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Pitfalls of Acting as a Successor Trustee

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I. Introduction

Accepting appointment as successor trustee of a Special Needs Trust (SNT) comes with a unique set of challenges. Public benefits issues, prior and future accounting complications, investment considerations, beneficiary expectations, and tax filings can derail proper administration from the outset of a relationship and may expose a successor trustee to heightened liability. That said, many corporate or bank trustees continue to move out of the SNT administration arena, and attorneys for beneficiaries are asked to find a successor to fill this void. This article will provide insights into navigating around the pitfalls inherent in successor trustee acceptance and best practice tips for attorneys looking for successor trustees.

II. National Landscape Overview

The need for the specialized and vital services provided by SNT trustees has always been present. Institutional, or "bank," trust companies that typically focus on generational wealth administration may lack the expertise in public benefits regulations to properly administer SNTs and, as such, may retain the advisory services of companies well-versed in public benefits. This approach is more expensive for the trust, thus potentially shortening the trust's lifespan. The additional oversight, knowledge, liability, and time required to properly administer an SNT generally translate into more trust administration overhead when compared to non-SNT trust administration. As such, many financial institutions are raising minimum account sizes (and fees), scaling back trust offerings, consolidating operations, trimming costs, transitioning SNT accounts to successor trustees, and reducing perceived liabilities.

According to an August 27, 2019, Wealth Advisor article by Scott Martin, just a "no-frills [trust] account…[is] probably going to cost at least $3,000 a year." [Martin, Scott. "Who's Charging What for Trust Services?" *Wealth Advisor*, 27 Aug. 2019] In the article, Mike Flinn, a Phoenix-based trust consultant, notes that a $2,500 annual minimum fee may work, "but at that level, it's going to be very difficult to stay in the business." Larger bank trust companies that cater to high-net-worth individuals and families often have minimum annual fees as high as $20,000. However, while a $20,000 annual minimum fee on its face appears to be quite high, it makes sense when an institution's minimum account size is $5 million in investable assets. At that size, the $20,000 minimum fee only equates to 40 basis points (or 0.40%) per year.

While some bank trustees may have lower (or no) minimum account sizes, there is frequently an annual minimum fee. The same holds for investment advisors. For example, there are many boutique institutional trustees that will administer trusts at lower assets-under-management percentage fees but outsource the investment management to a Registered Investment Advisor (RIA). As such, it is important to counsel beneficiaries as to the total cost of this type of administration. In other words, the potential successor trustee should disclose the fees for trust administration and the fees for investment management (as well as any other applicable fees) to illustrate the true cost to the beneficiary.

Institutional trustee fees are also most likely at their nadir already. Fees can only go up because it's expensive to be an institutional trustee, especially given the ongoing trend of increased regulation. Audits of federally chartered trustees by the Office of the Comptroller of the Currency ("OCC") are staggering - both in terms of time and cost to the trustee. Such regulatory

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