

## *Selecting Professional Fiduciaries*

In last month's article, the issue of the appointment of family member fiduciaries was addressed. Most often, a combination of family member fiduciaries and professional fiduciaries is appropriate. Professionals rarely serve as health care proxy agents and usually do not serve under general durable powers of attorney. Most often family members and friends fill these roles. Professionals do act as attorneys in fact for specific transactions. However, when a client does not have any other players in the game, professionals fiduciaries are the only option.

### *Professional Executors*

People often gravitate toward the appointment of a professional as executor out of a lack of understanding of the responsibilities of executors. As discussed in greater detail in last month's article, an executor's role is primarily administrative. Executors make few decisions about the disposition of property. Thus, a problem with the appointment of a professional executor is that professional services are not necessary to fulfill the majority of the responsibilities of an executor.

Another common problem with the appointment of a professional executor is fees. An executor is entitled to a reasonable fee for the services rendered to the estate. Even when a professional serves as executor, an attorney will usually be retained; thus, there may be two professional fees paid from the estate. Many attorneys, when also serving as a professional executor, will waive the fee for the same and only charge one professional fee, but such time charges will include actions both as an attorney and as an executor. The result is that the estate ends up paying an attorney's rate for services that could (and should) be charged at a much lower rate.

### *Professional Trustees*

There are a number of valid reasons for the appointment of a professional trustee. As addressed in last month's article, all trustees are responsible for managing the trust property, understanding the legal landscape and understanding the tax implications of actions and inactions. Many professional trustees bring at least one of these abilities to the table. In many situations, trustees also make distribution decisions. Many professionals have experience dealing with difficult decisions and can make them in the absence of emotional and conflict of interest issues.

A tax issue arises when one appoints a family member trustee to serve over a share for his/her benefit. If the trustee has the discretion to make distributions to him/herself, the trustee will be said to have a general power of appointment over the trust property. The property will be subject to all the claims of the trustee's creditors, all of the income will be taxable to the trustee and the trust property will be included in the trustee's estate for estate tax purposes. One means by which to avoid these harsh consequences is to limit the reasons for which the trustee can make distributions to ascertainable/determinable standards, usually, health, education, maintenance and support. However, such standards can severely limit distributions.

A common method to avoid the harsh consequences of the family member trustee having a general power of appointment and the limitations of ascertainable/determinable standards is to appoint a professional trustee and permit broad discretionary distributions, but prohibit the family member trustee from making distribution decisions to or for his/her benefit. The family member trustee can participate in distribution decisions to or for other family members without consequence; however, in consideration of the emotional and conflict of interest issues; these decisions may be best left only to the professional trustee.

#### *Alternatives for Professional Trustees*

Having determined that the appointment of a professional trustee is appropriate, one must consider who or what entity to appoint. Banks, trust companies, attorneys and other professionals (CPAs, CFPs..) serve as professional trustees. Each brings to the table a slightly different skill set and few cover all three general responsibilities of trustees, investment, legal and tax. Skills not covered by the professional will require additional assistance.

Investments can be handled by a competent investment manager who should first gain an understanding of the objectives of the trust. The legal responsibilities can be handled by an attorney who practices in this area. Finally, the tax implications can be addressed by a competent CPA or tax attorney.

When selecting a professional trustee, the overriding concern should not be the three general issues which, as discussed above, can all be handled with competent assistance. The overriding concern should be; who or what entity will carry out the wishes of the creator of the trust when that person is no longer able to communicate them? The professional trustee must make difficult decisions based on what the donor wanted. Consequently, the professional should be an integral part of the estate planning process that gives rise to the trust. Moreover, the objectives and desires of the donor with respect to distributions should be communicated at this time.

Given that it is not possible for one to discuss all of the possible reasons for distributions with a professional at the time of the drafting of the instrument, how does the professional trustee gain the necessary understanding to make the “right” decisions? A method I have used for years to document a client’s objectives is for the client to complete a memorandum to me which defines what distributions are appropriate under a variety of circumstances. As indicated above, it is impossible to cover every possible distribution issue, for no one has a crystal ball to tell us what issues future generations may face; however, the memorandum is broad enough to reflect the donor’s desires.

Not only does the professional trustee need to understand these issues, the replacement for the initial trustee must have a method by which to gain such an understanding. This is a common problem when banks are named as trustee. The original trust officer may know the donor’s objectives, but when the trust officer changes (a rather common occurrence particularly in this time of bank consolidation), the new trust officer only sees names on paper. In my practice, the memorandum from the donor

stays with the trust administration file; therefore, if I am replaced as trustee, future trustees will learn the donor's desires.

Another important issue to consider in naming a professional trustee is fees. There are a number of ways a professional trustee can be compensated. The most common is as a percentage of the property under management. Most trustee fee schedules provide for a sliding scale fee that decreases as a percentage of assets as the assets under management increases. When comparing trustee fee schedules be careful to consider what the fee covers. Does this cover only investment management? What about legal advice? What about tax planning and tax compliance? If these services are not included, how much in additional fees will the trustees incur to meet their responsibilities?

There are a number of other relatively minor issues that should also be considered. The location of the trustee while relevant is not too important in our computer driven society. The age of the trustee is also relevant if the same age or older than the donor. This issue should be addressed by a carefully drafted trustee replacement paragraph.

Finally, most professional trustee decisions come down to trust. Is the donor confident that the professional will do the "right" thing?

Under recently promulgated Internal Revenue Service rules of practice, only written tax opinions meeting very detailed requirements may be relied upon by taxpayers for the purpose of avoiding tax-related penalties. Any tax advice included in this article is not intended and cannot be used by any recipient for the purpose of avoiding any such penalties.

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