costs, expenses, taxes and creditor claims are paid distribute and/or apply the balance to the heirs. Send the heirs accountings each time and let them know the steps you are taking. Your duties of application and distribution are explained in the Trust Agreement. A trust pays income taxes at a higher rate than most individuals do and, so, it is best that the trust accumulate no income to incur such taxes although a tax return for the trust should still be filed. Therefore, pay or apply assets and income to the heirs as set forth and permitted in the Agreement as quickly as possible, holding funds to cover the expenses noted above, in a non-interest bearing account or low-interest account.

Sometimes, trust provisions state that you are not to pay an heir's share immediately but rather dole the same out to an heir over a period of time or at certain ages.

You may distribute or apply an heir's share in cash or "in kind". Thus, for example, you may give an heir stock and/or cash to comprise the heir's share as you decide.

- G. Keep records and do accountings. Perform all obligations as stated in the Agreement in accordance with your powers stated in the Agreement. Be a prudent investor when administering funds or assets for heirs.
- H. Marital election claims. A surviving spouse would claim 30% of a deceased spouse's assets, including trust assets, under the Florida Marital Election statute (Chapter 732, effective October 1, 2001). Consult with this office if a possible claim could be made. It is important to handle it properly. If the surviving spouse is receiving Medicaid benefits the State could, possibly, make the claim for the surviving spouse with devastating results. Consult with this office if there is any possibility that such a claim may be filed.

VIII. FEES

Most Trust agreements usually provide that the trustees receive fees for their services. The Agreement explains whether you are entitled to fees. If you are entitled to fees collect

same before distributions are made to the heirs. Even if no fees are allowed you should be repaid your expenses in trust administration before distribution to heirs. Those trust administrative expenses could include room, board and travel expenses when coming to Florida on trust business (not a holiday), reimbursement for attorneys and accounting fees, postage, courier expenses, et cetera.

IX. CREDITORS

You must pay all just claims of creditors of the initial beneficiary prior to making final distribution of assets to the heirs. Indeed, you have personal liability to do so unless the trust was devoid of assets. Have mail forwarded to you so you will receive bills and otherwise investigate to determine if bills may be outstanding. Any bills that come within 2 years after the initial beneficiary's death need be paid unless you challenge them.

You should have this office file a "**Notice of Trust**" with the probate court. Also, the decedent's original Will should be filed with the Probate Court. This does not start probate proceedings but merely informs the court that if probate is commenced a trust exists to pay bills. Also, if you want to challenge a bill you can do so in the probate court.

Sometimes it is best to commence probate proceedings, even if there are no probatable assets, merely to utilize a probate procedure to cut off claims of creditors 90 days after publication of notice. That will shorten the time of your personal liability from 2 years to 90 days after publication.

X. AMENDMENTS

A revocable trust may be amended by the Settlor. If so, the Settlor need only sign the amendment and it can be made without your knowledge or consent. We want to assure that the Settlor remains the boss and is in control. Thus, the Settlor can change trustees, add successor trustees, change heirs or amounts going to heirs. It is preferred that the Settlor send you copies of any amendments made. The Agreement outlines the right of amendment.

XI. OUR SERVICES

This law firm stands ready to guide you or assist you in any way. Often a trustee will ask this firm to handle trust administration, especially after the death of a Settlor, and we can do so for a fee as your agent.

In any event, we want to make sure you are comfortable with your duties and that the needs and wishes of the Settlor, our client, are obeyed and honored. Should you have any questions you should contact us for guidance or assistance. Thank you.