

LAWYER

NOVEMBER 11-24, 1998 VOL. 9 NO. 16 © IBJ CORP.

IN RE:

ESTATE PLANNING

Trustee shoulders myriad duties and liabilities

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Be careful what you wish for, you just might get it. That goes double for deciding to accept the job of trustee.

Considered by many "nice work, if you can get it," being a trustee carries with it obligations and pitfalls waiting to ensnare the unsuspecting.

The trustee is charged with administering the trust according to its terms. The specifics depend on the type of trust and the intentions of the settlor. In addition, every trustee has certain general duties. Failure to fulfill any duty owed either the settlor or beneficiaries results in a breach of trust, which can carry significant penalties and personal liability.

Those liabilities include any loss or depreciation in the value of the trust property; any profit made by the trustee; any profits which would have otherwise accrued to the trust; and the attorney's fees of the beneficiaries for pursuing the breach.

Taking over a trust from a previous trustee is perilous, as well. Unless the successor trustee has taken action to compel the previous trustee to deliver the trust property or redress a previous breach, the successor becomes liable for each breach of his predecessor.

General duties charged to the trustee include the duty to be prudent, loyal, protective, personally attentive and accountable to the beneficiaries. He is also expected to act cautiously and thoughtfully to protect and conserve trust assets.

Being prudent encompasses more than the total return on the investments. Since a specific investment is neither prudent, nor imprudent, but depends upon the circumstances sur-



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rounding each individual trust, the standard looks at the process used by the trustee. This process includes having a written investment policy statement describing how investments are to be selected, purchased, managed and even-

tually sold.

Loyalty is a more subtle issue. It involves putting the interests of the trust and beneficiaries before those of the trustee and defending the trust in actions that affect trust property. When the interests of the trust and beneficiaries collide, the trustee must fulfill the intentions of the settlor. It requires skill worthy of the diplomatic corps when a beneficiary wants a distribution and Uncle Bill is the trustee.

Caving in to pressure from beneficiaries just to "get them off of my back" has been considered putting the interests of the trustee ahead of the trust. This situation is also one of the strongest arguments against appointing a family member as trustee. Too often an angry rift develops within a previously close family when Uncle Bill has to tell Buffy and Jody "no" because a requested distribution would be a breach of trust.

Loyalty also precludes self-dealing. It is, at best, frowned upon when the trustee benefits from being on both sides of a transaction. Examples include loaning money to himself, selling property to or buying property from the trust, and, in the case of a corporate trustee, investing in or retaining the trustee's own stock.

Yes, the corporate trustee can have the beneficiaries grant it the authority to hold its own stock, but the rule of thumb in these situations should be "when in doubt, it's best to divest."

An especially slippery slope is when the attorney-trustee receives a trustee fee and also bills the trust for legal services. This controversial subject currently has the American Bar Association on one side and some state legislatures on the other. Conventional wisdom recommends contracting for legal services from an arm's-length, third-party source.

Indirect benefits accruing to the trustee is one of the most vague, and insidious, pitfalls. No one questions a business lunch paid for by a service provider during which trust matters are discussed, or the poinsettia received during the holidays. But what about complimentary tickets to a civic or sporting event or an invitation to attend an industry conference with all expenses paid? Where do you begin to draw the line?

There is also a loyalty due the beneficiaries in matters outside the trust. A trustee selling unrelated goods or services to a beneficiary for which he receives a fee or commission runs the risk of being accused of using undue influence.

While the duty to give personal attention requires the trustee to take active control in managing trust affairs, he is not expected to be a master of all professions. Hiring an accountant, lawyer and investment adviser as agents and delegating the daily tasks of administration to them is not only acceptable but also advisable in areas where the trustee lacks expertise.

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