

Planning and Administration for Trusts that Hold Corporate Assets

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Breakfast Seminar for Trust & Estate Professionals
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1. **Threshold questions:**
 - Holding vs. disposing of shares and assets
 - Board representation
2. **Exercising discretionary powers**
 - Corporate vs. trust duties
 - Recording trustee decisions
 - Enforceability of exculpatory clauses
3. **Beneficiaries' right to information**
4. **Remedies in estate litigation**
 - Applications for advice & direction
 - Oppression

Holding/Disposing of Shares

- Shares = investment
 - Consider the prudent investor rule
- Minority shareholder / no voting control
 - Trustee has no power to control board or affect decisions of directors
 - Limited ability to supervise business
 - Shares may be illiquid
 - Trustee unable to assess current and potential value of shares with respect to income stream and capital growth
- Non-performing assets
 - Duty to convert

Board Representation

- To what extent should trustees involve themselves in business of company?
 - Are trustees required to appoint themselves to board?
 - Trustees must exercise reasonable care in selecting a nominee
- Trustees are required to actively supervise the business
- Directors may be personally liable
 - Indemnification; D&O insurance

Exercise of Discretion

- Trust law: trustee must exercise powers in best interests of beneficiaries & in accordance with terms of trust
- Corporate law: directors & officers owe fiduciary duty to act *bona fide* and in best interests of corporation
- Beneficiaries' right to complain about conduct of trustee-director
- Current law blurs the distinction between trustee and director

- Issues to consider in succession planning & in accepting trustee appointments:
 - Is trustee-director bound by fiduciary trust obligations when voting as director?
 - Does the even-hand rule apply to the trustee-director?
 - Does the “form rule” apply to corporate distributions and, if not, what principles govern the trustees’ characterization of corporate distributions?

Exercise of Discretion

- Recording trustees' exercise of discretionary powers:
 - Keep a record of the fact that an issue was considered; when it was considered; what factors were considered in coming to a decision; what alternatives were considered; what decision was reached, by whom and for what reason
 - Start by looking at the trust instrument for guidance about relevant/mandatory considerations
 - Verbatim record of unusual or particularly important comments
- Business records are admissible if:
 - Made contemporaneously
 - Made by someone with personal knowledge of the subject matter recorded and whose position obliged them to record the information
 - Made in the ordinary course of business

Disclosure Obligations

- Shift away from “proprietary” approach to interests-based approach
 - Balance disclosure interests of beneficiaries against interests of trustees in withholding information
- *Waters*’ 3 categories of information to which beneficiary can seek access:
 1. Existence of trust and one’s own beneficial interest
 2. Accounting of the trust
 3. Reasons for exercise of trustee discretion

Disclosure Obligations

- *Schmidt v. Rosewood Trust* (2003, England)
A beneficiary's right to access trust documents should be viewed "as one aspect of the court's inherent jurisdiction to supervise, and if necessary intervene in, the administration of trusts."
- Traditionally trustees were not required to disclose their reasons for their exercise of dispositive discretions: "chilling effect on trustee deliberations"
- Shift toward balanced approach means courts look to circumstances to weigh competing interests

Disclosure Obligations

- Waters suggests that duty of loyalty to the corporation supersedes the duty to disclose as a trustee
- Balance interests of beneficiaries against interests of corporation
- Consider:
 - Breadth (relevance) of request
 - Commercial disruption and interference with business operations
 - Uneven access to information among beneficiaries
 - Mitigating factors, e.g. confidentiality agreement

- Consider exculpatory clauses
 - But “absolute” and “unfettered” discretion does not really exist
- Application for advice & directions
 - Courts do not normally tell executors or trustees how they should exercise their discretion
 - Deference on business judgment
- Limitation period

Exculpatory Clauses

- 2 basic forms of exculpatory clauses:
 - excuse trustees from liability for failing to abide by their common law and statutory duties

No Trustee acting in good faith shall be held liable for any loss occasioned to the trust fund except for loss caused by his or her own dishonesty, gross negligence or wilful breach of trust.
 - relieve trustees from the obligation to adhere to certain duties in the first place

Trustees are not required to maintain an even hand between the income and capital beneficiaries

Exculpatory Clauses

- General view that exculpatory clauses are valid
- Exceptions / restrictions:
 - Narrow construction
 - Mala fides
 - Improper purpose (*Fox v. Fox Estate*)
 - Failure to consider (deny discretion)
 - Unreasonable decisions
 - Contrary to public policy
- settlor cannot vitiate the essential fiduciary character of a trustee or change the nature of a trust through an exculpatory clause

Advice & Directions

- Application for advice and directions normally not appropriate forum for questions about exercise of discretion
- Courts will not answer
 - Hypothetical questions
 - Questions which will not end litigation
 - Questions about current state of law
 - Questions which address problems which may or may not arise depending on future events

THANK YOU

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