

*Selection of Personal Representative and Trustee*¹

The selection of an personal representative² and trustee is very important to your estate plan for it is the personal representative and the trustee who will have the responsibility to carry out your plan. A hasty decision as to these selections could frustrate the best planning. To aid you in your selection, this memorandum discusses the duties of the personal representative and trustee, the advantages and disadvantages of an individual versus a corporate fiduciary, co-fiduciaries, the necessity of appointing an alternate or successor fiduciary and the compensation of a fiduciary.

A. *DUTIES*

1. *Personal representative:*

The personal representative's duties start immediately after your death and continue until the close of the probate of your estate. During this period, the personal representative generally has the duty to gather, preserve and distribute the assets of your estate which are subject to probate proceedings. This includes presenting your will to the court to have it admitted to probate, making an inventory of your assets and liabilities, paying all debts of your estate, filing federal and state income and estate tax returns, making a final account of the receipts and disbursements of your estate and distributing your assets to your beneficiaries. The length of this administrative process can vary from six months to several years.

2. *Trustee:*

The duties of the trustee begin when the trust is funded with assets and continue until the termination of the trust, which could be over the lifetime of several beneficiaries. The trustee's duties fall into two basic categories: management and investment.

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²The term “personal representative” means the person or institution responsible for the administration of your probate estate. The term is used in lieu of the gender-distinct terms executor or executrix (where there is a last will) and administrator or administratrix (where there is no last will).

As manager, the trustee must distribute the income and principal of the trust according to the provisions of the trust. Some trusts will contain specific guidelines for the trustee to follow. Other trusts will give the trustee wide discretion in how the income and principal will be distributed. If the trustee is given wide discretion, the role becomes much like that of a parent or supporter, with the duty to decide how much money your spouse, children, or other beneficiaries of the trust need for their health, education, support and maintenance.

As an investor, the trustee should invest the trust principal with prudence and avoid speculative risks. Investment portfolios should be diversified and produce income. A balance should be struck between a high yield of income and maintaining the principal at the highest level possible. In addition to the trustee's duty to make prudent investments, he is usually given broad powers to sell, exchange or mortgage the trust assets and to invest in or purchase other assets. Therefore, it is important that the trustee have experience not only in investments but in the management of assets.

B. *INDIVIDUAL VS. CORPORATE FIDUCIARIES*

1. *Personal representative:*

a. *Individual:* Ordinarily, there should be a bias in favor of naming your spouse as an personal representative. The spouse would be familiar with the assets of your estate and the needs of the beneficiaries. Choosing your spouse or another family member also gives that person a sense of participation in the handling of the estate. However, that bias will be overcome if the spouse is expected to be a hindrance in handling the estate or the spouse is hostile to other major beneficiaries, or the spouse would be glad to be relieved of the responsibility of serving as an personal representative. In addition, considerations should also be given to the emotional state of a family member, particularly your spouse, upon your death, and the ability of that person to make important decisions under those conditions.

b. *Corporate:* Sometimes, a corporate fiduciary, such as a bank, is your best choice for an personal representative since it is experienced in the administration of estates. But, as a practical matter, a corporate fiduciary may decline to serve as personal representative unless there are sufficient assets to make the administration profitable.

2. *Trustee:*

- a. *Individual:* As a trustee, an individual can be a good choice if that person is willing and capable of serving as manager and investor of the trust. If you do choose an individual as trustee, particularly as a sole trustee, you should be sure that the trustee has no conflicting interests with those of the beneficiaries. For example, it may not be wise to appoint your spouse as sole trustee of the trust of which your spouse and your children of a previous marriage are the beneficiaries. In addition, since the trustee's responsibilities normally last for a long period of time (in some cases over the life span of several beneficiaries), you should consult with any individual before their appointment as trustee in order that you will be satisfied that he or she has a clear understanding of the duties as a trustee and will consent to serve.

- b. *Corporate:* As in the case of an personal representative, a corporate fiduciary may decline to serve as trustee unless there are sufficient assets to make the administration profitable. Assuming, however, a corporate fiduciary is named and is willing to serve, there are several advantages. Corporate entities such as banks are equipped to perform all the routine tasks of administration that are often so foreign to individuals. They are experienced in investments and often have committees that advise them of proper investments. In dealing with the beneficiaries, a corporate fiduciary is not distracted by emotional ties and commitment, and can, therefore, act impartially. Corporate entities also offer perpetual tenure and there will be no disruptions of the administration of an estate or trust because of the death or incapacity of the fiduciary. The disadvantages include the likelihood of a lack of that personal touch and knowledge which an individual close to the testator and his family might have and which might be helpful in exercising discretion as to distributions to trust beneficiaries. Also the corporate fiduciary will be subject to change of personnel.

C. *CO-FIDUCIARIES*

You may appoint more than one person as personal representative or trustee. However, a rule of thumb is not to choose more than one fiduciary unless that fiduciary is equipped to make a contribution to the effective administration of the estate or trust. That contribution may be investment experience, sound judgment for dealing with business problems that may be presented, experience in handling the myriad details that may arise in the course of administration, or the vital matter

of being a friendly and sympathetic bridge between the beneficiaries and the professional fiduciaries who will attend to investments and administration.

Typically, a spouse and a business associate might be appointed co-personal representatives and a spouse or child of a corporate entity such as a bank might be appointed as co-trustees. Such arrangements have the advantage of involvement of a family member and the necessary business knowledge of investment expertise. The disadvantages include the possibility of a deadlock and the added expense because of conferences and delays.

If you appoint co-fiduciaries, you do not have to give each of them identical powers over the trust assets. You can place certain powers exclusively in the hands of a particular fiduciary. For example, your will could specify that the power to deal with a particular asset, such as a business interest, is to be held solely for a specific fiduciary. If you appoint a bank as co-trustee, it can be excluded from the power to sprinkle income or invade principal, or to participate in investment decisions, or to determine how business interests or other special assets shall be dealt with. To an extent, the bank's role could be reduced to record-keeper and custodian of assets.

D. *ALTERNATE OR SUCCESSOR FIDUCIARY*

The designated personal representative or trustee may be unable or unwilling to serve when the time comes to accept the appointment, and, if accepted, there may come a time when the designated fiduciary may be unable or unwilling to continue to serve. Therefore, it is good planning to provide for a successor or alternative fiduciary. This could be done in several ways. First, you could simply name a successor alternate fiduciary in your will or trust instrument. Second, you could provide that the personal representative or trustee then serving the empowered to name a successor upon his resignation. Third, you could name a third party or allow the beneficiaries to designate a successor fiduciary should the need arise for a successor. Without a provision for selection in your will or trust instrument, the selection will be made by a court.

E. *COMPENSATION*

1. *Personal representative:*

At the conclusion of the probate proceeding, the personal representative is entitled to a fee. The amount of the fee is often defined by statute under the law of the state where the probate is held. For example, in Oklahoma the fee is five percent of the first \$1,000.00 of assets; four percent of the next \$4,000.00; and two and one-half percent of the rest of the assets.

Further allowance may be made, in the court's discretion, for any extraordinary service; however, this allowance cannot exceed the amount of the personal representative's fees as determined by the formula above. You may appoint someone who is not a resident of the state of your residence as personal representative. However, in most instances, the probate court will not allow reimbursement to such person for traveling expenses to appear at court hearings and perform other administrative tasks.

2. *Trustee:*

Unlike fees for personal representatives, fees for trustees are generally not determined by statute. A trustee's fee is usually designated as "reasonable" in the trust agreement. Often an individual trustee who is a member of your family or a close business associate will waive the fee.

On the other hand, most corporate trustees, such as banks, are in the business to make money and have a schedule of compensation as trustee. There is usually a minimum fee for the smaller estates and a percentage of the trust assets for larger estates. In addition to the basic fee, there may be an acceptance fee or termination fee or perhaps both. There may be extra charges for preparation of tax returns. There may also be extra charges if there is a co-trustee, on the theory that a co-trustee makes the job more difficult. These are all proper subjects of inquiry before designating a corporate entity as trustee.

CONCLUSION

The selection of an personal representative and trustee is of vital importance to the success of your estate plan. This appendix outlines only the general rules which should be applied. Your estate planner can advise you on specific rules in connection with the complexities of tax consideration, potential conflicts of interest and other issues which might arise in your particular plan. While these considerations vary from plan to plan, you can make your plan work best by being sure your choices for fiduciaries have prudence, sound judgment and absolute integrity.