

What Are The Duties Of A Trustee?

Trusts have become a common method of estate planning for most US citizens. They provide tremendous flexibility in estate structure, allow changes to be made in the plan to adjust to new circumstances even after a death, and save probate fees and at times certain taxes. A fiduciary duty applies to the actions of the Trustees who must carry out the instructions imposed in the trust instrument or face personal liability. This article briefly outlines the Trustee duties normally encountered when assuming the office of Trustee.

The Trust Instrument

A Trust is merely one form of contract in which the Settlor, also called "Trustor" or "Grantor", creates a "Trust", which appoints a person to take care of another person. The person appointed is the Trustee and the person for who the benefit is created is the "Beneficiary." Unlike most contracts, however, the law and the courts impose upon the Trustee a fiduciary duty, the highest duty known to law, and the Trustee can find him or herself subject to such liabilities even decades after the alleged wrongdoing. The Settlor can limit the obligations and to some extent even the liability faced by the Trustee by appropriate wording in the Trust. The key is to balance some reasonable limit on the Trustee's liability with adequate protection to the beneficiaries. It is to be remembered that the beneficiaries may be children or incompetents and not capable of protecting themselves and the limitations of liability may increase their exposure. It is also to be remembered that quite often Trustees die or become unwilling to act and successor Trustees are appointed and those full liabilities may be necessary to protect the beneficiaries from the new Trustees. The Grantor of the Trust can determine the extent the Trustee's powers in the Trust agreement or in the Will. The Trustee must thoroughly understand their duties and obtain such legal and tax advice as necessary to carry out the duty appropriately. The Courts make it clear that not only is the Trust to compensate Trustee for obtaining such advice, but that failure of the Trustee to obtain appropriate expert advice can be grounds for claims of breach of fiduciary duty. As one Trustee put it, "My job is to follow directions but what that means is not always simple. Thus, my job is to find the right people to make sure I follow the directions correctly."

Basic Duties

The duties of a Trustee vary from state to state, but in general, a Trustee's duties include:

- a) A duty to carry out the Trust in accordance with the terms of the Trust or Will.
- b) A duty not to delegate their duties to another person-any duty which calls on him to exercise skill and judgment cannot be delegated, such as investment responsibilities. This duty does not prohibit them from hiring professional experts to evaluate the investments for their suitability to the Trust.
- c) A duty to exercise a reasonable degree of skill and care when managing Trust assets.
- d) A duty to exercise the highest loyalty to the Beneficiaries to administer the Trust solely in their best interests, and put aside their own self-interests. No "conflicts of interest" are allowed at any time and full disclosure of any potential conflicts of interest must be made.
- e) A duty to possess, protect, and preserve the Trust property. They must also defend the Trust and Beneficiaries against anyone who would challenge the Trust's validity or seek to claim trust assets.
- f) A duty to separate and set aside the Trust property and is required to keep Trust property separate from their own property. If the Trustee co-mingles their property with the Trust property, they are liable for any losses that could result from the co-mingling.
- g) A duty to make the Trust property productive. They must act prudently and reasonably as to investing, acquiring, selling, and managing trust property. Appropriate tax planning for both the Trust and the Beneficiaries is part of this duty.
- h) Depending on the terms of the Trust instrument, the Trustee normally must file with the Court an accounting, often every year, indicating income and outgo and status of all assets.

Duty To Account To Beneficiaries—California Probate Code §16062

Except as otherwise provided in this section and in §16064,

- a) Trustee shall account at least annually, at Trust termination and upon change of Trustee, to each Beneficiary to whom income or principal is required or authorized in Trustee's discretion to be currently distributed. A Trustee of a Trust created by an instrument executed before July 1, 1987, is not subject to the duty to account provided by subdivision (a).
- b) A trustee of a trust created by a will executed before July 1, 1987, is not subject to the duty to account provided by subdivision (a), except that if the trust is removed from continuing court jurisdiction pursuant to Article 2 (commencing with §17350) of Chapter 4 of Part 5, the duty to account provided by subdivision (a) applies to the Trustee.
- c) Except as provided in §16064, the duty of a Trustee to account pursuant to former §1120.1(a) of the Probate Code (as repealed by Chapter 820 of the Statutes of 1986), under a Trust created by a Will executed before July 1, 1977, which has been removed from continuing court jurisdiction pursuant to former §1120.1(a), continues to apply after July 1, 1987. The duty to account under former §1120.1(a) may be satisfied by furnishing an account that satisfies the requirements of §16063.
- d) Any limitation or waiver in a trust instrument of the obligation to account is against public policy and shall be void as to any sole Trustee who is either:
 - 1) A disqualified person as defined in §21350.5.
 - 2) Described in subdivision (a) of §21380, but not described in §21382.

An account furnished pursuant to Probate Code §16062 shall contain the following information:

- a) A statement of receipts and disbursements of principal and income that have occurred during the last complete fiscal year of the trust or since the last account.
- b) A statement of the assets and liabilities of the trust as of the end of the last complete fiscal year of the trust or as of the end of the period covered by the account.
- c) Trustee's compensation for the last complete fiscal year of the Trust or since the last accounting.
- d) The agents hired by Trustee, their relationship to the Trustee, if any, and their compensation, for the last complete fiscal year of the Trust or since the last accounting.
- e) A statement that the recipient of the account may petition the court pursuant to §17200 to obtain a court review of the accounting and of the Trustee acts.
- f) A statement that claims against Trustee for breach of Trust may not be made after the expiration of 3 years from the date the Beneficiary receives an accounting disclosing facts giving rise to the claim.
- g) All accounts filed to be approved by a court shall be presented according to Probate Code §16069. Exceptions to duty to account, provide terms of the Trust or requested information. The Trustee is not required to account to the Beneficiary, provide the terms of the Trust to a Beneficiary, or provide requested information to the Beneficiary pursuant to §16061, in the case of a Beneficiary of a Revocable Trust, as provided in §15800, for the period when the trust may be revoked. If the Beneficiary and the Trustee are the same person.
- h) A duty to treat all Beneficiaries impartially. They must not favor one Beneficiary over another. If they are unable to remain impartial, and exercise their duties in good faith, they may be liable for any harm against the Beneficiary.

Conclusion

Above is merely a brief outline of the most general duties imposed upon a Trustee. Any responsible person will take the time to carefully investigate the obligations and assets proposed to be placed at their disposal prior to assuming this significant responsibility. While it is a great compliment to be nominated a Trustee by a Grantor, it is also a potential liability and requires the same degree of care in deciding whether to assume it as will be required to carry the duties successfully. It may very well be the most important task one is asked to carry out in one's life—a degree of trust is demonstrated that eloquently indicates that someone considers the potential trustee a trust worthy person. Whether that means one accepts the obligation depends on one's own ability to devote the attention and time to carry out the duties appropriately.