

September 18, 2000

# TRUSTEES' DUTIES

## Table of Contents

<b>1.</b>	<b>INTRODUCTION.....</b>	<b>1</b>
<b>2.</b>	<b>SURPRISE: YOU ARE THE TRUSTEE.....</b>	<b>1</b>
	2.1. Beginning.....	1
	2.2. Terminating Trustee Status. ....	2
<b>3.</b>	<b>INITIAL STEPS.....</b>	<b>2</b>
	3.1. Governing Document. ....	2
	3.2. Status. ....	2
	3.3. Assets. ....	2
	3.4. Beneficiaries.....	2
<b>4.</b>	<b>RESPONSIBILITIES.....</b>	<b>2</b>
	4.1. Initial Administrative Responsibilities. ....	2
	4.2. Bookkeeping Responsibilities. ....	3
	4.3. Investment Responsibilities.....	3
	4.4. To The Beneficiaries. ....	3
	4.5. Tax Responsibilities. ....	3
	4.6. Trust Remainder On Termination. ....	4
<b>5.</b>	<b>INDICATIONS OF A GOOD TRUSTEE.....</b>	<b>4</b>
<b>6.</b>	<b>APPROPRIATE TRUSTEES.....</b>	<b>4</b>
	6.1. Impact Of Time. ....	4
	6.2. You. 5	
	6.3. Independent 3rd Party (Individual). ....	6
	6.4. Children Or Other Heirs. ....	6
	6.5. Bank Or Trust Company. ....	6
	6.6. Protectors. ....	8
<b>7.</b>	<b>CALIFORNIA LAW.....</b>	<b>10</b>
<b>8.</b>	<b>LIABILITIES.....</b>	<b>11</b>

<b>9. PROTECTION.....</b>	<b>13</b>
9.1. Law.....	13
9.2. Governing Document. ....	15
9.3. Insurance.....	16
9.4. Operational Safeguards.....	16

September 18, 2000

# TRUSTEES' DUTIES

## 1. INTRODUCTION.

### 1.1. Prospective Trustees.

This handout is primarily designed for people who have been asked to be the trustee of an irrevocable trust.

**Review Document.** Before agreeing to be the trustee, you must review the proposed trust instrument to be sure it has the most up-to-date language to protect you from future claims. Better yet, have it reviewed by experienced trust counsel on your behalf.

**Special Circumstances.** You may also, at that time, seek to have specialized language added to the trust's boilerplate to reflect the peculiarities of your situation: beneficiaries and assets.

**Example.** The trust is to own the stock of a closely held business. Only one of three children is active in the business. How will you deal with compensating the working beneficiary, while still getting an adequate return for the other beneficiaries? How long can you safely keep 100% of the trust's assets invested in the business?

### 1.2. Trust Grantors.

This handout should also be of interest to people trying to decide whom to select as trustee. For example, after reading this handout, the trust creator might wish to have the trust drafted to allow the creator to retain flexibility and influence over the trust, without retaining formal tax "ownership." One way might be to give the trustee the power to amend the trust in certain situations, e.g., to fulfill the trust's original intent.

## 2. SURPRISE: YOU ARE THE TRUSTEE.

### 2.3. Beginning.

Assume you have just been asked to be a trustee. Or assume that you have been informed that, under the terms of a written trust agreement, you are now the trustee.

Relax. You cannot become a trustee without your consent. Until you sign the trust

agreement, or some other document under which you accept the responsibilities, you are not the trustee. Also, even once you have accepted the role of Trustee, you are not Trustee of any assets until they are transferred to your name as Trustee. That transfer must come either from the donor or from the previous Trustee.

#### **2.4. Terminating Trustee Status.**

There is a flip side to this. Assume that you are the Trustee, and no longer wish to be the Trustee. Can you just resign? No. You are still the Trustee until a new Trustee has accepted the role and received all of the Trust assets from you.

What if you wish to resign and no one else will take your place? You may petition the probate court for appointment of a successor. Presumably the cost of that court petition will be paid by the trust itself. However, be careful not to get yourself into a situation where such a procedure is your only way out.

### **3. INITIAL STEPS.**

Once you have become the Trustee, what should you do first?

#### **3.5. Governing Document.**

Study the trust agreement or Will.

#### **3.6. Status.**

Accept trusteeship.

#### **3.7. Assets.**

Take control of trust assets.

#### **3.8. Beneficiaries.**

Meet with grantor or beneficiary(ies) to determine income and principal needs.

### **4. RESPONSIBILITIES.**

#### **4.9. Initial Administrative Responsibilities.**

**Transfer** assets to trust ownership. See Probate Code §16009. If the trust was created under a will, review estate accounting to make sure amount distributed to trust is correct.

**Bookkeeping** records must be established.

**Inventory** trust assets & record tax bases & acquisition dates.

**Quality** & appropriateness of trust assets must be reviewed.

**Insurance** for trust assets must be adequate in both amount and types of coverage, including fire, earthquake and liability.

**4.10. Bookkeeping Responsibilities.**

**Collect** dividends, interest and proceeds of matured and called bonds.

**Reinvest** promptly.

**Record** details of all income & principal receipts & disbursements.

**4.11. Investment Responsibilities.**

Establish investment strategy appropriate to needs of present and future beneficiaries.

Make investment changes in timely manner and after thorough analysis.

Review trust assets regularly for quality and performance.

Supervise business and real estate interests.

**4.12. To The Beneficiaries.**

Remit income to beneficiary regularly and send detailed income and principal statements to beneficiary.

Exercise discretion about advancing principal to beneficiary if needed and if permitted by trust terms.

Fund minor beneficiaries' education, if trust allows.

Pay for support and medical needs of beneficiary, if beneficiary is ill.

**4.13. Tax Responsibilities.**

Track taxable income and assets' adjusted cost bases.

File fiduciary income tax returns annually and furnish data annually for beneficiary's tax returns.

Time investment transactions to minimize taxes.

**4.14. Trust Remainder On Termination.**

Determine proper time for partial and final distributions.

Calculate proper share of each remainder beneficiary.

Provide accounting and tax data.

Arrange transfer of assets.

**5. INDICATIONS OF A GOOD TRUSTEE.**

**5.15.** Retain trained professionals (staff or independent contractors).

**5.16.** Submit actions to independent audit and examination.

**5.17.** Seek legal counsel when needed.

**5.18.** Does not delegate authority, except where specific expertise is needed.

**5.19.** Avoids conflicts of interest.

**6. APPROPRIATE TRUSTEES.**

**6.20. Impact Of Time.**

An important consideration in selecting a trustee is the length of time the trustee may need to serve in that capacity.

**Long Period.**

Assume you are 40 years old and establish a trust now for your 10 year old child, and the trust is to terminate on the last to occur of two events:

- (i) child's 25th birthday; or
- (ii) your death.

Your life expectancy might be another 40 years. Therefore, it may be fine to name your best friend or your sibling as trustee. However, you must also give careful consideration to naming a successor trustee.

**Corporate Trustee.** You might, for example, simply name a corporate trustee as the successor, with the thought that the corporate trustee will still be "alive" when

needed.

**Individuals.** You might name a series of individual trustees, and give each the ability to name a successor. That allows future changes in the order of succession based on the then-acting trustee's best judgment.

**Protector.** You might also name a best friend as the trust's "protector." As such your friend may be given the power to remove the then-acting trustee and name a new one. Or perhaps just the power to remove the then-acting trustee, with your named successor automatically taking over.

### **Short Period.**

Assume you are named the trustee for a friend whose estate goes outright, free of trust, to the children in equal shares *immediately* upon death. Assume your friend dies on January 1, 1998. How long *might* you serve in that capacity?

First, the estate tax return (IRS Form 706) is due on October 1, 1998. Even if an extension is sought and granted, the tax is due on that date.

Second, assume the 706 is filed by the extension date (common for larger estates), April 1, 1999.

Third, the IRS is likely to issue an audit notice 18 months after the return is filed, October 1, 2000.

Fourth, the process from the first audit notice to the filing of a petition in Tax Court (if needed to dispute IRS valuation claims) takes about 1 year, October 1, 2001.

Fifth, from the time of filing a petition in Tax Court to the date the case is heard is typically 30 months, April 1, 2004.

Finally, from the time of hearing to the rendering of a decision is usually 1 year, April 1, 2005.

**Total Time From Death To Distribution: 7 years, 3 months.**

### **6.21. You.**

For a living (revocable or family) trust designed to avoid probate, you and your spouse may be the best choices. However, at some point due to health problems, you may be well-advised to resign in favor of someone else.

For a trust you establish to benefit your children or grandchildren, you should not be the trustee. Otherwise, there is a risk the IRS will attempt to include that trust's assets in your taxable estate.

#### **6.22. Independent 3rd Party (Individual).**

The best choice is often a friend, relative or business colleague whose judgment you trust. This is the best way to be sure the assets of an irrevocable trust for your children is not included in your taxable estate.

#### **6.23. Children Or Other Heirs.**

For a trust established for your children or other heirs, naming them as trustees may be like putting the fox in charge of the chicken coop.

**Alternative:** name the child + 1 trusted outsider. This way the child must *at least* consult with someone before making an investment or a distribution.

**Alternative:** name the child + 2 trusted outsiders. This way the independent trustees can out-vote the child.

**Alternative:** name the child as the sole trustee, but do not permit the child to make principal distributions until certain specified ages. That limits the child's ability to waste trust assets.

**Alternative:** name the child as the sole trustee for income distributions, but make a trusted outsider responsible for investment and principal distribution decisions.

#### **6.24. Bank Or Trust Company.**

A professional trustee is an excellent choice in some situations.

#### **Benefits.**

A professional trustee is not caught up in the family's history and psychology. The benefit may be impartial advice on distributions.

Also, a professional trustee that is not in the business of selling securities, insurance or real estate can give impartial investment advice.

Professional trustees routinely get discounts on brokerage fees.

Some will act as co-trustees with you or someone you trust.

**Danger: Staff Turnover.**

Select the professional trustee carefully. Some banks attempt trust work, but do not pay enough to retain quality people. Our clients meet a wonderful trust officer, only to discover that, in time of need, that trust officer has moved to another company.

By contrast, at least one local bank has a full-time trust staff of 23, with an average experience of over 20 years each in the trust business.

**Professional Trustee's Fees.**

An objection that some people make to using a professional trustee is cost. But that is sometimes deceptive: it is sometimes cheaper to have a professional handle the work for a fee than to have a relative or friend poorly discharge the trustee responsibilities. Below is an excerpt from a local bank's fee schedule for comparison:

**Acceptance Fee.**

Securities	\$ 20 per issue
Real Estate, Trust Deed Notes, Contracts of Purchase	\$ 75 each unit
Minimum Acceptance Fee	\$200

**Annual Fee** (Based On Assets' Value):

Bank has no investment responsibility	1/2 of 1% on \$1,000,000  3/8 of 1% on next \$4,000,000  negotiate over \$5,000,000
Bank has investment responsibility	1% of 1st \$1,000,000  8/10 of 1% on next \$4,000,000  negotiate over \$5,000,000
Minimum annual fee:	\$1,500.00

Due to the minimum fee, with insurance trusts the bank recommends using a person during the insured's lifetime, and then switching to the bank after the insured dies (and the policy matures).

**Distribution Fee.**

1% of principal distributed to ultimate beneficiaries other than Grantor.

**6.25. Protectors.**

**Reason For Use.** Conservative drafting is to not give the grantor and beneficiaries the power to remove and replace the trustee. Although a trustee can be removed for cause by a court, a judicial proceeding can be expensive and result in significant delay in achieving the client's desired goal. Also, the proceeding may not be successful.

**Source.** The office of "protector" has been borrowed from foreign trusts as a way to give the grantor additional influence over the trustees without fear of having the trust corpus includible in the grantor's estate. The trust protector provides another layer of checks and balances to monitor the trustee's activities to be sure they accord with the grantor's objective in setting up the trust.

**Usual Power.** A trust protector is a person who has the absolute power to remove any trustee and designate another. You might, for example, give one person the power as protector to remove a trustee, and give a different person the power as protector to name a new trustee.

**Candidates.** The role of protector is designed to give the grantor additional influence over the trust. Therefore, the best candidates to be protectors are those who are most likely to be completely subservient to the grantor's wishes.

**Number.** If more than one people are protectors, the trust instrument typically requires only one of them to act to remove the trustee. Sometimes a trust with multiple protectors will provide that a protector, having acted, is no longer a protector.

**Other Powers.** When used in foreign trusts, protectors often have even broader powers, including the power to:

- regulate trust investments;
- amend the trust;
- change the beneficiaries;
- remove the trust to another country; and
- revoke the trust and cause the funds to be repaid to the grantor.

**Fiduciary.** The goal is to insulate the protector from being considered a fiduciary. That is because fiduciary status carries liability with it. However, in most situations, even if the protector is held to be a fiduciary, the protector's liability will be limited to the protector's power: to remove (and sometimes name) a trustee. The protector should be protected by specifying that the protector is not responsible for monitoring the trustee's activities.

**Disclosure.** In most situations the grantor names a number of people as protectors. However, the protectors are not informed of that status until the grantor wishes to effect a change in trustees. This means that, upon the grantor's death, the protectors might not be aware of their power. However, that is usually acceptable because the protector is, in effect, an extension of the grantor, so with the grantor gone there is no further reason to have a protector.

**Flexibility.** The grantor only needs 1 protector to go along with grantor's wish to change trustees.

**Limits On Power To Appoint.** To ensure that the protector is not influenced by conflicts of interests, the protector should be prohibited from appointing as trustee the protector, the protector's spouse, any relatives of the protector, or any individuals in business with the protector and to prohibit the appointment as protector the grantor's spouse, beneficiaries of the trust, or any other potential object of bounty under the trust. Also, the protector should not be the grantor or any other person who has contributed property to the trust because of potential adverse federal estate tax consequences.

**Typical Clause.** Following is the type of language which might be added to a trust to facilitate the appointment of a protector:

**Initial Appointment.** Grantor appoints \_\_\_\_\_ as this Trust's Protector.

**Remove & Appoint Trustees.** The Protector may, in the exercise of sole and absolute discretion, remove any and all Trustees, designate successor Trustees in their place and appoint co-Trustees.

**Limit On Appointment Of Trustees.** The Protector may not appoint as Trustee himself or herself, Grantor, any other person who has contributed property to the trust, any person who is married to the Protector or who is related to the Protector or the Protector's spouse within the third degree of consanguinity, or any person who is a partner or fellow shareholder of the Protector in any enterprise in which the Protector holds a substantial interest within the meaning of §2036(c) of the Internal

Revenue Code as in effect on January 1, 1990, or to which the Protector devotes on an average more than 10 hours per week.

**Successor Protectors.** The Protector also may, in the exercise of sole and absolute discretion, designate by instrument in writing delivered to the Trustee(s) a successor Protector to act if there is no Protector otherwise appointed who is willing and capable of serving and revoke any such designation before it becomes effective.

**Limit On Appointment Of Protectors.** Neither Grantor, any other person who has contributed property to the trust, any descendant of Grantor, nor a spouse of any descendant of Grantor may serve as a Protector. Any successor Protector shall have all the powers of the initial Protector.

**Liability.** Grantor is not imposing any fiduciary responsibility on the Protector to monitor the actions of the Trustee(s). Except for any matter involving the Protector's own individual willful misconduct or negligence proved by clear and convincing evidence, no Protector shall incur liability due to any error of judgment, mistake of law, or action of any kind taken or omitted to be taken if in good faith reasonably believed by the Protector to be in accordance with the provisions and intent of this Trust. The Protector shall not be liable for failure to remove any Trustee even if the Trustee may be guilty of a gross violation of his or her fiduciary duties.

## 7. CALIFORNIA LAW.

California Probate Code §16000, entitled "Duty to administer trust," provides the basic Trustee mandate:

On acceptance of the trust, the trustee has a duty to administer the trust according to the trust instrument and, except to the extent the trust instrument provides otherwise, according to this division.

§16002, entitled "Duty of loyalty, requires "The trustee...to administer the trust solely in the interest of the beneficiaries."

§16014, entitled "Special skills," provides as follows:

- (a) The trustee has a duty to apply the full extent of the trustee's skills.
- (b) If the settlor, in selecting the trustee, has relied on the

trustee's representation of having special skills, the trustee is held to the standard of the skills represented.

§16040, entitled "Standard of care; modification by trust instrument," is a statement of the classic law applicable to Trustees everywhere in the country:

(a) The trustee shall administer the trust with reasonable care, skill, and caution under the circumstances then prevailing that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument.

(b) The settlor may expand or restrict the standard...by express provisions in the trust instrument. A trustee is not liable to a beneficiary for the trustee's good faith reliance on these express provisions.

## 8. **LIABILITIES.**

### 8.26. **Scope.**

If a Trustee is sued for acts or omissions described in this handout, or for other reasons, that liability may be personal. In other words, it may not be limited to trustee fees or any interest the Trustee may have in the trust.

Also, the potential plaintiffs include not only the trust's grantor and beneficiaries, but also others, e.g., the IRS.

### 8.27. **Standard.**

The standard for fiduciary responsibility is very high. However, it is very rare for a fiduciary to be held to a *strict liability* standard. Yet that standard was applied by a Delaware court in Madden v. Phelps, 671 A2d 870 (1995).

The issue in that case was: "what liability standard governs the executor or administrator to an heir or devisee when the administrator is unable to distribute the heir's entitlement to her because he has distributed the estate to a person not entitled to it? Answer: the strict liability standard is appropriate if the fiduciary "misdelivers" estate property before expiration of the period in which creditors make their claims and a final accounting is judicially accepted. By contrast, had the time for presentment of creditors' claims passed and final accounting been signed by the court, then the fiduciary's misdelivery would be actionable only under a negligence standard.

### 8.28. **Common Situations Giving Rise To Liability.**

A Trustee may come under attack by beneficiaries for many reasons, e.g.:

- (i) an investment decision proved to be a poor one;
- (ii) the failure to invest resulted in a loss to the trust;
- (iii) compensation taken by the Trustee;
- (iv) allocation of assets among various subtrusts;
- (v) exercise of discretion to make or not make a distribution to a beneficiary;
- (vi) alleged failure to minimize taxes, whether estate, income or other types.

In general, if a Trustee is sued, it is usually due to one of these 3 situations:

**Conflict Of Interest.**

Probate Code §16004 provides (in part) as follows:

(a) The trustee has a duty not to use or deal with trust property for the trustee's own profit or for any other purpose unconnected with the trust, nor to take part in any transaction in which the trustee has an interest adverse to the beneficiary.

...

(c) A transaction between the trustee and a beneficiary which occurs during the existence of the trust or while the trustee's influence with the beneficiary remains and by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duties. This presumption is a presumption affecting the burden of proof. This subdivision does not apply to the provisions of an agreement between a trustee and a beneficiary relating to the hiring or compensation of the trustee.

Many lawsuits against Trustees are based on using Trust assets as if they belonged to the Trustee. For example, one Trustee deposited Trust funds in a bank. In exchange, the bank made unsecured personal loans to the Trustee for which the Trustee might not otherwise have been eligible. The beneficiaries were able to show that the Trustee could have received a higher rate of interest on Trust funds at another bank which would not have made the unsecured loans to the Trustee.

**Investments.**

The Trustee has a duty to make Trust assets productive. See §16007. However, the highest duty is arguably to preserve principal. §16006, entitled "Control and preservation of trust property," provides as follows:

The trustee has a duty to take reasonable steps under the circumstances to take and keep control of and to preserve the trust property.

California's version of the Uniform Prudent Investor Act (UPIA) begins at Probate Code §16045. It is worth reviewing in details (a process that will take about 10 minutes), since many actions against Trustees are for making allegedly imprudent investments. For example, new Probate Code §16047(c)(8) (part of the UPIA) allows the trustee, when considering which assets to hold in the trust, to consider:

"An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries."

### **Others' Actions.**

Trustees often get sued for others' actions, e.g., by a co-trustee or investment manager. See Prob. Code §§16012 (Delegation of Duties); and 16013 (Co-Trustees):

If a trust has more than one trustee, each trustee has a duty to do the following:

- (a) To participate in the administration of the trust.
- (b) To take reasonable steps to prevent a co-trustee from committing a breach of trust or to compel a cotrustee to redress a breach of trust.

### **Fees.**

Beneficiaries often object to the fees a Trustee charges. However, a court will usually consider fees reasonable if they fall within the range of magnitude of what would be charged by a corporate trustee. Extraordinary fees may be appropriate. However, a cautious Trustee may seek beneficiary approval before taking them or, lacking that, may seek advance court approval.

## **9. PROTECTION.**

There are several potential sources of protection for the Trustee.

### **9.29. Law.**

California law provides a convenient procedure for a Trustee to receive court approval before proceeding with a proposed action. The ability to seek a court's approval is so broad that it is reprinted (in relevant part) below:

#### **§17200. Petitioners; Grounds for Petition.**

(a) ...a trustee or beneficiary of a trust may petition the court...concerning the trust's internal affairs or to determine its existence.

(b) Proceedings concerning a trust's internal affairs include, but are not limited to, proceedings for any of the following purposes:

- (1) Determining questions of construction of a trust instrument.
- (2) Determining the existence or nonexistence of any immunity, power, privilege, duty, or right.
- (3) Determining the validity of a trust provision.
- (4) Ascertaining beneficiaries and determining to whom property shall pass or be delivered upon final or partial termination of the trust, to the extent the determination is not made by the trust instrument.
- (5) Settling the accounts and passing upon the acts of the trustee, including the exercise of discretionary powers.
- (6) Instructing the trustee.
- (7) Compelling the trustee to report information about the trust account to the beneficiary, if
  - (A) the trustee has failed to submit a requested report or account within 60 days after written request of the beneficiary and
  - (B) no report or account has been made within six months preceding the request.
- (8) Granting powers to the trustee.
- (9) Fixing or allowing payment of the trustee's compensation or reviewing the reasonableness of the trustee's compensation.
- (10) Appointing or removing a trustee.
- (11) Accepting the resignation of a trustee.
- (12) Compelling redress of a breach...by any available remedy.
- (13) Approving or directing the trust's modification or termination.
- (14) Approving or directing the combination or division of trusts.

- (15) Amending or conforming the trust instrument in the manner required to qualify a decedent's estate for the charitable estate tax deduction under federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by IRS final regulations and rulings, in any case in which all parties interested in the trust have submitted written agreement to the proposed changes or written disclaimer of interest.
- (16) Authorizing or directing transfer of a trust or trust property to or from another jurisdiction.
- (17) Directing transfer of a testamentary trust subject to continuing court jurisdiction from one county to another.
- (18) Approving removal of a testamentary trust from continuing court jurisdiction.
- (19) Reforming or excusing compliance with the governing instrument of an organization pursuant to §16105.
- (20) Determining the liability of the trust for any debts of a deceased settlor. However, nothing in this paragraph shall provide standing to bring an action concerning the internal affairs of the trust to a person whose only claim to the assets of the decedent is as a creditor.
- (21) Determining petitions filed pursuant to §15687 and reviewing the reasonableness of compensation for legal services authorized under that section. ....

### **9.30. Governing Document.**

The best source of protection for a Trustee is the governing document itself. This is evidence of the trust creator's intent: to what standard of care should the Trustee behold?

In general, there are two types of trust documents. One type has an omnibus "indemnification" paragraph. Following is an example (from a document not prepared by this law firm):

Exculpation. Each individual...Trustee [is] personally liable only for [personal] willful misconduct or gross negligence. No Trustee shall be personally liable for making any delegation with reasonable care that is

authorized under this agreement, nor for...action taken without that Trustee's express or implied agreement. When...the Trustee's action is subject to a person's consent, consultation or direction, the Trustee shall not be personally liable for any loss due to any delay or failure to act due to this requirement, from any mistake in judgment as to that person's availability, or from following any direction.... Also, the Trustee shall not be precluded from buying from, selling to, or otherwise conducting trust business with that person, [despite] an apparent conflict of interest. While not required, the same procedure referred to in the 'Records and Accounts' paragraph of Exhibit A [getting the beneficiaries' written consent] to settle the Trustee's account may also be [used] to obtain the [beneficiaries'] conclusive consent...to the Trustee's specific conduct of any other particular matter. The Trustee shall [not] be personally liable for decisions relating to generation-skipping tax considerations, except for willful misconduct. The Trustee shall be indemnified and held harmless...for any claim, demand or suit falling within [these] exculpatory provisions...or otherwise within the Trustee's power, duty and authority. The cost of indemnification may be apportioned against the various trusts as the Trustee deems appropriate...."

The other type has language indemnifying the Trustee at each point in the agreement at which it lists a Trustee power or duty.

### **9.31. Insurance.**

Errors and omissions insurance may be available for Trustees. This must be discussed with a competent commercial insurance professional.

### **9.32. Operational Safeguards.**

There are several types of operational safeguards that a Trustee can adopt to limit potential future liabilities.

### **Communications With Beneficiaries.**

One approach is to keep the beneficiaries informed, *in writing*, of all trust activities. Prob. C. §16060 describes this as a Trustee's duty. An improvement over just mailing them a letter is to mail it *registered, return receipt requested*. That makes it harder for the beneficiaries to claim that they never received the information.

A further improvement is to obtain the beneficiaries' signature approving of the Trustee's actions, e.g., of the annual accountings. In some situations the Trustee may be able to condition a beneficiaries' receipt of a discretionary distribution on first

obtaining the beneficiaries' approval of an accounting, or even a full release of actions taken by the Trustee so far.

What if the beneficiaries will not sign? The Trustee can petition the probate court for approval of the Trustee's activities. See the citation of California law above.

### **Legal Review.**

Another approach is for the Trustee to review all significant Trust activities with experienced legal counsel. This should be done at least annually.

### **Professional Co-Trustee.**

Some trust instruments allow a trustee to name a co-trustee, usually an institutional co-trustee. That has the advantage of inserting a conservative professional organization into the situation. The Trustee is less likely to have a problem with paperwork (one source of Trustee liability), and has an experienced institution available (as an alternative to an experienced lawyer) with whom to review each situation.