

# Trust Administration and Trustee's Duties

# Trustee Powers

## 1. Express Powers

a. While a trustee is given express powers in the trust document, courts allow trustees to act as a reasonably prudent person in carrying out trust duties.

## 2. Power to sell property

## 3. Power to enter into contracts

## 4. Power to revoke when the settlor names himself as trustee

## 5. Power to withdraw income or principal

## 6. Sometimes have power to modify

# Duty of Loyalty and Good Faith

1. This where the trustee must act reasonably (objective standard) and in good faith (subjective standard) – need both.

2. No self-dealing

i. Ex. Trustee may not buy or sell trust asset

ii. Ex. Sell property of one trust to another that the trustee manages

iii. Ex. Borrow from trust or make loans

iv. Ex. Use assets to secure personal loan

v. Ex. Engage in transactions with friends or relatives

vi. Ex. Or otherwise act for personal gain

a. Exception

1) Under the Uniform Trust Act, a trustee can avoid liability if he can show that the transaction was objectively reasonable and fair and not affected by a conflict of interest.

# Duty of Prudence

1. At common law, the trustee could not delegate any discretionary responsibilities because doing so would go against the settlor's intent.
2. Under modern law, a trustee can delegate responsibilities if it would be unreasonable for the settlor to require the trustee to perform such tasks.
3. Duty to Oversee Decisions
  - a. A trustee can delegate management of investment strategies if it would be prudent under the circumstances but it has to oversee the decision-making process. The trustee would otherwise be responsible for any actual losses regardless of cause.

# Trust Investments

- a. At common law, trustees were limited to statutory lists of acceptable investments unless the trust instrument expressly authorized deviation. Only a minority of states follow this rule.
- b. Model Prudent Man Investment Act (MPMIA)
  - 1) Also followed by a minority of jurisdictions, allows any investment that a prudent man would make, so only bars speculative investments.

# Uniform Prudent Investor Act (UPIA)

- 1) Requires that the trustee act as a prudent investor would as if he's investing his own money and has little to no concern with the level of risk with each investment and the trustee must act with reasonable care, caution, and skill when investing trust assets unless the trustee has special skills or expertise in which case he'll have an increased duty
- 2) Duty to diversify to spread the risk of loss. If the cost of diversifying would outweigh the benefits of diversifying, no need to diversify. It's not an absolute.
- 3) Trustee has a duty to make property productive (derive maximum amount of income from investments, sell assets when appropriate, respond to all claims, secure insurance, pay all ordinary and necessary expenses, and act in a timely fashion in all matters).
- 4) At common law, the trust fund had to be separate from other trust funds and the trustee's own funds. However, now to increase diversity and decrease costs, some comingling of trust funds and investment in mutual funds is allowed. If a trustee comingles trust assets with his own property, and some property is lost or destroyed, the presumption is the lost or destroyed property is the trustee's and the remaining property belongs to the trust. If there's an increase in value of the property, it's presumed the increased value belongs to the trust.

# Portfolio Approach

Used in evaluating whether the trustee is investing appropriately. It goes away from C.L. approach and a high- risk investment that would otherwise be too risky under C.L. can be offset by other low risk investments.



# Authorized Investments

If there's an exculpatory clause that expressly authorizes all investments a trustee who acts in bad faith or recklessly will not be protected. But such clauses will give trustees room for minor lapses in judgment.





# Duty to be Impartial

a. Trustee has a duty of impartiality and balance conflicting interests of present and future beneficiaries. By investing the property so that it produces reasonable income, while preserving the principal for the remaindermen.



# Duty to Sell

Regardless of what the trust says about the trustee's ability to retain trust assets, the trustee has a duty to sell trust property within a reasonable time if a failure to do so would be inconsistent with the modern portfolio approach



# Duty to Inform and Account

## 1. Duty to Disclose

- a. Trustee has a duty to disclose complete and accurate information about the nature and extent of the trust property and must allow access to trust records and accounts. The trustee must also identify breaches of trust and disclose any to the beneficiaries.
- b. Uniform Trust Code provides that the trustee must provide a copy of the trust instrument upon request unless otherwise provided by the settlor in the instrument.
- c. Duty to notify unless disclosure would be severely detrimental to the beneficiaries, the trustee must notify the beneficiaries if he intends to sell a significant portion of the trust assets.

## 2. Duty to Account

- a. A trustee must periodically account for actions taken on behalf of the trust so that his performance can be assessed against the terms of the trust.
- b. The UTC allows the settlor to waive the trustee's duty to report to the beneficiaries and the beneficiaries can waive receipt of reports.
- c. Constructive Fraud
  - 1) If an accounting includes a false factual statement that could have been discovered if properly investigated by the trustee, then constructive fraud results.

# Other Duties

## 1. Duty to Secure Possession

a. Trustee has a duty to secure trust assets within a reasonable period of time. In the case of a testamentary trust, the trustee must monitor the executor to ensure the trust receives all the property its entitled to.

# Other Duties

## 2. Duty to Maintain

a. When dealing with real property, a trustee must take whatever steps an ordinary owner would take which includes insurance, repairing, and otherwise maintaining the property.

## 3. Duty to Segregate

a. The trustee must separate his personal property from trust assets to be sure one cannot be switched.

# Other Duties

## 4. Duty to Hold and Distribute

a. Until the trust terminates, the trustee must hold the trust assets and distribute them as required. During a period where the trust property is not immediately distributable, trust income will be distributed or retained according to any instructions in the trust instrument. If there is no instruction, there are three approaches to the distribution of trust income during this period: (1) the trustee may distribute the trust income to the testator's heir on the theory that the income represents property that was not disposed of by the testator's will and therefore passes by intestacy; (2) the trustee may accumulate trust income and allocate it to the trust principal for distribution to the ultimate remaindermen; and (3) the trustee may distribute trust income to those individuals who would be the remaindermen if the trust were to terminate when the income is received by the trustee.

# Powers of Appointment

1. Usually the powers of appointment are given to a beneficiary and it enables the holder to direct the trustee to distribute some or all of the trust property without regard to the provisions of the trust.
2. The donee of a power of appointment can direct the appointment of an interest equal to or less than that specified in the power given to him.
3. Ineffective Appointments
  - a. When one makes an appointment in excess of the power given to him, all other valid appointments are still valid but the property that was invalidly appointed goes to the taker in default appointment.