

RESPONSIBILITIES OF TRUSTEES AND EXECUTORS

Responsibilities of a Trustee

A trust is a very important device oftentimes used in managing one's assets as part of the estate plan for that individual. The trustee's role, therefore, becomes very important as part of that estate plan. The following paragraphs will describe the various responsibilities of a trustee and will answer frequently-asked questions concerning those responsibilities.

Perhaps the best starting point is to describe the role of a trust itself. A trust is a legal device, whereby assets are held in the name of one or more individuals or companies (who are called the "trustees" of the trust) for the benefit of the named beneficiaries of the trust. As legal owner of the assets, the trustee can deal with the assets in most of the ways that a full owner may deal with the assets. For instance, a trustee normally can purchase and sell trust assets or lease trust assets to third parties. And usually, a trustee may borrow on behalf of the trust (for instance, the trustee can mortgage real estate). Trustees can also lend money to third parties. The specific powers conferred on a trustee are normally found in the written document that establishes the trust.

The major distinction between a trustee and a full owner of property is that the trustee at all times must act exclusively on behalf of the beneficiaries of the trust and at a relatively high standard of care. That is, the trustee must act at all times with the sole purpose of benefitting the beneficiaries of the trust; must act exclusively in their interest; and act prudently in doing so. For example, the trustee cannot sell trust assets to himself or herself at a "bargain" price nor borrow money from the trust at below-market interest rates.

The major duties of a trustee can be broken down into four categories: (1) taking control of trust assets; (2) managing the assets in a prudent manner to generate income or, in some cases, merely to protect the principal value of the assets; (3) to distribute income and principal from time to time (as directed under the trust); and (4) to account for all of the trustee's actions in managing the assets and distributing principal and income to the beneficiaries.

A. Marshaling Trust Assets. The trustee is responsible for taking title to all trust assets, initially when the trust is formed and throughout the life of the trust. Many times, trusts are set up in writing today, but assets for the trust will not come into being for many years to come (for instance, under trusts established under one's Will). Nevertheless, when the time comes, the trustee must take all actions necessary to identify the trust assets and take title to them.

B. Managing Trust Assets. Once the trustee has taken title, the assets are then managed by the trustee to achieve the trust's purposes. For instance, investment accounts with brokerage firms may be established to invest the trust assets in a manner that either generates income,

attempts to add value to the assets, or a combination of the two. It is very important for the trustee to first ascertain the trust's objectives before implementing an investment strategy.

C. Distributions. Most often, trusts are established to authorize the trustees to make distributions to the beneficiaries when the trustees consider it to be in the beneficiary's best interest to do so, taking into account the trust's purpose. This gives the creator of the trust comfort in knowing that the trustee, who controls the distributions, will benefit the intended beneficiaries without giving the beneficiaries full control over the assets. The terms of the trust will either dictate when distributions are to be made or will give the trustee discretion in deciding when to make distributions and how much to distribute.

D. Accounting. By law, the beneficiaries have the right to require the trustees to account to them for the actions the trustees take each year. The trustees must summarize all of the actions they take in dealing with the trust assets. Those actions include the investment of trust assets; the receipt of dividends, interest, rent, and the like; the appreciation in value of trust assets during the year; distributions to beneficiaries; and payment of expenses. As part of this accounting, the trustees must file income tax returns when the trust generates income or capital gains and pay from trust assets any income taxes due.

As you can see, the trustees' responsibilities are substantial. Therefore, a significant amount of time may be required on trust business. In view of that, the law allows the trustees to be paid a "commission" for the trustees' work. That commission may be either under a schedule spelled out under the statute or one that is negotiated between the trustees and the beneficiaries. The law also allows the trustees to hire investment managers, lawyers, and accountants to assist in performing all of the duties described above.

Responsibilities of an Executor

An Executor is classified in the law as a "fiduciary". A fiduciary is a person who has been selected for a position of special faith, trust and reliance. A Trustee is another type of fiduciary and the duties and responsibilities which the Executor has in the settlement of an estate are quite similar to the duties and responsibilities that a Trustee would have.

A. Possession and Control of Assets. During the administration of an estate, the Executor is entitled to possession and control of all assets of the estate. The Executor has a responsibility to protect and preserve the estate assets, and also to see that the assets are invested in a prudent manner. The persons to whom the Executor owes these duties are first, any creditors of the estate, and secondly, the beneficiaries of the estate. As with anyone in a fiduciary position, if an Executor's duties are not properly or competently performed, the Executor may have to answer to any of these persons who have been harmed as a result.

B. Filing the Petition for Probate. The process of probate begins with the preparation and filing of a Petition for Probate, which will result in the Executor appointed in the Will being named as the Executor of the estate and the Executor being issued "letters testamentary" by the Court. These letters are evidence of the Executor's legal authority to act as the personal representative of the estate. During administration process begins by identifying, collecting, taking inventory, securing and investing the assets of the estate. It is important that

the Executor secure all assets and property by terminating any home deliveries, mail, or other services as required. In addition, insurance should be considered for tangibles, autos, and jewelry until policies are located.

C. Estate Tax Returns. There are two deadlines of utmost importance that all fiduciaries must be aware of. The first relates to the New York estate tax. New York gives the Executor the option to make a prepayment of estate taxes 6 months from the date of death. Exercise of that option requires prepayment in an amount equal to at least 90% of the total amount estimated to be due. If that option is not exercised, New York state will charge interest at the rate of one-half (½) percent per month for months 7, 8 and 9 on the amount that should have been prepaid. The other major deadline is the filing of the federal estate tax return, which must be filed within 9 months from the date of death. Interest and penalties will accrue if payment is not made by that time. Under current law, a federal estate tax is due only if the gross estate is above \$5,430,000 and New York estate tax is due if the gross estate is above \$3,125,000. Even if the gross estate is above these amounts, however, there may not be a tax due if amounts are transferred to a surviving spouse.

D. Compiling List of Assets/Date of Death Values. With these filing deadlines in mind, it is important for an Executor to begin a preliminary list of the assets at the date of death. The Executor will want to review personal and business income tax returns for several years prior to the date of death, as well as checking and savings account statements. It will be necessary for the Executor to obtain the date of death value of all assets, including real estate, bank accounts, stocks and other securities, bonds, business shares, etc. The Executor will want to physically review and photocopy any certificates of stock, bonds or other such assets in order to obtain identifying information and with a view toward securing these assets. All life insurance policies should be reviewed for information on ownership, beneficiary designations and the specific type of policy involved. A claim will need to be made to obtain the proceeds of any insurance policies, and the Executor will need to obtain an insurance form known as Form 712, for the estate tax return, to show the proof of payment.

During this period of time, it is often a good idea for the Executor to prepare a preliminary budget for the estate and beneficiaries to establish what may be the best methods of meeting the estate's liquidity needs during the process of administration.

E. Miscellaneous Responsibilities. A few miscellaneous tasks that need to be considered by the Executor are:

- Cancel all credit cards, subscriptions, charge accounts, etc. and to request refunds if applicable.
- Notify all utility services and provide a change of address for billing purposes. Services should be discontinued if and when the property is transferred.
- File claim forms for medical expenses. Medicare should also be processed if refunds might be due.
- Apply for Social Security and Veterans benefits or burial allowances, if applicable
- Obtain a Release of Lien on any real estate.

F. Fiduciary Tax Return. During this part of the administration of the estate, there are other tax filing requirements for which the fiduciary should be aware. A fiduciary tax return

is required to report any income or interest greater than \$600, earned during any one year during the process of administration. Such a filing may need to be made on both the New York State and the federal levels. An estate or trust, as with any private individual, may have a tax liability on gains incurred during the course of the year. Many people acting in a fiduciary capacity often wish to have their own accountants assist in the preparation of this return. The fiduciary's lawyer will want to stay in close contact with the fiduciary to coordinate the filing of these returns if they become necessary.

G. Distribution of Estate. After expenses, including taxes, have been paid, the next level or plateau of the administration is the procedure involving distribution of the estate to the beneficiaries. The estate should review with the Executor the terms of the Will or the provisions of the law which apply in order to identify the persons who are beneficiaries of the estate and are entitled to distribution. The estate attorney should also calculate the distributive shares after deductions of any taxes which are attributable to that share. Distributions of the assets are made to the beneficiaries, at times by distributing the assets directly in satisfaction of a bequest, and other times by selling those assets and converting them to cash, and then distributing the cash.

H. Accounting. After distributions have been made, the Executor can proceed to complete the administration of the estate with the Surrogate's Court. During this stage, the Executor will supply the Court with an accounting of the estate's assets and liabilities and how distributions have been made or those which are proposed. It is this procedure in which the Court enters its order discharging the Executor as the personal representative of the estate once the Executor's duties have been completed.

I. Final Income Tax Return. The final stage of the administration process is to file any final income tax return which the estate is obligated to file for the year in which final settlement occurs. It should be remembered that when the estate is closed the estate may have had taxable income for that year or otherwise be responsible for the payment of taxes. Sufficient funds must be budgeted for these tax obligations.

J. Personal Responsibility. In accepting the role as Executor, the Executor agrees to be personally responsible for the administration of the estate. The Executor should be aware that should he or she fail in this duty, the Executor may be the subject of a lawsuit by any person who has been injured by the Executor's failure. The Executor has a duty to exercise care, diligence, and prudence in dealing with the estate's property. The Executor's conduct will be considered reasonable if the Executor acts as a "prudent man" would act — with the care and skill that a prudent person would exercise in his or her own affairs. This might mean having funds invested in interest-bearing accounts as opposed to non-interest bearing accounts, and selling or transferring risky investments. It is because of this exposure to items which might otherwise be unknown to the Executor that the Executor and the estate's attorney should work closely together, and the Executor should permit the estate's attorney to advise him or her at each level with regard to the Executor's duties and responsibilities.

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These are general overviews of the procedures and the tasks required of an Executor and/or a Trustee. Any specific questions should be discussed with an attorney.