

# Trustee Duties and Diligence: Tips for Driving Defensively in the Current Climate



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## **A. FIDUCIARY DUTIES AND BEST PRACTICES**

The following duties are imposed on trustees by statutory and case law. The provided recommendations regarding satisfying these duties reflect best practices for both corporate and individual trustees.

<b><u>DUTY</u></b>	<b><u>PRACTICAL WAYS TO SATISFY THIS DUTY</u></b>
<b>OVERALL:</b> Know the trust, the beneficiaries and the assets. Be purposeful, not reactive.	<ul style="list-style-type: none"> <li>• Be familiar with the trust document.</li> <li>• Understand the grantor intent and what it takes to comply with that intent.</li> </ul>
<b>DUTY OF LOYALTY:</b> Administer the trust exclusively for the interest of the beneficiaries.	<ul style="list-style-type: none"> <li>• Know who the beneficiaries are, their birthdates and addresses, and how to communicate with them.</li> <li>• Make prudent, informed decisions with the intent and beneficiaries in mind.</li> <li>• Remove any of your interests from the picture.</li> <li>• Disclose any conflicts of interest.</li> </ul>
<b>DUTY OF PRUDENCE:</b> Administer the trust as a prudent person would, considering the purposes, terms, distribution requirements, and all relevant circumstances, while exercising reasonable care, skill, and caution.	<ul style="list-style-type: none"> <li>• Diversify investments, following the modern portfolio theory, which includes delegation</li> <li>• Review, update, and follow investment objectives</li> <li>• Rebalance portfolios and adjust as needed for beneficiaries' needs.</li> <li>• Actually distribute mandatory amounts.</li> <li>• Categorize discretionary amounts based on standards stated in trust.</li> <li>• Never distribute to or for a non-beneficiary.</li> </ul>
<b>DUTY OF IMPARTIALITY:</b>	<ul style="list-style-type: none"> <li>• Remain impartial and consider the best interests of any and all current, remainder, and contingent beneficiaries.</li> </ul>

<p>Treat beneficiaries impartially unless otherwise directed by the governing instrument.</p>	<ul style="list-style-type: none"><li>• Balance the requests and needs of current beneficiaries with the obligation to preserve some assets for future beneficiaries.</li></ul>
<p><b>DUTY TO INFORM AND ACCOUNT</b></p> <p>Keep qualified beneficiaries of the trust reasonably informed of the trust and its administration.</p>	<ul style="list-style-type: none"><li>• Ensure compliance with state and federal tax and financial reporting requirements.</li><li>• Be generally familiar with state and federal laws governing trustees/trusts.</li><li>• Seek outside help from professional advisors when appropriate.</li><li>• Communicate with the beneficiaries and interested parties on a regular basis—to provide information to them and to obtain information from them.</li><li>• Consider seeking court approval of accounts</li><li>• Separately track trust accounting income and principal, charging expenses appropriately.</li></ul>
<p><b>DUTY OF CONFIDENTIALITY:</b></p> <p>Do not disclose non-public information made available through your position as trustee.</p>	<ul style="list-style-type: none"><li>• Do not disclose information that is not available to the general public including: the trust documents, financial information, private contact information, etc.</li><li>• Prior to speaking to another person on behalf of beneficiary, obtain written permission from beneficiary to do so.</li></ul>

## **B. TRUSTEE TIPS**

1. Check in with the current trust beneficiaries to find out if they have experienced financial changes due to the COVID-19 crisis and the resulting impacts on the economy. Have they lost income? Any health expenses? Any change in retirement planning? Document all that you learn—even if no changes, and communicate that to the investment decision makers.
2. Calendar a follow up check in with the beneficiary to stay apprised of their situation. Document your efforts, any information you learn, and any trust information you provide.
3. Does each trust have an investment policy statement? If not, consider adopting one.
4. Review the trust investment policy statement and, if needed, update it. Document that you reviewed it and any changes made as a result.
5. Have the market fluctuations increased the percentage of concentration in particular sector or company such that the investments are no longer in compliance with the investment policy adopted by the trustees? Rebalance the portfolio if needed or note why not.
6. Review each trust investment portfolio now and document the completion of the review. Consider whether changes are needed due to any changes in the beneficiaries' situations, changes in markets or anything else.
7. If investment changes are made, document why doing so is consistent with the investment purpose of the trust, the needs of the beneficiaries, and all relevant circumstances.
8. As part of the investment review, find out whether the income of the trust will likely change in 2021 due to the change in markets and interest rates.
9. Consider obtaining approval of 2019 and 2020 trust accounts—either via court or via beneficiary signature. Then calendar to do this again for 2021 and thereafter.
10. For any trusts that own or operate any portion of a closely held company, have the company's business insurance coverage reviewed to see whether any business interruption coverage exists. Document that you proposed this to the company decision-makers if you are not the decision maker.