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Co-Fiduciary Risk: The Pitfalls and the Rewards – How to Balance Both and Protect Yourself

May 2013



- Why would anyone want to be a Co-Fiduciary ?
- Why do we want to work with them?
- Trends in the industry
- The Roles of the Trustee – Corporate and Individual
- Rewards and benefits
- Pitfalls
- Best practices in keeping the relationship strong and providing protection

Why would anyone want to be a Co-Fiduciary?



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- Lawyers, family members and friends
 - Representation of the living or deceased
 - Help to convey wishes and expectations
 - “Watching over” the bank or corporate trustee
 - Self serving motives
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- “Be careful what you ask for”

Why Do We Want To Work With Them?

- Its part of our core business
- In some cases, co-fiduciary business could be a significant part of the trust book
- You will never be able to do away with this business despite trying
- According to Spectrem Group, as of 2011, there was approximately \$860bln in assets held in trusts ⁽¹⁾

- (1) 2012 Personal Trust Update

- Although asset values are down, there is still a significant amount held in trusts both in the U.S. and abroad
- Tax laws are impacting the trust industry:
 - ✓ Basic estate planning
 - ✓ Philanthropy
 - ✓ Transfer to next generation and beyond
- Some states are catching up to Delaware:
 - ✓ Directed trustee/bifurcating responsibilities
 - ✓ Protector status
 - ✓ Decanting

- Fiduciary duties apply to both individual and corporate trustees:
 - ✓ Highest standard of care
 - ✓ Duty of impartiality
 - ✓ Duty of loyalty
 - ✓ Duty of fairness
- Carry out the terms and intent of the grantor/creator – general or specific
- Management Duty:
 - ✓ Management of assets and overall portfolio strategy
 - ✓ Accountings (principal and income)
 - ✓ Tax returns
 - ✓ Discretionary distributions
- Relationship manager – engaging with the family or beneficiaries

- Helps to build a bridge to the grantor
- Understand the family dynamics or grantor intent
- Idea generation
- Strength in numbers when able to agree on tough issues that could upset beneficiaries
- Build a valuable partnership over a long period of time
- Co-fiduciaries can become your advocate
- Source of future new business
- What else.....?

- Not all relationships work out
- How many co-fiduciaries are involved?
- Being outvoted by multiple co-fiduciaries
- Slows down the decision making process – both administrative and investment
- Some may not understand their “role”
 - ✓ Do they understand the document?
 - ✓ Do they understand their liability?
 - ✓ Do they understand investments?
- Tend to see self interest decision making putting the corporate trustee in a bad position
- Investment execution can be challenging

“Managing” the Pitfalls – Best Practices

- Establish clear expectations amongst all parties:
 - ✓ Articulate roles
 - ✓ Constant reminder of the duty of a fiduciary
 - ✓ Communicate key provisions of the document
 - ✓ Establish lines of communication on decision making
 - ✓ Discuss investment management – investing vs. trading
 - ✓ Of applicable, tie breaking language in the document
- Educate
- Document
- Use common sense

- Be sure to know the terms of the underlying document
- In the event of challenging decisions or impasse consider:
 - Decanting
 - Move the trust situs
 - Delegation
 - Does document or state law allow for a delegation of duties?
 - Virtual representation or Non-Judicial Settlement from beneficiaries
 - Petition the court for clarification or modification
 - Modify to add a Trust Protector
- Seek a resignation or successor trustee

- Communicate, communicate, communicate
- Documentation is critical
- Clear definition of roles
- Avoid making “heart string” decisions
- Remember the corporate trustee in most cases will be looked upon as the “expert”
- Managing the risks and relationship but know when to seek a legal remedy



- Questions
- Comments
- Observations



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