

SUMMARY OF POWERS AND DUTIES OF TRUSTEES

GENERAL

The powers and duties of a Trustee are primarily determined by the terms of the written trust agreement and the laws of the jurisdiction in which the trust is being administered. Therefore, both the language of the trust, as well as the applicable law, need to be carefully considered in determining the general and specific powers and duties of a Trustee under a particular trust agreement.

The Indiana Trust Code, as interpreted and applied by case decisions, is the primary law which sets forth the powers and duties of a Trustee in Indiana. It is important to remember that many of a Trustee's powers and duties as described in the Trust Code may be modified, expanded, or otherwise changed by the language of the actual trust document. In most cases, both the trust document and the applicable law need to be reviewed in determining the nature and scope of a Trustee's powers and duties in a particular situation.

GENERAL DUTIES

First and foremost among a Trustee's duties is to hold, manage, and care for the property of the trust for the sole benefit of the beneficiaries of the trust under the terms of the trust instrument. A Trustee acts as a fiduciary to the beneficiaries and as such is to exercise a high degree of care for the property entrusted to his possession. Generally stated, a Trustee is to act in regards to the trust estate in the manner in which men of ordinary prudence, discretion and judgment would act in the management of their own affairs. Under no circumstances should the property of the trust be commingled with the Trustee's separate property. Trust property should be titled or held in the name of the trust.

STATUTORY DUTIES

The specific statutory duties of a Trustee as described in Indiana's Trust Code are as follows:

- (a) The Trustee has a duty to administer a trust according to its terms.
- (b) Unless the terms of the trust provide otherwise, the Trustee also has a duty:
 - (1) to administer the trust solely in the interest of the beneficiaries;
 - (2) to treat multiple beneficiaries impartially;
 - (3) to take possession of and maintain control over the trust property;
 - (4) to preserve the trust property;

- (5) to make the trust property productive;
- (6) to keep the trust property separate from his individual property and separate from or clearly identifiable from property subject to another trust;
- (7) to maintain clear and accurate accounts with respect to the trust estate;
- (8) upon reasonable request, to give the beneficiary complete and accurate information concerning any matter related to the administration of the trust and permit the beneficiary or his agent to inspect the trust property, the Trustee's accounts, and any other documents concerning the administration of the trust;
- (9) to take whatever action is reasonable to realize on claims constituting part of the trust property;
- (10) to defend actions involving the trust estate;
- (11) not to delegate to another person the authority to perform acts which the Trustee can reasonably perform personally; and
- (12) to supervise any person to whom authority has been delegated.

SELF-DEALING

Indiana's Trust Code also specifically limits the power of the Trustee to enter into agreements which may be self-dealing as follows:

- (a) Unless the terms of the trust provide otherwise, the Trustee has a duty:
 - (1) not to loan funds to himself or an affiliate;
 - (2) not to purchase or participate in the purchase of trust property from the trust for his own or an affiliate's account;
 - (3) not to sell or participate in the sale of his own or an affiliate's property to the trust; or
 - (4) if a corporate Trustee, not to purchase for or retain in the trust its own or a parent or subsidiary corporation's stock, bonds, or other capital securities, provided, however, the Trustee may retain such securities already held in trusts created prior to the effective date of this article.

(b) If the terms of the trust permit the Trustee to deal with a beneficiary for his own account, the Trustee has a duty to deal fairly with and to disclose to the beneficiary all material facts related to the transaction which the Trustee knows or should know.

(c) Unless the terms of the trust provide otherwise, the Trustee may sell, exchange or participate in the sale or exchange of trust property from one (1) trust to himself as Trustee of another trust, provided the sale or exchange is fair and reasonable with respect to the beneficiaries of both trusts and the Trustee discloses to the beneficiaries of both trusts all material facts related to the sale or exchange which the Trustee knows or should know.

ACCOUNTING

The Indiana Trust Code also imposes accounting requirements on a Trustee. The pertinent part of that section of the Code reads as follows:

Unless the terms of the trust provide otherwise or unless waived in writing by an adult, competent beneficiary, the Trustee shall deliver a written statement of accounts to each income beneficiary or his personal representative **annually**. The statement shall contain at least:

- (1) all receipts and disbursements since the last statement; and
- (2) all items of trust property held by the Trustee on the date of the statement at their inventory value.

INVENTORY

Note that subparagraph 2 under the Accounting section refers to an inventory. An inventory is a listing of all of the assets and their value as of a particular date. A Trustee should inventory all property which comes into his possession or under his control, which inventory should show:

- (1) the nature of the assets (real estate, securities, cash, insurance, etc.);
- (2) the value of the assets on the date (or approximate dates) the Trustee assumed ownership or control over the assets (e.g., the fair market value of real estate at the time the real estate was transferred to the trust, etc.); and
- (3) the date the asset became part of the trust estate.

RECORD KEEPING

Since a trustee is required to account for his handling of trust property and also may be required in certain instances to file tax returns and make court filings, it is **absolutely essential** that full and complete records be kept at all times by the Trustee. Those records should include, at a minimum, the following items:

- (1) Copies of all bank account statements and canceled checks.
- (2) A ledger (or checkbook register) showing the date and nature of all deposits and withdrawals from any checking account. Note: It is very important to separately list each item which is included in any deposit (e.g., interest, dividends, rent, pension, etc.).
- (3) All documents showing the value of assets **both** at the time the asset came into the Trustee's possession or control **and** throughout the administration of the trust, including all account statements, value documents (certificates, stock value statements, brokerage reports, etc.), the actual document representing the asset (deeds, stocks, bonds, CDs, contracts, leases, titles, etc.), savings and checking account records, and so forth.
- (4) All invoices, receipts, canceled checks, and other documents or records showing disbursements made from trust accounts.
- (5) All records and documents showing any sale, transfer, or other disposition of trust assets, including papers showing the sale, exchange, or other disposition of securities (stocks, bonds, mutual funds, certificates of deposits, etc.), real estate, personal property, or other assets.
- (6) All documents related to tax filings, including Forms 1099, K-1, 1040, 1041, and schedules thereto, and all supporting documentation related thereto.
- (7) All documents and records related to any partnership, corporation, joint venture, or business in which the trust has any interest.

The more detailed the records kept by the Trustee, the easier (and less expensive) it is for the Trustee, an attorney, or an accountant to prepare accountings, inventories, tax returns, and other papers involved in the administration of a trust.

BENEFICIARIES

A Trustee is required to administer a trust with due regard to the respective interests of both income beneficiaries and remaindermen. An "income beneficiary" is one who under the terms of the trust is entitled to receive periodic distributions of income derived from the use of the principal of the trust (e.g., interest dividends, rent, etc.). A "remaindermen" is one who is entitled to the remainder of a trust estate after a particular estate within the trust has expired. For instance, the creator of a trust (settlor) may provide that income from the trust will be used for the health, education, maintenance, and support of his child ("income beneficiary"), with the remainder to pass to the settlor's grandchildren ("remaindermen") on the child's death. Thus, a Trustee is responsible to consider the interests of both the income beneficiaries and remainderman in administering the trust. That responsibility often involves the Trustee's decision as to how to allocate receipts and expenditures between income or principal, which decision will be guided by the trust agreement or in the absence of direction therein, by the provisions of the Indiana Trust Code.

A Trustee's power to allocate expenses (charges) of the trust against income or principal of the trust will need to be discussed with legal and tax counsel.

Among the most difficult decisions for a Trustee to make involves the discretionary distribution of income (or principal) to a beneficiary under a trust. Again, the specific terms of the trust, when viewed in light of the law and common practice, must be the guide in determining the timing, extent and type of distributions to be made to a beneficiary. Of course, professional counsel may be sought by the Trustee regarding such decisions.

BREACH OF DUTIES

A Trustee is accountable to the beneficiary for the trust estate. A Trustee may be held liable for breaching his duty to the beneficiary of a trust. Further, a Trustee who exercises powers beyond his authority to the harm of the beneficiary may be liable to the beneficiary. That liability may extend to the acts of agents of the Trustee which, if committed by the Trustee, would be a breach of the trust. Such liability may include:

- (1) any loss or depreciation in the value of the trust property as a result of the breach;
- (2) any profit made by the Trustee through the breach;
- (3) any reasonable profit which would have accrued on the trust property in the absence of a breach; and
- (4) reasonable attorney's fees incurred by the beneficiary in bringing an action on the breach.

POWERS

The powers of the Trustee are usually specified in the trust agreement. Therefore, that document needs to be studied carefully to determine what the Trustee is or is not empowered to do in administering the trust property. Those powers will usually include a description of how the creator of the trust desires the property (including both principal and interest) to be administered, invested, and distributed. Also, the trust instrument will typically contain a list of standard powers granted a Trustee.

Indiana law provides a detailed description of powers available to a Trustee but states that such powers apply "unless the terms of the trust provide otherwise." Therefore, a Trustee should first determine which powers are included, or excluded, by the trust agreement before determining what other powers may be granted him under the Trust Code. A list of the statutory powers of a Trustee under Indiana law can be obtained from this office if desired.

COMPENSATION

Indiana's Trust Code provides that unless the terms of the trust provide otherwise, or unless a Trustee breaches his trust, a Trustee is entitled to reasonable compensation from the trust estate for acting as Trustee. Again, the terms of the trust need to be reviewed regarding the issue of a Trustee's compensation.

INVESTMENTS

Among a Trustee's most important duties is the proper management, investment, and protection of the assets of the trust estate. An individual Trustee should seek competent professional investment counsel, in conjunction with tax and legal counsel, as to how best to invest the trust assets in view of the purpose and terms of the trust, the needs and rights of the beneficiaries, and the requirements of law. Again, a Trustee should prudently exercise the same discretion and judgment in dealing with the trust property as he would in investing and managing his own property. The Trustee should **not** turn over investment decisions to another person or company (broker, money manager, financial planner, etc.) without first receiving a legal opinion that such a delegation of authority is permitted under the trust and Indiana law.

TRUSTEE'S DUTIES IN REGARDS TO ESTATES

With the advent of Living Trusts as a means of avoiding probate, many Trustees, following the death of the creator of the trust, will essentially act like an executor of the estate (**without** the involvement of a Probate Court), in administering the decedent's property held in the trust. Most of the above-described aspects of a Trustee's responsibilities apply equally to the Trustee who is administering a Living Trust after the death of the creator. In addition, the Trustee will typically also perform the following duties:

- (1) Prepare and file tax returns including (a) death tax returns (e.g., Federal Estate Tax and Indiana Inheritance Tax Returns, if applicable), (b) fiduciary income tax returns for the trust, if applicable, and (c) the decedent's final income tax returns;
- (2) Obtain a separate federal tax identification number for the trust (if not already assigned to the trust);
- (3) Determine the date-of-death values of all property held in the trust, including arranging for any appraisals required to determine the value of real estate and personal property;
- (4) Assure that any property which was not owned by the trust at the time of the creator's death is transferred to the trust under the "pour-over" provisions of the decedent's Last Will and Testament (note that if property outside of the trust exceeds a value of \$25,000, it may be necessary to file the Will for probate to complete the transfer of that property);

- (5) Pay the funeral and burial expenses, as well as the expenses of the last illness of the decedent, if directed by the trust document to be paid from the trust property;
- (6) Distribute the property to the beneficiaries as directed by the trust, including the conveyance by Trust Deed of real estate held in the trust, delivery of tangible personal property owned by the trust, and distribution of the residual of the trust property (note that the timing of distribution will often be related to the timing of the payment of death taxes);
- (7) Account to the beneficiaries of the trust at the time of final distribution of the property; and
- (8) Employ an attorney, and perhaps an accountant or financial advisor, to assist in the administration of the trust.

OTHER INFORMATION

The Indiana Trust Code covers many other questions regarding the duties and powers of a Trustee, including the relationship between Co-Trustees in administering a trust, the relationship of a Trustee to third parties, the remedies available to a Trustee in enforcing and interpreting a trust, the power to terminate a trust, and the removal or resignation of a Trustee. Of course, the trust agreement may also address such items and will generally prevail over provisions in the Trust Code.

The Trustee's obligation to file tax returns and pay taxes needs to be addressed with competent counsel.

This memorandum contains a general overview of the duties and powers of a Trustee under Indiana law. It should not be relied on in making specific decisions regarding a particular question or trust. The law outlined herein is subject to change through legislation or court decisions. Legal advice should be sought regarding the specific facts and law involved in making particular decisions as a Trustee.