Hoopes, Adams & Alexander, PLC
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JOHN R. HOOPES
RONALD P. ADAMS
PATRICIA A. ALEXANDER
RYAN M. SCHARBER

WRITER'S E-MAIL
JPalella@halaw.com

Avoiding Personal Liability in Acting as a Trustee or Personal Representative

Good record-keeping, following the instructions of the trust or will, and communicating effectively with interested parties are key steps in carrying out your fiduciary duties

• **This article is adapted from our Successor Trustee Handbook (if link doesn't work, please visit www.halaw.com and search for Trustee Handbook.**

The successor trustee of a trust and the personal representative of an estate are subject to a variety of duties. The penalties for breaching a duty include having to pay for any resulting damage to the trust (or estate), out of your own pocket. Personal liability – even if you are not paid for your efforts – is one of the things that go along with being a fiduciary.

While you may perceive that there is a low risk of getting sued, you must not ignore the possibility. When you are acting as a fiduciary and are essentially in control of someone else's property or inheritance, you can easily become the focus of others' suspicion, frustration or anger.

Two things can help you avoid personal liability in connection with serving in a fiduciary capacity.

- First, keep good, well-organized records and thoroughly document all transactions, including any reasons for making or not making distributions.
- Second, understand the instructions contained in the trust, and obey them.

In doing those things, keep beneficiaries well informed of trust business and be friendly and cooperative. People are relatively unlikely to take legal action against someone who is considerate and communicates well, and with whom they have a good relationship.

THE VALUE OF PROPER RECORD-KEEPING

If you are sued, having a carefully documented file is going to look far better to a judge and jury than having a file that is in disarray. Similarly, a trustee who seeks advice from experts is going to look better than one who "wings it." In other words, from day one you must prepare for a lawsuit. It has been said that "if one wants peace, one should prepare for war." A trustee who is fully prepared for war, but not deliberately doing anything to start it, is far more likely to avoid becoming a casualty.

Consider the dynamics of a lawsuit against a trustee. Judges and juries alike tend to have more sympathy for the party that appears to be "right." If you have sloppy records (or have none), or if you have not sought help when you came up against something beyond your expertise, or if you have not provided beneficiaries with information that you should have, you will not be given the benefit of any doubt.

CARRYING OUT THE INTENT OF THE TRUST

Your second line of defense is your ability to show how you carried out the intent of the trust. The better you do that, the more difficult it will be for a beneficiary (or anyone else) to show that you did something wrong.

It may be tempting to take a shortcut to fix a problem or correct a poorly worded document. That is not your job. Only a court of proper jurisdiction can change a trust document, and even a court's authority to do that is limited. Do not take it upon yourself to deviate from what is written. The trust instrument is the best expression of the trustmaker's intent. That expressed intent may be your best defense. You may not add to or subtract from the words of the document. You cannot be selective in carrying out various parts of the document. Consult your legal counsel if there is ever any question as to the correct interpretation of the trust instrument.

It is common for the lawyer who drafted the trust instrument to represent successor trustees, but there is no rule that says the successor trustees are stuck with the drafting attorney. You have a duty to seek competent legal counsel, and you will need to assess whether that is a role that the drafting attorney can fill. Even if the drafting attorney is competent and highly regarded, you may not feel at ease communicating with him or her. When you choose your legal counsel, you should give some consideration to how comfortable you feel with that person. Your attorney should inspire trust and confidence and should be someone with whom you can be completely frank and honest.

If you ever wish to stop serving as trustee, you can resign, but your job (and the attendant duties and potential liability) does not end until a replacement trustee steps into your shoes and all of the trust assets are transferred to your replacement. Remember that, once you accept the job of Trustee, you cannot get out of a lawsuit merely by resigning.

CONCLUSION

In discussing matters of personal liability, it is not this article's purpose to scare you out of acting in a fiduciary capacity. You have been named to serve because someone close to you has a great deal of respect for you and trusts your judgment and integrity. We offer this discussion to

help you anticipate problems before they occur and to give you a few relatively simple pointers on how to make the process go smoothly.

To help our clients, their trustees and anyone else who just wants to know what if means to be a trustee, Ron Adams is hosting a no-cost Successor Trustee workshop on November 17th at the Hilton Phoenix/Mesa Hotel in Mesa. "What Do I Do Now?" will hold value for two audiences: 1) people like you or your family members who have already created a will or trust and want their estates to be properly managed upon their death or disability, and 2) adult children or other trusted persons who have been named to manage those assets and affairs. Let us know if you or anyone close to you would like to attend. You can register online at www.halaw.com/trustee or call Julie Palella, at 480-345-8845 for more information.