What It Means to Be a Trustee:
A Guide for Clients

by the Fiduciary Matters Subcommittee
of the ACTEC Practice Committee*

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APPENDIX B
A LIST OF TRUSTEES’ TYPICAL RECORDS

Legal Records
Governing instrument(s) (including disclaimers or documents exercising a power of appointment)
Written evidence of the resignations and appointments of trustees, preferably the signed resignations and
appointments themselves.
Court filings with respect to the trust (e.g., accounts, petitions for adjudication, schedules of distribution,
petitions for appointment or resignation of trustee, with all attendant papers)
Court judgments and decrees with respect to the trust and its trustees
Out-of-court agreements regarding administration/distribution/termination of the trust
Agreements with respect to trustee compensation (including fee schedules, formal waivers, etc.)
Tax receipts with respect to the trust fund
Legal opinions furnished by counsel to the trustees
Record of discretionary actions taken, and the basis for same
Record of investment decisions made, and the basis for same
Record of adjustments between principal and income (if permitted by local law) and basis for same
Record of selection/change of advisors (legal, investment, or tax) and basis for same

Financial Records
Tax returns (income, gift, estate, real estate, employment, etc.)
Asset and transaction statements
Deed, certificate, etc. of any non-financial asset owned by the trust
Tax basis of trust assets
Appraisals of trust assets
Accountings

Operational Records
All correspondence sent or received by the trustee in his or her role as trustee
Current family tree for beneficiaries
For each beneficiary: name, tax identification number, address, telephone numbers and email addresses; date of
birth, adoption, marriage, divorce, and death; and circumstances, if any, of incapacity
For each trustee: name, address, telephone numbers and email addresses

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Editor’s Note: The following is a guide for clients on the duties and responsibilities of a trustee. It should be of
great benefit to clients in deciding whether to act as a trustee and to Fellows in advising clients on what it means
to be a trustee. It was prepared by the Fiduciary Matters Subcommittee of the ACTEC Practice Committee.

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FOREWORD
Your attorney, as a Fellow of the American College of Trust and Estate Counsel (“ACTEC”), has commended this Guide to you because you are interested in what it means to be a trustee. Perhaps you are considering naming a trustee for your family, or perhaps someone has suggested that you serve as a trustee yourself.

With that in mind, a committee within the College has prepared this Guide for the use of its Fellows and their clients. The text is a consensus of suggestions and considerations. Reading the text will not equip you to be a trustee, but, instead, the authors intend to offer you an appreciation of what it means to be a trustee. For those considering accepting a trusteeship, the goal is not to encourage or discourage but rather to insure that any such decision is made with sufficient information to understand the basic ramifications.

The accuracy and applicability of issues raised in this Guide, and the possibility that there may be other relevant issues not raised here, should be addressed by your attorney in the context of the laws and practice in the jurisdictions whose laws govern particular trusts.

For information about the American College of Trust and Estate Counsel, and its Practice Committee which authored this Guide, please see Appendix C.

GENERAL STATEMENT
While there are many types of trusts, and trusts are used to accomplish a wide variety of objectives, as exemplified in Appendix A here, the essence of a trust is a legally binding arrangement under which

* Copyright 2005. The American College of Trust and Estate Counsel. All rights reserved. Members of the Fiduciary Matters Subcommittee are Donna G. Barwick, John H. Clymer, Edward M. Condit, David J. Estes, Allen D. Evans, Martin A. Heckscher, Virginia A. McArthur, Phillip F. Spalding, William C. Weinsheimer and Norris P. Wright. Editor’s note: Sources close to the subcommittee indicate that special mention is due to Ed Condit, who carried the laboring on this project for several years, and to Bill Weinsheimer, who got the project completed and across the finish line.
a person, as “grantor”1 appoints another person, as trustee, to hold property in a fiduciary2 relationship for a third person, the beneficiary.

That is the essential structure, but frequently the arrangement may be for multiple beneficiaries, and sometimes with multiple trustees, and occasionally multiple grants of a trust. A trust may be defined by law and the trust instrument, which may be the Will of someone who has died, or an agreement or other lifetime document, and which spells out the uses to which the property is to be applied. Appointing someone to be trustee implies a confidence in that person and an expectation that he or she will apply the property faithfully and according to the grantor’s objectives for the benefit of the beneficiaries and not for the personal benefit of the trustee.

The administration of a trust is governed primarily by state laws, although Federal tax laws and other regulatory provisions also are part of the picture. State trust laws differ from state to state, so the discussion in this Guide will necessarily be general in nature. The required document is the trust instrument in the administration, for example, can vary widely and may determine how burdensome the job of trustee can be. For a more detailed description of the duties of a trustee, you should consult your attorney who specializes in trust law.

We will begin with an overview of a trustee’s duties, some of which may be specified in the governing instrument and some of which may be explicit or implicit in applicable state and federal law. To perform those duties, trustees are given powers, and some of those as well are specified in the governing instrument while others are granted by the court as applicable state or federal law. Following overviews of those subjects, this Guide will offer practical and administrative points to consider when addressing what it means to be a trustee and points to think of in choosing a trustee or deciding whether to become a trustee.

GENERAL DUTIES OF A TRUSTEE

A trustee stands in a special relationship of fiduciary responsibility to the grantor of the trust and to the beneficiaries. In carrying out his or her fiduciary duties, the trustee, Throughout the relationship. The starting point is the trust instrument and its specification of what the trustee is to do to accomplish the purposes for which the trust has been established. For example in the case of the simplest trust disposition, the instrument might state that the trustee is to hold and invest the assets, to pay net income to beneficiary #1 for life and then to distribute the remainder to beneficiary #2. Beyond that, certain duties are imposed on trustees by state law. The emphasis on a particular duty may depend on the purpose for which the trust was created. In the rest of this section are general descriptions of basic categories of a trustee’s typical duties prescribed by the trust instrument and governing law.

Duty to Administer Trust by Its Terms. The trustee is obligated to administer the trust strictly by its terms. That means the trustee must be guided by the trust instrument, including any amendments, and, unless there is an absence of direction or ambiguity, must be limited by the intent apparent from the face of the trust instrument. Therefore it is the duty of the trustee to read and understand the entire trust instrument. To the extent the trustee needs guidance in interpreting the terms of the trust, he or she should seek advice from a qualified attorney.

Duty of Skill and Care. The laws of most states require that a trustee administer the trust with care, skill, prudence, and fidelity. That means any person with the job of serving as a trustee would use in the conduct of the trust’s activities to accomplish the purposes of the trust. Thus, even if a trustee has never previously served in such a capacity, he or she will be held to a high standard of performance.

Duty to Give Notices. The trustee must read the trust provisions carefully to determine the circumstances in which he or she is required to give notice to beneficiaries, co-trustees and successor trustees. For example, trusts typically require notice if a trustee desires to resign as trustee, or if another trustee or designate a successor trustee. Some trusts give beneficiaries rights of withdrawal of new contributions to the trust, or upon attaining a particular age, and the trustee must be careful to give notices to the beneficiaries of their withdrawal rights in those situations. In trusts which authorize the trustee to name a professional investment advisor, there is often a requirement that the beneficiaries be given written notice of such action. Similarly, notice of delegation of investment functions may be required by statute in states which have adopted the Prudent Investor Rule.

Duty to Furnish Information and to Communicate. The trustee has the duty to keep the beneficiaries informed of all transactions concerning the trust and any other matters which may affect the interests of the beneficiaries. The trustee must also provide information to the beneficiaries on a regular basis, such as a written report in the form of a statement of account.

APPENDIX A: TYPES, PURPOSES AND PROVISIONS OF TRUSTS

Trusted in our era almost always established by the terms of a written instrument, which may be the Will previously executed during the lifetime of a person who has died, or it may be an inter vivos instrument executed by a living person and which is effective immediately.

Trusts are created for a variety of purposes, but there are a few typical trusts that are the ones most often in estate planning. Understanding the type and purpose of the trust is key to understanding the duties of the trustee. In common usage the governing instrument may be loosely referred to as the “trust”, but strictly speaking the “trust” is the legal entity created under the instrument governing it.

Inter Vivos Trusts (Including “Living” Trusts). Inter vivos trusts are trusts created during the lifetime of the grantor. Inter vivos trusts are either revocable or irrevocable by the grantor. Inter vivos trust instruments are most typically called “agreements” or “indentures”, or sometimes “declarations” if the grantor is the trustee. Inter vivos trusts which are revocable are commonly referred to as “living trusts” and are often created to hold assets in the expectation that they should not be subject to the probate court process following the death of the grantor. Living trusts commonly continue after the disability or death of the grantor and the instrument spells out the subsequent terms of the ongoing trust. One common type of irrevocable inter vivos trusts is insurance trusts that are designed to hold life insurance so that the insurance proceeds are not included in the taxable estate of the grantor. Other types of irrevocable trusts are designed to hold lifetime gifts, as, for example, where the beneficiaries are minor children or are otherwise incapacitated and unable to manage the donated assets.

Testamentary Trusts. Testamentary trusts are created under the will of someone who has died and thus come into being only at the death of that person.

Common Subtrusts. Either in a Will or in an inter vivos trust a married person might create sub-trusts that would come into effect upon the death of the spouse and then continue for the lifetime of the surviving spouse. Examples would be a “marital deduction trust” intended to qualify for the estate tax marital deduction and a “credit shelter trust” or similar entity designed to hold assets qualifying for the grantor’s exemption from estate tax. Such trusts often also provide family subtrusts or separate shares for children or other ultimate beneficiaries.

Generation-Skipping or “Dynasty” Trusts. Trusts that are intended to take advantage of the exemptions from the federal generation-skipping transfer tax, benefiting distant or multiple generations of a person’s descendants, are sometimes called generation-skipping or “dynasty” trusts.

Charitable Split-Interest Trusts. Another common type of trust would benefit one or more individuals or one or more charities, often called a “charitable split-interest trust”. The federal tax law imposes strict restrictions on the use of charitable trusts that qualify for the charitable income tax and estate tax deductions. A common type of charitable split-interest trust is a charitable remainder unitrust that benefits a family member or members for life or a period of years, after which the trust estate is to pass to one or more charities.

1 The authors have used the term, “grantor” throughout, to refer to the person creating the trust. “Grantee” is the relevant term used in the U. S. Internal Revenue Code. The terms “settlor,” “donor” and “trustor” are synonymous with “grantor.” “Settlor” is a term inherited from trust practice in Great Britain, where trusts have been known as “settlements.”

2 “Fiduciary” is both a noun and an adjective, signifying a relationship of mutual reliance and faithfulness.
ness partner in a business or entity that will have to be administered by that person as trustee. Would selecting a different person be more desirable in those cases? The location of the trust property is another consideration. Geographic proximity to the beneficiaries is usually desirable, but the technology now available reduces the impact of this factor. Neverthless, a key consideration in selecting a trustee is the likelihood that the trustee will be available to the beneficiaries of the trust and will be a good communicator. A lack of communication skills or a reluctance of the trustee to be available to the beneficiaries may cause problems over the years.

**Term of the Trust.** How long a trust is anticipated to last may impact the choice of trustee. A person who is aging rapidly, has health problems, or is too busy, would generally not be a good candidate for a long-term trusteeship. Also, for longer duration trusts, a succession of trustees should be provided. A corporate trustee may not, for example, be available for the duration of a longer term trust.

**Fees.** It is generally understood that corporate trustees charge fees based on a percentage of the trust’s income or principal, or both. In smaller trusts that can be expensive (especially where minimum fees are used). Family members often serve without fees, or their relative, for a fee, but they usually need to have and compensate investment advisors, accountants or attorneys to assist them in carrying out their duties. Generally, those fees can be negotiated, and may be payable out of trust assets if the trust instrument or local laws permit.

**Summary.** The various considerations above must be weighed in determining who would be best suited to act as trustee. There is not always a good or clear answer. Because the initial selection may not work out, it is advisable to build into the trust agreement a process for the trustees to select, or for the adult beneficiaries (or some designated third party) to remove the trustee and, in either event, to appoint a successor trustee. Trusts are not static. The types of assets being administered, as well as other needs of the beneficiaries, are apt to change significantly over the years. In selecting a trustee one should anticipate the changing nature of the trust’s assets and the changing conditions of the beneficiaries as well.

In the event of resignation or removal or a trustee’s death a successor trustee must be appointed. Often the trust instrument will name a successor and the successor may either accept the appointment or not. If the former trustee is still alive, the former trustee has the duty to transfer all assets and pertinent records to the successor. In the event of the death of an individual trustee the responsibility for those actions will fall upon the personal representative of his or her estate. If there is a surviving spouse, the trust instrument, generally a financial institution or title company will recognize the affidavit of death of the former trustee signed by the successor trustee together with a copy of the trust instrument as sufficient to pass title. Alternatively, if the Court has appointed a successor trustee, the certificate of appointment by the Court will be sufficient to enable the new trustee to obtain title to the assets. The successor trustee, like an initial trustee, has the duty to see that all the assets are collected. As the foregoing discussion implies, it is often desirable to arrange for two or more trustees to serve concurrently, rather than to have one serving alone. Especially if the potential sole trustee is to be an individual and not a corporate trustee, there are tremendous advantages in having co-trustees to share the required exercises of judgment, as well as to assure continuity if one or more of them becomes unable to perform. In fact, even with a corporate trustee it is often desirable to appoint an individual co-trustee to serve concurrently to provide a personal touch and oversight.

**AFTERWORD.** To summarize, a trusteeship requires many disciplines, each as important as the other. An emphasis on the safety of the trust’s assets, a prudent and appropriate effort to maintain and enhance the investment value of the trust assets, awareness and management of continuing cycles of deadlines, and adequate maintenance of communications with beneficiaries.

The authors remind you that this Guide comprises a presentation of general guidelines and does not contain specific legal advice. The authors do not solicit or accept, and you should not rely on any information in this guide that may be of use to you or that may be useful to your professional advisor. The authors do not intend to create an attorney-client relationship with any reader of this Guide. Any advice or opinions expressed in this Guide are for informational purposes only and are not intended to be and should not be construed as legal advice. In any event, the reader is advised to consult a professional advisor regarding the applicability of any advice or opinions in this Guide to his or her particular situation.

Informed regarding the trust and its administration. The trustee should provide the beneficiaries with information about the assets of the trust and the trust’s investment performance, and should provide a statement of the services provided for any individual who is provided the services in a manner that is not less than the service to the trust.

**Duty to Account.** The laws of most states require that the trustee periodically provide the current trust account that identifies the account of the assets, liabilities, receipts, and disbursements of the trust. The form and frequency of the accounting will vary from state to state, and may depend in part on the value of the trust and the number and sophistication of the beneficiaries. Generally, the trustee is required to provide an accounting to each beneficiary who is income or principal, and a written statement that the accounting and recordation of the disbursements and receipts is currently distributed. It may also be appropriate to furnish remainder beneficiaries as well as accounting.

**Duty Not to Delegate.** Generally, the trustee has a duty not to delegate to others the performance of any acts the trustee can reasonably be expected to perform personally, or any acts involving the exercise of judgment and discretion. The trustee should keep records documenting the basis for any significant decision. The trustee may use agents, such as accountants, accountants and investment advisors, to advise or assist in the performance of administrative duties. The trustee may not, however, blindly follow their advice. Although some states specifically authorize the trustee to delegate investment functions to a professional investment advisor, the trustee must still maintain supervisory responsibility. The trust instrument may authorize the trustee to delegate some or all of his or her powers to a co-trustee.

**Duty of Loyalty.** The trustee is obligated to administer the trust solely in the interests of the trust beneficiaries. The trustee may not engage in any act that puts his or her personal interests in conflict with those of any of the trust beneficiaries.

**Duty to Avoid Conflict of Interest.** The trustee has a fiduciary duty to act in the best interest of the trust, and must not make a transaction or engage in a business relationship that is inconsistent with the trust beneficiary’s interest. The trustee must not in any way use their personal knowledge or personal gain or for any other purpose connected with the trust, nor to take part in any transaction in which the trustee has an interest adverse to a beneficiary. In general, the trustee may not use trust assets in any manner that benefits the trustee personally, even if there is no loss to the trust. The trustee shall consult with an attorney regarding any proposed transactions that the trustee suspects might violate this rule. Note, however, that the trust instrument may authorize the trustee to engage in a transaction which would otherwise be a conflict of interest, as long as the transaction is shown to be fair to the trust and to the beneficiaries. For example, if the trustee is a beneficiary, or is related to a beneficiary, the trust instrument may authorize the trustee to buy designated assets from the trust.

**Duty to Segregate Trust Property.** The trustee has a strict duty not to commingle personal funds or other non-trust assets with the property of the trust. Trust property must be separate at all times from the trustee’s personal funds. For example, trust accounts at banks and other financial institutions must be segregated from personal accounts, and held in separate accounts which are designated as property of the trust.

**Duty of Impartiality.** The trustee has a primary duty to treat the beneficiaries impartially, unless otherwise specifically provided in the trust instrument. That duty includes the duty of fairness to all of the beneficiaries. Generally, the trustee is responsible for determining the interests of lifetime beneficiaries with those of the remainder beneficiaries, and in balancing the interests of members of the same class. For example, as a part of the duty of impartiality, the trustee may not allow one beneficiary to use trust property, such as a vacation home, to the exclusion of the others without charging market rents to the beneficiaries.

**Duty to Invest.** The trustee has the duty to invest trust assets in a manner which is appropriate for the particular trust. Exercise of that duty is probably comes to mind initially when one thinks about what it means to be a trustee. Unless otherwise required by the trust instrument, the trustee will generally have a duty to diversify investments and determine an appropriate combination of investments for the trust. The trustee must see that the initial assets are received by the trustee. The trustee should become familiar with the specific investment directions given in the trust instrument, and also must know the investment directions and restrictions under governing state law. In states where the trustee must adopt the Prudent Investor Rule, a trustee who is not a professional investor would be well advised to delegate investment decisions to a professional advisor. The overall concept to keep in mind is that a trustee must be prudent in his or her handling of trust investments. This requires that the trustee determine the financial needs and risk tolerance of the beneficiaries in establishing the investment objectives and program for the trust.

**Duty to Enforce and Defend Claims.** The trustee has a duty to take reasonable steps to enforce claims on
behalf of the trust and to defend the trust against adverse claims. In deciding whether to enforce a claim, or defend the trust against a claim, the trustee should consider the economic realities of the situation. If the costs of enforcing or defending a claim outweigh the potential benefit to the trust, the trustee may be well advised to settle or abandon the claim. A successor trustee may be obliged to examine the acts of a prior trustee to determine if a possible claim exists in favor of the trust.

**Duty of Confidentiality.** The trustee should keep the affairs of the trust confidential and otherwise required by law. For example, the trustee should not disclose the terms of the trust, the identity and interests of the beneficiaries or the nature of the trust assets to anyone who is not a beneficiary of the trust or who does not need this information to assist in the administration of the trust. In addition, the trustee should keep confiden- tial any personal information he or she has learned about the beneficiaries through serving as trustee.

**POWERS OF A TRUSTEE.** On becoming a trustee one enters a relationship which is governed by rules and bounded by limits. A trustee who thinks of himself or herself as controlling the relationship is far more likely to encounter serious problems. The phrase that the more practical characterization is that of a faithful partner with the grantor and the beneficiaries, in fulfilling the trust's objectives.

Other sections of this Guide describe what must be done or achieved by the trustee, and to some extent what shall not be done. This section addresses "administering the power," which generally enable the trustee to perform his or her duties and to achieve the assigned objectives. The governing instruments for most modern trust relationships contain lists of "powers" and also a variety of restrictions. Because of the many types of permissible investments, the manner by which trust property may be bought, held and disposed of, and how discretionary elections and other decisions may be made. Beyond what is in the governing instrument lies a large body of trust law which the trustee must heed. The common law of trusts has grown over several centuries, largely originating in the English courts and subsequently adopted in a case by case and varied locally within courts and legislatures throughout North America. Since the middle of the Twentieth Century "interpretations" and "restatements" have brought some unity and innovation to harmonize diverse local rules.

With such a rich and sometimes confusing library of how to manage the trust, it may be surprising that any one trustee must consider the expected duration of the trust, the needs of the beneficiaries and applicable tax consequences from time to time.

Although there are risks in generalization, the operating principle in most instances is as follows: (a) if the governing instrument clearly allows an action to be taken by the trustee, it is appropriate and fair to the beneficiary, or (b) if permitted by state law the action may be taken even if the trust instrument lacks sufficient specificity, but (c) if the instrument and state law are silent the trustee may seek a local probate court or other court having appropriate venue and jurisdiction, for instructions as to the action to take.

**INVESTING TRUST ASSETS.** State law governs what investments are appropriate for trust assets. The trust instrument can also expand or reduce the limits of state law so to approve or disapprove investments in a particular trust. The law of trust investments is undergoing dramatic change. The governing instrument should be reviewed with that in mind. Bypassing the terms of the trust is not a probable solution. Historically, most trusts have been drafted to require that the trustee distribute income to one beneficiary or several beneficiaries and hold the principal for the remainder beneficiaries or ultimate beneficiaries.

In deciding upon investments, then, the trustee owes a duty of impartiality to both sets of beneficiaries. Therefore, the job of investing trust assets must include a local professional requiring a balance between income and capital appreciation. For many years, state laws created lists of legal investments for trusts. A trustee was protected from liability for investing in the listed securities. The late 1950’s saw the birth of an approach to investing often called Modern Portfolio Theory. That Theory’s premise is that risk can be quantified and that risk and return work together over time. Also, the theory holds that asset allocation, rather than market timing, or security selection, is a primary determinant of investment performance. Maximizing current return might be inconsistent with maximizing “wealth.” Investment professionals now typically concentrate on portfolio design to maximize “total return,” without forsaking the goal of capital appreciation. Some trustees may find such an allocation of capital difficult to explain or justify. Trustees should consider all the relevant circumstances before accepting the trusteeship.

**Resignation of the Trustee.** There is perhaps no more powerful measure of the seriousness of an appointment as trustee than the fact that once the appointment is accepted the trustee generally will have power to remove a trustee in cases where there has been a breach of duty by the trustee or other misfeasance. Further, it is sometimes provided in trust instruments that only a court may order the power to remove a trustee, either with or without cause.

**CHOOSING TRUSTEES.** At least one trustee must be named when a trust is established. That may be a qualified individual or an institution having trust powers under applicable law. Successor trustees may be named, in case the initial or prior trustee resigns or otherwise ceases to serve. Sometimes a trust instrument will describe a procedure by which successors are to be selected.

The duties and responsibilities of a trustee are var- ied. Some consider it difficult for one individual to carry out all of the duties and responsibilities of a trustee; however, an individual trustee may, in most cases, engage the services of advisors to assist the trustee. The other option is to name a corporate trustee, intending that the corporate trustee would undertake all of the duties and responsibilities of a trustee, without delegating them. (References to a “person” in the following text will include corporate as well as individual trustees.)

What are the primary considerations in deciding whom to select to be trustee?

**Responsibility and Reliability.** The trustee portfolio should be designed to carry out his or her duties in a timely and responsible manner. If there is any question whether that will be difficult for that person to accomplish, then perhaps a co-trustee, with capabilities that complement those of the other trustee, should be considered.

**Experience and Expertise.** A candidate for trusteeship should have had experience as trustee or as a bank officer or as having been involved in the operation of a business. Also, the candidate should have relevant experience in the field of the trust assets which the trustee would be managing. In addition, the candidate should be familiar with the trust laws of the state where the trust is located.

**Conflict.** Does the candidate have any other interests which might conflict with his or her duties as a trustee? For example, is the person a member of a family who has problems dealing with other family members who will be beneficiaries? Is the person a co-owner or busi-
organizations. Although the trustee may delegate some of those functions to outside providers, the trustee is ultimately responsible to the beneficiaries for the proper administration of the trust. In this regard, the trustee may aptly be considered to be the “captain of the ship.” Thus, the trustee must make sure that any service provider he or she engages for the trust is fully capable of handling the assigned task and has adequate information to do so on an ongoing basis.

While the trustee may delegate certain trust functions to an outside provider, he or she should recognize that trust instructions given to those providers are personal to the trustee and cannot be delegated to anyone. Most importantly, the trustee alone must determine how, when and to whom trust property will be distributed. The trust instrument will frequently describe those functions that the trustee is required to carry out “in his or her sole and absolute discretion,” such as deciding whether to grant a lease on distribution of trust property or whether the trust should be terminated before the specified termination date. For many years the laws of most states required a trustee to make all investment decisions and did not allow those decisions to be delegated to an investment advisor. However, “Prudent Investor Rule” statutes enacted in the 1970s permit a trustee to delegate investment decisions to an independent advisor provided he or she exercises reasonable care in selecting the advisor, establishes that the delegation is consistent with the terms of the trust, and monitors the investment performance on a regular basis.

Presumably the trustee will pay outside organizations or individuals for the services they provide to the trust, such as custody, accounting, tax and investment advice. While it is appropriate, depending on the terms of the governing instrument, for trust funds to be used in this manner, the trustee should review the costs of administering the trust (including the trustee’s own compensation) to make sure that the total is reasonable and does not exceed the amount allowable under the governing instrument or the law of the state where the trust has its situs or “legal home.”

A TRUSTEE’S COMPENSATION AND LIABILITY

A trustee who performs the prescribed duties, and who does not exceed the proper limits upon the trustee’s powers, is entitled to financial compensation for his or her services. Conversely, a trustee who fails to perform duties properly, or who exceeds limits on powers, may have legal liability to the trust and its beneficiaries.

Trustee compensation is governed by laws of the state in which the trust is administered and also by the terms of the governing instrument. In some states a fee schedule is set out by statute or court rules. Alternatively a fee schedule may be described in the governing instrument. Otherwise, trustee compensation is generally interpreted to mean a trust income or a share of trust property. The criteria for determining reasonable compensation may include (i) the degree of risk and responsibility assumed by the trustee, (ii) the size of the trust (as measured by detailed time records), (iii) the value of the trust estate and its income, (iv) customary fees charged in the community by other trustees, (v) whether the other sources of services were required of the trustee, (vi) the novelty and difficulty of the issues involved, and (vii) other relevant factors. Generally the trustee is entitled to draw fees whenever he or she believes appropriate and the services have been rendered. The trustee is also entitled to reimbursement for out-of-pocket costs that have been incurred. Generally trustee’s fees are subject to review, and the trustee may be required to account for payments to persons who render services on behalf of the trust. In some states prior court approval is required before a fee may be paid to the fiduciary. If there is more than one trustee, in some jurisdictions trustee’s fees up to the statutory amount may be paid to several trustees (i.e., in some states if a trust exceeds a certain size, up to three trustees can be paid the statutory amount). In other jurisdictions the trustee facilitates the payment of fees to a third party, who is not permitted to be paid for all trustees and must be divided between them as agreed upon. Fees paid to attorneys, accountants, investment managers, and the like may be separate and in addition to the trustee’s fee. However, to the extent that those fees are for services normally provided by a trustee, they may reduce the compensation to which the trustee is entitled.

If an individual trustee is a member of the beneficiary family, particularly if not a trained or professional fiduciary, it should be made clear in the governing instrument whether or not the trustee is to be entitled to compensation.

Trustee Liability. A trustee can become personally liable for a breach of duty as trustee when the breach results in a loss to the trust; however, the trustee is not a guarantor of the principal and income of the trust and usually will not be liable for losses that occur despite faithful performance of his or her duties. Grantors commonly provide in trust directing instruments that the trustee may have some measure of exemption from liability. Different states have different provisions regarding accounting and whether such an accounting starts the statute of limitations running so that after the relevant period of time the trustee would no longer be liable for an act which had occurred in the past. The trustee may also have a right to rely on the advice of persons acting as an investment manager, unless there is specific authority for delegating responsibility to the agent and relying on the agent’s advice. For example, some trust instruments provide that the trust will be insured to make distributions to the beneficiary during the existence of the trust. Those discretionary distributions may be coupled with other required distributions or may be required if certain conditions relating to the beneficiary. The provisions concerning discretionary distributions may vary widely among trust instruments. For example, the trust instrument may provide the trustee with discretion to make distributions to the beneficiary without any guidelines or without any limitations upon the trustee’s authority. On the other hand, the trust instrument may provide the trustee with written guidelines within which to exercise the discretionary distribution powers. One typical approach is to provide the trustee with authority to make distributions to the beneficiary for the beneficiary’s “health, education, support and maintenance.” Even so, such descriptive wording generally does not provide for the proper allocation of discretion. Discretionary allocations (often called “ascertainable standards”) will require substantial judgment by the trustee in determining the needs of the beneficiary. The trust instrument may provide that if the trustee fails to make mandatory distributions to the beneficiary to justify the exercise of the discretionary distribution power. The trustee may also find it necessary or appropriate to justify the discretionary distributions before making such discretionary distributions. All of those possibilities may be more specifically provided for in the trust instrument, or it may be that the trustee must rely upon the trust’s own independent judgment and evaluation. Termination Distributions. The final distribution which the trustee is required to make is the allocation of remaining assets. The decision about the timing and amount of the final distribution is determined by the terms of the trust. It is not unusual for the trustee to seek judicial authority for such termination distributions even though the trustee may have operated the trust independently of court supervision up to that time. Determining the appropriate beneficiaries and their respective distributive shares, and the powers for the further administration of the trust assets, are all important aspects of final distributions.

Total Return Trusts. With the acceptance of Modern Portfolio Theory it has become increasingly apparent that traditional principles of allocating receipts between income and principal may cause needless conflicts between the trustee and the beneficiaries. That conflict is most clearly demonstrated in the circumstances of a beneficiary receiving the income for a fixed period of time and the principal being distributed to another beneficiary at the termination of that period. What the beneficiary needs relates solely to income distributions will seek to maximize the allocation of receipts to the income account, the beneficiary who is destined eventually to receive the principal will prefer to maximize the allocation of receipts to principal. That divergence of interests can become difficult for the trustee to resolve, because some assets may provide greater income and less principal or vice versa. This divergence may create income and greater principal appreciation. As a result, there is a developing approach to trust distributions encompassed under the umbrella description of “total return trust.” Although that subject is beyond the scope of this Guide, it does justify a simple comment. Among the many developments under the “total return” also be the development among the beneficiaries of the trust to modify the allocation of receipts between income and principal to more properly reflect the interests of the beneficiaries, rather than having to use tra

Trustees have always been under a duty to diversify trust investments, but the newer laws designed to accommodate Modern Portfolio Theory particularly emphasize the importance of diversification.

DISTRIBUTING TRUST ASSETS

One of the fundamental duties of a trustee is to make reasonable distribution of trust income to the beneficiary.

When that obligation of the trustee may seem obvious, it is a matter of substantial importance and potential liability to the trustee. That is compounded by the fact some trusts give the trustee a discretion to make distributions to the beneficiary to justify the exercise of the discretionary distribution power. The trustee may also find it necessary or appropriate to justify the discretion before making such discretionary distributions. All of those possibilities may be more specifically provided for in the trust instrument, or it may be that the trustee must rely upon the trust’s own independent judgment and evaluation.

Termination Distributions. The final distribution which the trustee is required to make is the allocation of remaining assets. The decision about the timing and amount of the final distribution is determined by the terms of the trust. It is not unusual for the trustee to seek judicial authority for such termination distributions even though the trustee may have operated the trust independently of court supervision up to that time. Determining the appropriate beneficiaries and their respective distributive shares, and the powers for the further administration of the trust assets, are all important aspects of final distributions.

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ditional rules of allocation. Another version of "total return" legislation allows for the conversion of a mandatory payment of net income into an annuity or proceeds at the age of 40% of the otherwise aggregate value of the trust assets.

There are also other methods of distribution which are not tied to the traditional income and principal allocations. The form and nature of these provisions are varied and sometimes complex, and require careful thought and reliance upon qualified legal counsel in their drafting and implementation.

RECORDS AND ACCOUNTINGS

Overview. To serve responsibly a trustee must keep clear trust records and provide accountings to beneficiaries. Records and accountings are management tools that are the basis for critical actions of the trustee including creation of a thoughtful investment policy, selection of administrators, trust investment in illiquid assets such as a closely-held business or real estate, strategic income and wealth transfer tax planning, and, of course, beneficiary reports. A trustee who is unable to account for the trust estate properly will likely have difficulty succeeding in a legal proceeding, and may even be removed or suffer a loss of compensation for their failure.

General Records of the Trust. Virtually all trusts hold financial assets, and those assets occasion written records such as bank statements, cancelled checks, brokerage statements and security trade confirmations. Other asset classes such as real estate will also have a routine set of records. Copies of filed tax returns are also a standard part of trust records. All trust records are important for legal and tax purposes and need to be retained in an orderly fashion. Reasonable record keeping is an inherent part of all trustee duties, particularly this duty, however, trusts and beneficiaries usually have a right to inspect trust records, subject to legal limitations in some cases. Appendix B contains a list of typical records that trustees keep.

Records of Trustee Actions. Trustees often are authorized by the trust instrument to make discretionary decisions. Those are nonrecurring events and need to be documented. For example, a trust instrument may authorize the trustee to distribute trust principal for educational expenses. If the trustee exercised discretion and makes a payment, the decision should be documented. A copy of the decision made, but some such written support is essential.

Trust Accountings. The beneficiaries of a trust have a legal right to receive sufficient information about the trust to protect their beneficial interests in the trust. That legal principle is the foundation of the trustee’s legal duty to account to the beneficiaries, and requires the trustee to disclose information. In addition to requiring trustees to account to beneficiaries, the law offers mechanisms for trustees to have their decisions and actions approved, thereby defining the scope of their authority. For example, a trustee may seek to have the trust beneficiaries consent to a specific transaction or to all transactions and trustee decisions during a specified time period. Indeed, the requirements of beneficiaries or of courts or the trustee in some cases are subject to direct court jurisdiction may be required to submit accountings for formal judicial approval. Even absent such requirement, a trustee may seek protection and finality by filing a formal accounting of all specific matters or of all transactions during a particular period of time. Accountings for periodic periods are also essential when there is a change of trustee, to ensure that the successor trustee understands his responsibilities with full knowledge and a clear state.

Form of Accountings. While there is a trend towards uniformity in trust accountings, the form of a trust accounting varies depending upon applicable local law, local practice and the specific circumstances of the trust. Most accountings should be prepared on the cash basis and a received trust fund is required to receive an adjustment in tax basis for Federal income tax purposes at the grantor’s death, subject to special rules. That adjusted basis is a factor that a trustee needs to consider in deciding whether to distribute trust assets during the grantor’s lifetime, rather than continuing to hold them until the grantor dies. A similar analysis would be required when a trustee considers whether to retain a power which would cause the inclusion of the trust assets in the trustee’s estate, or to renounce that power in order to keep the trust assets out of the grantor’s estate.

Charitable Trusts. Special provisions of the tax laws apply to trusts established entirely or partially for charitable purposes. Even if income is exempt from tax, the trustee will probably be required to file tax returns. Special assistance of qualified tax counsel should be obtained.

COMPLIANCE WITH OTHER GOVERNMENT REGULATION

A trustee should acquire at least a general idea of the impact of the securities laws as they apply to persons who invest other people’s money. The applicable body of Federal law is the Investment Advisers Act of 1940, and there are complementary state statutes in effect. A trust is a fiduciary and subject to the regulations of an occasional trustee, and not on a professional basis, may have no involvement with those laws, but every trustee is well advised to seek qualified legal counsel for guidance as to the need to register or otherwise comply with those laws. It is sometimes necessary for a trustee to comply with the requirements of other authorities quite separately from those administering securities laws or tax laws.

Courts of probate jurisdiction exercise broad authority over many categories of trusts, particularly those provided under decedent’s Wills. All practicing lawyers who are familiar with probate law practice will know the requirements for such procedures as the following: best appraisals, local market, the use of broker's lists, and the like. Each as stated above, and a host of duties assigned to the beneficiaries. (See the chapter on the law of protest of probate offices in the Uniform Probate Code and the Uniform Trust Code.)

In all types and areas of compliance with laws and regulations, and throughout the course of administering a trust, the trustee should consult with qualified legal advice as to peculiarities of local law and any aspect which is not thoroughly within the knowledge of the trustee.

A TRUSTEE’S CHOICE, USE AND COMPENSATION OF ADVISORS AND SERVICE PROVIDERS

Up to this point the trustship an individual trustee must provide for a variety of services to implement the administration of the trust. Those services will be required to fulfill some or all of the following functions:

(a) arranging for safekeeping of trust property;
(b) maintaining an accurate and efficient system for processing and accounting for the receipts, disbursements, investments and distributions from the trust;
(c) accurately reporting the accounting and other relevant trust information to the beneficiaries on a periodic basis;
(d) arranging to make distributions and disbursements from the trust on a timely basis;
(e) engaging competent counsel to advise on legal and compliance issues, including compliance with the requirements of any court which has jurisdiction of the trust;
(f) obtaining competent fiduciary income tax return preparation services;
(g) engaging competent advice for the continuing important functions of the trust property; and
(h) providing adequate liability and fidelity insurance.

Many of the foregoing services are available through firms that provide services to the banks, trust companies, and other fiduciaries. The fees charged by such entities may vary widely.

For Federal income tax purposes, there are three types of trusts (other than those for charitable purposes). In the case of simple trusts, which are those required to file estate and income tax returns. The recipient beneficiaries pay tax on the net income paid to them and their income, which may include the sale of non-cash assets actually distributed as well as some income which may not have been distributed during the year. In the case of simple trusts, which are those whose trustees have discretion over whether income is distributed to the beneficiaries, any income not distributed to the beneficiaries during the year will be taxed to the trust, while income which is distributed is taxable to the beneficiary who has received it. Income of grantor trusts is taxed to the grantor, whether or not a distribution of trust income is made. The third type includes revocable trusts, but it may also include certain irrevocable trusts due to special tax rules that may cause a person having certain powers over the trust to be treated as “grantor” of the trust for income tax purposes.

Generally, the trust pays tax on net capital gains realized by the trust, even if principal is distributed to beneficiaries in the same year, although there are some exceptions to that rule.

Other Income Tax Considerations. Assets included in an estate of a deceased trustor who receive an adjustment in tax basis for Federal income tax purposes at the grantor’s death, subject to special rules. That adjusted basis is a factor that a trustee needs to consider in deciding whether to distribute trust assets during the grantor’s lifetime, rather than continuing to hold them until the grantor dies. A similar analysis would be required when a trustee considers whether to retain a power which would cause the inclusion of the trust assets in the trustee’s estate, or to renounce that power in order to keep the trust assets out of the grantor’s estate.
The rules of allocation. Another version of "total return" legislation allows for the conversion of a mandatory payment of net income into an annuity or other form in a payment of 3% to 5% of the prevailing aggregate value of the trust assets. There are also other methods of distribution which are not tied to the traditional income and principal allocation. The form and amount of those provisions are varied and sometimes complex, and require careful thought and reliance upon qualified legal counsel in their drafting and implementation.

RECORDS AND ACCOUNTINGS

Overview. To serve responsibly a trustee must keep clear trust records and provide accountings to beneficiaries. Records and accountings are management tools that are the basis for critical actions of the trustee including creation of a thoughtful investment policy, selection of investments, management of illiquid assets such as a closely-held business or real estate, strategic income and wealth transfer tax planning, and, of course, beneficiaries' mortality. A trustee who is unable to account for the trust estate properly will likely have difficulty succeeding in a legal proceeding, and may even be removed or suffer a loss of compensation for his or her potential liabilities.

General Records of the Trust. Virtually all trusts hold financial assets, and those assets occasion written records such as bank statements, cancelled checks, brokerage statements and security trade confirmations. Other asset classes such as real estate will also have a routine set of records. Copies of filed tax returns are also a standard part of trust records. All trust records are important for legal and tax purposes and need to be retained in an orderly fashion. Reasonable record keeping is an inherent part of all trustee duties, particularly this duty, and trust beneficiaries usually have a right to inspect trust records, subject to legal limitations in some cases. Appendix B contains a list of typical records that trustees keep.

Records of Trustee Actions. Trustees often are authorized by the trust instrument to make discretionary decisions. Those are nonrecurring events and need to be documented carefully. For example, a trust instrument may authorize the trustee to distribute trust principal for educational purposes. If the trustee exercises discretion and makes a payment, the decision should be documented and the rationale explained. If the decision creates a potential conflict, the trustee must disclose the conflict and generally avoid dealing in a more important capacity for the trust assets.

The trustee must comply with transfer tax laws such as the estate tax and generation-skipping tax and the rules for filing of relevant returns and payment of those taxes.

Income Taxes. Trusts generally are tax-paying entities, but many trusts do not pay income taxes. It is important to understand the tax consequences of the trust income taxation of trusts, or to retain an advisor who will provide assistance in this regard. State laws for taxation of trust income vary widely from state to state, and a trust may have to allocate the tax burden on a per beneficiary or per trust asset basis. A significant factor is that the federal marginal tax rates on trust income reach the highest rates at $9,750 of trust income at the time this Guide is written.

For Federal income tax purposes, there are three types of trusts (other than those for charitable purposes). In the case of simple trusts, which are those required to file and distribute trust income currently, the recipient beneficiaries pay the tax on whatever income is taxable, which may include the value of non-cash assets actually distributed as well as certain income which may not have been distributed. In the cases of grantor trusts, which are those whose trustees have discretion over whether income is distributed to the beneficiaries, any income not distributed to the beneficiaries during the grantor's lifetime will be taxed to the trust, while income which is distributed is taxable to the beneficiary who has received it. Income of grantor trusts is taxed to the grantor, whether a court for distribution of specific matters or of all transactions during a particular period of time. Accountings for prior periods are also essential when there is a change of trustee, to ensure that the successor trustee can understand his or her responsibilities with full knowledge and a clear state.

Form of Accountings. While there is a trend towards uniformity in trust accountings, the form of a trust accounting varies depending upon applicable local law, local practice and the specific circumstances of the trust. Most accountings should be prepared on the cash basis and a recessed trust should receive an adjustment in tax basis for Federal income tax purposes at the grantor's death, subject to special rules. That adjusted basis is a factor that a trustee needs to consider in deciding whether to distribute trust assets during the grantor's lifetime, rather than continuing to hold them until the grantor dies. A similar analysis would be required when a trustee considers whether to retain a power which would cause the inclusion of the trust assets in the trustee's estate, or to remove that power in order to keep the trust assets out of the trustee's estate.

Charitable Trusts. Special provisions of the tax laws apply to trusts established entirely or partially for charitable purposes. Even if income is exempt from tax, the trustee will probably be required to file tax returns. Special assistance of qualified tax counsel should be obtained.

COMPLIANCE WITH OTHER GOVERNMENT REGULATION

A trustee should acquire at least a general idea of the impact of the securities laws as they apply to persons who invest other people's money. The applicable body of Federal law is the Investment Advisers Act of 1940, and there are comprehensive state statutes in effect in all 50 states which generally require that a person or corporation engaged in an occasional trusteedship, and not on a professional basis, may have no involvement with those laws, but every trustee is well advised to seek qualified legal counsel for guidance as to the need to register or otherwise comply with those laws.

It is sometimes necessary for a trustee to comply with the recordkeeping requirements of other authorities, quite separate from those administering securities laws or tax laws. Courts of probate jurisdiction exercise broad authority over many categories of trusts, particularly those provided under decedent's Wills. All practicing lawyers who are familiar with probate law practice will know the requirements for such procedures as the following: being appointed as a personal representative, bonds and sureties, obtaining judicial instructions when necessary, and submitting proper accountings to the court, the beneficiaries, and, when there are charitable interests, to the state attorney general or other legally designated overseer of charities.

In all types of areas of compliance with laws and regulations, and throughout the course of administering a trust, the trustee should continue to seek qualified legal advice as to peculiarities of local law and any aspect which is not thoroughly within the knowledge of the trustee.

A TRUSTEE'S CHOICE, USE AND COMPENSATION OF ADVISORS AND SERVICE PROVIDERS

Up to the point of trusteeship an individual trustee must provide for a variety of services to implement the administration of the trust. Those services will be required to fulfill some or all of the following functions:

(a) arranging for safekeeping of trust property;
(b) maintaining an accurate and efficient system for processing and accounting for the receipts, disbursements, investments and distributions from the trust;
(c) accurately reporting the accounting and other relevant trust information to the beneficiaries on a periodic basis;
(d) arranging to make distributions and disbursements from the trust on a timely basis;
(e) engaging competent counsel to advise on legal and compliance issues, including compliance with the requirements of any court which has jurisdiction of the trust;
(f) obtaining competent fiduciary income tax return preparation services;
(g) engaging competent advice for the continuing important function of the trust property; and
(h) providing adequate liability and fidelity insurance.

Many of the foregoing services are available through arrangements with a trust company which is appropriately licensed, bonded and insured, and which will assume full responsibility for the administration of the trust. In other instances the services will be "unbundled," meaning that different aspects will be furnished by separate individuals or organizations.
Trustees have always been under a duty to diversify trust investments, but the newer laws designed to accommodate Modern Portfolio Theory particularly emphasize the importance of diversification.

**DISTRIBUTING TRUST ASSETS**

One of the fundamental duties of a trustee is to manage the trust assets (as differentiated from the discretionary duties of the trust instruments). While that obligation of the trustee may seem obvious, it is a matter of substantial importance and potential liability to the trustee. That is compounded by the fact that some significant questions arise when the trustee exercises its broad discretion in the determination of beneficiary distributions, both as to timing and amount. The issues surrounding distribution policy are relevant not only during the existence of the trust but also at the termination date when final distributions are required.

**Required Distributions during the Existence of the Trust**

If the trust instrument is clear and unambiguous, required distributions to a beneficiary during the existence of the trust are generally obvious to both the trustee and beneficiary, but if the wording of the trust instrument is not clear, or is ambiguous, the trustee may need to seek judicial interpretation. It is common for a trust to contain provisions regarding the frequency of distribution of net income earned from the trust assets. While the required income distribution may be clearly stated in the trust instrument, it does put considerable importance upon the trustee’s proper allocation of receipts between the income and principal of the trust and also upon the selection of appropriate investments. Another common form of required distribution is a specific dollar amount payable on a regular basis to the beneficiary. That dollar amount may be calculated in many different ways such as a percentage of the current value of the trust assets, as a fixed dollar amount, or as a combination of the two.

**Discretionary Distributions during the Existence of the Trust**

It is also common for the terms of the trust instrument to give the trustee certain discretion in making distributions to the beneficiary during the existence of the trust. Those discretionary distributions may be coupled with other required distributions or may be given in addition to those required distributions to the beneficiary. The provisions concerning discretionary distributions may vary widely among trust instruments. For example, the trust instrument may provide the trustee with discretion to make distributions to the beneficiary without any guidelines or without any limitations upon the trustee’s authority. On the other hand, certain trust instruments may provide the trustee with written guidelines within which to exercise the discretionary distribution powers. One typical approach is to provide the trustee with authority to make distributions to the beneficiary to provide for the beneficiary’s “health, education, support, and maintenance.” Even so, such descriptive wording generally leaves the trustee with considerable discretion. These discretionary distributions (often called “ascertaintable standards”) will require substantial judgment by the trustee in determining the needs of the beneficiary. The trustee may find it necessary or appropriate to make distributions before making such discretionary distributions. All of those possibilities may be more specifically provided for in the trust instrument, or it may be that the trustee must rely upon the trustee’s own independent judgment and evaluation.

**Termination Distributions.** The final distribution which the trustee is required to make is the allocation by the trustee of the net income and principal as originally contained in the trust fund after the termination of the trust. It is not unusual for the trustee to seek judicial authority for such termination distributions even though the trustee may have operated the trust independently of court supervision up to that time. Determining the appropriate beneficiaries and their respective distributive shares, and the powers for further distribution of those assets, are all important aspects of final distributions.

**Total Return Trusts.** With the acceptance of Modern Portfolio Theory it has become increasingly apparent that traditional principles of allocating receipts between income and principal may cause needless conflicts between the trustee and the beneficiaries. That conflict is most clearly demonstrated in the circumstance of a beneficiary receiving the income for a fixed period of time and the principal being distributed to another beneficiary at the termination of that fixed term. With this arrangement, the beneﬁciary relates solely to income distributions will seek to maximize the allocation of receipts to the income account, the beneﬁciary who is destined eventually to receive the principal will prefer to maximize the allocation of receipts to principal. That divergence of interests can become difﬁcult for the trustee to resolve, because some assets may provide greater income and less principal growth, while other assets may provide greater principal and greater income and greater principal appreciation. As a result, there is a developing approach to trust distributions encompassed under the umbrella description of “total return trust”. Although that subject is beyond the scope of this Guide, it does justify a simple comment. Among the many developments under the “total return also be the approach by which a trustee to modify the allocation of receipts between income and principal to more properly reflect the interests of the beneficiaries, rather than having to use tra-
behalf of the trust and to defend the trust against adverse claims. In deciding whether to enforce a claim, or defend the trust against a claim, the trustee should consider the economic realities of the situation. If the costs of enforcing or defending a claim outweigh the potential benefit to the trust, the trustee may be well advised to settle or abandon the claim. A successor trustee may be obliged to examine the acts of a prior trustee to determine if a possible claim exists in favor of the trust.

**Duty of Confidentiality.** The trustee should keep the affairs of the trust confidential, and otherwise required by law. For example, the trustee should not disclose the terms of the trust, the identity and interests of the beneficiaries or the nature of the trust assets to anyone who is not a beneficiary of the trust or who does not need this information to assist in the administration of the trust. In addition, the trustee should keep confidential any personal information he or she has learned about the beneficiaries through serving as trustee.

**POWERS OF A TRUSTEE**

On becoming a trustee one enters a relationship which is governed by rules and bounded by limits. A trustee who thinks of himself or herself as controlling the relationship is far more likely to encounter serious problems. The reason for this recognition is that the more practical characteristic is that of a faithful partner with the grantor and the beneficiaries, in fulfilling the trust's objectives.

Other sections of this Guide describe what must be done or achieved by the trustee, and to some extent what shall not be done. This section addresses "administrative powers," which generally enable the trustee to perform his or her duties and to achieve the assigned objectives. The governing instruments for most modern trust relationships contain lists of "powers and duties" which include such powers as adding new beneficiaries, naming a successor, making distributions and the like.

**INVESTING TRUST ASSETS**

State law governs what investments are appropriate for trust assets. The trust instrument can also expand or reduce the limits of state law so to serve the objectives of a particular investment in a particular trust. The law of trust investments is undergoing dramatic change. The governing instrument should be reviewed with that in mind, to determine what special expertise the trustee will need to remove a trustee, either with or without cause.

**RESIGNATION**

There is perhaps no more powerful measure of the seriousness of an appointment as trustee than the fact that once the appointment is accepted the trustee generally cannot resign or be removed by anyone acting for the trust. There are two major exceptions. First, the provisions of the trust instrument may provide a method for resignation and even establish a procedure for appointment of a successor trustee. Second, the trust may follow applicable legal procedures to secure a court approved resignation. These exceptions, however, are not substitutes for the trustee's careful consideration of all relevant circumstances before accepting the trusteeship.

**Resignation by the Terms of the Trust Instrument**

Many trust instruments provide a method of resigning as well as a procedure for the appointment of a successor trustee. If such language is clearly contained in the trust instrument, the trustee must follow those written provisions. That should include attention to (a) the trust instrument's procedure for the appointment of a successor trustee who is willing to accept such appointment, (b) the requirement that notice of resignation be given to all the beneficiaries, and (c) the delivery of the trust assets to the successor trustee.

**Resignation by Judicial Procedures.** If the trust was created under a Will, or if it is already subject to current supervision of a court, the rule is quite common that the trustee must petition the court having jurisdiction for resignations. In determining the scope of provisions contained in the Will, likewise, if an inter vivos trust instrument does not provide a clear and specific procedure for resignation, the trustee would have to petition the court having appropriate equity jurisdiction over the trust for permission to resign. The court may accept the resignation of the petitioning trustee taken, it may revoke a resignation if it subsequently becomes necessary to do so. The primary concerns of the court will be that the trust assets be preserved and that the trustee's resignation is in the best interests of the trust's beneficiaries. The court will also consider the availability of a suitable successor trustee who is willing to accept such appointment, (b) the resignation of the beneficiary's obligation to furnish accounts to the beneficiaries, and (c) the delivery of the trust assets to the successor trustee.

**CHOOSING TRUSTEES**

At least one trustee must be named when a trust is established. That may be a qualified individual or an institution having trust powers under applicable law. Successor trustees may also be named, in case the initial or prior trustee resigns or otherwise ceases to serve. Sometimes a trust instrument will describe a procedure by which successor trustees are to be selected.

The duties and responsibilities of a trustee are varied. Some consider it difficult for one individual to carry out all of the duties and responsibilities of a trustee; however, an individual trustee may, in most cases, engage the services of advisors to assist the trustee. The other option is to name a corporate trustee, intending that the corporate trustee would undertake all of the duties and responsibilities of a trustee itself, without delegating them. (References to a "person" in the following text will include corporate as well as individual trustees.)

What are the primary considerations in deciding whom to select to be trustee? The process of selecting a trustee should be conducted by an individual or committee with experience and training in trust and estate matters. The process should include a review of the background, education, experience, and character of the individual or committee. The process should also include a review of the trust's assets, liabilities, and obligations. The process should also include a review of the trust's objectives and the scope of the trustee's powers and duties.

**Experience and Expertise.** A candidate for trusteeship should have had experience as trustee or as an attorney specializing in trust law. The candidate should have a genuine interest in the trust and the beneficiaries. The candidate should also have the time and resources to devote to the trust and the beneficiaries.

**Conflicts.** Does the candidate occupy a position of trust in a manner that might be said to conflict with the interests of the trust? Is the candidate someone who has a prior or present financial interest in the trust?

**Other Considerations.** Does the candidate have a history of involvement in the trust industry? Does the candidate have a reputation for integrity and fairness? Does the candidate have a history of involvement in charitable activities?

The process should be fair and transparent. The process should be conducted by an independent third party, and the process should be documented in a written report. The process should be conducted in a manner that is consistent with the trust's objectives and the scope of the trustee's powers and duties.

The process should also include a review of the trust's assets, liabilities, and obligations. The process should also include a review of the trust's objectives and the scope of the trustee's powers and duties.

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The process should also include a review of the trust's assets, liabilities, and obligations. The process should also include a review of the trust's objectives and the scope of the trustee's powers and duties.
ness partner in a business or entity that will have to be administered by that person as trustee. Would selecting a different person be more desirable in those cases? Geographic proximity to the beneficiaries is usually desirable, but the technology now available reduces the impact of this factor. Nevertheless, a key consideration in selecting a trustee is the likelihood that the trustee will be available to the beneficiaries of the trust and will be a good communicator. A lack of communication skills or a reluctance of the trustee to be available to the beneficiaries may cause problems over the years.

Term of the Trust. How long a trust is anticipated to last may impact the choice of trustee. A person who is aging rapidly, has health problems, or is too busy, would generally not be a good candidate for a long-term trusteeship. Also, for longer duration trusts, a succession of trustees should be provided. A corporate trustee is often used under these conditions to provide for the duration of a longer term trust.

Fees. It is generally understood that corporate trustees charge fees based on a percentage of the trust's income or principal, or both. In smaller trusts that can be expensive (especially where minimum fees are used). Family members often serve without fees, or at relatively minimal fees, but they usually need to have and compensate investment advisors, accountants or attorneys to assist them in carrying out their duties. Generally, those fees can be negotiated, and may be reduced if all of the beneficiaries are located in the same community. The fees are generally calculated on the basis of the trust's assets, with the applicable state laws governing the calculation of the fees.

Summary. The various considerations above must be weighed in determining who would be best suited to act as trustee. There is not always a good or clear answer. Because the initial selection may not work out, it is advisable to build into the trust agreement a process for the trustee to resign or for the adult beneficiaries (or some designated third party) to remove the trustee and, in either event, to appoint a successor trustee. Trusts are not static. The types of assets being administered, as well as other needs of the beneficiaries, are apt to change significantly over the years. In selecting a trustee one should anticipate the changing nature of the trust's assets and the changing composition of the beneficiaries as well.

In the event of resignation or removal or a trustee's death a successor trustee must be appointed. Often the trust instrument will name a successor and the succes- sor can either accept the appointment or not. If the for- mer trustee is still alive, the former trustee has the duty to transfer all assets and pertinent records to the suc- cessor. In the event of the death of an individual trustee the responsibility for those actions would fall upon the personal representative of his or her estate. If there is a surviving spouse, the surviving spouse is entitled to be appointed as the successor trustee.

Communication. Geographic proximity to the beneficiaries is usually desirable, but the technology now available reduces the impact of this factor. Nevertheless, a key consideration in selecting a trustee is the likelihood that the trustee will be available to the beneficiaries of the trust and will be a good communicator. A lack of communication skills or a reluctance of the trustee to be available to the beneficiaries may cause problems over the years.

Duty to Account. The laws of most states require that the trustee periodically provide the current trust account to the beneficiaries. An annual account of the assets, liabilities, receipts, and disbursements of the trust. The form and frequency of the accounting will vary from state to state and may depend on the value of the trust and the number and sophistication of the beneficiaries. Generally, the trustee is required to provide an accounting to each beneficiary to whom income or principal is paid or who is to receive a distribution. The accounting can be prepared by an independent accountant, attorney or other qualified person. Duty Not to Delegate. Generally, the trustee has a duty not to delegate to others the performance of any act the trustee can reasonably be expected to perform personally. Duties such as the above are among the most commonly occurring duties of a trustee. In addition, there may be duties imposed by the trust instrument or by state law.

Duty of Loyalty. The trustee is obligated to administer the trust solely in the interests of the trust beneficiaries. The trustee may not engage in any act that puts his or her personal interests in conflict with those of any of the trust beneficiaries.

Duty to Avoid Conflict of Interest. The trustee has a fiduciary duty to avoid any conflict of interest and to act in the best interests of the trust beneficiaries. This duty requires that the trustee avoid any transaction or arrangement that is not in the best interests of the trust beneficiaries. The trustee must also avoid any conflict of interest with a third party, even if the third party is a beneficiary of the trust.

As noted in the FOREWORD, the accuracy and applicability of issues raised in this Guide, and the possibility that there may be other relevant issues not raised here, should be addressed by your attorney in the context of the laws and practice in the jurisdictions whose laws govern the particular trust.

Duty to Enforce and Defend Claims. The trustee has a duty to take reasonable steps to enforce claims on which the trustee suspects might violate this rule. Note, however, that the trust instrument may authorize the trustee to engage in a transaction which would otherwise be considered a conflict of interest. For example, if the trustee is a beneficiary, or is related to a beneficiary, the trust instrument may authorize the trustee to buy or sell assets from the trust.

Duty to Segregate Trust Property. The trustee has a strict duty not to commingle personal funds or other non-trust assets with the property of the trust. Trust property must be separate at all times from the trustee’s personal funds. For example, trust accounts at banks and other financial institutions must be segregated from personal accounts, and held in separate accounts which are designated as property of the trust.
a person, as “grantor” appoints another person, as trustee, to hold property in a fiduciary relationship for a third person, the beneficiary.

That is the essential structure, but frequently the arrangement may be for multiple beneficiaries, and sometimes with multiple trustees, and occasionally multiple grants of a trust are defined by law and by the trust instrument, which may be the Will of someone who has died, or an agreement or other lifetime document, and which spells out the uses to which the property is to be applied. Appointing someone to be trustee implies a confidence that person and an expectation that he or she will apply the property faithfully and according to the grantor’s objectives for the benefit of the beneficiaries and not for personal benefit of the trustee.

The administration of a trust is governed primarily by state laws, although Federal tax laws and other regulatory provisions also are part of the picture. State trust laws differ from state to state, so the discussion in this Guide will necessarily be general in nature.

The requirement of competency in the administration, for example, can vary widely and may determine how burdensome the job of trustee can be. It is more a detailed description of the duties of a trustee, you should consult your attorney who specializes in trust law.

We will begin with an overview of a trustee’s duties, some of which may be specified in the governing instrument and some of which may be explicit or implicit in applicable state and federal law. To perform those duties, trustees are given powers, and some of those as well are specified in the governing instrument while others are expressable in applicable state or federal law. Following overviews of those subjects, this Guide will offer practical and administrative points to consider when addressing what it means to be a trustee and points to think of in choosing a trustee or deciding whether to become a trustee.

**GENERAL DUTIES OF A TRUSTEE**

A trustee stands in a special relationship of fiduciary responsibility to the grantor of the trust and to the beneficiaries. In carrying out his or her fiduciary duties, the trustee is charged with the performance of that unique relationship. The starting point is the trust instrument and its specifications of what the trustee is to do to accomplish the purposes for which the trust has been established. For example in the case of the simplest trust disposition, the instrument might state that the trustee is to hold and invest the assets, to pay net income to beneficiary #1 for life and then to distribute the remainder to beneficiary #2. Beyond that, certain duties are imposed on trustees by state law. The emphasis on a particular duty may depend on the purpose for which the trust was created. In the rest of this section are general descriptions of basic categories of a trustee’s typical duties prescribed by the trust instrument and governing law.

**Duty to Administer Trust by Its Terms.** The trustee is obligated to administer the trust strictly by its terms. This duty must be carried out all acts by the trust instrument, including any amendments, and, unless there is an absence of direction or ambiguity, must be limited by the intent apparent from the face of the trust instrument. Therefore, the trustee must read and understand the entire trust instrument. To the extent the trustee needs guidance in interpreting the terms of the trust, he or she should seek advice from a qualified attorney.

**Duty of Skill and Care.** The laws of most states require that a trustee administer the trust with the care, skill, prudence, and diligence that a prudent man, having the job of serving as a trustee would use in the conduct of the trust’s activities to accomplish the purposes of the trust. Thus, even if a trustee has never previously served in such a capacity, he or she will be held to a high standard of performance.

**Duty to Give Notices.** The trustee must read the trust provisions carefully to determine the circumstances in which he or she is required to give notice to beneficiaries, co-trustees and successor trustees. For example, trusts typically require notice if a trustee is removed or if a trust terminates or is otherwise terminated, or designate a successor trustee. Some trusts give beneficiaries rights of withdrawal out of new contributions to the trust, or upon attaining a particular age, and the trustee must be careful to give notices to the beneficiaries of their withdrawal rights in those situations. In trusts which authorize the trustee to name a professional investment advisor, there is often a requirement that the beneficiaries be given written notice of such action. Similarly, notice of delegation of investment functions may be required by statute in states which have adopted the Uniform Fiduciary Rule.

**Duty to Furnish Information and to Communicate.** The trustee has the duty to keep the beneficiaries informed of the assets and the status of the trust. The trustee must keep the beneficiaries informed of all income and distributions that are made from the trust.

**APPENDIX A**

**TYPES, PURPOSES AND PROVISIONS OF TRUSTS**

Trusts in our era almost always are established by terms of a written instrument, which may be the Will previously executed during the lifetime of a person who has died, or it may be an inter vivos instrument executed by a living person and which is effective immediately.

Trusts are created for a variety of purposes, but there are a few typical trusts that are the ones used most often in estate planning. Understanding the type and purpose of the trust is key to understanding the duties of the trustee. In common usage the governing instrument may be loosely referred to as the “trust”, but strictly speaking the “trust” is the legal entity created under the instrument governing it.

**Inter Vivos Trusts (Including “Living” Trusts).** Inter vivos trusts are trusts created during the lifetime of the grantor. Many inter vivos trusts are either revocable or irrevocable by the grantor. Inter vivos trust instruments are most typically called “agreements” or “indenitures”, or sometimes “declarations” if the grantor is the trustee. Inter vivos trusts which are revocable are commonly referred to as “living trusts” and are often created to hold assets in the expectation that they should not be subject to the probate court process following the death of the grantor. Living trusts commonly continue after the disability or death of the grantor and the trust instrument spells out the subsequent terms of the ongoing trust. One common type of irrevocable inter vivos trusts is insurance trusts that are designed to hold life insurance so that the insurance proceeds are not included in the taxable estate of the grantor. Other types of irrevocable trusts are designed to hold lifetime gifts, as, for example, where the beneficiaries are minor children or are otherwise incapacitated and unable to manage the donated assets.

**Testamentary Trusts.** Testamentary trusts are created under the will of someone who has died and thus come into being only at the death of that person.

**Common Subtrusts.** Either in a Will or in an inter vivos trust a married person might create subtrusts that would come into effect upon the death of whichever spouse dies first, and then continue for the lifetime of the surviving spouse. Examples would be a “marital deduction trust” intended to qualify for the estate tax marital deduction and a “credit shelter trust” or similar entity designed to hold assets qualifying for the grantor’s exemption from estate tax. Such trusts often also provide family subtrusts or separate shares for children or other ultimate beneficiaries.

**Generation-Skipping or “Dynasty” Trusts.** Trusts that are intended to take advantage of the exemptions from the federal generation-skipping transfer tax, benefiting distant or multiple generations of a person’s descendants, are sometime called generation-skipping or “dynasty” trusts.

**Charitable Split-Interest Trusts.** Another common type of trust would benefit one or more individuals or one or more charities, often called a “charitable split-interest trust”. The federal tax law imposes strict restrictions on the use of charitable split-interest trusts that qualify for the charitable income tax and estate tax deductions. A common type of charitable split-interest trust is a charitable remainder unitrust that benefits a family member or members for life or a period of years, after which the trust estate is to pass to one or more charities.

**Charging Accounts and a Trust Instrument.** Generally a trust instrument provides explicitly whether it is “revocable” or “irrevocable”. If a trust instrument is revocable, it may be changed by the grantor or someone else, by following the procedures established under the trust instrument. If a trust instrument is irrevocable, it cannot be modified unless a court having jurisdiction over the trust orders a modification, following what is essentially a trial involving all persons interested in the trust. Under certain circumstances the Court will allow a modification of the terms of the trust and/or its termination if all the beneficiaries, including representatives such as guardians ad litem for unborn beneficiaries, consent to the change or termination. For example, a Will may have created a trust that was of sufficient size to be practicable when the will was written, but with the passage of time it may become so small as to be uneconomic to administer and the Court might order the distribution of the trust assets to such of the beneficiaries as the Court determines would most closely honor the intent of the decedent.

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1. The authors have used the term “grantor” throughout, to refer to the person creating the trust. “Grantee” is the relevant term used in the U.S. Internal Revenue Code. The terms “settlor,” “donor” and “trustor” are synonymous with “grantor.” “Settlor” is a term inherited from trust practice in Great Britain, where trusts have been known as “settlements.”

2. “Fiduciary” is both a noun and an adjective, signifying a relationship of mutual reliance and faithfulness.
APPENDIX B
A LIST OF TRUSTEES’ TYPICAL RECORDS

Legal Records
- Governing instrument(s) (including disclaimers or documents exercising a power of appointment)
- Written evidence of the resignations and appointments of trustees, preferably the signed resignations and appointments themselves.
- Court filings with respect to the trust (e.g., accounts, petitions for adjudication, schedules of distribution, petitions for appointment or resignation of trustee, with all attendant papers)
- Court judgments and decrees with respect to the trust and its trustees
- Out-of-court agreements regarding administration/distribution/termination of the trust
- Agreements with respect to trustee compensation (including fee schedules, formal waivers, etc.)
- Tax receipts with respect to the trust fund
- Legal opinions furnished by counsel to the trustees
- Record of discretionary actions taken, and the basis for same
- Record of investment decisions made, and the basis for same
- Record of adjustments between principal and income (if permitted by local law) and basis for same

Financial Records
- Record of selection/change of advisors (legal, investment, or tax) and basis for same
- Tax returns (income, gift, estate, real estate, employment, etc.)
- Asset and transaction statements
- Deed, certificate, etc. of any non-financial asset owned by the trust
- Tax basis of trust assets
- Appraisals of trust assets
- Accountings

Operational Records
- All correspondence sent or received by the trustee in his or her role as trustee
- Current family tree for beneficiaries
- For each beneficiary: name, tax identification number, address, telephone numbers and email addresses; date of birth, adoption, marriage, divorce, and death; and circumstances, if any, of incapacity
- For each trustee: name, address, telephone numbers and email addresses

What It Means to Be a Trustee:
A Guide for Clients
by the Fiduciary Matters Subcommittee of the ACTEC Practice Committee

Editor’s Note: The following is a guide for clients on the duties and responsibilities of a trustee. It should be of great benefit to clients in deciding whether to act as a trustee and to Fellows in advising clients on what it means to be a trustee. It was prepared by the Fiduciary Matters Subcommittee of the ACTEC Practice Committee.

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APPENDIX B—A LIST OF TRUSTEES’ TYPICAL RECORDS .................................. 19
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FOREWORD
Your attorney, as a Fellow of the American College of Trust and Estate Counsel (“ACTEC”), has commended this Guide to you because you are interested in what it means to be a trustee. Perhaps you are considering naming a trustee for your family, or perhaps someone has suggested that you serve as a trustee yourself.

With that in mind, a committee within the College has prepared this Guide for the use of its Fellows and their clients. The text is a consensus of suggestions and considerations. Reading the text will not equip you to be a trustee, but, instead, the authors intend to offer you an appreciation of what it means to be a trustee. For those considering accepting a trusteeship, the goal is not to encourage or discourage but rather to insure that any such decision is made with sufficient information to understand the basic ramifications.

The accuracy and applicability of issues raised in this Guide, and the possibility that there may be other relevant issues not raised here, should be addressed by your attorney in the context of the laws and practice in the jurisdictions whose laws govern particular trusts.

For information about the American College of Trust and Estate Counsel, and its Practice Committee which authored this Guide, please see Appendix C.

GENERAL STATEMENT
While there are many types of trusts, and trusts are used to accomplish a wide variety of objectives, as exemplified in Appendix A here, the essence of a trust is a legally binding arrangement under which...
APPENDIX C
ABOUT ACTEC

The American College of Trust and Estate Counsel (ACTEC) is a professional association comprising approximately 2,700 lawyers from throughout the United States. Fellows of the College are nominated by other Fellows in their geographic area and are elected by the membership at large. Fellows are selected on the basis of professional reputation and ability in the fields of trusts and estates and on the basis of having made substantial contributions to these fields through lecturing, writing and teaching.

Among the purposes of ACTEC are improving and reforming trust laws, maintaining an association of lawyers skilled and experienced in the preparation of wills and trusts, and bringing together qualified lawyers whose character and ability will contribute to these purposes.

Within ACTEC there are various national working committees of Fellows, among which is the Practice Committee, whose members concentrate on how trust and estate lawyers can increase the efficiency of their practices, how they should deal with practical and ethical problems and how they can expand the scopes of their practices. Members of that Committee serving during 2004 and recent prior years have prepared this Guide.

Information about ACTEC may be found at www.actec.org.