

NOVEMBER 2014 NEWSLETTER

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HOW SHOULD I CHOOSE MY EXECUTOR OR TRUSTEE?

FIRM ANNOUNCEMENTS:

A. **NEW ASSOCIATE**

Pozzuolo Rodden, P.C. would like to welcome Bill Rhodes as a new associate to the firm. He graduated from the Beasley School of Law of Temple University. Mr. Rhodes received a Bachelor of Science Degree in Crime, Law, and Justice from Penn State University.

Prior to becoming an associate at Pozzuolo Rodden, P.C., Counselors at Law, Bill Rhodes clerked for Presiding Judge Walter Marshall in Gloucester County during Judge Marshall's final year on the bench. At the culmination of his clerkship, he received the Samuel G. DeSimone award for excellence in mediation for maintaining the highest successful mediation rate in the history of the program. Mr. Rhodes has developed his advocacy skills by working as a certified legal intern at the Gloucester County Office of the Public Defender and the Philadelphia District Attorney's Office. In 2013, Bill Rhodes was among the first students to receive a certification in Trial Advocacy from Temple University.

Bill Rhodes is admitted to practice in Pennsylvania and New Jersey.

B. BLOGS

1. The following are a few of the business, tax and estate planning blogs posted on our main website www.pozzuolo.com during the past month:

- a. Estate Was Unsuccessful In Demonstrating Reasonable Reliance On A Tax Expert To Abate A Failure To File Federal Estate Return Penalty
- b. Reliance On A Tax Expert Is Reasonable Cause For Late Payment Of Federal Estate Taxes
- c. Changes Made To Testamentary Trust Were Indicative Of Decedent's Intent To Have Trust Last As Long As Legally Possible
- d. Undisputed Facts In The Record Do Not Support Employee's Depiction Of Racial Discrimination And Retaliation
- e. Certificate Of Authority And Payment Of State Taxes Is Necessary For A Foreign Business Corporation To File A Complaint In The State Of New Jersey But Can Be Remedied

Please visit our website www.pozzuolo.com for more information on these and other relevant topics.

2. The following are a few of the family law blogs posted on our family law website www.pozzuolofamilylaw.com during the past month:

- a. Court Must Consider Receipt Of Equitable Distribution Retirement Benefits To Determine Spouse's Post Divorce Alimony Benefits
- b. Father Is Permitted To Move Out Of State With Two Minor Children
- c. Wife's Alimony Terminated Due To Her Cohabitation
- d. Child Custody Order Modified To Require Parents To Attend Co-Parenting Counseling And No Alcohol Consumption During Or For 24 Hours Prior To Custodial Time
- e. Court Denies Father's Child Custody Contempt Petition After Child's Relocation To Another State Because Child's Best Interests Were Served By Not Changing The Current Child Custody Arrangement

Please visit our website www.pozzuolofamilylaw.com for more information on these and other relevant topics.

C. FREE ONLINE CLE/CPE CREDITS:

Pozzuolo Rodden, P.C. is pleased to announce the opportunity to obtain free CPE/CLE credits by viewing the LawLine webcast courses previously taught by Joseph R. Pozzuolo and/or Jeffrey S. Pozzuolo titled "The Negotiation and Documentation of Commercial Financing Documents Including the Use of Convertible Loans With Put and Call Options", "How Middle Income Families Should Plan for Retirement Including Ethics" and "The Fundamentals of Starting

a Business”.

*How Middle Income Families Should Plan for Retirement- <http://bit.ly/ZvgNbr>

*The Fundamentals of Starting a Business- <http://bit.ly/13Q8dei>

*The Negotiation and Documentation of Commercial Real Estate Loan Documents-
<http://bit.ly/17jfXSN>

Any problems, please feel free to contact Chrissy @ chrissy@pozzuolo.com

Also, each of these seminars can be viewed without receiving credit on the internet at
“Pozzuolo Rodden, You Tube” or at www.pozzuolo.com.

QUESTION OF THE MONTH:

**CAN THE MEMBERS OF AN LLC BE RESPONSIBLE TO PAY THE DEBTS
AND LIABILITIES OF THE LLC?**

Answer-See Page 7 of this Newsletter

How Should I Choose My Executor or Trustee?

When drafting your estate plan, one of the most important decisions you will make is the selection of the personal representative for your estate and trust. This may seem like a very simple decision; many people will choose their spouse or oldest child by default, but there are many factors that you should consider before choosing your fiduciary(ies).

1. Financially savvy

Your fiduciary will be responsible for marshalling your assets, valuing them, and then distributing the assets to your beneficiaries. Your fiduciary will also be responsible for paying any debts of your estate, including any bills associated with your funeral, burial, and last illness. The fiduciary will have to be comfortable being responsible for large amounts of money and know how to responsibly manage those assets. Your fiduciary will be responsible for managing and selling and/or distributing your real property, cash, stocks and bonds, brokerage accounts, and your life insurance and retirement accounts if your estate or trust is the named beneficiary. If you named your estate or trust as the beneficiary of your retirement plans, you need an executor who is cautious and prudent and who will immediately liquidate and distribute the plan assets upon your death but rather consult with a professional tax advisor on how to make distributions from the plan in a fashion that incur the smallest payment of income taxes.

If your fiduciary is managing the assets in a trust, he or she needs to be someone who can responsibly manage the funds of the trust so that the funds are available to the beneficiaries for many years or based on his or her life expectancy. Even if the fiduciary hires someone to manage the funds in the trust, he or she still must oversee the management of the funds as he or she is

responsible to the beneficiaries of the trust for the funds.

2. Common Sense

As important as being financially savvy is knowing when you are in over your head and knowing to hire an attorney and other advisors for assistance. Many fiduciaries will need to hire an attorney or accountant to prepare your final income tax returns, your estate income and death tax returns, and for assistance preparing an accounting of the estate for your beneficiaries. Furthermore, if you have a large estate or trust, your fiduciary will likely need to retain someone to professionally manage the funds unless he or she has extensive experience managing and investing large sums of money.

3. Time and Availability

Your fiduciary will be required to devote a significant amount of his/her time to managing your estate and/or trust. For an estate, the first few months are the period which will require the most time from your executor. He/she will have to sort through your residence, safe deposit box, office and computers to find all documentation relating to your assets and debts and then sort through all of these documents, which can be a very lengthy process. Depending on how you bequeath your personal property, your executor will also have to go through all the items in your house so that the personal property can be divided among your beneficiaries or sold and added to your residuary estate. Another task that can require significant time from your executor is paying for the expenses of your funeral, burial, and final illness and dealing with the insurance company if there are any issues regarding coverage for those final expenses. Your executor will also have to get appraisals for your real property and any tangible personal property of significant value.

Appointing someone as trustee is asking them to make a significant time commitment and should be discussed with him/her before you name them in your trust document. A trustee will potentially have to serve for ten, twenty, or more years and must be willing to make such a time commitment. Furthermore, when picking a trustee who may have to serve for so long, you should pick someone who will live long enough to be able to perform his or her duties and you should also have at least one back up trustee if your first trustee dies or becomes incapacitated before the trust has terminated.

4. Emotionally capable

Your fiduciary must be capable of making sound decisions when confronted with difficult emotional situations. For your executor, you should pick someone who you believe will be able to act on behalf of your estate in the months following your death. Dealing with the loss of your presence in his or her life can be an emotionally trying time for your loved ones and if you believe someone will be particularly debilitated by your death, that person may not be a wise choice for your executor. Not only will he or she have to mourn you but he or she will also have to deal with the additional stress of administering your estate and dealing with the beneficiaries of your estate.

Both your executor and your trustee will need to have a strong constitution for dealing with the beneficiaries of your estate. Your executor will have to handle complaints from the beneficiaries about how long it is taking to administer your estate and demands for an advance

and/or final distributions from the estate. Even if your estate administration is proceeding smoothly and on schedule, there will invariably be one beneficiary who will complain repeatedly about what he or she mistakenly perceives to be long delays and cause your executor additional stress. Your executor will also have to deal with disputes among the beneficiaries about who will receive certain tangible, sentimental personal property in your estate, such as articles of jewelry, or disputes about who will receive real property as his or her distribution from your estate if all the beneficiaries want a certain parcel of real property you owned.

Your trustee will also have to be emotionally capable of dealing with the demands of the trust beneficiaries over the life of the trust. A trustee must be able to say ‘no’ to requests from a the beneficiary for additional distributions if the trustee does not feel it would be a responsible use of the funds, either because it would deplete the trust too quickly or because such a distribution would not comport with your intentions for the trust. If the trustee also has a close personal relationship with a beneficiary, he or she might not feel like they can say “no” to the beneficiary’s demands without ruining the personal relationship.

5. Family Conflicts

You should be cognizant of the potential for conflict among your family members when choosing your fiduciary. Will one of your children feel slighted if you do not choose him/her? Do some of your children not get along? If you plan on selecting a family member to act as a fiduciary, be sure to pick someone who gets along with all of the beneficiaries of your estate or trust. You may think that your children get along sufficiently well that there will not be problems, but be aware that the dynamics of their relationship can change when one person is given more power than the others, when there is a large sum of money being handled by that one child or when the patriarch is no longer alive to control or check any sibling disputes. Moreover, emotions will be heightened in the period after your death and perceived slights can easily be blown of proportion.

6. Corporate Fiduciaries

Many of the potential issues discussed above can be avoided through the use of a corporate fiduciary. If you have a large estate, it might be wise to name a corporate executor or trustee above or along with an individual executor or trustee to assist with meeting all the requirements of serving as a fiduciary. The fees that must be paid to a corporate fiduciary may seem expensive; however, your corporate fiduciary will have significantly more expertise serving as a fiduciary than most individual executors or trustees. Moreover, the corporate fiduciary’s fees are normally balanced against the additional income an appreciation received from the professional management of your assets. A corporate fiduciary will have the resources and expertise to actively monitor and manage the assets of the estate and trust and can make prudent and professional investment decisions as issues arise.

An advantage of using a corporate fiduciary is the knowledge that your estate and/or trust will be professionally managed after your passing and that the needs of your spouse and children will be met. A corporate fiduciary will work with your beneficiaries to assess their needs and come up with an investment plan that is tailored to meet the needs of the individual beneficiaries.

As mentioned previously, your fiduciary will have to devote a significant amount of time

to managing your estate and/or trust. A corporate fiduciary will have access to the accountants, lawyers, and other professionals to aid them in managing the funds, preparing the necessary tax returns each year, and handling requests from the beneficiaries for distributions. On top of all the record keeping that the fiduciary must do for the trust or estate, he or she will also stay current on changes in the tax code and estate and trust law. As a corporate fiduciary is in the business of being a fiduciary you can be sure they will be up to date and your estate or trust will be managed according to the current laws.

Finally, using a corporate trustee will ensure that you have a fiduciary who will be able to serve for the entire duration of your estate and/or trust. This is especially important for a trustee as the trust can last for several decades depending on the distribution scheme you have decided on and an individual trustee might not be willing or able to commit to serving for such a long period of time. A corporate trustee will be able to meet your beneficiaries' needs and provide continuity in administration.

7. Use of Co-Fiduciaries

If you do think there is potential for family conflict, it may be advisable to name co-executors and co-trustees so that the spouse or child you name does not have to deal with the brunt of the complaints and dissension among the other beneficiaries. If your spouse is one of the trustees and you also name an independent corporate or individual trustee, your spouse might feel less pressure to accede to the demands of your children for unreasonable distributions from the trust. It is not unheard of for children to threaten or imply that the surviving spouse will not see their grandchildren anymore unless they agree to the child's demand for a distribution that your spouse does not think is prudent or wise. Many children will immediately try to get their hands on their future inheritance and are not above using threats, explicit or implied, to do so. An independent corporate or individual fiduciary will save your spouse from having to deal with the stress of such demands because he or she can simply tell the child that it is out of her hands as the independent trustee has vetoed the request.

Naming a corporate co-fiduciary is another way to relieve your individual fiduciary from the stress of administering an estate or trust. The corporate fiduciary will be impartial when handling disputes among the beneficiaries and when responding to requests from the beneficiaries for additional distributions. The corporate fiduciary will not have the bias or knowledge of family drama that an individual fiduciary might be influenced by. Instead, it will make decisions based on the governing document, i.e. the will or trust, and the status of the estate or trust assets to be sure that the most prudent decision is made.

An experienced estate planning attorney should be consulted for all questions or concerns about creating an estate plan that fits your needs.

QUESTION OF THE MONTH:

CAN THE MEMBERS OF AN LLC BE RESPONSIBLE TO PAY THE DEBTS AND LIABILITIES OF THE LLC?

A limited liability company (an “LLC”) generally protects members’ personal assets from the creditors of the LLC. If an LLC member treats the LLC as a separate entity (i.e. treats it as if it were an unrelated business and follows formalities) and does not abuse the LLC form, then courts have a strong presumption against an LLC’s creditors accessing an LLC member’s personal assets. In a nutshell, the more an LLC member treats the LLC as a separate bona fide business enterprise versus a mere instrumentality or piggy bank or means to defraud customers, the stronger the limited liability protection will be provided.

The following is a brief summary when the limited liability veil can be pierced:

1. **Undercapitalization:** An LLC should be capitalized so it can reasonably meet its debts that would arise in the normal course of business as opposed to having a razor thin capitalization and constant injections of the capital whenever expenses arise. There is no set amount or set ratio, but it is what is reasonable based on the nature of the business and the industry. As a rule of thumb, you should never intentionally underfund the LLC, when it is formed, to defraud the business’s creditors.
2. **Failure to Follow Formalities:** While formalities are relaxed for an LLC, the more followed, the better the protection. The LLC should have minutes, hold meetings, have their own bank accounts,.... In addition, if a member is acting on behalf of the LLC, his or her signing of any document or contract should clearly signify in what capacity he or she is signing such as “John Doe, Member” or “John Doe, Manager” instead of simply “John Doe.” Last, it is important to use the LLC moniker after the name (i.e. LLC) to place the public on notice of your limited liability status. The more a member meets the common law and statutory LLC formalities, the less likely a creditor can access a member’s personal assets.
3. **Intermingling of Assets:** In addition to formalities, it is important that the LLC’s business assets and the member’s personal assets not be comingled. Each entity should have its own bank account and pay its own expenses. Business funds should not pay personal expenses or vice versa at any time. As a rule of thumb, you should treat the LLC as two strangers would treat each other. Would you pay for a stranger’s vacation, personal meals or new personal car? Would you have one bank account paying the bills for yourself and a stranger? It is absolutely imperative to not co-mingle personal assets with the LLC assets the same way you would treat a stranger.
4. **Use of the LLC to Perpetrate a Fraud:** If an LLC is used to create or perpetrate a fraud, then a creditor may access a member’s assets. An LLC should be used to protect an investor if a business transaction goes bad, not to assist a member to defraud customers or clients or to make a string of absurdly risky ventures relying on the limited liability protection. For example, if a member has a substantial tort liability and closes up shop and simply opens up the same business with the prior LLC’s equipment under a new LLC, that member’s personal assets may be accessed. Further, if a member embezzles funds from clients or investors his personal assets may be accessible to creditors. The key is whether the member is intentionally or willfully using the LLC form to defraud the public versus simply having a bona-fide business transaction gone bad. Generally, the more the member has a true business intent versus an intent to defraud future creditors the more protection will be provided.
5. **Alter-Ego:** This focuses on the level of control a parent/member/owner has over the LLC and requires some major injustice or wrong. It is when a parent/member/owner and the LLC are blurred and the LLC is a mere instrumentality of the parent/member/owner. For example, if a parent LLC owns an

LLC subsidiary with the identical management, and the LLC subsidiary performing the contracts is thinly capitalized, uses the parent's equipment, materials, and employees, is under the parent's strict control and has no other real purpose/substance then it is more likely that the LLC creditors will have access to parent/member's personal assets. In other words, the LLC subsidiary is a mere instrumentality acting vicariously for the parent/member/owner. Thus, it is important to allow an LLC subsidiary to have its own autonomy.

6. **Direct Suit:** Last, a member may be liable for criminal acts and/or intentional torts. If a manager/member/owner knowingly, voluntarily and intentionally participates in any aspect of the crime or tort he can be personally liable.

Empirically, the LLC limited liability protection is more likely to be pierced where the manager or member engages in a criminal act, intentional tort or fraud, there is under capitalization or the LLC is an alter ego of the manager/member. It is important to avoid these situations, think of the LLC as a completely separate self-contained being/entity, and treat it that way.

Please feel free to contact this office and meet with one of our experienced attorneys to further discuss these issues to determine if a limitation provision would be beneficial to your company.

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- If there are any legal questions you would like this office to answer in the future, please email the question to us at info@pozzuolo.com. Each month, the question with the most relevance to our privately held business clients, advisors, and friends will be answered in our monthly newsletter. The questions can relate to any of the areas practiced by this office including business planning and transactions, corporate law, commercial litigation, employment law and litigation, commercial real estate and development, construction law and litigation, estate planning, estate administration, tax and pension law, family law litigation.
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PUBLICATIONS

All of the following professional publications and past newsletters written by attorneys of this office are available by clicking here: [http://pozzuolo.com/Pubs Articles.shtml](http://pozzuolo.com/Pubs%20Articles.shtml)

Corporate/Tax Articles

- Bankruptcy - How To Prevent It And How To Cope With It Should It Happen To Your Business
- Deferred Compensation Rewards And Retains Key Employees
- Design Buy-Sell Agreements For Maximum Utility
- How An S Corporation Avoids The Double Taxation Incurred When Excessive Compensation Is Treated As A Dividend
- How Mortgage Lenders Should Draft Broker Agreements To Avoid RESPA Violations
- How To Look, Act And Sound Like A Professional Corporation
- How to Structure a Suitable Buy-Sell Agreement
- How To Use Non-Qualified Deferred Compensation Arrangements As A Business, Retirement And Tax Planning Tool
- Money Purchase Pension Plan Falls Out Of Favor
- Protecting A Client's Business From Unfair Competition Using Restrictive Covenants

- Structuring Loans From Qualified Plans - How To Handle The Strict Tax Rules
- What Type of Qualified Corporate Retirement Plan Best Serves Your Business, Tax And Retirement Needs
- Why An Employment Contract Is Mandatory

Estate Planning Articles

- Adapt Estate Planning Strategies to Fit the Needs of Same-Sex Couples
- College Funding Tool Offers Estate Planning Advantage
- Diversify Strategies For An Effective Estate Plan
- Divorce and Estate Planning
- Divorce Raises The Need For Performing An Estate Planning Review
- Drafting The Durable Power Of Attorney For Wealth Protection Purposes
- Estate Planning For Pet Owners
- Remarriage Situations Can Raise Special Estate Planning Considerations
- Six Proven Estate Planning Techniques
- Special Needs Trust - An Estate Planning Tool For The Disabled
- The Limited Liability Company -A Sophisticated Tool For Estate Planning
- Using Trusts To Maximize Family Protection And Minimize Estate Tax
- Why Living Wills- Advance Directives Are An Essential Part Of Estate Planning

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects. It is to provide insight into legal developments and issues. You should always consult with legal counsel before taking any action on matters covered in our updates.

This newsletter is courtesy of Pozzuolo Rodden, P.C.

To subscribe, unsubscribe, or for any questions, please contact us at INFO@POZZUOLO.COM.