

Risks and Liabilities

Serving as a Trustee or Personal Representative

Presented by

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Agenda

- Minimizing Risks of Acting as Trustee
 - Screening Trusts for Acceptance
 - Protection Against Bad Investment Performance
- Do You Know Your Responsibilities
 - Fiduciary Duties Risk
- Getting Help If You Act
 - Delegation of Duties
- Questions and Answers

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Disclaimer

- Retired Attorney
 - Practitioner's View
 - Draftsman
 - Acted as Trustee and Watched Others Do So
- Co-Founder and President of Idaho Trust National Bank
 - Administrator's View
 - Bias toward Corporate Trustees

Importance of Risk Management

- Professionals act as Trustee and PR
 - Focus on Trustee
- Cobbler's Children have no shoes
 - Neglect of details
 - Reliance on good judgment and professional experience

ALERT

Brokers and Insurance Agents

May Be Barred From Acting as
Trustee or Personal Representative



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Attorneys and Accountants

Acting as Trustee or Personal
Representative May Be Excluded From
Professional Liability Coverage



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ALPS Exclusion

- Effective November 1, 2006
 - Exclusion 3.1.3
 - No coverage for any claim arising out of the operation of a trust of which the insured attorney was or is trustee.
 - Not a “new exclusion...a clarification” to prior coverage
- Do You Have Coverage?
 - Are you sure?

Why Professionals Act

- Accommodate a Client
- Believe no other viable solution
- Building a business
 - State law restrictions
- Money

Question: Is it unethical for a professional to act as a Trustee or Personal Representative?

Minimizing Risks of Acting as Trustee

Screening Trusts for
Acceptance



Acceptance Checklist

- Applicable Principal and Income Act
- Complete Inventory of Trust Assets
- Identify Current Beneficiary and Remainderman
- Key Principal and Income Dispositive Provisions
 - Mandatory or Discretionary

Acceptance Checklist

- Terminating Event
- Terminating Distributions
- Settlor's Intent of Trust
- If Successor Trustee
 - Duty to inspect records and acts of prior trustee
 - Hold harmless and indemnification

Acceptance Checklist

- Reputational Risks
- Can Trustee Perform the Services
- Unusual Provisions/Duties
- Conflicts of Interest
- Inspections of Real Property
- Resignation/Withdrawal Provisions
- Fee Provisions

Do You Know Your Responsibilities?

Fiduciary Duties Risk



Legal Duties of Trustee

- Care and skill
- Loyalty
- Confidentiality
- Impartiality
- Inform and Account

Duty of Care and Skill

- Definition

- Exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property
- IDAHO STATUTE 15-7-302
 - Prudent man dealing with property of another
 - Has special skills or represents special skills then under duty to use

Duty of Care and Skill

- Trustee exercise

- IDAHO STATUTE 15-7-301

- General duty to administer trust expeditiously

- Follow policies and procedures

- Risk Factors

- Case loads

- Lack of Properly trained staff

- New Business Pressures

- Inexperience of Trustee

Duty of Care and Skill

- Illustration
 - Responding to plumbing problem
- Drafting considerations
 - Can modify
 - IDAHO STATUTE 15-7-302
 - Authorizes modification
 - Increase standard for what constitutes a breach
 - For example, gross negligence v. simple negligence

Duty of Care and Skill

- Primary Risk Area
 - Investments



Idaho Uniform Prudent Investor Act

- “A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements and other circumstances of the trust.”
 - I.C. 68-501 to 68-514

Idaho Uniform Prudent Investor Act

- Modification

- Can be expanded, restricted, eliminated or otherwise altered by trust terms

- I.C. 68-501

- Example

- Specific trust investment required

- Trust beneficiaries can excuse application

- Restatement of Trusts 2d 216

Trustee Standards

- Reasonable care, skill and caution
 - I.C. 68-502(1)
- “A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee’s representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.”
 - I.C. 68-502(6); See also I.C. 15-7-302 for similar language

Process of Managing Investments

- Trust Terms Control
 - May set
 - Process
 - Specific investments
 - Prohibited investments
 - Investment advisor
 - Standards for performance measurement

Process of Managing Investments

- Trustee Duties at Inception (I.C. 68-504)
 - Review trust assets
 - Make retention and disposition decisions
 - Purpose: begin process of moving portfolio into compliance with Uniform Prudent Investor Act
 - E.g., individual portfolio v. fiduciary portfolio

Process of Managing Investments

- Trustee shall consider, as applicable (I.C. 68-502)
 - General economic conditions
 - Effects of inflation and deflation
 - Expected tax consequences
 - Role each investment or course of action plays within overall trust portfolio
 - Expected total return from income and appreciation
 - Other resources of beneficiaries
 - Needs for liquidity, regularity of income
 - Preservation or appreciation of capital
 - Asset’s “special relationship or value,” if any, to trust purposes or beneficiaries

Process of Managing Investments

- Trustee shall Diversify (I.C. 68-503)
 - Exception if trust purposes better served otherwise
 - Closely held stock concentration

Duty of Care and Skill

Investments

- Standard of conduct not performance
 - Focus on “process”
 - “Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee’s decision or action and not by hindsight.”
 - I.C. 68-508
- **NOTE: 15-7-308 allows removal for investment performance persistently and substantially below those of comparable trusts**

Allowable Investments

- Historical Background
- “A trustee may invest in any kind of property or type of investment consistent with the standards of this act.”
 - I.C. 68-502(5)
 - Detailed investment powers in Idaho Uniform Trustees’ Powers Act
 - I.C. 68-106(c)

Allowable Investments

- The costs of investing and managing trust assets must be “appropriate and reasonable” based on relationship to
 - Assets in trust
 - Trust purposes
 - Trustee skills

Duty of Loyalty

■ Definition

- “Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”
Meinhard v. Salmon (1928) (Cardozo)

■ Trustee exercise

- Something more than the morals of the marketplace
- **Includes Trustee fees**
- Biggest current conflict
 - **Charging professional fees AND fiduciary fee**
 - **Collecting commissions, trails or loads AND fiduciary fee**

Duty of Loyalty

- Illustration

- Buying Assets from the Trust
- Loaning Money to Trust

- Drafting considerations

- Drafting for fees: community standard
- Conduct of sale of assets
- Dispute resolution

- IDAHO STATUTE 15-8-101 et al. (TEDRA)

Duty of Confidentiality

- Definition

- Trustee shall not disclose information to any person concerning the existence, condition, management and administration of any trust

Duty of Confidentiality

- Illustration

- Claims by disinherited children

- IDAHO STATUTE 15-7-303

- Only a “beneficiary” entitled to copy of trust and information about trust assets and administration

- Inquiry by one beneficiary regarding expenditures to another beneficiary

- Drafting Considerations

- Provision for *in camera* disclosure in the event of litigation

Duty of Impartiality

■ Definition

- Trustee shall balance the competing interests of differently situated beneficiaries in a fair and reasonable manner

■ Trustee exercise

- Income v. Principal Beneficiaries
- Current v. Remainder Beneficiaries
- Major area for litigation
- “The squeaky wheel can’t get the grease.”

Duty of Impartiality

- Illustration
 - Case of CA Trust: Sale of Antioch Property
- Drafting considerations
 - Preferences regularly given
 - Designation of income or principle
 - Sprinkle provisions v. designation of particular items to particular people

Duty to Inform and Account

■ Definition

- Provide beneficiaries with all the information which is needed to protect the beneficiaries' equitable interest
- IDAHO STATUTE 15-7-303
 - Trustee shall keep beneficiaries reasonably informed regarding trust and its administration

■ Trustee exercise

- Most commonly a problem for non-corporate trustees
- Modern Trend by Corporate Trustees: 24/7 access
 - www.IdahoTrust.com

Duty to Inform and Account

■ Drafting considerations

– Timing and manner subject to drafting

- Monthly/Annual Statements

- Submitted to Court

- Parent/Guardian receives in case of minor or incapacity

- Information to Trust Protector

- **No information at all?**

– Provision for conclusiveness of accountings after a set period

- **IDAHO STATUTE 15-7-307**

- **Six months to object after final accounting**

Getting Help If You Act

Delegation of Duties



Delegation of Duties

- Old Rule

- Trustee cannot delegate acts which Trustee could reasonably be required to perform

- No delegation of discretionary duties



Delegation of Duties

■ Current Law

– IDAHO STATUTE 68-107

- Cannot delegate entire administration of trust to co-trustee or another person

– IDAHO STATUTE 68-509

- Trustee may delegate investment and management functions “that a prudent trustee of comparable skills could properly delegate under the circumstances”

– IDAHO STATUTE 68-106

- Trustee may employ persons to advise or assist in performance of administrative duties
- Trustee may employ agents to perform **any** act of administration whether or not discretionary



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Delegation of Duties

- Current Law

- IDAHO STATUTE 68-509

- No liability for acts of agent if Trustee uses reasonable care, skill and caution in:
 - Selecting agent
 - Establishing scope and terms of delegation
 - Periodically reviews agent's actions

Questions and Answers

Thank You

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