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Ten Minute Interview: How to Mitigate Trustee Liability

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Brian Lucareli, Director of Foley Private Client Services (PCS) and co-chair of the Family Offices group, sits down with Abbey Magnuson, associate and member of the firm’s Estate & Trusts Practice Group and Family Offices team, for a 10-minute interview to discuss ways to mitigate trustee liability. Abbey emphasized the role Family Offices play in the administration of trusts and how they can help lessen trustee liability issues.

Please note that the interview copy below is not exact. We do our best to provide you with a summary of what is covered during the interview. Thank you for your consideration.

Lucareli:

Hello, I’m Brian Lucareli, Director of our Private Client Services Group and co-chair of our Family Officesteam at Foley & Lardner, and today I’m here with Abbey Magnuson, an associate and member of our Estates and Trusts practice group. Welcome, Abbey.

Magnuson:

Hi, Brian.

Lucareli:

And today Abbey's going to discuss ways to mitigate trustee liability which is certainly near and dear to my heart in my practice area. So, Abbey, again, welcome. But before you get started would you mind just sharing a little bit with our audience your professional background?

Magnuson:

Great. So, I've been with Foley & Lardner since I graduated law school. I'm in the Estates and Trusts practice group and in addition to traditional estate planning practice I concentrate my practice in trusts and estate administration including fiduciary duties and trustee liability.

Lucareli:

Well, that is perfect because you are our expert on the day in this subject. So, as I said we're going to talk about ways to mitigate trustee liability. So, let's just start out with a fundamental question and that is what is trustee liability?

Magnuson:

So, trustees owe fiduciary duties to the beneficiaries of a trust and that means they're required to administer a trust in good faith and in the best interest of the beneficiaries and not for themselves. So, a trustee commits a breach of trust when they violate one of these fiduciary duties. There are many remedies under different types of laws, so we find our remedies under statutory law, common law, and even in equitable doctrines. But in addition to these, another remedy is that a trustee can be held personally liable for a breach of the trustee's fiduciary duty to the extent that either the beneficiaries or the trust, experience a loss or to the extent that a trustee benefited from a self dealing transaction. So, there are a number of ways we can mitigate against this personal liability of the trustee. Really the situation will dictate what steps are appropriate in a given situation. So, say for example, factors such as the number of beneficiaries of a trust and the relationship to each other, what assets are currently held by a trust, or may in the future be owned by a trust such as a business or an illiquid asset. And also, what stage of administration a trust is in. So, say for example, it's a trust that was just created, it is not currently making distributions, will really be different than a trust that's been around for multiple generations and maybe is making annual or even quarterly regular distributions to beneficiaries.

Lucareli:

Excellent. Way to kick that off. And then so from a family office perspective how can family offices help mitigate trustee liability?

Magnuson:

So, family offices are generally involved in administration of a trust, whether that be because a family office employee serves as trustee or whether because a family member serves as co-trustee of different family trusts, say with a third party or maybe even a bank or trust company. Family offices often play a key role in administering trusts. Really the first step to mitigating trustee liability is effective and efficient trust administration. And really family offices can help with this step of the process. So for example, keeping good records on accounts, really keeping account of what came into the trust and what went out and why. Also being responsive to beneficiaries in a timely manner and similar along those lines, keeping beneficiaries reasonably informed. When beneficiaries are informed and feel their trustees are being responsive, it gives the beneficiaries confidence that the trustee is working on their behalf. It also gives them inside knowledge about whats being administered and insight into ensuring that the trust is being administered for their best interest. Also, if anything is ever later questioned, the trustee does have a record of what the beneficiaries knew and when.

Lucareli:

So, details very important it sounds like.

Magnuson:

Yes, very important.

Lucareli:

So, let’s go one step further and say what are some proactive steps that should be taken to mitigate trustee liability then? I know you mentioned some but what are some of those steps that can be taken.

Magnuson:

So there are a number of different steps we can take and as I mentioned before really the situation will dictate what steps are appropriate in a given situation, but under the uniformed trust code which we often refer to as the UTC which has been adapted in numerous states, I believe right now 36 states have adopted some version of the UTC, which has been adopted here in Wisconsin. The statute provides a number of different ways that trustees can mitigate against trustee liability. We don’t have time today to go into the numerous examples within the UTC that there are, but I would mention kind of the two easiest and most used I would say approaches to mitigate against trustee liability.

The first is providing accounts to beneficiaries. So, under the UTC the default rule is that trustees are required to keep their beneficiaries reasonably informed. They’re also, under the default rule here in Wisconsin, required to provide accounts annually to beneficiaries. So likely with the help of the family office, trustees should develop a mechanism or process by which those accounts are sent to the beneficiaries to ensure that annually those are sent to the beneficiaries. When those records and accounts are sent, the statute of limitations then begins to run and protects the trustee to the extent that the information was sent to the beneficiary.

So, the time period can really vary by state. Here in Wisconsin, a beneficiary is time-barred within one year of being sent the information.

Lucareli:

Okay.

Magnuson:

However, it’s really important to note that the report must adequately disclose the existence of a potential claim by providing sufficient information so that the beneficiary knows of a potential claim or should have inquired. So, it’s important to know that in order to receive that liability protection the trustee is required to provide certain information.

Lucareli:

Okay.

Magnuson:

So, the second I would say most used or easy to use mitigation technique is a beneficiary consent and release. So, under the Uniformed Trust Code again, a trustee is not liable for actions to the extent that the beneficiary is informed about the prior acts and then releases the trustee for those actions. Kind of along the similar lines, a trustee is not liable for taking an action if the beneficiary is informed of the action and then approves of the action before the trustee engages in that action.

So, some trustees will choose to regularly maybe at different intervals, annually, or at certain time periods choose to receive an all encompassing release from their beneficiaries. Other trustees will instead choose to only receive a release upon a significant action. So, whether that be significant trust distribution to one beneficiary or maybe an investment that maybe is more risky than others they’ll receive that release. Similarly, though to accounts, in order to receive that liability protection the trustees are required to provide very specific information at that time the release is sent in order for that release then to be later valid.

Lucareli:

Okay. So those are two great ideas and obviously the UTC is very important in regards to all this.

Magnuson:

It is. Yes. And like I mentioned it’s adopted by a majority of states but there are also a number of other protections outlined in the UTC that can be taken advantage of.

Lucareli:

Perfect. So, I’ve got a couple final questions for you. So, I’m going to tap into your experience. So based on your experience Abbey, as well as things that you have seen in your practice, what would be the one word of caution for trustees?

Magnuson:

My one word of caution I think that is often overlooked is to be weary of conflicts of interest. Whether that be an actual conflict of interest or merely just the presence and appearance of a conflict of a trustee. So, for example, oftentimes, the person we most trust and would want to be trustee of our family trust is somebody who has a conflict of interest. So, for example, an employee who has worked for the family for a long time may have the appearance of a conflict. There really is an advantage to having some independence. However, when there is a conflict it really just puts every action that that trustee engages in, in a negative light. So, you really should be weary of the appearance of any conflict and how it really can overshadow any action of the trustee even a reasonable action engaged by the trustee.

Lucareli:

So, transparency is definitely important on this.

Magnuson:

Yes.

Lucareli:

Good. Alright, well last question for you and to conclude. If you could give one recommendation to a trustee what would that advice be?

Magnuson:

I think my one recommendation that maybe people often don’t think of, is to invite beneficiaries into the decision making process. You know, this can make the process maybe longer or more difficult but really there are a lot of benefits to engaging with the beneficiaries when the situation is appropriate. The benefits that you can have you can use the experience to educate your beneficiaries about how their trust is being administered and what is going on, in addition to just covering basic trust administration education sessions. It also gives the beneficiaries ownership over the decision-making process and decisions that are being made for their trust on their behalf. It gives the beneficiaries a confidence in the process that the trustee is administering that trust for their benefit and fulfilling those fiduciary duties. It also, as I mentioned earlier, really gives the trustee a record of what the beneficiaries knew and when, if there ever is, a later challenge to one of their decisions.

Lucareli:

Great. Well, Abbey I want to thank you for your time, and certainly for your professional insight today, it was very good reminders for me and I know our audience would appreciate it and I also want to thank all of you for watching this presentation. For more information please visit us at Foley.com under Family Offices. Thank you.

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