

You Are the Fiduciary

*A Brochure for
Individuals Named as
Executor or Trustee*

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SECTION OF REAL PROPERTY | TRUST & ESTATE LAW



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After an individual's death, his or her assets will be gathered, business affairs settled, debts paid, necessary tax returns filed, and ultimately assets distributed as the deceased individual (generally referred to as the "decedent") directed. These activities generally will be conducted on behalf of the decedent by a person acting in a fiduciary capacity, either as executor (in some states called a personal representative) or as trustee, depending upon how the decedent held his or her property.

As a first step, it's helpful to know the meaning of a few common terms.

A *fiduciary* is an individual or trust company that acts for the benefit of another. Trustees, executors, and personal representatives are all fiduciaries. A fiduciary may be appointed to act during the person's lifetime or after death. This brochure focuses on a fiduciary's role after the person's death.

A *grantor* (also called *settlor* or *trustor*) is an individual who conveys property by means of a trust; the person whose wishes are expressed in the trust. A deceased grantor is also referred to in this brochure as a decedent.

A *testator* is a person who has made a valid will (a woman is sometimes called a "testatrix"). A deceased testator is also referred to as a decedent.

A *beneficiary* is a person for whose benefit a will or trust was made; the person who is to receive property, either outright or in trust, now or later.

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A *trustee* is an individual or trust company that holds legal title to property for the benefit of another and acts according to the terms of the trust.

An *executor* (also called “personal representative”; a woman is sometimes called an “executrix”) is an individual or trust company that settles the estate of a testator according to the terms of the will.

Principal and Income, respectively, refers to the property or capital of an estate or trust and the returns from that property, such as interest, dividends and rents. In some cases, gain resulting from appreciation in value of the property may also be income.

As a general rule, the administration of a decedent’s estate or trust requires the fiduciary to address certain routine issues and follow several standard steps to distribute the decedent’s assets in accordance with his or her wishes. For purposes of this brochure, we will focus on activities that occur in an estate or trust immediately after the individual has died and the questions to ask as the fiduciary.

Important Questions the Fiduciary Should Ask

What does the will or trust say? It is important to read and understand the will or trust so that you will know who the beneficiaries are; what they are to receive and when; how many years the trust will be ongoing; and who, if any, are your co-fiduciaries.

Does the will or trust give everything outright, or does it create new trusts that may continue for several years? Does a trust mandate certain distributions (“All income earned each year is to be paid to my wife, Nancy.”) or does it leave this to the trustee’s discretion (“My trustee shall distribute such income as she believes is necessary for the education and support of my son, Alan, until he reaches age 25.”)? The document often imparts important directions to the fiduciary, such as which assets should be used to pay taxes and expenses, and will usually list the fiduciary’s powers in some detail. Most fiduciaries will re-

tain an attorney who specializes in the area of trusts and estates to assist them in performing their duties properly. An attorney’s advice is very helpful in ensuring that you understand the provisions of the will or trust and your obligation to the beneficiaries.

Is a probate proceeding required? Probate is the formal legal process that gives recognition to a will and appoints the executor or personal representative who will administer the estate and distribute assets to the intended beneficiaries. The laws of each state vary, so it is a good idea to consult an attorney to determine whether a probate proceeding is necessary and whether the fiduciary must be bonded, a requirement that often is waived in the will. Most probate proceedings are neither expensive nor prolonged.

What assets am I responsible for? It is the fiduciary’s responsibility to take control of all assets comprising an estate or trust. Especially when a fiduciary assumes office at the grantor’s or testator’s death, it is crucial to secure and value all assets as soon as possible. Some assets, such as brokerage accounts, may be accessed immediately; others, such as insurance, may require filing a claim. The usual practice is to engage a professional appraiser to value the decedent’s tangible property, such as household furniture, automobiles, jewelry, artwork, and collectibles. Depending on the nature and value of the property, this may be a routine activity, but you may need the services of a specialist appraiser if, for example, the decedent was a serious collector of rare or unusual items. Real estate, whether it is a home or commercial property, and any business interests, must also

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be valued. The fiduciary also must value financial assets, including bank and securities accounts. Besides providing a valuation for assets that may be reported on a court-required probate inventory or on the state or federal estate tax

return, the appraisal can help the fiduciary gauge whether the decedent's insurance coverage on the assets is sufficient; appropriate insurance should be maintained throughout the fiduciary's tenure.

What debts, taxes, and expenses must be paid? Generally, there is a statutory procedure for properly paying these items, including written notice to any known or reasonably ascertainable creditors. It is the fiduciary's duty to adhere to this procedure in determining when bills unpaid at death should be paid, and whether to pay them or notify creditors of temporary delay. In some cases, such as property or casualty insurance bills or real estate taxes, the estate may be harmed if the bills are not paid promptly. While most bills will present no problem, it is wise to consult an attorney at the outset as the fiduciary can be held personally liable for improperly spending estate or trust assets.

The fiduciary is responsible for a number of tax returns. First are the personal returns of the decedent; the final income tax return for the year of the decedent's death; a gift or generation-skipping tax return for the current year if needed; and prior years' returns that may be on extension all may need to be filed. In addition, if the value of the estate (whether under a will or trust) before deductions exceeds the amount sheltered by the *applicable exclusion amount* (as identified in the Tax Cuts and Jobs Act of 2017), which was \$10,000,000 in 2018 (and indexed to inflation thereafter), the fiduciary must file a federal estate tax return and may also need

to file a state death tax return. Because the estate or trust is also a taxpayer in its own right, a new tax identification number must be obtained and a fiduciary income tax return must be filed for the estate or trust as well. It is important to note for planning that the estate or trust and the beneficiaries may not be in the same tax brackets. Thus, timing of certain distributions can save money for all concerned. Some tax preparers and accountants specialize in preparing such fiduciary income and estate tax returns and can be very helpful. They are familiar with the filing deadlines and will be able to determine whether the estate or trust must pay estimated income taxes quarterly.

Most expenses that a fiduciary incurs in the administration of the estate or trust are properly payable from the decedent's assets. These include funeral expenses, appraisal fees, attorney's and accountant's fees and insurance premiums. The fiduciary must keep careful records and always obtain receipts.

How do I pay bequests and set up new trusts? Wills and trusts often provide for specific gifts of cash ("I give my niece \$50,000 if she survives me") or property ("I give my grandfather clock to my granddaughter Nina") before the balance, or residue, is distributed. The residue may be distributed outright or in further trust, such as a trust for a surviving spouse or for minor children. Be sure that all debts, taxes, and expenses are paid or provided for before distributing any property to beneficiaries.

Although it is usual to obtain a receipt and refunding agreement from the beneficiary that states that he or she agrees to refund any excess distribution made in error by the fiduciary, as a practical matter it is often difficult to retrieve such funds. In some states, you

The fiduciary is responsible for a number of tax returns:

- (1) personal income tax;**
- (2) federal and state estate tax; and**
- (3) fiduciary income tax.**

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will need court approval before making any distributions. Where distributions are made to ongoing trusts or according to a formula described in the will or trust, it is best to consult an attorney to be sure the funding is completed properly. Tax consequences of a distribution sometimes can be surprising, so careful planning is important.

How do I administer and invest ongoing trusts? Trusts are designed to distinguish between income and principal, as many of

them, especially older trusts, provide for income to be distributed to one person at one time and principal to either that same person at a different time or to another person entirely. For example, many trusts for a surviving spouse provide that all income must be paid to that spouse, but only pay the spouse principal in limited circumstances, such as a medical emergency. At the spouse's death, the remaining principal may be paid to the decedent's children to the decedent's children, to charity, or to other beneficiaries. Income payments and principal distributions can be made by check, or at the trustee's discretion by distributing securities or other property, as well as cash.

Unless a fiduciary has experience in this area, it is recommended that he or she seek professional advice regarding the investment of trust assets. In addition to good investment results, the fiduciary should invest within the applicable Prudent Investor Rule that governs the trust or estate. A skilled investment advisor can help the fiduciary decide how to invest, what assets to sell to provide cash for expenses, taxes, or

outright distributions, and how to minimize income and capital gains taxes.

During the period of administration, the fiduciary must provide an annual income tax statement (called a Schedule K-1) to each beneficiary who is taxable on any income earned by the trust. The fiduciary can be held personally liable for interest and penalties if the income tax return is not filed and the tax paid by the due date, generally April 15.

How do I close an estate or trust that is terminating? Estates close when the executor has paid all debts, expenses, and taxes; received tax clearances from the IRS and the state; and all assets on hand have

been distributed. Trusts terminate when a date or event described in the document occurs, such as the death of a beneficiary or the date the beneficiary attains a stated age. Some states require a petition to be filed in court before the assets are distributed and an estate or trust can be closed. When such a formal proceeding is not required, it is nevertheless good practice to require all beneficiaries to sign a document, prepared by an attorney, in which they approve of your actions as fiduciary and acknowledge receipt of assets due them. This protects the fiduciary from later claims by a beneficiary. A final income tax return must be filed and a reserve kept back for any tax that may be due.

Fiduciary work is time-consuming and can be difficult; it is appropriate to seek payment for your services.

Other Important Questions Everyone Should Ask

How do I title accounts? Each bank or investment firm may have its own format, but generally you may use, for a trust, "Alice Carroll, Trustee, Lewis Carroll Trust dated January 19, 2017," or, in a shorthand version, "Alice Carroll, Trustee under agreement dated

Fiduciary Dos

- › Do be sure you understand terms of the will or trust and the needs of the beneficiaries, both present and future.
- › Do provide a statement to all beneficiaries as required by the law of your state and keep the beneficiaries informed.
- › Do act impartially toward all classes of beneficiaries. You cannot favor the income beneficiary, who wishes a high current return, at the expense of the remainder beneficiaries, who may prefer growth, or vice versa. You are expected to deal fairly with all beneficiaries.
- › Do act with the utmost honesty at all times, and document major decisions and actions.
- › Do exercise good judgment and seek advice when you need it.
- › Do exercise reasonable care and skill when administering the estate or trust and retain professionals, including attorneys, investment managers and tax return preparers, when you lack the requisite skill or experience. Remember, others may be relying on you for their financial security and quality of life.
- › Do make assets productive at all times, including checking account assets.
- › Do read and understand your state's investment rules for fiduciaries. Many states have adopted the Prudent Investor Rule.

January 19, 2017.” For an estate, use “Alice Carroll, Executor, Estate of Lewis Carroll, Deceased.”

How do I sign my name in a fiduciary capacity? An executor signs: “Alice Carroll, Executor (or Personal Representative) of the Estate of Lewis Carroll, Deceased.” A trustee signs: “Alice Carroll, Trustee.”

Where do I hold the estate or trust assets? If you engage a trust company, they will open an account in the name of the estate or trust and provide regular statements showing all income and disbursements. You can open an investment account with a bank or brokerage company in the name of the estate or trust. All expenses and disbursements must be made from these accounts, and you should receive regular statements.

How (and how much) do I get paid? Fiduciary work is time-consuming and can be difficult; it is appropriate to seek payment for your services. The will or trust agreement may set forth the compensation. If they do not, many states provide either a fixed schedule to

Fiduciary Don'ts

- › Don't act to benefit yourself, or in a way that might place you in an apparent or real conflict of interest.
- › Don't commingle estate or trust assets with your own assets.
- › Don't make investment decisions without a professional's assistance unless you are skilled in this discipline. Poor investment management can result in losses to the estate or trust and may subject to personal liability.

Whether you stop acting because the estate or trust has terminated, or you wish to resign before the conclusion of your administration, you must be discharged, either by the local court or by the beneficiaries.

which you must adhere, or allow “reasonable” compensation, which usually takes into account the size and complexity of the estate, and the time spent by the fiduciary. Executor’s or trustee’s fees are taxable compensation to you. Several states do not permit the fiduciary to pay his or her own compensation without a court order; check with your attorney before you write yourself a check.

What if a beneficiary complains? Even professional fiduciaries, such as trust companies, receive complaints from time to time. The best way to deal with them is to do your best to avoid them in the first place by following the guidelines above. Many complaints arise because beneficiaries are not kept up to date on the administration of the trust or estate. Frequent communication with beneficiaries is a must. Most states require a fiduciary to send beneficiaries specific notices and accounting information. Whenever possible, consult with an attorney who specializes in trust and estate matters when a complaint arises.

Can I be sued or held personally liable? Your errors or mismanagement of a trust and estate can indeed subject you to personal liability. Common pitfalls include not paying tax or filing returns on time, improper investment choices (whether too conservative, too speculative, or favoring one beneficiary over another), self-dealing (buying assets for yourself or your family from the estate or trust, whether or not at market price), or allowing property or casualty insurance to lapse, resulting in a loss to the account. Your

best protection is to get good professional advice and to document your actions and decisions.

How am I discharged as fiduciary at the end of the administration?

What if I want to resign? Whether you stop acting because the estate or trust has terminated, or you wish to resign before the conclusion of your administration, you must be discharged, either by the local court or by the beneficiaries.

In some states, this is a formal process, involving the preparation of an accounting. In others, a relatively simple document signed by the beneficiaries can be used. If you are resigning prior to the conclusion of your administration, check the document to see who succeeds you as fiduciary. If no successor is named, you may need a court proceeding to appoint a successor before you can be discharged.

A Few Observations on the Role of Fiduciary

Acting as a fiduciary can be one of the most important things you do for a loved one. This brochure serves as a general guide to the duties and responsibilities of a fiduciary in the context of an estate or trust following the death of an individual and may be useful not only in helping you serve as a fiduciary, but also in your own selection of a fiduciary to act on your behalf when the time comes. It also may help you determine when to seek the expert assistance of a corporate fiduciary such as a trust company. With proper help and counsel, you can do a good job and earn the satisfaction of knowing that you have served the decedent and the beneficiaries well. ■

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