

When a Corporate Trustee May Be a Disadvantage for Your Trust

July 24, 2025

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Last month I explored the potential advantages of naming a corporate trustee, acknowledging that the decision is ultimately a matter of personal preference. In this second part of a two-part, “point-counterpoint” consideration of corporate trustees serving as such for individuals’ personal trusts, I take up potential disadvantages and reasons you might consider not naming a corporate trustee to manage your trust.

Should you name a financial institution as corporate trustee to manage your trust when you are no longer able to do so for yourself?

Whether you name a financial institution to manage your trust assets when you are no longer able to do so for yourself is ultimately a matter of personal preference and choice. In this second part of a two-part, “point-counterpoint” consideration of corporate trustees serving as such for individuals’ personal trusts, I take up potential disadvantages and reasons you might consider not naming a corporate trustee to manage your trust.

\$\$\$ - Higher Costs

Relying on a financial institution to manage your trust when you are no longer able to do so for yourself generally requires a more substantial commitment to administrative costs. While friends and family might be willing to serve when you’re gone – and frequently agree to do so with no thoughts of compensation (or the time commitment potentially involved!) – no corporate trustee is going to undertake or continue the effort without being adequately compensated. Corporate trustees charge annual fees that typically range from 0.5% to 2% of the trust’s “assets under management,” depending on the size and complexity of the trust. These fees are intended to compensate reasonably for professional services required to manage the assets and administrative responsibilities. In my experience, family members and friends serving as trustees typically charge little or nothing for their trust/asset management efforts, regardless of the discretion afforded to them under the governing trust document(s). The decision whether to exercise this discretion in favor of taking a fee is typically driven on the one hand by a sense of entitlement and, on the other, by an inherent sense of fairness (including an assessment of the likelihood of heartburn and frustration) to be generated by beneficiaries’ uninformed and often unwarranted perception of impropriety occasioned by the resulting imbalance as violative of “equality for all” expectations.

To be sure, individual circumstances vary widely, and a family/friend trustee should have no reservations about being reasonably compensated for work that money managers and financial advisors would otherwise be charging a significant sum. Most trusts expressly afford trustees discretionary authority to be compensated for their efforts. And, unless expressly stated in the trust document, Virginia, like most jurisdictions, allows such discretionary compensation by default. Consequently, one can generally expect trust administration costs under a corporate trustee to exceed what an individual trustee might be expected to charge (if anything) for his or her trust management services. It is typical to allow an individual trustee the discretion to take a fee for one’s services. The more substantial the trust, the more time and effort can be expected to monitor and manage – especially if one or more family members have their own expectations (however misguided or unrealistic they may be!)

regarding the timing and extent of their inheritance. In my experience, there's almost always at least one troublemaker beneficiary making things miserable for everyone else – especially the trustee.

Lack of Personal Touch

Corporate trustees are in the business of managing trusts and, therefore, manage many trusts at once. Consequently, a corporate trustee may not be able to provide the personalized attention that a close family member could. In all fairness, a corporate trustee cannot be expected to understand or appreciate the unique family dynamics or emotional aspects of the trust as well as a family member or close friend could. Perhaps you are in the 1% of those fortunate to have developed a close long-term relationship with a trusted advisor at a corporate trustee and have convinced yourself that no other friend or family member could possibly be trusted to do as good a job carrying out your wishes. I'm not here to talk you out of your blissful naivety, but you owe it to yourself to give due consideration to the probabilities of your trusted advisor dying and how familiar the likely successor(s) is/are with your situation.

Less Flexibility

Institutional trustees often operate under strict guidelines and may be less flexible or slower to respond than an individual who can make quick, informal decisions. This relative inflexibility stems, at least in part, from a higher likelihood of being held to task in hindsight for decisions which, at the time, may have seemed eminently reasonable. A beneficiary is more likely to attempt to create a legal issue about holding a corporate trustee liable for decisions that, in retrospect, turn out sub-optimally. Consequently, a corporate trustee can be expected to apply a more rigorously conservative approach to investing and discretionary distributions, for instance. Of course, this may be precisely what you're looking for in a trustee.

Alternative Asset Limitations

Along with less flexibility in the manner in which they might be expected to make decisions regarding the assets under their management, corporate trustees are oftentimes limited in the asset classes they manage. Precluded from keeping particular types of assets in their portfolio, a chosen corporate trustee may become the tail wagging the proverbial dog when they prove incapable of serving 100% of your trustee needs. For instance, real estate is quite frequently beyond the purview of a corporate trustee. Therefore, if you have substantial "alternative asset" holdings (i.e., beyond the traditional "stocks and bonds," annuities, and typical financial market holdings such as derivatives), a corporate trustee may not be the right choice for you. On the other hand, the more specialized or unique the holdings, the more likely you will want to try to find a trustee with the needed specialized expertise to manage these alternative assets appropriately. Special circumstances demand special consideration. Just recognize, as well that a corporate trustee with the relevant specialized skill set may not be the best choice to serve as your fiduciary for your other trust assets. And even if they are a potential fit across all of your asset classes, their relative expertise and/or comfort level may require some drafting cooperation to develop and settle on an arrangement with which the corporate trustee can get comfortable. For instance, we recently assisted a blended family in avoiding a potentially very costly legal fight by identifying and working with an independent corporate trustee to develop a settlement trust arrangement, the terms, procedures, and potential liability protections of which the trustee could accept. The new trust arrangement overcame the mutual distrust factors, avoided significant legal fees, and uncertain outcomes. Cooperatively addressing and overcoming the specific corporate fiduciary's reservations ultimately afforded all of the trust beneficiaries the independent management/oversight they each needed.

Final Thoughts

I would be dishonoring the legal profession if I did not acknowledge, quite lawyerly, that "it depends!" If you haven't figured it out yet, there is no one-size-fits-all "right" answer. Everyone's situation is in some respects unique and people's risk preferences fall across a full spectrum (from a nihilistic "what do I care? I'll be dead!" to "I couldn't possibly do that to my loved ones!"). Choosing a trustee is a deeply personal decision that depends on the size and complexity of your trust, your family situation, and your priorities for administration and oversight. For many, a hybrid approach—naming both a family member and a corporate trustee as co-trustees—offers the best of both worlds: professional management and personal insight.

While I can't possibly speak to my readers' individual risk preferences, there are clearly certain factors that might lend themselves more favorably to a corporate trustee selection in a given situation. All other things being equal, you may want to consider appointing a corporate trustee in the following circumstances:

- Your trust is large or complex.
- There is potential for conflict among beneficiaries.
- You lack a trustworthy or capable family member to serve.
- You want to ensure long-term, professional management.
- The trust includes specialized assets such as real estate, business interests, or significant investments.

Before making a final decision, I would encourage you to consult with your estate planning attorney or financial advisor to weigh the pros and cons in your specific situation. After the fact, if you find yourself trying to manage or extricate yourself from inheritance-related entanglements (with or without a trust), you should seriously consider engaging an experienced trust and estates litigator to assist in crafting and implementing an outside-the-box arrangement which might very well result in a third-party, corporate fiduciary as the answer . . . or then again, it might not. I would be glad to offer personal recommendations for an estate planning attorney, financial advisor, or trust and estates litigator, should you be interested. I would also welcome the opportunity to review your situation, provide thoughtful recommendations, and assist with implementation as appropriate.

The potential significance and impact of a well-chosen trustee cannot be overstated. In short, there is no “one size fits all” solution, and, simply stated, a corporate trustee may not be right for your situation. A well-chosen trustee (corporate, professional individual, family member, or friend) can provide peace of mind. The wrong trustee choice could mean the dismantling of everything you’ve worked your entire life to accumulate and damn your loved ones to costly and frustrating litigation. Too dark? I wish. Trust management legal issues might account for only a small fraction of trust cases, but the actual percentage is of little or no consequence when 100% of the cases I’ve seen on a continuous basis for over 25 years involve some form of dispute with or over the trustee.

“What about a ‘trust protector’ arrangement?” you ask. “Should I be insisting on one of those for my trust?” Next time!