



MEMORANDUM

DATE: November 4, 2020
TO:
FROM: Dana and Associates, LLC
RE: Trust Administration

The purpose of this Memorandum is to outline some of the responsibilities and duties you will have as a Fiduciary. This memorandum is in no way intended to serve as an exhaustive list of all your responsibilities and duties. If you have a question regarding how to proceed, you should consult us as your Attorneys prior to taking any action. The following is a guide to help you understand the fundamental aspects as to your duties and should serve you as a checklist of things to consider.

RESPONSIBILITIES OF A FIDUCIARY

Your first responsibility should be to gather information that we can review together. This information will be used to assist you in your primary duties to collect all assets, safeguard the assets, properly account to all creditors, make sure all taxes are properly paid and then make final distributions to the appropriate beneficiaries.

1. Obtain and safeguard all applicable documents including the original Trust document and the Last Will and Testament along with all amendments/codicils.
2. Secure names, addresses, phone, and social security numbers of all current and future beneficiaries. Call, or ideally meet with each current beneficiary, and get a profile of their age, temperament, station in life, family situation, financial status (including tax bracket) and expectations from the Trust. This should, of course, be two-way communication in which the beneficiaries in turn have the right to have their questions answered. In that regard, avoid over promising or overly optimistic projections of time and amount of distributions from the Trust.
3. In the case of future beneficiaries, it is usually sufficient to just obtain a current address and phone number. Consider doing this confidentially, so as not to invite dialogue with those who might never have a vested interest in the Trust.
4. Obtain the income tax returns of the Decedent for the past two years and make sure that the income tax returns for the year of the death of the decedent are timely filed.
5. Collect monthly statements for all investments, brokerage accounts, bank accounts, IRAs, etc.



6. Obtain copies of all Deeds to real estate, titles to vehicles, Stock Certificates and other documents evidencing the owner of the various assets.

7. Gather all information relating to life insurance policies, annuities and other instruments that may have beneficiary designations so that you can ascertain the beneficiaries of each of these assets.

8. Where a closely held business is involved, obtain the Corporate Records or other documents related to the creation and operation of the business.

9. Finally, gather ALL insurance policies, including property and casualty, car insurance, homeowner's insurance, etc.

PREPARE AN INVENTORY

The first step in administering an estate or a trust is to prepare a comprehensive inventory of all assets owned by that entity so that you can fulfill your fiduciary duties to collect the assets, safeguard the assets, and ultimately distribute the assets to the appropriate beneficiaries. The amount of each asset listed on the inventory will be as of the decedent's date of death. Typically, you will want to prepare this inventory using an Excel Spreadsheet that you can email to us. We can then modify and update the inventory as more accurate information about the assets are determined. The format of the inventory should follow Exhibit A attached hereto. As part of the inventory, it is important to determine the fair market value of all assets as of the date of the decedent's death. These values will be used for multiple purposes such as establishing the "stepped up basis" for capital gains, determining whether or not an Estate Tax Return will be filed, and determining the total value of the estate for purposes of making distributions to the beneficiaries.

SAFEGUARD THE ASSETS

Once it is determined that an asset is owned by the Trust or by the Estate, you, as the fiduciary should take all appropriate steps to make sure that the assets are protected. This will involve:

1. Making sure that all assets are properly insured and that there is no lapse in coverage. Review the properties insurance or have this done by an experienced insurance consultant. Liability coverage should be in at least the amount of your entire Trust. If gaps exist, supplement the coverage. And, check with the agent to determine whether or not a special "vacant property" policy is needed.

2. Perhaps changing the locks on all real estate so that beneficiaries cannot enter the residence for the purpose of removing the personal property.

3. Taking possession of all vehicles, motor homes, golf carts, etc. that may be used by the beneficiaries. You need to protect the liability of the Estate and the Trust.

4. Making sure that the landscaping is properly maintained and that there are no leaks in the sprinkler system.

5. Clean out the refrigerator.



6. You may want to consider hiring a property manager to assist you with your fiduciary duties.
7. Confirm that all real estate taxes are up to date.
8. Is the property mortgaged or is there a lender on vehicles or other assets? If so, make sure that the monthly payments are continued to be paid timely.

TRUST INVESTMENTS

Remember, you are a fiduciary and you are held to a strict “prudent investor” standard. You should be conservative in your investment strategies. And, you should not engage in any acts of self dealing with trust assets. You should engage professional guidance from investment advisors as to which assets should be kept and what assets should be liquidated. You and your investment advisor should consider:

1. Creating your ideal Trust investment portfolio, first consider your current beneficiary(ies) and his or her need for cash from the Trust. In general, the greater this need, the more income oriented (i.e., bonds or a bond fund) your portfolio should be. Some ready cash, of course, should always be maintained.
2. Next, consider your beneficiaries tax bracket and position accordingly. For example, if your beneficiaries are tax-exempt charities, an otherwise taxable--and therefore higher yielding--bond portfolio is appropriate. On the other hand, if your beneficiary is a widow with a high taxable income in his or her own right, the Trust bond position should probably be tax-exempt.
3. Keep in mind your investment duty as Trustee to preserve the long-run, post inflation value of the Trust for any future beneficiaries. Usually, this means at least a significant position (perhaps 40%-50%) of assets invested in, stocks, real estate, or other vehicles which historically protect against long-term inflation.
4. Remember, you owe a fiduciary duty not only to the current income beneficiaries, but also the future remainder beneficiaries. You have a duty of fairness to both sets of beneficiaries. These duties may be altered by the trust instrument. You should have our law firm review the instrument and give you legal advice as to your exact duties.
5. Finally, if your desired portfolio differs from the Trust's current portfolio, how will the transition be affected? If some current assets will need to be sold, consider their income tax basis, and resulting capital gains taxes that would be paid as a cost of your portfolio repositioning. Where bases are very low, it can make sense to delay repositioning somewhat, until future tax years.

DISTRIBUTIONS DURING THE ADMINISTRATION

1. The first step in determining your responsibilities and duties to make distributions to any beneficiary is to review the operative provisions in the Trust. You should seek our counsel to determine if the distributions are mandatory or discretionary. And, if they are discretionary, what is the distribution standard (e.g., support, medical care, education, comfort?) under your governing document.



When distributions are discretionary, start by asking the beneficiary (or their parent, guardian or other representative) for a personal budget of the monthly needs of that beneficiary and copies of their latest federal income tax return. In most cases, you as the fiduciary, have a duty to consider other resources available to that beneficiary that might exist outside of the Trust or Estate. You should consult with us prior to making any distributions. We will assist you in fulfilling your fiduciary duties by preparing a proposed plan of distributions and have it approved by the beneficiaries.

2. It is generally easier on a beneficiary and a Trustee for the two to agree on a fixed monthly payment, adjustable (in the absence of a very extraordinary change or circumstances) only once a year.

3. In setting this amount, try to ensure that the Trust will remain actuarially sound, i.e. that given current spending patterns, life expectancies and investment yields, the beneficiary will not outlive the Trust. This is not always possible, but where discretionary payments are causing the real value of Trust principal to decline over time, that fact and its long run implications should be fully disclosed to all beneficiaries. Sometimes, a little financial planning by a beneficiary will go a long way.

TRUST ACCOUNTINGS

One of your major responsibilities and duties as a fiduciary is to keep all beneficiaries reasonably informed with the financial affairs of the Trust. It is also important to keep accurate accounting records to protect yourself from liability for making poor investment choices, making excessive distributions, or in some cases not distributing enough to a beneficiary. Fiduciary liability is a major source of litigation. Our job, as your legal counsel, is to protect you from expensive and time-consuming litigation. You need to consult with us on a regular basis so that we can properly assist you in fulfilling these duties and responsibilities.

1. All Trust cash receipts and disbursements should be recorded on a standard single entry (or, in complicated situations double entry) bookkeeping system. This can be done using Excel or Quicken (or other software programs). We can assist you in preparing these accountings on a regular basis.

2. Some state statutes and often the Trust document itself require a Trust to make a periodic report to beneficiaries of all major financial transactions in the Trust and a complete and thorough inventory of all assets on hand. Although most statutes require such reporting only once a year, it is usually better from a relationship standpoint to render reports at least quarterly. Most corporate Trustees deliver computer-generated statements monthly.

3. Finally, beyond bare bones cash reports, consider special accountings of investment performance or other areas of particular beneficiary interest. Vis-a-vis one size fits all computer-generated reports can be tailored to the financial sophistication and individual interests of each beneficiary.

TAX MATTERS

When acting as a fiduciary, you must consider all transactions you make in light of how that transaction will impact income taxes, capital gains, gift taxes and estate taxes. Each



asset may be subject to different income tax rules. For example, some assets like IRAs, Annuities, etc. have significant income tax consequences associated with distributions from these assets. You must consult with us prior to the disposition or distribution of any asset of the Trust or the Estate.

1. Virtually all Trusts are required to file a state and federal Fiduciary income tax return-IRS Form 1041-by April 15th of each year. Upon taking over as Trustee, ensure that your Trust accounting system (see preceding section) will make possible this routine, accurate filing of the return. Also, remember that the decedent is required to file an income tax return for the year in which the death occurred. We must coordinate with our firm and your CPA as to which advisor will be responsible for the different tax returns.

2. Obtain and review copies of prior tax returns and ascertain their audit status. Is there any possibility of obtaining a refund via an amended return?

3. Ascertain the income tax basis of each asset. Generally, this is the new “stepped up basis” which is equal to the fair market value of the assets on the date of death of the decedent. However, the law is uncertain in this area and it may be the old cost basis equal to what was paid for the asset when it was purchased years earlier. You should consult with us prior to selling any assets of the Trust or Estate to make sure that we have properly minimized capital gains.

4. Given the Trust’s current portfolio, it is important to project the annual taxable income. In doing this, take into account projected Trustee fees/compensation and whether they will be available as income tax (vis-a-vis estate tax) deductions.

5. If the projected taxable income is too high (or low), consider investment repositioning: moving to or from growth assets, or to or from tax-preferred investments.

6. Because part of the Trust tax planning is also distribution planning, ascertain the brackets of each of your beneficiaries. Then, plan to accelerate or differ distributions so as to minimize the aggregate tax on the Trust and its beneficiaries.

7. When you do make distributions, alert your beneficiary-- first informally and later formally via IRS Form K-1---of the tax consequences. Do this as early as possible so as not to present your beneficiary with an unanticipated tax bill on April 15 of the following year.

8. Has--or will--the Trust be subject to federal estate taxation? The federal estate tax exemption has fluctuated greatly over the past 2 decades. Please consult with us as to whether or not a Federal Estate Tax Return (form 706) is needed. Remember, that this return is due 9 months after the decedent’s death. If the Trust property has already been included in a recent federal estate tax return, what is the status of these proceedings?

9. Whenever the Trust property will be subject to eventual federal estate taxation, who will be responsible for preparing and submitting this return (IRS Form 706)? Areas in which this impacts the administration of your Trust include: valuation of Trust assets (including discounts for non-marketability, minority, blockage, alternate or special use valuation, as appropriate), tax treatment of all incident fees, and raising the cash needed to pay any tax.

10. Similarly, if the Trust is or will be subject to generation-skipping taxation, review, determine, and/or document the Trust inclusion ratio. Consider long-run planning in this area such as making distributions from exempt Trusts to lower generation beneficiaries and



non-exempt Trusts to higher generation beneficiaries using special powers of appointment to extend the life of exempt Trusts or investing exempt Trusts for growth.

11. Keep in mind that proper Trust tax planning is an ongoing process, and at least once a year (perhaps at return preparation time) you should revisit each of the above issues.

DEPARTURES FROM YOUR NORMAL FIDUCIARY STANDARD

In fulfilling your duties, there may be times when you will not want to engage in a transaction without the prior approval and consent of all beneficiaries. This may be the case such as holding a large position in one or two publicly traded companies, or maybe having a Closely Held Business, or maybe a transaction with a beneficiary of the Trust. Before engaging in such transactions, you need to consult with us to make sure that you are properly protected from a claim from a disgruntled beneficiary in the event the transaction subsequently proves to be a loss of value to the trust.

1. Where appropriate, this can be done, but as a prudent Trustee you should be protected against future questioning (and possible surcharge) of your conduct. One option is to rely on well-drafted exculpatory language in the Trust document itself.

2. Another option--the one most frequently chosen--is to act only with the well-informed written consent of all other beneficiaries with full disclosure.

3. The final possibility is to seek court approval for your proposed actions.

4. Finally, whenever you are purchasing from or selling assets (e.g., a residence) to a beneficiary, protect yourself with an independent appraisal, separate counsel for the beneficiary, the informed approval of any other beneficiaries, and/or a court order.

COMPENSATION TO THE FIDUCIARY

As a fiduciary, you are certainly entitled to take “reasonable compensation” from the Trust or the Estate. We have found that some fiduciaries are reluctant to take compensation. We generally advise them to take compensation for many reasons. First, as fiduciary you have significant liability. And this is true even in cases that you did not tax compensation. Second, it takes an inordinate amount of time to properly fulfill your fiduciary duties. Our experience has been that fiduciaries that are reluctant to take compensation are also the same fiduciaries who are not spending the appropriate amount of time to fulfill their duties and collect, safeguard, and distribute the assets. We will advise you as to what an appropriate compensation would be for you. This advice will be based upon your educational background, experience, expertise, time involved, relationship to the beneficiaries, etc. We can advise you as to what the Courts would consider to be reasonable compensation. We will also want to make sure that you maintain adequate records that documents the time that you spend in taking care of the affairs of the Estate or the Trust. We want to make sure we give full disclosure of all fees and charges on the records and accountings for the Estate or the Trust. And last, we want to make sure that you receive the appropriate income tax forms and treat the amount of compensation that you receive as income on your personal return. Absent this documentation or in the event your fees are not deemed to be “reasonable”, you could be surcharged and return all compensation to the Estate or the Trust.



Furthermore, you could get into a situation as to whether or not the money can come out of the Trust to defend you against a claim from a beneficiary.

TERMINATING THE TRUST

1. As with most other Trust administration matters, termination is governed by the Trust agreement, so when an event giving rise to termination has occurred, obtain proper documentation for your files: e.g. the birth certificate of a life tenant or the birth certificate of a beneficiary reaching 35 or some other age of distribution.

2. Determine whether your distributee will want any Trust assets distributed in kind. If so, and there will be some time gap before distribution, obtain the distributees written and/or informed consent to your retention. If no part of the distribution will be in kind, convert assets to cash promptly, then invest the cash in a money market fund or other safe, interest-earning vehicle.

3. Before distributing, be sure that your distributees are the *only* possible takers under the instrument and there are no other apparent claimants (other heirs, creditors) who might emerge and seek to surcharge you. We recommend that we prepare a proposed plan of distribution showing the allocation of the various assets to all the beneficiaries. We will then circulate this plan to all beneficiaries and obtain their knowledge and consent prior to making the distribution. If there is going to be a problem, we want to deal with it prior to making the distributions and giving money to a disgruntled beneficiary who could then turn around and use this money to hire lawyers to file suit against you.

4. Before making the final distributions, we will prepare and require each beneficiary to sign a receipt and release of liability to protect you. If your beneficiary refuses to sign a reasonably drafted receipt and release, we may seek court approval prior to making the distributions.

5. Your final act as Trustee-usually done months after the final asset distribution-will probably be the filing of the Trust's final income tax return. Make sure that we assist you determining what an appropriate "hold back" would be to cover all final administration expenses of the Trust. As with all prior distributions, alert your beneficiary--first informally and later formally via IRS Form K-1--of the tax consequences to him or her.

CONCLUSION

As you can see from this outline, you have tremendous responsibilities and duties as a fiduciary. We are here to assist you and all our fees can and should be paid from the Trust or the Estate and are deductible as administration expenses.

