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Boldt: Trust, but clarify, when electing a client's trustee and duties

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We frequently draft trusts for our clients. Most common are revocable living trusts or testamentary trusts for the benefit of minor children. Some clients choose to nominate a corporate entity to serve as trustee, but not every client has assets substantial enough to justify that expense. Other clients nominate an individual person to serve as trustee, often designating someone who is familiar with the beneficiaries and who they believe will carry out the terms and intent of the trust. Careful consideration should be given to who will fill the role of trustee. Unlike a personal representative who will administer an estate for a number of months (hopefully not years), a trustee could have significant duties to fulfill for an extended period of time.

Do your clients' estate plans typically include a trust? If so, have some of those clients nominated an individual person to serve as trustee? If you answered "yes" to those questions, ask yourself if you could do the same to this one: Do those clients, or better yet those individual trustees, understand the fundamental duties and the breadth of the obligations they have agreed to undertake?

If an individual trustee is the plausible option for your client, advise them on a trustee's general duties and discuss who may be the best-suited person in their life to fulfill the role. Some of the advice given to your client should resemble the following general information.

A trustee must be responsible and attentive to their duties. Be sure to select someone you believe can fulfill the role efficiently and effectively. If possible, elect someone with sufficient experience handling financial matters, whether personally or professionally. If a professional, ensure that individual knows that a trustee who has special skills or expertise has a duty to use the special skills or expertise to administer the trust. Perhaps a relative or a friend who works in the finance industry and has experience not only with money management, but also with the role of a fiduciary, could serve.

Even if you don't have a personal connection to someone with independent expertise who can serve as trustee, the Indiana Code allows the individual you select to delegate trust investment and management functions to an outside adviser who has an appropriate level of expertise. The management and distribution of money (in addition to annually accounting for it) are some of the key functions a trustee performs; they are also the likeliest source of liability for a trustee.

If you intend the trustee to delegate certain functions, the better approach is to draft specific terms defining the functions that your trustee must or may delegate. The trustee should also know whether it retains a risk of liability upon delegating certain functions. An example from the Indiana Code demonstrates a trustee's ongoing duty after it delegates functions to an outside adviser, as well as how the terms of the trust factor into that duty:

Per I.C. 30-4-3-9(a), a trustee who follows the direction of an outside advisor is relieved of liability only if the terms of the trust "expressly direct the trustee to rely, or relieve the trustee from liability if he does rely," on the outside adviser's directions. But I.C. 30-4-3-9(b) makes clear that a trustee is not relieved of liability if they follow a direction that the trustee knows to be a breach of fiduciary duty by the outside adviser. However, if the outside adviser holds the power of direction solely for the adviser's benefit, the trustee may refuse to obey the direction only if the attempted exercise of the power violates the terms of the trust as to that specific power. Clearly, a trustee cannot simply delegate functions to an outside adviser per the terms of the trust without continuing to monitor that adviser's behavior.

Specific terms in a trust also enable your trustee to follow your intent. Do you intend for the trustee to use trust funds to pay for your child's college education? Many people do, but what if that undergraduate degree appears to be on a 6-, 7-, or 8-year track? Should your trustee pay for only the first four years? What about graduate school? Do you want your trustee to take into account the other resources a beneficiary has available to satisfy their needs? What does a beneficiary's "maintenance and safety" mean to you?

Another important issue to stress to an individual before they agree to serve as trustee is that they will need to remain connected to and somewhat engaged in the lives of the beneficiaries. A trustee should communicate with beneficiaries at least quarterly and document those communications. They should be kept aware of major events in the beneficiaries' lives, as well as their income and overall financial wellbeing. The individual trustee who merely sends a check once a year and prepares a basic accounting for the beneficiaries risks liability for failing to actively manage or oversee the trust.

Before your client executes a trust, ensure they speak with the trustee-to-be about the role and its requirements. Ideally, your client has reviewed a draft of the trust document with them and confirmed they understand the overall intent. Once the individual agrees to serve as trustee, prepare a letter for your client that can be shared with the trustee (and successor trustee if they wish) that lays out the fundamental duties and ongoing obligations the trustee agrees to undertake.•

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