

What Do I Say When a Client Asks Me to Serve as a Trustee?

By Jay W. Freiberg

You have been asked by your client to serve as a trustee. How should you respond? The short answer is yes. Being asked by a client to serve as a trustee is undoubtedly an honor. The client is placing important assets in your hands to safeguard and manage. These types of services also meaningfully strengthen your relationships with your clients. So, you say yes when a client asks you to serve as a trustee.



But, being a trustee is not a one-way street. It comes with risks. Primarily the risk of being sued by a trust beneficiary for breach of fiduciary duty.

To be sure, breach of fiduciary duty claims come in all shapes and sizes. But simply by remaining mindful of your beneficiaries, your co-trustees and your assets, you will go a long way toward mitigating trustee risk.

A. Know Your Beneficiaries

This is likely the surest way to avoid trustee litigation. Allegedly wronged or ignored beneficiaries are always a ripe source for fiduciary disputes. As a fiduciary, you want to learn about the family situations of your beneficiaries. And you want to encourage your beneficiaries to share this information with you.

Several relatively common family situations should raise red flags for you. Examples include second or third spouses, family estrangement and, simply, quirky family members.

Second and third spouses can easily become an issue because of the inherent tension between the current spouse and the children of prior spouses. Typically, the current spouse wants more immediate income from the trust. Conversely, the children from prior spouses have an interest in preserving as much trust corpus as possible, which will usually flow to them at the death of the current spouse.

Family estrangement is also a stress point. Certain family members advocate for one thing. Income distributions or income-producing asset allocations, for example. The other side advocates for the opposite, oftentimes just as a knee-jerk reaction to what is advocated by their enemy.

What about quirky family members? In one trust case that I litigated, the husband of one of the beneficiaries was a litigious type. He sued the cable company, the car leasing company, etc. It was only a matter of time before he trained his sights on his wife's trustee. In another, we had a beneficiary who had a laundry list of non-typical ailments, including chemical sensitivity and numerous accidents. Sometimes this foretells substance abuse problems. And, in any event, folks like these invariably look to a trustee to blame for their unpleasant life situations.

All families have some level of dysfunction. Indeed, oftentimes you as trusted counsel are being brought on board as a trustee precisely because an extra steady hand and good judgment are needed to manage the family and its assets. But as an intelligence gatherer you can be aware of the landmines. A full vetting at the outset of the appointment should occur, but also insist upon regularly scheduled updates. Encourage your beneficiaries to communicate with you. Acknowledge their communications. And do not be afraid to ask pointed questions.

B. Know Your Co-Trustees

Trustees are easily tarred with the same brush as a bad acting co-trustee. If your co-trustee self-deals or otherwise breaches their fiduciary duty, you too will be sued. And unless you can demonstrate that you properly dissented from the complained of acts, you too may be liable.

In New York, we have a statutory dissent statute when there are three or more acting trustees: EPTL 10-10.7. In other jurisdictions it is pursuant to common law. In any circumstance, however, if a co-trustee has the power and is acting contrary to your directions, or you simply have been outvoted by your co-trustees, timely record your dissent from the action in writing delivered to your co-trustees. This should effectively limit your liability for the complained-of act.

Note, however, that if the action rises to the level where significant trust assets are in jeopardy, consider commencing a court action. You do not want to be in a situation whereby you stood idly by while the trust's assets were frittered away, even if you have formally dissented from the act.

Several common examples of co-trustee tension will help you recognize the dangers here. One is serving alongside a family member of the trust's settlor. Another

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is serving alongside a trustee who also works in a business owned by the trust.

When you serve with a family member, you are starting off right from your appointment in a situation where the non-fiduciary family beneficiaries are annoyed, embarrassed or otherwise upset that an apparently more favored family member was put in charge. Try and turn this uncomfortable situation to your advantage, by explaining to the non-fiduciary beneficiary that you are in place precisely to speak on their behalf. Earn their trust and you will alleviate this co-trustee pressure point.

When you serve with a co-trustee who also serves in a business owned by the trust you walk a fine line. As co-trustees you are co-equals. But, you are also this person's boss as the equitable owner of the business. Your co-trustee wears two hats—trustee and business manager—and has fiduciary obligations in both roles. Your role is to carefully manage this situation. Indeed, as co-trustee you are ultimately on the hook for any bad acts of your co-trustee as co-trustee, as discussed above, and for their bad acts as business manager, as discussed below.

C. Know Your Assets

A trustee need not know how to manage any asset. But every fiduciary must ensure proper care and maintenance of all assets in the trust.

Trustees overseeing a traditional basket of stocks and bonds can exercise their fiduciary obligations by engaging and monitoring appropriate asset allocators and managers.

While value fluctuation is not avoided, nor should it be, wild valuation swings are typically avoided. More-

over, costs are relatively stable and, important to your beneficiaries, so is the income stream.

Trusts that do not own stocks and bonds, however, do not have the same stability and therefore require heightened supervision by trustees. Consider businesses owned by trusts, or real estate, art and alternative assets placed in trust. Non-traditional assets such as these are often placed in trust and raise the risk profile for a trustee.

The use of trusts to own businesses, large and small, has been growing. These businesses are often placed in trust for both tax and succession planning purposes. But questions and risk abound for trustees. How does the business cash flow affect distributions to beneficiaries? What about valuation? A trustee can be surcharged for holding a wasting asset. And liability at the business level, including for sexual harassment, data breaches or negligence, is also a liability at the trust level.

Similar issues arise with real estate. Questions regarding distributions, capital contributions and buy/sell decisions need to be considered and answered. And all risks associated with owning property are also potential trustee risks.

Special risks are also present in art owned by trusts. Art is expensive to store and insure. Great price fluctuations are not uncommon. The wise trustee will remain cognizant of these concerns.

Finally, alternative assets—which can run the gamut from royalty streams to a cattle ranch to cryptocurrency—require specialized expertise. At bottom, know your trust assets and place each in expert hands. This too will go a long way to avoiding breach of fiduciary litigation, an important goal for all trustees.

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