

Managing Trustee Risk

January 31, 2019

Jay W. Freiberg
Elman Freiberg PLLC
450 Seventh Avenue
33rd Floor
New York, New York
10123
Direct: (646) 780-8108
Mobile: (917) 796-8404
jfreiberg@ef-law.com
www.ef-law.com



Serving As A Trustee On Your Clients' Trusts Is A Rewarding Experience

- ▶ Cement your professional relationship with the client.
- ▶ Manage significant, exotic or, at the very least, interesting assets.
- ▶ Make a real impact on the lives of the trust's beneficiaries.
- ▶ Receive an annual commission.



But risks abound when serving as a trustee. More and more, beneficiaries are suing their trustees for breach of fiduciary duty and other claims alleging nonfeasance or malfeasance by the trustee.

Mastering These Three Fundamental Parts Of Your Trusts Will Significantly Minimize Risk

- ▶ Know your beneficiaries.
- ▶ Know your assets.
- ▶ Know your co-trustees.

Know Your Beneficiaries

- ▶ Meet with them.
- ▶ Talk with them on the telephone.
- ▶ Email with them.
- ▶ And be certain to document all of your touches with your beneficiaries.

What Are Some Things That You Should Look Out For In Your Beneficiaries?

- ▶ Blended families, which are becoming more and more common. Different needs for beneficiaries of the family trust.
- ▶ Estranged family members, a very ripe source of disputes.
- ▶ Quirky family members, which may foretell substance abuse or other problems.



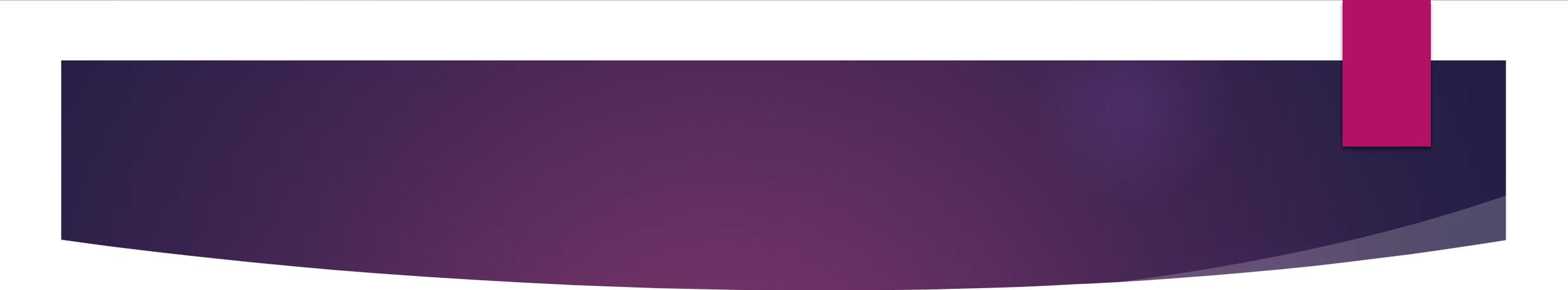
All families have some level of dysfunction, so this cannot be the hurdle that you must clear before taking on the role of trustee. Indeed, a trustee is often needed in precisely difficult family situations. But, being aware of the potential issues lurking with your beneficiaries and proactively managing them minimizes the risk.

Know Your Assets

Fiduciary litigation oftentimes arises when an allegedly aggrieved beneficiary conflates managing assets with care and maintenance of assets. The latter – care and maintenance – is your job as trustee no matter what the asset. But management can be delegated and, indeed, often should be.

To Reap The Protection Of Delegating You Must Follow A Process

- ▶ Interview, check references, etc. before hiring the manager.
- ▶ Meet regularly to discuss the assets entrusted to the manager.
- ▶ Diversify managers if the assets are significant enough to warrant this.
- ▶ Change managers if performance does not measure up against a reasoned yardstick.
- ▶ Monitor costs against a benchmark.
- ▶ Contemporaneously document all of the foregoing.



Traditional assets are easy. Stocks and bonds can be managed by many excellent service providers and benchmarks are easy to come by.

What about non-traditional assets? This requires more work by the trustee.



Be particularly aware of family business assets where some but not all family members are charged with running the business. Always a heightened risk here because the non-management family members are resentful from day one that a relative or relatives were viewed as more worthy of running the family business.

Know Your Co-Trustees

We often serve alongside a co-fiduciary. You are easily tarred with the same brush as a bad-acting co-trustee. So, spend some time getting to know her, him or it.



Institutional co-trustees are preferred. Why? Because institutions already have procedures in place to minimize risk. Individual co-trustees, however, are not so constrained and the opportunities for them to breach their fiduciary duties are greater.

What About A Family Member Or Members As A Co-Trustee?

- ▶ The automatic tension here is that the co-trustee was specifically elevated to a position of managing the assets, and thus the affairs, of another family member.
- ▶ What if the family members who are co-trustees with you do not get along with each other? This gums up the work of the trust.



Jay W. Freiberg

Partner

Jay is an aggressive and efficient problem solver who represents all types of stakeholders in and out of the courtroom. Focusing primarily on complex trust and estate disputes, including fraud and tax issues and multi-jurisdiction litigation, he brings deep experience in helping clients win. His private clients, including entrepreneurs, executives and philanthropists, also look to Jay for seasoned judgment in potentially contentious business and personal matters. Jay offers a unique litigation-focused skillset not usually found with typical trusts and estates attorneys; as a federal court clerk and commercial litigator by training, he has spent the last 20 years in courtrooms across the country, and inherently understands the hurdles, pitfalls, and opportunities within the courtroom setting.

Jay is admitted in numerous courts throughout the United States, including the US Tax Court, the US Court of Appeals for the Second Circuit, the US District Court for the Southern and Eastern Districts of New York, and the US District Court for the Eastern District of Pennsylvania. Partnering with local counsel, notably in Delaware and in Florida, Jay is able to provide seamless counsel to his multi-jurisdictional clientele.

Jay is an adjunct professor at Fordham University School of Law, where he has taught legal writing for over 10 years.

Prior to forming Elman Freiberg, Jay was the chair of Katten Muchin Rosenman's New York Fiduciary Litigation practice. He also served as a law clerk for the Honorable Diane Weiss Sigmund, judge for the US Bankruptcy Court in the Eastern District of Pennsylvania.

1.646.780.8100 | jfreiberg@ef-law.com