Price & Farrington's Estate and Tax Planning *Fast*Facts

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Estate, Tax and Wealth Planning for Advisors and Clients

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How to Be a Trustee, Part 1:
A Primer for the First-Time Fiduciary

So you've been appointed to serve as a trustee in someone's estate plan. Or maybe you're trying to decide who to name as a trustee in your own estate plan. How does a trustee, or a successor trustee, carry out its duties? Here's a start for you or your clients:

Property properly put. A trustee is what the law calls a *fiduciary*. That's a person who is responsible for taking care of something that belongs to someone else. Under the law, fiduciaries owe legally enforceable duties to the people on whose behalf they handle property. Property can include: ***real*** property; ***tangible personal*** property (household goods; personal effects); ***intangible personal*** property (stock certificates or cash or bank accounts); and things you can't really see or touch but have value (contract rights).

Your fiduciary duties come first every time you act in your capacity as trustee. To have a good feel for what your duties are as a trustee, you need to understand what a trust is.

A Trust is a legal relationship that results when a person (the ***trustmaker, settlor*** or ***grantor***) makes an agreement with a ***trustee*** to handle property for the benefit of ***beneficiaries***. The agreement is normally set out in a written document called the ***trust instrument*** *or* ***trust agreement.*** The first and foremost duty of the trustee is to read, understand and faithfully follow the terms of the trust instrument.

Once the trust agreement is made, the trustmaker transfers property to the trustee. The trustee actually becomes the ***legal*** owner of the property. But the "real" owners of the property are the beneficiaries, who are said to be the ***equitable*** or ***beneficial*** owners, and will actually benefit from the property.

Trustees. A trust can have more than one trustee at a time. Since each ***cotrustee*** can be held responsible for a cotrustee's breach of fiduciary duty, it's important to pay attention to everything that is done in the administration of the trust. Questions or problems should be communicated between cotrustees. Generally, where there are two cotrustees both have to agree on matters of trust administration, and where there are three or more cotrustees, the majority rules. A cotrustee should be sure to ***make a written record*** of any points of disagreement about trust business. A trustee who has questions about his or her role should ***seek appropriate advice*** immediately. Don't hesitate to consult your lawyer, CPA, financial advisor or other professionals.

Being named as a ***successor trustee*** in someone else's trust instrument doesn't obligate you to accept the position. Once you do, however, you accept all that goes with it. It is a position of both great ***honor*** and great ***responsibility.***

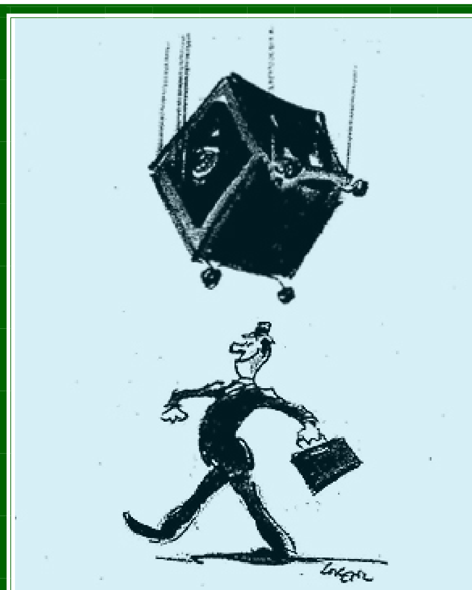
Guidelines. The law doesn't demand absolute perfection from you, but it does demand absolute ***loyalty***, ***honesty*** and complete and accurate ***disclosure*** to the beneficiaries.

1. Basic Rules. To avoid personal liability, take pains to document that you are acting (e.g., signing a contract) in your capacity as a trustee and not as an individual, by writing ***"[your name], trustee"***. It must be clear that you are obligating the trust and not yourself personally.

2. Sources of Authority. Your authority comes first and foremost from the ***trust instrument***, and the duties and powers described there are your primary instructions. The second source of your authority is the Revised Code of Washington (RCW) or any other relevant ***state law***. The third source of authority is found in court decisions relating to trusts. This is

Ponderings for a New Year

- ***Many who find the day too long, think life too short.***
- ***The years teach us much which the days never knew.***
- ***Time makes more converts than reason.***
- ***Some people can stay longer in an hour than others can in a week.***
- ***The less one has to do, the less time one finds to do it in.***
- ***Time is a great teacher, but unfortunately it kills all its pupils.***



"Less cholesterol … regular checkups … no nicotine … no alcohol … low sodium … moderate exercise … no sugar…"

known as the ***"common law".*** All of these sources of authority, plus the Internal Revenue Code, Treasury Regulations and court decisions that interpret the Code will dictate what you can and cannot do. This should convince you that you will need to rely on the advice and guidance of your attorney, your accountant and your other advisors during your service as trustee.

3. Fundamental Duties. Bear in mind that the penalty for breaching any of these duties is that you will have to pay for any resulting damage to the trust out of your pocket. Even if you aren't being paid for your services, potential ***personal liability*** is one of the things that goes with being a fiduciary.

☑ ***General Prudence.*** As a Trustee you're duty-bound to deal with the trust property as a ***"prudent person"*** would deal with property of another. Your actions will be judged against what a reasonable person would have done in the same circumstances, given the same limitations to which you were subject and armed with the same information that was at your disposal. If you conduct yourself properly, you won't be faulted if something bad happens, such as a decline in the value of trust assets. Your job description is to act reasonably under the circumstances, and if you do that you don't have to worry about being judged in hindsight. The standard for judging your job performance will take into account any special ability or expertise (actual or claimed) that you have.

☑ ***Carry out the trust terms.*** It will be difficult for anyone to find fault with your performance of your fiduciary duties if everything you do is in accordance with the terms of the trust instrument. Therefore, the most important duty of the trustee is to become familiar with the terms of the trust and follow them implicitly. If at any time you're reasonably in doubt about the correct interpretation of the trust instrument, you can rely on professional advice or petition a court for guidance.

☑ ***Duty of loyalty.*** As a trustee you must always act to further the interests of the trust and the **beneficiaries**. You are serving for the benefit of someone else, not for yourself. If there is a conflict of interest between your personal interests and the trust or between the trust and the interests of third parties, you as trustee should put the interests of the trust first. For example, you shouldn't sell trust property to yourself or sell your property to the trust, or loan yourself trust assets, because this creates an ***appearance of self-interest***. These rules apply even though a particular transaction may be scrupulously fair, and even if it is advantageous to the trust. Exceptions might result where there is court permission and/or where all beneficiaries have been notified by you and are given an opportunity to act.

☑ ***Duty not to delegate.*** You are responsible for the administration of the trust and should not turn it over entirely to someone else. You can delegate certain administrative details to people qualified to handle them. For example, you can employ an agent to collect rents or retain professionals to provide special services. If you are one of two or more trustees, you can't rely on the other trustees to administer the trust. You must participate. If another trustee acts improperly you have a duty to correct the situation. Each trustee is responsible to the beneficiaries for the misconduct and breaches of duty of the other trustees.

Other duties.

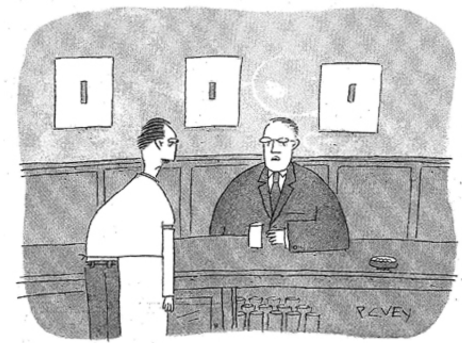
✦ ***Duty to account.*** Beneficiaries are entitled to be kept reasonably informed about their interests in the trust, but you are duty-bound to account to each beneficiary only with respect to that beneficiary's interest.

✦ ***Duty to segregate trust assets.*** You must keep the trust porperty separate and istinct from your own property, i.e., you must not put trust income or principal into your own personal accounts.

✦ ***Duty to get help is you need it.*** "Flying from the seat of your pants" is dangerous, because it can expose you to personal liability if something goes wrong. Your reliance on the advice of a competent, qualified professional can be a defense to a claim that you breached your fiduciary duty.

✦ ***Duty to protect and preserve trust assets*** and to insure them whenever practicable. Few things are worse than having a trust asset destroyed through no fault of yours and then discovering that the asset wasn't insured. In that case, your own personal bank account could become the insurance company. Ouch!

✦ ***Avoiding the appearance of impropriety.*** A wise trustee does his or her best to be completely above reproach, just in case somebody questions your activities as trustee. ■



"I'm trying to put my priorities behind me."

NEW YEAR RESOLUTIONS

I WILL BE MORE ORGANIZED.

I WILL LOSE WEIGHT.

I WILL BE NICER.

I WILL SEE AN ESTATE PLANNING ATTORNEY, FINALLY.

Next time: Part 2 of "How to be a Trustee" including the advantages for you and your beneficiaires of working with a professional fiduciary.

We wish you good planning! GDP