When Managing Assets in a Trust:
The Trustee and Their Duties

When your client is a Trustee and you are managing the assets held in the Trust, you need to keep some critical points in mind. Is your client the person authorized to make decisions regarding the assets held by the Trust and what are the Trustee succession instructions in the Trust document? For instance, what happens when a client Trustee dies, resigns or becomes incapable? To ensure that you are taking instructions from the correct person, several documents need to be accessible to you. Also, what are the client Trustee’s obligations and duties and how does this affect the investment mix recommended? Managing assets in a Trust creates the need for specific awareness and understanding of Trustee succession, powers and duties.

Trust Set-Up

A Trust is set up by one person called the Settlor transferring legal title to property to another person called the Trustee, to hold for the benefit of another person called the Beneficiary. The person who administers the trust is referred to as the Trustee. By the very nature of the word “Trustee”, this person is usually chosen because they are extremely trustworthy, and can be relied upon to properly administer and manage the property of the Trust.

Trustee Succession

When you are managing assets held in a trust, who is your client, and who has the authority to make decisions if a Trustee dies, resigns, or become incapable of administering the trust? The answer can be found in several documents that should be reviewed from time to time.

These documents include:
- The Trust Deed;
- Any Deeds of Appointment;
- Letters of instruction from the original and subsequent Trustees; and
- Letters from legal advisors regarding the nature of the Trust, including confirmation of the client’s instructions.

Where the trust instrument is unclear or silent on the issue, then provincial trust legislation will provide procedures for the appointment of successor Trustees.

Trustee Powers & Duties

The sources of Trustee powers and duties are found in provincial statute, the common law, and the Trust Deed itself. Generally, the provincial legislation, which sets out the powers and duties of trustees, authorizes the Trustees to invest the trust property in any investments that a prudent investor might invest. The Trust Deed will also usually set out specific obligations, and can modify or override common law rules.
Sometimes beneficiaries may challenge a Trustee’s decisions based on a perceived breach of the Trustee’s duties and obligations. To protect yourself and your client, it is helpful to be mindful of the Trustee’s duties and obligations, and keep records of your communications.

Common law duties include:

- **Duty of loyalty to the beneficiaries.** The Trustee must strictly avoid any conflict of interest between the Trustee’s personal interests and those of the beneficiaries. No personal profit or benefit can come from the fiduciary position. If the Trustee purchases a beneficial interest from a beneficiary, evidence must show that the transaction was honest, for fair consideration and the beneficiary was fully informed and consented to the transaction.

- **Duty of reasonable care.** The Trustee must exhibit “vigilance, prudence and sagacity” in carrying out the Trustee’s functions. A professional Trustee, is held to a higher standard of diligence and knowledge.

- **Trust Investments.** All provinces have adopted a form of the “prudent investor” rule pursuant to which a Trustee may make any investments a prudent investor would make. Some provincial statutes set out a list of investment criteria that Trustees must consider in making investment decisions. Particularly, Ontario legislation requires the Trustee to consider:
  - General economic conditions;
  - The possible effect of inflation or deflation;
  - The expected tax consequences of investment decisions or strategies
  - The role that each investment or course of action plays with the overall trust portfolio;
  - The expected total return from income and the appreciation of capital;
  - Needs for liquidity, regularity of income and preservation or appreciation of capital;
  - An asset’s special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

- **Duty to Act Personally.** The Trustee must act personally in carrying out his or her functions, unless the provincial legislation or Trust Deed provides otherwise. However, there is latitude to hire professionals to assist in decision making. The final decisions are ultimately the Trustee’s and the Trustee must supervise the professional in their performance of administrative services. Failure to adequately supervise may result in personal liability.

- **Duty to Act with an Even Hand.** The Trustee must not favour one beneficiary over another unless otherwise specifically provided in the Trust Deed. A Trustee who exercises a discretionary power must maintain a balance among beneficiaries whose interest may not only differ, but conflict. Particularly important are those trusts that “gift over” to the next generation at the end of the life of the primary beneficiary. In these cases, the Trustee must balance the needs of both generations in determining the income earning potential of the investment with their capital retention or growth prospects.

It is important to have copies of the trust instruments as they may specifically allow for dealings between the Trustee and the Trust which otherwise would constitute a conflict of interest. You should familiarize yourself with any trust documents for the Trust and any obligations and limitations of the Trustee’s powers as set out in the Trust Deed so that you do not inadvertently advise your client to make a decision which results in a breach of the terms of the Trust or the obligations and duties of the Trustee.

**Final Word**

Advising a client Trustee on managing investment assets within a Trust can be complicated. Also, as your client ages, it will become increasingly important for you to understand the Trustee succession plan so that you can be assured that you are acting on the instructions of the authorized Trustee. Whether the Trustee’s duties are governed by statute, common law or the trust instrument, the Trustee must always act in a reasonable and prudent manner. Your advice can be used as evidence that the Trustee acted within their duties.