

THINGS TO CONSIDER BEFORE AGREEING TO SERVE AS AN INDIVIDUAL TRUSTEE

November 1, 2017



When the grantor of a trust selects a trustee, the grantor often names a family member or close friend. While many people may be honored to be named as trustee, serving in this capacity is a major responsibility that should not be taken lightly. This is especially true since many individuals have little or no experience dealing with the legal issues and record keeping requirements that go along with serving as a trustee. Additionally, many trustees may lack the experience necessary to make investment decisions pertaining to the trust assets. This is often a perilous combination when the fiduciary standards for trustees are exceedingly high and trustees have personal liability for failing to discharge their duties with the required skill, prudence and diligence.

The American College of Trust and Estate Counsel has promulgated guidelines defining the general duties of a trustee*. These duties include, among other things, the following responsibilities:

DUTY TO ADMINISTER TRUST BY ITS TERMS: It is essential that a trustee read and comprehend all the provisions of the trust document. Trustees should also have a familiarity with the fiduciary legal standards in their jurisdiction and how those standards apply to discharging their obligations under the trust.

DUTY TO GIVE NOTICE: The trustee must understand the trust provisions pertaining to when notice is required to be given to a co-trustee or beneficiary. For example, many trust documents require the trustee to give written notice to interested persons when a trustee wishes to resign, assign powers to another trustee or appoint a successor trustee. Additionally, some trust documents require the trustee to keep beneficiaries abreast of certain investment decisions.

DUTY TO REPORT: Trustees are required to provide beneficiaries with certain information about the trust and its administration. To this end, the trustee should apprise beneficiaries about transactions affecting the trust assets, as well as any action taken by the trustee that may affect a beneficiary's interest in the trust.

DUTY OF IMPARTIALITY: The trustee must treat all beneficiaries impartially. This means that when the trustee makes a distribution decision pertaining to one beneficiary, the trustee must also consider the interests of other beneficiaries. In some situations, the trustee may have a responsibility to ameliorate the effect of the distribution on the other beneficiaries.

DUTY TO AVOID CONFLICTS OF INTEREST: The trustee has an obligation not to use the trust assets for his or her personal enrichment. All transactions should solely be in the interests of the beneficiaries. If a conflict of interest question arises, the trustee should consult with legal counsel regarding the propriety of the transaction.

DUTY TO INVEST: Historically, the trustee has a legal duty to invest the assets of the trust in a manner that is appropriate for the particular trust. In the absence of trust language to the contrary, this generally entails an obligation to make sure the investments are properly allocated and diversified. For certain trusts, the duty to invest may be directed or delegated to client's chosen investment advisor.

The above are just a few of the legal duties commonly imposed on trustees. Court dockets across the United States are littered with lawsuits related to the failure of trustees to competently discharge their fiduciary duties. One way to avoid the legal pitfalls of serving as an individual trustee is to enlist the assistance of a professional trustee as a co-trustee, trust agent or even trust protector. A professional trustee can assist an individual trustee with the sometimes overwhelming responsibility of administering a trust. Additionally, a professional trustee can provide a measure of liability protection for an individual trustee by advising on or assuming the responsibility for distribution decisions.

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In the final analysis, many individual trustees conclude that the cost of retaining a professional trustee is far outweighed by the peace of mind gained from knowing that a trusted advisor is available to help walk them through the complicated world of trust administration.



*About the author: **Wright Mitchell** is an affiliate partner at Pendleton Square Trust, a Tennessee-chartered provider of trust advisor services. Nothing in this article should be construed as providing legal or tax advice regarding your specific situation.*