

Frequently Asked Questions: Trustees

Acting as a trustee or settlor is an important and significant responsibility. To help you consider whether to accept such an appointment and how to perform your duties, we have prepared some answers to common questions.

Who are the different parties to a trust?

There are three parties to a trust:

- Settlor
- Trustee
- Beneficiary

There may be one or more trustees or beneficiaries.

What is a “Trust Deed”?

This is a document signed by the settlor and trustee(s) governing the trust and setting out the various beneficiaries, their entitlement, guidelines regarding investments and the powers given to the trustee(s).

Who is the settlor of a trust? What does that person do?

The settlor is the person who creates the trust. The settlor creates the trust by signing a trust deed and contributing an asset of nominal value, such as a dollar bill or a gold coin which should not be returned or spent. The settlor gives the initial trust property to the trustee.

The settlor must be an adult, mentally competent, and not a bankrupt. He/she must also clearly intend to create the trust.

After creating the trust, a settlor generally owes no further duties to any party. One possible exception is when the settlor benefits from the trust he/she has created, or continues to exercise power over the trust property. For this reason, settlors are often third parties who will not benefit from or participate in the trust after it is created.

What does the trustee do?

A trustee holds and manages the trust property for the benefit of the beneficiaries of the trust according to the terms of the trust and the law. The trustee must hold and manage the trust property in a reasonable, prudent and careful manner.

The trustee is the *legal* owner of the trust property. To protect the beneficiaries, there are strict obligations imposed on trustees to account for their actions.

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What duties does a trustee owe? To whom are these duties owed?

A trustee is a fiduciary. This means that the trustee owes duties of trust, confidence, honesty and good faith to the beneficiaries of the trust.

What are some of the obligations of a trustee?

A trustee must:

- Carry out the terms of the trust deed with honesty, due care and attention;
- Personally carry out the decision-making responsibilities entrusted to him/her and not to delegate those responsibilities or neglect them; and
- Ensure that his/her own interests do not conflict in any way with his/her duty to the beneficiaries.

A trustee must scrupulously avoid any and all situations where his/her interests are in any way in conflict with those of the beneficiaries. For example, if the trustee intends to purchase or sell trust property, the trustee cannot obtain any personal advantage from the transaction. The trustee may have to obtain court approval before purchasing or selling trust property.

Can a trustee delegate some of his/her obligations?

Subject to the terms of the trust deed, a trustee can delegate certain tasks if:

- The duties do not require personal performance by the trustee;
- It is authorized by statute or the trust deed;
- It is impossible for the trustee to perform the task personally; or
- It is common to delegate that particular duty or power.

A trustee can delegate the management of trust investments to an investment professional provided the trustee gives the investment professional directions as to the type of investments that are permitted.

A trustee can also rely on the advice of professionals (i.e. lawyers, accountants, financial advisors) to meet the standard of care imposed on trustees.

Does a trustee need to manage or invest trust property?

One of the most important duties of the trustee is to manage and/or invest the trust property. If a trustee manages and/or invests the trust property in good faith and does so with the “care, skill, diligence and judgment [of] a prudent investor” managing and/or investing his or her own property, then the trustee will not be liable to the beneficiaries for his or her decisions. This is taken from section 27 of Ontario’s *Trustee Act*.

If the trustee is concerned about his or her ability to make investment decisions, then the trustee should seek the advice of a qualified financial professional. So long as the trustee is prudent, and engages a competent expert, the trustee should not be liable for any losses resulting from relying on the expert’s advice.

Does a trustee have to treat all beneficiaries equally?

A trustee has a duty to act impartially when dealing with beneficiaries, and not to prefer one beneficiary over the other *unless* the trust deed states that the trustee does not need to treat beneficiaries equally.

Should a trustee record his/her decisions and what he/she does with the trust property? Can a beneficiary see these records?

A trustee must maintain proper accounts and records of the trust property and investments. This means that the trustee will need to keep complete records of all of his or her trustee activities and decisions.

The trustee's accounts and records need to be produced for inspection at any time if the trustee receives a request from a beneficiary or a court with proper jurisdiction. A trustee may be asked to "pass his or her accounts" (show full records) to beneficiaries or to a court before he or she is entitled to receive any payment for his or her work as a trustee, unless the trust deed states otherwise.

Trustees should maintain accounts from the time of their appointment, rather than attempting to "catch up" later. Because trust accounting can be complicated and has unusual rules, trustees may need assistance from professionals to put their accounts and records in proper form.

Can a trustee exercise his or her discretion in making trust decisions?

A trustee is not beholden to the whims and wants of the beneficiaries. A trustee is entitled to make his or her own decisions subject to the terms of the trust deed. Some trust deeds may also give the trustee absolute discretion on any distributions to the beneficiaries.

Trustees have an obligation to act in good faith when deciding whether and how to exercise their powers.

What is a breach of trust and what are its consequences?

A breach of trust occurs when a trustee

- Fails to administer, invest or manage properly the trust property;
- Does not act in accordance with the trust deed; or
- Otherwise fails in his/her legal duties.

Liability can arise whether the breach was innocent, negligent or fraudulent. If a trustee fraudulently deals with trust property, he or she can also face criminal liability. If a trustee commits a breach of trust, he or she can also be removed as a trustee.

Can a trustee's liability be limited?

A trustee's liability can be limited by the terms of the trust deed. However, there are laws which apply to trustees which the trust deed cannot eliminate.

What is the 21 year rule?

Under Canada's *Income Tax Act*, a trust is deemed to dispose of all of its capital assets every 21 years. This is to prevent trusts from indefinitely avoiding capital gains tax.

Well before that deadline the trustees should consult with their tax advisors about how best to address this important issue.

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