Trustee Duties and Diligence: Tips for Driving Defensively in the Current Climate

By Matthew J. Shea and Marya P. Robben

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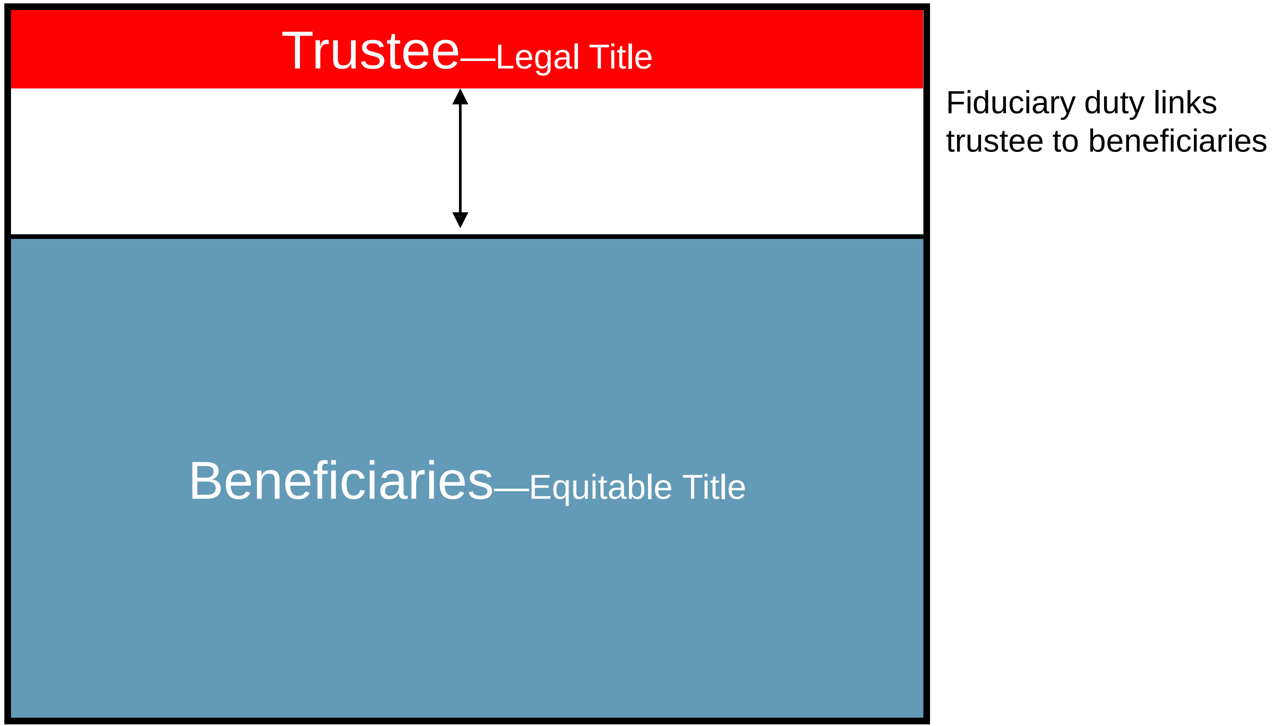
Lathrop GPM

The Fiduciary Duty

- The Fiduciary Duty is a massive duty that a trustee owes to beneficiaries of the trust and it is primary composed of the duty of loyalty and the duty of prudence but also including a number of subduties.
- Agency compared to Fiduciary Duty



Duty of Loyalty

- The Rule: The trustee must put the beneficiaries' interests above the trustee's interests at all times and for all purposes.

- Highlights:
  1. Trustee must not engage in any self-dealing.
  2. Trustee absolutely may not profit from any business dealings with the trust.
  3. The trustee cannot favor one beneficiary over other beneficiaries unless the document directs otherwise.

- Remedy for breach: If the trustee violates the duty of loyalty, the trustee can be held liable for appreciated damages.

Duty of Loyalty—Tips for Satisfying

1. Focus on them: Set own stress aside—it's about the beneficiaries.

2. Knowledge:
   - Know who the beneficiaries are and how to contact them.
   - Know the trust documents—terms, purposes, and trigger events.
   - Understand the intent of the grantor and what it takes to comply with that intent.

3. Communicate and Document: Contact the beneficiaries to find out how they are impacted by COVID and economy. Document information.

The Duty of Prudence

- The Rule: A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distribution requirements, and other relevant circumstances while exercising reasonable care, skill, and caution.

- Highlights:

1. Objective standard of care & subject to a reasonableness test.
2. Higher standard for professional trustees.
3. Several functions within this duty.

- Remedy for breach: If the trustee violates the duty of prudence, the trustee can be held liable for actual or presumptive monetary damages.

The Duty of Prudence-Functions

- The Custodial and Administrative Functions
  - Duty to Collect and Protect Property
  - Duty to Earmark Trust Property
  - Duty Not to Mingle Trust Funds with Trustee's Own
  - Duty to Keep Adequate Records of Administration
  - Duty to Bring and Defend Claims

Tip: Document everything in remote environment.

- Trustee Selection and Divided Trusteeship

Tip: Consider impact to cotrustees or successor trustee as situations change.

The Duty of Prudence-Functions

- The Investment Function—Requires the trustee to invest the trust assets as a prudent person would using reasonable care, skill and caution.
  - Allows for and mandates comprehensive portfolio management (modern portfolio theory)
  - Duty to diversify the trust assets—market, sector, and stock.
  - Delegate…but review and monitor.
  - Invest based on beneficiaries' situation along with purpose and terms of the trust.

Prudence (Investment)—Tips

1. Trust Invest Policy Statement:
   – If none, consider adopting one.
   – If trust has one, review it, confirm compliance and, if needed, update it. Document that you reviewed it.
2. Review stock concentrations: Have the market fluctuations increased the percentage of concentration in particular sector or company such that the investments are no longer in compliance with the investment policy?
3. Adjust investments for changed income needs of beneficiaries based on current environment.
4. Document your considerations of market changes and any actions taken or decision not to change.
5. Do not be reactive. Prudence is planning.

Prudence (Distribution)

- The Distribution Function—must act reasonably and with good faith when making distribution decisions
  - To act reasonably, you need to know the beneficiaries and know their needs.
  - If the trust is intended to provide for the beneficiary’s needs for life, that intent and those needs to be factored into distribution decisions.
  - Cannot let your personal bias (or that of a cotrustee) impact whether or not to make a distribution or not.

Prudence (Distribution)—Tips

- The Distribution Function—must act reasonably and with good faith when making distribution decisions

1. Make sure you know if the pandemic and economy has impacted a beneficiary's health, education, maintenance, or support needs.
2. Review each trust investment portfolio now, and document the completion of the review. Consider whether changes are needed due to any changes in the beneficiaries' situations.
3. If investment changes are made, make sure the needs of the beneficiaries are considered.
4. Do not distribute based only on a situational reaction; follow your normal process.

Duty to Inform and Account

- Must keep beneficiaries reasonably informed about the administration of the trust.
- Inform beneficiaries of material facts necessary to allow them to protect their interests.
- Tips:
  - Consider whether to seek court approval of trust accountings to approve your actions and investment decisions.
  - Inform beneficiaries how market changes are impacting the trust investments and future distributions.
  - Promptly respond to information requests, as always.

Duty of Impartiality

- Remain impartial and consider the best interests of any and all current, remainder, and contingent beneficiaries.
- Balance the requests and needs of current beneficiaries with the obligation to preserve some assets for future beneficiaries, which often causes some conflict.

Tip: Do not make a reactive decision based on changed circumstance without considering all relevant issues.

Questions?

- Marya P. Robben
  Marya.Robben@lathropgpm.com
  612-632-3010

- Matthew J. Shea
  Matt.Shea@lathropgpm.com
  612-632-3428