

against the trustee for a breach of such duty.² The safety of the trust fund is the first care of the law, and on this depends every rule which has been made for the conduct of trustees.³ So, the trustee has the duty of defending the trust against attack, if he or she reasonably believes the attack is unjustified,⁴ and he or she must defend against adverse claims to the trust assets.⁵ However, the trustee owes no duty to the beneficiary to resist alteration or revocation of the trust under the grantor's reserved powers.⁶ Where a trustee of an express trust has received the trust fund and has not spent it for trust purposes, he or she cannot deny that the fund is still in his or her hands.⁷ A trustee, while keeping possession of the trust, cannot lay claim to the trust fund by setting up a superior title in himself or herself.⁸ It is no part of the duty of a trustee to attempt to prove that certain named children of the creator of the trust are illegitimate.⁹ Although it is the duty of the trustee to protect the trust estate from an attempted alienation of the income contrary to law,¹⁰ a trustee is not chargeable with the duty of supervising the expenditure of the income after its payment to the beneficiary or his or her guardian.¹¹

§ 323 Standard of conduct; good faith, care, and skill

A trustee is a fiduciary of the highest order who is held to a high standard of conduct with respect to administration of the trust, and he or she must act fairly, justly, honestly, in the utmost good faith, and with sound judgment and prudence, but he or she is not an insurer of the trust property or of results, and will not be held responsible for mere mistakes or errors of judgment, or for losses not attributable to lack of fidelity.

Research References

West's Key Number Digest, Trusts ⇨173, 179, 232, 270

A trustee is a fiduciary of the highest order,¹ who is required meticulously to observe the fiduciary relationship and to perform the obligations of a trustee to the cestui que trust,² and he or she is held to a high standard of conduct with respect to administration of the trust.³ In this respect, a trustee is held to something stricter than the morals of the market place, and not honesty alone, but, rather, to the highest standard of behavior.⁴ Many forms of conduct regarded as permissible for those acting at arm's length are forbidden to those bound by fiduciary ties.⁵ So, it is generally required that a trustee act fairly, justly,⁶ and honestly⁷ in administering the trust, with the utmost⁸ good faith,⁹ and in performance of

²Alaska—Matter of Pacific Marine Ins. Co. of Alaska in Liquidation, 877 P.2d 264 (Alaska 1994).

³Tex.—Brault v. Bigham, 493 S.W.2d 576 (Tex. Civ. App. Waco 1973), writ refused n.r.e., (July 18, 1973).

⁴Del.—Wilmington Trust Co. v. Carpenter, 39 Del. Ch. 528, 168 A.2d 306 (1961).

⁵Cal.—Metzenbaum v. Metzenbaum, 115 Cal. App. 2d 395, 252 P.2d 31 (2d Dist. 1953).

⁶U.S.—Witherbee v. Commissioner of Internal Revenue, 70 F.2d 696, 4 U.S. Tax Cas. (CCH) ¶ 1279, 13 A.F.T.R. (P-H) ¶ 1065 (C.C.A. 2d Cir. 1934).

⁷Tex.—Republic Nat. Bank & Trust Co. v. Bruce, 130 Tex. 136, 105 S.W.2d 882 (Comm'n App. 1937).

⁸Ohio—Stone v. Guardian Trust Co., 1 Ohio Op. 529, 22 Ohio L. Abs. 663, 4 Ohio Supp. 4 (Mun. Ct. 1934).

⁹N.Y.—Dwight v. Gibb, 145 A.D. 223, 129 N.Y.S. 961 (1st Dep't 1911).

¹⁰N.Y.—Seely v. Fletcher, 63 Misc. 448, 117 N.Y.S. 86 (Sup 1909), aff'd, 135 A.D. 920, 120 N.Y.S. 1145 (1st Dep't 1909).

¹¹N.Y.—In re Fisk, 45 Misc. 298, 92 N.Y.S. 394 (Sur. Ct. 1904).

[Section 323]

¹Okla.—State ex rel. Oklahoma Bar Ass'n v. Busch, 1998 OK 103, 976 P.2d 38 (Okla. 1998), as corrected, (May 18, 1999).

²Me.—Estate of Wilde, 1998 ME 55, 708 A.2d 273 (Me. 1998).

³Okla.—State ex rel. Oklahoma Bar Ass'n v. Busch, 1998 OK 103, 976 P.2d 38 (Okla. 1998), as corrected, (May 18, 1999).

⁴U.S.—Seminole Nation v. U.S., 316 U.S. 286, 62 S. Ct. 1049, 86 L. Ed. 1480, 86 L. Ed. 1777 (1942).

⁵Ga.—Malcom v. Webb, 211 Ga. 449, 86 S.E.2d 489 (1955).

⁶Wash.—In re Parks' Trust, 39 Wash. 2d 763, 238 P.2d 1205 (1951).

⁷Okla.—State ex rel. Oklahoma Bar Ass'n v. Wallace, 1998 OK 65, 961 P.2d 818 (Okla. 1998).

⁸Okla.—State ex rel. Oklahoma Bar Ass'n v. Wallace, 1998 OK 65, 961 P.2d 818 (Okla. 1998).

⁹Okla.—State ex rel. Oklahoma Bar Ass'n v. Wallace, 1998 OK 65, 961 P.2d 818 (Okla. 1998).

his or her obligations is required to act with the highest degree of loyalty¹⁰ and fidelity.¹¹ He or she may not obtain any advantage by the slightest misrepresentation, concealment, threat, or adverse pressure.¹² In all his or her dealings with the trust estate, the trustee must act with candor and frankness,¹³ and must not only be strictly truthful in all his or her representations, but must not remain silent concerning any matter of which he or she has knowledge that would throw light on the trust estate.¹⁴ He or she is required not only to avoid actionable fraud but also circumstances which are improper or suggest the appearance of fraud or lack of loyalty,¹⁵ and the withholding of material facts is a breach of duty and a legal fraud, regardless of an intent to deceive.¹⁶

In the performance of duties imposed on a trustee, general requirements are that he or she exercise reasonable care,¹⁷ or common skill, common prudence, and common caution,¹⁸ and that he or she refrain from negligent acts of commission or omission,¹⁹ or willful defaults.²⁰ In other words, a trustee must exercise sound judgment and prudence,²¹ and

in the discharge of his or her duties, he or she must exercise due²² diligence,²³ or that care and diligence which an ordinarily prudent person would exercise in the management of his or her own affairs.²⁴ However, a trustee having a greater skill or more facilities than those of an ordinarily prudent person owes the duty to exercise the skill that he or she has and to employ the facilities available to him or her.²⁵

In any event, a trustee is not an insurer of the trust property or of results,²⁶ and when it is shown that a trustee has been faithful and diligent, the courts will view his or her acts with liberality and indulgence,²⁷ and will not hold him or her responsible for mere mistakes or errors of judgment.²⁸ However, actual fraud in the management of the estate is not required in order to constitute a breach of the trustee's duty,²⁹ and good faith is no defense where the trustee has arbitrarily overstepped the bounds of his or her authority,³⁰ or has acted from an improper motive,³¹ or where he or she has not exercised diligence or has acted

Trustees possessing broad discretion

Even trustees who possess broad discretion in administering the trust property are held to a standard of good faith in doing so.

Neb.—Karpf v. Karpf, 240 Neb. 302, 481 N.W.2d 891 (1992).

¹⁰Wash.—Estate of Jordan by Jordan v. Hartford Acc. and Indem. Co., 120 Wash. 2d 490, 844 P.2d 403 (1993).

¹¹Md.—Gianakos v. Magiros, 238 Md. 178, 208 A.2d 718 (1965).

¹²N.D.—Burlington Northern and Sante Fe Ry. Co. v. Burlington Resources Oil & Gas Co., 1999 ND 39, 590 N.W.2d 433 (N.D. 1999).

¹³Okla.—State ex rel. Oklahoma Bar Ass'n v. Wallace, 1998 OK 65, 961 P.2d 818 (Okla. 1998).

¹⁴N.D.—Burlington Northern and Sante Fe Ry. Co. v. Burlington Resources Oil & Gas Co., 1999 ND 39, 590 N.W.2d 433 (N.D. 1999).

¹⁵U.S.—Tankersley v. Albright, 374 F. Supp. 538, Fed. Sec. L. Rep. (CCH) ¶ 94483 (N.D. Ill. 1974), judgment aff'd in part, rev'd in part on other grounds, 514 F.2d 956, Fed. Sec. L. Rep. (CCH) ¶ 95029 (7th Cir. 1975).

¹⁶Ala.—Metropolitan Life Ins. Co. v. James, 238 Ala. 337, 191 So. 352 (1939).

¹⁷Va.—NationsBank of Virginia, N.A. v. Estate of Grandy, 248 Va. 557, 450 S.E.2d 140 (1994).

¹⁸Mass.—Gorman v. Stein, 1 Mass. App. Ct. 244, 295 N.E.2d 178 (1973).

¹⁹Del.—Hogg v. Walker, 622 A.2d 648 (Del. 1993).

²⁰Pa.—In re Smith's Estate, 332 Pa. 581, 2 A.2d 779 (1938).

²¹Md.—Cassell v. Pfaifer, 243 Md. 447, 221 A.2d 668 (1966).

²²Okla.—Harrison v. Barton, 1960 OK 256, 358 P.2d 211 (Okla. 1960).

²³Md.—Cosden v. Mercantile-Safe Deposit and Trust Co., 41 Md. App. 519, 398 A.2d 460 (1979).

²⁴Kan.—Pizel v. Whalen, 252 Kan. 384, 845 P.2d 37 (1993).

²⁵Miss.—Sligh v. First Nat. Bank of Holmes County, 735 So. 2d 963 (Miss. 1999).

²⁶Ark.—Hardy v. Hardy, 217 Ark. 296, 230 S.W.2d 6 (1950).

²⁷S.C.—International Shoe Co. v. U. S. Fidelity & Guaranty Co., 186 S.C. 271, 195 S.E. 546 (1938).

²⁸Pa.—Bolton v. Stillwagon, 410 Pa. 618, 190 A.2d 105 (1963).

²⁹Ala.—Strawn v. Caffee, 235 Ala. 218, 178 So. 430 (1938).

³⁰S.C.—Beacham v. Ross, 187 S.C. 398, 197 S.E. 369 (1938).

³¹N.J.—In re Koretzky's Estate, 8 N.J. 506, 86 A.2d 238 (1951).

unreasonably,³² or has been guilty of such gross neglect as no reasonably intelligent person would consider proper.³³ So, a trustee cannot do any act inconsistent with the best interests of the beneficiaries of the trust, irrespective of the trustee's good or bad faith.³⁴ The fact that the trustee was the creator of the trust, who reserved to himself or herself broad powers of management with absolute and uncontrolled discretion as trustee, does not relieve him or her of the obligations of fidelity and diligence attached to the office of trustee.³⁵ Also, the fact that the trustee is the parent of the beneficiary does not lessen the obligations which he or she assumed.³⁶

If the action of a trustee is properly questioned, he or she must sustain the burden of showing the wisdom or propriety of his or her conduct.³⁷ A claimed breach of a trustee's duty must be tested by the facts of the particular case,³⁸ and the acts of the trustee must be judged in light of the circumstances affecting his or her action.³⁹ So, in determining the propriety of the acts of a trustee, the court must look at the facts as they existed at the time of their occurrence, not aided or enlightened by those which subsequently took place.⁴⁰ Whether a trustee fulfilled his or her obligation to employ reasonable prudence and skill depends on the circumstances as they reasonably appeared to the trustee when he or she acted, and not as the circumstances might appear at some subsequent time.⁴¹ The standard of conduct required of a trustee must have a

definite relationship to the nature of the undertaking and to the conditions and circumstances then existing as well as those reasonably to be foreseen.⁴²

Breach or repudiation of trust agreement.

A trustee who breaches or repudiates a trust agreement commits an act which necessarily encompasses fraud.⁴³

Exculpatory clause.

A provision in the trust instrument restricting the trustee's liability to acts constituting actual fraud or willful misconduct will be given effect.⁴⁴

Corporate and other professional trustees.

While there is authority that a stricter standard of care and skill is applicable to corporate and other professional trustees than that which is applicable to individual nonprofessional trustees,⁴⁵ there is also authority that, in the absence of an agreement to the contrary, a corporate trustee has no greater duty or responsibility than an individual acting in the same capacity,⁴⁶ and that whether a corporate trustee has been negligent must be determined by the ordinary rule of duty owed by an individual trustee.⁴⁷

Advice of counsel.

While in some instances, a trustee's acting on the advice of counsel relieves the trustee

³²Ohio.—In re Ferris' Estate, 19 Ohio Op. 2d 428, 88 Ohio L. Abs. 597, 182 N.E.2d 78 (Prob. Ct. 1962).

³³Tex.—Republic Nat. Bank & Trust Co. v. Bruce, 130 Tex. 136, 105 S.W.2d 882 (Comm'n App. 1937).

³⁴Pa.—In re Niessen's Estate, 489 Pa. 135, 413 A.2d 1050 (1980).

³⁵N.Y.—Osborn v. Bankers Trust Co., 168 Misc. 392, 5 N.Y.S.2d 211 (Sup 1938).

³⁶Ala.—Randolph v. East Birmingham Land Co., 104 Ala. 355, 16 So. 126 (1894).

³⁷Pa.—Petition of Capital Bank & Trust Co., 336 Pa. 108, 6 A.2d 790 (1939).

³⁸Mich.—Hertz v. Miklowski, 326 Mich. 697, 40 N.W.2d 452 (1950).

³⁹U.S.—Redmond v. Commerce Trust Co., 144 F.2d 140 (C.C.A. 8th Cir. 1944).

⁴⁰N.Y.—In re Mendleson's Will, 46 Misc. 2d 960, 261 N.Y.S.2d 525 (Sur. Ct. 1965).

⁴¹Wash.—In re Parks' Trust, 39 Wash. 2d 763, 238 P.2d 1205 (1951).

⁴²N.J.—In re Cook's Will, 136 N.J. Eq. 123, 40 A.2d 805 (Prerog. Ct. 1945).

⁴³Kan.—Jennings v. Jennings, 211 Kan. 515, 507 P.2d 241 (1973).

⁴⁴Mo.—Jarvis v. Boatmen's Nat. Bank of St. Louis, 478 S.W.2d 266 (Mo. 1972).

⁴⁵Cal.—Moeller v. Superior Court, 16 Cal. 4th 1124, 69 Cal. Rptr. 2d 317, 947 P.2d 279 (1997).

⁴⁶N.Y.—In re City Bank Farmers Trust Co., 189 Misc. 942, 68 N.Y.S.2d 43 (Sup 1947).

⁴⁷N.Y.—In re Pate's Estate, 84 N.Y.S.2d 853 (Sur. Ct. 1948), decree aff'd by, 276 A.D. 1008, 95 N.Y.S.2d 903 (1st Dep't 1950).

from liability,⁴⁸ in other cases, such action does not have that effect.⁴⁹ So, acting on advice of counsel is a factor to be considered in determining the trustee's good faith in the administration of his or her trust, but is not a blanket of immunity from liability in all circumstances.⁵⁰ Moreover, a trustee may safely rely on the advice of counsel on legal questions which arise in the management of the estate, only when an ordinarily diligent and careful person would do so in respect of his or her own property.⁵¹

§ 324 Exercise of power in trust

The donee of a power in trust has the duty to exercise it, but the power may not be exercised to the detriment of the beneficiary or under circumstances which violate the purpose of the power.

Research References

West's Key Number Digest, Trusts ⇨173, 179, 270, 279

Where a power in trust is given to a person, it is his or her duty to exercise it,¹ even though he or she is given a discretion as to the manner of executing it.² An imperative power in trust may not be released by the grantee of the power,³ but it may be extinguished by an effective revocation of the trust.⁴ A power in trust must be exercised in good faith and sincerity,⁵ without violation of the purpose of the power or detriment to the beneficiary,⁶ and

the power may not be used to enable the donee of the power to enjoy the res for his or her own benefit, directly or indirectly.⁷ However, if a power is granted individually and not in trust, no intent to restrict it will be inferred from the fact that the grantee is, in the same instrument, given fiduciary duties, and such power may be exercised for the grantee's own benefit.⁸ A trustee's exercise of a power of appointment to a nonobject negates the trustor's intent and is technically a fraud on the power and a breach of trust.⁹ Where the trustee under a trust indenture is named as the donee of a power in trust, the duties imposed on the trustee with respect to such power is executed by him or her as a "donee of a power" and not as a "trustee."¹⁰

§ 325 Acquisition of adverse interest

Generally, a trustee will not be allowed to acquire an interest adverse to the trust, and a purchase by the trustee, in his or her own name, of an outstanding title, encumbrance, or claim against the estate or cestui que trust, or any other interest adverse to the trust, constitutes a breach of trust, and inures to the benefit of the cestui que trust.

Research References

West's Key Number Digest, Trusts ⇨231(3)

While there are qualifications of the rule,¹ generally, a trustee will not be allowed to

⁴⁸Mass.—Dill v. Boston Safe Deposit & Trust Co., 343 Mass. 97, 175 N.E.2d 911 (1961).

⁴⁹N.Y.—Hendry v. Title Guarantee & Trust Co., 165 Misc. 349, 300 N.Y.S. 741 (Sup 1937), judgment modified on other grounds, 255 A.D. 497, 8 N.Y.S.2d 164 (1st Dep't 1938), judgment aff'd, 280 N.Y. 740, 21 N.E.2d 515 (1939).

⁵⁰Pa.—In re Borden's Trust, 358 Pa. 138, 56 A.2d 108 (1948).

⁵¹Hawaii—Richards v. Midkiff, 48 Haw. 32, 396 P.2d 49 (1964).

[Section 324]

¹U.S.—Fulton Nat. Bank v. Tate, 363 F.2d 562 (5th Cir. 1966).

Duty to execute power, generally, see C.J.S., Powers § 21.

²N.J.—Commercial Trust Co. of N. J. v. Barnard, 27 N.J. 332, 142 A.2d 865 (1958).

³N.Y.—Application of Schluskel, 195 Misc. 1008, 89 N.Y.S.2d 47 (Sup 1949).

⁴N.Y.—Application of Schluskel, 195 Misc. 1008, 89 N.Y.S.2d 47 (Sup 1949).

⁵N.Y.—Osborn v. Bankers Trust Co., 168 Misc. 392, 5 N.Y.S.2d 211 (Sup 1938).

⁶Mass.—Loring v. Karri-Davies, 371 Mass. 346, 357 N.E.2d 11, 94 A.L.R.3d 884 (1976).

⁷N.Y.—In re Geffen's Estate, 25 Misc. 2d 734, 202 N.Y.S.2d 599 (Sur. Ct. 1960).

⁸U.S.—C.I.R. v. Newman, 159 F.2d 848, 47-1 U.S. Tax Cas. (CCH) ¶ 9175, 35 A.F.T.R. (P-H) ¶ 857 (C.C.A. 2d Cir. 1947).

⁹U.S.—Horne v. Title Ins. & Trust Co., 79 F. Supp. 91 (S.D. Cal. 1948).

¹⁰N.Y.—Bankers Trust Co. v. Firth, 177 Misc. 797, 31 N.Y.S.2d 889 (Sup 1941).

[Section 325]

¹N.Y.—Bendean v. Moody, 254 A.D. 130, 5 N.Y.S.2d 94 (4th Dep't 1938).

Purchase by a trustee at a judicial sale caused by a third party which he or she has taken no part in procuring and over which he or she has no control as not improper, see C.J.S., Judicial Sales § 15.