

Choosing the Right Fiduciary: Why It Can Make or Break an Estate Plan

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Even the most carefully crafted estate plan can unravel if the wrong individuals are appointed to serve as executor or trustee. Executors and trustees are fiduciaries vested with broad authority to administer assets under their custody. They are responsible for asset management, tax compliance, recordkeeping, and the distribution of assets to beneficiaries. Sometimes the fiduciary only serves a matter of months; other times, their appointment can last for years or even decades.

Oftentimes, a client will reflexively appoint their spouse as primary fiduciary, followed by one or more of their children as successor fiduciaries. It is certainly understandable that a client would want their closest relatives involved in administering their assets. When the fiduciary is also the primary beneficiary, and there is no need for ongoing administration, even a fiduciary who lacks sophistication may not cause significant issues, as the fiduciary is essentially tasked with administering their own assets. However, when the fiduciary is not the primary beneficiary, or when the administration will be ongoing, the complexity of the role means that appointing the wrong fiduciary may have significant consequences.

This is because the fiduciary may be tasked with satisfying claims, paying estate taxes, or even winding down a business. A fiduciary who lacks sophistication or knowledge exposes the assets under their control to significant risk of mismanagement and waste. A fiduciary who lacks the knowledge and experience to navigate their responsibilities may fall into traps that a more seasoned fiduciary would avoid. A fiduciary's contentious relationship with a beneficiary may make it difficult to maintain neutrality and avoid conflict. Even well-intentioned fiduciaries may have poor communication skills or fail to engage competent professionals to assist them in their duties.

The client can take proactive steps to mitigate the risk of appointing the wrong fiduciary and prepare their nominated fiduciaries for success in their roles.

Setting the Nominated Fiduciary up for Success

While these conversations are often considered taboo, the client should have a candid conversation with their nominated fiduciaries to ensure that they understand the scope of their responsibilities. The fiduciary should be provided with the names and contact information of the client's accountant, financial advisors, and attorney. The fiduciary should also know where the client's important documents and records are located. While clients are often (and understandably) uncomfortable revealing the nature and extent of their assets, they should maintain records of their assets, liabilities, and obligations, as well as the passwords to their e-mails and other electronic accounts, along with their other important documents. The client may also wish to discuss with their nominated fiduciary any specific wishes or priorities that they want honored, family dynamics, gifting history, and any other particular issues or concerns the client may have.

Taking these proactive steps will ensure that when the time comes for the nominated fiduciary to assume their role, the

transition will be smooth.

Consider Appointing Co-Fiduciaries with Defined Roles

Appointing more than one fiduciary is also a way to balance family involvement with ensuring that a competent fiduciary is appointed to guide the family member in their duties and responsibilities. This may be particularly advantageous when the family fiduciary is young or inexperienced, as having an experienced fiduciary to serve together with them ensures that assets are properly invested, tax returns are timely prepared and filed, and records of their administration are maintained.

For states that permit directed trusts, consideration should be given to clearly defining the roles of each co-fiduciary. For example, a client could designate a family member as the fiduciary responsible for making distribution decisions, while an independent trustee is tasked with making decisions concerning investment strategies. A mechanism should also be incorporated to anticipate and resolve deadlocks, avoiding delays or even total inaction.

It is important to note that having more than one fiduciary can increase administrative costs or create the potential for conflict between the co-fiduciaries. Therefore, appointing co-fiduciaries may not be the right decision in every circumstance.

Drafting for Flexibility and Ongoing Administration

Sometimes the client's nominated fiduciary may be unable or unwilling to serve for justifiable reasons, or after assuming office, can no longer continue to serve as fiduciary. While the client should evaluate the qualifications of any successor fiduciary that may need to serve, mechanisms should also be incorporated to anticipate and resolve fiduciary succession issues.

For example, a trust agreement may provide that the last remaining trustee in office can appoint successor trustees or co-trustees. This provides the primary fiduciary with the opportunity to assess the current administrative landscape, what family members may be willing or available to serve, as well as the costs and benefits of appointing a professional or corporate fiduciary as successor fiduciary.

Similarly, the trust agreement can provide that a majority of the beneficiaries may nominate successor fiduciaries if the office becomes vacant. These mechanisms help to avoid a contentious or difficult relationship forming between the fiduciary and the beneficiaries.

Fiduciary Removal

Taking appropriate steps and precautions during the client's lifetime to ensure proper administration may still not be enough to avoid conflict or difficulties once the fiduciary is appointed. Therefore, it is just as critical to provide a mechanism to remove an unqualified or recalcitrant fiduciary. Sometimes it is appropriate for the beneficiaries to hold this power. Other times, a trust protector may be appointed to serve in this role. A "trust protector" is a non-fiduciary who is provided with defined, limited powers. Having a trust protector to monitor the activities of a trustee and, if need be, remove a trustee ensures impartiality and neutrality in the decision.

Conclusion

Nominating an executor or trustee is among the most consequential decisions that a client will make in their estate plan, yet many clients reflexively appoint their spouse or other close relatives. The wrong choice can cause conflict, erode family relationships, increase the cost of administration, and (in the worst of circumstances) invite litigation. By thoughtfully evaluating fiduciary candidates, ensuring fiduciaries are prepared and willing to serve, and incorporating flexibility into the estate planning documents to anticipate changed circumstances, advisors can help clients preserve family harmony and ensure their wealth is preserved for their beneficiaries.