

# **A PRIMER ON THE TRUSTEE INTAKE PROCESS (AND BEYOND) FROM A LITIGATOR'S POINT OF VIEW**

**Jay W. Freiberg**

**Elman Freiberg PLLC**

**450 Seventh Avenue, 33rd Floor**

**New York, NY 10123**

**Direct: (646) 780-8108**

**Mobile: (917) 796-8404**

**[jfreiberg@ef-law.com](mailto:jfreiberg@ef-law.com)**

**[www.ef-law.com](http://www.ef-law.com)**

**Jeremy A. Mellitz**

**Law Offices of Jeremy Mellitz, LLC**

**2788 Long Hill Rd**

**Guilford, CT 06437**

**Phone: (203) 313-1938**

**Fax: (203) 453-3709**

**[jeremy@mellitzlaw.com](mailto:jeremy@mellitzlaw.com)**

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# **WHAT TO LOOK FOR IN A TRUSTEE?**

- In short, good judgment. No particular expertise required.
- A person that you trust with two very important things — your assets and your beneficiaries.
- Articulate expectations up front.

# QUESTIONS TO CONSIDER

- Why is Settlor setting up the Trust?
- Does Settlor want to retain control?
- Trustee in name only?
- Different set of factors in what to look for depending on why.

## Friend v. Institution?

- Friend may cave in too easily?
- Prefer a stranger? Then probably an institution.
- But corporate trustees may come at great expense. And almost certainly have rules on what the Trust can hold.

# SKILLSET TO CONSIDER

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Organized? Good at record keeping?

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Skills with respect to managing assets?

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Able to keep beneficiaries reasonably/adequately informed?

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Respect for others and ability to engender respect, particularly as to beneficiaries

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Someone as to whom potential allegations of undue influence are remote or nonexistent (e.g., not the caretaker)

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# SKILLSET TO CONSIDER

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Someone who is willing and able to put in the time

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Someone who recognizes their limitations and will not hesitate to delegate as warranted

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Someone who is impartial but not disconnected

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Someone who can navigate potentially difficult family dynamics

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# OTHER CONSIDERATIONS

- Age
- Health
- Location
- The trustee's own financial standing (reduced temptation)
- Family members as trustees
  - A common choice
  - If you pick a child, don't automatically make it the oldest child (sometimes a cultural expectation, sometimes it's an easy default choice)
  - Beware of potential jealousies
  - Beware of potential deadlocks



## **WHAT TO CONSIDER WHEN ASKED TO BE A TRUSTEE?**

- In some measure, the considerations are the same as in section 1 above, just from the trustee perspective.
- Don't jump in until you've thought about the significant responsibility and risks that come along with the opportunity.
- Read the Trust instrument.
- What is Settlor's expectations? Do they align with yours?

# PROS AND CONS

- Do you have the necessary bandwidth to devote to properly serving as a trustee? Don't spread yourself too thin.
- Can be very rewarding
  - Perhaps manage interesting assets
  - Make a meaningful difference in people's lives
  - Earn a nice commission





## RED FLAG WARNINGS

But no free lunch.

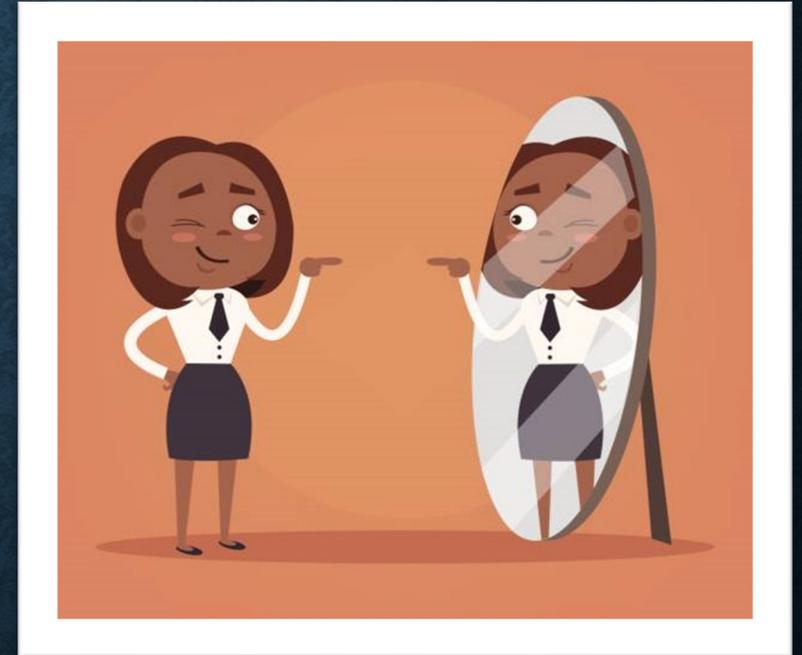
- Highly dysfunctional or litigious family
- Jealousy/competition between family members
- Pre-existing feelings/perceptions by family members of disproportionate gifting before the creation of the trust
- Profligate spenders amongst the beneficiaries



- Are you a replacement trustee?
  - If so, what happened with the predecessor?
  - Did the predecessor quit voluntarily? Or under threat or pressure?
  
- If family members have been involved in litigation (with each other, with third parties), what was the subject matter and what was the context?
  - Bona fide and reasonable/understandable
  - Or indicative of a true Red Flag consideration

# OTHER CONSIDERATIONS

- As an honest look-yourself-in-the-eye assessment
  - Are your skills suitable to handle at least some of the trustee functions?
  - Are you emotionally, etc. able to delegate functions?
- Is there an *in terrorem* clause?



**MONITORING  
YOUR CHARGES  
(BENEFICIARIES)  
AFTER YOU'VE  
BECOME A  
TRUSTEE**



Failing to do this is,  
in short, the  
quickest way to find  
trouble as a trustee.

When beneficiaries  
perceive an  
adversarial  
relationship,  
eventually this will  
turn into reality.

- Keeping a close eye on your beneficiaries is required.
- Do not treat them like they are subservient to you.
- Even if ungrateful, annoying.
- You work for them – do not turn fiduciary/beneficiary relationship on its head.



# JAY W. FREIBERG

## PARTNER



Jay is laser-focused on efficiently obtaining wins for his clients, who hire him for his seasoned judgment in dispute resolution both in and out of the courtroom. A trusted counselor, he has deep expertise representing all types of stakeholders in all manner of sophisticated and complex trust and estate disputes. As part of this practice, he counsels private clients in potentially contentious business and personal matters regarding, among other areas, closely-held businesses, real estate, tax and insurance. A carefully aggressive advocate, Jay's clients look to him for their thorniest matters.

Jay is admitted in numerous courts, and understands the hurdles, pitfalls and opportunities within the courtroom setting. Partnering with local counsel, notably in Delaware and in Florida, Jay is able to provide seamless counsel to his multi-jurisdictional clientele.

In the community, Jay is an adjunct professor at Fordham University School of Law, where he has taught legal writing for over 10 years, and is *pro bono* trust and estate litigation counsel to the New York Public Library.

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.

Jay resides in Manhattan with his wife and two children. When not with his family or in the office, he can be found training for his next race. Jay is a veteran of numerous road races and triathlons and, on happy occasion, makes the podium.

1.646.780.8100 | [jfreiberg@ef-law.com](mailto:jfreiberg@ef-law.com)

# JEREMY A. MELLITZ

## *PARTNER*



Jeremy has long been recognized as one of the top commercial litigators in Connecticut and New England.

With his diverse skill set, he also advises corporate Boards and C-suite executives on a full range of corporate and employment issues.

In addition, he is regularly sought out by both fiduciaries and by beneficiaries both for preventive advice and for actively handling litigation with respect to all aspects of will contests and trust disputes.

Jeremy is adept at structuring creative resolutions to knotty and complex situations. He has brought this knowledge to bear in an academic setting, teaching Negotiation at the Yale Graduate School of Business. When resolution is not possible, he is at home in a courtroom, where he brings the full weight of his experience to the fight and is surgically effective.

Jeremy was the top U.S. litigator for over 20 years for a widely respected international private client law firm before breaking away from the constraints of BigLaw to form his own law practice.

He lives in Guilford, Connecticut with his wife and twin daughters. He has been white water rafting for many years without noticeable injury and is often in the company of his dog, aptly named Lucky.