

## SELECTING A TRUSTEE

Among the important decisions you should make as part of your estate planning, one of the most important is selecting **who** should serve as trustee in the event you create a trust for the benefit of another person.

In order to better understand how to pick who should be your trustee, it is a good idea to understand the role that they play and the different terms that are used.

### What's the Job Title?

The basic idea of a trust is the legal separation between authority and benefit so that the person that is given legal authority to act is not the beneficiary. It is the appointment of a person or institution to be legally in charge of the property intended to benefit another person. This can be done for a variety of reasons, but typically because the beneficiary is unable to make appropriate decisions on their own about the assets they inherited from you. This inability may be because of age, as is the case with minor or very young beneficiaries, or it may be due to some infirmity, such as advanced age, illness, or some other incapacity. At other times, trusts are needed for tax purposes and the appointment of someone other than the beneficiary may be required by tax rules.

Once you have determined that you need a trust, the next question is **who** should serve in that role. There are many situations in which you may want to appoint yourself and/or your spouse, if you are married, as the trustee. For example, single or married people who establish a revocable trust for their own estate plan will often appoint themselves as the sole trustee. This is allowed by law and desirable in most circumstances. In some types of trusts, there are tax reasons why the person who creates the trust cannot be their own trustee or they must have another trustee serve with them. For example, certain types of tax protection trusts are created as irrevocable trusts and will not work if the creator of the trust is also a trustee.

For most people, however, the most typical issue is the appointment of a trustee for the time following their death or in the event of mental disability. Their issues are not tax issues. Parents, for example, want to make a decision as to who should manage their estate and who should be in charge of the protection of their children's inheritance, until those children reach an appropriate age.

### Different Titles

If you have a will, you are the maker of the will. In your will, you get to say who will be in charge of the estate after your death. This position used to be called an "Executor" (male) or an "Executrix" (female). The modern, gender-neutral term for this position is "Personal Representative". This is the *temporary* role of the person in charge of a probate administration. The Personal Representative is a court-appointed position. The Personal Representative is responsible for seeing to the administration of decedent's estate, paying all the expenses, the settling of all of the affairs and finally a distribution of the estate to the appropriate beneficiaries.

When a person uses a trust as their estate planning instrument instead of a will, that role is pretty much the same but because it is a trust and not a will, their position is technically referred to as a trustee. If the original creator of the trust served as their own original trustee, which is the usual case, then the person who serves after their death or upon their mental disability is referred to as a *successor* trustee.

Here is something that tends to add some confusion: Where a trust is created by a will, which only becomes effective upon the death of the maker of the will (the testator or testatrix), then that type of trust is referred to as a testamentary trust. When a person's will creates a trust after the death of the maker of the will, the person in charge of that testamentary trust is also referred to as a "trustee". Because the will is creating the trust instead of the trust being created while you are still alive will, that testamentary trust still has to go through probate in order to be given legal authority with the trustee in charge.

A trust for a beneficiary, whether testamentary or one set up while you are alive ("inter vivos" or "living" trust) may be indefinite or for a stated period of time or tied to the beneficiary's age, etc. It is a separate job from the person who is the temporary trustee immediately following the death of the Trust owner or the Personal Representative under a will. Both the job that is temporary (Personal Representative or successor trustee) and the job of the long-term trustee (for protection of the inheritance of a trust beneficiary), can be done by the same person. That is, you can choose one person to be in charge of the administration of the estate but also to be in charge of trust funds held for the benefit of beneficiaries over the longer period of time. Alternatively, you can choose one person or persons to be in charge of the administration role and another person or persons to be in charge of the trust funds for the beneficiary long-term.

### Trustee Selection and Qualifications

Trusts for the general administration of the estate or for the trust funds for separate beneficiaries can be handled by different trustees or they can all be handled by the same trustee.

A trust can have one trustee or more than one trustee. If there is more than one trustee, you can usually choose whether all trustees must act unanimously or whether a majority rule will prevail. There are some practical limits, however. For example, the more people there are who are involved, the slower the process and the greater the potential for dispute and deadlock.

Often clients will ask us if all of their children can serve as co-trustees together. Upon further inquiry, it sometimes appears that the reason for this question really has to do with concern for children who might have hard feelings if they are "left out" or our clients may admit they do not want to create controversy by determining who they want to appoint. While the desire to honor children and the desire to avoid converting their feelings may be admirable, this is not a good reason to name a group of people to serve together as trustees. A difficult decision as to which one should serve is a good indication that there might be controversy if they all were.

Sometimes clients are concerned with whether or not their choice requires that they pick someone who has training or experience. While experience is a good quality and an important factor to consider, training or experience in administration of an estate is not required, since appropriate, professional advice and counsel can be obtained. Even a person who has no legal background or accounting background can do an excellent job as a trustee, by making well-informed policy decisions and delegating the legal and financial detail work to professionals.

You can choose individuals to act as trustees or you can choose institutions, such as a trust company, to be your trustee or co-trustees. The advantages of having individuals act as trustees include:

1. Personal familiarity with your goals, your wishes and the details of your estate. A desire to be involved in the family and emotional issues.
2. Often relatives or friends appointed as trustee do not charge for their services, although by law they are entitled to do so. However, see below after disadvantage number 3.

Some disadvantages of having individuals act as trustees include:

1. Though this seems to be a position of honor, it is often a difficult position to be in, when the beneficiaries are also family members. This person can often become the scapegoat or caught in the crossfire of family rivalries or disputes. Before you choose someone to be the trustee after you are gone, ask them if they want to do it!
2. Sometimes power can make people crazy.
3. Non-professional trustees may take actions that are not legal or not wise. You are the best judge of a person's character and how they will relate to the beneficiaries.

Individual trustees can be less expensive than institutional trustees. However, individual trustees are usually more dependent upon attorneys and accountants for the administration of the estate, whereas with institutional trustees many of the services that require attorneys and accountants would be included as part of their fee. While the fees of an individual trustee are possibly less than that of an institution, you would have to compare the need for the addition of attorneys, investment advisors, and accountants' fees in order to fairly compare the cost of an individual trustee to an institutional trustee. With regard to investment fees and expenses for advice on the investment of trust assets, this can become quite a complex subject. Sometimes the institutional trustee's fee for being trustee does not include many of the investment fees they will charge for investment advice. Some fees can be part of the investment cost, paying for them when the investment is bought or when it is sold. Before deciding on an institutional trustee, you need to ask about fees in detail and get it in writing.

## Guardians and Trustees

For people planning trusts for minor children, the companion issue is who will be the guardians for minor children. A guardian is the person who you name to be in charge of who would have physical custody of the child or children. The guardian of a minor can be nominated in a will or in a properly executed trust.

Usually, the person named is also intended to actually have physical custody. This can be the most important decision you make. Don't name anyone with whom you have not already talked. Make sure they are in complete agreement with you and that they would do it, if called upon.

The job of determining and/or having physical custody is different than the job of being in charge of that child's inheritance and trust. Obviously, if the person who is in charge of the money is also the person who is entitled to receive payments for support of that child, there is always the potential of a conflict of interest. But think of this as well: many times the person who has custody and also controls the money will not provide *enough* money from the trust to adequately compensate themselves for the important role they have taken on or feel they do not need to reimburse themselves for all the associated costs. It is usually a good idea to appoint someone else as trustee of the inheritance, to serve alone or to serve as co-trustees with the guardian who has custody, in order to obtain both the security of another party's involvement, but also to provide for an objective view of what is needed in any given situation.