McSWINEY & WOOD LAW FIRM, P.C. SUMMER 2022 NEWSLETTER

The Firm's Summer 2022 Newsletter focuses on choosing the right trustee for your trust.

Choosing a trustee to manage your trust when you have died is an important decision and one that should not be taken lightly. Depending on the type of trust you are creating, the trustee will be in charge of overseeing your assets and the assets of your beneficiaries. Most people choose either a friend or family member, a professional trustee such as a lawyer or an accountant, or a trust company or corporate trustee for this key role. Here are some considerations in making this critical decision, but first, here are some of the definitions for the topics that will be discussed in this newsletter.

What is a trustee?

A **trustee** takes legal ownership of trust assets, manages the trust, and is responsible for carrying out the purposes of the trust.

Beneficiaries are people or entities named to receive trust assets and will depend on the trustee for legal expertise, financial savviness, prudence, objectivity, and empathy. When selecting a trustee, it’s important to consider the different types of trusts and associated responsibilities.

How Do You Choose a Trustee?

Most people pick a friend, family member, attorney, or corporate trustee to oversee their assets**.**
Before choosing a trustee, consider these four factors:

1. Time: Trustees must be prepared to devote enough time to properly manage the trust. Serving as a trustee involves a significant amount of work, such as:

- Filing income and estate tax returns
- Securing and selling real estate
- Maintaining property
- Hosting estate sales
- Conducting appraisals for personal items, like jewelry and artwork
- Notifying creditors of outstanding debts
- Keeping records of trust account activity
- Communicating with beneficiaries
- Preparing an annual report of the trust's activity

Depending on the type of assets, trustees may have to spend substantial time processing requests, mediation, and making final decisions about distributions. With career, family, and community responsibilities, it can be difficult for individual trustees to quickly respond to time-sensitive, beneficiary requests, and legal requirements imposed on trustees by state and federal law.

2. Responsibility: One responsibility of the trustee is to oversee distributions to beneficiaries. Some trusts may provide specific instructions about the nature of permissible distributions, but often, trustees will have to decide which distributions are appropriate. Trustees who have personal relationships with beneficiaries may struggle to make objective decisions. Complicated family dynamics, especially paired with grief, can make this responsibility more difficult. For example, a trustee may be required to withhold funds from a financially irresponsible relative but may fear that the decision will hurt their relationship.

Corporate trustees, though they do not have as much knowledge of the relationships between family members, have the ability to make impartial decisions. Like individual trustees, they operate under a fiduciary duty, which means they must act in the best interest of beneficiaries. In addition, institutional trustees provide continuity; trust officers will always be available to administer the trust, whereas individual trustees could become incapacitated or die.

3. Expertise: Individual trustees, without expertise, can easily make mistakes or mismanage trust assets. Auditors do not review the decisions of individual trustees. Serious errors could remain undetected for years, resulting in heavy fines or lawsuits. Internal auditors and regulatory government agencies check that corporate trustees properly manage trust assets. They review account management processes, compliance procedures, and fulfillment of the fiduciary duty. Typically, institutional trustees include a team of trusted professionals in accounting, law, and compliance and carry liability insurance.

4. Cost: Typically, corporate trustees charge fees equal to a percentage of the value of the trust assets. Trust companies or corporate trustees provide all services within one bundled fee. Though individual trustees, like family members or friends, may not require a fee to manage the trust, they may hire professionals to assist them with their decisions and responsibilities. Depending on the types of assets in the trust, individual trustees may need to consult hired attorneys, accountants, or portfolio managers, adding to the overall cost.

What traits should you look for in a trustee?
Individuals that exhibit bad traits such as poor judgment, a sense of superiority, or an inclination to not follow terms of the trust (directions) should be avoided. As the name goes, the trustee should be trustworthy. If you cannot trust the individual to hold $100 for you, you should not name them as a trustee.

If you choose a family member or friend, he/she should be financially astute, and good with money. You want someone who is, at a minimum, familiar with basic concepts of investing, and preferably someone who has assets of their own that they are investing with an investment advisor. Your sister does not have to be a financial guru, but she should be smart enough to know that she cannot directly invest the money herself. As trustee, she will hire an investment advisor to invest the trust assets, or work with your current investment advisor.

What are the pros and cons?
Most people like to start by considering friends and family members as trustees. They are going to be most familiar with you and your family, and they will understand your family’s dynamics.

In addition, family members often do not charge a trustee fee (although they are usually entitled to take a fee). Cost-conscious clients see this as a plus, but it may not be the best decision. Your family may be better served with a professional trustee or trust company who has expertise with trust administration, especially if the trust does not terminate at your death but will continue on as a trust for your beneficiaries for a period of time. It could also lead to resentment if the family member does or does not take a fee. Being a trustee can be a lot of work. Your brother may resent not getting paid while overseeing trust assets for your children whom he perceives as being ungrateful. On the flip side, your children may resent their uncle getting paid from their money if he does take a fee.

Another disadvantage is that your family member may be too close to the family and may get caught up in family drama. Or, he may have a power trip and enjoy being in control of your beneficiary's finances. You may want someone with a little more distance who will see your beneficiaries with a fresh set of eyes and treat them equally.

The advantage of a lawyer or an accountant serving is that they have familiarity with your family if you have worked together for a long time. While they will likely charge more than a friend or family member, they typically charge less than a trust company or corporate trustee. Lawyers and accountants generally charge their hourly rate for the time they spend serving as trustee. A disadvantage is that they may not have the same institutional structure that a trust company will have. This can also be a plus if you prefer a trustee with more flexibility than an institutional trustee.

Trust companies bring structure and oversight to the trust administration including a trust department that oversees the administration. You will pay for this service, but in many instances, it will be money well spent. They will make the tough decisions and tell beneficiaries "no" when appropriate. It is often advantageous to use a trust company when the beneficiaries do not get along, when there is a problem beneficiary, or when you are dealing with large sums of money.

A drawback to a trust company is that they may be hard to remove or become inflexible. They also may be tightfisted in making distributions if it will reduce the assets under management that they are investing. These concerns can be addressed by giving a neutral third party, such as a trusted family member or advisor, the ability to remove and replace the trustee. This is called a "Trust Protector".

Can I have two trustees?

It is possible to choose a corporate trustee and an individual trustee to administer the trust. By naming co-trustees, the trust can have both professional management and decision-making input from a family member or friend.

Co-trustees allow family dynamics to play a role in distribution decisions but give tough administration responsibilities to the institutional trustee. Why not name your sister and a professional trust company? Your sister will be most familiar with the family dynamics, but the trust company can handle all the trust administration and make the tough calls when needed.

Build flexibility into the plan. Give others, such as your spouse, the ability to remove and replace the trustee. You also may be able to remove and replace the trustee during your lifetime.

Let someone else decide. In certain circumstances, you can let the beneficiaries choose the trustee upon your death. Or you can let me or another advisor (as a Trust Protector, if you have so designated one) choose the trustee down the road.

Do not put off finalizing and signing your estate planning documents just because you have reached an impasse on who to name as trustee. Talk to me so we can work through your concerns and find a solution that works for you and your family.

Summer Office Hours:
We are open Monday through Friday from 8 a.m. to 4 p.m. Please note that meetings are still by appointment only.

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