KEY CONSIDERATIONS

In Selecting a Trustee

There are many types of trusts in the estate planning world designed to achieve a variety of goals, from various aspects of tax planning and wealth transfer during your lifetime to planning for the disposition of your assets upon your demise. The range of trusts available all fall into one of two categories: a living trust or a testamentary trust. A living trust, as the name implies, is created and at least partially funded during your lifetime. A testamentary trust is created following your death under the terms of your will.

At its root, a trust is an agreement by you, the grantor or trustor, to transfer assets to your trustee to be managed and distributed by your trustee according to the terms of your trust. In the case of a living trust, during your lifetime, you may wear multiple hats: trustor, trustee and beneficiary. But, for better or for worse, a trust may last far longer than you do (up to 365 years in Nevada). Thus, among the important estate planning decisions to be made, you must select a trustee (and successor trustee, if you are to serve as your own trustee of a living trust).

A trustee or successor trustee has many important duties that come into play following your demise, so care must be exercised in making the selection. A trustee takes legal ownership of the trust assets and has a fiduciary responsibility for managing those assets and fulfilling the purposes of the trust. Typically, this requires an individual to:

- Maintain documents and records
- Collect all trust assets and confirm titling in the name of the trust
- Understand the intentions of the trustor and the terms and provisions of the trust document
- Manage or oversee management of the trust assets, exercising appropriate discretion when needed
- Make required or discretionary distributions to beneficiaries of the trust as dictated by the trust terms
- Prepare returns and pay taxes on behalf of the trust, as required

While this list provides a high level summary of the duties of the trustee, as with many things, "the devil is in the details."

Asset Management

A trustee is held to a fiduciary standard in managing assets and must:

- Exercise the care, skill and diligence that a prudent person would in conducting his or her own affairs
- In the case of securities, develop and document investment objectives, including goals, performance objectives, asset allocation and so on
- Manage any real estate or business interests held by the trust
- Ensure that the assets are managed according to the trust terms and in the best interests of both present and future trust beneficiaries
- Maintain insurance on trust assets where prudent

Record Keeping

A trustee must maintain complete and detailed records, including:

- All income received, expenses paid and all transactions within the trust
- Separately account for principal and income as appropriate
- Provide statements and tax notifications to beneficiaries as required
- File required tax returns and pay taxes on behalf of the trust

Of course, an individual trustee can rely on professionals such as attorneys, CPA's and investment managers in performing these duties, but must be reasonable and prudent in the selection of professionals and must oversee their performance.

How to Select a Trustee

From the duties described, it is clear that the duties of a trustee are serious and extensive. A trustee can be sued by interested parties should they breach their duty of care.

It is very common in the case of a living trust for the trustors to serve as their own trustees. But what if they become unable to do so due to death or incapacity? What factors should be considered in selecting a trustee? Some characteristics to consider:

- Honesty and integrity to
  - Maintain confidentiality
  - Demonstrate loyalty and impartiality among all present and future beneficiaries
  - Avoid any self-dealing
- Sophisticated understanding of
  - Estate planning
  - Investment standards
  - Tax requirements
  - Insurance
  - Any unique assets of the trust such as real estate or business interests
- Organizational skills to maintain records and oversight of any engaged professionals
- Communication skills to
  - Explain terms of the trust to beneficiaries
  - Explain discretion exercised under the terms of the trust
  - Explain trustee's duties

Some may have family members that check all the boxes. But will those family members have the time and desire to serve? Sadly, for these purposes, capable family members often have very busy and full lives of their own. Moreover, many individuals will be in over their heads and easily overwhelmed by their duties as trustee. While some trustors may prefer to appoint a family member or family friend due to comfort for their heirs, the selection should be made carefully with some thought to the likely duration of the trust; in other words, will the desired person have the longevity required of the role?

Though some trustors shy away from corporate or institutional trustees out of fear of cost or of saddling heirs with a bureaucracy to deal with, there are pros and cons that should be weighed.

Cost

An individual trustee will often depend upon other professionals for services. Investment managers, lawyers, CPA's all come with a cost. A well-staffed institutional trustee may manage assets in-house and have the knowledge and experience to rely less on other outside professionals as well. While cost is an important consideration, sometimes an institutional trustee can be more cost-effective overall.

Bureaucracy

If you're considering an institutional trustee, it is important to inquire about account loads, the process and timelines for discretionary decision-making, and the ease of access to decision-makers by trust beneficiaries. Will your trust be one of 20 on the trust officer's desk, or one of 200?

The counterpoint to this consideration is the duty of objectivity and impartiality. Where a family member or friend may know family members better, they may also have favorites or have difficulty saying "no" to an imprudent request. Even if a sophisticated friend or family member is available and willing, it may make that person's life easier to share the trusteeship as co-trustee along with an institutional trustee.

Longevity

If your trust is expected to continue for generations, considering an institutional trustee with a long track record of service may provide better stability and consistency than naming an individual with obviously less predictable longevity.

In short, the job of a trustee is not an easy one and care must be exercised in the selection. Some individuals may be up to the task; in some cases, a well-chosen institutional trustee may prove a better option. And for some, the appointment of an individual and an institutional trustee serving together as co-trustees may be ideal.

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