

FIDUCIARIES

One of the main decisions to be made in any estate plan is the selection of the persons who will handle different aspects of your plan. Each of these people are “your substitute”. You want them to handle things as you would. Each of these positions is a position of trust. In fact, the term “fiduciary” means a person in a position of trust. As we discuss each of the fiduciaries you will select, keep in mind that you are trusting each of them with something very important to you. As you review their duties and responsibilities, the person you select should have the capabilities to carry out these duties. He/she will have significant responsibilities as well as receiving the brunt of any discontent in your family.

Executor

Your executor handles the administration of your probate estate. The administration of your estate is like closing out the business of your life. This position has a business, organizational and administrative component and a personal component. First, your Executor collects your assets, pays your debts and distributes your property to your heirs. Second, if your estate includes illiquid assets which are needed to pay estate taxes and/or in order to make distributions as required by your Will, then your Executor must sell those assets. If your estate includes a business, your Executor must wind the business up and, if it can be sold, sell the business. Third, if your estate is taxable, then your Executor must obtain values on all the property, file an estate tax return and work with the IRS on any issues which may arise from a review of the return. Fourth, your Executor handles the distribution or disposition of your personal effects and assists your family during this transitional time. Open communication and sensitivity to the interpersonal dynamics can make the difference between a family whose bonds

remain in tact and one whose bonds are irrevocably broken.

The administrative or organizational component is the one that comes to mind when you think of administering an estate. This aspect is the most extended responsibility. Any money which is owed to you must be collected. Any debts you owe must be paid. Any reports to be filed must be filed. An estate tax return must be filed with the IRS if your estate exceeds the taxable level, \$1 million in 2003 and after 2010, \$1.5 million in 2004 and 2005, \$2 million in 2006 through 2008 and \$3.5 million in 2009. In reporting this information, all of your property must be valued. After collecting all of your assets your executor will distribute the assets as you direct in your Will. The position requires more organizational and administrative skills than financial

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management skills since the assets that are collected are used to pay expenses and taxes and then distributed.

Administration of an estate is not intended to be an extended process. However, if a tax return is required the process usually takes at least two to three years. If you have a business, the Executor will need to handle the dissolution or sale of the business. If you are not survived by a spouse, your Executor will arrange for the sale of your home. Your Executor may need to sell other assets to pay your debts and the expenses of administration.

When you are considering someone for this position you should consider their ability to handle the organizational and administrative demands.

A frequently overlooked aspect of the Executor's duties are the personal ones. Your Executor arranges for the distribution (or disposition) of your personal items in your home. In selecting

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an Executor, this personal side of the administration of your estate should also be considered. Your Executor will go through your personal items and distribute them to the persons you desire, sell them or give them away.

In addition to these tangible tasks your Executor acts as an ambassador (for you), a mediator (among your family members or heirs), a counselor of sorts (to your family members). Your Executor assists your family in the transition. This

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time is a difficult one. Something has occurred which your family did not want and over which they had no control. Their emotions may be expressed directly and openly. They may be repressed or kept to themselves. In any case, emotions may get focused on aspects of your estate administration. Lack of knowledge, lack of control, causes problems. Your family's grief and frustration may get played out in the division of your personal effects or it may be focused on the Executor and his actions in handling your estate. Problems can be minimized if your Executor provides your family with full information concerning the administration of your estate. Efficiency, organization, patience and diplomacy are all important characteristics in this position.

Trustee

The position of Trustee also has two sides, financial and personal. The Trustee manages and invests your property. The type of skills which are helpful depend on the type of property you own. The management of commercial real estate uses different skills than the management of marketable securities. Generally the type of assets which are held in a trust are marketable securities and bonds. Investments in real estate are less common. When real estate is held in a trust, it is frequently one

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of the assets initially transferred to the trust. Under Texas law a Trustee can generally retain any asset which is

transferred to the trust (even though the investment would not normally be considered a "prudent" investment.) Investments acquired after the trust is formed should be investments a prudent investor would make.

The other aspect of the Trustee's responsibility is the Trustee's relationship with the beneficiaries. This role includes the decision on what distributions to make to the beneficiaries of the income and/or principal of the trust. Your Will includes provisions for the distribution of the funds held in the trust. These provisions are the

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instructions to the Trustee. Generally in a Family Trust or trusts created for your children, the trust provides that the assets in the trust may be distributed to the beneficiaries for their "health, education, support and maintenance". The courts have held that distributions for these items are ones that can be determined and thus the language is referred to as an

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"ascertainable standard". If you add the word "comfort", the courts have held that they cannot determine what would be appropriate for someone's comfort, so a

distribution cannot be enforced or prohibited under that standard. Sometimes the Trustee is directed to consider the beneficiary's other resources in making distributions. In administering the trust the Trustee determines when distributions should be made, how much they should be and for what purposes.

Another important aspect of the role of the Trustee is the Trustee's relationship with the beneficiaries. Ideally, the trustee and the beneficiaries have a relationship of mutual respect and they have the ability to communicate openly. The relationship and communication between the beneficiaries will affect the impact of the trust on the beneficiaries. If the trust is for the benefit of your spouse and your spouse is not the trustee of the trust, then his/her comfort level with regard to his/her continued care is significantly affected by the relationship with the Trustee. If the trust is for the benefit of your children, the relationship with the Trustee impacts the way the distributions are made, the beneficiaries' input on the distributions and the information provided the beneficiaries to name a few areas. These factors can make a difference between a trust which facilitates a child's development or hinders it. The relationship can foster conflict between the Trustee and the beneficiaries and between the various beneficiaries.

Having given you an overview of the two areas of responsibility for a Trustee, let's look at the impact and importance of these decisions. As you consider the following situations, also consider the impact of the relationship between the trustee and the beneficiaries. Usually, there is one beneficiary (or set of beneficiaries) that are the current

beneficiaries, for our purposes the "income beneficiaries" and another set of beneficiaries that receive the property later, frequently after the income beneficiaries die, for our purposes the "remainder beneficiaries". The decisions your Trustee makes significantly affect both sets of beneficiaries. Let's assume that the income beneficiaries can only receive income. The investments the Trustee makes will impact the amount of income. Does the Trustee invest in bonds or growth stocks? Now let's assume the Trustee has the power to distribute principal as well as income. In this situation, the type of investments held in the trust will not significantly affect the amount which can be distributed. Regardless of the investments, the decisions on to whom distributions are made and how much the distributions are, do affect both the income beneficiaries and the remainder beneficiaries.

When the Trustee is considering the distributions to be made from the trust, who is the Trustee to protect? The Trustee is to protect and consider both sets of beneficiaries. The decision to distribute to the income beneficiaries or not and for what purposes is important. The decision becomes more difficult and "loaded", if you will, if the remainder beneficiaries are either not related to the income beneficiary or estranged from the income beneficiary.

Consider the situation in which the income beneficiary is a second spouse and the remainder beneficiaries are children of the first marriage. A number of factors affect the amount the children will inherit. First, the investments made by the Trustee. Second, whether principal of the trust can be distributed to the second

spouse. Third, whether the distributions are for support only. Fourth, whether the Trustee is to consider the spouse's other resources.

The Trustee's position is not an enviable one, but it is very important. Your Trustee must be able to manage and invest the funds in a prudent manner which considers the needs of the beneficiaries, both income and remainder. You would like your Trustee to make the same kind

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of distributions you would, if you were there. The trust should provide the Trustee with guidance in making these distributions. However, there is considerable room for the Trustee to exercise his discretion and to consider the changing circumstances. You want this flexibility in the trust. For example, let's consider the meaning of the word "education". Clearly, tuition for college for a highly motivated student would be included. What about room and board. What about spending money? What about a car? What kind of car? What if the beneficiary is making C's or worse. What if the beneficiary drops half his classes each semester?

In many situations, the beneficiary will also be named as the Trustee. Is this a good idea or a bad idea? If the beneficiary is the Trustee, the trust does not protect the beneficiary from his/her own poor investments and/or indiscretion in making distributions to himself/herself.

If a beneficiary is the Trustee is his ability to use the money for his own purposes unrestricted. A resounding "NO". You may have heard that a trust does not restrict your spouse's use of the funds for his/her support. The key here is "support". His/her support is interpreted according to your spouse's lifestyle so support can be a fairly extravagant lifestyle if that is the manner in which he/she lived during your lifetime. Even this distribution must be qualified in that the trust must have sufficient resources to provide for this lifestyle.

Although your spouse is the trustee and the beneficiary, he/she cannot use the funds indiscriminately. He/she cannot distribute the funds to persons who are not beneficiaries of the trust. He/she cannot give the property away. He/she cannot use the funds for expenses which are beyond her life style. If your spouse bought a new Honda every three years during your lifetime, he/she can continue to do so. However, your spouse cannot now begin buying a new Rolls Royce every year.

If your spouse is the Trustee, who is going to stop him/her from making unauthorized distributions. Good question. First, if you think your spouse

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will distribute funds indiscriminately to herself or use the funds for other unauthorized purposes, do not appoint your spouse as Trustee. Second, if you do want your spouse to be able to spend the funds in this manner, provide for that in the trust. Third, someone can

complain. The remainder beneficiaries can sue your spouse if he/she uses the trust funds for purposes that are not authorized by the trust. You want to avoid this situation.

< Do not name an individual Trustee unless he/she can handle the duties set out above.

What about a corporate trustee - a bank or a trust company? Horror stories abound. The widow that couldn't receive any money. The poor investments made. I heard them too. And then I started hearing them about individual Trustees as well. Don't name an individual because you don't want a corporate trustee. Name an individual as trustee because they can

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best handle the job. If you don't know an individual, then consider a corporate trustee. Always give the beneficiaries or a trusted group of individuals (a trust committee) the power to remove the corporate trustee and replace it with a new one. This method works well as a check and also enables the beneficiaries or trust committee to monitor the corporate trustee's performance and select another corporate trustee when the corporate trustee's performance is not up to their standards.

What about the fees a corporate Trustee charges. Handling a trust both in terms of managing the investments, keeping proper records, filing the necessary

returns and diligently considering the needs of the beneficiaries takes time. Seriously consider paying anyone who handles this responsibility. Any exceptions to paying a Trustee? First, if the Trustee (and his family) are the sole beneficiaries, payment is not necessary since the Trustee is basically handling his own affairs. Second, a fee is frequently not paid when the trust assets are relatively small (in relation to the needs of the beneficiaries) and a close family member is serving as Trustee. However, I would still consider paying the Trustee at least a nominal amount.

Having said that. How much to pay? Corporate trustee fees are a good guide. For this reason, I do not consider the fees of the corporate trustee to be a significant factor. If you feel your situation does not warrant their fee - negotiate a different fee.

Trust committee

In selecting a Trustee you may want to provide a mechanism to check the Trustee's performance and to take action if the performance is not as anticipated. The Trustee whose performance is being monitored may be a corporate trustee or may be an individual. The Trust Committee is generally given only the power to remove and replace a Trustee and to name a Trustee if all of the Trustees named in the document are unable to serve. Generally, the Trust Committee is not a fiduciary. The Trust Committee is more like a "fiduciary monitor". However, if the Trust Committee is given powers normally given to a Trustee, the Trust Committee can become a fiduciary with all its responsibilities and risks.

The Trust Committee can have other responsibilities. For example, the Trust Committee may be a group of advisors with whom the Trustee is required to meet periodically. The Trust Committee may consist of members who are income beneficiaries and others who are remainder beneficiaries so that the interests of all beneficiaries can be discussed. In the latter situation, the Trust Committee can provide a vehicle to ensure that communication among all beneficiaries remains open.

For an elderly individual who establishes a revocable living trust during his/her lifetime, the Trust Committee can include family, friends, advisors or colleagues who will provide a "human input" to the decisions made by the corporate trustee. The same situation occurs if the trust is set up for a surviving spouse, particularly when the couple has no children. The uses of the committee can be as diverse as the individuals who create trusts.

Guardians

Most people are aware of the responsibility of a guardian. The guardian is the person who raises your children should both you and your spouse die. The decision of who should act as Guardian is a difficult one. In some

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situations it is so difficult that the couple fails to make a Will because they either don't know a guardian or cannot agree on a guardian. [A Will with no guardian appointed is far better than no Will - but

you knew that, didn't you.] The guardian should be a person who has your value system and would raise your children as you would.

Other factors are important. Consider the relationship of your child to the potential guardian. Consider also the geographical proximity of the guardian to you. Proximity is less important with younger children and more important with school age children.

Another question which is frequently asked is whether the guardian and the Trustee should be the same person. They can be. The risk in naming the guardian as Trustee may be that the Trustee/Guardian may use the trust assets for their own expenses. However just as frequently, the concern is the Trustee/Guardian's reluctance to use any of the trust assets. The failure to use any of the trust assets can cause resentment. In the former case do not name them as Trustee. In the latter situation discuss this aspect with the guardian.