

Estate Planning

General overview of the duties of Executors and Trustees

1. What legislation governs the affairs of a Trustee?

Trusts Act 1973 (Qld)

Trusts (Investments) Amendment Act 1999

2. What are the duties of a Trustee?

(a) General

Generally speaking, the duty of a trustee is properly to preserve the trust fund and to pay the income and the capital to those who are entitled to them respectively.

The Trustee has to adhere to the terms of the Will or other trust, act personally, and, above all, carry out all duties and exercise all powers conferred on them in good faith.

A trustee who breaches their duty may be personally liable for any loss caused by the breach.

The duties of the trustee will usually be determined by the terms of the trust document as well as any applicable legislation – such as the Trusts Act in Queensland. In the case of executors, the Will is the trust document.

(b) Duty to preserve and invest trust property

- (i) This duty includes the trustee's obligation to secure the trust property and preserve it and to invest it in proper investments where appropriate.

The trustee must act with reasonable care, diligence and prudence when making and managing investments.

Trustees (and particularly executors of an estate) have a primary obligation to preserve the assets of the trust/estate and should generally taking a cautious investment approach.

- (ii) Under the *Trusts (Investments) Amendment Act 1999*, a trustee may, unless expressly forbidden by the trust deed or Will, invest the trust funds in any form of investment they consider appropriate – subject to the general duties referred to above.
- (iii) The trustee must also make sure that any trust property is transferred to them.
- (iv) The duty to properly invest the trust fund involves the balancing of a number of competing factors. The duty to preserve the trust property principally means the capital of the trust. The trustee will thus be concerned to ensure that the capital value of the trust is maintained, and protected against inflation where possible.

The trustee will also be concerned to secure the best income return from the trust assets, provided that the capital is not put at risk in the process.



- (v) The relevant trustee legislation in Queensland sets out matters to which a trustee must have regard in exercising the power of investment. Without limiting the matters a trustee may taken into account when exercising a power of investment, a trustee, must, so far as they are appropriate to the circumstances of the trust, have regard to the following matters:
- the purposes of the trust and the needs and circumstances of the beneficiaries;
 - the desirability of diversifying trust investments;
 - the nature of and risk associated with existing trust investments and other trust property;
 - the need to maintain the real value of the capital of the trust;
 - the risk of capital loss or depreciation;
 - the potential for capital appreciation;
 - the likely income return and the timing of income return;
 - the term of the proposed investment;
 - the probable duration of the trust;
 - the liquidity and marketability of the proposed investment;
 - the total value of the trust estate;
 - the tax consequences of the proposed investment;
 - the likelihood of inflation affecting the value of the proposed investment or other trust property;
 - the cost (including commissions, fees, charges and duties payable) of making the proposed investment; and
 - the results of an annual review of the existing trust investments.
- (vi) A trustee must obtain advice from a qualified independent financial advisor at least annually and consult accounting advisers and lawyers in relation to these issues on a regular basis.

(c) Duty to insure trust property

A trustee has a duty to insure trust property, at least in circumstances where it would be a prudent commercial decision to insure.

It would be prudent to insure the property for its full replacement value.

(d) Duty to act in good faith

A trustee must not deal with the trust property for their own benefit, or otherwise profit from the trust.

For example, a trustee cannot purchase trust property unless expressly authorised to do so by the trust document or Will or, if there is no such power, by the court.

It does not matter whether the sale is for a proper value.

The only other exception is that a trustee may purchase assets from the trust with the informed consent of all the beneficiaries who are over 18 for a fair price.

(e) Duty of follow the trust deed or Will

A trustee must adhere to and to carry out those terms and only depart from the words of the trust with the approval of the court.

If anyone else challenges the Will, the trustee is bound to defend it.

(f) Duty to keep accounts and supply information

A trustee must keep proper accounts and keep the beneficiaries informed.

Generally the trustee will engage accountants to prepare the accounts and tax returns.

(g) Duty to consider

A trustee is invested with powers and discretions under a duty to consider how best to exercise them, and, depending upon the nature of any particular discretion, whether to exercise it at all.

The trustee must exercise their powers and discretions in good faith with a proper regard for the fiduciary duties imposed on the trustee.

A trustee is not generally required to give reasons for the way in which they exercise their discretions.

(h) Duty to act impartially between beneficiaries

A trustee must act impartially between beneficiaries, particularly in matters concerning the distribution of the income and capital of the trust, unless otherwise authorised by the trust.

3. What are the powers of a Trustee?

(a) Source of powers

Duties are what a trustee must do in carrying out the trust.

Powers are what the trustee may do in the administration of that trust.

The powers exercisable by a trustee are derived from three sources:

- (i) the trust document (i.e. the Will);
- (ii) statutory powers available to the trustee; and
- (iii) any power conferred on the trustee by the court.

(b) The power to delegate

A trustee must act **personally**, and if there is more than one trustee they must also act **unanimously**.

Any purported delegation of his or her powers by a trustee without express authority to do so under the trust instrument or by statute is a breach of the trustee's duty to act personally.

4. What are the rights of a Trustee?

(a) The right of reimbursement and indemnity

A trustee who properly incurs expenses on behalf of the trust is entitled to reimbursement from the trust.

This right extends to all expenses and obligations properly incurred in the administration of the estate.

(b) Right to obtain the opinion, advice and direction of the court

If in doubt about their powers or duties under the trust a trustee may seek the opinion, advice and direction of the court under a statutory right.

Provided the trustee, submits to the court all material and relevant facts, they will be protected if they act in accordance with the court decision.

(c) Trustee Remuneration

Trustees and executors are not generally entitled to a fee from the trust or estate – unless they are professional advisers and the Will authorises them to charge a fee.

Executors can charge “commission” on the estate but few private trustees actually claim commission.

5. The liabilities of a Trustee

(a) General

A trustee who breaches the terms of the trust or Will are liable to make good any loss suffered by the trust.

(b) Relief of trustees from liability

Where a trustee has acted honestly and reasonably, and ought fairly to be excused for any breach, the court has statutory power to relieve the trustee in whole or in part from personal liability for the breach.

All three elements must be satisfied. It is not enough to show that the trustee has acted honestly and reasonably; grounds must also be advanced to show that he or she ought fairly to be excused.

6. Does the Trustee have to accept the appointment?

No person is bound to accept the obligations of a trustee and any nominated executor can disclaim the role.

However, if the nominated trustee accepts the trust, they cannot then disclaim it or retire from the role except by the proper procedure.

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These comments and opinions are of a general nature and are based on Cooper Grace Ward's interpretation of the law as at the date the document was prepared. The position may alter if the law changes as a result of legislation, new rulings or cases. Clients contemplating establishing a trust should obtain specific advice on the implications of that strategy.

