How To Administer A Trust Appropriately

Submitted by J. Mark Fisher

- Powers, Duties And Liabilities Of Trustees To Third Parties

- Monitoring Trust Account Reporting

- The Importance Of A Spendthrift Clause And Creditors Rights

- Method Of Resolving Trust Disputes

- Setting Up And Terminating A Trust

VI. HOW TO ADMINISTER A TRUST APPROPRIATELY

A. Powers, Duties and Liabilities of Trustees to Third Parties

1. **Powers.** (Florida Statute 736.0816 (Same as old Florida Statute 737.4025))

- Collect Trust property and accept or reject additions to the Trust property from a Settlor, including an asset in which the Trustee is personally interested, and hold property in the name of a nominee or in other form without disclosure of the Trust so that title to the property may pass by delivery but the Trustee is liable for any act of the nominee in connection with the property so held.
- Acquire or sell property, for cash or on credit, at public or private sale.
- Acquire an undivided interest in a Trust asset, including, but not limited to, a money market mutual fund, mutual fund, or common Trust fund, in which asset the Trustee holds an undivided interest in any Trust capacity, including any money market or other mutual fund from which the Trustee or any affiliate or associate of the Trustee is entitled to receive reasonable compensation for providing necessary services as an investment adviser, portfolio manager, or servicing agent. A Trustee or affiliate or associate of the Trustee may receive compensation for such services in addition to fees received for administering the Trust provided such compensation is fully disclosed in writing to all qualified beneficiaries. As used in this subsection, the term "mutual fund" includes an open-end or closed-end management investment company or investment Trust registered under the Investment Company Act of 1940, 15 U.S.C. ss. 80a-1 et seq., as amended.

- Exchange, partition, or otherwise change the character of Trust property.

- Deposit Trust money in an account in a regulated financial service institution.
- Borrow money, with or without security, and mortgage or pledge Trust property for a period within or extending beyond the duration of the Trust and advance money for the protection of the Trust.
- 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, but not limited to, merging, dissolving, or otherwise changing the form of business organization or contributing additional capital.
- With respect to stocks or other securities, exercise the rights of an absolute owner, including, but not limited to, 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.
    - Deposit the securities with a depositary or other regulated financial service institution.
- 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.

- 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.
- 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.
- Insure the property of the Trust against damage or loss and insure the Trustee, Trustee's agents, and beneficiaries against liability arising from the administration of the Trust.
- Abandon or decline to administer property of no value or of insufficient value to justify the collection or continued administration of such property.
- 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.
- 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.
- Allocate items of income or expense to Trust income or principal, as provided by law.
- Exercise elections with respect to federal, state, and local taxes.
- Select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the Trustee, exercise rights under such plan, annuity, or insurance, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds.

- Make loans out of Trust property, including, but not limited to, loans to a beneficiary on terms and conditions that are fair and reasonable under the circumstances, and the Trustee has a lien on future distributions for repayment of those loans.
- Employ persons, including, but not limited to, attorneys, accountants, investment advisers, or agents, even if they are the Trustee, an affiliate of the Trustee, or otherwise associated with the Trustee, to advise or assist the Trustee in the exercise of any of the Trustee's powers and pay reasonable compensation and costs incurred in connection with such employment from the assets of the Trust and act without independent investigation on the recommendations of such persons.
- Pay an amount distributable to a beneficiary who is under a legal disability or who the Trustee reasonably believes is incapacitated, by paying the amount directly to the beneficiary or applying the amount for the beneficiary's benefit, or by:
    - Paying the amount to the beneficiary's guardian of the property or, if the beneficiary does not have a guardian of the property, the beneficiary's guardian of the person;
    - Paying the amount to the beneficiary's custodian under a Uniform Transfers to Minors Act or custodial Trustee under a Uniform Custodial Trust Act, and, for that purpose, creating a custodianship or custodial Trust;
    - Paying the amount 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, if the Trustee does not know of a guardian of the property, guardian of the person, custodian, or custodial Trustee; or

    - Managing the amount as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution.
- 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.
- Prosecute or defend, including appeals, an action, claim, or judicial proceeding in any jurisdiction to protect Trust property or the Trustee in the performance of the Trustee's duties.
- Sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the Trustee's powers.
- 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, subject to the right of the Trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

a. New Provisions:

- To exercise federal, state, and local tax elections
- To select payment options with respect to retirement plans, annuities, and insurance contracts
- To make loans, including to a beneficiary, with terms and conditions that are fair and reasonable
- Upon termination of Trust, to exercise powers appropriate to the winding up of the Trust and the distribution of Trust property

b. Additional Powers:

Section 736.0815 provides that a Trustee's powers include any that are appropriate to achieve the proper investment, management, and distribution of the Trust property, as well as all powers that an unmarried, competent owner has over individually owned property.

Section 736.08163 provides specific powers to the Trustee to handle environmentally contaminated property and provides protection from personal liability for the Trustee.

Section 736.0807 authorizes a Trustee to delegate duties and powers that a prudent Trustee of comparable skill could properly delegate under the circumstances, provided the Trustee exercises reasonable care, skill, and caution in selecting the agent, in defining the scope in terms of the delegation, and in supervising the agent.

Section 736.0808 relates specifically to the Revocable Living Trust and provides that while this Trust is changeable, a Trustee may follow the direction of the grantor, whether or not that authority is explicitly stated in the terms of the Trust.

Section 736.0814 provides a Trustee must exercise all discretionary powers, regardless of the breadth of discretion expressed in the instrument, in good faith and in accordance with the terms and purposes of the Trust and the interest of the beneficiaries. This section also protects Trustees, who are also beneficiaries of the Trust, from having adverse gift or estate tax consequences because of their distribution and administration powers with respect to the Trust.

2. General Duties:

Section 736.0801 places a mandatory duty on the Trustee to administer the Trust in good faith.

Section 736.0813 places a duty on the Trustee to inform and account to the beneficiaries and to keep the beneficiaries reasonably informed of the Trust and its administration. The following should be done:

a. Give written acceptance of the Trust and the full name and address of the Trustee to the qualified beneficiaries within 60 days after the Trustee's acceptance.
b. Notify the beneficiaries of the existence of the Trust, the identity of the Settlor, the right to request a copy of the Trust instrument, and the right to accountings within 60 days after the Trustee acquires knowledge of the creation of an irrevocable Trust or that a formerly revocable Trust has become irrevocable.
c. Upon reasonable request by the beneficiaries, furnish them with a complete copy of the Trust instrument.
d. Once the Trust becomes irrevocable, furnish a Trust accounting to the beneficiaries annually as well as on termination of the Trust or on a change of Trustee.
e. Upon reasonable request, provide the beneficiaries with relevant information about the Trust's assets and liabilities and the particulars of the Trust administration.

Section 736.0812 places a duty on the Trustee to redress breaches known to have been committed by former Trustees.

Section 736.0802 places a duty of loyalty and impartiality on the Trustee to administer the Trust solely in the interest of the beneficiaries. (For example, a Trustee may not engage in any sale, encumbrance, or transaction involving Trust property for his or her own personal account that involves a conflict between the Trustee's personal and fiduciary interest. Any such offending transaction is voidable *per se* by an affected beneficiary.)

Section 736.0804 places a duty to administer the Trust, as a prudent person would, by considering the purposes, terms, distribution requirements, and other circumstances of the Trust and by exercising reasonable care, skill and caution.

Section 736.0805, 736.0806, 736.0810, 736.0811 and section 736.08165 impose a duty to incur only reasonable expenses, use special skills, control and protect Trust property, keep accurate records, enforce and defend claims, and administer pending the outcome of the contest or other proceeding.

Section 736.0810 imposes a duty to keep clear, distinct, and accurate records and not co-mingle Trust assets.

Section 736.08105 requires the Trustee to obtain marketable title but only when it is required for a specific sale or conveyance.

Section 736.0817 places a duty on the Trustee to expeditiously distribute Trust property upon termination of the Trust. However, the Trustee may retain a reasonable reserve for the payment of debts, expenses and taxes.

3. Liabilities of Trustees to Third Parties

The Trustee is liable for breach of Trust, including a violation, intentional or not, of any of the duties discussed above. See section 736.1001

Section 736.1009 protects a Trustee from liability when the Trustee acts in reasonable reliance on the terms of the Trust.

Section 736.1010 offers protection to Trustees for breaches resulting from a reasonable lack of knowledge of the happening of certain external event such as the marriage, divorce, educational status, or death of a beneficiary.

Section 736.1011 places restrictions on the enforceability of a term in a Trust attempting to relieve the Trustee of liability for a breach of Trust. Under this section, an exculpatory term may not relieve a Trustee of liability for breaches committed in bad faith or with reckless indifference to the purposes of the Trust or the interest of the beneficiaries. Further, an exculpatory term is unenforceable if it was inserted as a result of an abuse of a fiduciary or confidential relationship between the Trustee and Settlor.

Remedies for breach of Trust pursuant to section 736.1001(2) include, but are not limited to, the following actions by the court:

a. Suspend or remove the Trustee.
b. Enjoin, void or compel actions by the Trustee.
c. Reduce or deny the Trustee's compensation.
d. Compel the Trustee to pay money or to restore Trust property.
e. Impose a lien or a constructive Trust on Trust property.
f. Recover wrongfully disposed of Trust property or its proceeds.

B. Monitoring Trust Account Reporting

Pursuant to section 736.0813, a Trustee must keep the qualified beneficiaries of an irrevocable Trust reasonably informed of the Trust and its administration. See also *Brent v. Smathers,* 547 So.2d 683 (Fla. 3d DCA 1989). This includes, upon reasonable request, providing the qualified beneficiaries with relevant information about the Trust assets and liabilities and the particulars of the Trust administration. The contents of the required accounting are detailed in section 736.08135. This section is identical to the old Florida Statute 737.3035 with the addition of a requirement that a Trustee's final accounting include a plan of distribution for any undistributed assets shown on the accounting. See section 736 .08135(2)(f).

Generally, the Trust accounting must be a reasonably understandable report from the date of the last accounting or, if none, from the date upon which the Trustee became accountable. The accounting must begin with a statement identifying the Trust, the Trustee furnishing the accounting, and the time period covered by the accounting. Although there is no prescribed format, it is recommended that the Trustee use a format based on the Uniform Fiduciary Accounting Principles (UFAP) similar to the probate accounting form used for all probate accountings in Florida. At a minimum, the accounting should be self-balancing and include the beginning inventory or assets on hand from the last accounting period, a statement of receipts, a statement of disbursements, and an ending inventory. In the statement of receipts and statement of disbursements, the items should be segregated into principle and income items.

A sample of the accounting form is attached as Exhibit “A”.

Only “eligible beneficiaries,” defined by this section as qualified beneficiaries, are entitled to receive the Trust accounting pursuant to section 736.0813. Section 736.0103(14) defines a qualified beneficiary as follows:

"Qualified beneficiary" means a living beneficiary who, on the date the beneficiary's qualification is determined:

(a) Is a distributee or permissible distributee of trust income or principal;

(b) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (a) terminated on that date without causing the trust to terminate; or

(c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated in accordance with its terms on that date.

EXHIBIT "A"

ANNUAL ACCOUNTING OF JOHN L. DOE LIVING TRUST DATED JANUARY 5, 1999

From: January 1, 2008 Through: December 31, 2008

The purpose of this accounting is to acquaint all interested persons with the transactions that have occurred during the period covered by the accounting and the assets that remain on hand. It consists of a SUMMARY sheet and Schedule A showing all Receipts, Schedule B showing all Disbursements, Schedule C showing all Distributions, Schedule D showing all Capital Transactions and Adjustments (the effect of which are also reflected in other schedules, if appropriate), and Schedule E showing assets on hand at the end of the accounting period.

It is important that this accounting be carefully examined. Requests for additional information and any questions should be addressed to the successor Trustee, the name and address is set forth below.

Under penalties of perjury, the undersigned successor Trustee declares that I have read and examined this accounting and that the facts and figures set forth in the Summary and the attached Schedules are true, to the best of my knowledge and belief, and that it is a complete report of all cash and property transactions and of all receipts and disbursements by me as successor Trustee of the JOHN L. DOE TRUST DATED JANUARY 5, 1999, from January 1, 2008, through December 31, 2008.

Signed on _________________, _____.

Successor Trustee:

____

Mary L. Doe
123 Any Street
Any City, Florida 32000

EXHIBIT "A" CONTINUED

ANNUAL ACCOUNTING OF JOHN L. DOE LIVING TRUST DATED JANUARY 5, 1999

From: January 1, 2008 Through: December 31, 2008

SUMMARY

		Income	Principal	Totals
I.	Starting Balance Assets per Inventory or on Hand at Close of Last Accounting Period	0.00	0.00	0.00
II.	Receipts Schedule A:	0.00	0.00	0.00
III.	Disbursements Schedule B:	0.00	0.00	0.00
IV.	Distributions Schedule C:	0.00	0.00	0.00
V.	Capital Transactions and Adjustments Schedule D: Net Gain or (Loss)		0.00	0.00
VI.	Assets on Hand at Close of Accounting Period Schedule E: Cash and Other Assets	0.00	0.00	0.00

NOTE:

Entries on Summary are to be taken from totals on Schedules A, B, C, D and E.

The Summary and Schedules A, B, C, D and E are to constitute the full accounting. Every transaction occurring during the accounting period should be reflected on the Schedules.

All purchases and sales, all adjustments to the inventory or carrying value of any asset, and any other changes in the assets (such as stock splits) should be described on Schedule D.

The amount in the "Total" column for Item VI must agree with the total inventory or adjusted carrying value of all assets on hand at the close of the accounting period on Schedule E.

EXHIBIT "A" CONTINUED

ANNUAL ACCOUNTING OF JOHN L. DOE LIVING TRUST DATED JANUARY 5, 1999

From: January 1, 2008 Through: December 31, 2008

SCHEDULE A Receipts

Date	Brief Description of Items	Income	Principal
	NONE	0.00	0.00

NOTE:

Schedule A should reflect only those items received during administration that are not shown on the inventory. Classification of items as income or principal is to be in accordance with the provisions of the Florida Uniform Principal and Income Act, Chapter 738, Florida Statutes.

Entries involving the sale of assets or other adjustments to the carrying values of assets are to be shown on Schedule D, and not on Schedule A.

EXHIBIT "A" CONTINUED

ANNUAL ACCOUNTING OF JOHN L. DOE LIVING TRUST DATED JANUARY 5, 1999

From: January 1, 2008 Through: December 31, 2008

SCHEDULE B Disbursements

Date	Brief Description of Items	Income	Principal
NONE	NONE	0.00	0.00

NOTE:

Schedule B should reflect only those items paid out during the accounting period. Classification of disbursements as income or principal is to be in accordance with the provisions of the Florida Uniform Principal and Income Act, Chapter 738, Florida Statutes.

Entries involving the purchase of assets or adjustments to the carrying values of assets are to be shown on Schedule D, and not on Schedule B.

EXHIBIT "A" CONTINUED

ANNUAL ACCOUNTING OF JOHN L. DOE LIVING TRUST DATED JANUARY 5, 1999

From: January 1, 2008 Through: December 31, 2008

SCHEDULE C Distributions

Date	Brief Description of Items	Income	Principal
NONE	NONE	0.00	0.00

NOTE:

Schedule C should reflect only those items or amounts distributed to beneficiaries during the accounting period. Assets distributed should be shown at their inventory or adjusted carrying values. Classification of distributions as income or principal is to be in accordance with the provisions of the Florida Uniform Principal and Income Act, Chapter 738, Florida Statutes.

Entries involving adjustments to the carrying values of assets are to be shown on Schedule D, and not on Schedule C.

EXHIBIT "A" CONTINUED

ANNUAL ACCOUNTING OF JOHN L. DOE LIVING TRUST DATED JANUARY 5, 1999

From: January 1, 2008   Through: December 31, 2008

SCHEDULE D   Capital Transactions and Adjustments

(Does not include distributions. Distributions are shown on Schedule C.)

Date	Brief Description of Transactions	Net Gain	Net Loss
NONE	NONE	0.00	0.00
	TOTAL NET GAINS AND (LOSSES)	$0.00	$0.00
	NET GAIN OR (LOSS)	$0.00	

NOTE:

Schedule D should reflect all purchases and sales of assets and any adjustments to the carrying values of any assets.

Entries reflecting sales should show the inventory or adjusted carrying values, the costs and expenses of the sale, and the net proceeds received. The net gain or loss should be extended in the appropriate column on the right side of Schedule D.

Entries reflecting purchases should reflect the purchase price, any expenses of purchase or other adjustments to the purchase price, and the total amount paid. Presumably no gain or loss would be shown for purchases.

Entries reflecting adjustments in capital assets should explain the change (such as a stock split) and the net gain or loss should be shown in the appropriate column on the right side of Schedule D.

The NET gain or loss should be entered in the Principal column of the Summary.

EXHIBIT "A" CONTINUED

ANNUAL ACCOUNTING OF JOHN L. DOE LIVING TRUST DATED JANUARY 5, 1999

From: January 1, 2008 Through: December 31, 2008

SCHEDULE E Assets on Hand at Close of Accounting Period

(Indicate where held and legal description, certificate numbers or other identification.)

	Estimated Current Value	Carrying Value
ASSETS OTHER THAN CASH:		
NONE	0.00	0.00
OTHER ASSETS TOTAL	$0.00	$0.00
CASH:		
NONE		0.00
CASH TOTAL		$0.00
TOTAL ASSETS (must agree with the Total for Item VI on Summary)		$0.00

NOTE:

Schedule E should be a complete list of all assets on hand reflecting inventory values for each item, adjusted in accordance with any appropriate entries on Schedule D.

Current market values for any assets that are known to be different from the inventory or carrying values as of the close of the accounting period should be shown in the column marked "Current Value." The total inventory or adjusted carrying value (not Current Value) must agree with the Total for Item VI on Summary.

C. The Importance of a Spendthrift Clause and Creditors Rights

Black's Law Dictionary defines a spendthrift as "one who spends money profusely and improvidently; one who lavishes or wastes his estate." A spendthrift Trust is "a Trust created to provide a fund for the maintenance of a beneficiary, and at the same time to secure it against his improvidence or incapacity" *Black's Law Dictionary, 5th Edition*.

An example of a spendthrift Trust is as follows:

> Except as otherwise provided herein, all payments of principal and income payable, or to become payable, to the beneficiary of any Trust created hereunder shall not be subject to anticipation, assignment, pledge, sale or transfer in any manner, nor shall any beneficiary have the power to anticipate or encumber such interest, nor shall such interest, while in the possession of the Trustee, be liable for, or subject to, the debts, contracts, obligations, liabilities or torts of any beneficiary.

The spendthrift provision is designed to block creditors and prevent a beneficiary from obtaining the beneficiary's interest in advance of the time provided for in the Trust. Although its legal effectiveness in some circumstances may be subject to some doubt, it may serve the purpose of discouraging the beneficiary or the beneficiary's creditors from taking such action.

There is no federal or state law which exempts an interest in a spendthrift Trust. However, section 541(c)(2) of the Bankruptcy Code excepts from the bankruptcy estate interests in spendthrift Trusts to the extent their restrictions are enforceable under applicable nonbankruptcy law. Spendthrift Trusts are enforced and upheld as valid in Florida.

In *McLeod v. Cooper*, 88 F.2d 194 (5th Cir. 1937), the Court held the general rule is, that a writ of garnishment cannot be used to seize spendthrift property which benefits a debtor. Judge Procter, in a 1981 bankruptcy case, held an interest in a spendthrift Trust, although not exempt, is not property of the estate. *In re Kelleher*, 12 B.R. 896 (Bankr. M.D. Fla. 1981). If the debtor can terminate a Trust or reach its corpus, a spendthrift clause does not secure property from creditors. *In re Nichols*, 42 B.R. 772, 776 (Bankr. M.D. Fla. 1984); *Fehlhaber v. Fehlhaber*, 850 F.2d 1453 (11th Cir. 1988). An exception to this rule is made to permit garnishment for alimony and suit money. See *Bacardi v. White*, 463 So.2d 218 (Fla. 1985).

D. Method of Resolving Trust Disputes

A Trust dispute can take several forms. It can occur between beneficiaries of the Trust, the beneficiaries and the Trustee and between the Trust itself and an outside third party. First, the beneficiaries can fight among themselves over assets of the Trust or division of current income and remaining principal. Second, the beneficiaries may have a dispute with the Trustee regarding expenses or the Trustee's investment decisions. Third, the Trust can be involved in litigation over assets held by the Trust such as real estate title disputes.

In my experience, there are three common methods to resolving these disputes. First and foremost, and of course the one that costs the least, is to open a dialogue with all parties involved, air out the differences, and resolve the dispute. The second method might be to agree to binding arbitration or mediation among the disputing parties. Sometimes, allowing the family members to meet with the mediator, an independent third party, and air out their grievances, allows cooler heads to bring the matter to resolution. The third method, of course, is litigation. Each party hires their own legal counsel, the Trustee retains legal counsel, and a judge decides the ultimate resolution. Trusts do not normally come before a Judge except to resolve disputes.

E. Setting Up and Terminating a Trust

A trust can terminate upon the death of the grantor, at specified times pursuant to the trust document, or upon the occurrence of a specific event. After the death of the grantor, the Trustee is charged with the duty to distribute the grantor's estate pursuant to terms of the Trust. Common terms of a Trust track those of a Will. The Trustee, after ensuring there are no taxes, debts, or other legal issues, will distribute the assets to the beneficiaries. Once final distribution has been made, the Trust terminates for lack of assets and activity. (See F.S. 736.0410).

Irrevocable Trusts can also be modified or terminated pursuant to judicial modification. (See F.S. 736.04113). Upon the application of the Trustee or any qualified beneficiary, a court, at any time, may modify the terms of the Trust. The court may find the purposes of the Trust have been fulfilled or have become illegal, impossible, wasteful, or impracticable to fulfill. If the Trust property is worth less than $50,000, the Trust may be terminated by the Trustee if the Trustee concludes that the value of the Trust property is insufficient to justify the continuing cost of administration. (See F.S. 736.0414).