

## **4. THE LEGAL CORPORATION**

History, Structure, Organization, Trustee

### **Background and History**

Generally the Seventh-day Adventist Church operates under a unique arrangement involving two entities, the unincorporated ecclesiastical body (the conference) and the non-profit corporation (the association/corporation). The association/corporation was originally established for the limited purposes of holding legal title to church property and receiving gifts and bequests from church members. In actual practice, the association/corporation acts to implement certain legal objectives of the conference.

It was not until 1860 that the Seventh-day Adventist Church voted to establish a legal organization. Many of the church pioneers were fearful of organizing and becoming like the world. The young church was occupied with the challenge of proclaiming rediscovered Bible truths and establishing its work in many places. However, there were a few leaders who realized that in order for the church to fulfill its spiritual mission it must also find a way to effectively function in the secular world.

During the early years, individual members held legal title to church facilities. Several problems developed, illustrating the risks of this practice. In one instance, the individual who held the title converted a Cincinnati, Ohio church into a vinegar establishment. In 1860, the church lost possession of two other meetinghouses. These incidents prompted James White to publish a series of articles in the *Review* urging church leaders to find a more secure method of holding church property. For several months, a debate raged between those for and against the establishment of a legal organization.

Finally, at the historic Battle Creek Conference held from September 29 to October 1, 1860, the delegates agreed on a unique, but wise, arrangement initially proposed by J. N. Andrews. They voted to select a few men to form a “legally incorporated business association” for holding title to church properties and receiving bequests from church members. The first church corporation established was the Review and Herald Publishing Association. (Incidentally, the name “Seventh-day Adventist” was also voted on the same day.)

### **The Corporate Legal Entity**

Legal Organizations Under the Law - The Seventh-day Adventist Church conducts its evangelistic work and performs its other religious functions as an unincorporated body. It is the general plan not to incorporate or register regular denominational organizations unless required by law. Corporate organizations are established pursuant to governing laws for the management of legal activity, and these operate under rules and bylaws as adopted by each organization. All organizations planning to form legal corporations for operations in North America shall first secure approval from the General Conference Executive Committee. The delegates to the regular conference sessions constitute the delegates to the session of the legal organization.

*The Seventh-day Adventist Church Manual (2005), p. 237*

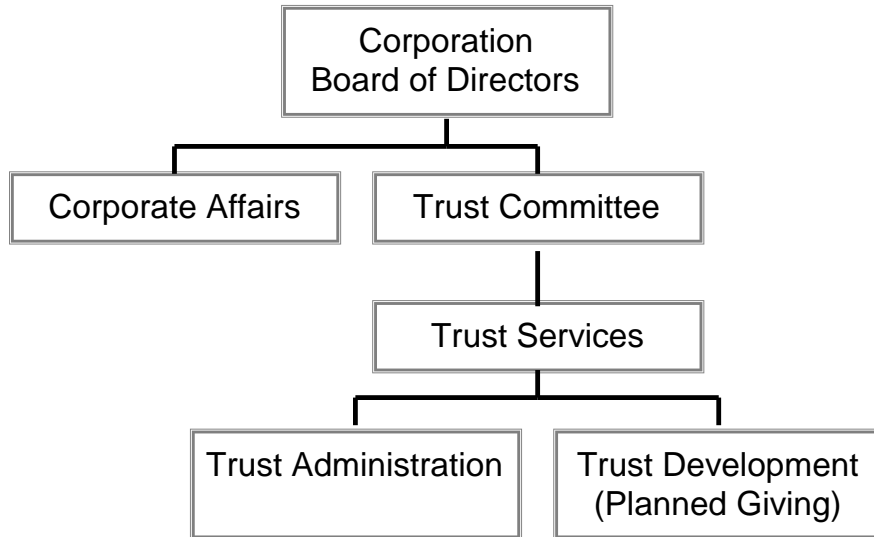
## **The Structure of the Corporation**

1. Membership. The corporation membership or constituency may be composed of the delegates to the conference meeting or members of the conference executive committee and board of directors. These members act as “shareholders” of the corporation in electing the board of directors and voting on the Articles of Incorporation and the Bylaws for the corporation.
2. Board of Directors. Corporation activities are controlled and managed by the board of directors. The board of directors appoints committees, reviews and approves all transactions, and ensures that the corporation follows the policies and programs of the conference, within its area of responsibility. In some cases, it may also appoint the corporate officers.
3. Committees. The board of directors usually creates and empowers various committees with specialized functions to act on its behalf, within well-defined guidelines and policies established by the board. These committees include the Trust Committee and the Investment Committee.
4. Officers. Corporation officers may be appointed by the board of directors or may be elected by the corporation constituency. The Trust Services director is often appointed secretary of the corporation, with a second individual to serve as corporation treasurer. Furthermore, the Trust Services director may also be a vice president of the corporation.

## **Corporate Functions**

1. Corporate Affairs. The corporation holds the legal title to all conference property: churches, schools, and other church facilities and institutions that are owned and controlled by the conference and its subsidiary units. In some conferences, the corporation performs investment functions.
2. Trust Services. The work of the Trust Services department usually involves promotion and development of trusts and wills, trust and estate administration, trust accounting, and investment management. The typical relationship between Trust Services and the corporation is illustrated by the following chart:

Figure 4-1



## Corporation Procedures

1. Notice of Meetings. Typically, corporation bylaws require that the corporation secretary provide notice of regular and special meetings of the membership and of the board of directors. These announcements should include the date, time, and place of upcoming meeting. The bylaws should specify the minimum period when the notices must be sent to all the members or directors.
2. Corporation Minutes. In many instances, the Trust Services director also serves as the corporation secretary and is responsible for recording the actions of the board of directors or the membership. It is important that the secretary keep an accurate record of the decisions made by the board. Since the minutes are the legal record of the corporation's proceedings, care should be taken to make the minutes clear, concise, complete, and accurate, using simple, unambiguous language.
  - A. Record of Attendance. The minutes should include a record of the members who were present, those who were absent, and any individuals who were present by invitation. The minutes are the legal record of what took place at the meetings and may be used as evidence in court.
  - B. Recording Resolutions. If necessary, the secretary should ask for formal wording of the proposition at the meeting so that the minutes accurately reflect the action of the meeting.

The minutes generally omit the names of persons who propose and second motions, although in some cases it may be advisable to show who introduced the proposition. Usually, it is unnecessary to list the names of those who vote for or against a proposition unless statute, charter, or bylaws require it. Where a special request is made to record a minority's dissenting votes or abstentions, the secretary should make these entries.

It is advisable to indicate in the minutes that a director personally interested in a particular transaction did not vote or left the room. For matters of great importance, such as sales of corporation property, consolidations, and similar transactions, the exact wording of resolutions, the names of persons who propose and second motions, and the names of those voting for or against should be recorded.

- C. Recording Discussions. Generally, discussions that take place at meetings are not included in the record, unless some member specifically requests that his/her view be made a matter of record. However, it may be appropriate to include an explanatory statement of the resolution or motion in order to clarify the proposal. Where this is necessary, the statement might well become part of the resolution by being included in the preamble under the "whereas" clauses. The secretary should not hesitate to record a full explanation of reasons for a particular vote.

Many secretaries err on the side of brevity when preparing minutes. The practice followed by some is to give detailed accounts of discussions, but limit minutes to a record of the motions and resolutions upon which action has been taken. Others include considerable material explaining the resolutions. This background information not only serves to aid in interpreting the resolutions, but may also help to refresh the memory of the directors on points of fact that may become the subject of future litigation. More detailed minutes may also eliminate future confusion as to the intent of a specific resolution.

- D. Matters Requiring Board Action. Some of the matters which require board action and recordation in the corporation minutes are the following:

- Sale of corporate assets
- Sale of irrevocable trust assets
- Investments
- Sale and purchase of real property
- Opening of bank or savings and loan accounts
- Distribution of matured trusts and estates
- Acceptance of gifts and bequests

Among those items which may be assigned to the Trust Committee by the board are:

- Acceptance of new trusts
- Amendments to trusts
- Return of trust assets to trustors
- Revocation of trusts

- E. Indexing of Actions. When the minutes are recorded in the permanent record book, it is appropriate to number each action taken, such as 1-02, 2-02, etc. 02 indicates that it is a year 2002 action; the 1 and 2 indicate the first and second recorded actions in 2002.

It is suggested that each action be indexed alphabetically, by action number and by page number, as follows:

<u>Action Title</u>	<u>Action No.</u>	<u>Page No.</u>
Smith, Lucy-Gift	02-01	02-01
Windsor, Ortha-Estate	02-02	02-02
Vernon, Mary-Gift Annuity	02-03	02-02

The chairperson and secretary must approve the minutes prior to their inclusion in the permanent record.

It is further suggested that copies of the minutes be delivered (regular mail or email) to each member of the board of directors as soon as possible following the board meeting.

Format. *The Corporate Secretary's Handbook* (Prentice Hall) recommends the following format for typing the minutes:

- (1) Leave a 1½-inch margin on the left side of the odd-numbered (right-hand) pages and a 1½-inch margin on the right side of the even-numbered (left-hand) pages; leave a 1-inch margin on the other three sides of all pages.
- (2) Fully capitalize and center the heading designating the meeting.
- (3) Indent paragraphs ten spaces.
- (4) Indent lists of attending directors and absentees, and all similar lists 15 spaces.
- (5) Double-space the main text of the minutes.
- (6) Double-space between paragraphs.
- (7) For the text of the resolution, indent ten spaces and single-space.
- (8) Capitalize the word "Corporation" when it refers to the organization whose meeting is being reported; capitalize "Board of Directors" in this manner when reference is made to the specific corporation board.
- (9) Make marginal captions in full capital letters.
- (10) In resolutions, fully capitalize the words "WHEREAS" and "RESOLVED" and follow each with a comma; capitalize the initial letter of "That" when used to begin a statement under "RESOLVED."
- (11) Write sums of money first in words, then in figures in parentheses.

## **The Corporation as Trustee**

The corporation functions as the legal entity primarily responsible for conducting the Trust Services program of the conference, as it is the corporation that is authorized by statute to act as trustee and to receive gifts and bequests.

## **Trust Services Personnel**

The operation of a successful Trust Services program involves a myriad of functions, duties, and responsibilities. Present-day standards in the field of trust and estate planning require the employment of personnel with experience and expertise compatible with the requirements of Trust Services.

Some organizations may have only one or two individuals performing the functions of the positions listed below. Larger organizations may designate that separate individuals perform each of these functions.

1. Director of Trust Services. The director is the key person in the operation of a successful trust program and must be carefully selected.

The director is responsible for the development, implementation, and coordination of the Trust Services program within the territory of the organization. The director is ultimately responsible for the management and operation of various functions, which include trust development and trust responsibilities. Adequate background or education in the field of estate planning, gift planning, business administration, and financial affairs is desirable.

Because of the deeply spiritual nature of Christian estate and gift planning, the director must be experienced and familiar with biblical and Spirit of Prophecy principles in the area of Christian stewardship. A pastoral or ministerial background has proven to be very helpful.

2. Trust Officer. The trust officer is primarily responsible for performing the duties of the corporate trustee and in this capacity deals directly with trustors, beneficiaries, and other parties transacting business with the trusts.

In order to be effective trust the officer must be experienced and knowledgeable concerning the various functions involved in trust administration, such as record keeping, accounting, investing, compliance with tax and legal obligations, direct assistance to trustors, acquisition and disposition of trust assets, and distribution to designated beneficiaries.

The trust officer must also be familiar with laws, customs, and denominational policies regarding wills, trusts, general business, and fiduciary responsibilities.

In all functions, the trust officer acts directly on behalf of the organization. The position recognizes spiritual maturity as well as the ability to relate well with trustors and other professionals .

3. Field Representative/Planned Giving Consultant. The field representative is a professional counselor in the area of Christian gift and estate planning directly involved with church members, educating them in this specialized area of Christian stewardship and assisting them as they plan their estates.

The Field Representative/Planned Giving Officer is also responsible for educating potential trustors/testators/donors about any applicable charitable estate planning considerations. Thorough familiarity with general estate planning principles and techniques as well as effective use of various charitable instruments, tax-saving plans, fiduciary rules, and business law is important. This important team member will often work cooperatively with and must project a positive and competent image to the trustor/donor's professional advisors such as the attorney, financial planner and CPA.

4. Corporation Treasurer. The corporation treasurer is responsible for providing and maintaining an accurate, comprehensive, and effective accounting service for the trust administration functions of Trust Services. The holder of this important position works closely with the director and trust officers in the areas of investment, financial analysis and planning, tax reporting, and acquisition and disposition of trust assets.

The treasurer should have a college degree or equivalent background in business administration, management, or accounting. Prior experience in auditing or denominational treasury, real estate sales, and investing is very desirable.

The treasurer must also be familiar with denominational policies and office routine. A good working knowledge of the denominational organization, financial programs, and procedures is also essential.

5. Certification of Personnel. General Conference policies regarding Planned Giving and Trust Services personnel require individuals who perform discretionary functions in either trust development or trust administration to be currently certified by the NAD Certification and Accreditation Committee. Such personnel are required to maintain a continuing education program.

## **The Legal Entity as Trustee**

The corporation/association/foundation functions as the legal entity primarily responsible for conducting the Planned Giving and Trust Services program of the conference, as it is this organization which is authorized by its articles of incorporation, bylaws and/or statute to act as trustee, issue gift annuities, and to receive gifts and bequests.

While the ultimate responsibility for all activities of the corporation rests upon its board of directors. Certain oversight and decision making authority is generally delegated to a committee

known variously as trust acceptance committee, trust management committee or simply, trust committee.

The Trust Committee usually has authority to act in the following areas:

- A. Trust, Gift Plan, and Estate Review and Acceptance. Review and acceptance usually involves consideration of estate plan proposals and deferred gifts that incorporate participation by the corporation as trustee or personal representative and the church as charitable beneficiary. The committee will also review matured estates and trusts when the organization is named as personal representative or successor trustee respectively.
- B. Trust and Estate Administration. Trust and estate administration includes the management and asset investment, document preparation, record keeping, trust accounting, and distribution.

The Trust Committee should include the corporation management team, other key personnel involved in trust administration and development, and legal counsel (where available or advisable). Some organizations that operate a large trust program have found it efficient to have more than one committee to oversee specific areas of trust work.

C. The organization's Corporate board may choose to draft Terms of Reference for the Trust Committee to memorialize the committee's responsibilities and authority. A sample Terms of Reference.

### **Duties of the Trustee**

The position of trustee is a great responsibility that must be taken seriously. The law imposes duties and liabilities upon a trustee that must be handled with care, skill, prudence, and diligence. Failure to do so may expose the organization to a breach of fiduciary responsibility and financial liabilities.

The following list includes some of the generally recognized duties of the trustee:

1. Duty to Administer. Upon acceptance of the trust, the trustee has a duty to administer the trust according to the provisions of the trust instrument and existing statutes.

The trustee usually can resign only with court permission or by consent of all beneficiaries, unless the trust instrument permits exceptions. Review specific state statutes.

2. Duty of Loyalty. The duty of loyalty is a fundamental duty of the trustee. It arises out of the trustee's fiduciary relationship with the trustors and the beneficiaries. The trustee must administer the trust solely in the interest of the trustors and lifetime and remainder beneficiaries.



3. Duty to Deal Impartially With Beneficiaries. If a trust has two or more beneficiaries, the trustee has a duty to deal impartially with them. If the trustee is also the income or remainder beneficiary and by its investment policy it improperly favors its own position at the expense of other beneficiaries, this may be cause for court removal of the trustee.
4. Duty to Avoid Conflict of Interest. The trustee has a duty not to use or deal with trust property for its own profit or for any other purpose unconnected with the trust, or to take part in any transaction in which the trustee has an interest adverse to that of the beneficiary.

A transaction between the trustee and a beneficiary which occurs during the existence of the trust or while the trustee's influence with the beneficiary remains and by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duties. This issue often arises in instances where the trustee uses the trust assets for its own purposes or receives compensation from a third party for the use of trust assets.

5. Duty Not to Undertake Adverse Trust. The trustee of one trust has a duty not to knowingly become a trustee of another trust adverse in its nature to the interest of the beneficiary of the first trust, and a duty to eliminate the conflict or resign as trustee when the conflict is discovered.
6. Duty to Take Control of and Preserve Trust Property. The trustee has a duty to take reasonable steps to assume and maintain control of, and to preserve, the trust property. It has a duty to keep buildings in a reasonable state of repair, to prevent theft or damage to trust property by third persons, and to provide adequate insurance for any risk that may pose a threat to the trust property, if persons of prudence would do so under similar conditions. It must bring such legal actions as may be necessary and appropriate to protect the trust property.
7. Duty to Make Trust Property Productive. The trustee has a duty to make the trust property productive in furtherance of the purposes of the trust. The trustee has a duty, within a reasonable time, to dispose of any part of the trust property, included 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.
8. Duty to Keep Trust Property Separate and Identified. The trustee has a duty to do the following:
  - A. To keep each trust asset separate from other assets in the trust.
  - B. To see that the trust property is designated as property of that specific trust.
  - C. To ensure that each asset is properly assigned to the trust.

- D. To avoid co-mingling assets held in a fiduciary capacity (trustee, personal representative, Power of attorney agent) with assets owned in a non-fiduciary capacity (Corporation owned).
9. Duty to Enforce Claims and Defend Actions. The trustee has a duty to take reasonable steps to enforce claims that are part of the trust property and to defend against actions that may result in a loss to the trust.
10. Duty to Pay Income to Beneficiaries. The trustee is charged with the duty of paying net trust income to the designated income beneficiaries as indicated in the trust document, or in the absence of any fixed interval, at reasonable intervals. In the determination of net income, the trustee is entitled to set aside appropriate reserves to cover anticipated future expenses and liabilities of the trust.
11. Duty Not to Delegate. The trustee has a duty not to delegate to others the performance of acts that the trustee can reasonably be required to perform and may not transfer the office of trustee to another entity or individual, nor delegate the entire administration of the trust to a co-trustee except as allowed by the trust or local statute.

In a case where a trustee has properly delegated a matter to an agent, co-trustee, or other person, the trustee has a duty to exercise general supervision over the person performing the delegated matter.

12. Duty to Use Special Skills. The trustee has a duty to apply the full extent of the trustee's skills.
- If the trustor, in selecting the trustee, has relied on the trustee's representation of having special skills, the trustee is held to the standard of the skills represented.
13. Duty to Furnish Information to Beneficiaries. The trustee has a duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration. Except as provided in the trust agreement, upon reasonable request by a beneficiary, the trustee shall provide the beneficiary with information about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust relevant to the beneficiaries' interest, including the terms of the trust that describe or affect the beneficiaries' interest.
14. Duty to Keep and Render Accounts. A trustee is under duty to keep clear and accurate accounts in such a manner as to show what has been received and expended, what gains have been realized, and what losses have been sustained, and to show an allocation between principal and income. To the extent that the trustee fails to keep adequate accounts, all doubts will be resolved against it and never in its favor. The trustee must render an accounting, at reasonable times, when called upon to do so by the beneficiaries. If the trustee does not honor the request, the courts may decide the issue. Generally, trustees are required to make at least annual accounting to the beneficiaries.

Not only must the trustee be prepared to render accounts to the beneficiaries, but it must also keep records which are adequate for the accurate preparation of tax returns and other reports required of it by federal, state, and local governments. Full and complete accounts rendered to the beneficiaries in a timely manner will give them the opportunity to review trust activity.

Most jurisdictions have established statutes of limitation that define the period in which beneficiaries may file a claim based on the information which has been disclosed.

15. Duties of the Trustee of a Revocable Trust. The trustee of a revocable trust shall follow any written direction acceptable to the trustee given from time to time (a) by the person then having the power to revoke the trust or any part thereof, or (b) by any person to whom the trustor has delegated the right to direct the trustee, but only as permitted by the trust document, and if the trust is silent, then in harmony with state law.

If a written direction would have the effect of modifying the trust, the trustee has no duty to follow the direction unless it complies with the requirements for modifying the trust.

16. Duty With Respect to Co-Trustee. If a trust has more than one trustee, each trustee has a duty to do the following:
- A. To participate in the administration of the trust.
  - B. To take reasonable steps to prevent a co-trustee from committing a breach of trust, or to compel a co-trustee to redress a breach of trust.

### **Trustee's Standard of Care**

The trustee shall administer the trust with the care, skill, prudence, and diligence, under the circumstances then prevailing, that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument.

When investing, reinvesting, purchasing, acquiring, exchanging, selling, and managing trust property, the trustee shall act with the care, skill, prudence, and diligence under the circumstances then prevailing, including, but not limited to, the general economic conditions and the anticipated needs of the trust and its beneficiaries, that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument. In the course of administering the trust pursuant to this standard, individual investments shall be considered as part of an overall investment strategy.

The trustor may expand or restrict these standards by express provisions in the trust instrument. A trustee is not liable to a beneficiary for the trustee's good faith reliance on these express provisions.

A trustee's standard of care and performance in administering the trust are not normally affected by whether or not the trustee receives any compensation.

### **Powers of the Trustee**

Generally the trustee's powers are derived from two sources. The first source is the wording of the trust instrument itself. The second is that which is necessary or appropriate to carry out the purpose of the trust and is not forbidden by its terms. The first source is the best and most dependable and the person drafting the trust should endeavor to grant to the trustee, in the trust instrument, all of the powers which it may reasonably need for efficient trust administration. Most states have granted statutory powers to trustees that are generally subject to contrary provisions in the trust instrument. 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 as defined in the above section, "Trustee's Standard of Care."

Some of the specific powers typically covered by the trust instrument and the statutes are the following:

1. Power to collect and hold property;
2. Power to receive additions to the trust;
3. Power to operate or participate in a business;
4. Power to invest;
5. Power to deposit trust funds;
6. Power to acquire or dispose of property;
7. Power to manage, control, or abandon trust property;
8. Power to encumber, mortgage, or pledge property;
9. Power to repair, improve, alter, or demolish property;
10. Power to develop land;
11. Power to enter into a lease;
12. Power to grant or take an option involving property;
13. Power to exercise voting rights or proxy of corporate shares;
14. Power to sell or exercise subscription or conversion rights;

15. Power to hold securities in the name of a nominee;
16. Power to insure trust property;
17. Power to borrow money;
18. Power to satisfy or contest any claim;
19. Power to pay taxes and assessments;
20. Power to make loans;
21. Power to distribute to beneficiaries;
22. Power to hire persons and agents;
23. Power to execute and deliver legal instruments; and
24. Power to prosecute or defend against actions.

### **Liabilities of the Trustee**

1. Liability of Trustees to Beneficiaries. If the trustee fails to discharge properly any of the duties with which it is charged, or if it fails to perform in accordance with the standard of care to which it is held by law, then the beneficiary has a right to recover from the trustee, in the form of a surcharge, the amount required to restore the beneficiary to the position he/she would have enjoyed had there been no breach of trust. In this area, any reasonable doubt will be resolved in favor of the beneficiary.

It thus behooves the trustee to keep full and accurate records of all trust transactions, and to administer the trust efficiently and in harmony with the powers and duties which it has, so that if its performance as a trustee is ever called into question, there will be opportunity for doubts to be resolved in favor of the beneficiary.

Problems typically arise in the following situations:

- A. When the trustee commingles trust assets with the trustee's own assets, without express authorization.
- B. When the trustee fails to account for all profits earned by the trust estate. Profits wrongfully gained belong to the trust and not to the trustee. The trustee must account for all gains made by successful but unauthorized investments, yet it must reimburse the trust for any losses sustained while engaged in unauthorized investment activities. The trustee is not guarantor or insurer of the trust estate and is not liable for losses where no breach of trust is involved.

- C. When the trustee commits negligent or wrongful acts, or fails to act when required. Examples of this include failure to collect rents or other receivables due the trust, failure to secure adequate insurance coverage for the trust assets, and failure to invest cash that the trustee has been directed to retain.
- D. Where the trustee improperly delegates duties that the trustee itself should have performed.

A provision in the trust instrument is not effective to relieve the trustee of liability for a breach of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interest of the beneficiary for any profit that the trustee derives from a breach of trust.

A trustee may not be held liable for a breach of trust if any of the following conditions apply:

- A. The beneficiary has consented to the act or omission before, or at the time of, the act or omission.
  - B. The beneficiary has released the trustee from liability for the breach.
  - C. The beneficiary, having the option to reject or affirm the transaction, has affirmed said transaction. However, the consent, release, or affirmation is not effective to discharge the trustee's liability for breach of trust in any of the following circumstances:
    - (1) The beneficiary was under incapacity.
    - (2) The beneficiary did not know of his/her rights in addition to all material facts which the trustee knew or reasonably should have known and of which the trustee should have informed the beneficiary.
    - (3) The affirmation was induced by improper conduct by the trustee.
    - (4) The transaction involved a bargain with the trustee that was not fair and reasonable.
2. Non-Liability for Following Instructions Under a Revocable Trust. A trustee for a revocable trust is not liable to the beneficiary for any act performed or omitted pursuant to written directions from the person holding the power to revoke, including a person who has been delegated power to direct the trustee.

### 3. Trustee Liability to Third Persons.

- A. Liability on Contract. In transactions with third parties, the trustee acts as a principal, and it is erroneous to think of it as an agent or to assume that the trust estate or the beneficiary will be primarily liable. The trustee has full and primary liability unless the liability has been specifically limited in dealings with third parties. Because of this situation, the trustee normally has an equitable right to reimburse itself for expenditures that it has properly made on behalf of the trust.

However, if the assets of the trust estate prove to be insufficient and the trustee has failed to limit its individual liability in its contract with third parties, it will remain liable.

Some states now excuse the trustee from liability on the contract where either the trustee's representative capacity or the identity of the trust is revealed in the contract.

- B. Liability for Taxes. The liability of the trustee for taxes depends largely upon the wording of the statute by which the taxes are imposed. If the tax is imposed upon the owner of record, then the trustee becomes personally liable because it is the owner of record of the trust property. If the tax is levied upon the property itself, then normally the trustee will escape personal liability for it.
- C. Liability as Owner of Property. The trustee is liable as owner of trust property to the same extent as if the trustee owned the property itself. For instance, if the trustee holds shares of assessable stock on which the par value has not been paid in, the trustee will be liable to pay, even though it holds the stock in trust. Provision may be made by statute that, if the trusteeship is shown as a matter of record in the stock registration, the trustee will not be individually liable.
- D. Liability for Tort. The trustee is just as responsible for its torts committed in the administration of the trust as it is in handling its own affairs. This liability extends to real property that the trustee is obligated to maintain, to any business that the trustee is operating, etc. It extends to any person employed by the trustee to engage in the business of the trust according to the legal concept of "respondeat superior."

This liability is individual to the trustee, even though it may have a right to indemnify itself from the trust estate, and the execution will run against it.

The trustee should secure adequate liability insurance coverage to protect the assets of the trust estate and its activities related to the trust administration. The cost of such insurance premiums is normally a proper charge against the trust estate.

4. Rights of Creditors of the Trustor. If the trustor retains the power to revoke the trust, the trust property is subject to the claims of the trustor's creditors, within the limits of the power of revocation, during the lifetime of the trustor.

When the trustor who had retained the power to revoke the trust dies, the property subject to the power of revocation at the time of the trustor's death is subject to the claims of the decedent trustor's creditors. This property is also subject to expenses of administration of the estate, to the extent that the decedent trustor's estate outside the trust is inadequate to satisfy those claims and expenses.

### **Trustee Responsibility**

The duties, powers, and liabilities of the trustee are complex and must not be entered into without adequate preparation.

The trustee should:

1. Give careful consideration to the problems involved in the administration of any trust;
2. Obtain the best legal counsel possible to draft the trust instrument;
3. Establish efficient procedures for accounting, filing, and record keeping; and
4. Approach the office of trustee with full awareness of the duties and potential liabilities that the trustee must assume.

With these guidelines in mind, the trustee may approach the trust relationship intelligently and perform the office of trustee in such a way that the trustee organization may be as fully protected as possible.

The trustors and individual beneficiaries of each trust may be dealt with in a manner that they have a legal right to expect, and ultimately the church may be benefited to the maximum degree possible under each trust instrument in which it is called upon to serve in the capacity of trustee.