

EXCERPT FROM PRIMER ON AMERICAN TRUST LAW

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Duties of the Trustee

What does the duty of *undivided loyalty* mean? The fiduciary is bound to act loyally in all dealings with the beneficiaries. The trustee must administer the trust solely in the interest of the beneficiary, and communicate all material facts which the trustee knows. The trustee may not profit at the expense of the beneficiary nor enter into competition with the beneficiary without consent. A sale, encumbrance, or other transaction involving the trust property is self-dealing when it is entered into by the trustee acting for the trustee's own benefit. The "no-further-inquiry rule" makes it an open and shut case: if there is no consent by beneficiaries (or authorization by court or settlor), a transaction which involves the fiduciary's self-dealing is voidable.

In addition to prohibiting self-dealing, the duty of loyalty prohibits a trustee from entering into a transaction affected by a conflict of interest. acting with any conflict of interest. In the case of a corporate fiduciary, there are special conflict of interest rules regarding the retention of corporate assets as part of the estate. A corporate trustee cannot invest trust funds by purchasing its own shares. Where a bank, for instance, is named as trustee and the estate already includes bank stock, the majority of states hold that retention of the stock is not proper unless authorized by the terms of the trust. .

What does the duty of *due care* mean? Upon acceptance, a trustee has an obligation to carry out her duties with ordinary prudence. If the fiduciary possesses or has held herself out as possessing greater skill than that of a person of ordinary prudence, then she is obligated to exercise that greater level of skill. Whether a trustee acts prudently depends on the circumstances as they reasonably appear to her at the time she acts; hindsight is not the judge of prudence. Prudence requires that the trustee acquaint herself with the terms of the trust and the nature of the trust property. Prudence requires that the fiduciary act with care, skill and caution. Prudence is a standard that applies to all the other obligations of the fiduciary.

Furthermore, no matter how many trustees there may be, each is under a duty to participate prudently in the decision-making and administration of the trust. This preserves the checks and balances inherent in a multi-fiduciary appointment. Not only must each fiduciary refrain from committing a breach of duty, but each must also use reasonable care to prevent co-trustees from committing a breach of duty. If necessary, the trustee is obligated to compel a co-trustee to remedy a breach of trust.

What does the duty of *proper delegation* mean? The fiduciary, who is in a position of trust and confidence, has a duty to personally carry out the responsibilities that have been assumed. While one cannot transfer all one's discretion to act, even to a co-trustee, certain acts may be delegated if

a prudent person might in like circumstances delegate such acts in the management of his or her own affairs. Delegation in most states is no longer limited to the performance of ministerial acts, but will be judged on the trustee's exercise of due care, skill, and caution.

Reasonable care, skill, and caution must be shown not only in the decision of when to delegate but also in the selection of agents and terms of delegation, including compensation, conditions, duration, and supervision. The duty of proper delegation also means that imprudent failure to delegate is actionable. Considerations include the nature and degree of discretion involved; the value and character of the property involved; the efficiency, cost, and convenience given the location or activities involved; the trustee's relevant skills or facilities; and the fairness and appropriateness of the responsibilities [compared] to the burdens and compensation of the trustee.

What does the duty of *impartiality* mean? The trustee is under an obligation to deal with all beneficiaries, whether concurrent or successive, on an equitable basis. Thus, for example, the trustee must protect and maximize the income interest and the corpus of the trust, without favoring the life tenant or the remainderman. The terms of the creating instrument may give the fiduciary the discretion to favor one beneficiary over another ("I give to my children in such amounts as the Trustee in her sole discretion may direct"); a trustee fulfilling that obligation does not violate the duty of impartiality, so long as there is no abuse of discretion.

What is the trustee's duty with regard to *care of the trust property*? The trustee is obligated to collect or take control of the trust property, making sure that all that is due to the trust is collected. If the trust contains tangible personalty, the trustee is ordinarily under a duty to take physical possession of it. The trustee should avoid undue delay in taking charge of the assets, and may be held liable for any losses resulting from a delay which is unreasonable under the circumstances.

The trustee is enjoined from commingling the trust property with the trustee's own property. Commingled assets may be subject to the trustee's own creditors and thus are not adequately protected. In most states and under the Uniform Common Trust Fund Act, corporate fiduciaries may pool assets of several trusts for purposes of investment; but the prohibition on commingling with the trustee's own assets remains effective. Trust assets should be "earmarked", that is, clearly marked as belonging to the trustee *as* trustee. Trustees will be held liable at least to the extent that commingling or failure to earmark the assets results in loss to the beneficiaries.

Once the property is collected, the trustee is obliged to act prudently to protect and preserve it. The trustee has a responsibility to safeguard the property with necessary levels of security, to obtain appropriate insurance against loss or damage, to pay the mortgage and taxes, to maintain the property in good repair, and to take whatever other steps are reasonably necessary.

What is the trustee's duty to *keep accounts and make accountings*? Accounts document the inventory, funds expended to maintain and care for the property, efforts made to enlarge the estate through investment and business administration, and distributions to beneficiaries. The duty

to make accountings is related to the trustee's duty to keep the beneficiaries informed (see duty of loyalty). The beneficiaries may compel the trustee to account to the court if not already under statutory duty to do so. If the trustee fails to keep proper accounts, he may be held personally liable for the expenses.