



TRUSTEE DUTIES

To be a trustee – what does it mean? Are you, or have you been asked to become, a trustee?

The Trusts Act 2019 significantly increased the responsibilities and obligations of trustees of all trusts – including trusts established before the introduction of this Act. So, if you are a trustee, or are considering becoming one, we suggest that you familiarise yourself on what your trustees duties are.

AS A TRUSTEE

Trusts are common beasts in the New Zealand legal landscape. A trust is created and exists where one or more people (each a settlor) transfer (settles) funds or assets (trust property) to one or more other people (each a trustee) to hold and own that property for the benefit one or more other people (each a beneficiary). Trust can be set up for many different reasons and purposes. For example, a family trust is a trust set up to benefit particular members of a family. Trusts can also be created in a will.

The trustee role is incredibly important and has a lot of responsibility tied to it. There is a special legal relationship between the trustee and the beneficiaries, which is called a ‘fiduciary’ relationship. The law recognises the level of trust and power a trustee has over assets being held on behalf of others, so the law sets a high bar in judging a trustee’s actions. As a trustee, it is your duty to act in the best interests of all the beneficiaries of the trust. A trustee must always act honestly and with a level of care and skill that would be expected of a reasonable businessperson in administering the affairs of others.

MANDATORY DUTIES

The Trusts Act 2019 sets out five mandatory trustee duties. If the trust deed has a clause that removes or alters one or more of the mandatory duties, that clause is ineffective. The mandatory duties are:

1. Know the terms of the trust: The trust terms are set out in the document that establishes the trust (eg. the trust deed or the will) as well as any subsequent updating documents.
2. Act in accordance with the terms of the Trust: A trustee must follow the rules and procedures set down in the trust documents.
3. Act honestly and in good faith.
4. Act for the benefit of the beneficiaries OR to further the ‘permitted purpose’ of the trust: A trust with a ‘permitted purpose’ is a trust with no specified “beneficiaries” – for example, a charitable trust.
5. Duty to exercise powers for a proper purpose: A trustee must make decisions in line with the intent of the trust.

DEFAULT DUTIES

There are also ‘default duties’ that you may be obligated to uphold as a trustee. A default duty can be modified in by the trust documents, unlike a mandatory duty. This is another reason why it is imperative to have a clear understanding of the terms of the trust. The default duties are:

1. **Duty of Care:** A trustee must exercise a level of care and skill in their actions as a trustee that is reasonable in the circumstances, taking into account any specific knowledge or experience that trustee holds or represents that they hold.
2. **Duty to invest prudently.**
3. **Duty not to exercise power for own benefit.**
4. **Duty to consider exercise of power:** A trustee should take into account the interests of beneficiaries and also consider the settlor's stated wishes.
5. **Duty not to bind or commit trustees to future exercise of discretion.**
6. **Duty to avoid conflict of interest.**
7. **Duty of impartiality:** A trustee must ensure at all times that their loyalty as a trustee lies with the beneficiaries. It is the trustee's duty and responsibility to protect the interests of all the beneficiaries. Where situations arise which place various beneficiaries in conflict with one another, the trustee is expected to act in an even-handed and fair manner.
8. **Duty not to profit.**
9. **Duty to act for no reward.**

The rulebook for being a trustee can therefore vary wildly from trust to trust. It is important to have a clear understanding of what level of involvement and risk you are personally signing up for.

FURTHER RESPONSIBILITIES

A trustee must keep detailed and accurate records for the trust, such as correspondence and contracts with third parties; capital and income accounts; a detailed list of trust property; and relevant details of the trust, such as beneficiaries contact details. All records relating to the trust must be maintained for the trust's duration, or longer if required.

Trustees must be able to provide beneficiaries with access to certain information regarding the trust, if requested. [NB: Trustees are not obliged to disclose documents which record reasons for exercising any discretionary powers. If you are a trustee and wish to receive guidance regarding what information is appropriate to disclose, we suggest you contact us.]

The trustees must meet regularly (at least every 12 months) to make decisions regarding trust assets. The decisions made usually need to be unanimous. It is also important that trustees record, by way of resolution, their decisions and the reasons for these.

Trustees are also required to act in a personal capacity. This means all trustees need to be personally involved in decision making and only delegate their responsibility where permitted to do so — eg. where the trustee is physically unable to perform their trustee duties.

MORE INFORMATION

Trustees are personally liable to the beneficiaries if they breach their trustee duties, whether accidentally or on purpose.

The duties and responsibilities of trustees can be multifaceted and this guide aims to provide a brief overview of significant trustees' obligations. However, if you have any questions about your current or future role as a trustee of a trust or under a will, we encourage you to talk these through with us. Give us a call or email us for more information.

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FURTHER CONSIDERATIONS

- ◆ Your relationship to the individuals proposing the trust;
- ◆ Why the trust is being established?
- ◆ Who are the proposed co-trustees? Do they have particular expertise in certain areas and do you think you could work effectively with them?
- ◆ What is the level of involvement required of you?
- ◆ How much time and costs (if any) will be involved in the trusteeship?
- ◆ Possible conflicts of interest which may arise;
- ◆ If the trust is already established, has it been properly administered to date? Could there have been breaches that require action?
- ◆ Where will the trust documentation be stored, and will you have easy access to this?