



YOUR DUTIES AS TRUSTEE
Guidelines for Trust Administration
by Layne T. Rushforth

1. **INTRODUCTION:** This memo is for a trustee under a trust¹ which was originally established as a revocable trust but which has become irrevocable because of the settlor's or surviving settlor's² death. Perhaps some of these tasks have been done by a predecessor trustee, but we recommend that you review this entire memo. Your task is to administer and distribute the trust estate³ as directed in the trust document. This memo outlines your duties as trustee, and gives a simplified overview of the trust administration process. In this memo, "you" and other second-person pronouns refer to the trustee designated in the trust or appointed under its terms. "We", "us", and other third-person plural pronouns refer to THE RUSHFORTH FIRM, LTD., a Nevada professional corporation. If you ever have a question about this memo or about what you should and should not do, please call us.⁴

1.1 **Title:** A "trustee" is one who owns assets under a trust. Persons acting jointly as trustees are called co-trustees, and sometimes the duties of each co-trustee are different, depending on the trust document. For the purposes of this memo, we will assume that there is one trustee, and if there are co-trustees, you should confer with us regarding the division of duties and responsibilities among all of the trustees.

1.2 **Trust Instrument:** Because a trustee is legally bound by the trust instrument, you must read the entire trust document carefully. Do not sign any document indicating that you are willing to abide by the trust document until you have read and understood all of its provisions.

1.3 **Official Appointment:** You have authority to act as trustee as soon as you have complied with the terms of the documents regarding your appointment. Because different trusts have different requirements, it is impossible to outline all specific requirements in this memo.

(a) As a general rule however, to become trustee, you must:

(1) Sign a "certificate of incumbency"⁵ indicating that you are the incumbent

¹A "trust" is the legally recognized arrangement under which a trustee owns and manages trust assets for designated beneficiaries. Sometimes, we also use the word "trust" to refer to the document that creates the trust arrangement, but usually we will refer to the document as the "trust instrument", "trust document", "trust agreement", or "declaration of trust". For the purpose of this memo, those terms include any pertinent trust amendments.

²The terms "settlor", "grantor", and "trustor" are used interchangeably to refer to the person or persons who originally established the trust. "Surviving settlor" refers to the last settlor living where there are two or more settlors who created the trust. "Deceased settlor" refers to the settlor or surviving settlor whose death makes the trust irrevocable.

³The "trust estate" consists of all assets belonging to the trust, whether they were originally owned by the trustee, received under a contractual beneficiary designation (such as under a life insurance policy or other contract providing death benefits), or received as a distribution from the settlor's probate estate.

⁴You are not obliged to engage us for any legal work. If you choose to engage another attorney or firm to assist you, references to "we" and "us" should be read as references to the attorney or firm you engage to advise you.

⁵In some states, this is referred to as an "Affidavit of Successor Trustee", but the function and purpose are the same.



(i.e., acting) trustee and declaring that you are willing to follow the terms of the trust instrument.

(2) Attach to the certificate of incumbency a copy of: (a) your predecessor's death certificate; (b) your predecessor's resignation; or (c) declarations from physicians stating that your predecessor is incapacitated to the point that he or she can no longer act as trustee.

(3) Have the certificate of incumbency recorded in the county in which the trust is considered located (often referred to in the documents as the "situs" of the trust) and in each county in which real property owned by the trust is located.

(b) You can choose, if you wish, to have your appointment confirmed by the court [NRS 164.010], but normally this formal court proceeding is not necessary. On the other hand, if there is a dispute as to your appointment or qualifications or if you anticipate that some of your decisions may be challenged by beneficiaries, court confirmation and a trust administration proceeding may be appropriate.

2. TRUST ADMINISTRATION:

2.1 **General Duties:** Generally, your task, as trustee, is to:

- (a) Collect all assets⁶ belonging to the trust;
- (b) Manage and invest trust assets;
- (c) Pay debts and taxes as required in the trust document; and
- (d) Distribute the remaining trust assets to the designated beneficiaries, as provided in the trust instrument.

2.2 **Powers:** Under Nevada law, a trustee can convey good title except as restricted by the document that transferred title to the trustee. [NRS 164.067] Of course, you are liable to the beneficiaries if you breach your duty as a trustee by failing to act prudently [NRS 164.740 et seq.] or by failing to follow the trust instrument. Most trusts have specific and detailed provisions relating to the powers of the trustee, which you must read carefully.

3. PROHIBITED ACTS: You must NEVER:

- (a) Act without the consent of your co-trustee (or a majority of all co-trustees, if there are more than two) except as pre-arranged by the co-trustees;
- (b) Deposit estate funds into a personal account;
- (c) Make loans without adequate documentation and proper security under the circumstances;

⁶In legal terminology, the words "property" and "assets" are used interchangeably.



- (d) Invest in speculative investments or in any investment which is not adequately documented;
- (e) Engage in purchases or other transactions between yourself as trustee and yourself (or any trust or business entity directly or indirectly controlled by you) without prior court permission;⁷
- (f) Place trust assets into an individual's personal safe deposit box;
- (g) Make cash disbursements to a beneficiary or any other person without getting a signed receipt;
- (h) Co-mingle the assets of the trust estate with those of any other entity or person;
or
- (i) Take title to assets in your own name without reflecting your capacity as trustee.

4. COLLECTION AND MANAGEMENT OF ASSETS: Your primary duties are: to take possession of the trust's assets; to see that debts, claims, taxes, and other expenses are provided for; to see that assets are properly invested; and to see that distributions are made to beneficiaries as directed in the trust instrument.

4.1 Notice to Creditors: If your appointment came as a result of the settlor's death, we recommend that you sign a "notice to creditors" and have it published [NRS 164.025]. The same notice should be mailed by certified mail, return receipt requested, to known creditors, particularly if you do not know the amount of their potential claims, if there are insufficient assets to pay them, or if you intend to dispute all or part of their claims.

4.2 Inventory: Your next responsibility as trustee is to ascertain the trust's asset and make an inventory of them. The inventory must include a value for each item. Bank accounts, publicly-traded securities, and vehicles listed in the "blue book" can be listed without a formal appraisal. Real estate, valuable jewelry, and other special collections should be appraised by an independent appraiser, whom you may select. We can help you select appraisers if you do not know any who are qualified and whose fees are reasonable. The value shown on the inventory should reflect the net value of each asset.⁸

⁷NRS 163.050 and 163.060 provide some exceptions to corporate trustees, but require court permission in all other circumstances.

⁸The "net value" is the gross value of the asset less the value of any known liens or encumbrances, including mortgages and other liabilities. The inventory should reflect the net value and how it was calculated.



4.3 Protecting Assets; Limiting Liability: It is your duty to see that assets are preserved and protected.

(a) Securities (especially bearer bonds), jewelry, and other items of substantial value should be kept in a safe deposit box. Please let us know if there are any items you think should remain, or be placed, in the possession of another person.

(b) Accounts at financial institutions⁹ belonging to the trust should be given early attention. The balance of each account should be transferred into a federally-insured trust account, registered something like this: "JAMES DOUGH, Trustee of the DOUGH 1990 TRUST dated 1-2-90". The trust should have its own tax identification number, which we can apply for at your request. Outstanding checks made by the deceased settlor should be itemized and, in most situations, honored. Accounts owned by the deceased settlor as a joint tenant with another named person do not necessarily belong to the trust; and the surviving joint tenant may have the legal right to collect the account. If there are joint accounts, call us so that we can discuss the details.

(c) The proceeds from life insurance and other death benefits are payable to the designated beneficiary or beneficiaries. Unless the trust is the beneficiary, such benefits are not assets of the trust estate. If there are no surviving beneficiaries, the probate estate may be the beneficiary, and the trust will receive its entitlement, if any, through the probate proceeding. If the trust is the designated beneficiary, the appropriate benefit claim form should be obtained, completed, and submitted as soon as reasonably possible.

(d) All credit cards issued solely in the deceased settlor's name should be cut, and the pieces should be returned to the issuer promptly with a request to cancel the account. If there is a joint account holder, advise each credit card company of the date of the deceased settlor's death and let it know that the surviving account holder will be solely responsible for any charges made thereafter. Please advise us of any action you take.

(e) Trust assets should be adequately insured against damage, theft, loss, and personal injury claims. Make sure existing policies continue in force after the deceased settlor's death. You may need to replace existing policies, or the trustee — or you as trustee — may need to be added as an insured on a rider to existing policies.

4.4 Disbursements: Keep meticulous records of all disbursements from trust accounts and assets. We strongly recommend that money be disbursed in the form of a check so that there is a written audit trail for all transactions. Document any cash transactions with written receipts.

4.5 Investments: Unless restricted by the trust instrument, you can generally invest in any type of asset, but keep in mind that Nevada law does not permit "speculative" investments by trustees and "safety" must always be a key factor in your selection of investments.

(a) You are required to act with "reasonable care, skill and caution". [See NRS 164.745(1).]

⁹Such as banks, savings and loan associations, credit unions, thrift companies, etc.



(b) “A trustee’s decisions concerning investment and management as applied to individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as part of an overall strategy of investment having objectives for risk and return reasonably suited to the trust.” [NRS 164.745(2)]

4.6 Impartiality: Unless the trust specifically authorizes you to favor one beneficiary (or class of beneficiaries) over another, you must be fair and impartial to all beneficiaries. “If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust property, taking into account any differing interests of the beneficiaries.” [NRS 164.720]

4.7 Record Keeping: You *must* keep an exact record of all receipts and disbursements. Your records should reflect the source of each receipt, and should indicate whether it represents principal or income¹⁰.

4.8 Sale of Trust Assets: It may be necessary to sell trust assets to avoid depreciation or other loss, to raise cash needed for expenses, or to comply with the terms of the trust document. Unless the trust document states otherwise, you can proceed with the sale of trust assets without prior notice to the trust’s beneficiaries or to the public.

4.9 Advisors: You may retain accountants and other advisors to help you make wise tax-planning and investment decisions. We are prepared to give you legal advice upon your request; however, if the trustee (you) or the trust becomes a party to a lawsuit, it may be necessary to retain another law firm to act in behalf of you and/or the trust.

4.10 Nontrust Assets: The trust governs only those assets legally owned by the trust. Assets that are not owned by the trust are not generally subject to the trust’s terms and are not your responsibility.

(a) Nontrust assets include assets passing by right of survivorship or by beneficiary designation. This includes property held by a deceased settlor in joint tenancy with another person. Nontrust assets also include life insurance, IRAs, and retirement plans for which a beneficiary has been designated (so long as that beneficiary survives). The trust does not govern assets passing by right of survivorship or assets passing by beneficiary designation (unless the trust is the designated beneficiary).

(b) The “probate estate” consists of assets payable to the estate (such as life insurance, retirement plans, IRAs, and other similar assets for which there is no designated beneficiary who survives, together with assets held in the name of a decedent alone. If there is a “probate estate”, a probate proceeding may be required, and you should discuss that with us. The probate estate becomes part of the trust estate only if there is a will that leaves the probate estate to the trust.

¹⁰“Principal” refers to all assets, such as a bank account, stock, car, home, and the like. “Income” refers to revenues generated from the principal includes interest, dividends, rent, royalties, and the like. Income also includes compensation for the deceased settlor’s personal services, such as salary and bonuses. Some payments may include income and principal, such as a mortgage payment.



(c) Even though nontrust assets are not governed by the trust, nontrust assets *are* included in the taxable estate for federal estate tax purposes. If you sign a federal estate tax return (IRS Form 706), all nontrust assets should be included.¹¹

5. FEDERAL AND STATE TAXES: If there is no court-appointed executor or administrator, you will be required to pay the deceased settlor's federal taxes, including income, gift, and estate taxes. A booklet is available from the IRS outlining a fiduciary's responsibility with regard to federal taxes. We or your accountant can obtain one for you at your request.

5.1 Income Taxes: The income tax returns that are required will depend on the various entities that exist and the amount of income each has. You should make arrangements with your accountant or other qualified return-preparer to have the necessary returns prepared. If there is a court-appointed executor or administrator, you must coordinate the preparation of tax returns with him or her.

(a) *Trusts* — From the time the trust becomes irrevocable at the time of the deceased settlor's death, the trust is required to file income tax returns (IRS Form 1041) for each calendar year. It is your responsibility to see that this is done. There may be several irrevocable trusts created under one document that require separate tax returns.

(b) *Individual* — Unless there is a court-appointed executor, you may also have other tax responsibilities. The deceased settlor's final income tax return (IRS Form 1040) must also be filed and the taxes must be paid for the year of the deceased settlor's death. If the deceased settlor dies before filing the income tax return for the prior year, you may have to file it and pay the applicable taxes, also.

(c) *Probate Estate* — Income paid after the deceased settlor's death usually belongs to the deceased settlor's probate estate, and the court-appointed executor or administrator may have to file a fiduciary income tax return (IRS Form 1041) for the estate and pay the income taxes, except with respect to income distributed to beneficiaries.

5.2 Gift, Generation-Skipping, and Estate Taxes: Any person who makes death-time transfers having a cumulative value equal to or less than the "applicable exclusion" of \$2,000,000¹² does not incur a federal estate tax. (The applicable exclusion for gift tax is \$1,000,000, and, if used, diminishes what is available to be applied against the estate tax.) A federal estate tax return is due if the gross value of the

¹¹See footnote 13.

¹²Internal Revenue Code § 2010(c) provides for an "applicable exclusion", which is the cumulative amount that can pass free of gift and/or estate tax. This is sometimes called "the exemption equivalent of the Unified Credit". For ESTATE TAX purposes, the applicable exclusion has been, is, and will be: \$625,000 in 1998; \$650,000 in 1999; \$675,000 in 2000; \$1,000,000 in 2002 and 2003; \$1,500,000 in 2004 and 2005; \$2,000,000 in 2006, 2007, and 2008; \$3,500,000 in 2009; unlimited in 2010; and \$1,000,000 in 2011 and beyond. Since 2004, the applicable exclusion for GIFT TAX has been \$1,000,000, and, under current law, no change is scheduled.



deceased settlor's estate¹³ plus the net value of lifetime gifts (other than annual gifts of less than \$12,000 per recipient per year) exceeds the applicable exclusion. If a tax return is required, we would be happy to prepare it at your request. Generation-skipping transfers are also reported on the federal gift and/or estate tax returns, so if distributions are made to grandchildren or lower generations (including persons 37½ years younger than the deceased settlor), this is another concern. There are circumstances in which an estate tax return is required even though no tax will be due because of deductions and exclusions. On the other hand, if the trust is a two-settlor trust that divided into separate subtrusts upon the death of the first settlor, it is possible that the assets in one of the subtrusts will be excluded from the surviving settlor's taxable estate. Please contact a certified public accountant or us if the gross taxable estate exceeds the exempt amount.¹⁴

5.3 State Taxes: In Nevada, there is no income tax, but Nevada is entitled to a portion of the federal gift, estate, and generation-skipping tax. Other states may have additional taxes that apply, depending on where the trustee is domiciled, where beneficiaries reside, and where assets are located. The rules are complicated, so be sure to consult with your accountant to determine if other states' taxes may be due.

6. ACCOUNTINGS; DISTRIBUTION: You should account annually to the trust beneficiaries for everything you receive and everything you disburse.

6.1 Accountings: An annual accounting to the beneficiaries is usually required until the trust is fully distributed.

(a) The annual accounting must distinguish between expenditures of income and principal, and must reflect all receipts and disbursements since the prior accounting (or since the original inventory in the case of the first accounting).

(b) As a courtesy to the trust's beneficiaries, keep them advised as to the progress you are making with respect to settling the deceased settlor's debts.

6.2 Division and Distribution: The ultimate goal of this process is to get the trust assets distributed into the hands of those entitled to it. The trust instrument may provide for distributions upon the deceased settlor's death or for periodic distributions until a particular date or until the occurrence of a particular event.

(a) It is common for a trust to be divided into shares for various beneficiaries or groups of beneficiaries. Sometimes the trust requires a division into separate trusts instead of

¹³The "taxable estate" for federal estate tax purposes includes the trust estate, the deceased settlor's probate estate, and most assets passing from the deceased settlor by operation of law or contract, such as joint tenancy assets and life insurance. We can help you determine what assets are to be considered and whether or not an estate tax return is required.

¹⁴See footnote 12.



shares. Sometimes those divisions are motivated for tax purposes¹⁵, and sometimes the division is simply to segregate shares or trusts so that the investments, income, and expenditures for one beneficiary do not affect those of another. Regardless of the reason, be sure to comply strictly with the requirements of the trust instrument.

(1) Unless the trust provides otherwise, when the trust specifies that assets are to be divided into shares that are equal or based on a fraction or percentage, the allocation should be done on a “pro rata” basis, meaning that each beneficiary receives the specified fraction or percentage of each asset.

(2) A pro rata allocation is fair, but it is sometimes impractical, especially with hard-to-divide or hard-to-share assets, such as homes and cars. Most trusts permit the allocation of specific assets based on their values at a specified time. If the Trustee is going to pick and choose assets for various shares, the Trustee must make sure to take into consideration any appreciation or depreciation in assets between the time of valuation and the time of distribution or allocation to shares. For example, suppose that at the time of the settlor’s death there is a bank account with cash totaling \$100,000 and a home valued at \$100,000. After six months, the Trustee is ready to give the bank account to one beneficiary and the home to another beneficiary, but that would be unfair if the home had decreased in the meantime to be worth \$80,000 because of the announcement of the construction of a nearby public housing project. The Trustee needs to be fair about those things, and most trusts permit (if not require) equitable adjustments.

(b) Distributions that are required “upon the deceased settlor’s death” can be made as soon as you determine that there are sufficient assets to meet the trust’s obligations to creditors, to the IRS, and to other beneficiaries. Before that determination has been made, a partial distribution can be made whenever you deem it appropriate.

(c) Periodic distributions are either mandatory or discretionary.

(1) Mandatory distributions are those payments required in the document. They should be paid as directed in the trust instrument. If the trust requires payments to begin at a certain date, and such payments cannot be made on time for one reason or another, be sure to make up the payments as soon as possible.

(2) Discretionary distributions are those payments which the trust instrument permits but does not require, such as quarterly income distributions. Discretionary distributions also include distributions that are mandated by the trust document where the time and/or the amount of the distribution is left to your discretion.

¹⁵It is common to divide a trust into separate trusts upon the death of one spouse so that the “applicable exclusion” of the first spouse to die can be preserved. That division is explained in a separate memo, which you should request if you have not already received it. For trusts that may continue for more than one generation, it is also important to divide trusts that become irrevocable into “exempt” and “non-exempt” trusts for federal generation-skipping transfer tax purposes. Whether or not these allocations are made and maintained can make a significant difference in the amount of estate and generation-skipping transfer taxes that are imposed.



(A) We recommend that you consider all relevant factors in making distribution decisions and that you keep a written record of the factors you weigh. It would be almost impossible to properly make discretionary distributions without conferring with the beneficiary and others.

(B) It is appropriate to ask the beneficiary to provide documents and information relevant to his or her financial condition, such as copies of paycheck stubs and federal tax returns.

(C) Some trust documents will allow payments “for” as well as “to” a beneficiary. This means that you can pay bills directly, buy assets for a beneficiary’s use, and provide services to a beneficiary without having to make direct payments to the beneficiary.

(d) The beneficiaries and other distributees should always sign receipts acknowledging receipt of the distribution which you have made.

(e) When the trust assets are all distributed and the beneficiaries have all signed receipts, the trust administration is complete.

6.3 Anticipating Disputes: If you anticipate that some of your decisions may be challenged by beneficiaries, if you know that there will be some decisions that will favor one beneficiary (or group of beneficiaries) over another, or if some of the trust provisions are ambiguous requiring court interpretation, it may be wise to have your appointment as Trustee confirmed by the Court and to otherwise seek judicial guidance, especially if you are about to make a decisions that is controversial. This gives the beneficiaries an opportunity to express their concerns to the court, but once the court has made a decision, your compliance with the court order cannot be subsequently challenged.

7. CONCLUSION: The trust administration process will take your time and effort. We hope you will call upon us when legal questions are involved and whenever you feel we can help simplify the trust administration process.

7.1 Time: It takes time to prepare petitions, inventories, and other required documents. There is a 90-day creditors’ claim period. Although you can begin distributions immediately after assuming your duties as trustee, it will take months before the simplest trust can be settled. If federal estate taxes are owed to the IRS, you cannot make a final distribution without settling with the IRS until after approximately 18 months from the deceased settlor’s death. Disputes with beneficiaries, heirs, creditors, and other claimants can complicate matters and lengthen the time it takes to complete the trust administration process. Selling trust assets can also delay the final settlement of the trust.

7.2 Beneficiaries: Unless you are the only beneficiary, we recommend that you communicate frequently with all the trust’s current beneficiaries, keeping them apprized of your activities, particularly those that affect them. If you have concerns about trust investments or discretionary distributions, conferring with the trust’s beneficiaries may avert misunderstandings later. Timely written correspondence to the trust’s adult beneficiaries and to the parents or guardians of minor beneficiaries regarding your



actions and decisions is your best defense against potential litigation later.

7.3 Effort: From the day you assume the duties of a trustee until the beneficiaries have signed receipts indicating that they have received all they are entitled to, the primary responsibility for the trust rests on your shoulders. Our task is to help ease your burden in every way possible, so if you need help, please let us know.

7.4 Compensation: Unless the trust instrument provides otherwise, you are entitled to “reasonable compensation” for your services, which is taxable income to you.

(a) “Reasonable compensation” can be based on an hourly fee or a percentage fee. Bank trust departments customarily charge an annual fee equal to approximately one percent (1%) of the current value of the trust’s assets. Sometimes a lower fee is quoted, but transaction charges often make up for the difference. In addition to the regular management fee, there is frequently also a distribution fee when assets are distributed out of the trust to one or more beneficiaries.

(b) If there are two or more trustees, the compensation should be allocated among the co-trustees according to their services, as they agree.

(c) If the trust instrument provides for more specific compensation, you should follow the trust instrument. If you feel that the compensation provided for in the trust is unreasonable, you can either resign or petition the court for additional compensation.

(d) A trustee’s fee is usually paid quarterly, and is normally paid one half from trust income and one half from trust principal [NRS 164.900(1) and 164.905(1)(a)], although an “acceptance fee” is generally charged entirely to the trust principal [NRS 905(1)(b)].

(e) If you intend to waive your compensation, consult us or your accountant about how to document this to avoid having taxable income imputed to you even though you are not going to receive it.

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