TRUSTEE'S DUTIES AND RESPONSIBILITIES
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I have prepared this informative article and enclose it with the trust instrument so that you may refer to it from time to time as needed. This article consists of general information available to the public and is not intended as legal advice. Should you need independent legal advice of counsel, you should consult an attorney in your capacity as Trustee.

This article, as inferred by the simple title, is intended as an introduction to the duties and responsibilities of the position of trustee. For many, the term "trustee" conjures an image of a rotund banker in a plush, cigar smoke-filled office deciding whether or not granny is going to vacation this summer on the French Riviera or on the Jersey shore. While this image caricatures an outdated persona of the trustee, it is not completely inaccurate in the living memory of some. These days (and with growing frequency) it is the granny who serves as the trustee. In the current "information age," when financial information is just a mouse-click away, and many people are subscribing to financial newsletters and magazines, and more and more people are taking an active role in their financial planning, it is not uncommon to see fathers and mothers, daughters and sons, or husbands and wives performing the duties of trustee of a family trust. It is for these individuals that this article is intended.

Fiduciary Duty of a Trustee

The position of trustee, it must be stated, was and is now one of the most "sacred" of all relationships -- one in which a property holder *gives* her property in trust, to a person who promises to use the property for the *exclusive* benefit of another, the beneficiary. Just like other *fiduciaries,* the trustee is entrusted to make decisions involving the use of the property *solely* for the benefit of the beneficiary, and to the *exclusion* of any self-interest on the part of the trustee. This taboo against what is called *self-dealing* is strictly enforced by the courts and a trustee should take care to avoid even the appearance of impropriety.

Black's Law Dictionary provides an adequate definition of trustee, paraphrased as follows:

> **Trustee.** Person holding property in trust. The person appointed, or required by law, to execute a trust. One in whom an estate, interest, or power is vested, under an express or implied agreement to administer or exercise it for the benefit or to the use of another. One who holds legal title to property "in trust" for the benefit of another person (beneficiary) and who must carry out specific duties with regard to the property. The trustee owes a *fiduciary duty* to the beneficiary.

Fiduciary duty is the highest of duties one may owe to another: it is the duty to act in someone else's *exclusive* financial interest while subordinating your own interests in a particular matter or decision. Because the implication of this notion is one of sacrificing one's self-interests for the benefit of another, fiduciary duty is the highest standard of duty implied by law. Fiduciaries are deemed to hold, it would

seem, a "sacred trust," and the acts of a fiduciary should not even hint of impropriety. Courts are very strict in safeguarding such sacred trusts, and may rule quite harshly against those whom they adjudicate as having breached the trust placed in them. In the famous case of *Meinhard v. Salmon*[1], a partner of a general partnership (by law, a partner stands in fiduciary relationship to the other partners) had entered into a land deal without informing or including the other partner in the deal. Writing the decision on the appeal of that case, the famous Judge Benjamin Cardozo explained the importance of the fiduciary duty as follows:

> Many forms of conduct permissible in a work a day world for those acting at arms length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

Background: A Short History of "Uses" (Trusts)

The Trust transaction arose from English Common Law and served as a method to bypass the ancient requirement of *primogeniture*, whereby only the first-born son of a property holder was to inherit his father's property. In a feudal society such as medieval England, the land was considered owned by the King. The King, in turn, would grant rights to tracts of his land to his *vassals* in order to ensure their loyalty and military service. One purpose of primogeniture was to preserve the unity of patrimony in the male line[2], and avoid division of the large family land estates, thereby preserving the power of the crown. Land, which was the source of all wealth, could not be gifted by Will. The gift of land by Will "stood condemned," Maitland wrote, "because it is a death-bed gift, wrung from a man in his agony. In the interest of the legal state, a boundary must be maintained against ecclesiastical greed and other-worldliness of dying men."[3] The church, it seems, encouraged death-bed bequests of personal property (money, jewels, etc.) for religious and charitable purposes, as well as for the saving of the donor's soul. It would not suit the King to have all his land donated to and dominated by the church. Land, it would turn out, could only pass by primogeniture, thereby ensuring the continued loyalty of the vassal's heirs.

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[1] *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928).

[2] LAWRENCE W. WAGGONER, ET AL., FAMILY PROPERTY LAW 70 & n. 5 (1991).

[3] 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 328 (2d ed. 1911)

Nevertheless, landowners sought means to make provisions at death for their other children. This became possible in the early part of the fifteenth century as a result of courts of equity enforcing "uses" of the land for persons other than the royal land grantholder. The Lord Chancellor, the judge of the Chancery Court, recognized the "use" as not a transfer of full ownership rights to land, and so would enforce, for example, the following transaction: a landowner could transfer legal title of land to A, to hold to the use of the landowner for life and then to such uses as the landowner might appoint in his Will. Therefore, the "use" of the land could be determined by Will without the need to transfer title by Will, which was forbidden. Through the ages, the "use" became a commonplace vehicle for all sorts of property, and most commonly today, money and other intangibles. E.g., "I, Gary Grantor, give $100,000.00 and my IBM stock to Thomas Trustee, IN TRUST, for the use and benefit of Beverly Beneficiary."

The Importance of "Title"

Modern property law in America, derived from the English Common Law, defines title to property as the formal right to all the incidents of ownership, which may include, among others: the right to sell the land or give it away, the right to possess it, the right to improve it, etc. A person vested with *all* the incidents of ownership is said to hold title in *fee simple absolute*. A fee holder may transfer all or some of his ownership rights.

For purposes of making trust relationships, the law recognizes title to property as being divided into two distinct components: "legal title" and "equitable title" (the latter is also called "beneficial interest"). Legal title is also called "bare" or "naked" title; legal title confers no beneficial interest in the asset (e.g., income from rents) on the title-holder, but rather gives the legal title holder the power to hold and manage the asset. Benefits from the property are owned by the beneficiary, who holds "equitable title."

A trust relationship comes into being upon the transfer by the maker of the trust (called variously, grantor, trustor, trustmaker, or settlor) of what essentially is *legal title* to the property transferred, to another (the trustee) for the use and benefit of yet another (the beneficiary). The vesting of legal title in the trustee allows for the management and control of the property -- indeed, the duties of a trustee *require* management of the property according to the terms of the trust instrument. However, the trustee owns *no* benefit from the use of the property. The beneficiary is the sole receiver of the fruits of such trust property. Under this theory of separate title, when the beneficial title and legal title eventually come to be vested again in a subsequent beneficiary or beneficiaries, as it eventually must, *merger of title* causes the title to again become one of *fee simple absolute*, whereby *all* the rights of ownership, legal and beneficial, are vested in the ultimate beneficiary.

Duties and Statutory Requirements

The principal duty, therefore, is clear: the trustee manages the trust property for the exclusive benefit of the beneficiary or beneficiaries. The Trustee's powers to carry out this principal duty are defined and limited by the language of the trust instrument, which expresses (or should express) the

intent of the Settlor. Sometimes a trustee's powers are incorporated into the trust instrument by reference to statute. In Virginia this if often done by citing to Virginia Code Section 64.1-57, a copy of which accompanies this article). The statute provides a reasonable reference to powers needed by fiduciaries to manage the trust property in a most efficient way.

Another conflict may emerge if the trust provides for more than one class of beneficiary. In other words, a trust instrument may require the trustee to pay all *income* to a current beneficiary for life, and upon such beneficiary's death, to pay all *principal* then remaining to the remaining beneficiaries (*i.e.,* remaindermen). The more income paid to the current beneficiary, the less principal will be available for later distribution. This creates a clear conflict between present and future beneficiaries unless income and principal are clearly delineated. There may arise a dispute over what exactly is income and what is principal. The Virginia trustee should refer to Section 55-253 *et seq*., also referred to as the Uniform Principal and Income Act, which defines principal and Income as follows:

> *Principal* as used in this article means any realty or personalty which has been so set aside or limited by the owner thereof or a person thereto legally empowered that it and any substitutions for it are eventually to be conveyed, delivered or paid to a person, while the return therefrom or use thereof or any part of such return or use is in the meantime to be taken or received by or held for accumumlation for the same or another person.[4]
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> *Income* as used in this article means the return derived from principal.[5]

For purposes of Trust management, items that are clearly treated as principal are:

1. Real estate -- sale/purchase transactions.
2. Stocks -- sale/purchase transactions; splits.
3. Bonds -- sale/purchase transactions.
4. Savings certificates -- sale/purchase transactions.
5. Trust administration expenses, fees.

Items that are clearly treated as income are:

1. Rent from real estate during trust administration.
2. Dividends from stocks during trust administration.
3. Interest from bonds during trust administration.

[4]Va. Code § 55-243.

[5]*Id.*

4. Interest from savings certificates, bank accounts.
5. Ordinary expenses incurred from managing a trust.

For a more complete description of the treatment of principal and income, see the statute.

Another area that deserves mentioning is the aspect of *statutory* duties of a fiduciary. Some trusts, especially those created by Will (known as testamentary trusts), are required to be supervised by the court, which requires that the trustee make an initial inventory of the trust property, and then file an accounting with the court once every year. The trust instrument, or Will creating the trust, may include language that waives such requirement of court supervision. However, by invoking statute[6], any person interested may move the court to require a trustee to give bond with surety, to qualify before the court, and render such reports as are necessary. This means that a beneficiary may at any time ask the court to supervise the trustee, whether or not it is required by the trust instrument. Trustees of testamentary trusts *must* make yearly accounts to the court unless the Will waives such accounting.[7] If the Will waives the requirement for accounting, the trustee still must: (1) within 90 days of qualification notify all adult beneficiaries entitled to receive either principal or income; provide each with a copy of the applicable Will provision; advise each of his or her right to require an annual accounting; and (2) annually thereafter provide each such beneficiary an accounting upon request.

Summary

The position of trustee is one of high responsibility. Those trustees who carry out their duties efficiently and effectively earn the respect of professionals who work closely with them -- attorneys, accountants, investment advisors. The primary duty of a trustee is to observe the fiduciary nature of the position and always act in the best interests of the beneficiaries, taking care not to give even the impression of impropriety or self-dealing. Trustees are held to the highest standard of care and must take their responsibilities with all due solemnity. In carrying out the duties of the position, the trustee may rely on the advice and help of other professionals, but are not thereby released from the high standard of care assigned their station. Protection and conservation of the trust principal; payments to the beneficiaries upon the provisions of the trust instrument; distribution of the remainder to named beneficiaries upon the end of the trust -- these are the responsibilities of the trustee that are to be held inviolate so long as the position is entrusted to you.

[6]See Va. Code § 26-1 *et seq.*

[7]Va. Code §§ 26-17.6, 26-17.7.

Addendum for Trustees of Irrevocable Life Insurance Trust (ILIT)

The essential duties of the Trustee of the ILIT are as follows:

1. Following the establishment of the trust, the Trustee will receive yearly the invoice for annual premium payment; upon receipt of the invoice, send notice to the insured and notify him or her of the arrival and amount of premium due.

2. The insured should send the Trustee a check in the amount of the premium, "payable to the order of [name of Trustee], Trustee of the [name of insured] Irrevocable Trust dated [date of trust]."

3. Upon receipt of the check, the Trustee should send two copies of a "Crummey" notice, each with the Trustee's original signature, notifying the beneficiary that funds in the amount of premium are being held and that the beneficiary has the right to withdraw the premium amount from the trust for a period of 30 days, unless waived. The Crummey letter should have a return stamped self-addressed envelope, and the beneficiary (or the beneficiary's custodian) should sign and return a copy of the notice, which should be kept permanently with the trust instrument. The beneficiary should keep the other copy.

4. Upon receipt of the returned Crummey notice, the Trustee endorses the insured's check as follows: "[Trustee's signature] pay to the order of [name of life insurance company] for policy [number]," and remits it to the company.

5. Upon the death of the insured, the Trustee should contact the personal representative of the insured to secure a copy of the death certificate, and then send notice of claim with the death certificate to the insurance company. The Trustee will receive the death benefits into the trust and will be charged with managing same according to the provisions of the trust instrument, and for the benefit of the beneficiaries named therein. The Trustee may seek legal, accounting, and/or investment advice from the respective professionals, but may not surrender his or her duties as fiduciary.