

## **THE 'TRUST' CONCEPT IS A DUTY TO CARE**

At its simplest, a trust is an arrangement whereby property or assets are transferred from one person (the 'settlor') to another person (the 'trustee') to hold the property for the benefit of a specified list or class of persons (the 'beneficiaries'). A trust can be created solely by verbal agreement but it is usual for a written document (the 'trust deed') to be prepared. This evidences the creation of the trust, sets out the terms and conditions upon which the trustees hold the trust assets and outlines the rights of the beneficiaries.

The practical advantages of a trust are gained from the distinction that is drawn between the formal or legal owner of property, the trustee, and those people that have the use or benefit of the property, the beneficiaries.

It is vital that the trustee remains independent and exercises proper control over the trust property. A trust may be deemed to be invalid if the settlor continues to exercise power over the trust assets by retaining benefit or control, or by giving directions to the trustees.

Those unfamiliar with the trust concept are often concerned at the prospect of transferring ownership of their property to a trustee. This concern can be alleviated if the trust concept and the distinction between legal and beneficial ownership is properly understood and it is clear that the trust is governed by a reliable trust law that can be enforced in a reputable jurisdiction.

Trust law imposes strict obligations and rules on trustees. There is a basic rule that a trustee may not derive any advantage, directly or indirectly, from a trust unless expressly permitted by the trust – for example, where a trust provides a professional trustee with the right to charge for its services. Full disclosure of the basis and amount of charges is required.

- Trustees must follow the trust deed and are subject to very strict rules governing the way in which their powers and discretion may be exercised. The courts regard a trust as creating a special relationship that places the most serious and onerous obligations on the trustee.
- Best interests of beneficiaries – Trustees must at all times exercise their powers in the best interests of the beneficiaries of the trust, and disregard the interests of others, including the settlor.

- Act prudently – Whether or not a trustee is remunerated, he or she must act prudently in the management of trust property and will be liable for breach of trust if – by failing to exercise proper care – the trust fund suffers loss. In the case of a professional trustee, the standard of care that the law imposes is higher. Failure to exercise the requisite level of care will constitute a breach of trust for which the trustees will be liable to compensate the beneficiaries. This duty can extend to supervising the activities of a company in which the trustees hold a controlling shareholding.

### **Understanding The Duties**

If you have been named as a trustee or successor trustee for someone's trust, you may be wondering what you are supposed to do. Successor trustees can relax a bit, because you don't do anything right now. You will only begin to act when the person becomes unable to manage his or her financial affairs due to incapacity, or when he or she dies. If you have been named as a trustee, you may already be acting in that capacity.

In either case, it is important that you understand your duties and responsibilities. This brochure will help. Let's start with some explanations.

### **What is a trust?**

A trust is a legal entity that can "own" assets. The document looks much like a will. And, like a will, a trust includes instructions for whom you want to handle your final affairs and whom you want to receive your assets after you die. There are different kinds of trusts: testamentary (created in a will after someone dies); irrevocable (usually cannot be changed); and revocable living trusts.

Today, many people use a revocable living trust instead of a will in their estate plan because it avoids court interference at death (probate) and at incapacity. It is also flexible. As long as you are alive and competent, you can change the trust document, add or remove assets, even cancel it.

### **How does a living trust work?**

For a living trust to work properly, you must transfer your assets into it. Titles must be changed from your "individual" name to the name of your trust. Because your name is no longer on the titles, there is no reason for the court to get involved if you become

incapacitated or when you die. This makes it very easy for someone (a trustee or successor trustee) to step in and manage your financial affairs.

### **Who are the people involved with a living trust?**

The grantor (also called settlor, trustor, creator or trustmaker) is the person whose trust it is. Married couples who set up one trust together are co-grantors of their trust. Only the grantor(s) can make changes to his or her trust.

The trustee manages the assets that are in the trust. Many people choose to be their own trustee and continue to manage their affairs for as long as they are able. Married couples are often co-trustees, so that when one dies or becomes incapacitated, the surviving spouse can continue to handle their finances with no other actions or steps required, including court interference.

A successor trustee is named to step in and manage the trust when the trustee is no longer able to continue (usually due to incapacity or death). Typically, several are named in succession in case one or more cannot act. Sometimes two or more adult children are named to act together. Sometimes a corporate trustee (bank or trust company) is named. Sometimes it is a combination of the two.

The **beneficiaries** are the persons or organizations who will receive the trust assets after the grantor dies.

### **What do I need to know now?**

The grantor should make you familiar with the trust and its provisions. You need to know where the trust document, trust assets, insurance policies (medical, life, disability, long term care) and other important papers are located. However, don't be offended if the grantor does not want to show you values of the trust assets; some people are very private about their finances. This would be a good time to make sure appropriate titles and beneficiary designations have been changed to the trust. (Some assets, like annuities and IRAs, may list the trust as a contingent beneficiary.)

You also need to know who the trustees are, who successor trustees are, the order in which you are slated to act, and if you will be acting alone or with someone else.

### **What responsibilities will I have as a trustee?**

The most important thing to remember when you step in as trustee is that *these are not your assets*. You are safeguarding them for others: for the grantor (if living) and for the beneficiaries, who will receive them after the grantor dies.

As a trustee, you have certain responsibilities. For example:

You must follow the instructions in the trust document.

- You cannot mix trust assets with your own. You must keep separate checking accounts and investments.
- You cannot use trust assets for your own benefit (unless the trust authorizes it).
- You must treat trust beneficiaries the same; you cannot favor one over another (unless the trust says you can).
- Trust assets must be invested in a prudent (conservative) manner, in a way that will result in reasonable growth with minimum risk.
- You are responsible for keeping accurate records, filing tax returns and reporting to the beneficiaries as the trust requires.

### **Do I have to do all of this myself?**

No, of course not. You can have professionals help you, especially with the accounting and investing. You will also probably need to consult with an attorney from time to time.

However, as trustee, you are ultimately responsible to the beneficiaries for prudent management of the trust assets.

### **How will I know if the grantor is incapacitated?**

Usually the trust document contains instructions for determining the grantor's incapacity. The trust may require one or more doctors to certify the grantor is not physically or mentally able to handle his or her financial affairs.

### **What do I do if the grantor is incapacitated?**

If all assets have been transferred to the trust, you will be able to step in as trustee and manage the grantor's financial affairs quickly and easily, with no court interference.

First, make sure the grantor is receiving quality care in a supportive environment. Give copies of health care documents (medical power of attorney, living will, etc.) to the physician. If

someone has been appointed to make health care decisions, make sure he or she has been notified. Offer to help notify the grantor's employer, friends and relatives.

Next, find and review the trust document. (Hopefully, you already know where it is.) Notify any co-trustees as soon as possible. Also, notify the attorney who prepared the trust document; he or she can be very helpful if you have questions. You may want to meet with the attorney to review the trust and your responsibilities. The attorney can also prepare a certificate of trust, a shortened version of the trust that also proves you have legal authority to act.

You will want to become familiar with the grantor's insurance (medical and long term care, if any) and understand the benefits and limitations. Assuming the insurance will cover a certain procedure or facility could be a costly mistake.

Have the doctor(s) document the incapacity as required in the trust document. Banks and others may ask to see this and a certificate of trust before they let you transact business.

If there are minors or other dependents, you will need to look after their care. The trust may have specific instructions. If the grantor's incapacity is expected to be lengthy, a guardian (of the person, not assets) may need to be appointed by the court. The attorney can help you with this.

Become familiar with the finances. You need to know what the assets are, where they are located and their current values. You also need to know where the income comes from, how much it is and when it is paid, as well as regular ongoing expenses. You may need to put together a budget.

If you cannot readily find this information, others (family members, banker, employer, accountant) may be able to help you. Last year's tax returns may be helpful. Also, if you discover any assets that were left out of the trust, the attorney can help you determine if they need to be put into the trust and can assist you.

Apply for disability benefits through the grantor's employer, social security, private insurance and veteran's services. Notify the bank and other professionals that you are now the trustee for this person. Put together a team of professionals (attorney, accountant, banker,

insurance and financial advisors) to help you. Be sure to consult with them before you sell any assets.

Now you can start to transact any necessary business. You can receive and deposit funds, pay bills and, in general, use the person's assets to take care of him or her and any dependents until recovery or death.

You'll need to keep careful records of medical expenses and file claims promptly. Keep a ledger of income received and bills paid. An accountant can show you how to set up these records properly. The trust may require you to send accountings to the beneficiaries. Also, don't forget income taxes (due April 15) and property taxes.

### **What happens if the grantor recovers?**

You go back to being a co-trustee or successor trustee and the grantor resumes taking care of his or her own financial affairs. It's very easy, and there is no court involvement.

### **What do I do when the grantor dies?**

You will have essentially the same duties as an executor named in a will would have. But if all titles and beneficiary designations have been changed to the grantor's trust, the probate court will not be involved. That means you will be able to act on your schedule instead of the court's.

The trustee is responsible for seeing that everything is done properly and in a timely manner. You may be able to do much of this yourself, but an attorney, corporate trustee and/or accountant can give you valuable guidance and assistance. Here's an overview of what needs to be done.

Inform the family of your position and offer to assist with the funeral. Read the trust document and look for specific instructions. Notify a co-trustee as soon as possible.

Make an appointment with an attorney to go over the trust document, trust assets and your responsibilities as soon as possible. Do not sell or distribute any assets before you meet with the attorney.

Before the meeting, make a preliminary list of the assets and their estimated values. You'll need exact values later, but this will help the attorney know if an estate tax return will need to be filed (due no later than nine months after the grantor's death). If there is a surviving

spouse or if the trust has a tax planning provision, the attorney may need to do some tax planning right away. The trust may also need its own tax identification number.

Collect all death benefits (social security, life insurance, retirement plans, associations) and put them in an interest bearing account until assets are distributed. If the surviving spouse or other beneficiary needs money to live on, you can probably make some partial distributions. But do not make any distributions until after you have determined there is enough money to pay all expenses, including taxes.

Notify the bank, brokerage firm and others of the grantor's death and that you are now trustee. They will probably want to see a certified death certificate (order at least 12), a certificate of trust and your personal identification.

To finalize the list of assets, you will need exact values as of the date of the grantor's death. Some assets will need to be appraised. An estate sale may need to be held to dispose of household goods and personal effects.

Keep careful records of final medical and funeral expenses, and file medical claims promptly. Keep a ledger of bills and income received. Contact an accountant and attorney to prepare final income and estate tax returns, if required. Verify and pay all bills and taxes. Make a final accounting of assets and bills paid, and give it to the beneficiaries.

If the assets are to be fully distributed, you will divide the cash and transfer titles according to the instructions in the trust. That's it...you're finished and the trust is dissolved.

If the assets are to stay in a trust (for minors, for a surviving spouse, for tax purposes or if the beneficiaries will receive their inheritances in installments), each trust will need a new tax identification number, and proper bookkeeping and reporting procedures will need to be established.

### **Should I be paid for all this work?**

Yes, trustees are entitled to reasonable compensation for their services. The trust document should give guidelines.

### **What if the responsibilities are too much for me?**

Consider hiring an attorney, bookkeeper, accountant or corporate trustee to help you. (A

corporate trustee can manage the investments and do the recordkeeping.) If you feel you cannot handle any of the responsibilities due to work, family demands or any other reason, you can resign and let the next successor trustee step in. If no other successor trustee has been named, or none is willing or able to serve, a corporate trustee can usually be named.

### What A Trustee Duty to Care

#### At Incapacity

- Oversees care of ill person
- Understands insurance benefits and limitations
- Looks after care of any minors and dependents
- Applies for disability benefits
- Puts together team of advisors
- Notifies bank and others
- Transacts necessary business
- Keeps accurate records and accounting

#### At Death

- Contacts attorney to review trust and process
- Keeps beneficiaries informed
- Puts together team of advisors
- Inventories assets, determines current values
- Makes partial distributions if needed
- Collects benefits, keeps records, files tax returns
- Pays bills, does final accounting
- Distributes assets to beneficiaries as trust directs