Trustee Duties and Post Mortem Planning

Presented by:
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When an individual assumes a fiduciary responsibility, they are required to fulfill a series of duties. These duties include:

1. Exclusion from delegation of responsibilities.
2. Prohibition from profiting from his/her dealings in the estate.
3. A requirement to deal with a life tenant and the capital beneficiaries in an even handed fashion.
4. A requirement to preserve and protect estate assets.

5. A requirement to account and file income tax returns.

6. A requirement to act honestly with a level of skill and prudence which would be expected of a person administering their own affairs.
1. **Exclusion from delegation of responsibilities.**

Most executors solicit assistance in the administration of an estate, including the employment of an accountant, lawyer and real estate broker. Hiring such agents is not considered delegation.

What cannot be delegated are discretionary decisions to another personal representative or agent of the estate.
2. **Prohibition from profiting from his/her dealings in the estate.**

A trustee is bound not to do anything which can place them in a position inconsistent with the interests of the trust or that can interfere with his fiduciary duty.

If the trust property is used for purposes of gain for the trustee, the trustee must account to the beneficiaries and pay those profits to the estate.
3. Requirement to deal with a life tenant and capital beneficiaries in an even handed fashion.

One of the most difficult duties an executor can face is managing the opposing interests of a life tenant against those of an capital beneficiary.
A personal representative must document the logic utilized to make the investment decisions, including tax implications, time horizon, risk tolerance, alternative sources of income available to the income beneficiary and income requirements.
4. **A requirement to preserve and protect estate assets.**

The administrator must insure that adequate insurance coverage exists on the real property and automobiles, that business interests are being managed with an appropriate level of skill and prudence, and that investment holdings are appropriately managed to minimize risk.
5. A requirement to account and file income tax returns.

An administrator must maintain an accurate account of all debits and credits flowing through the trust. Beneficiaries are entitled to a complete and accurate account of all activity. A personal representative must ensure that all tax returns are filed in an accurate and timely fashion.
6. A requirement to act honestly with a level of skill and prudence which would be expected of a person administering their own affairs.

A prudent person does not have to be perfect. They can make a mistake or an erroneous decision without being negligent. Skill and prudence is not necessarily limited to discretionary decisions as it can also include reinvestment of funds resulting from a maturing investment.
Many trustees and advisors are advancing the duty of prudence to include more collaborative efforts with other partners in the estate planning and financial services community.
Scenario 1: Bill and Mary Smith have been married for a number of years and this is a second marriage for each. Bill has two adult children from a previous marriage and Mary has no children.

Bill is a small business owner and most of his wealth is in the business.
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Mary’s Will leaves her estate to her husband with extended family and the step children as contingent beneficiaries.

Bill’s Will establishes a modest testamentary trust for each adult child and a spousal trust for the residue of the estate. The gift over beneficiaries of the spousal trust are Bill’s adult children.
At the time of Bill’s death, however, most his assets are in an inter-vivos trust. Terms of the trust include:

- Minimum of three trustees with discretion to add or remove trustees.
- Discretionary decisions require approval of the majority of trustees.
- Capital and income beneficiaries to the trust include the spouse and adult children.
Dilemma:

1. In the Will, the gifts to the adult children are deferred until the death of spouse, whereas I.V. trust has the adult children as current beneficiaries.

2. Bill’s Will clearly supports the pursuit of financial independence for his adult children.
Dilemma:

3. Spouse wants autonomy over financial affairs.

4. Spouse requires resources to maintain her lifestyle, but could jeopardize gift over to step-children.
Alternative

Purchase fully funded life insurance on Mary’s life from assets in the trust. Step-children would be the irrevocable beneficiary on each policy.
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- Parallels the objective of the Will with a deferral of the gift to the adult children until the death of the spouse.
- Supports the pursuit of financial independence.
- Spouse achieves autonomy over financial affairs.
- Certainty of gift to the adult children.

Challenge – negotiation of value for adult children.
Scenario 2: At Susan’s death, she has two adult children who reside with her, Jimmy (high functioning AISH recipient) and Becky.

At Susan’s death, she had an interest in:

- Rental property - $375,000.00 (to Jimmy in a testamentary trust)
- Rental property - $375,000.00 (to Becky)
- Jointly held cash and investments with Becky
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Dilemma;

• Does Jimmy have standing under DRA?
• Both Jimmy and Becky wish to honour the Will, but what certainty is there that Jimmy will be provided for?
• There are no estate assets to maintain the real property for Jimmy.
Option

With the jointly held assets, purchase a life annuity on Becky for Jimmy and purchase a fully paid life insurance policy on Becky with an irrevocable beneficiary designation to a trust for Jimmy.

Challenge – negotiation of value for both the annuity and life insurance.
Conclusion

Increased frequency of collaboration. Exercising prudence and discretion may require a significantly different asset allocation model.