

## FIDUCIARY DUTIES

What liability does a Trustee have for declining value or loss of assets? In other words, just what discretion does a Trustee have as regards managing assets and investments as well as in making decisions regarding distributions? What responsibility does a trustee have if assets are heavily invested in the stock market and market performs as we have seen in the last year or two?

Sometimes providing that a Trustee has “absolute” discretion is not what it appears to be. As discussed last month there are certain rules relating to fiduciary duty, prudent investing, and the purpose of the trust which may, with good purpose, restrict the discretion of a Trustee in certain regards.

The definition of several common legal terms may be helpful.

**Fiduciary Duty**-Black’s Law Dictionary states that

“Out of such a relationship, the law raises the rule that neither party may exert influence or pressure upon the other, take selfish advantage of his trust, or deal with the subject matter of the trust in such a way as to benefit himself or prejudice the other except in the exercise of the utmost good faith and with the full knowledge and consent that the other, business shrewdness, hard bargaining, and astuteness to take advantage of the forgetfulness or negligence of another being totally prohibited as between persons standing in such a relation to each other. Examples of fiduciary relations are those existing between an attorney and client, guardian and ward, principal and agent, executor and heir, trustee and beneficiary of a trust.”

Kansas law as determined from cases determined by the Court of Appeal and Kansas Supreme Court have held:

One occupying fiduciary relationship is not permitted to traffic in trust estate to his personal knowledge or advantage.

Person occupying fiduciary capacity may not profit personally as a result of transactions concerning trust estate.

**Waste**-An abuse or destructive use of property by one in rightful possession, such as spoil or destruction, done or permitted, to lands, houses, gardens, trees, or other to other fixtures or structures by the tenant thereof, to the prejudice of the remainder interest holder, heir or beneficiary.

**Negligence**-First of all, a Trustee is not immune from liability for allegedly breaching his fiduciary duties by carelessly and negligently handling trust assets and making investments in bad faith and/or making investments in which he the Trustee has a conflict

of interest based upon prudent investor rule. Again, the terms of the trust will control, but the law relating to prudent investing and fiduciary duty will impact the rights, duties and obligations of the Trustee.

The prudent investor standards bear repeating:

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

(b) A fiduciary's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives suited to the trust.

Further, if a trust is created for successive beneficiaries, the Trustee has a duty to the successor beneficiaries to act with due regard for their interests as can be determined in light of the circumstances of the trust and the relevant circumstances of the beneficiaries. If there is evident a purpose to benefit successive beneficiaries it may be a breach of the Trustee's fiduciary duty to distribute all or the majority of the assets outright to the current beneficiary or beneficiaries.

A Trustee does have liability and if you are acting in that capacity you should get good advice about your duties in light of the written document and circumstances of the beneficiaries. Every situation is unique. Please get advice from a knowledgeable estate planning attorney before deciding how trust assets should be managed in your situation. For actual management, you may want to consult with a professional who is experienced in investment advising.

**Tim J. Larson, JD, PA, has its offices in Wichita, Kansas. Tim J. Larson and Logan M. Brown are members of Wealth Counsel, the Wichita Estate Planning Council, and *e.Planners*, a select group of nationally known and recognized Estate-planning Attorneys.**