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TRUSTEE GUIDELINES

This paper gives a broad overview of the duties and responsibilities of trustees in the administration of a Texas trust. Since each trust will have unique purposes, terms, beneficiaries and assets, this paper does not substitute for the advice of an attorney nor is it an exhaustive discussion of all matters that may occur during the administration of a trust. However, it does discuss some of the common duties and responsibilities of trustees and hopefully is a useful guide for trustees.

READ THE TRUST INSTRUMENT

The Texas Trust Code ("Trust Code") provides that a trustee shall "administer the trust according to its terms" as well as according to the provisions of the Trust Code. The starting point for any trustee is to read and periodically review the trust instrument to become familiar with its terms, discussing any concerns or questions with the trustee's attorney.

UNDERSTAND YOUR DUTIES AS A FIDUCIARY

In the absence of any contrary terms of the trust instrument or contrary provisions of the Trust Code, the trustee owes its beneficiaries the duties that have been well established under common law. Some of these duties include:

A. *A Duty of Loyalty.* A trustee must administer the trust in the interests of the beneficiaries, not the interest of the trustee. The trustee cannot personally benefit from serving as trustee of a trust. A trustee may not engage in self-dealing. The Trust Code prohibits a trustee from loaning trust funds to himself or his affiliates, relatives, employees, partners, or other business associates. If the trustee is also a beneficiary, loans may be made to the trustee/beneficiary only if permitted by the trust instrument. The Trust Code also prohibits a trustee from selling trust property to or purchasing trust property from the trustee or his affiliates, relatives, employees, partners or other business associates unless the trust instrument expressly permits the transaction or all of the beneficiaries consent after being made fully aware of all facts.

We recommend the following common sense approach: If you question whether or not an action is proper, even if it only has the appearance of impropriety, call your attorney for advice. Additionally, we offer the following practical guidelines:

1. If you have to ask if a transaction creates a conflict of interest, do not do it.
2. If you or a person close to you might receive a benefit from the transaction that you would not have received if you were not the trustee, do not do it.
3. If you are hesitant to fully disclose the transaction to the beneficiaries, do not do it.
4. If a beneficiary objects and a potential conflict exists, do not do it.

Remember: Poor judgment is sometimes forgiven by a judge or a jury, but self-dealing almost never is.

B. *A Duty Not to Delegate.* A trustee has an obligation to personally administer the trust and should not delegate duties that the trustee is required to perform. A trustee may employ agents, attorneys, financial advisors, real estate brokers, accountants, etc. to assist the trustee with performing its duties.

C. *A Duty to Keep and Render Accounts.* A trustee has a duty to keep full, accurate and clear accounts of the trust estate. The Trust Code gives a beneficiary the right to demand a written statement of accounts covering the trustee's actions once a year.

D. *A Duty to Furnish Information.* A trustee has a duty to keep the beneficiaries fully informed. At reasonable times, the trustee is under a duty to provide complete and accurate information regarding the trust, and the beneficiary has an absolute right to examine the trust property, accounts, vouchers and other documents relating to the trust administration.

E. *A Duty to Exercise Reasonable Care and Skill.* A trustee is under a duty to administer the trust exercising such care and skill as a man of ordinary prudence would exercise in dealing with his own property.

F. *A Duty to Take and Retain Control of Trust Property.* A trustee is under a duty to take all reasonable steps to obtain and control the trust property.

G. *A Duty to Preserve Trust Property.* A trustee must use the same care and skill that a person of ordinary prudence would use to preserve trust property.

H. *A Duty to Enforce Claims.* A trustee is under a duty to take reasonable actions to collect claims that are due to the trust.

I. *A Duty to Defend.* A trustee is under a duty to do what is reasonable, under the circumstances to defend actions by third parties against the trust.

J. *A Duty Not to Commingle Trust Funds.* A trustee has a duty to keep trust property separate from other property not belonging to the trust and to properly designate it as trust property. Not only is it a trustee's duty to keep the trust property separate from the trustee's own property, but also to keep that property separate from other trusts the trustee may administer. Joint investments may be proper, but each trust's interest must be kept separate. For instance, if a trustee commingles property belonging to the trust with some of the trustee's own property and some of the property is lost or destroyed, a court will presume that the remaining property belongs to the trust and will allocate all of the loss to the trustee. If a trustee commingles property and makes withdrawals, from a fund, the court will presume that the remaining amount in the fund belongs to the trust. If the withdrawals are used to make investments that increase in value, then the beneficiary can claim that trust property was used to make the investment (meaning that the increase belongs to the trust). If the investments decrease in value, a court will presume that the trustee's own funds were used.

K. *A Duty with Respect to Bank Deposits.* Although a trustee may deposit funds in a bank, he is under a duty to use reasonable care in selecting the bank and to properly designate the deposit as a trust deposit. He may not subject the deposit to unreasonable restrictions on withdrawal or leave substantial funds in a non-interest bearing account for an unduly long period of time.

L. *A Duty to Make Trust Property Productive.* In general, the trustee is required to make trust property productive.

M. *A Duty to Deal Impartially with Beneficiaries.* When there are multiple beneficiaries of a trust (including beneficiaries holding successive interests in a trust), it is the duty of the trustee to deal impartially with the beneficiaries.

N. *A Duty with Respect to Co-Trustees.* Unless the trust provides otherwise, all of the trustees are under a duty to participate in the trust administration. Therefore, a trustee cannot properly delegate the acts required of the trustee to the co-trustees. It is the duty of a trustee to use reasonable care to prevent other trustees from committing a breach of trust.

O. *A Duty with Respect to Person Holding Power or Control.* In some trust instruments an individual who is not the trustee (or only one of the trustees) may be given certain powers or control over certain aspects of the trust estate. Ordinarily, if the trustee has no power over the act in question and no authority with regard to it, he will not be liable for complying with the directions of the one to whom the authority is granted. If the trustee knows or should have known that the person holding the power is violating his or her duty, however, the trustee may be held liable.

REVIEW OF TRUST INVESTMENTS AND ACTS OF PREDECESSOR TRUSTEE

Upon accepting a trust, the trustee should promptly review the trust's investments. It may be necessary to sell assets that are inappropriate to retain in the trust estate. The trustee should also review the prior trustee's actions. Section 114.002 of the Texas Trust Code provides that a successor trustee is liable for a breach of trust by a predecessor trustee only if he "knows or should know of a situation constituting a breach of trust committed by a predecessor" and permits the breach to continue, fails to make reasonable effort to compel the predecessor to deliver trust property, or fails to make reasonable efforts to compel the predecessor to redress a breach of trust. The trustee should review the predecessor's accounts to ascertain whether there appear to be any improper transactions.

Once a trustee has accepted the trust, it should periodically review the trust's investments in light of the needs of the beneficiaries. The trustee's review should include reviewing the performance of the portfolio, an analysis of the level of risk, projected cash flow, tax considerations, distribution levels, and whether or not the investment policies for the trust are being met. Regular and prudent review may help protect the trustee from liability even if there are investment losses. The investment policies will typically include references to asset allocation and investment quality standards.

The trustee should review the cash assets of the trust to determine whether all cash is deposited in bank accounts within the insured limits in an FDIC insured institution when not invested. To the extent that cash is not needed for administration expenses of the trust and beneficiary distributions, the trustee should attempt to invest cash in interest bearing accounts.

DEALING WITH REAL ESTATE

If the trust owns real estate, the trustee will need to take prudent steps to insure and maintain the property. Some special considerations when managing real estate are as follows:

(1) Evaluate environmental risks of real estate;
(2) Perform due diligence before buying real property;
(3) Make full disclose to a purchaser in the sale of real estate;
(4) Obtain and maintain insurance sufficient to protect the trust and the property;
(5) Periodically personally inspect the property;
(6) Timely review property tax appraisals and statements and protest overvalued properties.

(7) Review mineral interests, including any division orders and leases;
(8) Carefully select tenants and property managers; and
(9) Have lease agreements signed by tenants and monitor rents. Update as necessary.
(10) Make repairs as needed. Obtain competitive bids for repairs.

MAKING DISTRIBUTIONS

A trustee should review the trust instrument and know the standard for distributions. For example, is the trust a "special needs trust" where governmental benefits could be placed at risk if certain distributions are made. Does the trust permit distributions of income and principal or is the trust limited to income distributions only? Is the purpose of the distribution within the standard of the trust? A trust that allows distributions for the health, education, support and maintenance of the beneficiary cannot be used to make distributions to allow the beneficiary to start a business or pay old debts. Does the distribution benefit the named beneficiary or is the request to benefit someone other than the named beneficiary such as a child or spouse of a beneficiary? Even if the trust instrument uses terms such as "absolute" or "uncontrolled" to describe the discretion granted to the trustee, this still will not generally give the trustee total and unqualified discretion. The trustee must exercise the discretion in a fiduciary capacity. In making a discretionary distribution, the trustee should document the beneficiary's request including the amount of the request and the purpose of the distribution. If the distribution standard requires the trustee to consider other sources of support, the trustee should obtain documentation from the beneficiary such as income tax returns, a financial statement and/or budget. When making distributions, the trustee should exercise some care that the distribution is being used for its stated purpose. For example if the distribution is for tuition, the Trustee may make the distribution directly to the school or university.

ACCOUNTINGS & DISCLOSURES TO BENEFICIARIES

The Texas Trust Code requires a trustee to provide the beneficiaries with a written statement of accounts annually which must show (1) the trust property that has been received and was not previously listed in a prior accounting, (2) a list of receipts and disbursements, (3) a list and description of all property being administered, (4) cash accounts, their balance, and whether those accounts are deposited, and (5) a list of all trust liabilities. The accounting should provide sufficient information for the beneficiary to have a clear understanding of the trust administration for the period covered. If the trustee fails to provide the accounting within 90 days after requested by the beneficiary, the beneficiary may file suit to compel the trustee to account. A trustee is not required to provide an accounting more often than once per year, but a trustee should always be willing to provide information to a beneficiary upon reasonable request.

TAX RETURNS

The trustee is required to file an annual income tax return for the Trust with the Internal Revenue Service. The Form is Form 1041. A Trustee should hire a qualified certified public accountant to prepare the returns. The CPA can also help the trustee set up and maintain a set of books for the Trust.