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Important Decision: Selection of Fiduciaries in Estate Planning

One of the most important decisions clients must make as part of their estate planning is who will act for them when they can no longer act for themselves. The inability to act most often occurs because of death, but, it can also, of course, occur because of an incapacity.

By **Rebecca Rosenberger Smolen and Amy Neifeld Shkedy** | June 28, 2021





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One of the most important decisions clients must make as part of their estate planning is who will act for them when they can no longer act for themselves. The inability to act most often occurs because of death, but, it can also, of course, occur because of an incapacity. Upon death, the choice of fiduciary involves the roles of executor for an estate, trustee for a trust, or guardian for a minor child, while incapacity during life generally would only involve agency to address health care decisions and address financial matters. In both instances, if the client is already serving in a fiduciary role for someone else, it might also involve deciding who should be the client's successor.

For married couples with responsible adult children, the decision-making is generally the easiest. Usually on the death or incapacity of the first spouse, the surviving spouse would serve in all fiduciary roles. However, as couples age, it often makes sense to have one or more children serve as co-fiduciaries with a parent, not only to partner with and support the surviving parent after the first spouse to die (or become incapacitated) is unavailable, but also due to the reality that as parents age they can become less capable of managing their financial affairs and it can be essential to have a younger person involved in an instrumental role. When both parents can no longer act, some clients put all children in the fiduciary roles and let them divide and conquer, while others are concerned about the challenge of having multiple decision makers effectively coordinate with each other and name fiduciaries to serve in succession. Every family dynamic and philosophy about the distribution of power and responsibility is a bit different and must be sorted out with the assistance of counsel for these roles to be properly filled.

For married couples with younger children, or with some not so trusted or capable adult children, it is generally necessary or appropriate to look to other family members, friends or corporate trustees to fill fiduciary roles rather than their children. Also, of course, this is a necessary approach for individuals or couples without children. It can also often be an issue with capable adult children (or other beneficiaries) where significant wealth is involved and there can be a benefit to bringing in more sophisticated individuals or corporate entities to provide beneficial expertise and administrative support to the trust administration process.

The problem with naming individuals is that life is unpredictable, relationships change over time, and selected individuals can have their own health issues or go through challenging periods in their lives for other reasons where they can't handle the added responsibilities of a fiduciary role. While selecting individuals is often preferable to selecting a corporate fiduciary, both because of the personal trust and the relationship to the client's ultimate beneficiaries, as well as due to the generally lower cost, often the most sensible thing to do may be to plan to have a corporate trustee involved.

When a corporate trustee is involved, the trustee can either serve alone or be paired with an individual. When possible, it is good to pair the corporate trustee with an individual so the corporate trustee will have "boots on the ground" to understand the life circumstances of a trust beneficiary. The individual trustee can also serve as a check and balance on the corporate trustee so there is some regular supervision of the trustee's work during the administration period.

In addition, or as an alternative, to identifying an outside individual to serve as co-trustee with a corporate trustee, it is also possible to give a beneficiary or other individual the power to remove and replace the corporate trustee. Such power serves as a check and balance over the trustee, while also allowing the family to efficiently move the trust to a different corporate trustee if, as time goes by, it becomes clear that there would

be a better fit elsewhere. The reasons for a change could be geographic, cost, quality of service or simply personality conflicts that can develop. Moreover, in recent times, staff members at corporate trustees have been regularly changing institutions so the ability to change trustees can also allow for continuity with trusted staff members who move from one corporate trustee to another.

A final note of caution is that it is important to update estate planning documents when selected fiduciaries are no longer appropriate or available to serve. Otherwise, there is a risk of paralyzing conflict, harmful malfeasance or a difficult vacancy to fill that may ultimately need to be addressed by a court process. Such court processes are often cumbersome, expensive, and riddled with strife for the family or other beneficiaries. This is truly an area of planning where an ounce of prevention can be worth much more than a pound of cure.

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