

Estate Planning Council of Greater Miami
May 19, 2016

Do You Really Want To Be a Trustee? Why?
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Bruce's Maxims on Serving as a Trustee

1. No one does you a favor by asking you to be a trustee.
2. The job of a trustee is to say no.
3. Trustees are judged in hindsight, and as we all know, hindsight vision is 20/20.
4. A trustee should be like a fine piece of Chinese porcelain (impervious to acid) and like Muhammad Ali's sparring partner (you have to be able to absorb punches, you can't get angry, and you can't fight back).
5. If you do agree to a request to be someone's trustee, you'd better bask in the appreciation and the glow of the esteem in which you are held by the person who asked you – because you sure won't get it from the beneficiaries. If you do a good job, it's what you were supposed to do, and besides, you were paid to do it.

A. General Duties of Trustees. All citations are to the Florida Statutes unless otherwise noted.

1. General overall rule:

736.0801 Duty to administer trust.—Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this code.

Comment: This would seem to be merely stating the obvious. However, the requirement that the trustee administer the trust in accordance with the interests of the beneficiaries can present surprising consequences and liability based on hindsight judgment.

2. Duty to act prudently:

736.0804 Prudent administration.—A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

736.0901 Applicability of chapter 518.—A trustee shall invest trust property in accordance with chapter 518.

518.11 Investments by fiduciaries; prudent investor rule.—

- (1) A fiduciary has a duty to invest and manage investment assets as follows:

(a) The fiduciary has a duty to invest and manage investment assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust. This standard requires the exercise of reasonable care and caution and is to be applied to investments not in isolation, but in the context of the investment portfolio as a whole and as a part of an overall investment strategy that should incorporate risk and return objectives reasonably suitable to the trust, guardianship, or probate estate. If the fiduciary has special skills, or is named fiduciary on the basis of representations of special skills or expertise, the fiduciary is under a duty to use those skills.

....

(2) The provisions of this section may be expanded, restricted, eliminated, or otherwise altered by express provisions of the governing instrument, whether the instrument was executed before or after the effective date of this section. An express provision need not refer specifically to this statute. The fiduciary is not liable to any person for the fiduciary's reasonable reliance on those express provisions.

Comment: there is tension between these provisions concerning the duty to invest prudently (which can be waived) and the duty to act in the interests of the beneficiaries (which cannot be waived).

3. Duty of loyalty:

736.0802 Duty of loyalty.—

(1) As between a trustee and the beneficiaries, a trustee shall administer the trust solely in the interests of the beneficiaries.

4. Duty of impartiality:

736.0803 Impartiality.—If a trust has two or more beneficiaries, the trustee shall act impartially in administering the trust property, giving due regard to the beneficiaries' respective interests.

Comment: this duty is one that can be and often is waived by the terms of the trust. For example, the trust instrument might state that the settlor wants the trustee to give priority to the needs of the settlor's spouse over the needs of the settlor's children in deciding when to make discretionary distributions.

5. Duty to inform and account:

736.0813 Duty to inform and account.—The trustee shall keep the qualified beneficiaries of the trust reasonably informed of the trust and its administration.

(1) The trustee's duty to inform and account includes, but is not limited to, the following:

(a) Within 60 days after acceptance of the trust, the trustee shall give notice to the qualified beneficiaries of the acceptance of the trust, the full name and address of the trustee, and that the fiduciary lawyer-client privilege in s. 90.5021 applies with respect to the trustee and any attorney employed by the trustee.

(b) Within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, the trustee shall give notice to the qualified beneficiaries of the trust's existence, the identity of the settlor or settlors, the right to request a copy of the trust instrument, the right to accountings under this section, and that the fiduciary lawyer-client privilege in s. 90.5021 applies with respect to the trustee and any attorney employed by the trustee.

(c) Upon reasonable request, the trustee shall provide a qualified beneficiary with a complete copy of the trust instrument.

(d) A trustee of an irrevocable trust shall provide a trust accounting, as set forth in s. 736.08135, from the date of the last accounting or, if none, from the date on which the trustee became accountable, to each qualified beneficiary at least annually and on termination of the trust or on change of the trustee.

(e) Upon reasonable request, the trustee shall provide a qualified beneficiary with relevant information about the assets and liabilities of the trust and the particulars relating to administration.

Paragraphs (a) and (b) do not apply to an irrevocable trust created before the effective date of this code, or to a revocable trust that becomes irrevocable before the effective date of this code. Paragraph (a) does not apply to a trustee who accepts a trusteeship before the effective date of this code.

(2) A qualified beneficiary may waive the trustee's duty to account under paragraph (1)(d). A qualified beneficiary may withdraw a waiver previously given. Waivers and withdrawals of prior waivers under this subsection must be in writing. Withdrawals of prior waivers are effective only with respect to accountings for future periods.

(3) The representation provisions of part III apply with respect to all rights of a qualified beneficiary under this section.

(4) As provided in s. 736.0603(1), the trustee's duties under this section extend only to the settlor while a trust is revocable.

B. Mandatory duties. There are mandatory duties that cannot be waived, not even by the terms of the trust itself.

736.0105 Default and mandatory rules.—

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(2) The terms of a trust prevail over any provision of this code except:

....

(b) The duty of the trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(c) The requirement that a trust and its terms be for the benefit of the trust's beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.

....

(s) The duty under s. 736.0813(1)(c) and (d) to provide a complete copy of the trust instrument and to account to qualified beneficiaries.

(t) The duty under s. 736.0813(1)(e) to respond to the request of a qualified beneficiary of an irrevocable trust for relevant information about the assets and liabilities of the trust and the particulars relating to trust administration.

C. Liabilities. The ordinary standard for determining liability is negligence and breach of fiduciary duty. Co-trustees who breach their duties are jointly and severally liable for damages.

736.1002 Damages for breach of trust.—

(1) A trustee who commits a breach of trust is liable for the greater of:

(a) The amount required to restore the value of the trust property and trust distributions to what they would have been if the breach had not occurred, including lost income, capital gain, or appreciation that would have resulted from proper administration; or

(b) The profit the trustee made by reason of the breach.

(2) Except as otherwise provided in this subsection, if more than one person, including a trustee or trustees, is liable to the beneficiaries for a breach of trust, each liable person is entitled to pro rata contribution from the other person or persons. A person is not entitled to contribution if the person committed the breach of trust in bad faith. A person who received a benefit from the breach of trust is not entitled to contribution from another person to the extent of the benefit received.

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(5) The beneficiary's recovery of a judgment for breach of trust against one liable person does not of itself discharge other liable persons from liability for the breach of trust unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution.

(6) The judgment of the court in determining the liability of several defendants to the beneficiary for breach of trust is binding upon such defendants in determining the right of such defendants to contribution.

D. Federal tax liabilities. Trustees can be subject to personal liability for the unpaid tax liabilities of the settlor or the trust, beyond the remaining assets of the trust estate, in some circumstances.

31 U.S. Code § 3713 - Priority of Government Claims

(a) (1) A claim of the United States Government shall be paid first when—

(A) a person indebted to the Government is insolvent and—

(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

(ii) property of the debtor, if absent, is attached; or

(iii) an act of bankruptcy is committed; or

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

(2) This subsection does not apply to a case under title 11.

(b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

For a good recent summary of potential liabilities of executors and trustees, see a recent paper by the Hodgson Russ law firm: <http://www.hodgsonruss.com/newsroom-publications-8881.html>.

E. Other personal liabilities. Trustees can also be subject to personal liability beyond the assets of the trust estate (and in some cases, exceeding the value of all assets that were ever part of the trust estate). Examples include unlimited personal liability for damages from ongoing environmental contamination and hazardous waste caused by trust assets or operations; tort liabilities for personal actions; and failure to indicate fiduciary capacity in contractual obligations.

F. Exoneration from liability. Within certain limitations, it is possible to structure the trustee's role so that the trustee will be liable only for egregious misconduct.

1. Permissible exoneration from liability.

736.1011 Exculpation of trustee.—

(1) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that the term:

(a) Relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or

(b) Was inserted into the trust instrument as the result of an abuse by the trustee of a fiduciary or confidential relationship with the settlor.

(2) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless:

(a) The trustee proves that the exculpatory term is fair under the circumstances.

(b) The term's existence and contents were adequately communicated directly to the settlor or the independent attorney of the settlor. This paragraph applies only to trusts created on or after July 1, 2007.

2. Example of trust clause exonerating trustee from personal liability.

I relieve each Trustee from all liability for his or her actions or failures to act as Trustee, even if a court finds the Trustee to have been negligent or in breach of fiduciary duty, but no Trustee will be relieved from liability caused by his or her actions or failures to act done in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.

3. Reliance on indemnification agreements.

The settlor of a trust might agree to indemnify the trustee from liability incurred by the trustee for actions or omissions while serving as trustee. But such an agreement could potentially be subject to challenge on public policy grounds if a trustee is found to have acted in bad faith or with reckless indifference, particularly if the beneficiaries who were harmed bear the economic burden of the indemnity (for example where a deceased settlor has agreed to indemnify the trustee, and the funds for indemnification come from the deceased settlor's estate that will pour over to the trust). Furthermore, if an individual indemnitor dies, the provisions of the indemnification agreement will become unenforceable unless the trustee files a timely claim in the probate proceedings for the indemnitor's estate. If the trustee also serves as personal representative of the deceased indemnitor's estate, or if the assets of the estate will pour over into the trust administered by the trustee seeking to preserve indemnification rights, the trustee will have a conflict of interest that likely will cause the trustee to be removed from office or to be supplanted by a temporary fiduciary appointed to serve during the existence of the conflict of interest.

G. Defense against beneficiary demands and lawsuits. A trustee who is without adequate personal resources could be subject to pressure to succumb to the demands of disaffected beneficiaries, because of the legal fees that the trustee would incur to defend itself if sued by the beneficiary for breach of fiduciary duty.

1. Procedure required for trustee to pay its legal defense costs from trust assets.

736.0802 Duty of loyalty.—

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(10) Payment of costs or attorney's fees incurred in any proceeding from the assets of the trust may be made by the trustee without the approval of any person and without court authorization, unless the court orders otherwise as provided in paragraph (b).

(a) If a claim or defense based upon a breach of trust is made against a trustee in a proceeding, the trustee shall provide written notice to each qualified beneficiary of the trust whose share of the trust may be affected by the payment of attorney's fees and costs of the intention to pay costs or attorney's fees incurred in the proceeding from the trust prior to making payment. The written

notice shall be delivered by sending a copy by any commercial delivery service requiring a signed receipt, by any form of mail requiring a signed receipt, or as provided in the Florida Rules of Civil Procedure for service of process. The written notice shall inform each qualified beneficiary of the trust whose share of the trust may be affected by the payment of attorney's fees and costs of the right to apply to the court for an order prohibiting the trustee from paying attorney's fees or costs from trust assets. If a trustee is served with a motion for an order prohibiting the trustee from paying attorney's fees or costs in the proceeding and the trustee pays attorney's fees or costs before an order is entered on the motion, the trustee and the trustee's attorneys who have been paid attorney's fees or costs from trust assets to defend against the claim or defense are subject to the remedies in paragraphs (b) and (c).

(b) If a claim or defense based upon breach of trust is made against a trustee in a proceeding, a party must obtain a court order to prohibit the trustee from paying costs or attorney's fees from trust assets. To obtain an order prohibiting payment of costs or attorney's fees from trust assets, a party must make a reasonable showing by evidence in the record or by proffering evidence that provides a reasonable basis for a court to conclude that there has been a breach of trust. The trustee may proffer evidence to rebut the evidence submitted by a party. The court in its discretion may defer ruling on the motion, pending discovery to be taken by the parties. If the court finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court finds good cause, the court shall enter an order prohibiting the payment of further attorney's fees and costs from the assets of the trust and shall order attorney's fees or costs previously paid from assets of the trust to be refunded. An order entered under this paragraph shall not limit a trustee's right to seek an order permitting the payment of some or all of the attorney's fees or costs incurred in the proceeding from trust assets, including any fees required to be refunded, after the claim or defense is finally determined by the court. If a claim or defense based upon a breach of trust is withdrawn, dismissed, or resolved without a determination by the court that the trustee committed a breach of trust after the entry of an order prohibiting payment of attorney's fees and costs pursuant to this paragraph, the trustee may pay costs or attorney's fees incurred in the proceeding from the assets of the trust without further court authorization.

(c) If the court orders a refund under paragraph (b), the court may enter such sanctions as are appropriate if a refund is not made as directed by the court, including, but not limited to, striking defenses or pleadings filed by the trustee. Nothing in this subsection limits other remedies and sanctions the court may employ for the failure to refund timely.

(d) Nothing in this subsection limits the power of the court to review fees and costs or the right of any interested persons to challenge fees and costs after payment, after an accounting, or after conclusion of the litigation.

(e) Notice under paragraph (a) is not required if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee has committed a breach of trust.

2. Example of trust clause permitting trustee to pay legal defense costs from trust assets.

If a beneficiary brings proceedings against a Trustee for breach of fiduciary duty or some other reason, the Trustee may have a conflict of interest that ordinarily would prevent it from paying legal fees and costs from the trust estate to defend itself. That could result in a financial burden on someone named to serve as a Trustee, make someone who has been selected to serve as a Trustee reluctant to accept the position, and make it possible to cause someone serving as Trustee to be intimidated in the performance of the Trustee's duties because of the threats of proceedings that might force the Trustee to pay fees and costs from the Trustee's personal or institutional resources. For those reasons, any such conflict of interest is deliberately and intentionally waived so that the Trustee can hire counsel to defend himself, herself, or itself if proceedings are threatened or brought against him, her, or it for any reason (whether by a beneficiary or by someone else) and pay all reasonable fees and costs for his, her, or its defense from the trust estate while the proceeding is pending without approval or permission from any person, tribunal, or authority, regardless of any law to the contrary. The Trustees are not required to notify the beneficiaries or any other person, tribunal, or authority of these payments except through annual or other periodic accountings required by law. Fees may be awarded, disallowed, or allocated in whole or in part upon conclusion of the proceedings, as provided by law. The Trustee will account for all such fees and costs paid by him, her, or it as provided by law, subject to the following. No fees or costs that have been incurred by any individual Trustee shall be disallowed, and no fees or costs of any other person shall be assessed or charged to that individual Trustee personally, unless that individual Trustee acted in bad faith or with reckless indifference to the purposes of the trust or the beneficial interests of the beneficiaries

H. Ok, what if I'm just an employee and not a trustee?

1. Fletcher Cyclopedia of the Law of Corporations.

§ 1135. Statement of the general rules

It is the general rule that an individual is personally liable for all torts the individual committed, notwithstanding the person may have acted as an agent or under directions of another. This rule applies to torts committed by those acting in their official capacities as officers or agents of a corporation. It is immaterial that the corporation may also be liable.

Under the responsible corporate officer doctrine, if a corporate officer participates in the wrongful conduct, or knowingly approves the conduct, the officer, as well as the corporation, is liable for the penalties. The responsible corporate officer doctrine applies to public welfare offenses that impose strict liability by plain language and intent. The person injured may hold either liable, and generally, the injured party may hold both as joint tortfeasors.

Corporate officers are liable for their torts, although committed when acting officially, even though the acts were performed for the benefit of the corporation and without profit to the officer personally. Corporate officers, charged in law with affirmative official responsibility in the management and control of the corporate business, cannot avoid personal liability for wrongs committed by claiming they did not authorize and direct what was done in the regular course of

that business, with their knowledge and with their consent or approval, or such acquiescence on their part as warrants inferring such consent or approval. However, more than mere knowledge may be required in order to hold an officer liable. The plaintiff must show some form of participation by the officer in the tort, or at least show that the officer directed, controlled, approved, or ratified the decision that led to the plaintiff's injury. If an officer or director has constructive knowledge of fraudulent acts, it may be enough to attach personal liability. Circumstantial evidence, such as the way a corporation transacts business, can be used to prove constructive knowledge, and direct evidence may not be needed. A corporate officer or director may not seek shelter from liability in the defense that he or she was only following orders. Personal liability attaches regardless of whether the breach was accomplished through malfeasance, misfeasance or nonfeasance. However, there is authority that a corporate officer cannot be held personally liable for nonfeasance.

Personal liability for the torts of officers does not depend on the same grounds as "piercing the corporate veil," that is inadequate capitalization, use of the corporate form for fraudulent purposes, or failure to comply with the formalities of corporate organization. The true basis of liability is the officer's violation of some duty owed to a third person that injures such third person.

2. Beaubien v. Cambridge Consolidated, Ltd, 652 So.2d 936 (Fla .5th DCA 1995). "It is well settled that an individual acting for a corporate trustee may be personally liable to third persons injured by his actions even if the individual was acting as agent for the corporation. Such corporate agents owe duties not only to the corporation, but also to the beneficiaries of a trust administered by the corporation. William Fratcher, IV Scott on Trusts, sec. 326.3 (1989). In this case, the plaintiffs clearly alleged that Carr was acting as the corporate trustee's agent -- manager -- administrator -- and that his actions or inactions caused them a loss. Under Florida law, such an individual may be held personally liable where a tort has been committed."

The Final Maxim on Serving as a Trustee

If you are a trustee, you should think of yourself as being in a position of the highest honor and duty. As was said by Justice Benjamin Cardozo of the New York Court of Appeals in the often-cited passage from *Meinhard v. Salmon*, 249 N.Y. 458 (1928):

Many forms of conduct permissible in a workaday world for those acting at arm's 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. As to this there has developed a tradition that is unbending and inveterate. 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 (*Wendt v. Fischer*, 243 N. Y. 439, 444). 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.