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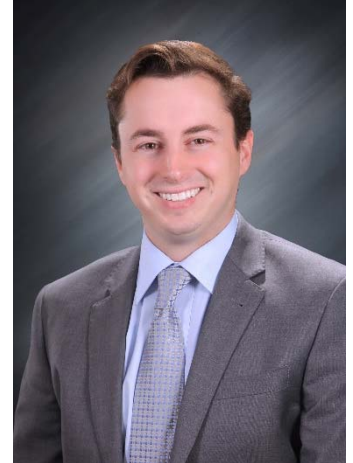
Suggested Reading:

God Wants You to Be Rich
by Paul Zane Pilzer

A wonderful demonstration of
God's abundant world

The Louisiana Trustee

The Louisiana Trust Code (Louisiana Revised Statutes §9:1721 *et seq.*) provides the default rules and framework in which the trustee over a Louisiana-sited trust operates. Generally, the role of the trustee is to hold and preserve the trust property for the benefit of the beneficiaries and to make distributions of trust property to the beneficiaries pursuant to the terms of the trust instrument and according to any discretion afforded to the trustee in such trust instrument or under the law.



Craig S. Daste, Jr.

THE TRUSTEE

The Louisiana Trust Code defines the trustee as *a person to whom title to the trust property is transferred to be administered by him or her as a fiduciary*.¹ This definition provides two key concepts which must be understood by the trustee—first, the trustee is the owner of the trust assets, not the trust itself, nor the beneficiary; and second, in such capacity as trustee, the trustee holds and administers the assets for the benefit of the beneficiaries as a fiduciary. In common parlance and common law, the trustee is the individual entrusted with the property of another, with a moral and legal obligation to administer it solely for the purposes specified. The trustee is the linchpin of the trust relationship, the primary powerholder whose decisions and discretion can often be more powerful than the settlor or the trust instrument itself.

ACCEPTANCE OF TRUST. In order to serve as trustee, a named or appointed trustee must first accept the trust. This is often accomplished by the trustee in the initial trust instrument or a simple document signed before a notary at the creation of the trust, agreeing to accept the trust assets for the benefit of the beneficiaries; however, in the cases of a testamentary trust or a person serving as successor trustee, the testamentary trustee will have to accept the trust upon the death of the settlor and the successor trustee will have to accept the

¹ La. R.S. §9:1781.

trust upon the resignation of the original trustee. The trustee is not required to post a bond unless the trust instrument does not dispense with the requirement or if the trustee is compelled to post security by the court upon application of an interested party.²

By accepting the trust, the trustee is accepting the liability and fiduciary duties imposed upon trustees under the trust instrument and the law.³ Upon accepting the trust, the trustee must expediently take and preserve the assets of the trust.

CONTROL OF DISCRETIONARY POWERS. A substantial component of the trustee-beneficiary relationship is the discretion of the trustee which is granted by the terms and the nature of the trust instrument to serve when the instrument so relies or when the language of the instrument is silent or ambiguous. When discretion is conferred upon a trustee with respect to the exercise of a power (e.g., the power to distribute assets to a beneficiary), its exercise shall not be subject to control by the court, except to prevent an abuse of discretion by a trustee.⁴ When determining the scope of his or her own discretion, the trustee should pay careful attention to the language of the trust instrument in determining the purpose of the trust and, considering such, how to fairly treat the immediate needs of respective beneficiaries balanced against the long-term goals of the trust. However, discretion is by its very essence a product of discernment, the ability to decide and to judge what is appropriate based on the trustee's experiences and understanding of the facts at hand.

The trustee's discretion is often the most important aspect of the trust relationship. Among the instructions and restrictions provided by the trust instrument and the fiduciary duties and obligations of the trustee to the beneficiaries, the discretion of the trustee fills in the gaps to ensure that the unique needs of the beneficiaries are best met despite facing a dynamic market and changing personal circumstances.

DISTRIBUTIONS OF INCOME. The trustee should distribute trust income to the income beneficiaries according to the terms of the trust instrument, in default of which distributions should be made at least every six months.⁵ A trust instrument may allow for income to be accumulated for later distribution, or for conversion of income to principal.

INVASIONS OF PRINCIPAL. Frequently trust instruments will provide that when trust income is insufficient to meet the needs of an income beneficiary, a trustee may, in his or her discretion, "invade" principal for the benefit of the income beneficiary. Additionally, the proper court may direct or permit a trustee to pay income or principal from the trust property for the necessary support, maintenance, education, medical expenses or welfare of a beneficiary before the time he is entitled to the enjoyment of that income or principal, if the interest of no other beneficiary of the trust is thereby impaired.⁶

DISTRIBUTION OF PRINCIPAL. Upon the termination of trust, the trustee shall distribute all trust principal to the principal beneficiaries.⁷ Upon a partial termination of trust, only the trust principal attributable to the partial termination should be distributed to the principal

² La. R.S. §9:2171, 2172.

³ See comments to La. R.S. §9:2181.

⁴ La. R.S. §9:2115.

⁵ La. R.S. §9:1962.

⁶ La. R.S. §9:2067.

⁷ La. R.S. §9:2029.

beneficiary of such trust principal. The trust instrument may provide for invasions of principal as discussed above.

POWER TO ADJUST. In the event that there are separate beneficiaries of income and principal, and the trustee determines that an adjustment to principal and income is necessary in order for the trustee to satisfy his or her duty to be fair and reasonable to all beneficiaries, a trustee may make an adjustment between principal and income, subject to various limitations.⁸ This may be necessary when, for example, the trust property consists of property that yields low or irregular income, such as cash or timberland. Due to additional rules and limitations under the Louisiana Trust Code and the potential for controversy, a trustee should consult counsel when reallocating trust assets to income or principal.

TERMINATION OR MODIFICATION OF TRUST. At the termination of the trust, it is the duty of the trustee to distribute the assets of the trust to the principal beneficiaries as expediently as possible. A trust is ordinarily terminated at a predetermined time or upon the occurrence of events or conditions as specified in the trust instrument. If the trust instrument stipulates no term, the trust shall terminate upon the death of the last income beneficiary who is a natural person.⁹

In order to terminate or modify the trust before its stated or natural term, the trustee must seek court approval, granted only in certain circumstances. The consent of all settlors, trustees and beneficiaries by itself is not effective to terminate a trust or any disposition.¹⁰ In a change of circumstances, a proper court may order the termination or modification of a trust, in whole or in part, if the continuance of the trust unchanged would defeat or substantially impair the purposes of the trust, or if the trustee has determined that the market value of the trust is less than \$100,000 and the costs of administration would similarly defeat the purposes of the trust.¹¹ Further, in the event that the accomplishment of the purpose of the trust becomes impossible or illegal, a proper court may order the termination or modification of the trust.¹²

RESIGNATION OF TRUSTEE. A trustee may resign at any time by giving written notice of resignation to each of the beneficiaries or by mailing written notice to each at his or her last known address, or by other method described in the trust instrument.¹³ Upon resignation, the trustee no longer has further authority with respect to the trust property except as necessary to wind-up his or her affairs as trustee, but the resignation does not remove liability for such resigning trustee's administration of the trust property.¹⁴ In order to wind-up his or her affairs as trustee and ensure preservation of the trust property, the trustee shall retain such powers and duties that are necessary for preservation and delivery of the trust assets to his or her successor.¹⁵

⁸ La. R.S. §9:2158, *et seq.* A trustee should consult counsel when reallocating trust assets to income or principal.

⁹ La. R.S. §9:1833. Additional provisions apply for trusts with non-natural persons as beneficiaries. This memorandum does not address revocable trusts in which the settlor might retain the ability to revoke, amend or terminate the trust at any time.

¹⁰ La. R.S. §9:2028.

¹¹ La. R.S. §9:2026.

¹² La. R.S. §9:2027.

¹³ La. R.S. §9:1788.

¹⁴ La. R.S. §9:1790.

¹⁵ La. R.S. §9:2069.

THE FIDUCIARY RELATIONSHIP

The trustee is a fiduciary and therefore owes a fiduciary duty to the beneficiaries (and potential future beneficiaries) of his or her trust. A fiduciary duty is a legal duty to act solely in another party's interest, and is the strictest duty of financial care recognized under the law. *Under the trustee-beneficiary relationship, the fiduciary trustee must act according to both 1) the best interests of the beneficiary and 2) the terms of the trust instrument.* If a trustee violates this fiduciary duty to the beneficiaries, he or she can be guilty of a breach of trust¹⁶ and chargeable under the Louisiana Trust Code for loss or depreciation resulting from such breach, profit made by the trustee through such breach or any profit that would have accrued to the trust in absence of such breach.

The changing desires of the settlor, pressure from family members or even unanimous agreement among all beneficiaries does not outweigh the trustee's fiduciary duty to the interests of the beneficiaries and the trust instrument. Even the original intent of the founding settlor, if not found in the language of the trust instrument, should not control the trustee's administration of the trust if it conflicts with the interests of the beneficiary or is counter to the explicit language of the trust.

DUTY OF LOYALTY. The duty of loyalty is a cardinal principal of the fiduciary relationship, requiring that the trustee administer the trust solely in the interest of the beneficiaries following the terms of the trust. The duty of loyalty can be breached by making a self-interested transaction or by taking an opportunity from the trust. A trustee can be considered self-interested if the trustee is personally a party to such transaction, makes a personal profit from a transaction, transacts affairs of the trust with a member of the trustee's family, etc. Even in transactions in which the trustee has no financial interest, the trustee should go to additional lengths to avoid conflicts of interest or even the appearance of impropriety.

In the event that it is necessary or beneficial for the trustee to buy or sell property for the trust from or to himself or herself or an affiliate, a court must provide authorization after a contradictory hearing unless the trust instrument expressly provides otherwise.¹⁷

PROHIBITION AGAINST SELF-DEALING. Another integral part of the duty of loyalty is the prohibition against self-dealing. Self-dealing is any action taken by the trustee for the trustee's personal gain instead of the benefit of the trust and its beneficiaries (e.g., a loan of trust property to the trustee for personal use or taking an opportunity belonging to the trust). A trustee naming his or her own investment firm and collecting a commission, using his or her own service company to provide the trust a service for a fee or leasing the trustee's own property to the trust may all be examples of prohibited self-dealing. In such cases where a trustee is appointed and expected to use his or her own expertise in the performance of his duties (e.g., as an investment advisor or a CPA) and receive payment for such services, such relationship should be expressly provided for in the terms of the trust instrument.

CONFIDENTIALITY. The duty of loyalty also requires the trustee to maintain confidentiality and prohibits the disclosure of information about the trust's affairs to any third party unless such information is public knowledge.

DUTY OF IMPARTIALITY. When there is more than one beneficiary, a trustee is required to administer the trust impartially, based on what is fair and reasonable to all beneficiaries, except to the extent that the trust instrument states an intention that the trustee shall or may

¹⁶ La. R.S. §9:2201.

¹⁷ La. R.S. §9:2085.

favor one or more of the beneficiaries.¹⁸ The trustee owes a fiduciary duty to each beneficiary individually which must be balanced against the interests of the other beneficiaries when considering the terms of the trust.

Issues of impartiality can arise when one or more beneficiaries are consuming a disproportionate share of trust assets or when there are beneficiaries among multiple generations. A distinction between beneficiaries of trust income and beneficiaries of trust principal can create questions regarding investment choice, allocation among income and principal, and may require a trustee to segregate or diversify trust assets or utilize the power to adjust trust principal to income or vice-versa under the Louisiana Trust Code. On the other hand, certain trusts will necessarily cause disproportionate spending of trust assets, such as a special needs trust where the trust instrument directs for increased spending on an income beneficiary's healthcare needs even to the detriment of the principal beneficiaries.

PRESERVATION OF TRUST PROPERTY. As both an owner and as a fiduciary, the trustee has a duty to take reasonable steps to take, keep and preserve the trust property.¹⁹ The trustee must perform maintenance and make repairs to trust property as needed to preserve its value. Further, the trustee must make a diligent effort to take and safeguard property against damage, theft or misappropriation, and when necessary, acquire insurance on trust property. Similar to the prudent investor rule (below), the trustee should only invest trust assets at a level commensurate with an appropriate risk tolerance level as decided by the needs of the trust beneficiaries and the direction in the trust instrument. This duty to preserve also includes the responsibility to pursue claims by, damages owed to or opportunities offered to the trust. In the event of damage or loss, the trustee has a duty to mitigate such damage, collect any insurance proceeds, seek legal remedies and otherwise as necessary.

This duty to preserve extends beyond the termination of the trust or the resignation or removal of the trustee. Until the trustee delivers the trust property to those persons entitled to it under the trust instrument or court order, the trustee shall retain such powers and duties that are necessary for preservation and delivery of the trust assets.²⁰

ADMINISTRATION AS PRUDENT INVESTOR. The Louisiana Trust Code requires that the trustee shall invest and manage trust property as a prudent person²¹ and a prudent investor,²² unless otherwise provided in the trust instrument. In satisfying the prudent investor standard, the trustee shall consider the purposes, terms, distribution requirements and other circumstances of the trust. Investment and management decisions should be evaluated in context of the trust property as a whole and as a part of the overall investment strategy having risk and return objectives reasonably suited to the trust.

For example, if a trust is created to provide a reliable, constant stream of income to the beneficiaries, the trustee might maintain trust property which produces regular dividends or other income, or maintain a reasonable level of liquidity to meet distribution requirements.

COMMUNICATION – ACCOUNTINGS & PROVISION OF INFORMATION. A trustee is under a duty to keep and render clear and accurate accounts of the administration of the trust to the

¹⁸ La. R.S. §9:2082.

¹⁹ La. R.S. §9:2091.

²⁰ La. R.S. §9:2069.

²¹ La. R.S. §9:2090.

²² La. R.S. §9:2127.

beneficiaries, at least annually.²³ Each annual account must show in detail all receipts and disbursements of cash and all receipts and deliveries of other trust property during the year, and present a list of all trust property at the end of the year.

The requirement of annual accountings is often waived in the trust instrument; however, within a reasonable time of request by a beneficiary, a trustee is still obligated to render an accounting despite any waiver in the language of the trust; furthermore, it is advisable to provide accountings on a regular basis to avoid future conflict, particularly, in the event that there is any controversy, any adverse beneficiaries, or if the trust corpus is particularly sizeable or volatile. Section 2088(D) provides an additional safeguard for the trustee, by allowing for a written approval by a beneficiary to serve as conclusive evidence against the beneficiary with respect to all matters disclosed in the account. It may be prudent to require that a beneficiary return a written approval after the trustee renders each accounting; if a beneficiary refuses to provide a written approval of the accounting, the trustee can apply to the court for approval contradictorily with a beneficiary, which is equally conclusive against a beneficiary.

Even without a written approval from a beneficiary, under Section 2234 of the Trust Code, the rendering of a complete and accurate accounting can cause any action for damages brought by a beneficiary to prescribe after two years following delivery by the trustee of such accounting to a beneficiary or his legal representative. It should be noted, however, that the prescriptive period of two years does not run against a beneficiary who is a minor until such beneficiary attains age 18.

In addition to accountings, Section 2089 of the Trust Code requires that a trustee give to the beneficiary, within a reasonable time of request, complete and accurate information regarding the trust property and permit the beneficiary to inspect the trust instrument, trust property and all accounts, vouchers and other documents related to the trust.

WHEN IN DOUBT, SEEK COUNSEL. In an event where it may be unclear as to whether or not a transaction might violate the trustee's duty of loyalty, be construed as self-dealing, adversely affect one or more beneficiaries, or generally be counter to the provisions of the trust instrument or applicable law, the trustee should seek counsel and possibly court approval before proceeding with such transaction. If a transaction is in good faith, it is possible to receive judicial permission to deviate from administrative provisions of the trust instrument²⁴ or provisions of the Louisiana Trust Code.²⁵

RELIEF IN ABSENCE OF PRIOR COURT APPROVAL. A competent beneficiary may relieve the Trustee from some duties²⁶ and liability²⁷ with respect to that beneficiary, who, when acting upon full information, can relieve the trustee by written instrument from duties and restrictions concerning the administration of the trust imposed upon the trustee by either the Trust Code or by the trust instrument itself. However, no writing may relieve prospectively or in general terms the trustee's duty of loyalty to the beneficiary.

²³ La. R.S. §9:2088.

²⁴ La. R.S. §9:2064.

²⁵ La. R.S. §9:2065.

²⁶ La. R.S. §9:2063.

²⁷ La. R.S. §9:2207.

Further, a proper court may excuse a trustee wholly or partly from liability²⁸ for a breach of trust, for cause shown and upon notice to an interested beneficiary, if the trustee acted honestly and reasonably. The trust instrument itself can waive trustee liability²⁹ except for any provision regarding the duty of loyalty or for any breach of trust committed in bad faith.

TRUST ADMINISTRATION

EXPENSES INCURRED. A trustee may incur expenses necessary to carry out the purposes of the trust and other expenses authorized by the provisions of the trust instrument so long as they are not forbidden by the provisions of the trust instrument.³⁰ Unless the trust instrument provides otherwise, the trustee is entitled to indemnity and reimbursement from the trust estate for expenses properly incurred by the trustee in the administration of the trust.³¹ If an expense is not properly incurred, the trustee is only entitled to reimbursement and indemnity to the extent the trustee has conferred a benefit upon the trust estate.³²

CHARGES. The Louisiana Trust Code requires that certain charges be made against income and against principal,³³ as follows:

Charges to be made against income: 1) Ordinary expenses incurred in connection with administration, management or preservation of the trust property; 2) a reasonable allowance for depreciation as determined by generally accepted accounting principles; 3) one-half of court costs, attorneys' fees and periodic accounting (or all if the matter primarily concerns the income interest); 4) one-half of the trustee's regular compensation; 5) expenses incurred by the trustee for management and application of income; 6) a tax levied on receipts of income; and 7) interest accrued on indebtedness.

Charges to be made against principal: 1) Extraordinary expenses incurred in connection with administration, management or preservation of trust property; 2) expenses incurred in making a capital improvement to principal, including special taxes or assessments; 3) expenses incurred in investing and reinvesting principal; 4) one-half of court costs, attorneys' fees and periodic accounting (or all if the matter primarily concerns the principal interest); 5) expenses incurred in maintaining or to protect the trust property; 6) one-half of the trustee's regular compensation; 7) any of the trustee's special compensation; 8) a tax levied upon assets related to principal; 9) estate tax apportioned to the trust, including interest or penalties; 10) principal of an indebtedness; and 11) all other expenses not chargeable to income.

TRUSTEE COMPENSATION. The trustee is entitled to reasonable compensation from the trust estate for his or her services as trustee, unless the trust instrument provides otherwise or unless the trustee waives compensation.³⁴ The trust instrument may affix a rate of compensation, but if it does not, the trustee may charge a reasonable compensation, subject to review by the proper court. If the affixed rate of compensation in the trust instrument is so low that no qualified person would serve, the proper court may increase the amount of

²⁸ La. R.S. §9:2208.

²⁹ La. R.S. §9:2206.

³⁰ La. R.S. §9:2117.

³¹ La. R.S. §9:2191.

³² La. R.S. §9:2192.

³³ La. R.S. §9:2156.

³⁴ La. R.S. §9:2181.

compensation. If a trustee commits a breach of trust, the proper court may deny all or a part of compensation.³⁵

A trustee entitled to receive compensation may waive it; however, it should be noted that even if a trustee receives no compensation, the trustee's acceptance of a trust subjects him or her to the duties and liabilities of a trustee.

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DELEGATION OF PERFORMANCE. A trustee shall not delegate the performance of his or her duties unless by power of attorney for performance of ministerial duties and acts that he or she could not be reasonably required to perform personally.³⁶ A trustee may delegate the selection of specific investments by acquiring mutual funds or other pooled funds, and may delegate investment and asset management functions, but in such delegation must exercise reasonable care, skill and caution in selecting the agent and must periodically review actions of the agent and take actions to remedy any breach of the agent's duties.

MULTIPLE TRUSTEES. There may be one or more trustees of a trust, often referred to as co-trustees, or trustees who serve in differing capacities, such as a managerial trustee who makes day-to-day decisions on management of trust assets, a distribution trustee who may have authority regarding the timing and amount of distributions to beneficiaries, and a custodial trustee who serves solely to give a trust a particular situs in a state with favorable laws.

By default, exercise of powers by two trustees requires unanimous consent of the trustees,³⁷ and exercise of powers by three or more requiring consent of a majority of the trustees.³⁸ However, when two or more co-trustees are appointed, this is typically governed by the terms of the trust.

In the event there are two or more trustees, each shall use reasonable care to prevent a co-trustee from committing breach of trust and shall compel the other trustee to redress any breach of trust.³⁹

³⁵ La. R.S. §9:2182.

³⁶ La. R.S. §9:2087.

³⁷ La. R.S. §9:2113.

³⁸ La. R.S. §9:2114.

³⁹ La. R.S. §9:2096.



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