

Selecting Family Member Fiduciaries

Selecting family member fiduciaries can be difficult, but if approached in a businesslike manner, the best choices, much like cream, rise to the top of the list. The first step is to list the fiduciaries needed and the roles and responsibilities of each. A typical estate plan requires fiduciaries in a Durable Power of Attorney, Health Care Proxy, Will and Revocable Trust.

Durable Power of Attorney

A durable power of attorney grants the right to perform certain delineated actions, often including bank, security and real estate transactions, on behalf of the principal. Thus, the responsibilities of the fiduciary focus on assisting the principal with businesslike activities. Such a power is only effective during the life of the principal, including when the principal is incapacitated. The characteristics of a good attorney in fact include one who is close, geographically, and has a general understanding of the principal's property.

Health Care Proxy Agent

In a health care proxy, a principal appoints an agent to make health care related decisions if the principal can not. Thus, the biggest difference from a durable power is that for a health care proxy to be effective, the principal must be unable to perform the task at hand. The characteristics of a good health care agent include close geographic proximity, but that is secondary to having knowledge of the principal's beliefs and desires with respect to health care issues. Estate plans often include a living will to address the issue of life sustaining measures; thus, that may be one less issue for the health care agent to address. The health care agent essentially must be able to clearly answer the question, what would the principal do given all the relevant facts and circumstances.

Last Will and Testament

Depending on a testator's circumstances, two fiduciaries may be appointed in a will, a guardian and an executor. A guardian is appointed to care for the person and property of the minor children of the testator. The appointment of a guardian for minor children is the most important reason why every person with minor children should have a valid will. The guardian controls property otherwise passing to the child until such child reaches the age of majority, at which time, the remaining property is turned over to the child. The guardian is responsible for providing necessities to the child and making all personal decisions for the child including health care.

The characteristics of a good guardian are the same as those of a good parent which is far too personal a topic to cover here. It is important to understand that the naming of a guardian does not guarantee that such person will actually be granted the authority to serve as guardian. For example, the rights of a biological parent will trump a named guardian unless the probate court finds the biological parent to be unfit.

The second fiduciary named in a will, an executor, is the person who will marshal the property, pay the debts and expenses and distribute the property of the testator. The geographic proximity of an executor is important for a couple of reasons. First, if the estate includes a home, the executor must maintain the home and dispose of the furnishings and other tangible personal property within the home; thus, a physical presence at the property is required. Second, in some jurisdictions, non-resident executors are treated unfavorably. For example, in Massachusetts, an executor who does not reside in the Commonwealth is considered a foreign executor and additional probate court filings and costs associated with the same are required. In Florida, only family members from outside the state may serve; thus, a professional fiduciary from outside Florida may not serve.

An executor needs to have or obtain a comprehensive understanding of all financial aspects of the decedent's life to create an inventory of all of the property, and then to distribute or sell property. It is important to understand that executors do not make many decisions. Rather, executors follow a series of steps that are most often directed by the attorney representing the estate. Thus, another characteristic of a good executor is good organization skills. An understanding of the testator's disposition objectives is less important.

Trustees

The appointment of a trustee is critically important because, unlike an executor, trustees make decisions regarding distributions of the decedent's property. The issues surrounding the appointment of a trustee depend on the period during which the trustee serves. If the trustee will only serve while the creator of the trust (called the "donor") is alive, the appointment issues are the same as for an attorney in fact. However, most trustees serve long after the death of the donor; thus, the appointment raises many more issues. A trustee serving after the donor's death may have broad discretion to make distribution decisions; thus, a good family member trustee must clearly understand the disposition desires of the donor.

All trustees are responsible for managing the trust property, understanding the legal landscape (knowing what can and can not be done and knowing what should and should not be done) and understanding the (usually, income and estate) tax implications of actions and inactions. Most family member trustees are unable to personally address these issues and hire one or more professionals. An alternative to this is to appoint a professional trustee who may bring one or more of these abilities to the table. (The appointment of professional fiduciaries will be addressed in next month's article).

Another difficult issue to consider when appointing a family member trustee is how the other family members will react. For example, if a child is appointed as the trustee of a trust for the benefit of the other children and grandchildren, will the other family members feel slighted by not being appointed? Will the other family members be able to deal with a sibling holding the purse strings? Many of these issues can be resolved with the appointment of a professional co-trustee to serve with a family member trustee. In cases where trustees have the authority to make distribution decisions, the

trustees must not only know what to do, they must be dedicated to the objectives of the donor and make difficult decisions to distribute or withhold funds to/from family members in the face of emotional and conflict of interest issues.

Appointing fiduciaries requires an understanding of the roles of the parties first. Then one must consider the players in their game. What family members and friends exist that may be able to serve? What are the good and bad qualities of each? Who are most likely to carry out the objectives and not be drawn off course by emotional pleas of family members or conflicts of interest? These are difficult decisions that can be more easily made if addressed in a businesslike manner.

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