THE OREGON FIDUCIARY'S HANDBOOK

A Guide Published by the
Estate Planning Council of Portland, Inc.

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Introduction

This guide is made up of six articles which describe the duties, responsibilities, and liabilities that are to be accepted when an individual becomes a fiduciary. The book provides a practical guide to conducting the specific duties of each type of fiduciary. This is done in a helpful "how to" format which includes checklists, things to watch out for, pages for notes, and a list of trustee powers taken directly from the Oregon statutes.

This handbook has two primary goals. The first is to help educate those who are considering becoming fiduciaries. The second is to provide a "first source" for people who have already accepted a fiduciary role and who are beginning to map out a plan for conducting his or her affairs in that position.

We hope the knowledge and direction provided by this publication will help promote productive, successful planning for families and businesses in our community.

The Estate Planning Council of Portland, Inc., is an organization whose membership is composed of attorneys, certified public accountants, insurance agents, and brokers who are chartered life underwriters, trust officers, and certain other financial and estate planning professionals. All members actively practice in the estate planning field.

Lastly, several words of caution: The description of duties, responsibilities and, liabilities presented here is intended to serve as a general guide in Oregon. Each fiduciary position is unique, and every fiduciary action must be tailored to the specific circumstances presented. Further, the duties of all fiduciaries must be performed with an appropriate knowledge of property, tax, and other laws and regulations which are subject to change. As a result, this publication should not be used as a substitute for professional assistance in specific circumstances. We expressly disclaim any responsibility for any actions taken on the basis of the materials contained in this publication. Before taking any action as a fiduciary that you are personally unfamiliar with, you should seek the advice of qualified advisors. Only they can provide you with complete and up-to-date counsel as you conduct your fiduciary duties.

Overview—General Fiduciary Duties

What is a "Fiduciary"? Do You Want to be One?

A "fiduciary" is someone who is trusted to manage property for someone else, the "beneficiary." A fiduciary is not an honorary position; serving as a fiduciary requires a serious commitment of time and a willingness to undertake obligations that may be quite complicated. Extraordinary trust and confidence are placed in a fiduciary. As a consequence, the fiduciary is expected to carry out the fiduciary duties carefully and honestly. The fiduciary is also expected to act selflessly and with undivided loyalty to the beneficiary. The fiduciary is given broad powers to carry out these tasks, but if the fiduciary commits improper actions, whether or not intentional, the fiduciary may incur personal liability.

This handbook describes the roles of several types of fiduciaries, including personal representative, trustee, conservator, guardian, attorney-in-fact, and custodian for a minor.

A "personal representative" (or "administrator") settles the estate of a person who has died by following the terms of the will of the deceased person. The fiduciary marshals assets, pays debts and expenses and distributes the rest of the estate's assets to the people entitled to receive them—the beneficiaries (who, in the case of an intestate estate are the decedent's heirs at law).

A "trustee" is appointed under a trust agreement to manage assets owned by the trust for the benefit of the trust's beneficiaries. The trustee is responsible for paying trust debts and expenses, investing trust assets, and making distributions to beneficiaries.

A "conservator" is appointed by the court to manage the assets of a person who is no longer physically or mentally able to manage their own financial affairs.

A "guardian" is appointed by the court after a finding that the protected person is incapacitated or financially incapable. The guardian is granted control over the physical person, including where that person lives and how much discretionary income there is to spend.

An "attorney-in-fact" is a person appointed under a Power of Attorney document to act either temporarily or on an ongoing basis as specified in the document, to manage the financial assets and sometimes the personal affairs for the person who appointed him/her.

A "custodian" is a person who is appointed to act on behalf of a minor who has received assets. The custodian manages those assets under the Oregon Transfers to Minors Act and serves until the minor turns between the ages of 18 and 25.

The experience you will have serving as fiduciary will depend on many factors, some of them outside your control, such as:

- The people involved, their personalities, and the relationships between them and in some cases, the fiduciary;
- The assets involved and their location;
- The time required and your availability;
- The skills required and how they compare with your skills and experience.

A fiduciary serves in a complicated position of responsibility and is subject to statutory and case law. If the fiduciary is found to have breached laws which cause financial or other damage, the fiduciary could be found to be personally liable. Before you agree to serve as a fiduciary you may wish to read this handbook carefully and also to consult your attorney and other professional advisors. Do you really want to serve as fiduciary? Do you have the time, skill, and patience? Are you really the right person for the job, and do you have appropriate insurance coverage to cover potential liability?

Duty to Carry Out the Fiduciary Purpose. If you are asked to serve as fiduciary, or if you are appointed by a will or trust to serve, you always have the right to decline the appointment. However, once you accept the appointment your job is to carry out the "fiduciary purpose" until you properly resign or are replaced. Your duties and responsibilities, fiduciary purpose if you will, as fiduciary are governed by the terms of the instrument under which you are acting—the will or the trust, for example. If there is no governing instrument, such as a will or trust, or the controlling document is silent, Oregon statutes and case law often provide guidance.

The "fiduciary purpose" also includes the obligation to protect the interests of the persons to be benefited by the will, trust instrument, or relevant law (the beneficiaries), and to carry out the specific terms and spirit of those documents and relevant law. Many estate planning and tax attorneys, as well as trust officers, accountants and investment professionals, are knowledgeable and experienced and can provide you with advice and assistance.

As a fiduciary, you must follow any specific instructions in the governing instrument. Even with the best possible motives, you cannot and should never substitute your judgment for those explicit directions. Sometimes the document or the law may give you wide discretion. In that instance your duty is to exercise that discretion in a manner that will best carry out the general fiduciary purpose.

Identify, Collect and Protect Property. As fiduciary, you must actively take steps to determine the nature and extent of the assets under your fiduciary control. In some instances, this is easy: If your mother names you custodian under the Uniform Transfers to Minors Act of 100 shares of IBM stock, you know you are responsible for that stock until the beneficiary reaches between the ages of 18 and 25.

In other instances, this duty is more time-consuming and even burdensome. If you are acting as the personal representative of a decedent's estate you may need to search the house, any safe deposit box, and review tax returns and records to identify all the assets belonging to the decedent.

Once you have identified the assets for which you are responsible, you must take whatever steps are necessary to place the assets under your exclusive legal control. If fiduciary rights to the property are disputed, you may need to bring a lawsuit to establish your right to control. As the assets are identified, you must value and list them in writing for review by the beneficiaries. If you are acting as personal representative of an estate, you must file an inventory with the court.

Protect Property. Although you must identify and take possession of the assets involved, you MUST NOT combine (or "commingle") the fiduciary assets with your own personal assets. Commingling assets can cause confusion about which assets belong to whom and might enable your own personal creditors to reach the fiduciary property, again, exposing you to liability. As a result, you should never, for any reason, deposit fiduciary funds in your own bank account or take title to fiduciary assets simply in your own name without any indication of the fiduciary relationship. Likewise, if you are fiduciary for several trusts or estates, you normally should not combine the assets of one with another. All fiduciary assets are to be earmarked clearly to indicate that you exercise legal control over the property as a fiduciary, and that the property does not belong to you personally. For example, if you are executor of an estate, all estate funds should be deposited in accounts titled as follows: "Your Name, Personal Representative of the Estate of John Q. Deceased." For trusts, the titling would be "Your Name, Trustee of the John Q Trust."

To protect the fiduciary assets from loss, it should be a first priority to review the adequacy of any existing insurance coverage and to ensure that insurance is converted into your name, as fiduciary for the named estate. Insurance may be required on residential or other real estate, or on valuable items like art, jewelry, and antiques.

As fiduciary, you are charged with defending both the fiduciary relationship and the assets. If someone tries to invalidate a will of which you are the personal representative, and you know that the will is valid, it is your job to prove the will's validity. Similarly, if someone claims a fiduciary asset, your duty is to defend your right to it as fiduciary.

Duty to Invest Prudently. How do you know whether a particular investment is prudent? It is important to be aware that some investments you or your neighbor might make personally would not be considered "prudent" for a fiduciary to make. However, there is no list you can review of permissible or impermissible fiduciary investments. Instead, fiduciary investments are judged on the basis of the prudent person standards which are also described in the laws referenced above.

There are few hard and fast rules that can be used to describe "prudent investments" because the prudence of an investment depends on all the facts and circumstances at the time. In this area you may find it helpful to seek the counsel of an attorney and investment professional who can provide the advice you need to make proper decisions regarding the types of investments that are often made by fiduciaries. Likewise, professional advisors will be able to help you avoid investments that may be viewed as inappropriate. They can also help you identify the factors to consider in judging the prudence of any particular investment that you are considering.

Assets under your fiduciary control must generally be promptly invested or otherwise "put to work" to produce income. For example, checks and cash you receive should quickly be deposited in interest-bearing accounts or otherwise prudently invested. Real estate should normally be leased or managed to produce income.

A particularly important part of the duty of prudent investment is the duty to diversify the fiduciary assets. "Diversification" is the opposite of putting all the fiduciary "eggs" into one basket. It means investing in assets which will respond differently to varying economic developments. The purpose of diversification is to minimize the risk of loss. For example, a trust would not normally invest only in bonds, or hold a large sum in just five stock positions. Diversification would usually suggest investing part of the trust assets in cash deposits, part in stocks, and part in bonds.

Prudent Administration. Your acts as fiduciary will normally be judged by comparison to what a "prudent person" would have done in the same circumstances.

Oregon law provides that a "prudent person" (or "prudent investor") exercises reasonable care, skill, and caution by considering the purposes, terms, requirements, and overall strategies under the circumstances of the specific fiduciary position.

This does not mean that you may take the same risks with fiduciary assets under your care that you may take with your own assets. You may sometimes be less than prudent in the management of your own affairs: you might allow a check payable to you to remain on your desk for several weeks, earning no interest, or you might allow your own deposit at a bank to exceed $250,000, making it partly uninsured by FDIC. (For current FDIC limits, visit www.FDIC.gov/deposit). However, if you accept appointment as fiduciary, you don't have the luxury of letting time go by while holding fiduciary funds uninvested. A prudent person would promptly deposit checks and see to it that all assets are properly insured.

If you do take an imprudent risk and the beneficiary is damaged as a result, you, as fiduciary, will be personally responsible to repay any loss out of your own pocket. In extreme cases you could even be found to be criminally at fault.

Loyalty and Self-Dealing. As fiduciary, you may be acting on behalf of people who need assistance or protection. Sometimes these people will have little or no capacity to act in his or her own interest.

Great trust and confidence are being placed in you. As a result, you are held to a high duty of loyalty to the persons for whom you serve. You cannot put your own interests above those of your beneficiaries. You cannot take any personal advantage or profit from your position as fiduciary (with the exception of reasonable compensation for your services). Moreover, you must scrupulously avoid getting into any situation where your own interests and the beneficiaries' interests could conflict, or could even be viewed as a conflict of interest on your part.

Good faith and good motives are no excuse for breaching the duty of loyalty.

If a particular situation or transaction is of such significance or there are competing views by the fiduciary and the beneficiaries as to which action to take, it is prudent to consider requesting direction from the courts to resolve the issue. This relieves the fiduciary of liability for consequences of taking one action rather than another.

Your fiduciary duty of loyalty runs to all the persons who have an interest in the fiduciary assets—both those people who currently enjoy the benefits and those who will later benefit. One of the most difficult aspects of the fiduciary's job arises simply from the fact that the duty of loyalty runs to both current and future beneficiaries. Often their interests conflict. The fiduciary must consider and balance the competing interests.

> **Example:** Assume Jane leaves her estate in trust. You, the trustee, are directed to pay all the trust's income to her second husband as long as he lives. When he dies, you are to distribute the trust assets to Jane's children by her prior marriage. In investing the assets, you have a duty of loyalty to Jane's husband to produce a reasonable level of income; at the same time, you also owe a duty of loyalty to Jane's children to invest so that the trust assets appreciate enough to keep up with inflation during the years Jane's husband is alive.

Impartiality. As fiduciary, you should generally be impartial in dealing with the people who have an interest in the fiduciary assets. However, being impartial does not necessarily mean treating all beneficiaries equally.

If, for example, the governing instrument permits you to make distributions to each beneficiary based on need, you may reasonably decide to distribute more to one than another, but you must do so in a neutral and unbiased manner, and the beneficiary's needs as well as your decisions must be well documented in your files.

Delegate Wisely: You have been selected to serve as fiduciary because someone has confidence in your ability and judgment. This does not mean, however, that you must personally perform each fiduciary task. It is often appropriate to employ someone else (called an "agent") to perform a particular aspect of your fiduciary management task, but it is not appropriate to delegate *all* your responsibilities.

It is not always clear which acts you should perform personally and which are appropriate to delegate. Again, your attorney, accountant, investment advisor or other professional advisor can help you. If you do decide to delegate, it is important to review the background and qualifications of the person you select. It is wise to document all delegated matters with a written agreement with each agent.

However, delegating to others does not relieve you of your responsibility. As a fiduciary, you must periodically review the performance of the agent you selected to be sure his or her performance is adequate. It is important to be aware that delegation does not get you "off the hook." If someone to whom you have delegated duties acts imprudently, you may be held liable.

> **Example:** You are trustee of a $250,000 trust, but you are not personally skilled in making investment decisions. You delegate to an investment adviser who fails to diversify and who invests all the money in technology stocks, for example. If technology stock prices tumble, you can be personally responsible for the loss, even though you properly delegated investment decisions. The concentration in technology stocks may be found to be imprudent because there was no diversification.

Duty to Furnish Information. When you are acting as fiduciary, you often have considerable discretion because confidence has been placed in your judgment. As a result, you are usually not legally required to inform or consult with the beneficiary before acting. An exception to this general rule may apply to trusts. If you are trustee of a trust, it may be prudent for you to give notice in advance of certain transactions which could have a significant effect on the interests of the trust beneficiaries (see the chapter on Trustees).

The beneficiary of the fiduciary arrangement is often the only person who can monitor the performance of the fiduciary. Consequently, to assist beneficiaries in protecting themselves you must respond to the beneficiaries' reasonable requests for information. Some fiduciaries have a statutory duty to render periodic accountings to the beneficiaries so that the beneficiaries know about the status of their assets. It is a good idea to check with your professional advisors when you begin your fiduciary duties so that you know the scope of your accounting obligations and move forward appropriately from the outset.

Even if you are not required to file formal accountings, the need for good record-keeping cannot be overemphasized. You will need to keep a record of everything you receive as fiduciary: all assets, and all income and gains from those assets. Likewise, you will need to record all payments you make as fiduciary, any distributions you make to beneficiaries, and all bills you pay.

Whether you keep these records separately or as part of the fiduciary banking records, you will find it helpful to list and label each individual receipt or disbursement separately (rather than, for example, lumping all of one day's receipts into one figure). This practice will assist you later in any required accountings and in preparing any required income tax returns. If you place numerous securities in a brokerage account, the broker's statements will ease your record-keeping chores.

Income tax rules may require you to file an income tax return for the assets you control. For example, an estate or trust often has to file its own income tax return. You may also be required to send to the beneficiaries certain information relating to the fiduciary assets, which they will need to file with their own returns. The income tax rules relating to fiduciaries are complicated, and advice should be sought from a professional who is experienced in the field of fiduciary taxation.

Multiple Fiduciaries. You may not be acting alone as fiduciary. Sometimes more than one fiduciary is appointed to act for one estate or trust. The relationship between co-fiduciaries can pose questions: Must you all act unanimously, or does "majority rule"? Can you delegate certain management tasks to your co-fiduciary? If tasks are delegated between co-fiduciaries, it is recommended that a written agreement exist between them as to the breakdown of roles and responsibilities. Additional guidance can be found in the fiduciary document or in the law if the document is silent. Circumstances differ and it is important to consult with your professional advisor.

Even if "majority rules" or you are allowed to delegate particular tasks, you cannot sit back and let the other fiduciary do all the work. If you stand by passively and let another fiduciary cause harm to the beneficiary or the fiduciary assets, you may be held personally responsible. If significant differences exist between co-fiduciaries about trust or estate administration, it may be helpful to seek instructions from the court.

Summary

As a fiduciary, you have many responsibilities, often involving discretion and always requiring honesty and good judgment. The discussion of general fiduciary duties in this chapter, and the more detailed discussion of the responsibilities of specific fiduciaries in the following chapters, will assist you in better understanding the scope and nature of your duties. It will also help you identify the areas in which you may need to request professional advice. The greater your understanding of your responsibilities, the greater the likelihood that your fiduciary experience will be an effective and positive one.

Fiduciary Accounting

Fiduciary accounting is generally of concern to personal representatives and trustees. In some cases it may be a concern for other fiduciaries. This type of accounting is unique for two reasons: first, because many of the rules, principles, and concepts vary from state to state; and second, because many of the actions taken by the fiduciary (including some which will affect the accounting) are governed not by state or federal laws but by the wishes of the decedent or grantor as expressed in the will, trust, or other governing instrument.

Understanding fiduciary accounting is important to properly allocate income and principal. This distinction is important because trusts and estates have two classes of owners—those that have an interest in the fiduciary's income (income beneficiaries) and those having an interest in the principal (remainder beneficiaries).

The primary source of guidance in determining principal and income is the governing instrument. In general, the document can be relied on to allocate receipts between income and principal. However, when the governing instrument is silent or ambiguous on how fiduciary accounting income is defined, the allocation between income and principal must be made pursuant to state law. The fiduciary accounting rules vary from state to state because each has adopted its own set of guidelines. Most states have adopted a form of one of the three Uniform Principal and Income Acts. In most cases, these Acts are controlling only if the instrument is silent or ambiguous on a specific topic covered by the Acts.

Fiduciary accounting income is trust or estate income determined based on the provisions of the governing instrument (i.e., will or trust instrument) and applicable local law. It determines the economic interests of the beneficiaries by providing a means of allocating receipts and disbursements between the trust's income, which may be accumulated or distributed to the income beneficiary, and the principal, which will eventually be distributed to the remainder beneficiaries.

Even though there are many more similarities than differences between a fiduciary's accounting system and systems for other entities, the differences are very important. The most important one is the fact, as stated above, that a fiduciary deals with two distinct classes of beneficiaries: income beneficiaries and principal beneficiaries. The interests of each can be—and often are—opposed to one another. This distinction makes it vital to maintain two separate sets of records that accurately distinguish between the two classes and account for their respective interests so that each may be fully protected.

There is no standard accounting system that will work well for all fiduciaries because each arrangement varies so much in size and complexity. Accordingly, the system should be designed with the particular situation in mind. Regardless of the size or complexity of the system, the principles of fiduciary accounting must be followed. Every fiduciary must understand these principles and follow them in the administration of the fiduciary estate.

In accepting the responsibility of serving as a fiduciary, a person agrees to manage the assets in accordance with the wishes of the person who established the fiduciary relationship. This often requires the fiduciary to make periodic reports to the person who established the arrangement (the "Settlor"), the beneficiaries, the federal and state governments, or, in some cases, the court. The fiduciary must keep clear and accurate accounts regarding the management and allocation of assets. Beneficiaries can require the fiduciary to prepare an accounting of income, expenditures, and assets. Additionally, recently enacted statutes require a trustee to submit annual financial reports to certain beneficiaries.

The basic objective of fiduciary accounting is to establish and maintain accounting records which will enable the fiduciary to prepare a report which clearly and accurately provides meaningful information to the interested parties. As a general rule, the following information should be maintained by the fiduciary:

- Records relating to the receipt of the fiduciary assets;
- Records of earnings, gains, and other receipts and of expenses, costs, and other expenditures;
- Records of all distributions made from the income and principal accounts; and
- Where applicable, an allocation of the receipts and disbursements between the income and principal accounts.

A principal problem encountered in designing and maintaining such a system is the absolute necessity to distinguish clearly between the principal of the estate or trust and its income. The distinction between principal receipts and disbursements and income receipts and disbursements can often be found in the will or trust instrument. If the governing instrument is silent, state law should be reviewed for clarification.

This distinction between principal and income is necessary because in many cases the decedent's Will or the trust instrument designates one person to receive the income (called an income beneficiary) and another to receive the principal (called a remainder beneficiary). Even though it may not be necessary under the terms of the document to make such distinctions, the fiduciary duty to provide information as well as the requirements of estate and income tax laws make it desirable, if not mandatory, to do so. As a result, the accounting system must be maintained in such a way that at any time the amount accruing to the two classes of beneficiaries may be readily determined. Finally, by distinguishing between principal and income, both the fiduciary and the beneficiaries can better determine the investment performance of the assets.

In any case, the fiduciary should adopt a reasonable and fair approach. The fiduciary needs to take into consideration the interests of those entitled to income as well as those entitled to principal, and must act in such a manner as persons of ordinary prudence, discretion, and judgment would in the management of his or her own affairs. For further information about the accounting requirements of fiduciaries acting in specific capacities, such as trustee or personal representative, please see the appropriate chapter and consult with a professional advisor.

Personal Representative
of a Decedent's Estate

When a person dies leaving assets that require a probate, the court appoints a fiduciary to administer that proceeding. In Oregon, the term "personal representative" is used to describe any fiduciary appointed to administer a decedent's estate, regardless of how the person is selected.

Who Will Serve as Personal Representative of the Estate?

If a decedent leaves a validly executed will that names a person to serve as personal representative, that nomination will be respected unless the person named resigns or is disqualified. Persons who may be disqualified from serving include:

- Licensed funeral practitioners with limited exceptions;
- Persons convicted of certain types of felonies;
- Persons suspended for misconduct or disbarred from the practice of law or who resigned from the practice of law when charges of professional misconduct were pending;
- Minors; and
- Persons who are mentally incompetent.

Potential conflicts of interest should be considered in selecting a personal representative. The person named is not automatically disqualified from serving if he or she is also a beneficiary of the estate. In fact, it is very common for a family member, such as a spouse or child, to serve as personal representative even though such family member is also receiving a share of the estate. However, if the conflict is more direct, for example if the personal representative is also a major creditor of the estate and the estate is marginally solvent, then the conflict may be grounds for disqualification or removal.

An attorney may be named to serve as personal representative. If an attorney who has also prepared the will is to be named, the attorney should discuss this decision with the testator thoroughly and disclose all implications of his or her serving as personal representative.

Oregon law gives preference to certain persons to serve as personal representatives. The following persons, in the order listed, are entitled to serve:

- The personal representative named in the will;
- The decedent's surviving spouse, or the surviving spouse's nominee;
- The decedent's nearest kin, or that kin's nominee;
- The Director of Human Services or the Director of the Oregon Health Authority, or certain attorneys approved by either of the foregoing or their designated representatives, if it appears that potential reimbursement of public assistance received by the decedent would result in a claim against the estate;
- The Director of Veterans Affairs, if the decedent was a protected person and the director joined the petition for appointment;
- Any other person qualifying.

To Whom Does the Personal Representative Owe a Fiduciary Duty?

The general responsibilities of a personal representative are to collect and preserve the assets of the estate, pay all valid claims, and then pay over the remaining estate to the proper beneficiaries. The personal representative's fiduciary duty is owed to all parties who have an interest in the estate. Primarily, the personal representative owes a duty to the beneficiaries of the estate to administer the estate properly so that they receive all that they are entitled to as promptly as possible. The personal representative also owes a duty to the creditors of the estate so that all valid claims are paid to the extent assets are available. Finally, the personal representative is considered an officer of the court and has a general obligation to the court to administer the estate efficiently and fairly, which includes a duty to carry out the decedent's intentions.

Because of the broad range of this fiduciary duty, and because conflicts can arise among the persons to whom the personal representative must be loyal, often the personal representative must resolve those conflicts and make decisions based on the degree of duty he or she owes to the various parties.

What Authority Does the Personal Representative Have?

In Oregon, most personal representatives are empowered to settle the estate without prior court approval for each transaction. The estate must be solvent for the personal representative to be entitled to these powers, and the court must specifically grant them in an order. Under the Probate Code, a personal representative acting reasonably for the benefit of the interested persons is authorized to do anything required for the prudent collection, management, and distribution of the assets of the estate.

These powers include:

- The power to sell assets, including real estate;
- The power to borrow money on behalf of the estate;
- The power to negotiate and settle claims against the estate.

A personal representative has considerable authority and independence in settling the estate. These powers reduce the cost and delay of probate but increase the responsibility of the personal representative. The personal representative has the authority to make most decisions on his or her own but must carefully consider fiduciary duties in making each decision because the personal representative is ultimately answerable for that decision.

What are the Fiduciary Duties of a Personal Representative in Administering the Estate?

Checklist of Duties. The personal representative's duties include:

- Identifying and notifying the decedent's heirs and beneficiaries;

- Winding up the decedent's personal affairs, such as notifying the post office and the Social Security Administration if the decedent was receiving Social Security, securing the decedent's residence, and canceling credit cards and subscriptions, including online subscriptions and online back up;
- Taking possession of the decedent's property, making sure that valuables are stored safely and that all property is adequately insured;
- Examining the decedent's papers to locate assets, such as bank accounts and insurance policies, and to identify creditors;
- Collecting benefits, such as life insurance, veterans benefits, and refunds for prepaid services such as magazine subscriptions, that are due to the estate or to beneficiaries;
- Preparing an inventory and valuation of estate assets;
- Filing all necessary income and estate tax returns, including the decedent's last income tax return, and paying all taxes due;
- Collecting all debts owing to the decedent or the decedent's estate, and pursuing lawsuits on behalf of the estate;
- Notifying creditors, identifying and paying proper claims against the estate, and rejecting improper claims;

- Dividing and distributing the remaining assets to the appropriate beneficiaries; and
- Accounting to the beneficiaries and to the court and closing the estate.

These duties must be carried out in a manner that satisfies the personal representative's general fiduciary duties discussed in the Overview. For example, the personal representative should follow the guidelines set forth in that chapter's discussion of the duty to manage assets prudently when gathering the assets and holding them until distribution.

Creditors' Claims. A significant responsibility of the personal representative is to identify creditors of the estate, notify them of the decedent's death, and to pay all proper claims. Creditors' claims are debts of the decedent that arose before the decedent's death, rather than debts relating to the administration of the estate. A claim is an assertion by a creditor who seeks to be paid a dollar amount from the general funds of the estate for a debt incurred during the decedent's lifetime.

The probate law of Oregon sets out a procedure for creditors' claims intended to resolve all claims during the probate proceeding. During the three-month period following his or her appointment, the personal representative must make a diligent search for claimants, including reviewing checkbooks and other financial papers, reviewing online banking and other accounts, collecting and inspecting the decedent's mail, and asking family members and friends of the decedent about possible creditors. Within 30 days after expiration of the three-month period, the personal representative must give actual notice to all "reasonably ascertainable" creditors. In order to do this, the personal representative must deliver or mail to known potential claimants a notice containing certain information specified by statute. In other words, a claimant who is known or should be reasonably known is entitled to delivery of the notice. In addition to giving actual notice to known creditors, the personal representative must publish notice of the probate in a newspaper of general circulation in the county where the probate is being administered.

Once notice has been given, a creditor must normally file its claim with the court and serve it on the personal representative. Claims filed within the four-month period have priority over subsequently filed claims.

Claims that are not filed prior to the time of the filing of a final account or within two years from the first publication of notice to creditors are barred.

When a claim is received, the personal representative must determine whether it is properly payable. After properly presenting a claim, the claimant need not do anything unless the claim is denied. In Oregon, a claim is deemed allowed unless it is denied within 60 days of presentment to the personal representative. If a claim is disallowed, the claimant has 30 days after delivery of the notice of disallowance to either request a summary determination in probate court or commence a separate action in a court of appropriate jurisdiction. If the claimant takes neither of these actions the claim is barred.

If a personal representative pays a claim that was unenforceable (for example, a claim that had not been properly filed), the personal representative has violated his or her fiduciary duty to the beneficiaries because the funds used to pay the invalid claim would have otherwise been distributed to the beneficiaries. This does not apply to ordinary bills or debts of the decedent, such as utilities, taxes, credit cards, and similar items.

If a personal representative pays a claim that was unenforceable (for example, a claim that had not been properly filed), the personal representative has violated his or her fiduciary duty to the beneficiaries because the funds used to pay the invalid claim would have otherwise been distributed to the beneficiaries. This does not apply to ordinary bills or debts of the decedent, such as utilities, taxes, credit cards, and similar items.

If a personal representative decides that a claim is not properly payable, then it is the personal representative's duty to contest the claim or negotiate a settlement of the claim. The personal representative may also need to resolve contingent claims. For example, the decedent may have personally guaranteed a loan which at the time of death was current so no actual amount is owing from the estate. If the lender properly files its claim, the personal representative should make arrangements that are acceptable to the lender and are reasonable for the estate to release the guarantee.

Although a personal representative owes a duty to the creditors to preserve the assets in order to pay claims, the personal representative is not responsible for helping a creditor properly file its claim. For example, even if the personal representative knows that a duly notified creditor has not filed its claim with the court, telling the creditor of the defect in time for the creditor to correct it may violate the personal representative's duty to the beneficiaries.

Defending and Interpreting the Will. A paramount duty of the personal representative is to carry out the decedent's wishes and see that the estate is properly distributed. This is the "fiduciary purpose" that the personal representative must carry out, as discussed in the Overview. Part of this duty is to uphold the decedent's will. If anyone brings an action contesting the will, it is the duty of the personal representative to defend the will in that action. Also, if any term in the will is ambiguous, the personal representative must determine the proper interpretation of that term, requesting assistance from the court if necessary.

Collecting and Managing the Estate Property. Besides protecting the tangible assets such as artwork, motor vehicles, and real estate through proper storage and insurance, the personal representative must protect the investment assets through proper management. Generally, except as otherwise directed by the will, the personal representative must manage the assets of the estate in the same manner a reasonably prudent person would manage his or her own assets. The personal representative's duties regarding asset management can be somewhat different than that of a trustee: the emphasis is generally on preserving the estate rather than producing income during the probate period.

The personal representative has dual and sometimes conflicting responsibilities: to settle the estate quickly, and to collect and preserve as much of the estate as possible for payment of debts and distribution to the beneficiaries. For example, if the decedent had a potential interest in real estate that could only be brought into the estate through litigation, the personal representative must consider bringing a lawsuit. In making this decision the personal representative needs to weigh the chances of success and the value of the property against the costs of the litigation and the possible delay.

Inventory and Appraisal. Oregon law requires that the personal representative file an inventory of the probate assets within 60 days of appointment as the decedent's personal representative. The inventory must show the estimates of the true cash values of the assets as of the date of the decedent's death. This valuation is particularly important if an estate tax return is required. Even if an estate tax return is not needed, the valuation is useful in making distributions and in determining the income tax basis of assets that are later sold by the beneficiaries. The personal representative must also file a supplemental inventory within 30 days after receiving possession or knowledge of property belonging to the estate not included in the inventory, or include a description of the property in the next accounting. The personal representative may employ an appraiser to determine the value of any property in the estate for which the value is of reasonable doubt.

Family Support. There are provisions under Oregon law that allow distributions to be made from an estate for the support of the decedent's family during probate. It is the personal representative's duty to determine whether payments under those statutes are appropriate. If so, it is the personal representative's duty to confirm compliance with the terms of the relevant statutes.

Oregon Elective Share. In general, an elective share is a statutory provision that a surviving spouse may choose between taking what is provided in the will of the deceased spouse or taking a statutorily prescribed share of the estate. Such election may be presented if the will leaves the spouse less than he or she would otherwise receive by statute. This election may also be taken if the spouse seeks to set aside a will that contains a provision to the effect that an attempt to contest the will defeats the rights of one to take under the will.

In Oregon, the surviving spouse can demand as much as 33 percent of all assets, including assets held in trusts, retirement accounts, life insurance benefits, and annuities. The actual size of the spousal elective share is determined by the length of time the spouse and decedent were married to each other. The longer the marriage, the larger the share to which a surviving spouse is entitled. Surviving spouses married under two years may receive 5 percent of all assets; surviving spouses married for 15 years or longer may receive 33 percent of all assets. The surviving spouse has up to nine months to contest the deceased spouse's estate plan and apply for the increased elective spousal share. Spouses may also waive their elective share rights by an agreement or waiver entered into before or after the marriage, and signed by at least the surviving spouse.

Use of Attorneys, Accountants, and Other Experts. The personal representative may hire and rely on professionals such as attorneys, accountants, and financial advisers. If the personal representative has used due care in selecting qualified individuals to assist in the management of the estate, then the personal representative should not be liable for the actions of such professionals. The personal representative cannot be completely passive and surrender all duties to such professionals, however. If the personal representative fails to properly supervise hired agents and professionals, he or she runs the risk of incurring liability for the agent's conduct for breaching the duty not to delegate unwisely, discussed in the Overview.

Relationship with the Attorney for the Estate. The relationship between the personal representative and the attorney for the estate is unlike other attorney-client relationships. The personal representative, in his or her fiduciary capacity, is the client of the estate attorney. As such, the communications between the attorney and the personal representative are protected by the attorney-client privilege, with one important exception. The attorney, like the personal representative, also owes a duty to the beneficiaries and to the court. If the attorney knows of a breach of the personal representative's fiduciary duty, the attorney may reveal that breach to the court that appointed the personal representative.

Estate and Income Tax Issues. The personal representative is responsible for determining whether any tax returns are required and, if so, for filing those returns on time and paying any tax due. Important decisions are often necessary with respect to certain elections and how the funds will be raised to pay the tax (for example, which assets should be sold). To fulfill these tax duties properly and avoid the personal liability that can be imposed under the Internal Revenue Code, the personal representative should consider obtaining substantial assistance from a competent tax adviser.

The following is a checklist of significant federal tax questions that the personal representative will have to answer in administering the estate. It is possible that other tasks and decisions will be necessary, depending on the circumstances. The purpose of this list is to illustrate the complexity of the tax duties; it is not meant to be a list of all possible issues nor an explanation of the substance of these tax issues:

- Is an estate tax return required? This depends on the size of the estate.
- Is an extension of time for filing any return needed or advisable? In some

circumstances, even though the information is ready, the estate tax return should be delayed because intervening events could create tax savings.

- Is the surviving spouse a citizen of the United States and, if not, is he or she likely to become a citizen in the near future?
- Are special marital trusts, known as QTIPs, set up in the will, which would require a special election on the tax return?
- Are disclaimers advisable? A disclaimer is made when a beneficiary declines to accept a benefit from the estate to which he or she would otherwise be entitled. Disclaimers are often useful in creating tax savings, although they may be used for other reasons.
- Does the estate include a closely held business or a farm? If so, and if certain technical requirements are met, then the estate may be able to defer payment of estate tax or to value the farm or business property in a more advantageous manner.
- Is there any other permissible way to delay payment of estate taxes?
- How should the decedent's remaining exemption from generation-skipping transfer tax be allocated?
- Will an estate income tax return be required?

- Should administration expenses be claimed on the income tax return or the estate tax return?
- Are any of the estate assets difficult to value? Should those assets be appraised by a professional?
- Will income tax returns or gift tax returns need to be filed for the decedent?
- Should there be Oregon elections like QTIP and OSMP (discussed below)?
- What is the impact of federal portability (discussed below)?

In making these decisions, the personal representative will have to consider not only the effect on the total tax payable, but also the effect on the respective beneficiaries. Sometimes a savings of total taxes paid will favor one beneficiary over another.

What Is the Potential Liability of the Personal Representative?

The personal representative must be concerned with potential personal liability for failure to carry out his or her fiduciary duties while administering the estate. By law the personal representative is required to post a bond before beginning to administer the estate, unless the bond requirement is waived. If a bond is posted, the surety company that issued the bond will also be liable for the personal representative's misconduct. However, the bond requirement can be, and usually is, waived in the will. As a result, except in the case of a decedent who died without a will, it is unlikely that such additional protection will be available.

Under the Internal Revenue Code the personal representative is responsible to ensure payment of taxes due from the estate. If the taxes of the estate are not paid, the IRS may hold the personal representative individually liable for those taxes.

Summary

The fiduciary responsibilities of a personal representative are complex and sometimes conflicting. Although the personal representative of a solvent estate has a great deal of power and autonomy in making decisions, that personal representative is also answerable to a diverse group of parties whose interests often are in conflict. It is therefore imperative that, in order to fulfill those fiduciary responsibilities, the personal representative consider the effects on all interested parties before making decisions. It is particularly important for a personal representative to seek out professional advisors to assist in minimizing tax liability and to ensure that sufficient funds are available to cover state and federal tax liability.

Trustees of Trusts

What Should You Consider When Deciding Whether to be a Trustee?

The first thing you should consider is the responsibility and standard of care imposed upon a fiduciary generally, as discussed in the Overview. You should also consider how long you will serve as trustee. A trust may last for several generations; indeed, a trust may outlast you as trustee. You should consider the property that you will be expected to manage, and the persons for whom you will be managing those properties. It is likely you will be working with the properties and beneficiaries for a long period of time, and you should be certain from the outset that you will be able to comfortably perform your duties within the spirit of the trust.

In particular, be cautious if you would be involved with any land on which “hazardous substances” have been used—such as land used once as a gas station or as a dry cleaning establishment, or even vacant property once used for dumping. Being involved as a trustee with this kind of property may, under current law, involve personal risk to your own assets. You also need to be aware that any person or entity that is given a power under the trust to direct or control the actions or investments of the trustee will be held to the same standards as a trustee, even if that person is not called a “trustee” in the trust.

Your fundamental job as trustee is to follow the directions contained in the trust’s governing instrument, which may be a will or a trust agreement, consistent with all provisions of trust law that may apply. It is often difficult to understand many of the subtleties of these obligations, and assistance from knowledgeable legal counsel should be considered.

Before you accept the trusteeship, you should read and become very familiar with the trust documents. If you don’t understand a provision, or if there seems to be a conflict or an ambiguity in the terms, you may consider consulting with a trusts and estates attorney. While your ultimate authority is the trust’s governing instrument, to the extent that the trust is silent, Oregon trust law will control your powers and duties.

Acceptance of the Trust. Even though someone has named you as trustee in the trust, your duty begins only when you actually accept the trusteeship. If you decline, another qualified trustee will be found.

You might accept the trusteeship as successor to another fiduciary. This could be from a former trustee who has died, resigned, been removed, or become incompetent. If the trust is a "testamentary trust"—one established under the terms of a will—you may accept the trust property from the personal representative of the estate in which the will is being probated. You will not usually be responsible for your predecessor fiduciary's actions, unless you actually know that the fiduciary made mistakes and took no corrective action. If you are aware of mistakes you may need to seek the assistance of a professional advisor to correct them.

Determining Trustee Duties

To determine a trustee's duties, there are three overlapping sources that must be considered: the governing trust instrument, the Oregon Uniform Trust Code (OUTC), and common law.

Provisions of Trust Generally Prevail. For purposes of defining a trustee's duties, the terms of the trust instrument prevail over most of the provisions of the OUTC and common law. However, a trustee has no duty to comply with trust provisions that are unlawful, contrary to public policy, or impossible to achieve. Further, certain duties of the trustee cannot be modified or eliminated by the trust instrument. These duties include the duty of a trustee to act in good faith and in accordance with the purposes of the trust and the duty to give notice, information, and reports to qualified beneficiaries.

To the extent that the terms of the trust instrument do not determine the trustee's duties, the OUTC and the common law of trusts and principles of equity govern the duties of a trustee. The most notable source of the common law of trusts is the Restatement (Second) of Trusts (1959). Federal law may also impose additional trustee duties, such as federal income tax and other reporting requirements.

Because there are numerous possible sources of duties a trustee may owe in his or her particular circumstances, the assistance of a trusts and estates attorney is often an absolute must for trustees seeking to determine the nature and scope of his or her duties.

Duty of Loyalty

Your most fundamental duty as trustee is one of exclusive loyalty to the trust beneficiaries. As discussed in the Overview, this duty prohibits any self-dealing between you and the trust, such as loans from the trust to you or investments by the trust in your business ventures. Specifically, the trustee must administer the trust "solely in the interests of the beneficiaries."

Trustee Self-Dealing: Transactions Voidable. If a trustee enters into a sale, encumbrance, or other transaction involving the investment or management of a trust property for the trustee's own personal benefit, the transaction may be voided (undone) by the beneficiary. This is the case even if the trustee acts in good faith, pays fair consideration, or actually receives no financial benefit from the transaction. The only exceptions are where:

- The transaction was authorized by the terms of the trust;
- The transaction was approved by the court;
- The beneficiary consented to the transaction, ratified it, or released the trustee; or
- The transaction involved a contract entered into or acquired by the trustee before the trustee became, or contemplated becoming, trustee.

Related-Party Dealings: Transaction Presumed Voidable. A transaction by a trustee is presumed to be affected by a conflict between the personal and fiduciary interests of the trustee if the trustee enters into it with any of the following persons: (1) the trustee's spouse, (2) the trustee's descendants, siblings, or parents, or their spouses, (3) the trustee's agent or lawyer, or (4) a corporation or other person or enterprise in which the trustee or other persons hold an interest that might affect the trustee's best judgment.

Unlike transactions entered into directly by the trustee, these transactions are voidable by the beneficiary unless the trustee establishes that the transaction was not "affected" by the conflict. Factors for consideration include whether the transaction was fair and whether the terms are similar to those negotiated at arm's length with a third party.

Unfair Advantage—Transaction Voidable if Not Fair to Beneficiary. Unless a trustee can establish that the transaction is fair to the beneficiary, a transaction between the trustee and a trust beneficiary may be voided by the beneficiary if the trustee obtains an advantage during the existence of the trust or while the trustee retains significant influence over the beneficiary. An example would be a transaction in which the trustee engages in independently of the trust but was actually an opportunity properly belonging to the trust.

Exceptions. The following transactions do not violate the duty of the loyalty if they are fair to the beneficiaries:

- An agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;
- Payment of reasonable compensation to the trustee;
- A transaction between a trust and another trust, decedent's estate, custodianship, or conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest;
- A deposit of trust money in a financial institution operated by the trustee; or
- An advance by the trustee of money for the protection of the trust.

Furthermore, the court may appoint a special fiduciary to make a decision with respect to any proposed transaction that may cause a conflict of interest if entered into by the trustee.

Duty of Impartiality

In addition to the general fiduciary duty of impartiality as discussed in the Overview, your duty as a trustee requires particular consideration of the interests of all beneficiaries of the trust. This duty becomes more difficult when the trust differentiates between interests in income and principal. For example, the trust might provide that all income is to be distributed to A for life, with the remaining trust assets (remainder) distributed to B when A dies.

A trustee must consider the interests of both income and remainder beneficiaries in making investments, repairs and replacements to trust assets, and the allocation of receipts and expenditures between income and principal. Income beneficiaries of a trust are entitled to income (trust income) earned from the trust assets for as long as is provided by the trust. Remainder beneficiaries are entitled to the trust assets themselves (trust principal) at the end of the income beneficiaries' interests, all according to the terms of the trust. Many times, a trustee's decision will increase income and decrease principal, or vice versa, effectively changing the amounts actually received by the beneficiaries.

It is very important to allocate trust receipts and expenditures between the principal and income accounts as this allocation will directly impact the amount that is available to the two types of beneficiaries. It is equally important to weigh the interests of income and remainder beneficiaries in investing trust assets. For example, you should regularly solicit and keep records of the facts concerning the financial needs and circumstances of each beneficiary. Then you can set an investment objective for the trust as a whole. The income beneficiaries' needs generally will require that you make some investment in income-generating assets, such as bonds, which may be taxable or tax-exempt. The remainder beneficiaries' needs will generally necessitate some investment in growth-oriented investments, such as stocks. The number of beneficiaries, their ages, outside income, tax brackets, and the duration of the trust all are factors which will influence the allocation of investments. You should keep a record of the investment program designed to meet the investment objective of the trust. You should also regularly review the investment objectives after updating the financial needs and circumstances of each beneficiary.

Discretionary Powers

Many trusts direct the trustee to exercise discretion, or judgment, in making distributions to beneficiaries. For example, a trust might call for the distribution of such amounts as the trustee deems to be necessary for the beneficiary's support and maintenance. Even while exercising this discretion, a trustee must still meet all trustee duties.

Drafters use a wide range of discretionary standards to grant a trustee absolute discretion in determining trust distributions. For example, some trust instruments confer "absolute and unfettered," "sole," "uncontrolled," or "unqualified" discretion on the trustee. This language does not mean "unlimited discretion." The trustee must still exercise the power in good faith and in accordance with the purposes of the trust. Indeed, the trustee's exercise or failure to exercise a discretionary power may constitute an abuse of discretion, such as when the trustee fails to exercise the power when the circumstances require action, or when the trustee's actions exceed the scope of the power.

Criteria to consider in determining whether a trustee abused discretion include the following:

- The extent of the discretion that the trust confers on the trustee
- The purposes of the trust
- The nature of the power
- The existence of any external standard by which the court can judge the reasonableness of the trustee's conduct
- The trustee's motives in acting (or failing to act)
- The existence of a conflict of interest between the trustee and the beneficiaries.

Investment Duties. As generally discussed in the Overview, your investments of trust property must meet the "prudent investor" standard unless the terms of the trust specifically state otherwise. Your investment portfolio for the trust is judged as a whole, rather than by applying the standard to each individual investment standing alone.

You should consider the following criteria in the selection of investments to meet the prudent investor rule:

- Probable income and probable safety of capital
- Marketability
- Length of term of investments
- Duration of trust

- Liquidity requirements
- Beneficiaries' needs and outside assets
- Tax consequences
- Inflation.

Prudence is judged by reviewing the facts and circumstances existing at the time the investment was made and at all times thereafter. You may support the prudence of your investment decisions by keeping written records of the factors considered and the circumstances in which the investment was made.

You need to analyze the extent to which the trust assets, taken as a whole (the "total portfolio") meets the "prudent investor" standard and the determined investment objectives of the trust. You should conduct a regular review of the suitability of the assets as trust investments and the ability to meet the investment objective of the trust.

If you receive imprudent investments into trust from the person creating the trust, or from the probate estate, you have a duty to dispose of them within a reasonable time. Your duty to make trust property productive generally requires the sale of unproductive assets and reinvestment of the proceeds in income-producing assets within a reasonable time.

As explained in the Overview, you have a general duty to make diversified investments to minimize the risk of loss. There may be practical reasons for non-diversification, such as when a trust is too small to allow broad diversification, or when a trust may suffer significant capital gains taxes from the sale of assets with low cost bases. In such circumstances, you may consider obtaining the informed approval and written consent of affected beneficiaries to the non-diversification of the trust, or you may seek court approval of your investment proposal.

Special Skills. If you have any special skills in managing assets, you must apply them in your trusteeship. For example, if you are a registered investment advisor, you must use your investment knowledge, experience, and resources in investing trust assets. If you do not have special skill or training in investing assets, and the assets of the trust are significant, you should consider seeking professional assistance to ensure that your investment strategy is "prudent."

Trust Distributions. The trust may direct you to distribute discretionary amounts of principal or income for a beneficiary's care and support. One of the most difficult tasks to confront you as trustee may be deciding whether the beneficiaries' circumstances warrant discretionary trust distributions. It would be wise for you to regularly review and keep records of beneficiaries' financial needs and circumstances. If you make honest, reasonable decisions to distribute discretionary amounts based upon such documented facts, courts will not generally second-guess your exercise of discretion.

Trust Termination. The trust document determines the time when the trust terminates. Your duty is to distribute the trust assets to the remainder beneficiaries entitled to them within a reasonable time after the terminating event occurs. You are allowed a reasonable period of time to make these final distributions to ensure that final costs and bills are paid or provided for.

Duty to Inform and Report

A trustee must keep "qualified beneficiaries" of the trust reasonably informed about the trust administration and of the material facts necessary for those beneficiaries to protect their interests. In addition, the trustee may, but is not required to, respond to any beneficiary's request for information relating to trust administration if reasonable under the circumstances.

Qualified Beneficiary. On any given day, a *qualified beneficiary* is a beneficiary who either (a) is currently eligible to receive mandatory or discretionary distributions from the trust; or (b) would be eligible to receive such distributions if the interests of all current permissible beneficiaries terminated, or the trust is terminated.

A trustee has the following reporting obligations to qualified beneficiaries:

- On request, promptly furnish a complete copy of the trust instrument to a qualified beneficiary.
- Within a reasonable time after accepting a trusteeship, notify all qualified beneficiaries of the trustee's acceptance.

- Within a reasonable time (usually 60 days) of acquiring knowledge of the creation of an irrevocable trust, notify qualified beneficiaries of the trust's existence
- Notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.

Special situations may arise in which the trustee should provide additional information. For instance, the trustee should consider providing prior written notice to a beneficiary before completing significant transactions or selling assets that are difficult to value or replace.

Annual Report. At least annually, and on termination of the trust, a trustee must send a trustee report to persons entitled to distributions of trust income or principal and to other qualified beneficiaries who request the report. The report must include a listing of trust property and liabilities, show the market values of trust assets, if feasible, and reflect all receipts and disbursements of the trust, including the source and amount of the trustee's compensation.

However, while the settlor of a revocable trust is alive, trust beneficiaries other than the settlor have no right to receive notice, information, or trust reports. Further, if the settlor's spouse survives the settlor, required information, notice, and reports should be given only to the settlor's spouse under certain circumstances.

Delegation

As discussed in the Overview, you may supplement your trust administration expertise by delegating the performance of some, but never all, of your duties to prudently selected and supervised advisors and agents. Reasonable fees are legitimate expenses of the trust. For example, you may employ a real estate broker or property manager in the sale or management of trust real estate, an accountant in the preparation of fiduciary income tax returns, or an investment advisor in the management of trust securities

Generally, if the trust instrument does not provide otherwise, a trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. In delegating duties to an agent, the trustee must exercise reasonable care, skill, and caution when: (a) selecting an agent, (b) establishing the scope and terms of the delegation, and (c) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

In deciding whether and how to delegate, the trustee has a duty to consider the benefits of the delegation versus the likely costs. To protect the beneficiaries against excessive costs, the trustee may need to adjust trustee compensation for functions that the trustee has delegated to others.

Delegating Investment Decisions. The delegation of duties frequently arises in the context of managing trust investments. In considering whether delegation is appropriate, the trustee should look at the following factors:

- The amount of discretion involved
- The value and character of the property involved
- Efficiency, convenience, and cost considerations
- Whether the act requires professional skill or knowledge that the trustee does not possess
- The fairness and appropriateness of the responsibilities, considering the trustee's burdens and compensation.

Duty to Identify, Collect and Protect Property

The person who established the trust, or the personal representative of an estate in the case of a testamentary trust, will deliver the assets which will fund the trust to you as trustee. You have a duty to identify and collect that property, and inventory those assets with the correct cost basis. You should record any conveyance of trust real property to you as trustee in the records office of each appropriate county. Leases of trust real property, real estate contracts, mortgages, and promissory notes should all have proper assignments to you, as trustee.

You also have the duty to properly identify assets as trust assets. You should keep trust property separate from your own property and from that of other trusts by registering the title in the name of the trust and accounting separately for receipts and expenditures attributable to it.

Tangible personal property and real property should be insured to an extent commensurate with its current appraised value. Insurance does not automatically transfer over to the trust. You must immediately make sure you have your own insurance policies in force.

If you are serving as trustee for a person other than yourself, you must prepare and file fiduciary income tax returns and advise beneficiaries of any trust income tax consequences to them. If you are uncertain what filings and notices are required, you should consult with a professional advisor.

In preserving trust real property you need to pay real estate taxes and mortgages and make necessary repairs. If a lawsuit is necessary to enforce a claim that the trust has, you must initiate a lawsuit. If trust funds are insufficient to preserve trust property (for example, if there are insufficient liquid assets to pay real estate taxes), then you need to notify and consult with the beneficiaries to determine an appropriate course of action.

Multiple Fiduciaries

You may not be acting alone as trustee. The trust may name more than one trustee. Each of you, as co-trustees generally, has to satisfy the same fiduciary duties already discussed. That becomes more complicated when there are multiple trustees.

Generally, each co-trustee has the right and the duty to participate in the administration of the trust. The exceptions are when you: (1) are unavailable because of absence, illness, or disqualification under other law, (2) are temporarily financially incapable, or (3) have properly delegated power to another co-trustee.

The trust documents (and applicable trust law) may allow you to delegate certain functions to the other co-trustee(s). Also, the trust documents might specify that individual co-trustees are to take responsibility for specified portions of the trust administration.

You also have some duty to try to prevent mistakes by your fellow co-trustees. How closely you have to monitor their activities depends upon the trust documents and the facts and circumstances of each individual case. For certain functions, such as liability for trust investments, a different liability standard applies if the function is delegated to another co-trustee rather than to an agent. However, if a co-trustee allows another co-trustee to have such control over trust property that it enables the co-trustee to misappropriate the property, it may constitute a breach of fiduciary duty.

Sometimes, co-trustees disagree about what to do. Must you all act unanimously, or does "majority rule"? The trust documents may dictate the answer to that question. If not, trust law will apply, which will usually apply majority rule. But even if "majority rules," or you are allowed to delegate particular tasks, you must continue to pay attention. If you stand by passively and let another co-trustee cause harm to the beneficiary or the trust assets, you may be held personally responsible.

If you disagree with actions or decisions of the other co-trustees, you should make your objections clearly and formally known to them, a process called dissenting. However, whether your dissent will protect you from liability is not always clear

Even if you properly dissent, you may still be held liable for the action if you fail to exercise reasonable care to prevent the other co-trustee from committing a serious breach of trust and fail to compel the other co-trustee to redress any serious breach of trust. To fully protect yourself, you may have to institute legal action against the other co-trustee(s).

Trust Provisions Relieving Trustee of Liability

Some trust instruments include exculpatory provisions that purport to relieve the trustee from personal liability for certain acts (or failures to act) or to limit the trustee's responsibility to a standard of care less than the ordinary or reasonable person standard.

Regardless of the nature and extent of the exculpatory provisions, the trust agreement cannot waive or modify certain duties. In particular, ORS 130.835 prohibits a settlor from relieving a trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or to the interests of the beneficiaries.

Also, any exculpatory provision is unenforceable if it is included in the trust instrument as a result of a trustee's abuse of a fiduciary or confidential relationship with the settlor. Similarly, if the exculpatory term is drafted by the trustee, it will be invalid unless the term has been reviewed by independent counsel for the settlor or the trustee proves that the term is fair under the circumstances and was reasonably communicated to the settlor.

Following Direction from Others

Some trusts provide that certain third persons have the power to direct specified actions of the trustee. These third parties are referred to as a special trustee, a trust advisor, or trust protector. Regardless of the title, the scope of the third party's duties will be defined by trust law and the terms of the trust instrument.

If a trust is revocable by the person who created it (sometimes called the "settlor"), the trustee "may follow a direction of the settlor that is contrary to the terms of the trust."

If the trust confers on a person the power to direct certain actions of the trustee, the trustee must act in accordance with an exercise of the power unless the exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

Getting Help

As you can see from this discussion, it is not always easy for a trustee to know what should be done in any particular circumstance. As trustee, you should not hesitate to seek legal advice from a trusts and estates attorney. As trustee, you are entitled to retain legal counsel to advise you at the expense of the trust, to be treated as a trust administration expense. Similarly, you are entitled to seek tax advice regarding the trust from a tax attorney or CPA as a trust administration expense. Given that, there is little reason to take the risk of making incorrect assumptions about the propriety of your actions in an uncertain area.

Guardians and Conservators

When individuals become so mentally incompetent or disabled that they cannot handle their own affairs, the court may appoint a guardian or conservator to assist them. A court may also appoint a guardian or conservator to assist minors. A person who handles personal affairs is called a guardian. A person who handles financial affairs is called a conservator. The person needing assistance, whether an adult or minor, is called the "protected person," although the term "ward" was used in earlier Oregon cases.

A guardian is responsible for caring for the protected person's personal needs and affairs, including housing, food, clothing, and medical needs. A conservator is responsible for the financial affairs of the protected person, including investments and expenditures, as well as initiating and defending lawsuits on behalf of the protected person. In most cases an appointed guardian will serve in both positions. Unless otherwise noted, the law applying to guardians as described below also applies to conservators. Where guardians and conservators are treated the same, the term "guardian/conservator" is used.

State law recognizes that not all incapacitated persons have the need for a "full" guardian/conservator, responsible for *all* aspects of the protected person's personal and/or financial affairs. Some protected persons are disabled to varying degrees of severity, but are not fully incompetent. They may be able to continue managing certain limited aspects of their personal or financial affairs. In such cases the court will appoint a "limited" guardian or conservator to assist the protected person only in those areas where assistance is needed. The judgment appointing a limited guardian or limited conservator will specify what decision-making powers the protected person will retain.

The law of guardianships continues to evolve. Major changes have been made in the guardianship statutes. Essentially all of the Oregon statutes regarding guardianships, conservatorships, and transfers to minors were repealed by the Oregon Legislature in 1995. In their place, the Legislature enacted ORS chapter 125 which contains a comprehensive statutory structure for creating and maintaining guardianships, conservatorships, and other protective orders. The repealed guardianship laws were formerly contained in ORS chapter 126. The portions of chapter 126 that are still valid law include the Oregon Uniform Transfers to Minors Act. There is also a relatively small body of case law for guardianships and other similar fiduciary relationships.

In spite of the expense and potential complications involved in establishing a fiduciary relationship for a minor or an incapable adult, in some situations there is no other alternative.

Who Might Need a Guardian/Conservator?

Under Oregon law, three types of people may need guardians. These three types of people together constitute "protected persons." The three types of protected persons are those who are "financially incapable," "incapacitated," and "minors."

Under Oregon law, "financially incapable" is defined as "a condition in which a person is unable to manage financial resources . . . effectively for reasons including, but not limited to, mental illness, mental deficiency, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power or disappearance.

"Incapacitated" is defined as "a condition in which a person's ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person's physical health or safety."

A "minor" is anyone under 18 years of age.

Oregon law presumes a person to be competent. Accordingly, Oregon law requires proof by clear and convincing evidence of the conditions necessary for appointment of a fiduciary.

Who Can Serve as Guardian/Conservator?

In selecting and appointing a guardian or limited guardian, the court has as its primary concern the protected person's best interest. Courts attempt to find the "most suitable person who is willing to serve as fiduciary." Individuals over 18, trust companies, banks, and specially qualified nonprofit organizations may be appointed to serve as guardian or limited guardian. In making the appointment, the court gives special preference to parents of a minor, who are viewed as the "natural" guardians of the child. Even if a parent is under age 18, the court may appoint the parent to serve as guardian.

The court also considers the wishes of the protected person in making an appointment of guardian or limited guardian. Prior to becoming incapacitated, the protected person may have designated the person he or she wanted to serve as guardian or limited guardian under a durable power of attorney or other document. If so, the court will usually appoint the person selected, unless he or she is found to be "unsuitable."

Similarly, a parent may appoint a guardian for a minor under the parent's will, and the court will usually follow the parent's wishes. This is one of the most important reasons for a parent to prepare a will.

What Are the Duties and Responsibilities of a Guardian?

The courts hold guardians to the highest fiduciary standard in caring for and representing the protected person. For this reason, the guardian is always under the general direction and control of the court. The court will closely supervise the guardianship.

General Duties. The guardian or limited guardian of the protected person must care for and maintain that person, assert his or her rights and best interests, and provide timely, informed consent to necessary medical procedures. If the protected person is a minor, the guardian or limited guardian of the person must see to it that the protected person is properly trained and educated, and that the protected person has the opportunity to learn a trade, occupation or profession.

Required Reports. The guardian must notify interested persons at least 15 days before the deadline for filing objections to a petition or motion to be appointed guardian. Once appointed, the guardian must file a report within 30 days of each anniversary of the guardian's appointment. The report is to include an assessment of the protected person's physical, mental, and emotional needs, and the protected person's ability to perform or assist in activities of daily living.

Medical Responsibilities. The guardian or limited guardian of the person is not authorized to involuntarily commit or detain the ward, except through formal involuntary commitment procedures under state law. The guardian or limited guardian of the person may not consent on the ward's behalf to any of the following procedures:

- Therapy or any other procedure which induces convulsion;
- Sterilization or abortion;

- Surgery solely for the purpose of psychosurgery; or
- Other mental health procedures which intrude on the protected person's body integrity, physical freedom of movement, or other crucial rights.

In certain situations, the guardian or limited guardian of the person may consent on the protected person's behalf to amputation.

As to a protected person who has become brain-dead and whose life depends on support systems, if the protected person has already signed an effective Health Care Directive that document should control. If not, the guardian or limited guardian of the protected person should work closely with the person's doctors and with an attorney to determine if life-sustaining treatment should be withheld or life-support systems terminated.

What Are the Duties of a Conservator?

A conservator is given broad authority to handle the financial affairs of a protected person. Conservators have a high responsibility to appropriately manage financial affairs and protect the assets of the protected person's estate. A conservator is bound to exercise scrupulous good faith in management of the estate's affairs. In managing the financial affairs of the protected person, all of the general fiduciary duties discussed in the Overview apply. In addition to those general duties, a conservator must comply with certain additional statutory duties.

Financial Obligations. The conservator is to furnish a bond conditioned on faithful discharge of all duties of the conservator; however, the court may waive the requirement of a bond on good cause shown. Upon appointment, the conservator must take possession of all the property of substantial value of the protected person, and all rents, income, issues and profits from those properties whether accruing before or after the appointment of the conservator. Title to all property of the protected person remains in the name of the protected person. The conservator may permit the protected person to retain possession and control of property and funds for living requirements depending on the needs and abilities of the protected person.

Payment of Expenses. The conservator may spend income or principal of the protected person's estate without prior court approval for the support, education, care, or benefit of the protected person and dependents of the protected person. However, the conservator should consult with the parent or guardian of the protected person to agree on appropriate standards before making expenditures. Conservators are also empowered to spend estate funds for the benefit of the protected person without prior court approval when such expenditures are "reasonably necessary."

Litigation of Claims. Conservators have broad power to deal with litigation matters on behalf of the protected person. The conservator need not seek prior court approval of a compromise of a claim involving the protected person; however, such prior approval may be advisable under some circumstances.

Filing Requirements. The conservator must file an inventory of all property of the protected person that has come into the knowledge or possession of the conservator within 90 days of being appointed. This inventory must include the conservator's estimate of the true cash value of the property.

The conservator must also file accountings with the court within 30 days of each of the following events: (1) each anniversary of the conservator's appointment, (2) the death of the protected person, (3) a minor protected person reaching age 18, and (4) an adult protected person regaining competence to manage his or her own financial resources.

Actions Requiring Prior Approval of the Court

Guardian's Acts in General. Because of the close supervision of the guardianship/conservatorship administration by the courts, guardians/conservators are frequently required to obtain prior court approval before acting on behalf of the protected person. In general, where some doubt exists as to whether a particular act is permissible, the guardian/conservator should always consider obtaining prior court approval.

Gifts. Gifts of the protected person's property cannot be made without prior court approval unless the value of the gift is under $250 per person in a calendar year, not to exceed. an aggregate amount of $1,000 for all gifts in a calendar year

In appropriate circumstances, the court may authorize gifts of the protected person's property to relatives, friends, and prospective beneficiaries under the protected person's will, or to other individuals or charities in which the protected person is believed to have an interest.

Sales. Sale of the protected person's principal residence can only be made with prior court approval. That prior approval must be based on a motion filed with the court, with notice provided to persons listed in.

Conflicts of Interest. A guardian/conservator must obtain court approval prior to employing a person or company in which the guardian/conservator has a pecuniary or financial interest. The guardian/conservator must make a full and accurate disclosure of the nature of the pecuniary or financial relationship to the court.

Placement in Mental Health Treatment Facilities. Before a guardian may place an adult protected person in a mental health treatment facility, the guardian must file a statement with the court informing the court that the guardian intends to make such a placement. Notice to the court must comply with Oregon statutory requirements.

Modifying Property Rights and Interests. The conservator must also obtain prior court approval for the following acts: (1) conveying or releasing contingent or expectant interests of the protected person in real property; (2) creating a revocable or irrevocable trust of estate property; (3) electing options to change beneficiaries under insurance or annuity policies, or surrendering such policies; (4) disclaiming an interest in real property of the protected person in an estate or inter vivos transfer; or (5) authorizing, directing, or ratifying an annuity contract or a contract for life care.

What Decisions Can the Guardian Make as to the Domestic and Personal Affairs of the Protected Person?

Marriage and Divorce. The judgment appointing a limited guardian may specify whether or not the protected person should be entitled to enter into a marriage. This will not be permissible if the protected person is incompetent; however, a protected person who is merely disabled may well be capable of entering into a marriage.

In general, the guardian should not commence a divorce action on behalf of the protected person. If the best interests of the protected person would be served by a divorce and the circumstances otherwise warrant it, the court may permit a divorce action to be commenced on the protected person's behalf.

Residential Changes. Except to the extent of any limitation under the judgment of appointment, a guardian has custody of the protected person and may establish the protected person's place of abode in or out of the state of Oregon.

Wills and Other Estate Planning Documents. A ward for whom a guardian of the person and estate has been appointed is presumed under the law to lack the necessary capacity to sign a will. The appointment of a limited guardian does not necessarily create such a presumption. If the ward in a limited guardianship wishes to make a will you should consult with professional advisors to determine and properly document that the ward has the necessary "testamentary capacity." Failure to do so may only invite an attack on the will's validity at a later time.

What Are the Limitations on the Powers of the Guardian?

Over the years, the courts have developed a number of important limitations and restrictions on the powers of guardians and limited guardians.

Contracts and Agreements Between Guardian and Protected Person. The courts view any transaction between the guardian and the protected person with great suspicion. If such a transaction is deemed harmful to the protected person's best interests, the court will presume that the transaction resulted from the guardian's "undue influence" over the protected person. A guardian is not permitted to profit from any transaction involving the protected person, with the exception of reasonable compensation as determined by the court. Similarly, purchases and rentals by the guardian/conservator of a protected person's property are carefully scrutinized. The guardian/conservator must not treat the protected person's property as his or her own.

Use of Minor's Funds. With few exceptions, the courts prohibit a parent who is serving as a guardian from using the child's funds for family expenses. It is the parent's duty to use personal assets to care for the minor, while keeping the minor's assets intact and invested for ultimate distribution to the minor upon obtaining majority. The guardianship estate cannot be used to satisfy the parent's own obligations of support. Any charge to the protected person's estate for room and board must be approved by the court before payment is made.

Community Property. If the spouse of the protected person serves as guardian/conservator, and the guardianship estate holds community property assets, a number of restrictions apply to the spouse/guardian's ability to deal with those community assets. While ordinarily each spouse may exercise broad management powers over community assets, those powers are, in effect, surrendered when the spouse/guardian/conservator begins serving. To avoid these restrictions the spouse/guardian/conservator may request that the court authorize a legal separation of both halves of the community property, with the protected person's half subject to the guardianship restrictions, and the spouse/guardian/conservator's half free from such restrictions.

What Compensation and Reimbursement May the Guardian/Conservator Receive?

The court is to review and specifically approve a guardian/conservator's compensation. The guardian/conservator may receive such compensation as the court determines to be just and reasonable.

In addition to compensation, the guardian/conservator may recover any out-of-pocket expenses, including reasonable attorneys' fees incurred on behalf of the protected person.

If the court finds that the guardian/conservator has failed to live up to its responsibilities, the court may reduce or deny the guardian/conservator's compensation. In some circumstances, the guardian/conservator may even be liable to the protected person for abuses of discretion.

What Occurs on the Death or Removal of the Guardian/Conservator?

If the guardian/conservator dies, the court appoints a successor. A court may remove a guardian/conservator whenever that removal is in the best interest of the protected person. Possible reasons for removal include mishandling the protected person's estate, committing a fraud against the protected person's estate, utilizing the office for personal gain, and failing to make a report or follow a court order. The former guardian/conservator, or his or her personal representative, must render a final accounting of the administration of the guardianship.

For a 30 day period following the death of a guardian/conservator, a temporary guardian/conservator serves until a successor can be appointed. This temporary guardian/conservator is a person designated by the guardian or limited guardian to serve in such instances. This designation should be made soon after the guardian or limited guardian is first appointed.

How Can Persons Interested in the Guardianship Keep Apprised of Developments in the Proceedings?

Persons who may be interested in receiving information about the status of the guardianship, including relatives and friends of the protected person, are well advised to file a Request for Special Notice of Proceedings with the court. By filing this document the person making the request is entitled to prior written notice of any hearing on significant matters in the guardianship proceeding.

What Happens at the End of the Guardianship Administration?

The guardianship administration terminates upon the death of the protected person, upon a minor's attainment of majority, or upon the recovery of the capacity of the protected person. If the guardianship terminates by the death of the protected person, the power of the guardian or limited guardian ceases. The guardian or limited guardian has no power to pay any further claims from the guardianship estate, and claimants must then file their claims with the protected person's personal representative.

Attainment of Majority. If the guardianship is for a minor for the sole reason of the protected person's age, then upon the protected person's attaining the age of majority (age 18), the guardian's power ceases.

Return of Guardianship Assets. Upon termination of the guardianship the former guardian or limited guardian is required to turn over all assets of the guardianship or limited guardianship to the persons entitled thereto. This will be the protected person who has attained majority in the case of a minor guardianship, the personal representative of a deceased protected person, or the ward himself or herself in the case of a protected person's recovery of capacity.

Agents Under
Powers of Attorney

What is a Power of Attorney?

A power of attorney is a document signed by one person, who is called the "principal," that appoints another person, who is called the "agent" (or sometimes the "attorney-in-fact"), to manage the principal's financial matters and conduct business on behalf of the principal. Essentially, a power of attorney says, "I authorize John Doe to do the following acts for me and everyone shall accept his acts as if they were my own."

The following terms are often used when describing a power of attorney: (1) durable, (2) springing, (3) general and (4) specific/special. If a power of attorney is a durable or springing power of attorney, this impacts when the power of attorney is effective. If a power of attorney is described as general or specific/special, this impacts the extent of an agent's powers.

Do you have to accept the role of agent under a Power of Attorney?

No. Being an agent under a power of attorney is voluntary. However, if you choose to take any actions as agent, you will have important fiduciary duties and responsibilities to the principal. Refer to the general discussion of the duties of a fiduciary contained in the Overview.

When does a Power of Attorney become effective?

The power of attorney document should alert you to whether it is a durable or springing power of attorney.

Durable Power of Attorney. A power of attorney is automatically durable unless specifically provided otherwise. Usually a durable power of attorney becomes effective the day it is signed.

Springing Power of Attorney. A springing power of attorney becomes effective on the occurrence of a future event specified in the document. Often, the future specific event is when the principal becomes financially incapable. When the specified event occurs, the power of attorney "springs" into effect.

If the springing power of attorney becomes effective when the principal becomes financially incapable, the document will usually provide the information on how to make the determination as to whether the principal is financially incapable. If the document does not provide this information, Oregon law provides that any physician may make a determination that the principal is financially incapable. The physician's determination must be in writing.

If the springing power of attorney under which you are acting requires a determination of financial incapacity by the principal's physician, you may need a letter from the physician to present with the power of attorney when you need to act for the principal. For example, you will need to go to the principal's bank and present the power of attorney and the evidence of financial incapacity so that the bank will recognize your signature on behalf of the principal when you deal with the principal's accounts.

The following terms are defined under Oregon law:

Financially incapable: means a condition in which a person is unable to manage financial resources of the person effectively for reasons including, but not limited to, mental illness, mental retardation, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power or disappearance.

Manage financial resources: means those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income.

Other. **S**ome powers of attorney are effective for a specific time period. For example, a principal could restrict a power of attorney by stating, "This power of attorney will remain effective until 2 years from today."

What Are Your Duties and Powers Under a Power of Attorney?

As discussed above, some powers of attorney are general and others are specific. Not all powers of attorney are the same. The power of attorney document is the first place to look to determine your powers and duties as agent. Unless the document says otherwise, Oregon law requires that an agent must use the property of the principal for the benefit of the principal. If the power of attorney document is unclear about your duties, you should seek assistance from an attorney.

General Power of Attorney. A general power of attorney usually gives the agent broad powers to manage a principal's property and financial affairs. For example, a general power of attorney may authorize you to do the following:

- Write checks on the principal's checking account;
- Make deposits to and withdrawals from the principal's financial accounts;
- Collect debts;
- Make claims;
- Initiate or defend lawsuits;
- Sign financial commitments;
- Make and perform contracts;
- Buy and sell real property, including the principal's residence;
- Sign legal documents;
- Incur debts;
- Buy and sell securities; and
- Generally "stand in the shoes" of the principal.

Some general powers of authority may also give you the power to:

- Make, amend, alter or revoke a trust agreement for the principal;
- Make or change the principal's beneficiary designations on any life insurance policy, retirement plan, or IRA;
- Enter into or revoke a community property agreement or a trust agreement for the principal;
- Make gifts of the principal's property;
- Transfer any of the principal's property to any trust;

- Disclaim property on behalf of the principal; or
- Make health care decisions for the principal.

Specific/Special Power of Attorney. Not all powers of attorney grant broad, general powers. A power of attorney may authorize you to handle only one particular transaction, such as the sale of a specific piece of real property, or to perform one particular type of activity, such as managing a securities portfolio. This type of power of attorney is known as a specific, special or limited power of attorney.

How do you use a Power of Attorney?

For the most part, you will need to show the original power of attorney document to financial institutions, realtors or other parties when attempting to use the power of attorney to manage the principal's financial affairs or conduct business on behalf of the principal.

Financial institutions will want to have copies of the power of attorney in their files. If you sell any of the principal's real property, you will need to record the power of attorney with the deed so that your authority to act for the owner is part of the public record of title.

When signing documents, you should sign the principal's name, followed by the words "by [your name] as agent" or sign your name followed by the words "as agent for [principal's name]". By signing documents in this way, you avoid personal liability for the principal's obligations.

When do Your Powers End under a Power of Attorney.

Your powers under a power of attorney can terminate in two ways. Your powers end when (1) the principal revokes the power of attorney or a conservator on behalf of the principal revokes the power of attorney, and (2) when the principal dies. If either of these events happen, you must stop acting under the power of attorney as soon as you have been alerted of the revocation or death.

A non-durable power of attorney does not allow the agent to act on behalf of the principal if the principal becomes incapacitated. Generally, a non-durable power of attorney grants a limited scope of action to the agent. For example, it may be to perform a single task.

These can be revoked by the principal at any time or may automatically cease effectiveness once the task has been performed in full. If the principal becomes incapacitated, the non-durable power of attorney becomes invalid.

Some powers of attorney end upon the occurrence of a specified date or event. These should be spelled out in the document.

Reference should be made to powers of attorney ending as a result of incapacity under non-durable powers of attorney and also indicate that some powers of attorney end upon the occurrence of a specified date or event.

How do you resign?

You may resign according to the terms and conditions stated in the power of attorney. If the document does not provide terms for how to resign, you may alert the principal, so long as the principal is financially capable. If the principal is no longer financially capable, you should seek the advice of an attorney so that steps can be taken to assure that a responsible person will take care of the principal's financial matters.

Fiduciary Duties of the Agent

An agent is a "fiduciary," which means you must act with the highest degree of good faith on behalf of the principal and can be held personally liable for violating your fiduciary duties. The general discussion of the duties of a fiduciary contained in the Overview is applicable and should be read.

Conclusion

This article is intended as a general guide and cannot provide you with detailed information for every situation that you may encounter as agent. You should always read the power of attorney document to determine the specific powers and responsibilities given to you.   You should also consult an attorney if the power of attorney is unclear or if you have additional questions about your role as agent.

Custodians Under the Uniform Transfers to Minors Act

What Is a Custodianship Under the Uniform Transfers to Minors Act?

A custodianship is a fiduciary arrangement under which a person called the "custodian" manages funds or property for a person who is under the age of 21, or if preferred, under the age of 25. A custodianship may arise from a variety of circumstances:

- Your will leaves a sum of money to a child, but because the child is a minor (under the age of 18), the funds need to be managed by someone for the child's benefit until the child reaches an age between 18 and 25; or
- You desire to set aside some funds for the future benefit of your minor child but want to ensure that someone can continue to oversee the management and investment of those funds while the child is between the ages of 18 and 25.

In either case a person known as a "custodian" can be appointed to manage the funds for the beneficiary until he or she reaches the desired age between 18 and 25. The custodian can then manage those funds for the beneficiary under the Oregon Uniform Transfers to Minors Act (the "Act").

Duties of a Custodian

As custodian you will be holding assets for the benefit of someone else, and you are clearly a "fiduciary" subject to the general rules that apply to fiduciaries. Because there is normally no governing instrument such as a will or trust agreement to guide you, you must look to the Act to ascertain your specific responsibilities and risks.

Distribution of Income or Principal. The Act gives you broad powers of distribution. You may distribute as much of the income or principal of the custodial account to or for the benefit of the beneficiary at such times and in such amounts as you deem advisable, provided that such distributions are for the beneficiary's benefit and general welfare. This may include a distribution of the entire account.

Unlike a guardian, you may, but are not required, to obtain prior approval from the local court of any proposed distribution. However, a beneficiary who has reached age 14 or any other "interested person" (such as a guardian of the beneficiary, an ex-spouse who is a parent of the beneficiary, or a creditor of the beneficiary) may petition the court to compel you to make distributions on behalf of the beneficiary.

Such broad powers of distribution carry with them some tax burdens. Where you have both created the custodianship and serve as its custodian, your continuing ability to control when and how much of the account can be distributed will cause the custodial property to be includable in your taxable estate for federal estate tax purposes should you die before the beneficiary reaches age 21. However, the spouse of a transferor may act as custodian and not experience the same inclusion.

Custodial income that is used to pay for items a parent is legally obligated to provide to the beneficiary (e.g. food and clothing) also becomes taxable income to the parent, regardless of whether the parent is the custodian. Generally, a parent's obligation of support ceases when a beneficiary reaches age 18, or when the beneficiary becomes self-supporting. While the issue of just what items fall within the scope of a parent's obligation of support is not well settled, the issue most often arises in the area of education. In a family of modest means the use of custodial funds to provide for private elementary education may be deemed outside the parent's obligation of support. In a family of large means, the use of custodial funds to provide college education for a beneficiary may still be within the parent's obligation of support even though the child has reached age 18.

Even if custodial income is not used for "legal obligations of support," certain income earned in a custodial account for a child under the age of 18, or in some cases, age 24, will be subject to the "Kiddie Tax," causing that income to be taxed at the parent's highest marginal tax rate.

You should consult with your tax advisor to more fully discuss the application of these rules.

Investment of Custodial Assets. You may invest and reinvest the custodial funds in virtually any kind of real or personal property. Any investment will be subject to the rules generally applicable to fiduciaries as discussed in the Overview, including the rules concerning self-dealing, diversification and prudence. In dealing with custodial property, a custodian shall observe the standard of care that would be observed by a prudent investor dealing with property of another. All custodial property held by a custodian for the same child will be treated as one custodianship and therefore will be considered together in determining whether the prudence and diversification standards have been met.

A parent who holds custodial property for his or her own child should not overlook the opportunity to use the account as a training tool to help the child learn about handling funds. Because most custodianships are relatively small (generally in the range of $1,000 to $30,000), some caution must be used in investments which have the potential for continuing liabilities. For instance, the investment of custodial property in a general or limited partnership which otherwise may seem to be a prudent investment may subject the custodial property to future assessments for additional funding of the partnership. Similarly, an investment in real property or a closely-held business may give rise to contractual or uninsured tort claims.

A custodian at all times shall keep custodial property separate and distinct from all other property in a manner sufficient to identify it clearly as custodial property of the beneficiary. In addition, a custodian shall keep records of all transactions with respect to custodial property, including information necessary for the preparation of the beneficiary's tax returns.

Personal Liability of Custodian

The custodian will not be personally liable for contractual obligations where the custodian clearly signed only in the capacity of "custodian." Nor will the custodian be held personally liable on tort claims arising from the ownership or control of custodial property, unless the custodian is personally at fault.

What if custodial property is used to buy a car for the child and title is taken in the name of the custodian "as custodian?" As a general rule, if the child injures another and is at fault, the child is liable. If the insurance coverage is inadequate, the injured person may reach the remainder of the custodial property, but the custodian would generally not be personally liable to the injured person in the absence of other circumstances which would render the custodian "at fault."

Accounting and Bond

You must maintain records of all transactions involving the custodial property. You should maintain a specific ledger showing all receipts and disbursements. While you are not required to give a formal accounting of custodianship activity, you must be in a position to render an accounting at any time.

Certain persons involved with the beneficiary or the account have the right to petition a court for a formal accounting:

- The donor creating the custodianship (or the donor's estate or guardian),
- The beneficiary's estate or guardian,
- An adult member of the beneficiary's family, or
- The beneficiary if he or she has reached age 14.

You must also maintain the information necessary for the preparation of the child's income tax returns. The income from custodial property is reportable on the child's federal income tax return. You should consult with your tax advisor to determine what tax filings, if any, are required.

You are not normally required to file a surety bond to secure the performance of your duties as custodian. If an interested person believes that a bond would be appropriate, he or she may petition the court and request that a bond be required.

Resignation, Succession and Removal

You are always free to decline to serve as custodian. If you initially agree to serve as custodian, but later decide to resign and an alternate custodian has not already been designated, you may appoint an adult individual (other than the person who created the custodianship), a bank, or a trust company as your successor. To be effective written notice of your resignation must be given to the successor custodian and, if the beneficiary has reached 14, to the beneficiary. Even if you are not ready to resign, you may designate a successor custodian in advance. This contingent appointment must also be done in writing.

If you become disabled or die in office and no successor custodian has been designated, a successor can be appointed in one of several ways:

- A beneficiary who has attained the age of 14 may, within 60 days, designate as successor custodian an adult member of the beneficiary's family, the beneficiary's guardian, or a bank or trust company to serve as successor custodian.
- If the beneficiary is under age 14 or fails to act within 60 days, the conservator of the beneficiary will serve as successor custodian.
- If the beneficiary has no conservator or the conservator declines to act, the transferor, the legal representative of the transferor or of the custodian, an adult member of the beneficiary's family or any other interested person may petition the court or designate a successor custodian.

If you breach your duties as custodian, you may be removed from office by the local court upon the petition of the transferor (or the transferor's estate or guardian), an adult member of the transferor's family, the guardian of the transferor, or even the beneficiary if he or she has attained age 14.

Compensation

As custodian you have a right to charge reasonable compensation for services performed during each year. This fee is paid from the custodianship property. If you fail to compensate yourself as you go along, you cannot go back and charge the custodial property for services performed in a prior calendar year; however, you can always reimburse yourself for any reasonable expenses (accounting fees, etc.) advanced on behalf of the custodianship.

These special compensation rules do not apply where you both established the custodial account and serve as its custodian. In those cases you may pay yourself such compensation as you believe appropriate, and at any time you believe proper.

There may be an advantage to not being compensated for your services as custodian. Under the Act, an uncompensated custodian is not liable for losses to custodial property arising from "ordinary" negligence. You would still remain liable for losses arising from bad faith, intentional wrongdoing, gross negligence, breach of undivided loyalty or failure to invest in accordance with the prudent person standard.

Termination of Custodianship

As a general rule, custodianships terminate when the "minor" reaches age 21, or in some cases, age 25; however, there are a few special circumstances where custodianships terminate when the child reaches age 18. For custodianships established on or after July 1, 1991, the termination date is between ages 18 to 25.

As an example, if a will leaves funds outright to a person who is then under the age of 18 and the personal representative of the decedent's estate elects to exercise its discretion to designate a custodian to hold the funds (rather than attempting to distribute the funds to the child, thereby requiring the establishment of a conservatorship or the creation of a blocked bank account), the custodianship would terminate upon the child's reaching 18. This is because the will did not expressly allow the establishment of the custodial account.

On the termination of a custodianship, the custodial property is turned over directly to the child.

Oregon Special Marital Property (OSMP) Election and Oregon Qualified Terminable Interest Property (QTIP) Election

In the classic estate plan for a married couple, the estate of the first spouse to die is divided into a credit shelter trust equal to the federal estate tax exemption, and the remainder of the estate is given to the surviving spouse, either outright or in a qualified terminal interest property (QTIP) trust or other trust that qualifies for the marital deduction. The assets distributed to the credit shelter trust are shielded from tax by the federal estate tax exemption and the state estate tax exemption, and the assets given to the surviving spouse are shielded from tax by the marital deduction, at least at the first death.

The advantage of this plan is that when the first spouse dies, it uses the deceased spouse's exemption amount plus the marital deduction for property passing to or available to the surviving spouse, resulting in no tax at the first death. This plan worked well for Oregon residents until 2002, when Oregon broke from the federal estate tax system. Following the break, the federal exemption was as follows:

- $1,000,000 in 2002;
- $3,500,000 in 2009;
- Unlimited in 2010;
- $5,000,000 in 2011;
- $5,120,000 in 2012; and
- $5,250,000 in 2013.

The Oregon exemption amount, however, stayed at $1,000,000 for deaths after 2005.

After 2005, Oregon estate plans needed to be changed to avoid the Oregon inheritance tax at the first death. There are two planning choices available: Oregon Qualified Terminable Interest Property (QTIP) Election and Oregon Special Marital Property (OSMP) Election.

An Oregon QTIP Election can be made for the assets in the credit shelter trust in excess of $1,000,000 and thereby defer the tax on the excess value over $1,000,000 until the death of the surviving spouse. This will work only if the credit shelter trust distribution provisions satisfy the marital QTIP requirements. In general, in order to qualify for the QTIP election, the surviving spouse can be the only beneficiary entitled to all the income and the income for the spouse must be distributed currently (and not accumulated).

The OSMP election is an irrevocable election that allows a QTIP-like deferral for trusts (or other property interests, or a portion of a trust or other property) that would not otherwise qualify for an Oregon QTIP election. By using and OSMP election (or an Oregon QTIP election) for the portion of the credit shelter trust that exceeds $1,000,000, an estate can fund the credit shelter trust to the full federal exemption amount and still pay no Oregon tax at the first death. On the second death, the OSMP assets will not be included in the surviving spouse's federal estate.

Federal Portability

The American Tax Relief Act of 2012 (ATRA) made permanent the portability to surviving spouses of the unused exclusion amount of decedents dying after 2010. Thus, a surviving spouse can use his or her own base exclusion amount of $5,250,000 plus the unused exclusion amount of his or her most recent deceased spouse to offset the tax on subsequent gifts or to offset his or her estate tax. The deceased spouse's unused exclusion amount (DSUE) will not be available to the surviving spouse unless the executor of the deceased spouse's estate makes an election to convey it and computes the amount to which the surviving spouse is entitled. Relief will be extended only in extraordinary circumstances to an executor who fails to make a timely election. In enforcing the carryover, the IRS is permitted to review the deceased spouse's prior filed gift tax returns and estate tax return to determine the proper DSUE amount, even after the statute of limitations with respect to those returns has closed.

APPENDIX

The following sources have been consulted and liberally adapted in the creation of this guide:

The Oregon Fiduciary Guide, as updated for current rules and regulations

Administering Oregon Estates: 2012 Edition