



Planning Pointers

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Choosing a Trustee

Many individuals establish trusts for the benefit of themselves and/or others. These trusts often serve one or more purposes (such as tax planning, asset protection/management, etc.), depending on the intent of the person who establishes the trust (known as the “settlor” or “grantor”). These trusts can be for a fixed term of years or for the lifetime of one or more persons. They can be revocable (the settlor retains the right to amend and/or revoke the trust), irrevocable (the settlor retains no such powers) or become irrevocable upon the occurrence of a certain event (such as upon the settlor’s death). Often these trusts are funded currently, but more frequently they are funded after the settlor’s death. For each type of trust, however, the settlor faces an important decision: Who should be the trustee?

What Are a Trustee’s Responsibilities?

ASSET MANAGEMENT

A trustee must oversee the management of the trust’s assets and is responsible for their prudent investment. Those assets could consist of traditional investment assets, such as cash, stocks, bonds, etc., or unique assets, such as a personal residence, commercial buildings, undeveloped real estate, closely-held stock, etc. Therefore, the trustee’s familiarity with handling the types of assets to be held in the trust is helpful. Otherwise, the trustee will need to hire professional advisors experienced with such assets for guidance.

CARRY OUT THE SETTLOR’S INTENT AS TO INVESTMENTS

Further, the trustee’s investment strategy is integral to carrying out the settlor’s intent as stated in the trust document. Has the settlor emphasized providing for the income beneficiary, so that the trustee should invest more for income? Or has the settlor indicated a preference for the remainder beneficiaries, so that the trustee should invest more for growth? Or is the document silent, so that the trustee must be impartial to both the current income beneficiaries and the remaindermen, by balancing the investment plan to provide for both income and asset growth? Thus, the trustee should have some financial and investment knowledge or have the power to hire professionals to provide the trustee with investment advice to meet the settlor’s goals.

CARRY OUT THE SETTLOR’S INTENT AS TO BENEFICIARIES

The settlor may have expressed specific intentions concerning certain beneficiaries. Has the settlor directed

the trustee to give priority to certain beneficiaries, such as a spouse or children? Has the settlor limited the interests of certain beneficiaries by imposing restrictions on the amounts to be distributed or the purposes for which distributions may be made? Or is the document silent, so that the trustee must treat the various beneficiaries impartially, without favoring the current income beneficiaries or the remainder beneficiaries? The trustee’s understanding of the settlor’s intent is key. When that intent is difficult to discern, the trust document should authorize the trustee to seek legal advice in interpreting and implementing that intent.

TRUSTEE’S DISCRETION

Frequently the settlor gives the trustee broad discretion in managing the trust assets and/or in making distribution decisions. The settlor may authorize the trustee to invest aggressively, outside the standard prudent investor rule. The settlor may direct the trustee to favor a hard-working beneficiary, or the settlor could direct the trustee to provide for or maintain a beneficiary’s lifestyle, regardless of the beneficiary’s work ethic. The settlor might intend that all beneficiaries be treated equally, or require that the trustee use independent judgment when deciding among the conflicting demands of various beneficiaries. A trustee needs to understand the settlor’s intent concerning the scope of the trustee’s discretion.

RECORDKEEPING AND REQUIRED TAX/ COURT FILINGS

The trustee is required to account for all transactions within the trust, on the investment side as well as on the distribution side. Such recordkeeping provides the trustee with reports needed for (i) any required tax filing (the trustee generally must make estimated tax payments and

file annual federal, and often state, income tax returns), and (ii) periodic probate/surrogate court accountings which certain trusts may require. These filings and recordkeeping can be burdensome, but the settlor may authorize the trustee to hire professionals to assist with these tasks.

What Are a Trustee's Liabilities?

NEGLIGENT ACTIONS

A trustee's failure to undertake the responsibilities listed above can result in personal liability to the trustee. Where the trustee's negligent actions have wasted the trust assets, the trustee may be required to make the trust whole from the trustee's personal assets. Most states require a trustee to purchase (using trust assets) a bond in an amount equal to the value of the trust assets. In the trust document, however, the settlor often specifically waives the bond requirement to avoid the premium costs to the trust.

ABUSE OF POWER

In addition, a trustee is accountable to the courts, and where a trust beneficiary believes the trustee has abused the trustee's power, the beneficiary can petition the appropriate court to review the trustee's actions. If the court finds an abuse of power by the trustee, the court can fine the trustee and/or direct the trustee to take certain remedial actions.

What Are the Traits of a Good Trustee?

The extensive and significant duties of a trustee require that the trustee be (i) responsible, (ii) trustworthy, (iii) organized, (iv) a good record keeper, (v) sensitive to and understanding of the settlor's intent and the beneficiaries' needs, (vi) able to make difficult discretionary decisions when beneficiaries have conflicting interests, and (vii) able to understand and oversee the trust's financial performance. Choosing the right trustee, therefore, is not an easy decision.

Frequently the settlor looks to family members, friends and/or professional advisors to serve as trustee(s). Although the individual serving as trustee may know the beneficiaries and understand the settlor's intent and financial/lifestyle philosophies, that individual may not have the necessary expertise to handle asset management, recordkeeping, tax filings, etc.

A corporate trustee (a corporation granted trust powers and authorized by law to serve as a fiduciary) can provide the expertise needed concerning many of the technical

duties of the trustee, such as recordkeeping, investment decisions, tax filings, etc. In addition, whereas an individual trustee may prefer to avoid difficult decisions, a corporate trustee can be the decision-maker where beneficiaries' interests conflict.

A settlor sometimes will designate both an individual and a corporation to serve as co-trustees. In the trust instrument the settlor can divide the specific duties between the trustees (such as making the corporate trustee responsible for all investment decisions, and the individual trustee responsible for all discretionary distribution decisions), or the settlor can allow the trustees to share all responsibilities.

What About Successor or Replacement Trustees?

When the settlor designates an individual to serve as trustee, it is possible that the named individual may cease to serve before the trust terminates, due to death, incompetence or a personal decision to resign. The settlor, therefore, may want to name potential successors to that trustee, or give that trustee (or one or more of the trust beneficiaries) the power to designate a successor trustee or trustees.

A corporation serving as a trustee provides permanence and continuity, even where the corporation later is sold to or merges/consolidates with another corporate entity with trust powers.

Because circumstances can change, a settlor frequently provides certain beneficiaries (or other individuals, such as family members or professional advisors) with the power to remove and replace a trustee. This power can be open-ended or restricted, such as allowing removal only under certain circumstances (e.g., when the beneficiary and trustee no longer reside in the same state), or requiring replacement with a specific type of trustee (e.g., a corporation). This power provides flexibility without jeopardizing the trust's purposes.

Summary

Choosing a trustee is an important and complicated decision. A settlor needs to consider the trustee's many responsibilities and determine if an individual, a corporation or both working together can best do the job. An estate planning advisor can assist a settlor with this decision.

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