

## **CHAPTER 59-16**

### **DUTIES AND POWERS OF TRUSTEE**

**59-16-01. (801) Duty to administer trust.** Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its purposes and in accordance with chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19.

**59-16-02. (802) Duty of loyalty.**

1. A trustee shall administer the trust solely in the interests of the beneficiaries.
2. Subject to the rights of persons dealing with or assisting the trustee as provided in section 59-18-12, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless the transaction was authorized by the terms of the trust; the transaction was approved by the court; the beneficiary did not commence a judicial proceeding within the time allowed by section 59-18-05; the beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with section 59-18-09; or the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.
3. A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with the trustee's spouse; the trustee's descendants, siblings, parents, or their spouses; an agent or attorney of the trustee; or a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.
4. A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.
5. A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.
6. An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment complies with the prudent investor rule of chapter 59-17. In addition to its compensation for acting as trustee, the trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust. If the trustee receives compensation from the investment company or investment trust for providing investment advisory or investment management services, the trustee at least annually shall notify the persons entitled under section 59-16-13 to receive a copy of the trustee's annual report of the rate and method by which that compensation was determined.
7. In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

8. If 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, or conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest; a deposit of trust money in a regulated financial service institution operated by the trustee; or an advance by the trustee of money for the protection of the trust is not precluded by this section.
9. The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

**59-16-03. (803) Impartiality.** If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

**59-16-04. (804) Prudent administration.** A trustee shall administer the trust as a prudent person would by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

**59-16-05. (805) Costs of administration.** In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.

**59-16-06. (806) Trustee's skills.** A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.

**59-16-07. (807) Delegation by trustee.**

1. A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in selecting an agent; establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.
2. In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.
3. A trustee who complies with subsection 1 is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.
4. By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.

**59-16-08. (808) Powers to direct.**

1. While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.
2. If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted 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.

3. The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.
4. A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of fiduciary duty.

**59-16-09. (809) Control and protection of trust property.** A trustee shall take reasonable steps to take control of and protect the trust property.

**59-16-10. (810) Recordkeeping and identification of trust property.**

1. A trustee shall keep adequate records of the administration of the trust.
2. A trustee shall keep trust property separate from the trustee's own property.
3. Except as otherwise provided in subsection 4, a trustee, other than a trustee granted trust or fiduciary powers from a federal or state authority, shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.
4. If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.

**59-16-11. (811) Enforcement and defense of claims.** A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

**59-16-12. (812) Collecting trust property.** A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee and to redress a breach of trust known to the trustee to have been committed by a former trustee or other fiduciary.

**59-16-13. (813) Duty to inform and report.**

1. Subject to section 59-14-03, while a trust is revocable or to the extent that trust property in an irrevocable trust is subject to a power of withdrawal, the duty of the trustee to inform and report are owed exclusively:
  - a. To the settlor, while a trust is revocable;
  - b. To the holder of the power of withdrawal to the extent the trust property is subject to the power during the period in which the power may be executed; and
  - c. To a qualified beneficiary when the qualified beneficiary is required by law or regulation to provide that information to determine eligibility for benefits or to verify continued eligibility for benefits under title 50.
2. With respect to trust property in an irrevocable trust which is not subject to a power of withdrawal:
  - a. A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.

- b. A trustee upon written request shall promptly furnish to a qualified beneficiary a copy of the portion of the trust instrument which relates to the interest of a qualified beneficiary.
- c. A trustee within sixty days after accepting a trusteeship shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number.
- d. A trustee shall notify the qualified beneficiaries of the trust existence, of the identity of the settlor, of the right to request a copy of the trust instrument, and of the right of the trustee's report as provided in subdivision f within sixty days after the date the trustee acquires knowledge:
  - (1) Of the creation of an irrevocable trust; or
  - (2) That a formerly revocable trust has become irrevocable.
- e. A trustee shall notify the qualified beneficiaries of any change in the method or rate of the trustee's compensation.
- f. A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, conservator, or guardian may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.
- g. A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.
- h. Subdivisions c and d do not apply to a trustee that accepts a trusteeship before August 1, 2007, to an irrevocable trust created before August 1, 2007, or to a revocable trust that becomes irrevocable before August 1, 2007.

**59-16-14. (814) Discretionary powers - Tax savings.**

- 1. Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as absolute, sole, or uncontrolled, the trustee shall exercise a discretionary power in good faith and in accordance with the purposes of the trust.
- 2. Subject to subsection 4, and unless the terms of the trust expressly indicate that a rule in this subsection does not apply:
  - a. A person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's personal benefit may exercise the power only in accordance with an ascertainable standard; and
  - b. A trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

3. A power whose exercise is limited or prohibited by subsection 2 may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.
4. Subsection 2 does not apply to:
  - a. A power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in section 2056(b)(5) or 2523(e) of the Internal Revenue Code was previously allowed;
  - b. Any trust during any period that the trust may be revoked or amended by its settlor; or
  - c. A trust if contributions to the trust qualify for the annual exclusion under section 2503(c) of the Internal Revenue Code.

**59-16-15. (815) General powers of trustee.** A trustee, without authorization by the court, may exercise powers conferred by the terms of the trust and, except as limited by the terms of the trust, all powers over the trust property which an unmarried owner, who is not an incapacitated person, has over individually owned property, any other powers appropriate to achieve the proper investment, management, and distribution of the trust property, and any other powers conferred by chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19. The exercise of a power is subject to the fiduciary duties prescribed by this chapter.

**59-16-16. (816) Specific powers of trustee.** Without limiting the authority conferred by section 59-16-15, a trustee may:

1. Collect trust property and accept or reject additions to the trust property from a settlor or any other person.
2. Acquire or sell property, for cash or on credit, at public or private sale.
3. Exchange, partition, or otherwise change the character of trust property.
4. Deposit or invest trust money in a regulated financial institution, including one operated by the trustee or an affiliate of the trustee.
5. Borrow money, with or without security from any financial institution, including a financial institution that is serving as a trustee or one of its affiliates, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust.
6. With respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital.
7. With respect to stocks or other securities, exercise the rights of an absolute owner, including the right to vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement; hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery; pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights; and deposit the securities with a depository or other regulated financial service institution.

8. With respect to an interest in real property, construct or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries.
9. Enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust.
10. Grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired.
11. Insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability.
12. Abandon, distribute, or decline to administer property of no value or of insufficient value to justify its collection or continued administration.
13. With respect to possible liability for violation of environmental law, inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest for the purpose of determining the application of environmental law with respect to the property; take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement; decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law; compromise claims against the trust which may be asserted for an alleged violation of environmental law; and pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law.
14. Pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust.
15. Pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust.
16. Exercise elections with respect to federal, state, and local taxes.
17. Select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights thereunder, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds.
18. Make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans.
19. Pledge trust property to guarantee loans made by others to the beneficiary.
20. Appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed.

21. Pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by paying it to the beneficiary's conservator or, if the beneficiary does not have a conservator, the beneficiary's guardian; paying it to the beneficiary's custodian under chapter 47-24.1 and for that purpose, creating a custodianship or custodial trust; if the trustee does not know of a conservator, guardian, custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution.
22. On distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation.
23. Resolve a dispute concerning the interpretation of the trust of the trust's administration by mediation, arbitration, or other procedure for alternative dispute resolution.
24. Prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties.
25. Sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers.
26. Purchase and pay from trust principal the premiums on life insurance.
27. Allocate items of income or expense to either trust income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization or for depletion in mineral or timber properties.
28.
  - a. With respect to the administration of trust assets as one or more trusts to:
    - (1) Receive and administer additional property as part of the trust estate or as a separate trust having terms identical to the terms of the existing trust;
    - (2) Sever any trust estate on a fractional basis, before or after a trust is funded, into two or more separate trusts for any reason;
    - (3) Segregate by allocation to a separate account or trust a specific amount or gift made from any trust to reflect a partial disclaimer, to reflect or result in differences in federal tax attributes, to satisfy any federal tax requirements or elections, or to reduce potential generation, skipping transfer tax liability, in a manner consistent with the rules governing disclaimers, such federal tax attributes, such requirements or elections, or any applicable tax rules or regulations, and any income earned on a segregated amount or gift after segregation occurs passes to the designated taker of such amount or gift; and
    - (4) Consolidate two or more trusts having substantially similar terms into a single trust.
  - b. In managing, investing, administering, and distributing the trust property of any separate account or trust and in making applicable tax elections, consider the differences in federal tax attributes and all other factors the trustee believes pertinent and may make disproportionate distributions from the separate trusts

created. A separate account or trust created by severance or segregation must be treated as a separate trust for all purposes from and after the date on which the severance or segregation is effective. The trustee shall hold such separate account or trust on terms and conditions that are substantially equivalent to the terms of the trust from which it was severed or segregated so that the aggregate interests of each beneficiary in the several trusts are substantially equivalent to the beneficiary's interests in the trust before severance or segregation; provided, however, that any terms of the trust before severance that would affect qualification of the trust for any federal tax deduction, exclusion, election, exemption, or other special federal tax status must remain identical in each of the separate trusts created.

29. Employ persons, including attorneys, auditors, investment advisers or agents, to advise or assist the trustee in the performance of administrative duties. A trustee may act based on the recommendations of professionals without independently investigating the recommendations.
30. Deal with the personal representative, trustee, or other representative of any other trust or estate in which a beneficiary of the trust estate has an interest, notwithstanding the fact that the trustee is a personal representative, trustee, or other representative of the other trust or estate.
31. On termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to the property.

**59-16-17. (817) Distribution upon termination.**

1. Upon termination or partial termination of a trust, the trustee may send to the beneficiaries, and the attorney general in the case of a charitable trust, a proposal for distribution. The right of any beneficiary, or the attorney general in the case of a charitable trust, to object to the proposed distribution terminates if the beneficiary, or the attorney general in the case of a charitable trust, does not notify the trustee of an objection within thirty days after the proposal was sent, but only if the proposal informed the beneficiary, or the attorney general in the case of a charitable trust, of the right to object and of the time allowed for objection.
2. Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.
3. A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent it was induced by improper conduct of the trustee or the beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts relating to the breach.