

Becoming The Trustee Of A Family Trust
HOW TO PROTECT YOURSELF FROM PERSONAL LIABILITY

A Litigator's Perspective



PRESENTED BY

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Online Seminar

June 28, 2006

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Welcome

The Firm

- Full service business law firm
- Established in 1960
- Representing closely-held businesses, entrepreneurs and individuals
- From start-up to succession planning
- “AV” Peer Review Rated

The Speaker

- SNSFE Partner
- Civil litigation - 40 years
- Trust litigation
 - Personal liability claims against trustees
 - Arising out of handling of trust assets

Introduction

Becoming The Trustee Of A Family Trust
HOW TO PROTECT YOURSELF FROM PERSONAL LIABILITY
A Litigator's Perspective

**What one should consider and do when
asked to accept the trusteeship of a
family / business trust**

CONSIDERATIONS

Considerations

What can be done to obtain reasonable flexibility in administering trust assets and limitations upon trustee's personal liability?

Considerations

- **Trustee's flexibility in administering trust assets**
 - **Specifically, ability to delegate decision making authority and liability**

Considerations

- **Reasonable limitations on trustee's personal liability to beneficiaries**
 - Investment of trust assets
 - Operating trust's business assets

**OBSERVATIONS FROM A
LITIGATOR'S PERSPECTIVE**

Observations From a Litigator's Perspective

- Differs from estate planners
 - Draft trust agreements
 - Tax consequences / avoidance
 - Post-death control over assets

Observations From a Litigator's Perspective

- **Geared toward trustee's:**
 - Duties and powers
 - Nature of personal liability of trustee for losses in administration of trust

CONCLUSIONS BASED ON LITIGATOR'S EXPERIENCE

Conclusions Based on Litigator's Experience

- **Estate planners don't consider trustee's needs / desires re:**
 - **Flexibility in administration (ability to delegate decision-making)**
 - **Reasonable or appropriate limitations in trustee's personal liability**
 - **Why-not focus of their efforts**

Conclusions Based on Litigator's Experience

- **Prospective trustee does not determine what flexibility he will be given in administering trust or the nature or extent of his personal liability for losses**

Conclusions Based on Litigator's Experience

- **Does not read trust agreement before agreeing to accept trusteeship**
 - **Duties & liabilities**
- **After death of grantor or other event triggering trusteeship he accepts and honors agreement**

Conclusions Based on Litigator's Experience

– Why?

- **Don't want to offend by “prying” into disposition of property**
- **General assumption that trusteeship similar to acting as executor under will so that trustee's duties, powers and liabilities are set by law and uniform in application**

SUGGESTIONS – WHAT TO DO

Suggestions – What to Do

- **Read trust agreement**
 - Discuss with grantor
- **General assumption that trustee's powers, duties and liabilities are set by law is NOT correct**

Suggestions – What to Do

- Unlike a will, a trust agreement is a contract between grantor & trustee**
- Exactly what trustee's duties, powers and liabilities are to be is not set by law but almost solely & exclusively by terms and provisions of trust agreement**

Suggestions – What to Do

- In fact, with limited exceptions (total exonerations of trustee from any liability- waiver of accounting / disclosure / obligations) provisions of Ill. Trust & Trustee Act operate by default only
 - » Only control if provisions of trust agreement on subject are silent

Suggestions – What to Do

- In effect, grantor, by provision of trust agreement can rewrite or supersede provisions of statute which would otherwise define and control trustee's duties and liabilities**

Suggestions – What to Do

What can grantor accomplish regarding trustee flexibility in administration and restrictions on personal liability by appropriate drafting of trust agreement?

Suggestions – Control Trustee Liability

- **Using trust agreement, grantor can control nature and extent of trustee's personal liability**
- **Can exonerate trustee from liability for losses and damages to trust assets in administration**

Suggestions – Control Trustee Liability

- **Generally, trustee liable for losses arising from failure to exercise due or ordinary care in administration**
 - » **This may not be an appropriate standard of liability for a non-professional trustee particularly in managing or investing trust assets**

Suggestions – Control Trustee Liability

- Liability can be controlled by provision in trust agreement which limits trustee liability for losses and injuries to trust assets to intentional, willful or reckless misconduct**

Suggestions – Flexibility To Delegate

- General common law and Trust and Trustee Act prohibit delegation by trustee of decision-making functions**
- “Acts involving the exercise of judgment and discretion”**

Suggestions – Flexibility To Delegate

- **Grantor can, by specific provision in trust agreement, grant trustee power to delegate discretionary, non-ministerial functions, such as investment and management (operations functions to agent)**

Suggestions – Flexibility To Delegate

- **Using this power, non-professional investor may delegate investment functions to a professional and may similarly delegate business / asset management decisions to professional managers or operators**

Suggestions – Delegation / Limitation Of Liability

- **Delegation will effectively limit personal liability of non-professional trustee**
 - Delegation may be tied to exoneration of trustee liability for delegated functions – generally or specifically

Suggestions – Delegation / Limitation Of Liability

- Trust agreement can provide for delegation and limit liability if trustee uses due care**

Suggestions – Delegation / Limitation Of Liability

- Selection of agent**
- Establishing scope and terms of delegation, so that, without restrictions upon or waiver of agent's liability – agent owes trust & beneficiaries duty to use reasonable care in performance**

Suggestions – Delegation / Limitation Of Liability

- Periodically and duly monitor agent's performance**
- Then trustee not personally liable for decisions / actions of agent, only failure to monitor**

Suggestions – Delegation / Limitation Of Liability

- **Great tool to provide a trustee**
 - **Allows trustee to obtain professional / competent management-investment services**
 - **Avoid personal service obligations and liability**

Suggestions – Read Trust Agreement

Why do you need to read trust agreement before agreeing to accept trusteeship?

Suggestions – Read Trust Agreement

- **Provisions of trust agreements vary widely as to provisions relating to trustee liability and delegation authority**

Suggestions – Read Trust Agreement

–Result of:

- » Non-issues to estate planner drafting trust**
- » Grantors being uninformed as to issues and their flexibility to set parameters**

Suggestions – Read Trust Agreement

- **As a result, will see:**
 - **Large loop bank's trust department acting as successor trustee**

Suggestions – Read Trust Agreement

» Excused from all liabilities for losses or injuries to trust assets other than as a result of willful or intentional misconduct

(would expect higher standard of care from professional trust administrator)

Suggestions – Read Trust Agreement

» Fully empowered to delegate investment and management functions to third parties – exonerated from liability arising from agent's acts

(Duties and liabilities you would expect a corporate trustee to perform and assume)

Suggestions – Read Trust Agreement

–Surviving spouse or adult child acting as successor trustee of husband / father’s trust

» Unrestricted civil liability for losses – including losses due to failure to invest assets consistent with requirements of prudent investor rule which basically requires the trustee to invest assets in conformity with standards and practices of professional investors

Suggestions – Read Trust Agreement

**» No authority to delegate
investments or management
decision-making**

**(Although such a trustee would benefit
most from delegation to a professional
manager / investor)**

CONCLUSION

Conclusion

- **Solution**
 - **Discuss with grantor**
 - **Review trust agreement**

Conclusion

- **Read and understand trust agreement**
 - **It's a contract**
 - **Contracts should be read and terms satisfactory to all concerned before accepted / agreed to**

Conclusion

- **Discuss issues and concerns with grantor**
 - **Trust agreements are generally subject to revision and change while the grantor is alive - once grantor is dead, it is too late**

Conclusion

- **Do you want the ability to delegate?**
- **Do you feel comfortable with personal liability for unintentional losses?**

Conclusion

- **What does grantor expect from you and what duties and liabilities are you to undertake?**

Conclusion

- **Trust agreement can be modified if necessary to accommodate needs and concerns of both grantor and trustee**

Questions ?

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THANK YOU

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