

Tips for Trustees

TRUSTS HAVE BECOME POPULAR ESTATE PLANNING tools, but they are traps for the unwary, and especially for an uninformed trustee. Whether it is designed to provide for family members, endow a charity, or manage real estate, the person who creates the trust (called the “trustor” or

“settlor”) usually has specific wishes and demands and expects that they will be closely adhered to. It is the trustee’s duty to make sure that happens.

Being a trustee can be a thankless job; it can even thrust a person with good intentions into the crosshairs of litigation. If you are asked to serve, weigh your decision carefully—a trustee’s work may become both complicated and contentious. These tips may be helpful.

READ THE TRUST

Become familiar with the precise wording of the trust document, for the trustee is obligated to administer the trust strictly according to its terms. Not all trusts are the same, so it is imperative that the trustee read the document carefully, assisted by an attorney familiar with trust administration.

PROVIDE ANNUAL ACCOUNTINGS

Some trusts are specific as to what the trustee may receive as compensation (for example, a fixed fee or a percentage of the value of the assets). But some trusts provide only for the trustee to receive “reasonable compensation,” which can mean different things to different people. To avoid problems, keep track of the hours you spend performing trust-related duties. If there is a dispute regarding compensation, be prepared to demonstrate the actual time devoted to trust matters.

The state Probate Code requires a

trustee to provide the beneficiaries with annual accountings that explain the trust’s income and expenses. (See Cal. Prob. Code § 16062.) Once the accounting is completed, be sure to serve it on the beneficiaries promptly, for service triggers the three-year statute of limitations. (Cal. Prob. Code §16460.) Indeed, if a trustee does not serve the accounting, the statute of limitations for filing a challenge will not even begin to run—and your potential liability can linger.

TRACK INVENTORY

Don’t assume the trust is in effect just because the documents have been signed. Make sure the assets in question were actually transferred into the trust and vested in the name of the trustee. If this has not been done, exercise best efforts to bring the trust’s assets into the trust as soon as possible. Locate all potential trust assets, and ascertain whether any that have not yet been transferred to the trust can still be included.

REMAIN NEUTRAL

Lawyers who are asked to serve as trustees are caught between two poles. On the one hand, they serve the trustor’s interest as expressed in the trust instrument. But they also must heed the interests of the beneficiaries, who may include parents, children, siblings, or dear friends of the trustor.

With such significant responsibility and exposure, the trustee’s actions will be scrutinized—and challenged—by

any beneficiary who feels he or she was treated unfairly. As we recently learned, though, this need to remain neutral is tempered as long as the trust is revocable (such as while the settlor is still alive). In that situation, the trustee’s duty is to the settlor and not the remainder beneficiaries; the trustee should act only in the settlor’s best interest (*Estate of Giralдин*, 199 Cal. App. 4th 577 (2011)).

The best approach to avoiding personal liability is to be unbiased and transparent when dealing with trust matters. If a trustee sees a looming problem, he or she must consult with an experienced attorney who can provide sound counsel in a delicate situation.

GET INSURANCE

No one is immune from a potential lawsuit, and that includes a trustee. The best protection—aside from getting good legal advice—is to purchase an insurance policy covering errors and omissions. Without appropriate coverage, a trustee’s personal assets could be exposed if a disgruntled beneficiary files suit.

Being a trustee is not a ceremonial post. It is a job with tremendous responsibility. Persons serving in that capacity must always be mindful of their duties and should ask for legal advice whenever in doubt.

Trusts often contain valuable assets, and sometimes they involve challenging family dynamics that rarely improve after the trustor passes away. In fact, they may very well get worse. In such circumstances, a trustee may wind up embroiled in a nasty piece of intra-family litigation. Although it may not be possible to avoid litigation, the tips outlined here will at least lay the foundation for a strong defense. ●

Robert A. Cohen is a partner with Anker, Reed, Hymes, Schreiber & Cohen in Woodland Hills, where he focuses on civil, probate, and trust litigation as well as business transactions.