

**HANDBOOK FOR THE FIDUCIARY  
ADVISING AND COUNSELING TRUSTEES**

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## HANDBOOK FOR THE FIDUCIARY

### I. DUTIES OF A TRUSTEE

#### A. Texas Trust Code Section 113.051

The Texas Trust Code provides that the trustee shall "administer the trust according to its terms and [The Texas Trust Code]. In the absence of any contrary terms of the trust instrument or contrary provisions of [The Texas Trust Code], in administering the trust the trustee shall perform all of the duties imposed on the trustees by the common law." Tex. Prop. Code Ann. §113.051 (Vernon's 1984). All references to the Texas Trust Code are to the Texas Trust Code, which is codified in Article 9 of the Texas Property Code.

#### B. Common Law

Case law has categorized fiduciary duties in various ways, but generally, they fall into four main categories: (1) duty of loyalty, (2) duty of competence, (3) duty to reasonably exercise discretion, and (4) duty of full disclosure. For a comprehensive discussion of fiduciary duties, see MOORE, FIDUCIARY LITIGATION TRIAL HANDBOOK 2000, 24<sup>th</sup> Annual Advanced Estate Planning and Probate Course.

Probably the most famous, and eloquent, description of a "fiduciary" was made by Justice Cardozo in the case of Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545-46, 62 A.L.R. 1 (1928):

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A (fiduciary) is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. ... Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

The following is a discussion of the general fiduciary duties owed by a trustee that have been well established under the common law.

#### 1. DUTY OF LOYALTY

The duty of loyalty is the hallmark of a fiduciary relationship. The trustee must at all times place the interests of the beneficiary above his own. Slay v. Burnett Trust, 187 S.W.2d 377 (Tex. 1945). The trustee is not permitted to "place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries." (Section 170, FRATCHER, SCOTT ON TRUSTS (Fourth Ed. 1989) ("SCOTT")). See also Section 170 of the RESTATEMENT (SECOND) OF TRUSTS, (the "RESTATEMENT"). A trustee who utilizes or takes trust property for his own benefit is considered to be "self-dealing." Any self-dealing by a fiduciary will give rise to a "presumption of unfairness," and the burden of proving the fairness of the transaction is placed on the fiduciary. Texas Bank and Trust Co. v. Moore, 595 S.W.2d 502 (Tex. 1980); Pace v. McEwen, 574 S.W.2d 792 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.); Jochec v. Clayburne, 863 S.W.2d 516 (Tex. App.—Austin 1993, writ denied).

Texas Trust Code Section 117.007 expressly provides that a trustee shall invest and manage the trust assets solely in the interest of the beneficiaries.

Section 117.008 expressly requires a trustee to act impartially in investing and managing trust assets if the trust has two or more beneficiaries, taking into account any differing interests of the beneficiaries. See also SCOTT and the RESTATEMENT, Section 183.

## 2. DUTY OF COMPETENCE

The Trustee has an affirmative duty to administer the trust. TEX. PROP. CODE §§ 113.006 and 113.051. The fundamental duties of a trustee include the use of the skill and prudence which an ordinary, capable and careful person would use in the conduct of his own affairs. Interfirst Bank Dallas, N.A. v. Risser, 739 S.W.2d 882, 888 (Tex. App. –Texarkana 1987, no writ). The duty of competence encompasses many “sub-duties,” some of which are described below.

### a. **Duty to Comply With Prudent Investor Rule**

Effective January 1, 2004, the Texas Trust Code has adopted the “prudent investor” rule. Texas Trust Code §117.003 provides that a trustee owes a duty to the beneficiaries of the trust to comply with the prudent investment rule, unless altered by the provisions of the trust. The standard of care for the prudent investor is stated in Texas Trust Code §117.004 as follows:

A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

A trustee’s investment decisions regarding individual assets must be evaluated in the context of the trust portfolio as a whole and as part of an overall strategy having risk and return objectives reasonably suited to the trust. See Section II *infra*.

### b. **Duty Not to Delegate**

The trustee is generally obligated to personally administer the trust and cannot delegate to others acts that the trustee should personally perform. See Section 171 of SCOTT and the RESTATEMENT. There are exceptions to this rule.

A trustee may employ attorneys, accountants, agents, including investment agents, and brokers reasonable necessary in the administration of the trust estate. TEX. PROP. CODE § 113.018. A trustee also may delegate investment decisions under certain circumstances. TEX. PROP. CODE §117.001. See Section II.A.7. *infra*.

### c. **Duty to Keep and Render Accounts**

A trustee is under a duty to the beneficiaries of a trust to keep full accounts of the trust estate that are clear and accurate. Section 172 of SCOTT and the RESTATEMENT. A beneficiary may demand a written statement of accounts covering the trust’s transactions. TEX. PROP. CODE §113.151.

### d. **Duties at Inception of Trusteeship**

Within a reasonable time after receiving trust assets, a trustee shall review the trust assets and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements and other circumstances of the trust, and the Texas Trust Code. TEX. PROP. CODE §117.006.

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