

**Fiduciary Duties During Administration of Trusts and Estates:
Keep Them in Mind and Avoid Litigation**

By

Glen Robertson

You have been appointed executor of an estate or trustee of a trust. You want to do your best for the beneficiaries but you have another major concern as well: avoiding being sued for the way you carry out your duties. Acting as a fiduciary is a serious responsibility and with it comes serious exposure to liability even for those with the best of intentions. In carrying out your duties, it is important to keep in mind exactly what fiduciary duties you owe to the beneficiary or beneficiaries of the estate or trust.

First and foremost, a fiduciary owes a duty of loyalty to the beneficiary. Put plainly, you must administer the estate or trust solely in the interest of the beneficiary. One finds this duty expressly spelled out in the Virginia code which requires the trustee to “invest and manage the trust assets solely in the interest of the beneficiaries.” The fiduciary is not permitted to profit at the expense of the beneficiary and may not purchase trust or estate assets for himself. If at any time the fiduciary chooses to act on his own account, a dangerous course of action which I would not recommend, he has a duty to treat the beneficiary fairly and to provide the beneficiary with all material facts related to the process transaction. While this duty seems to be fairly innocuous and one would be tempted to believe he could easily meet this obligation and still enter into such a transaction, such personal dealing is an invitation to litigation and a fiduciary would be wise to make a rule of avoiding any question of violating this duty by not entering into such transactions.

Of course, fiduciaries have a duty to exercise reasonable care and skill in dealing with the property of the estate or trust. In essence, a fiduciary is expected to exercise good faith and to take the same care for the property of the estate or trust as one would for one’s own property. Furthermore, if you have held yourself out as having greater skill than an ordinary individual, as many professionals obviously do, the law places a higher burden upon you to exercise that heightened skill that you possess.

The Uniform Prudent Investor Act, effective January 1, 2000, requires a trustee to invest and manage assets of a trust as a prudent investor would do. A trustee is required to consider the purposes,

terms, distribution requirements and other circumstances of the trust in meeting this standard. One should also keep in mind that the act is secondary to the trust documents themselves and the standard placed on a trustee can be different than the Uniform Prudent Investor Act if the trust documents so dictate. In attempting to comply with the Act, keep in mind that it requires a trustee to diversify the trust's investments unless the trustee, in the exercise of his or her reasonable judgement, determines that special circumstances exist which argue against diversification and the purposes of the trust are better served without diversifying. As is the case with the general duty under the Act, the diversification requirement can be opted out of by the trust governing documents. In the absence of such an opt out, though, a trustee who fails to diversify may lose the protections provided to him by state law and be liable to the trust or estate for any losses resulting from the failure.

Virginia law also requires, when there are multiple beneficiaries, that the fiduciary deal impartially with those beneficiaries. This includes acting impartially and managing the trust assets and investing those assets. A fiduciary must take into account the differing interests of the multiple beneficiaries.

Obviously a fiduciary must administer the trust or estate. As a part of this obligation, the fiduciary is under a duty to his beneficiaries not to delegate to others actions which he can reasonably be required to perform himself. As one would expect, though, Virginia law does carve an exception for this delegation rule which permits fiduciaries to delegate investment and management functions, as needed, to someone of higher skill and expertise.

A fiduciary must also take and maintain control over the trust or estate property and to keep and maintain accurate accounts of that property. When administering an estate, the fiduciary has a duty to provide annual accountings to the Commissioner of Accounts as a part of his obligation. A trustee of a testamentary trust, likewise, has the obligation to file annual accounts unless the will setting up that testamentary trust releases him from the requirement. Even such a waiver of the filing requirement, though, does not relieve the trustee of the testamentary trust from his obligation to keep and maintain accurate accounts for the beneficiaries and any of the beneficiaries, or even a court, could demand that the trustee file annual accounts with the Commissioner, notwithstanding the will's waiver of that obligation.

A fiduciary has a duty not to commingle assets of the trust with his own. Thus, always keep a strict separation of your property and that of the trust. Failure to follow this simple rule will almost surely bring litigation against even the best intentioned trustee.

A fiduciary has a duty to his beneficiaries to defend any lawsuits that may result in a loss to the

estate unless the circumstances of the case make defending the lawsuit unreasonable. Similarly, the fiduciary has an obligation to pursue claims. Failure to do so can result in the fiduciary being charged with making good the obligation which was not pursued. Likewise, if a fiduciary fails to defend against claims which he is aware are defensible, he can be held responsible for that as well.

Finally, a fiduciary has a duty to the beneficiaries to provide them with complete, accurate and reliable information as to the property in the trust or estate and to permit the beneficiaries to inspect the property, accounts, vouchers or other documents which relate to the trust in order to satisfy themselves of the accuracy of the information being provided.

While this article does not attempt to be an exhaustive discussion of a fiduciary's duties, it is a good starting point for anyone undertaking this very serious responsibility.

If you have any questions about acting as a fiduciary, please call us for assistance to avoid liability and perform your duties as a fiduciary.

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Glen M. Robertson's practice is concentrated in the areas of civil litigation. He has a broad range of trial practice experience in commercial and corporate litigation. He has represented business and institutional clients of all sizes from large public corporations to sole proprietorships, as well as private individuals.

Contact Information:

Wolcott Rivers Gates

Attorneys at Law
One Columbus Center, Suite 1100
Virginia Beach, VA 23462-6765
Phone: 757.497.6633
Fax: 757.497.7267

email: grobertson@wolriv.com

www.wolcottiversgates.com

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