

Basic Trust Law

Daniel N. McLean
Crowley, Haughey, Hanson, Toole & Dietrich, P.L.L.P.
Helena, Montana

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- A. Elements of all trusts:
 - 1. Creator/Donor/Trustor/Grantor
 - 2. Trustee
 - 3. Beneficiary(ies)
 - 4. Property

- B. Types of Private Trusts
 - 1. Lifetime (inter-vivos)
 - (a) Revocable
 - (b) Irrevocable
 - (c) Governing instrument is trust agreement or declaration

 - 2. Testamentary (through will or created at death)
 - (a) Irrevocable
 - (b) Can be amended by court order or reformation
 - (c) Governing instrument is will or trust agreement

- C. Types of Public Trusts
 - 1. Charitable Trusts: Charitable purpose to benefit public welfare
 - (a) Education, relief of poverty, art, science;
 - (b) Health, hospitals, museums;
 - (c) Forests, lakes, rivers and streams, environment;
 - (d) Sports, competition.

 - 2. Statutory (or Constitutional) Trusts
 - (a) To benefit public (e.g., people of Montana, or public institutions such as universities and schools). [Beneficiary]

- (b) Created by statute (e.g. Morrill Act, Federal Enabling Act) or Constitution = governing instrument/document. (Trustor = Congress or State Legislature, Constitutional Convention).
- (c) Trustee: (Land Board, DNRC, DEQ, other state agency(ies), private trust company, charitable trust, conservation organization, etc.)
- (d) Property (assets): Land grants, gifts/contributions, earnings, growth (appreciation), property acquired in exchange, proceeds of sale, accumulated income.

1. Income and principal accounting has specific rules for private trusts, governed by the Montana Trust Code.

- (a) Principal and Income Act provides guidelines for characterizing receipts and distributions. (e.g., capital appreciation/capital gain is *principal*, not income, although it is *taxable* income)
- (b) Equitable adjustments between principal and income sometimes possible.
- (c) Trustee discretion to adapt to circumstances (within purpose of trust).
- (d) Governing instrument can override the principal and income rules.

2. Does Trust Code govern public/statutory trusts when governing document (e.g., statute) is not specific?

- (a) **72-33-103. Common law as law of state.**
Except to the extent that the common law rules governing trusts are modified by statute, the common law as to trusts is the law of this state.
History: En. Sec. 3, Ch. 685, L. 1989.
Official Comments:
Adopted from California Probate Code Ann. (1987) section 15002. The reference to the "common law" is to the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and to changing conditions.

- (b) **72-33-202. Intention to create trust.** A trust is created only if the trustor properly manifests an intention to create a trust.
History: En. Sec. 10, Ch. 685, L. 1989.
Official Comments:
Adopted from California Probate Code Ann. (1987) section 15201, which in turn codified section 23 of the Restatement (Second) of Trusts (1957). Special requirements may apply to the manifestation of the trustor's intent.
- (c) **72-33-205. Trust for indefinite or general purposes.** A trust created for an indefinite or general purpose is not invalid for that reason if it can be determined with reasonable certainty that a particular use of the trust property comes within that purpose.
History: En. Sec. 13, Ch. 685, L. 1989.

D. Trust Administration

1. Trustee Duties and Responsibilities (selected samples from Montana Trust Code)

- (a) **72-34-101. Duty to administer trust.** On acceptance of the trust, the trustee has a duty to administer the trust according to the trust instrument and, except to the extent the trust instrument provides otherwise, according to chapters 33 through 36.
- (b) **2-34-103. Duty of loyalty.** (1) The trustee has a duty to administer the trust solely in the interest of the beneficiaries. (2) It is not a violation of the duty provided in subsection (1) for a trustee who administers two trusts to sell, exchange, or participate in the sale or exchange of trust property between the trusts, if both of the following requirements are met:
(a) the sale or exchange is fair and reasonable with respect to the beneficiaries of both trusts; and
(b) the trustee gives to the beneficiaries of both trusts notice of all material facts related to the sale or exchange that the trustee knows or should know.
- (c) **72-34-107. Duty to take control of and preserve trust property.** The trustee has a duty to take reasonable steps

under the circumstances to take and keep control of and to preserve the trust property.

- (d) **72-34-108. Duty to make trust property productive.** The trustee has a duty to make the trust property productive under the circumstances and in furtherance of the purposes of the trust.
- (e) **72-34-109. Duty to dispose of improper investments.** (1) Except as provided in subsection (2), the trustee has a duty within a reasonable time to dispose of any part of the trust property included in the trust at the time of its creation, or later acquired by or added to the trust, that would not be a proper investment for the trustee to make. (2) Unless the trust instrument expressly provides otherwise, the trustee may, without liability, continue to hold property included in the trust at its creation or later added to the trust or acquired pursuant to proper authority, if retention is in the best interests of the trust or in furtherance of the purposes of the trust.
- (f) **72-34-114. Duty to use ordinary skill and prudence.** (1) The trustee shall administer the trust with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would use to accomplish the purposes of the trust as determined from the trust instrument. (2) The trustor may expand or restrict the standards provided in subsection (1) by express provisions in the trust instrument. A trustee is not liable to a beneficiary for the trustee's reliance on these express provisions.
- (g) **72-34-118. Standard of care not affected by compensation.** A trustee's standard of care and performance in administering the trust is not affected by whether or not the trustee receives any compensation.

2. Trustee Powers (selected samples from Trust Code)

- (a) **72-34-301. General powers of trustee.** A trustee has the following powers without the need to obtain court authorization:
 - (1) *the powers conferred by the trust instrument;*
 - (2) *except as limited in the trust instrument, the powers conferred by statute; and*
 - (3) *except as limited in the trust instrument, the power to perform any act that a trustee would perform for the*

purposes of the trust under the standard of care provided in 72-34-114.

- (b) **72-34-303. Exercise of powers subject to trustee's duties.** The grant of a power to a trustee, whether by the trust instrument, by statute, or by the court, does not in itself require or permit the exercise of the power. The exercise of a power by a trustee is subject to the trustee's fiduciary duties.
- (c) **72-34-336. Payment and settlement of claims.** The trustee has the power to do any of the following:
- (1) pay or contest any claim;
 - (2) settle a claim by or against the trust by compromise, arbitration, or otherwise; or
 - (3) release, in whole or in part, any claim belonging to the trust.

3. Compensation of Trustees.

- (a) **72-33-626. Trustee's compensation as provided in trust instrument -- different compensation.** (1) Subject to subsection (2), if the trust instrument provides for the trustee's compensation, the trustee is entitled to be compensated in accordance with the trust instrument. (2) Upon proper showing, the court may fix or allow greater or lesser compensation than could be allowed under the terms of the trust in any of the following circumstances:
- (a) whenever the duties of the trustee are substantially different from those contemplated when the trust was created;
 - (b) whenever the compensation in accordance with the terms of the trust would be inequitable or unreasonably low or high; or
 - (c) in extraordinary circumstances calling for equitable relief.
- (3) An order fixing or allowing greater or lesser compensation under subsection (2) applies only prospectively to actions taken in administration of the trust after the order is made.
- (b) **72-33-627. Trustee's compensation where trust silent.** If the trust instrument does not specify the trustee's compensation, the trustee is entitled to reasonable compensation.

- (c) **72-33-631. Repayment of trustee for expenditures.** A trustee is entitled to the repayment out of the trust property for the following:
- (1) expenditures that were properly incurred in the administration of the trust; and
 - (2) to the extent that they benefited the trust, expenditures that were not properly incurred in the administration of the trust.

E. CAVEAT AND DISCLAIMER.

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THANK YOU FOR THE OPPORTUNITY TO SHARE THIS INFORMATION. I HOPE IT IS HELPFUL.

Dan McLean