SELECTING YOUR TRUSTEE

Selecting who should serve as your trustee during your incapacity and, ultimately, after your passing is not as simple as you may think. Learn what characteristics to look for when choosing those who will handle the future of your estate.

Craig R. Hersch

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THE FAMILY ESTATE & LEGACY PROGRAM™

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SELECTING YOUR TRUSTEE

Text	While the subject of who to select as your successor trustee could fill volumes of books, our book is rather brief. Nevertheless, worry not! Craig goes into quite a bit of detail that explores the strengths and pitfalls surrounding who takes over your estate after your passing or during a time of need.
Key Takeaways	You can also gain a complete overview of the main ideas of the book by reviewing the key takeaways. Located at the end of each chapter, the key takeaways emphasize the crucial elements covered in each chapter without having to read through every paragraph.
Audio	The recording linked below is not just a spoken version of the written words. In a personal interview, Author Craig R. Hersch discusses the detailed and nuanced elements associated with selecting your successor trustee. Find this interview at **www.estateprograms.com/selectingyourtrustee**
Video	The video summary of Selecting Your Trustee explores the various mindsets associated with who you might want handling the future of your estate. Paired with the scorecard and audio interview, the video summary offers a deepened understanding of the issues at hand.The video is located at **www.estateprograms.com/selectingyourtrustee**
Scorecard	If you flip to the back of the book and unfold the back cover, you'll see a scorecard aimed at the various mindsets of those who you may select to serve as your successor trustee. We encourage you to share this scorecard with your children and loved ones to make the right decision when filling this important office. The results of this scorecard are revealed with the online version at: **www.estateprograms.com/selectingyourtrustee**
ebook	If you want to share all of this valuable information, be sure to direct your loved ones and family members to our website to access the free digital copy of this book. **Visit www.estateprograms.com/selectingyourtrustee**

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Preface

Responsibility Not Privilege

In 2004 my mother, Phyllis Hersch, was diagnosed with acute myeloid leukemia (AML), an aggressive blood cancer with a grim prognosis that usually means the end within a few months, if not a few weeks. My mother and father lived only four miles from my front door in Fort Myers, Florida, so I was the first to learn.

About 24 hours after the diagnosis, my mother, father and I landed in Houston, Texas to seek treatment at The University of Texas' MD Anderson Cancer Center. There, Mom would hopefully qualify for a lifesaving bone marrow transplant: a procedure that, at the time, we neither knew little about nor were we aware of how grueling the entire process would become.

Upon arrival her blood was immediately tested. Then the staff whisked her through the vast medical complex to a room where she endured a painful bone aspiration procedure, extracted from her hip for analysis.

After reviewing her charts, Mom's first doctor told her that she only had an 11% chance of survival and didn't want to take the case. We rushed to her patient advocate who sent us to Dr. Marcos de Lima. I remember sitting in his examination room as he looked my mother in the eyes and said, "Phyllis, I will only take your case if you believe that you can make it. Do you believe?"

Mom emphatically answered, "Yes!" she did believe.

Amazingly, like the proverbial needle in the haystack, they found a donor. His name, we would later learn, was Yiftach Levy, an Israeli who had relocated to San Diego. What is remarkable is that if you saw his picture you'd swear that he could be a relative on my mother's side of the family. For the procedure to work, the match had to be exact, something for which neither my sister nor I qualified, since our genes are half Dad's.

The ensuing nine months would be a living hell for my mother and father. Chemotherapies wiped out any semblance of Mom's immune system. After bringing her nearly to the point of death, the doctors introduced Yiftach's lifesaving bone marrow hoping that it would produce her own healthy marrow, leading to cancer free red and white blood cells.

Even so, there was concern that the new white cells would reject and attack Mom's internal organs, believing them to be foreign invaders. The technical name of this condition is graft-versus-host disease, which, curiously, is something the doctors actually hoped would occur in moderation. I was told that "a little" graph-versus-host would serve to kill off the remaining cancer cells that were expected to remain in Mom's system after the bone marrow transplant.

During this entire process my father, understandably, was mentally paralyzed with worry about the health and life of his wife of 41 years. He was a devoted caregiver, by her side the entire time. My sister and I rented him an apartment near the MD Anderson campus and shipped his car out to him. We took turns flying out every few weekends to keep both of them company and to provide moral support.

While Mom was receiving treatment in the hospital one day, Dad and I were shopping for groceries. "Craig," Dad began, "I think I want you to take over as trustee now. I have so much on my mind, and it's hard for me to make sure the bills are paid on time and that someone is watching over our investments."

I was named as the successor trustee in their revocable trust, which I had drafted. "Are you sure, Dad? It's not like you are incompetent or anything. You're just going through a hard time," I asked.

"Yes, it's just too much for me now," Dad said. "You know that Mom isn't yet on Medicare, and if we miss one of her health insurance payments they'll drop her like a hot potato. Then what will we do?"

I was confident I could help. "Okay, Dad. I'll do it as long as you want me to." I answered. After all, this was my "thing". Who was better qualified than I to serve as my parents' trustee? I was 40 years old, a Florida bar board certified wills, trusts and estates attorney, a CPA, and I helped to form a private trust company to become a founding shareholder on the board of directors.

Little did I know.

There were nights I would lie awake wondering if I had transferred enough money into the account to cover Mom's health insurance payment. The insurer fought us over the $750,000 bone marrow transplant with her slim chances of survival. One slip-up would prove Dad was right, they would do anything possible to drop her coverage.

This was my first experience having to actually perform the work of trustee as opposed to counseling my clients about the duties and responsibilities.

I've always told my clients to think of the offices of trustee, executor, personal representative and agent under a durable power of attorney as huge responsibilities and not as an honor.

Boy was I right. I didn't know how right I was until I had to act.

When Dad's financial advisor called with recommendations, I wasn't sure what to do. I knew my own risk tolerance, but had to guess what was right for Mom and Dad. When we had to sell securities to move money into the checking account, I had no idea what Dad would have done unless I called him.

It would have been even more difficult if I couldn't interact with him because of dementia or Alzheimer's. As it was, I had trouble accessing some of his online accounts because Dad couldn't remember usernames or passwords, or even which email address was the default for resetting those items. My sister was helpful and supportive, but the whole affair was a huge headache.

Then I realized — what if I wasn't a wills and trusts attorney and didn't understand nearly as much about the legal, tax and financial world as I did? How would a client's daughter who is a schoolteacher in Topeka, Kansas help her parents who don't live near her? What assistance might the trust documents give her that she would need if faced with a similar situation to mine?

From those experiences came a deeper understanding of what my client's adult children may have to go through when named as a successor trustee. I reengineered how our clients' trusts dealt with these situations. From the dark cloud came the silver lining that made me create my estate planning process — The Family Estate & Legacy Program™ — and the ability to become more helpful than ever.

Thankfully, my mother survived the bone marrow transplant, but she would have to endure a stem-cell transplant six years later when the disease returned. The stem-cell transplant represented newer medical technology than her previous bone marrow transplant, and would stave off the disease for a few more years. She passed away in February 2016, a full 11 years following the initial diagnosis. We were certainly blessed with more time than we originally thought we would have.

Out of all this came the reason for my writing this concise book. Selecting a successor trustee has more pitfalls to it than one might imagine. It's not only your own demise you are planning for, but also who is to act for you in the event of your incapacity, or simple inability to deal with the responsibilities you take for granted that you once handled day after day.

Acting as a successor trustee is more about duties and responsibilities than it is about holding a position of honor. In these pages, you'll learn the different options you have to select who you name to serve as your successor trustee.

Is your spouse the best option? What about your adult children? Do you select your oldest child, or should all of them serve together? What about a bank or trust company? I'll review the advantages and disadvantages associated with each of these choices and several others.

We'll also review the timelines associated with the different responsibilities of those who serve in this important role. Should you have a different trustee if you become disabled with dementia or Alzheimer's than the trustee who will administer your estate after your passing? Who should the trustee be for your surviving spouse's lifetime? Your children's lifetimes?

As a Florida attorney, I write this book from that perspective. Each state's laws are different, so you will want to check with a qualified lawyer in your jurisdiction before acting. This book is not intended to convey specific legal advice to you or to form an attorney-client relationship. No such relationship can be formed with me or any other attorney associated with these pages without a written engagement agreement. Therefore, any email, telephone, written or other communication with my office prior to a formal engagement would not be governed by any attorney-client privilege.

While every effort is made to convey current information at the time I wrote these chapters, trust laws change constantly. I intend for this book to be a broad overview of the issues clients face when selecting the party that he or she should name in his or her trust documents. I intentionally omit many of the details, caveats and exceptions to the general rules that may apply to specific situations. I also want to point out that when I use gender words, such as he, she, hers, his, him and her; I do not intend to convey any assumptions. Using a specific pronoun instead of a "his or her" reference is a writing style I prefer to make it easier for the reader to understand whatever point that sentence conveys. Please don't interpret my use of gender pronouns as sexist, chauvinistic, or discriminatory in any way.

I welcome your comments, questions and criticisms — and especially your kudos!

Please feel free to reach me at:

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Chapter One

What's a Successor Trustee?

I'm guessing you are familiar with a revocable trust (also known as a "revocable living trust" or a "grantor trust") and wouldn't be reading this book if you didn't have some familiarity with this estate planning tool. Simply explained, trusts are legal contracts between its grantor and the trustee governing how trust assets are invested and distributed.

You usually serve as both the grantor (creator) of the trust and as the trustee (director) of the trust. You are also the primary trust beneficiary for your lifetime, and you can amend the terms of the trust or revoke it in its entirety. If the trust is revoked, then those assets are returned to you.

For all intents and purposes, the trust is another method for you to own and hold your assets. The trust uses your social security number as its tax identification number. There are no separate tax returns for your trust during your lifetime.

The trustee of the trust is the person or entity charged with the responsibility of carrying out its terms. During your lifetime, and so long as you are acting as the trustee of the trust, its terms are simple — you get to do what you want with the trust assets. You can invest in anything you choose, and you can take monies and assets from your trust whenever you want in whatever quantities you desire.

At your death, your trust contains your direction for who inherits your assets and how they inherit those assets.

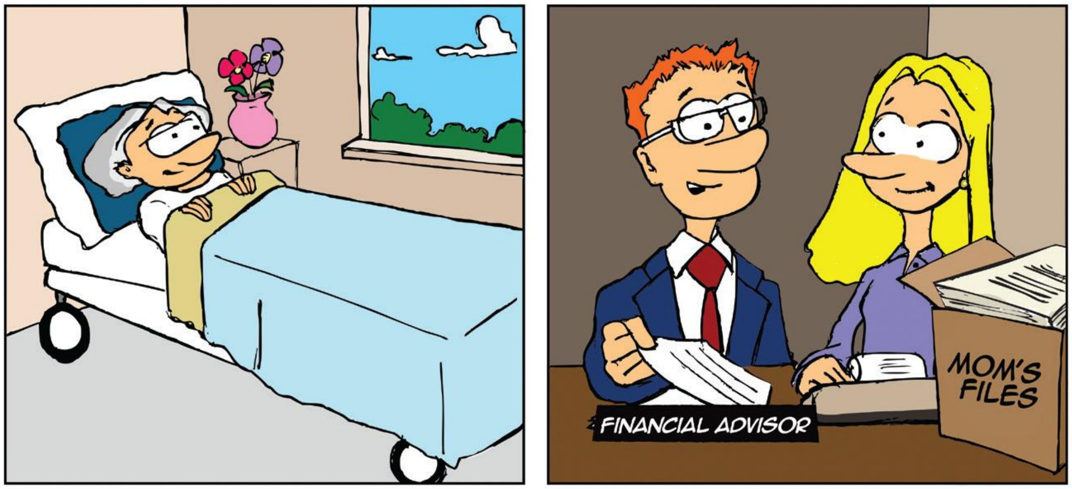
CONSIDER THIS

Sally creates a revocable living trust for her lifetime. She is both the grantor of the trust and serves as the trustee. Her trust states that, upon her death, the trust assets are to be divided between her two children. Sally transfers her home, her bank accounts, her brokerage accounts and a vacant parcel of real estate into her trust. When Sally wishes to withdraw assets, she can do so whenever she wants and in whatever amount she desires. If she wants to move money from her savings account into her trust brokerage account, she can do so at will and can decide to buy and sell the securities titled in her trust brokerage account as she pleases.

The purpose of this book is to review the choices and decisions you will need to make about who will succeed you in carrying out the terms of your revocable trust. In other words, who your successor trustee will be.

More than perhaps any other decision you will make, who you name to serve as your trustee in the event of your disability and your passing affects the success or failure of your estate plan.

Disability Trustee



When considering successor trustee choices, a client's mind will often fixate on the choice for the trustee who will administer the estate upon her death. However, more important to her should be the choice over who will serve as her trustee in the event of her disability.

Who makes the investment decisions or otherwise interacts with her financial advisor if she is stricken with dementia or Alzheimer's disease? Who decides what monies to spend on medical or nursing home care, or to distribute trust assets for the benefit of her spouse or other dependents?

These are weighty decisions, and can have a real economic effect when you are most vulnerable. We'll review your choices and what steps to take to arrive at your decisions in the following chapters.

CONSIDER THIS

Sally names her daughter Victoria as her successor trustee in the event that Sally should become disabled and unable to make legal, tax or financial decisions for herself. When Sally develops Alzheimer's disease, Victoria takes over as Sally's trustee. The trust assets remain for the benefit of Sally exclusively even though she is no longer serving as her own trustee. Victoria is now charged with the responsibility of working with Sally's financial advisor, CPA and attorney to make the investment, tax and legal decisions that Sally would otherwise make. Victoria is a physician with a busy practice and two young children at home. She struggles to find the time to keep up with Sally's affairs, but loves her mother and feels a duty to help in any way she can.

Naming a loved one to take care of your legal, tax and financial affairs in the event of your incapacity often places a significant burden on your loved one's shoulders. It's natural to name someone you trust. What can you do within your trust to make your successor trustee's life any easier? These are questions we will explore further.

Administrative Trustee

Following your death, your successor trustee will interact with your attorney, accountant, financial advisor and other professionals to administer your trust estate and distribute the assets in accordance with its terms. The trustee may decide which assets to sell and convert to cash to pay for taxes and expenses of your administration, and how best to preserve the estate for the beneficiaries during the administrative process.

CONSIDER THIS

When Sally dies her trust continues to name Victoria as the administrative trustee. Sally has two children who share equally under the terms of her trust, daughter Victoria and son Jeffrey. Jeffrey has had alcohol and drug dependency problems throughout his adulthood and has never held down a job for any length of time. Sally's liquid assets total $600,000; she has a home worth $350,000 and a vacant lot worth $50,000. Jeffrey needs a place to live and wants Sally's home as a part of his inheritance. Victoria must decide whether she will distribute the home to Jeffrey, but that would leave his share with little cash for him to maintain the home for the rest of his life. Victoria could, as trustee, instead sell Sally's home and distribute cash and securities that enable Jeffrey to purchase a smaller residence so he will have more cash with which to maintain it.

The trustee named who will manage the administrative phase of your trust will have many important and weighty decisions to make, even in the best of scenarios. We'll review these issues together to clarify and explain how your trust may best address your particular circumstances.

Testamentary Trustee

Some trusts don't distribute the assets outright to the trust beneficiaries following the grantor's death. Instead, the trusts continue on as testamentary (after death) trusts for the benefit of the beneficiaries. It is common for these testamentary trusts to divide into separate shares, and a different trustee may govern each share.

CONSIDER THIS

Sally's trust divides into two shares at her death, one share each for Victoria and Jeffrey. While Sally named Victoria to serve as the trustee for her own share, she didn't trust Jeffrey to manage his share competently as he has suffered from alcohol and drug dependency problems since reaching adulthood. Consequently, Sally named First National Bank & Trust Company to manage the investments and decide on the distributions for Jeffrey's share.

Should you name one child to serve as trustee for a troubled child's share? How do you best protect the inheritance you plan to leave your loved ones? What about protecting the inheritance from creditors, predators and divorcing spouses? Could those situations mandate an independent trustee to shield the inheritance from a divorce court, bankruptcy judge or similar problem? What about taxes?

Who you name to serve as trustee for each stage of your trust will shape the success or failure of your estate plan. Too often these issues are not addressed in the client/attorney estate planning conference. Within these pages we'll explore together the pitfalls and opportunities that exist when making some of the most important decisions when planning your estate.

In the next chapter let's examine many of the different options you may have when naming the successor trustee to your revocable living trust.

Key Takeaways

- During your lifetime you are the beneficiary of your own revocable trust and usually serve as your own trustee;
- If you should become unable to manage your own financial affairs because of illness or incapacity, your disability trustee makes important decisions regarding your financial, tax and legal affairs;
- Your administrative trustee will administer your trust following your death but before your trust is distributed to your beneficiaries;
- The testamentary trustee will govern after-death trust shares that are created and continue on for your spouse and other beneficiaries.

Chapter Two

The Candidates – Interested Trustees

Before deciding whom you want to name in your trust as your successor trustee, you will want to review all of your choices. There are many options to consider, and whom you select to serve as your disability trustee may differ from whom you select to administer your trust following your death. There is nothing wrong with choosing different trustees for different time periods as the responsibilities differ, and therefore one candidate may be better suited for a specific task than another.

Often we name family members to serve as our trustee who are also future beneficiaries and will inherit from our trust. You should know the serious conflict of interest issues confronting anyone who is both a trustee and beneficiary. The temptation exists for the trustee to use money or assets for his own benefit when he isn't supposed to do that. Since courts do not oversee a trustee's operation of trusts unless an interested party files a lawsuit over an alleged misdeed, trustee malfeasance could go on for years before it is discovered.

Before we review the potential trustee candidates, let's first differentiate between interested trustees and independent trustees.

Interested Trustee

As I mentioned, an interested trustee is one who is also a beneficiary. It's very important to consider whether that person will act in a fiduciary sense, meaning he will carry out his duties indifferent to his own personal interests.

CONSIDER THIS

Gary names his son Austin to serve as his disability trustee. Austin and Gary's other son Mike are named as equal beneficiaries of Gary's trust after his death. When Gary develops dementia Austin takes over all of Gary's financial accounts held in the trust. Austin decides to "borrow" $15,000 from his father's bank account to pay some of Austin's personal bills. Austin justifies this to himself since he will inherit half of his father's estate one day anyway, and there's plenty of money. This pattern continues for several years, depleting Gary's accounts. By the time Mike discovers what his brother has done, it's too late. The damage has been done. Mike could bring a lawsuit against his brother to remove him as trustee (and probably should) but to recover amounts is often as futile as attempting to get blood from a turnip.

The single most important issue when naming an interested trustee is whether that person (or entity, as we'll discuss when charitable institutions serve as trustee) can resist the temptations associated with a conflict of interest. A trustee's responsibilities include making investment, tax, legal, and distribution decisions. These are all heightened after your death, especially when your trust continues on for a surviving spouse.

Typically, the trust provides that the surviving spouse will receive all the income that the trust generates (interest and dividends) for her lifetime. Upon the surviving spouse's death, the principal of the trust (the trust assets) is distributed to the remaindermen (defined as the beneficiaries who follow the lifetime income beneficiary, often the children). The trustee is supposed to balance the needs of the income beneficiary against the needs of the remaindermen.

This isn't an easy task. If the trustee invests in bonds, for example, that could maximize the income that the surviving spouse will receive for the rest of her life. However, in so doing, bonds rarely grow in value. When the surviving spouse dies, the remaindermen (the children who inherit following the spouse in this example) could lose to inflation.

In contrast, if the trustee invests in growth assets that generate little in interest and dividends, the remaindermen may be delighted, but the surviving spouse isn't.

Consider the case where the grantor of the trust names his spouse, who is not the mother of his children, as the trustee when she is also the income beneficiary.

CONSIDER THIS

Gary's spouse, Karen, who is not the mother of his adult children Austin and Mike, survives Gary. He names Karen as his successor trustee, and she is the primary income beneficiary of his trust until her death. Karen is an interested trustee with a conflict of interest since she is the not only trustee, but also the beneficiary directly affected by those decisions. Karen ignores her conflict of interest. Rather than acting impartially she invests in high income-producing assets to maximize her lifetime income while sacrificing growth. Austin and Mike bring a lawsuit for damages against Karen for breach of her fiduciary duties and to remove her as trustee.

This problem may be taken care of by language in the trust instrument that directs the trustee to consider the needs of the surviving spouse as the most important consideration, even at the expense of the remaindermen beneficiaries. You can see how tricky it might become, as there are dozens of significant decisions the trustee constantly makes.

While the examples I've illustrated so far show some of the worst-case scenarios, most trustees try to administer honorably. When mistakes happen it isn't always malicious, instead it could be due to ignorance of the many fiduciary responsibilities, or a result of bad advice (or lack thereof) from the trustee's advisors.

Now that you've seen just a few of the issues when considering who should serve as your successor trustee inside of your trust, let's examine the possible interested party candidates. In this chapter I give a brief synopsis so you can get a feel for how the various players are defined. In the following chapters I'll address more specifically the various opportunities and pitfalls that can and often arise.

Your Spouse

A great majority of my clients select their spouse to serve as the first successor trustee (or sometimes as a co-trustee) both in the event of their incapacity and upon their demise. This may seem like a "no-brainer" although it's my feeling that the duties and responsibilities are often underestimated. No one suffers more emotionally from your passing than your spouse, making her vulnerable for at least some period of time.

Strengths

No one knows and understands you like your spouse. Within the perspective of a happy marriage, no one loves you in this same way, and would feel an obligation to carry out your wishes as you would. It therefore follows that your spouse may be the best person to serve in a role that requires a deep understanding to carry out your intent.

Dangers

For the most part, if you are the spouse that has always handled the financial affairs, investment accounts and tax returns, your spouse may be lost and vulnerable stepping into this role. She may also fall victim to the conflict of interest temptations as described above and that we'll delve into deeper in the following chapters.

Your Adult Children

Again, like naming your surviving spouse, a great majority of my clients name an adult child or children in the role of successor trustee once both spouses are deceased. However, when there is more than one adult child, difficulty arises when deciding which child to name, or whether to name several adult children together as co-trustees. An honest assessment of your child's responsiveness and ability to effectively interact with his siblings becomes paramount.

Strengths

Your adult children may understand you as well as your spouse. Hopefully your daughter or son also feels the moral obligation to carry out your wishes as you would. In the event of your disability, you can trust them to keep your best interests at heart, and when you pass, they'll lovingly ensure that your intent is followed.

Dangers

Depending upon how much you've communicated about your financial affairs, your adult child could be blindly stepping into the role of successor trustee. I can't tell you how many times in my professional practice I've had an adult child who had absolutely no idea of his parents' net worth, where the accounts were located and who the advisors are. The conflict of interest temptations discussed above also apply, and this is exacerbated when you figure in sibling rivalries that may have festered for decades. Don't underestimate how the power of emotion, money and losing a parent affect your adult child when she serves as your successor trustee.

Charities

You may wonder why I list charities under "interested trustees", since these institutions aren't related to you. Whenever a charity is named, either as an income beneficiary or as a remainderman, they have a vested interest in the outcome. This can sway their judgment when making investment or distribution decisions; hence a charity may be an interested trustee.

Strengths

Charities often have their own team of professionals who know and understand the role that a fiduciary plays, including how to invest and manage a trust. They won't normally serve in the event of your disability, but are happy to administer your trust upon your passing and until the distribution.

Dangers

When your trust creates a testamentary trust for a spouse or children that continues for their lifetime then, at its termination, distributes to charity, having that charity serve as a trustee creates the same conflict of interest described with other trustee/beneficiaries above. Here, the charity will want as much growth as possible but at the expense of income to the lifetime beneficiary, since to distribute principal ultimately mean less money for the charity.

Now that we've examined interested trustees, in the next chapter we'll review independent trustees.

Key Takeaways

- It is tempting to name a spouse or a close family member as your successor trustee since they know you so well and are likely to carry out your wishes;
- The conflict of interest for a trustee/beneficiary should be considered, including your loved one's ability to both understand and follow the fiduciary responsibilities thrust upon him;
- Likewise, consider your loved one's ability to make good financial, legal and tax decisions;
- The emotional state of a loved one following your death may adversely affect her ability to serve;
- At first glance, naming a charity to serve as a trustee would appear to be a way to select an independent, impartial party. When that charity is also a beneficiary however, the same conflict of interest issues that arise with spouses and adult children also apply.

Chapter Three

The Candidates - Independent Trustees

Now that we've examined the strengths and dangers of our spouse, adult children and charitable beneficiaries, we can compare the independent trustees. By definition, independent trustees have no beneficial interest in your trust. They are truly impartial; investment, distribution and other decisions made when governing your trust have no direct economic effect on independent trustees.

Who are these independent trustees? Most often they are banks, trust companies, brokerage firms, attorneys, CPAs, financial advisors and even distant relatives or family friends can fit the definition. I'll subdivide this category into ***corporate trustees*** which I'll define as banks, trust companies and brokerage firms, ***professional trustees*** that include attorneys, CPAs and financial advisors, and then distant relative and friends, who I'll name ***non-professional trustees.***

Many clients will reject the use of corporate trustees out of hand. It's something they won't even consider. Sometimes it's from a bad family experience.

CONSIDER THIS

Grandpa formed a trust many years ago, naming Personal Service Bank & Trust Company as trustee upon his death. The trust was to continue on for Grandma's lifetime, and after her death it remained in place for Son and Daughter. The family had great confidence in Personal Service Bank & Trust, as they had developed personal relationships with the management team from the President on down to the trust officer. A few years following Grandpa's death (making his trust irrevocable), We've Been Acquired Bank bought Personal Service Bank & Trust. Then We've Been Acquired Bank became acquired by We Don't Know You Gigantic Bank. The original management team had either retired or moved on. The trust instrument didn't give the beneficiaries any way to remove and replace the corporate trustee, which was now an entity that looked nothing like the one Grandpa originally named. State law provided that each successive bank step into the shoes of its predecessor absent a contrary provision in the trust instrument itself. The family experienced high fees, a revolving door of trust officers, and frustrating 1-800 numbers complete with automated menus. Son and Daughter pledged to their own children and grandchildren they would never make the same mistake.

This isn't an uncommon story, and I both understand and commiserate with any family that has put their inter-generational wealth in the hands of a corporate trustee with no means to remove and replace that entity. While there are good reasons to consider corporate trustees (as I'll review in the following pages), I always suggest that my client consider naming a beneficiary or some other trusted individual to have authority within the trust document to have removal and replacement powers.

Corporate Trustees

Corporate trustees, when properly used, can serve an important role. In the preface of this book I described a personal experience when my mother became afflicted with acute myeloid leukemia and my parents set up residence at the MD Anderson Cancer Center in Houston, Texas. In that case I called in a corporate trustee to temporarily act as my co-trustee, as I was extremely busy managing my law practice and raising my family. Despite my excellent qualifications and background, I worried that I would do a poor job of managing my parent's financial affairs. By calling in a corporate trustee, I received immeasurable comfort and clarity delegating day-to-day investment decisions and bill paying duties to a team of professionals while maintaining oversight and veto-power.

When used correctly, corporate trustees can add great value, doing the heavy lifting that you may otherwise discount because you're so used to doing everything yourself.

[**perhaps a story board illustration to accompany the below:]**

CONSIDER THIS

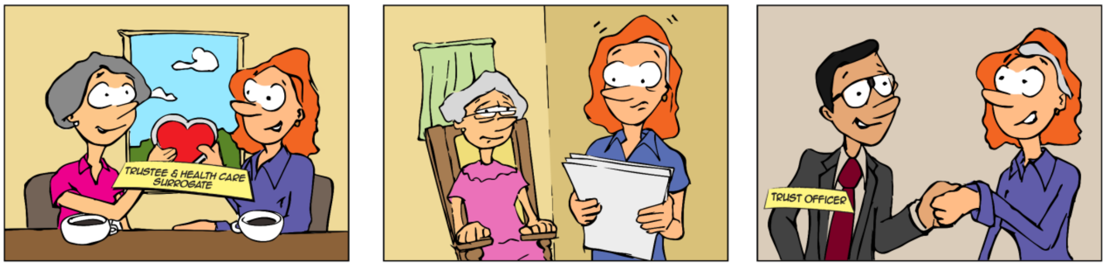
Michelle named her daughter, Becky, to act as trustee of her revocable trust in the event of disability. When Michelle developed dementia, Becky took over the day-to-day tasks of managing investments, paying bills and filing tax returns. Besides the trustee duties, Becky was also Michelle's health care surrogate, so she had to ensure that her mother's care was proper, which included hiring in-home care nurses and figuring out what sources of income or assets should best be used to pay for the care.

While Michelle lived in Florida, Becky was a full-time elementary school teacher in Pennsylvania, married with two young children of her own. Becky loved her mother and felt a loving responsibility to do everything possible for her. Nevertheless it was a lot. She couldn't easily take off work to travel to Florida to care for her mother, and besides, she had a busy life with a husband and children at home. It wasn't even easy to get on the phone with her mother's financial advisor during working hours to discuss how best to pay for the increasing expenses.

Michelle's attorney suggested naming a trust company as a co-trustee to perform many of the tasks that overwhelmed Becky. At first, Becky resisted. However, as problems arose and things slipped through the cracks, Becky agreed. The trust company provided immediate relief, dealing with the many responsibilities while consulting Becky regularly.

The trust officer visited Michelle to make sure that her home health care workers were doing their job and took measures to secure valuables such as Michelle's jewelry from theft since third parties were now frequently in Michelle's home. In addition, the trust officer reviewed Michelle's estate *planning documents and worked with her attorney to ensure everything was up to date. At tax time, the trust officer delivered Michelle's important tax information to her CPA and made sure that her quarterly estimated payments were made.*

All of this took a tremendous burden off of Becky, who didn't know how she got by before employing the trust company. Since the trust document gave Becky the authority to hire and fire this co-trustee at will, Becky had comfort knowing, despite the delegation, she remained in control of all the important decisions.



Cost Concerns with Corporate Trustees

One of the chief concerns when naming a corporate trustee is the cost. Most corporate trustees charge a fee based on a percentage of the value of the trust. The percentage is referred to as "basis points", and the charges are applied annually. Consequently, 100 basis points mean that the annual charge is equal to one percent of the value of the trust. A trust worth $1 million would incur an ongoing trustee fee of $10,000 annually.

Being named as successor trustee alone won't trigger corporate trustee fees. Corporate trustees charge no fees if they are named but are not yet serving as trustee. The charges will only apply once they begin to act.

Most corporate trustees charge as little as 40 basis points (0.40%) or up to 150 basis points annually (1.50%). The fees are relative to the services provided. Acting as a trustee as described in the Michelle and Becky example would certainly cost more than when the corporate trustee is only acting as a custodian over the investments, with no other ancillary services. Another consideration is the amount of family assets under management. As the number of assets under management increase, most corporate trustees charge fewer basis points.

A client who invests $1 million with a corporate trustee may be charged 100 basis points ($10,000) annually, while another client who invests $3 million with a corporate trustee might be charged 86 basis points ($25,800) annually. The more money under management, the smaller the overall percentage charged.

You might believe that a $10,000 annual fee on $1 million under management is a great deal of money, and it is. Consider, however, that you most likely already incur fees on your investment accounts without receiving all the services that most corporate trustees provide. You just may not be as aware since most brokerage statements don't line item their fees. Instead, you must review websites and prospectus reports to discover the charges that apply to your holdings, which most people don't take the time to do.

A quick review of the Fidelity Magellan Mutual Fund, as an example, shows a gross expense ratio of 85 basis points. Therefore $1 million invested in that mutual fund could generate $8,500 of fiduciary and related expenses. What you get for the equivalent of 85 basis points is the same trades, asset management and custodianship that anyone else who owns that mutual fund receives.

CONSIDER THIS

According to a 2013 Yahoo Finance report, Oppenheimer Developing Markets charged amounts equivalent to 136 basis points; Thornburg International Value 129 basis points; Oakmark International 106 basis points; First Eagle Overseas 117; and Hartford Capital Appreciation 116 basis points. Reviewing online prospectus statements, Index mutual funds usually fared much better with fees normally ranging between 30 and 70 basis points, but not all of them. In another report, ASAF Bernstein Managed Index 500 B charged fees equivalent to 204 basis points.

There is no personalized service when you own a mutual fund. No trust officer interacts with you or your loved one. There's no personal review of your total financial portfolio, no creation of income and expense budgets, nor is there any interaction with your family attorney and CPA.

Please understand that I'm not proclaiming that there's anything wrong with any of these mutual fund companies. I'm simply suggesting that you may already pay significant wealth management fees without even realizing it. Further, investing with mutual fund families like Fidelity, Vanguard, Janus, John Hancock, American Century and many others has assisted many Americans with attaining great wealth.

Here, however, I'm reviewing the issues surrounding corporate trustees serving as your successor trustee, which by definition only occurs when you are unable or unwilling to serve. At that time, many other factors in addition to wealth management come into play. Successful estate plans consider not only the cost of hiring a qualified trustee, but also the value in doing so. The fees you save by naming a family member or friend can be entirely offset by the losses resulting from unqualified trustees making poor financial, tax and legal decisions.

Transfer of Asset Issues

Naming a corporate trustee brings forth issues you probably never considered. Your longstanding relationship with your financial advisor may be dislodged when a corporate trustee steps in to serve. Typically, corporate trustees will often move your accounts from your existing financial institution to the trust company's institution.

CONSIDER THIS

Jim had a longstanding professional relationship with Thomas, a Certified Financial Planner who owned his own firm and used Schwab as his firm's trading platform. Jim named Southern Trust Company as his successor trustee. When Jim became incapacitated with Alzheimer's, Southern Trust Company became the trustee of his revocable living trust and promptly moved all of the investment accounts from Thomas' firm to Southern Trust accounts.

This is normal operating procedure, as the trustee has fiduciary duties including responsibility for the investment management. If you do not want your existing financial advisor to be replaced, then you should either name an institution he is associated with to ensure continuity, or name a professional trustee such as an attorney or CPA who can maintain that relationship. If you name a professional trustee, you should discuss your expectations regarding continuing ongoing relationships to ensure that she is comfortable maintaining the ones you have in place.

Another transfer of asset issue that can erupt is when you intend to use the trustee that your current financial advisor is associated with, but that relationship changes.

CONSIDER THIS

Instead of naming Southern Trust Company as his successor trustee, Jim consulted with Thomas, his Certified Financial Planner, and inquired who he should name as his successor trustee so that their professional relationship wouldn't be disrupted in the event of Jim's incapacity. Thomas *suggested Jim name the Charles Schwab Trust Company. Jim instructed his estate planning professional to draft the appropriate language into his trust to make it so.*

After Jim signed his documents, Thomas moved to a different trading platform not associated with Schwab. When Jim became incapacitated, he never amended his trust to name the different trustee so that the professional relationship would continue.

It's therefore very important for those who wish to maintain certain relationships that their trust and estate plan also keep up to date with the financial firm with whom their advisor is working.

Asset Management Issues

When naming a corporate trustee, whether working with your current financial advisor or an employee of a corporate trust department, it's wise to have conversations regarding ongoing asset management during your disability.

Some corporate trust departments, when taking over your portfolio, will liquidate certain assets they don't follow, or those assets they can't own, such as proprietary mutual funds. Also known as "house brand" mutual funds, these mutual funds are both created and managed by an investment and brokerage firm. Many proprietary mutual funds cannot move to an account outside of the firm, requiring the owner to sell it and recognize capital gain or loss.

CONSIDER THIS

Jim had assets outside of Thomas' investment management, including proprietary mutual funds through the ABC Investment Firm. He also owned stock certificates in Proctor & Gamble Company, with whom he spent a good part of his career. Despite Thomas' advice to diversify, Jim did not want to realize the sizable capital gains, so he signed letters of retention relieving Thomas of liability regarding those holdings. When Jim became incapacitated and the Southern Trust Company took over as disability trustee, the proprietary mutual funds were sold along with a sizeable portion of the Proctor & Gamble holdings, resulting in significant realized capital gains.

Steps can be taken to avoid Jim's theoretical outcome with whatever financial institution becomes a successor trustee, but this requires arrangements to be put into place prior to the disability trustee taking office. See Appendix A of this book for specific questions to ask a potential corporate trustee.

Corporate Trustee Not Interested

Before moving away from corporate trustees, I must mention that there are situations where they are not interested in serving as your successor trustee. Despite being named in your trust instrument, if the corporate trustee isn't willing to serve, it has no obligation to serve and may decline.

One such situation is where the financial assets under management aren't significant enough to warrant the corporate trustee's minimum annual fee. If your financial assets aren't more than $500,000 in value, then naming a corporate trustee may not be viable.

The higher the amount under management, the greater likelihood the corporate trustee will serve. Some institutions have $1 million minimums, for example, and others even higher. Always check with your intended corporate trustee before naming them in your legal documents.

Corporate trustees also decline to serve when a major portion of your net worth comprises real estate and closely held business interests. Corporate trustees are in the business of managing investment portfolios, not family businesses or real estate.

If either situation applies to you yet you seek an independent trustee, consider a professional trustee.

Professional Trustees

An alternative to a corporate trustee is naming a professional such as an attorney, CPA or financial advisor. Like a corporate trustee, professional trustees are independent parties who don't have a beneficial interest in the trust, and presumably understand the legal, tax, financial and fiduciary role to play when serving as trustee.

Attorneys

It's common, in fact, for attorneys to act as trustee, particularly in the northeastern United States. The advantages of naming an attorney to serve as your trustee in the event of your disability or death are obvious, especially if the attorney drafted the trust itself.

What may not be so obvious is the conflict of interest that the attorney will have when serving. An attorney's duty is to his client. Once that attorney becomes the trustee, now he also has fiduciary duties to the trust beneficiaries. These duties could conflict.

The counter-argument to this is that when serving as disability trustee, the attorney's client and the beneficiary of the trust are the same. Upon that client's death, the attorney would normally represent the trustee of the trust, who has fiduciary duties to the trust beneficiaries.

This kind of potential for conflict exists and should be considered carefully by both you and your attorney before making this selection.

CONSIDER THIS

Leonard named his attorney, Dalton, as his successor trustee. When Leonard becomes incapacitated, Dalton steps in to serve. Leonard's wife, Marcie, asks Dalton to reveal confidential communications that Leonard and Dalton had while drafting the trust. Dalton never represented Marcie, and therefore refuses to disclose the confidential communications, citing the Code of Professional Responsibility. Marcie persists, hiring her own lawyer who argues that his client has a right to know based upon her status as a future beneficiary of the trust. This sticky situation could have been completely avoided had Dalton not been named, or had Dalton not accepted the office of trustee.

CPAs

CPAs serving as trustee are less common, but don't appear to have the same legal conflict that an attorney may have. The issue here is whether the CPA fully understands the duties and responsibilities involved with the office. My experience is that most do, but again it is important for you and your CPA to have frank discussions about expectations before proceeding down this avenue.

Financial Advisors

Now let's consider naming your financial advisor himself, rather than his financial firm, which would be a corporate trustee. I've had several clients want to name their financial advisors as successor trustee, and the financial advisors themselves are usually enthusiastic about taking on the role — at first.

The problem lies with the FINRA (Financial Industry Regulatory Authority). Most broker-dealers don't allow their financial advisors to serve as fiduciaries for their clients or for anyone else. They worry that if the financial advisor were to be sued, the financial firm would also be named as a party defendant. The financial firms would rather you name their corporate trust department, which has built in policies and procedures for dealing with the many situations that arise in a trust administration your financial advisor may or may not be familiar with.

Not that all financial advisors are prohibited from serving as your trustee. If that's something that both of you want, then I suggest that you investigate the possibility. Just make sure that he runs it by his compliance officer first, and obtains that consent in writing. You wouldn't want to be in the situation where your financial advisor is named, you subsequently become incapacitated, and only then he finds out that his compliance office won't allow him to serve.

Distant Relative or Family Friend

I classify distant relatives and family friends who are not beneficiaries of the trust as non-professional trustees. On the surface, naming a distant relative or family friend as your successor trustee can seem like a good idea. I must admit that this is one I would normally try to talk my client out of. You may already have begun to realize that the duties, responsibilities and liabilities of your successor trustee are significant, as well as the time commitment necessary to do the job right.

With that said, I've seen an uncle to adult children beneficiaries calm down a volatile family situation and then successfully administer his deceased brother's estate. These situations are rare, however. This is a damned if you do and damned if you don't proposition like no other.

If everything goes smoothly, then the beneficiaries don't appreciate the time, effort and responsibilities involved. The distant relative or family friend isn't a beneficiary, so when she takes a trustee's fee, the beneficiaries wonder why she needs to get paid anything at all. It's a lot to ask someone to spend time and effort only to receive nothing for it.

If instead something goes wrong, then blame will soon follow. Unless you have beneficiaries who are likely to be warring and suspicious of one another, but will respect the authority of the individual you intend to name, then I would advise that you shy away from this choice. Even if the calming influence is important, consider naming this individual as a co-trustee rather than the sole trustee.

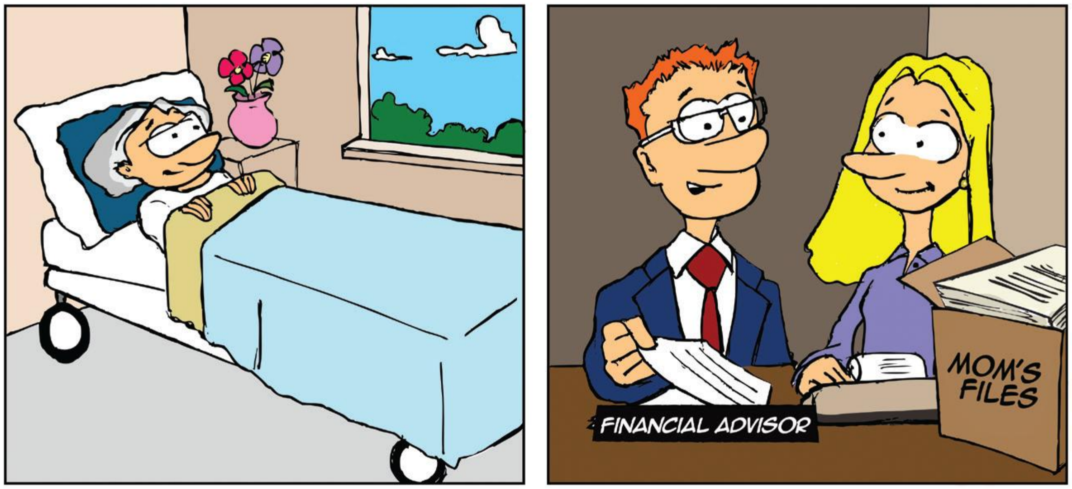
In the ensuing chapters we'll review together specific situations, and how you might use interested trustees, independent trustees, or some combination of both to achieve estate planning success that includes wealth preservation and family harmony.

Key Takeaways

- Independent trustees by definition do not have a beneficial interest in your trust and are therefore more likely to carry out their fiduciary duties impartially than would interested trustees;
- Independent trustees include corporate trustees, professional trustees, and non-professional trustees;
- When naming a corporate trustee, it's important to consider giving a family member, beneficiary, or trusted individual the power to remove and replace the bank, trust company or financial firm with another;
- Corporate trustees usually will transfer or consolidate your trust investment accounts under their fiduciary umbrella. They may sell certain investments when doing so;
- Corporate trustees often won't serve when your investment portfolio doesn't meet their minimum requirements or when your net worth consists mainly of real estate and closely held business interests;
- Professional trustees include attorneys, CPAs, and financial advisors;
- Attorneys who represented you in drawing your trust may have difficult conflict of interest issues to navigate when serving as trustee;
- Financial advisors should seek written permission from their compliance officers before agreeing to be individually named;
- Despite the fees, independent trustees may save your estate money overall from poor decisions made by unqualified trustees;
- It's usually not a great idea to name distant relatives or family friends as your successor trustee, except in rare situations where such an individual might provide a steady, calming influence in an otherwise volatile family situation.

Chapter Four

Serving During Your Disability



As I wrote earlier, when considering who will serve as the successor trustee to your revocable living trust, it's likely that you'll first think about who will serve upon your demise. However, even before naming the successor trustee, there is the important but often overlooked office of disability trustee.

Your disability trustee, by definition, will manage your trust assets during a period of disability. That period may be short term, such as if you have an extended hospital stay, where afterwards you take back the office of trustee; or the period could be long term as in a situation where you contract dementia or Alzheimer's disease and could therefore last from the initial period of disability until your death.

When accepting the office, your disability trustee will likely be thrust into managing your investments, paying your bills, deciding which of your assets are best used to do so, and may even bear the responsibility of selling your home if it becomes necessary or prudent due to prolonged illness.

This means that your successor trustee will need to know what assets you own, who your financial, tax and legal advisors are, and be responsible in making timely decisions.

Before we delve into these various aspects, let's first consider whether your revocable trust adequately defines just when you should no longer act as your own trustee, bringing in your disability trustee.

Defining Disability

Many revocable trusts make a simple conclusory statement indicating your successor trustee without defining specifically what is and when you are considered disabled. The Family Estate & Legacy Program™ (described in Chapter Nine) takes care of these issues by clearly defining disability inside your trust document.

It should come as no surprise that "disabled" is a subjective term, open to interpretation. Of the trusts that actually define the term, many rely on a physician's statement. A physician qualified in determining mental capacity, usually a neurologist, is called upon to issue an opinion whether whoever is acting as trustee has the requisite capacity to carry out the normal day-to-day activities.

CONSIDER THIS

Kevin, a son of one of my longtime clients Jerry, called my office. "Craig, we have a problem," Kevin began, "I'm down from Michigan, and when I arrived at Dad's condo there was a pile of unopened mail of bank and brokerage statements, unpaid bills and all sorts of things. I asked Dad if it was okay for me to go through it, and I found that he had written a $10,000 check to the housekeeper! He clearly made out and signed the check, but when I asked him about it he had no recollection."

I suggested that Kevin take Jerry to a neurologist. The doctor later confirmed Stage 3 Alzheimer's disease. We then initiated The Family Estate & Legacy Transitional Event Sequence™ (See Appendix C) replacing Jerry as his own trustee with Kevin, who was named his successor disability trustee.

When you become a financial danger to yourself, then it's time for your disability trustee to step in. The problem is that most of us won't admit when we're not making wise choices any longer and are often unwilling to give up the reins. Compound this with physicians who are fearful of liability and are becoming less likely to sign any document that would remove a patient from acting as trustee, and you have a potential stalemate situation.

One effective means of dealing with this situation is to name a disability committee whose purpose is to remove any trustee from acting. While the committee would certainly want a physician's opinion as to the trustee's condition, such a statement is unnecessary. A majority vote of the committee could remove the acting trustee.

Sometimes trustees won't agree to meet with a physician for an assessment. The trust document could address this situation by deeming the trustee incompetent if he won't agree to a checkup. There are many ways to deal with this problem, and it's preferable if you and your attorney discuss these issues ahead of time and include appropriate language so you or any trustee that follows you won't become a financial danger to you or to the other trust beneficiaries.

A client will occasionally express concern that the parties who he names on a disability panel will remove him unnecessarily. I have a few responses: First, you should name individuals who love you and who you trust, or some combination. You can include your attorney, CPA or financial advisor with your spouse and children, for example. Second, you are always in control of your trust. If you are improperly removed as your own trustee, then you can always amend the trust and name yourself in that office again. Third, I offer anecdotal evidence that in my 27 years of practice (at the time I am writing these words) I am unaware of any committee that removed a client as his own trustee too early, although I can point to several instances of the removal coming too late.

Who Best to Name Depends on Your Unique Situation

We now arrive at the point to consider the best party to act as your disability trustee. This depends upon your personal family and financial situation. If you are in a long term marriage, have children of that marriage, a good legal, tax and financial support team and an uncomplicated estate with investment assets and a home, then your spouse may be well suited to serve as your successor trustee.

If, however, your situation is more complicated due to blended family issues, supporting an adult child beneficiary, real estate investments, closely held business interests, a large taxable estate, a sophisticated estate plan or a variety of other more complicated situations, then you may want to consider naming an independent trustee along with a spouse or family member.

You also can divide responsibilities, although when doing so you want to make sure that your trust clearly delineates who manages what and, in the event of a conflict, whose decision controls.

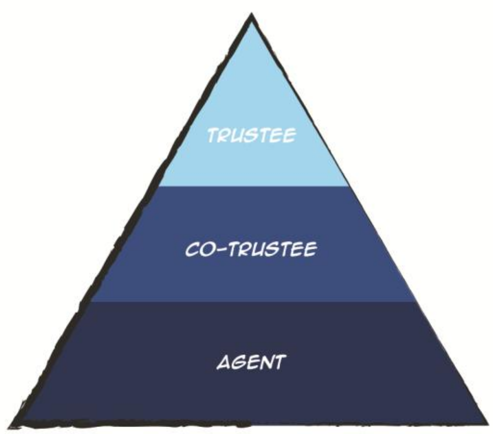
CONSIDER THIS

Benjamin's trust estate includes a family business where son Roger is a co-owner and executive. His homestead is in Florida, and he owns a Minnesota lake cottage. Benjamin's investment accounts total several million dollars, and he has minority interest investments in closely held partnership entities. At the time of his disability, Benjamin was married to his second wife, Sharon, and had two other children, Fred and Linda. Working with his legal team, Benjamin named a corporate trustee as his successor disability trustee to watch over the investment assets, while he named Roger as trustee over the family held business and closely held partnership assets, while naming Roger and Sharon together as trustees over the residence properties. In the event of conflict, as majority vote of the corporate trustee, Roger and Sharon will have control. Roger and Sharon acting together can remove and replace the corporate trustee.

As you can see in Benjamin's example, you have many options when naming a successor disability trustee. Benjamin limited the corporate trustee's fees by not putting them in control of assets they want no part of anyway, the closely held business interests and the residences. Instead, the corporate trustee is solely responsible for professional money and investment management, which they are in the business of providing.

Benjamin gave Sharon a say in the residences since she is directly affected by them, and because Roger's livelihood is tied up in running the family business, he is the logical trustee to control and vote his father's shares.

When naming any corporate trustee as I noted in Chapter Three, it is good practice to name a committee that can remove and replace it. Here, Benjamin chose his wife and son Roger. Family dynamics will frequently dictate these choices, and frank conversations should, in the drafting phase, take place between the parties to ensure that they are ready, willing and able to serve in their assigned roles. More on this follows in Chapter Nine.



Agent or Co-Trustee?

It's important to understand the difference between naming a corporate fiduciary as a trustee, co-trustee or as the trustee's agent. Most revocable trust agreements give the acting trustee a power to hire professionals such as an attorney, CPA and financial advisor, including a bank or trust company. When so hiring, the trustee develops an agency relationship with the professional firm.

In these agency relationships, the trustee is responsible for the consequences of the decisions made. If there is professional malpractice by any agent, the trustee would have to be the party to prosecute the lawsuit.

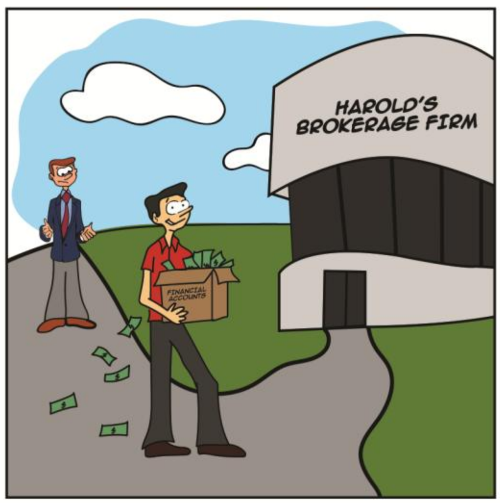
Conversely, if the trustee names a corporate fiduciary as a co-trustee, then that financial firm, bank or trust company has equal liability to the trustee, and the beneficiaries can bring a lawsuit directly against the fiduciary for alleged malfeasance.

This is a crucial distinction, notably when essential financial decisions are being made. In the preface to this book I reviewed my personal experience when serving as a trustee for my parents when my mother underwent treatment at the MD Anderson Cancer Center in Houston, Texas. When I found myself overwhelmed with helping my parents as well as tending to my own busy life, I decided not to hire a corporate trustee as an agent, but rather name them as a co-trustee to my parents' trust.

By naming the corporate trustee as a co-trustee, they had substantially more liability if, for example, they managed bill-paying services and missed my mother's health insurance payment. You may recall she wasn't yet on Medicare and her health insurance company was balking at the $750,000 cost of a bone marrow transplant to save her life. The insurance company would have dropped her like a hot potato if a premium payment had not been timely paid.

If I had instead hired the trustee as my agent, the entire liability would have completely fallen on my shoulders. When considering who will act as your disability trustee, consider all the responsibilities, and whom you wish to make responsible for all the various decisions.

Hiring and Firing Existing Advisors



It should be stressed that along with the ability to appoint legal, tax and financial agents, your disability trustee has the authority to replace your existing relationships. Sometimes this might be a good thing, depending upon whom you have serving in these roles.

Then again, this power can also be dangerous.

CONSIDER THIS

When Doris became incapacitated, her son Nathan took over as successor trustee. Nathan didn't know Doris' financial advisor, Thomas, that well but had great confidence in his own advisor, Harold. Nathan moved all of Doris' financial accounts to Harold's brokerage firm. Within eighteen months, Harold had lost a significant portion of Doris' wealth. Had Doris been competent, she never would have moved her assets away from Thomas, but her son made the fateful decision.

It's important when you name family members or friends to serve as your trustee that they are familiar with your existing professional relationships, and that you have expressed your confidence (or lack thereof) with them. One way to solidify your current financial relationship is to name that corporate trustee as your successor trustee or co-trustee. Doing so would mitigate the possibility that the Doris situation described above happens to you.

Supporting Others with Your Trust Assets

While you are alive and well, using money or assets titled in your trust for your spouse, a dependent child, or someone else that you are helping out for whatever reason is no big deal. Once you become disabled, however, and someone else is acting as your trustee, then what you might think is intuitive isn't.

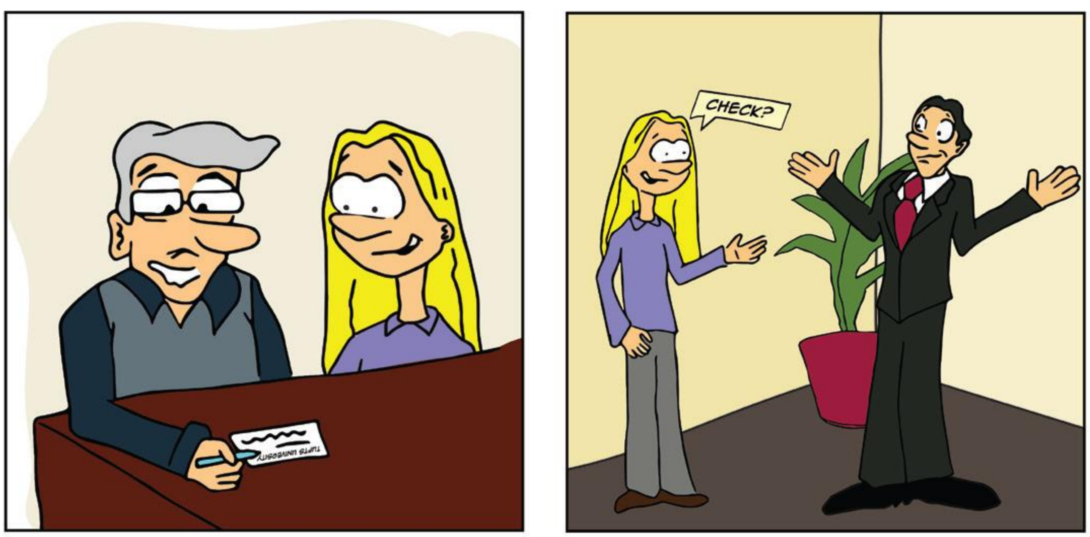
CONSIDER THIS

Community Bank & Trust Company is acting as Sam's successor trustee as he requires expensive nursing home care. Sam is in a second marriage with Diane and has adult children from his prior marriage. It appears that Sam's move into the nursing home is permanent, and his children are pressing the trust company to sell his home to pay for his care. Sam is no longer competent to understand these types of issues and decisions. Diane does not wish to vacate the home, even though it is in Sam's trust and she owned no interest in it. One of Sam's daughters, Julie, insists that Sam would not want Diane to have to move somewhere else, but the other children maintain that Diane has sufficient assets of her own. If Sam's trust document doesn't give clear direction on these matters, then Community Bank & Trust will have a difficult decision to make.

Continuing gifts are yet another issue that many trusts don't address. The IRS has ruled that if a trustee (or durable power of attorney) does not have the express authority to make gifts from the grantor's assets, then those gifts will not be treated as "present interest" gifts. A gift must qualify as a present interest gift to qualify for the annual gift tax exclusion, making the gift tax free.

CONSIDER THIS

Sam had been making gifts to pay for his granddaughter Danielle's tuition to Tufts University. The tuition exceeded $25,000 per semester, but was considered gift tax free because Sam had been making the payments directly to Tufts, qualifying it for an unlimited federal gift tax exclusion. When Sam became incompetent, his trust provided no direction regarding continuing gifts, so Community Bank & Trust Company could not continue to make the payments on Sam's behalf while Sam was incompetent.



The same example could be made if Sam were supporting a family member's health expenses.

Another reason to create gifting powers is to allow your trustee to transfer assets from your trust for advanced estate planning during your disability, including Medicaid planning. When creating these powers, however, you are also giving the trustee significant leeway to "raid the trust account." This speaks to several concepts, including the confidence you have in whoever you have named as your successor trustee, and whether it is or isn't a good idea to have a disinterested trustee fill a trustee or co-trustee role, providing a check and balance.

When considering whom you want to serve as your disability trustee, the concepts discussed in this chapter (and more!) are all possible situations he might find himself in. You probably now appreciate the difficult decision you have in whether to name an interested trustee, a disinterested trustee, or some combination as your disability trustee. Take your time to think through various scenarios your trustee might encounter should you become incapacitated, and then discuss your concerns and feelings with your legal team. After that careful thought and contemplation you are prepared to name the best parties to fit your situation.

Key Takeaways

- Who you name as trustee in the event of your disability is one of the most important estate planning decisions you'll make;
- Know how your trust document defines disability;
- Consider naming a disability panel to remove any incapacitated trustee;
- Discuss your expectations with those who you intend to name as disability trustee;
- Ensure your trust contains powers to delegate tasks and hire co-trustees when necessary;
- Discuss the importance of retaining your current professional relationships, or further solidify those relationships by naming your current corporate trustee as the disability trustee or co-trustee.
- If you financially support others, make sure that your trust allows your disability trustee to continue that support should you become incapacitated, and that you have discussed your intent with whomever will serve as your disability trustee;
- Gift powers can be both useful and dangerous.

Chapter Five

Administering Your Trust After Death

The next timeline event is one that no one wants to consider. There is a misconception that when you pass away with a revocable living trust, the trustee only needs to divide up the assets and make distribution.

That couldn't be farther from the truth, because your administrative trustee (the trustee responsible for administering your trust estate in the period following your death) has a host of obligations to fulfill before she arrives at the point where she can divide and distribute the trust assets. The scope of this book is too narrow to review all the steps that should be accomplished. For this, I point you to www.estateprograms.com where you'll find The Estate Settlement Program™, which is a seven module process where your legal team leads your trustee through the trust administration.

You can also read another book I've published, *Legal Matters When a Loved One Dies.* That book defines the various roles and functions that your administrative trustee will take on and accomplish in much greater detail than the space available in this book.

To select the person or entity that will serve as your administrative trustee, let's consider some of the functions she will perform between the time of your demise and distributing your trust assets to your beneficiaries.

Marshall the Trust Assets and Obtain Date of Death Values

Your trustee will generally have to make sure she identifies all the assets that are in your trust, and work with your financial advisors and appraisers to obtain the date of death values on the financial assets and the real estate and other assets such as your closely held business assets.

CONSIDER THIS

Recall Benjamin from an earlier example who owned a family business with his son Roger, a Florida homestead, a Minnesota lake cottage, investment accounts totaling several million dollars, and minority ownership interests in closely held partnership entities. Before the due date of the federal estate tax return, Benjamin's trustee will need to obtain the date of death values of the investment portfolios, appraisals on the real estate, and will hire a business appraiser well versed in estate tax law to value his minority interests in the family business and closely held business entities. This process must start soon following Benjamin's death, as to value business interests takes time and effort.

Finding the assets could be half the battle for many successor trustees. In some trust administrations this task is made easier because you kept your successor trustee "in the know" regarding where you keep your various bank and brokerage statements, deeds to real property, and business interests. In others the successor trustee is completely lost, not knowing where to find this information. Being organized and communicative with those you have named in this important role will greatly assist her efforts when the time comes.

Determine Whether to Liquidate Assets

Since the administrative time period is short (anywhere from as little as four months to two years for complicated estates) your trustee may liquidate assets prone to large market fluctuations, since it is the trustee's responsibility to protect and preserve the assets rather than grow them. The step-up in tax cost basis equal to the date of death values mitigate the capital gains that would have otherwise triggered income taxes, so the disincentive to sell assets isn't as strong for your administrative trustee.

CONSIDER THIS

Benjamin made fantastic investments in ABC Company, which mushroomed in value over the past several decades. ABC Company's value grew so much in Benjamin's portfolio, in fact, that it made up over half of the value of his entire investment holdings. Despite advice from his investment advisors to sell some of the stock to diversify his portfolio, Benjamin sold none of the stock during his lifetime because it paid a healthy dividend, and he would have paid significant capital gains taxes. When Benjamin died, however, the step-up in tax cost basis eliminated the capital gains issue, and the trustee had significant liability under the "prudent investor" rule. If ABC Company stock nose-dived in value between the time of Benjamin's death and the distribution to the trust beneficiaries, the trustee could be held liable to the trust beneficiaries for failing to diversify.

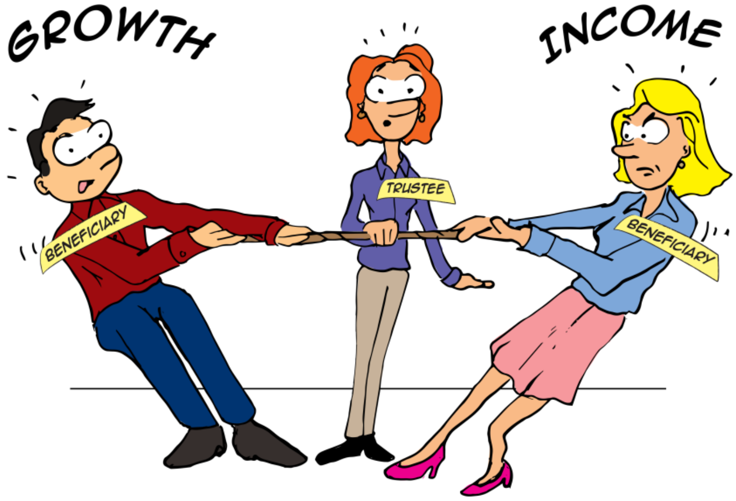
Make Income Distributions for Ongoing Trusts

Your trust may continue on for your spouse or others, so your trustee will have to decide upon the investments to create an income stream for those beneficiaries while balancing their needs against the needs of the remaindermen beneficiaries. She consequently has to look not only at the present needs of the trust for its administration, including raising money to pay taxes and administrative expenses, but also to the present and future needs of the beneficiaries.

Carry On or Sell Business Interests

If you own a closely held business interest in your trust at the time of your death, the trustee will manage either continuing the business for the benefit of the beneficiaries (until that interest is distributed to a beneficiary) or liquidating the interest. Sometimes the business is sold while at other times the business has no value and must be shut down.

Resolve Disputes



There are two basic types of disputes that a trustee may have to confront while administering her loved one's estate. The first is a dispute that existed at the time of the death of the decedent.

CONSIDER THIS

Benjamin is involved in litigation at the time of his death. His personal representative and/or trustee must continue to defend, prosecute or settle the lawsuit following Benjamin's death.

While rare, the second type of dispute is one that arises during the trust administration itself. Benjamin's trustee might be sued by a beneficiary, creditor or other party in which case the trustee would be responsible to defend, prosecute or resolve the dispute.

Clear Creditors

While many clients believe that they won't have any creditors at the time of their death, the trustee may be held personally liable if she makes distribution before paying off your estate creditors. Typical bills include doctors, hospitals, and credit cards. Secured creditors such as mortgage lenders and automobile lenders are also dealt with. There are certain legal procedures that must be followed under state law to ensure that all creditors are notified and have filed a claim. The estate's attorney will guide your trustee through this process.

Pay Taxes

The trust or estate administration may be required to file an estate tax return nine months following the date of death if the value of your estate is over the federal estate tax threshold. If you own properties or residences in states that have an estate tax, a state estate tax return may also be due. Your administrative trustee will work with your tax return preparer, obtaining appraisals on real properties and closely held business interests, informing the tax return preparer of the date of death values on your investment portfolios, along with a host of other information required for those returns.

If tax is due, your trustee will need to work with legal counsel to ensure that the correct sources of the funds to pay the taxes are used, as federal and state law and the trust governing document itself governs from where those payments are made.

In most estates, fiduciary income tax returns will also be due. State law governing "principal" and "income" distributions, along with the trust document will also dictate how the income tax burdens are divided between the trust and its beneficiaries.

CONSIDER THIS

Irrevocable/Testamentary trusts that accumulate income pay taxes on a compressed tax rate schedule. In 2015 trusts that accumulate more than $12,000 of income pay the highest marginal income tax rate, 39.6%. In contrast, when the trust distributes all the income, the trust does not pay the income tax, instead the beneficiaries pay at their own marginal tax rate.

Prepare Accountings

Before distributions may occur, the trustee has a responsibility to prepare an accounting that is distributed to the beneficiaries for their approval. The accounting begins with the date of death values of the trust assets, adds the income earned and capital gains realized, subtracts (and reports) the expenses paid, including all professional fees, subtracts capital losses realized, taxes paid and reserves for future expenses and taxes, and arrives at a schedule of proposed distribution.

If any beneficiary objects to the accounting, the trustee must either resolve the issue with the beneficiaries or take the accounting to a court for approval. The attorney will draw up a release and consent which confirms the beneficiaries' approval of the accounting before distributions are made.

Make Distributions

The administrative trustee is responsible to make partial and final distributions. The specific bequests of certain assets, properties or dollar amounts are simple and easy to accomplish. The more difficult decisions arise when the trustee must fund testamentary trusts, such as a marital trust that continues on for the benefit of the surviving spouse.

Your revocable trust may contain several testamentary trusts at your demise. Besides marital trusts, there may be family trusts, trusts built in for adult children or grandchildren, and all of those trusts may be subdivided into estate and generation skipping tax exempt and non-exempt sub-trusts.

Even if there are no testamentary trusts, there is often more than one beneficiary among whom the trustee will divide the assets.

Choosing the trust assets to use to satisfy the bequests can make for difficult decisions. Assets will each have unique growth and income attributes. Some assets, such as a residence, will have continuing carrying costs, while others, such as closely held partnership interests will have their own sets of issues. The various tax attributes of different classes of assets will have an effect on the beneficiary who inherits them. The trustee will work with the trust attorney and CPA to consider the alternatives and arrive at a plan of proposed distribution for the beneficiaries to approve.

Selecting Administrative Trustee

As you can determine from this brief chapter, the trustee you select to administer your trust following your death may be confronted with many technical issues. While that trustee will have your team of legal, tax and financial professionals assisting her, you should consider the relative strengths and weaknesses of whoever you believe will be fit to serve this role, and consider whether a co-trusteeship with a corporate or professional trustee might be necessary in your trust administration.

Key Takeaways

- Who you decide to name as your disability trustee may or may not be the right fit for the responsibilities of the trustee who will administer your trust estate following your death;
- Your administrative trustee will likely have many serious responsibilities, and those responsibilities carry significant liability along with them;
- You will want to arm whoever you select as administrative trustee with information relative to your assets, whether there will be any unusual issues in your estate administration, and introduce your administrative trustee to your legal, tax and financial advisors;
- Consider naming a corporate or professional trustee to help any interested trustee you have named with the technical and complex issues that accompany this role.

Chapter Six

Continuing Marital Trusts

After completing the trust administration phase, testamentary trusts are often established for the trust beneficiaries, particularly when a spouse survives. Often referred to as "marital trusts", these trusts may or may not qualify for the federal estate tax marital deduction.

A surviving spouse receives income from the marital trust, with principal available when the income doesn't cover the surviving spouse's needs. These needs are defined as providing for her continuing health, education, maintenance and support.

You may wonder why the words "health, education, maintenance and support" are so frequently used when describing distribution standards within estate plans. Those words are deemed to be an "ascertainable standard" under the Internal Revenue Code. As such, the beneficiary (here, the spouse) may also serve as the trustee of the trust share, and not have those assets included in her estate for federal estate tax purposes.

If a spouse, child or other beneficiary who is also serving as her own trustee of her testamentary trust, so long as the principal invasion rights are limited to an ascertainable standard, the beneficiary/trustee is not treated as having ownership over the trust assets. This remains true even though she has the power to determine investments and make distribution decisions.

This begs the question. Should you name your surviving spouse as the trustee over a continuing trust of which she is a beneficiary following your death? Of course, the answer depends upon a variety of circumstances, as we've learned in preceding chapters.

Those in a long-term marriage with a spouse, one who is also the parent to the children who inherit the trust upon the death of the surviving spouse, and where the spouse is comfortable serving in the role of successor trustee, can determine she is probably the best choice. Most married couples want the surviving spouse to have control over the trust assets and investments, and to make distribution decisions.

CONSIDER THIS

Jerry named his wife Elaine as the successor trustee to the marital trust share held for her benefit. Elaine is also the mother of their two adult children. Elaine is comfortable serving in this role as she is both familiar and confident of her family's finances. She also worked with her legal, tax and financial advisors at every stage of the estate plan through Jerry's trust administration following his death.

Blended Family Situations

When your spouse is not the parent to your children, naming your spouse as a beneficiary/trustee over amounts that are to benefit all of your loved one's may set the stage for conflict. Recall the Gary and Karen example we reviewed in Chapter Two.

CONSIDER THIS

Gary's spouse, Karen, who is not the mother of his adult children Austin and Mike, survives Gary. He names Karen as his successor trustee, and she is the primary income beneficiary of his trust until her death. Karen is an interested trustee and has a conflict of interest both as the trustee making the decisions and the beneficiary directly affected by those decisions. Karen ignores her conflict of interest, rather than acting impartially she invests in high income-producing assets to maximize her lifetime income while sacrificing growth. Austin and Mike bring a lawsuit for damages against Karen for breach of her fiduciary duties, and to remove her as trustee.

While not common, you can imagine tensions between income and remaindermen beneficiaries of the same trust share. The lifetime income beneficiary would prefer to maximize the distributions she'll receive, while those that inherit following her death are more interested in the growth of asset values during her lifetime. Generally speaking, these goals compete.

In many states, including Florida, statutes allow the trustee to convert an income trust into a "total return unitrust" that pays an annual percentage of the trust assets rather than the income. This allows the trustee to disregard whether the assets are producing interest and dividends. Instead, the trust pays a percentage of the trust value each year to the spouse. So long as that value grows, both the income beneficiary and the remaindermen beneficiaries can be satisfied.

A surviving spouse may not have knowledge of these available options on her own unless she is an attorney versed in these matters. She's not likely to be consulting with the attorney regularly, since distributing the trust assets culminated the trust administration process.

Adding a Disinterested Trustee

One solution to mitigating the spouse's dual role is to select a disinterested professional or corporate trustee to serve as her co-trustee. To give the surviving spouse maximum control when naming a co-trustee with her, the trust instrument could allow her to remove and replace her co-trustee at will. By having a professional at her side, she has a second opinion to balance her fiduciary role against her beneficial interests. Further, she has someone who may point out avenues such as the total return unitrust she may not have known were available.

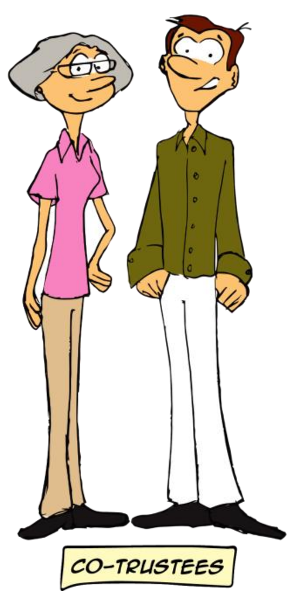
A well thought out trust not only allows the spouse/trustee the ability to name a co-trustee, but also to name a professional/corporate trustee as an agent. As an agent, the professional/corporate trustee does not have the same authority as the spouse/trustee, or the liability. By providing these options, the spouse/trustee can meet with the trust attorney and decide whether to use a professional/corporate trustee and if so, at what level.

In some circumstances, it may be appropriate to name a disinterested co-trustee that requires a vote of at least one remaindermen in addition to the spouse to remove and replace. Perhaps you're worried about your surviving spouse having dementia, or moving the trust assets to a financial advisor of whom you don't approve, or reacting to family relationship issues. Any of these could point to such an approach.

Another option is to name a disinterested, corporate trustee as the sole trustee. Here you are guaranteed an impartial fiduciary. The issue here goes to whether the surviving spouse feels he must beg for distributions. This issue might be solved by giving the surviving spouse a "five and five power" which is defined as giving the surviving spouse the right to demand the greater of $5,000 or 5% of the annual value of the trust.

As always, there are different alternatives available if you believe that a disinterested trustee would help maintain family harmony and provide comfort and clarity to the surviving spouse and the children.

Naming Adult Children to Help the Spouse/Trustee



Where the surviving spouse is also the parent to the remaindermen beneficiaries, naming one of the children as a co-trustee may be a viable option, especially when the surviving spouse is elderly and is not used to carrying out the day-to-day tax and financial decisions.

CONSIDER THIS

When Edith died her husband Archie did not understand the family finances, having no interest in it. To make matters worse, their daughter Gloria suspected that her father may have had the beginnings of mild dementia. Fortunately, Edith had named Gloria as Archie's co-trustee. Archie felt a semblance of control and Gloria took excellent care of Archie's finances.

Naming an adult child as a co-trustee may be more problematic in blended family situations, as illustrated in the Gary and Karen situation. This can be mitigated if the trust is drafted to benefit the surviving spouse, but that's not always the case.

I have observed many step-parents who get along famously with their step-children. In those situations where the children and step-parent get along well, you might achieve the best of all worlds. The beneficiaries specifically affected by the decisions have a say in the ongoing trust management as trustees. If the parent and the children truly desire what is best for one another, it can work out exceptionally well.

I've also seen biological children not do what's best for their parent. So you can never assume that biological children will always act in their parents' best interests.

I would always recommend that all parties engage in open and frank conversations before pursuing this avenue, whether or not a blended family exists. The consequences are so important that you can assume nothing when naming a parent and an adult child as a co-trustee.

Key Takeaways

- Testamentary (after death) marital trusts typically benefit the surviving spouse for her lifetime, and usually terminate at her death in favor of adult children;
- Marital trusts have an inherent conflict in that every dollar spent by the spouse is one less dollar the children will one day inherit;
- The trustee must therefore balance the needs of the spouse as the lifetime income beneficiary against the needs of the children as the remaindermen;
- Naming your spouse is a common solution, although his ability and familiarity with the role may determine whether he should serve as a sole trustee or as a co-trustee with another;
- Naming a disinterested trustee as the sole or co-trustee could solve or mitigate any problems that might arise.

Chapter Seven

Continuing Trusts for Adult Children, Grandchildren

A parent may leave amounts outright to her children, or, to better protect the inheritance, she may leave it in a continuing trust share, usually one share for each child. The issue here is who should serve as the trustee for each child's share.

The parent can't serve since she by definition is deceased, unless creating a lifetime trust by gift, which is outside of the scope of this book. Since the children rarely inherit until both parents are deceased, there is no surviving spouse who would serve for the child's trust share.

Let's review the possibilities, and whom you might consider serving as trustee for your children's ongoing trust shares.

Minor/Underage Children or Grandchildren

Obviously when we die and leave a trust share to a young child or grandchild, she shouldn't serve as her own trustee. We need to name a trustee for her. Consider these facts when deciding who you should name as the young beneficiary's trustee:

- The value of the trust share;
- What the trust share comprises — is it stocks and bonds or will it be an interest in a family partnership or closely held business interest?
- The beneficiary's age and maturity;
- The age and life expectancy of the trustee you name.

CONSIDER THIS

Rhonda leaves her 15-year-old granddaughter, Amy, a trust share that will approximate $350,000. That's not sufficient funds to warrant a corporate trustee, and Amy shouldn't serve as her own trustee until she's matured enough to prudently invest and spend the funds. Rhonda narrows the choices down to her sister, Paula age 67, her son Archie age 44 (who is Amy's father) and her CPA Tom (age 62). Rhonda wishes to allow Amy to take over her own trust share when she is 35 years of age, but that would be 20 years from now. Paula will be 87, Tom will be 82 and likely retired, and Archie will be 64. Archie has never been good at handling money, so Rhonda is reluctant to name him exclusively as Amy's trustee. She could name Archie with Tom or with Paula, either of whom would provide Rhonda some comfort that someone else is looking over the funds.

The minimum age in some states to serve as a trustee is 18, and in others it is 21. I would never advise that you name any beneficiary of such a young age to serve as the trustee of her own inherited trust share. This is true even if she is hyper-vigilant and responsible.

My reason is that young beneficiaries haven't lived long enough to experience the ups and downs of handling money.

CONSIDER THIS

Kyle's parents died in a tragic car accident, leaving him as the direct beneficiary, at age 21, over the life insurance proceeds and assets. Kyle, a junior at a prestigious liberal arts college is roommates with Jensen, a computer science engineering major. Jensen believes he is creating a new software program that will make him the next Bill Gates. All he needs is $250,000 of capital to make it happen. He approaches Kyle to ask for the money.

Even responsible young adults don't have enough life experience to sort out what might be "pie in the sky" from a genuine opportunity. Experienced adults have difficulty too, but most of us were burned a few times and know the due diligence we should perform before investing large sums of money in an unknown prospect. Even if that opportunity is a "slam dunk", there are certain precautions that a knowledgeable adult would pursue, such as stockholder and security agreements that a young beneficiary may never consider.

When assets are sufficient to warrant a corporate trustee, just as in prior chapters, I urge you to consider naming a corporate trustee for a set period. A bank or trust company could serve as a co-trustee with a trusted family member or friend, providing checks and balances to ensure the trust funds are correctly used.

CONSIDER THIS

Rhonda instead had $750,000 that she intends to leave in a trust share for her granddaughter Amy. Had she named Archie as the sole trustee and if he either made improper distributions to himself, or ineffectively managed the money, Amy's only recourse would be to sue her father for fiduciary negligence. Rhonda names Archie along with a trust company. The way the trust company's professionals manage the assets and distributions must be agreed to between Archie and the trust company.

Should Competent Adult Children Serve As Trustee?

When creating ongoing testamentary trusts for your adult children, assuming that each child is a competent, responsible adult, there's no reason not to name each child as their own trustee. Yet, when the child has no previous experience managing assets or large sums of money, is it wise to turn over their share right away?

Consider the plight of many professional athletes. Despite earning more than $27 million in salary, and millions more in endorsements, basketball superstar and cultural icon Dennis Rodman appeared in court several years ago because he could not pay $800,000 in past due child support. He claimed that he was broke.

Scottie Pippen, a teammate of Rodman's on the Chicago Bulls championship teams, found himself near bankruptcy just a few years after his retirement despite career earnings over $110 million. Curt Schilling, Mike Tyson, Bjorn Borg and Johnny Unitas are all famous athletes who made millions yet declared bankruptcy.

A common theme amongst all of these tales is that those who earned and lost enormous sums had no prior experience with monetary success. Like a lotto winner, overnight they found themselves immersed in millions. Unable to manage their newfound fortunes, and unable to create a high-quality vision of their post-athletic careers, these athletes lost what took them a lifetime of training, sacrifice and hard work to achieve.

There are lessons to be learned for those planning estates — even for those of more modest means. When parents name their adult children, who often have no experience managing wealth, as direct beneficiaries without an intermediary, why would Mom and Dad expect their children to act with any more restraint managing newfound wealth than do professional athletes? What leads them to believe that they won't make impulsive and risky decisions when they have no experience accumulating and managing wealth?

I propose an alternative solution. Name a corporate trustee such as a bank or trust company.

Many clients object to the thought of imposing a gatekeeper on their family's inheritance. They've heard horror stories of inept financial institutions that charge high fees and dole out low performance. The trust instrument named a bank or trust company with no means to remove the institution, no matter their performance.

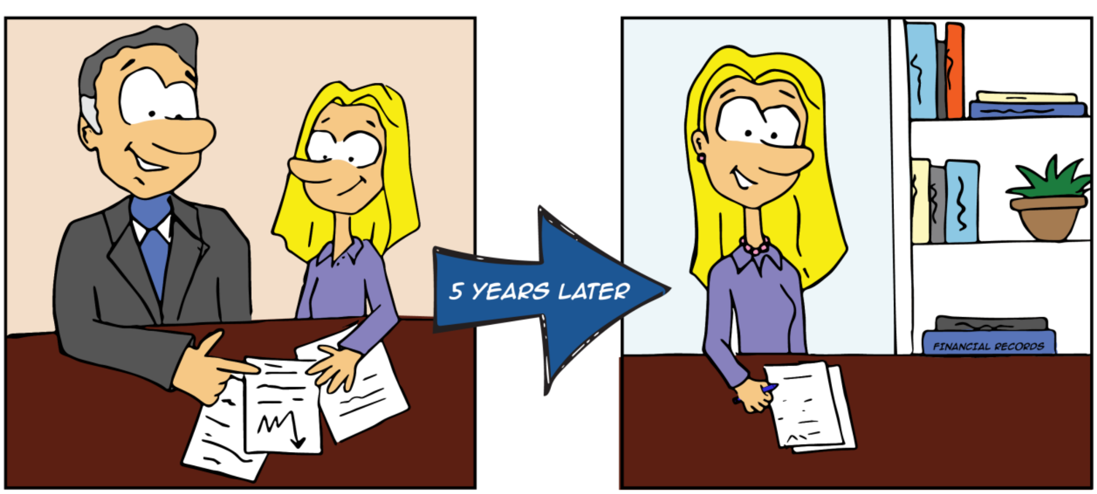
This can be easily remedied by allowing the family to remove and replace the corporate trustee with another one. See Chapter Eight for more insight on that count.

Yet another objection is the expense of a corporate trustee. In Chapter Three I explained how corporate trustee fees are more reasonable than you might imagine. Many clients already pay brokerage fees or management expenses, inside of mutual funds for example. Often you are only exchanging one fee for another. Also consider how much the beneficiary may lose without proper guidance. How much is that worth?

The corporate trustee does not have to be the sole trustee, nor does it have to be permanent. Naming a corporate trustee need not be an "all or nothing" proposition. Let's go back to the Rhonda and Amy example.

CONSIDER THIS

Rhonda's granddaughter Amy is now 25 years old. On Rhonda's passing she names a corporate trustee to serve with Amy for a period of five years following Rhonda's death. Rhonda had her attorney draft a provision allowing Amy to remove and replace the corporate trustee so she can always have a corporate trustee of her choosing. By naming a corporate trustee, Rhonda provided Amy with a mentor in how to handle wealth. After the five-year period, Rhonda's trust provides that Amy may serve as her own trustee or she may retain the corporate trustee for any period. It's up to Amy.



You may wonder whether making a child her own trustee somehow creates tax or creditor protection problems. It certainly can. But with proper planning, a beneficiary can control her own trust share and not have that share included in her estate for federal estate tax purposes. This is where you find she is an "interested trustee" who is limited to making discretionary distributions for her own "health education, maintenance and support."

Again, the terms "health education, maintenance and support" are found in the Internal Revenue Code and are referred to as an "ascertainable standard". So long as an interested trustee is limited to making discretionary distributions to themselves in accordance with an ascertainable standard, then those assets won't be included in her estate for federal transfer tax purposes.

Similarly, if a beneficiary has unbridled discretion as to her own trust share, it likely won't survive creditor attacks. There are ways to protect the continuing trusts for your beneficiaries. Those methods are described in more detail in my book *The Florida Residency & Estate Planning Guide.*

You can even give your adult beneficiary the ability to name to whom her inherited trust share is distributed upon her death.

CONSIDER THIS

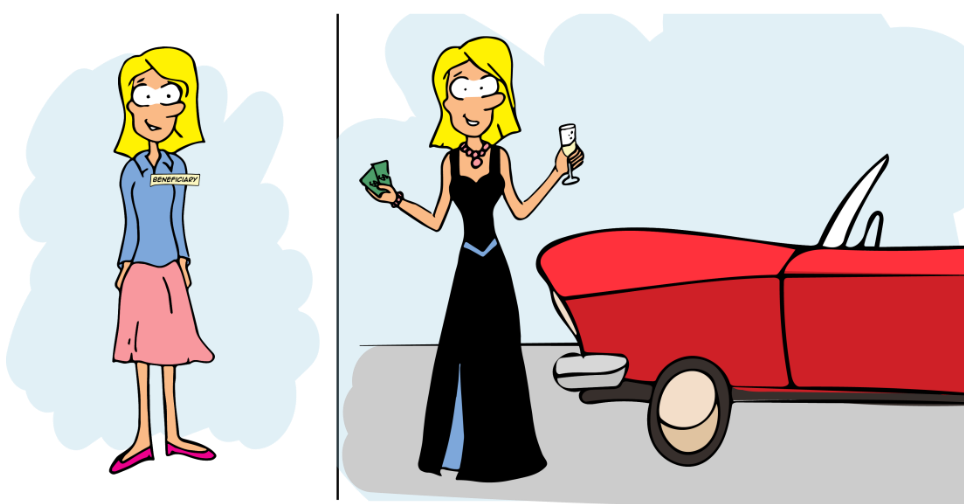
Rhonda's trust provides the continuing trust share for Amy, with Amy as her own trustee. Amy can make discretionary distributions to herself for her health, education, maintenance and support. If Amy ever has a creditor problem or is a defendant in a lawsuit, the trust mandates that Amy name an independent co-trustee. This serves to provide further protections as Amy cannot be compelled to make a distribution to herself as the co-trustee must consent to the distribution.

Phase-In Period

Similar to the illustration where Rhonda required her granddaughter Amy to work with a corporate trustee for a period of five years following Rhonda's passing, you could have a phase-in period for your adult children to act as trustee based on their ages.

CONSIDER THIS

Rhonda names her sister Paula to serve as Amy's sole trustee, unless at the time of Rhonda's death Amy has attained the age of 35, in which case Amy serves as the co-trustee with Paula. When Amy attains the age of 40, whether Paula is serving as Amy's trustee or co-trustee, Amy may serve as her own trustee.



The age you choose will depend upon a variety of factors. I've had clients impose an independent trustee or co-trustee until their child attains retirement age. I've had clients indicate that if the child is only 30 years old at the time of the parent's passing, the child may serve as her own trustee.

Spendthrift Beneficiaries

A spendthrift beneficiary is defined as one who can't control his spending habits and is ineffective at managing money. When you believe that a beneficiary has spendthrift habits, it's sensible to impose a gatekeeper trustee to manage his inheritance and decide when and how much each distribution should be.

The beneficiary won't be happy with this. They never are. But when you know that he will waste away his inheritance, you are acting as a loving, not as a punitive parent.

CONSIDER THIS

Esther had two responsible sons and a spendthrift daughter, Jessica. Esther's trust created testamentary trust shares for her sons and a testamentary trust share for Jessica, but their trust provisions were drafted differently. Upon Esther's passing, each of her sons controlled their own trust share as trustee. Jessica's trust share, however, was controlled by an independent corporate trustee. The distribution guidelines for Jessica's share were more conservative, as Esther wanted the money to be available to fund Jessica's retirement years, as she suspected her daughter would not save much, if anything, during her working years. Esther did this not only to protect Jessica from herself, but also to protect her sons. She knew that if Jessica had control over her inheritance, she would promptly consume it and then arrive, hat in hand, on her brothers' doorsteps seeking their inheritance.

I've seen Esther's situation in my practice several times. In one file I recall that a son of a client blew his $3 million inheritance in just two years, and then badgered his siblings for handouts. They felt terrible saying "no" to their brother, but knew that he would only waste any money they gave him. It was a bad situation all around and caused disharmony amongst an otherwise close family.

A parent who wants to "treat the children equally" isn't doing them any favors when one child is a spendthrift beneficiary. Trust vehicles and whom you name as your child's trustee are tools that, used effectively, will serve the family well.

Beneficiaries with Dependency Issues

Similar to the spendthrift beneficiary, a beneficiary with known drug, alcohol, gambling or similar dependency problems needs to be protected from himself. The temptation to waste away an inheritance is just too great.

As I've mentioned before, one should never make a beneficiary's sibling his or her gatekeeper. That's a recipe for family fights. Further, provisions should be drafted that allow the trustee to require the beneficiary to attend rehabilitation programs, with the penalty for noncompliance resulting in the restriction of trust funds to be used only for food, clothing, shelter, health and other necessaries.

Where the trust share may not be sufficient for an independent corporate trustee to manage, perhaps naming an attorney, CPA or strong-willed family member (who is not as close as a sibling) might work.

CONSIDER THIS

Assume that Esther's daughter Jessica is not a spendthrift, instead she has suffered from drug and alcohol dependency issues her entire adult life. Esther decides against an independent corporate trustee, but instead names her cousin Dennis as the trustee. Dennis is a practicing attorney, has a no-nonsense approach to life, has always been close to Jessica and has Jessica's confidence. Under the trust instrument Dennis can name his successor, which may be an independent corporate trustee.

Before naming someone to serve in this rather delicate role, it's essential to discuss whether he is willing, and to include him in the conversations with your attorney when crafting the provisions governing the beneficiary's share.

Special Needs Beneficiaries

Special needs beneficiaries have some type of identified disability whether physical or mental. They may be receiving government benefits, such as Medicaid. These government benefits have very strict asset and income limitations.

The challenge when leaving an inheritance to a special needs beneficiary is not to disqualify him from receiving necessary benefits. Attorneys will draft specific language, often referred to as a "Special Needs Trust" or "Supplemental Needs Trust". These trusts contain restrictive distribution provisions to comply with state and federal laws so as not to disqualify the beneficiary from the receipt of these important benefits.

One requirement for a qualifying Special Needs Trust is that the beneficiary cannot act as his own trustee. You must name an independent trustee. Here it is imperative to name a person or a financial institution familiar with these types of trusts. It is not only important for the trust to be drafted in such a manner as to not disqualify the beneficiary — but the trustee must also be careful not to violate the trust terms (which are complex and legalistic by nature) when administering the trust. Improper administration of the trust could result in the beneficiary's disqualification.

As you can see from this chapter, there are many unique circumstances that require different approaches to find success with your estate plan. A careful thought process and honest assessment of your beneficiaries are crucial to selecting the right trustee for the situation. Keep in mind that each situation and every beneficiary is different.

Key Takeaways

- Minor or underage beneficiaries should have a competent trustee serve at least until the beneficiary is old enough to manage her own trust share;
- Responsible young adults could be tempted to make risky investments. Consider not only your beneficiary's maturity, but whether he's been "around the block" long enough to understand the importance of due diligence when investing;
- Even competent adult beneficiaries could benefit from a mentor to serve as a trustee or as a co-trustee for a period of time following your passing;
- Phase-in periods involving a trusted or independent trustee could serve your beneficiaries well;
- Spendthrift beneficiaries, those who suffer from dependency problems or special needs beneficiaries should always have a knowledgeable, independent trustee serve;

Chapter Eight

Other Considerations

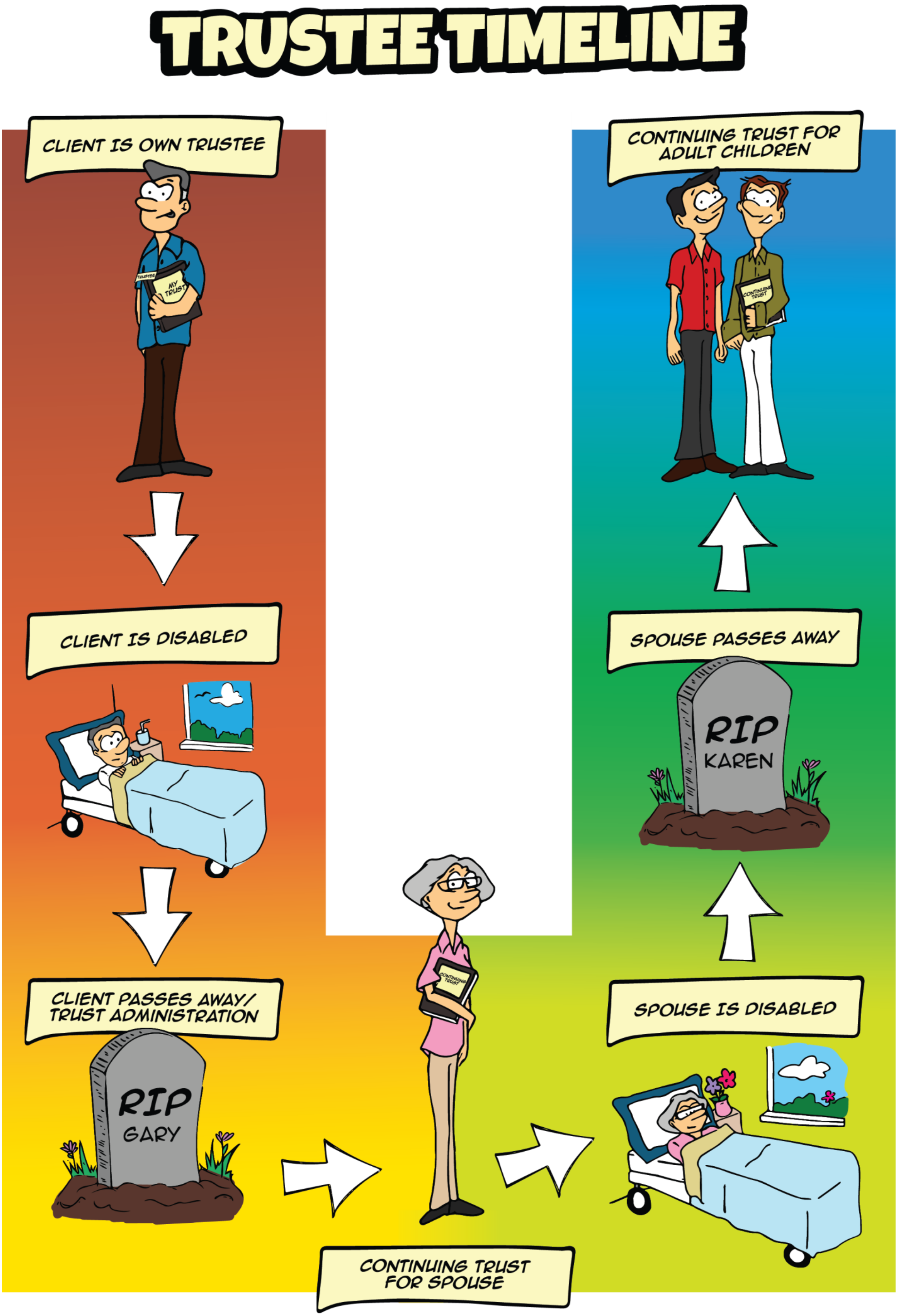
As you have learned in these pages, selecting the right successor trustee requires a great deal of thought and consideration. The typical trustee timeline includes several stages, including the period when you serve as your own trustee, the time during where you might be disabled, the trust administration following your passing, the time during your surviving spouse's lifetime, perhaps even the time of your surviving spouse's disability, and down to an eventual distribution to your children.

Each stage contains its own set of challenges and therefore requires unique skill sets necessary to navigate the required duties and responsibilities. That's what we have covered together in the first seven chapters.

Your decisions, however, don't end with selecting a trustee. When naming a trustee, it's important to discuss with your attorney and consider a variety of related provisions including:

- A definition of disability for any individual serving as trustee that would remove him from office;
- Who should have removal and replacement powers over a trustee;
- Whether you want to absolve your trustee of the annual accounting requirements to all the beneficiaries;
- Corporate trustee indemnification provisions;
- Letters of Retention and waiver of prudent investor rule;
- Gifting powers a trustee should have during a period of your disability;
- Direction regarding whether a trustee may continue supporting anyone dependent upon you following your disability; and
- Whether a trustee can hire agents or name another person or entity to serve as a co-trustee.

Let's examine each of these issues in greater detail.


TRUSTEE TIMELINE
CLIENT IS OWN TRUSTEE
TRUSTEE
MY TRUST
CLIENT IS DISABLED
CLIENT PASSES AWAY/ TRUST ADMINISTRATION
RIP GARY
CONTINUING TRUST
CONTINUING TRUST FOR SPOUSE
SPOUSE IS DISABLED
SPOUSE PASSES AWAY
RIP KAREN
CONTINUING TRUST FOR ADULT CHILDREN
CONTINUING TRUST

Defining Trustee Disability

Just as it was important to define your disability for the grantor and original trustee of your trust, it will be just as important to define when your successor trustee is to be deemed disabled and no longer capable of serving. You may name your spouse, for example, as your successor trustee. If she should develop dementia or some other mental incapacity, she should no longer serve as the trustee.

Defining the incapacity can be tricky, however. Physicians are reluctant to sign statements removing a trustee for fear of liability. Alternatives to expressly requiring a physician's statement removing a trustee may include:

- Naming a disability panel that can deem a trustee incapacitated; or
- Showing that a diagnosis of any stage of dementia or Alzheimer's requires the removal, and if the trustee won't share his physician's report then he is deemed incapacitated.

Note that a physician may diagnose a patient without having to sign a legal document removing her as trustee. The problem here is that the HIPAA laws prevent the physician from sharing any diagnosis without the patient's consent. Therefore, the trust can be drafted to deem your successor trustee incompetent if, after two interested parties request a diagnosis, she won't share that diagnosis within so many days of the request.

These are sensitive issues to navigate. This is yet another reason why it's important to have conversations with your named trustees ahead of time so that there are no surprises down the road.

Removal and Replacement Powers

Provisions often not discussed, considered or implemented into many trusts are how a trustee is removed and replaced for reasons other than disability.

I remain surprised how many trusts I review don't address this issue. This is even more alarming when I ask my clients about the parties they've named as successor trustees in their current trust documents. More often than not, my clients want to make a change. Sometimes the trustee they've named has passed away; sometimes the financial institution was absorbed by a larger bank. It's also common that my client no longer has a professional relationship with a financial institution named as trustee.

There's nothing wrong with amending your trust to name a new successor trustee. Consider, however that after you've become disabled or die, you can no longer amend your trust.

Recall the illustration in Chapter Three where Jim's financial planner, Thomas, had changed firms, but Jim hadn't updated his trust documents to name the different corporate trustee. When Jim becomes incapacitated or dies his wife Jane might have to deal with someone unfamiliar with his financial plan. That is, unless Jim includes a provision in his trust that allows Jane to remove and replace the corporate trustee.

CONSIDER THIS

Jim's revocable trust contains a provision that allows his spouse, Jane, to remove and replace any acting successor trustee. When Jim dies and his trust continues to name The Southern Trust Company as his successor trustee, even though he no longer has a professional relationship with that institution, Jane can name the firm where their longstanding financial planner, Thomas, worked.

The removal and replacement powers should be carefully considered, however. In blended family situations a surviving spouse could be accused of shopping for a trustee most favorable to her situation instead of acting as an impartial fiduciary manner towards all of the trustees. In these situations, it might be best to require two individuals to remove and replace the successor trustee.

Jane is not the mother to Jim's two sons Zachary and Ethan. Rather than giving any one person the ability to remove and replace a successor trustee, Jim's trust provides that during Jane's lifetime, either Zachary or Ethan must join Jane in any removal and replacement of a corporate trustee.

Where the surviving spouse is serving in the role as successor trustee, this issue can become even more delicate.

CONSIDER THIS

Jim names Jane as his successor trustee, and Jane is the primary beneficiary of Jim's trust for the rest of Jane's life. He trusts Jane explicitly and does not want to cause conflict between her and his sons. For that reason, Jim provides that Zachary and Ethan must have "cause" to remove Jane as a trustee. "Cause" is defined as Jane being grossly negligent in the investment and management of the trust funds, or by making improper distributions.

Every family's situation will be different. That's why I suggest that you explore this issue thoroughly with your estate planning attorney. A related issue is whether you want to circumvent a trustee's annual accounting requirements to all the beneficiaries.

Accounting Requirement – Designated Representative

Most state laws, including Florida's, require the trustee of a testamentary trust to provide an accounting to all "qualified" or "interested" beneficiaries. This means that when you die leaving a surviving spouse who is the lifetime beneficiary following your passing, along with your children as the remainder beneficiaries after your spouse's death, it is your spouse who will have an obligation to provide an accounting each year to your children. Your children, under the law, would be defined as "qualified beneficiaries" who are entitled to a copy of the trust instrument itself and annual accountings.

That accounting would include the trust's beginning balance, capital gains and losses realized, income received, distributions made and expenses paid. "Significant transactions" should also be disclosed.

CONSIDER THIS

Jane is the trustee of the marital trusts established in her deceased husband Jim's marital trust for her benefit. She is required to provide an annual accounting of the marital trust to Jim's sons, Zachary and Ethan.

Many married clients don't want their surviving spouse to have to account to their children as they don't want the children meddling in the surviving spouse's economic affairs. When this is the case, many state laws provide that you can name a "Designated Representative" to receive the information on behalf of the beneficiaries, but not share it with them. The Designated Representative office provides a legal means to circumvent the annual accounting requirement.

In other instances, however, the client wants transparency. Perhaps she believes that if she leaves amounts to her husband and names him as trustee, she wants him to account to her children annually so they can monitor his investment and distribution decisions.

Nothing about this decision is routine or easy. There are advantages and disadvantages to every choice. If you don't want your children or any other remainder beneficiary to possess a legal right to demand an annual accounting, consider naming a Designated Representative in your trust.

Corporate Trustee Indemnification Provisions

When naming a corporate trustee, some of the financial institutions (but not all) require that certain indemnification and release provisions be included in your revocable living trust. Some of the financial institution drafted provisions are innocuous. Others not so much.

Most of these provisions indemnify and hold the corporate trustee harmless from the conflict of interest involved when self-dealing, allow the trustee and its affiliates to charge and collect fees, and bifurcate liability. An indemnification provision usually provides that the trustee is released from liability plus their defense attorney's expenses are paid from the trust assets if a beneficiary sues the trustee for breach of duty or negligence.

You might ask why some trust companies want to be indemnified from a conflict of interest. There are several reasons. Some large banks and financial institutions underwrite the issuance of stocks and bonds. When their trust department purchases those same securities when serving as the trustee of your trust, a beneficiary could allege that the bank had self-interest in using its discretionary authority to purchase assets that the bank's underwriting unit wants to sell. It acted as both the seller and the buyer in that transaction.

CONSIDER THIS

Big Bank underwrites the issuance of public works municipal bonds issued by Anytown, USA. When Big Bank serves as your trustee, they require release of conflict of interest and indemnification provisions that would allow them to purchase Anytown's municipal bonds inside of your trust portfolio.

Similarly, some financial institutions also sell mutual funds through their mutual fund families. Schwab, Fidelity, Vanguard, Northern Trust and the Bank of America are all large institutions that have created their own mutual funds for consumers. These institutions require release of conflict of interest and indemnification provisions to purchase their proprietary mutual funds as a holding of your trust.

Other trust companies are arms of brokerage firms. Here, when you become disabled or die, you may have named the brokerage firm as the trustee of your trust since you have a longstanding relationship with your broker who works there. When this happens, the broker may earn commissions while the brokerage firm's trust department charges trustee fees. The release and indemnification provisions cover this scenario as well.

In yet other situations, some large financial institutions own mortgage finance and real estate brokerage companies. When, acting as your trustee, they borrow money from a lending subsidiary on your trust's behalf (perhaps to refinance a mortgage or open a line of credit) or hire the real estate brokerage firm to sell properties out of your trust; there is an obvious conflict of interest. The required language therefore releases the financial institution from liability associated with these issues.

Directed trusts are also becoming popular. In a directed trust the financial advisor you always did business with continues to manage your investments, but a trust company of another institution serves as the administrative trustee, taking care of accountings, distribution decisions, and assets outside of normal investment holdings such as real estate or closely held business interests. In these situations, the administrative trustee needs to be absolved from liability associated with your financial advisor's decisions and vice versa.

You may believe after reading this section you don't want to indemnify or hold anyone harmless for any of these issues. I want to make two comments on that point. First, a well-drafted trust contains general trustee indemnification provisions, as no one will serve as your successor trustee if a beneficiary sues them and they would have to pay out of their own pocket to defend the lawsuit.

Trustees make decisions all the time that can be second guessed with hindsight. No one would serve if every decision made could cause liability. That's why most well-drafted revocable trusts contain these provisions so that a trustee doesn't have to constantly look over her shoulder.

Second, the financial institution required language that goes beyond the normal indemnifications dealing with their conflict of interest and self-dealing problems is usually non-negotiable. I've attempted to alter some of the language only to run into the financial institution's in-house lawyers working in the compliance department who won't budge. In that case, you have a decision to make.

I would suggest having conversations with the corporate trustee you're considering naming as your successor trustee to specifically determine why it needs the required provisions and then make your decision. Not all of these conflict of interest release and indemnification provisions are the same. Each is tailored to the specific institution you are dealing with. I've helped you along by compiling a list of questions in Appendix A to this book that you might ask a corporate trustee before naming them as successor trustee.

Letters of Retention and Waiver of Prudent Investor Rules

I once had a client, "Ernie" who worked for many years at Procter & Gamble Company in Cincinnati. Over the years he accumulated significant amounts of P&G stock, which made up a majority of his investment portfolio.

Whenever Ernie met with financial professionals, they would warn him against having so much of his net worth tied up in one company. They told Ernie that doing so was risky and urged him to diversify his holdings across several companies.

Ernie resisted. "P&G has always been good to me as a blue chip dividend paying outfit that's funded my retirement years. Besides, I don't want to pay the large capital gains tax I would incur if I sell some of the shares. I never plan to sell."

Realize that your successor trustee will likely have a duty to act as a "prudent investor" under state law, which includes the prudent investor statutes. Under those statutes, Ernie's successor trustee would be forced to diversify his holdings. It's imprudent to hold too much of your net worth in any one company.

Consider, for example, Enron. The high-flying Texas energy company seemed like a sure bet in the 1990s, only to declare bankruptcy in 2001 amid corporate scandals and fraud. Investors who held inordinate amounts of Enron stock in their portfolios went from being millionaires to paupers overnight.

Any successor trustee, whether it's your spouse, adult child, or a trust company, must guard against this possibility. The prudent investor standards don't consider whether any given company has been in business for generations. Large holdings in any company aren't prudent. Consider, for example, the Eastman Kodak Company. Based in Rochester, New York, Kodak ruled the photography and imaging business for generations. Then digital technology and Smartphones came along. Kodak is now a meager shell of what it once was.

If you have holdings you don't want your successor trustee to sell no matter what, you should include "letters of retention" provisions in your trust, directing your trustee to retain the shares in the event of your disability, and releasing them from liability for doing so. I don't advise that you handcuff your trustee too much as there may be very good reasons to sell when you are no longer at the helm of your own trust. But if you have strong feelings, discuss these with your estate planning attorney and whoever you select as your successor trustee.

The waiver of the prudent investor rules and release of liability may also extend to other assets such as closely held business interests and real estate. Bring these issues up with counsel should they apply to your situation.

Gifting Powers during Your Disability

Another issue I rarely see addressed in many trusts is the ability for your successor trustee to make gifts on your behalf. You may, for example, be making gifts to loved ones for a variety of reasons. You want to help support educational expenses, or have a loved one with a serious illness who needs help to pay medical bills.

Perhaps you are making annual exclusion gifts to reduce the taxable value of your estate, or to pay premiums of life insurance policies inside of an irrevocable life insurance trust. Maybe your successor trustee will have to make gifts out of your estate to Medicaid trusts so that continuing care or nursing home expenses do not consume your assets.

There may be many reasons that continuing gifts are desired following your incapacity but before your passing. But know this — without giving your successor trustee specific provisions that include the power and direction to make gifts, he can't. The trustee has a fiduciary obligation to follow the trust provisions. Absent direction that the trust can be used for someone other than you (as the grantor of the trust) during your lifetime, the trustee would be violating his obligations should he make gifts outside of the trust terms.

Gifting powers also have tax implications. The IRS ruled that absent authority to make gifts, they will not be considered "completed" because a beneficiary could challenge them. In order for "annual exclusion gifts" (at the time I write these chapters the annual exclusion gift is limited to $14,000 per beneficiary each calendar year) to be tax-free they must be completed. Absent specific gifting authority under the terms of your trust, your successor trustee's gifts could be taxable even if they otherwise would have qualified as tax free.

Continuing Support of a Dependent

A related issue to gifting from your trust following your incapacity is the support of those financially dependent upon you. While you might believe that it is intuitive to continue to support your spouse, it's not. Absent a provision indicating your desire to support any dependents, there may be an argument that the trust funds should only support you during your period of incapacity.

You may be raising minor children, or support elderly parents. In both instances a provision directing the trustee to continue to support those individuals during a period of your incapacity is necessary.

When you are acting as your own trustee supporting a dependent is never an issue. Keep in mind, however, that you want your trust to be specific when a successor trustee steps in.

Hire an Agent or Name a Co-Trustee

A final thought here concerns your trustee's ability to hire professionals, such as attorneys, financial advisors and tax return preparers as his agent. Most trusts contain provisions allowing the trustee to do so, and where the trust is overly basic and doesn't so provide, state law typically allows him to do so.

This is another scenario that is not often covered either in trusts or under state law. Absent a provision that allows a trustee to hire and name a co-trustee, he can't.

Why would you want a provision allowing your trustee to hire a co-trustee? There may be many reasons. Perhaps it would help break a deadlock when there are accusations of breach of fiduciary duty. In blended family situations a surviving spouse or adult child may want the trustee to name an independent co-trustee to ensure that the decisions being made consider all the beneficiaries.

Another reason could be to protect the trustee who is also a beneficiary. Assume that following your death your adult child is serving as the trustee of his own inherited trust share and gets sued. He doesn't want a judgment creditor to demand he distribute his inheritance in satisfaction of that liability. Without the option of naming a co-trustee, his only choice may be to resign as his own trustee.

CONSIDER THIS

After your death, your son Tony experiences business problems. His former business partners, who know that Tony inherited significant sums from you, sue him claiming that Tony's negligence caused financial harm to their company. Tony is the sole trustee and beneficiary of the share you left him. His share is vulnerable to attack by the former business partners.

If instead he can name a co-trustee, he can then find a friendly party who will serve as his co-trustee. That friendly party can suspend trust payments to him until the danger has passed. Not all judgment creditors are likely to file another lawsuit to compel the co-trustee to make distributions to satisfy the judgment. This may provide an opening for your child to offer the creditor pennies on the dollar in settlement.

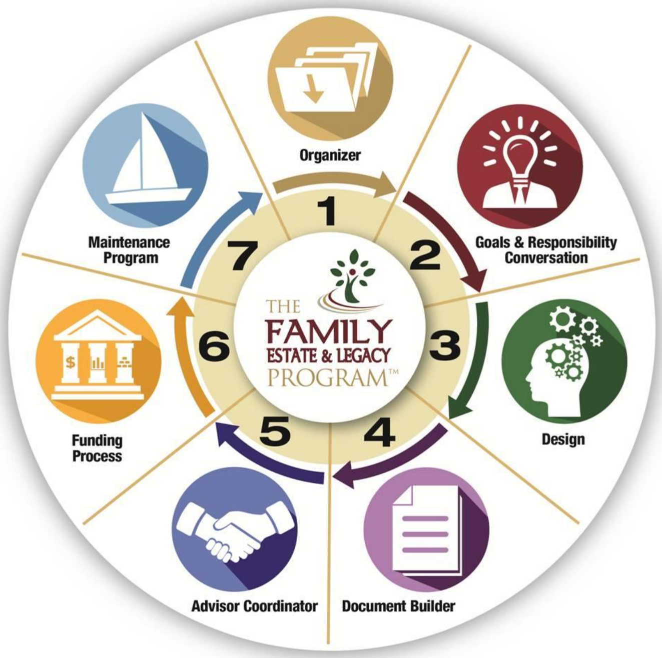
There are other reasons to name a co-trustee. If your goal is to keep your trust open and flexible for your loved ones who follow you, this is an option to explore further.

Key Takeaways

- Just as your trust defines when you are disabled and should no longer serve as trustee, it should define how those individuals who follow you are deemed disabled;
- Include provisions indicating who has removal and replacement powers over any trustee acting;
- Your successor trustee will have annual accounting requirements to all qualified beneficiaries following your passing. You can circumvent these requirements by naming a Designated Representative;
- Some corporate trustees require indemnification and release provisions that should not be brushed off as "standard language". You should instead carefully read and consider what those powers release and indemnify and whether you are comfortable with them.
- Your successor trustee will have a legal obligation to diversify your holdings absent provisions directing them to retain unusually large holdings inside of your trust portfolio;
- Absent specific provisions allowing gifts, your successor trustee may not be able to continue gifting amounts you would have intended during a period of your disability;
- If you are supporting a spouse, child or elderly parent, your trust should contain provisions directing your successor trustee to continue that support;

Chapter Nine

The Family Estate & Legacy Program™



We've covered a lot of ground throughout these pages. You've learned the differences between interested trustees and independent trustees, and when you might name one or the other as your successor in your revocable living trust. We've reviewed the different periods on a typical trust timeline, and how each requires a different skill set of your trustee.

You've seen how important it is to not only to think through a trustee's duties and obligations, but also whether the family member you're considering will be mentally and emotionally up to the task. We've also considered together how a well-chosen successor trustee can lead to family harmony, but how a bad choice could lead to the exact opposite outcome.

We've reviewed why you must anticipate conflicts of interest of any trustee who is also a beneficiary, and how trust provisions may be drafted to clarify your intent of whose interest should be considered primary. You may not have realized how a lifetime income beneficiary's interest contrasts with that of your remainder beneficiaries. You now know the significant weight of the choices thrust upon your named trustee.

It may have come as a surprise to you the many ways you can use a professional or corporate trustee. There's a lot more choices than naming just one or leaving corporate trustees out entirely. You've also learned of some things to watch out for, questions to ask and legalities to consider.

Perhaps it's now undeniable to you how vital it is to have a knowledgeable, well-qualified attorney lead you through selecting your successor trustee. You may ask yourself how you go about choosing an attorney and a law firm that will navigate these difficult issues. To assist you with this important choice, I've created a unique, trademarked process entitled The Family Estate & Legacy Program™. This is a seven-step process that takes you from where you are today to where you need to be for now and into the future.

Organizer

The first step is our Client Intake Process including our Client Organizer. You may already be familiar with tax organizers that CPAs send out prior to filing your annual Form 1040 Federal Income Tax Return. Our Client Organizer is similar, except it is geared to gather the information necessary for you to make informed decisions relative to your estate plan. For us, as your legal team, the organizer serves to provide us relevant information to maximize your results.

Completing a personal balance sheet is an important element of our organizer. Some new clients push back at this requirement, wondering why we need this information to plan your estate or even to help you select the right successor trustee for each situation. Realize that a good estate plan is fashioned to the family and the type and value of assets they own. Who you may consider as your trustee will depend upon a variety of factors, including the family relationships you enjoy, the types of assets that you own and how you own them.

The attorneys and legal teams working under The Family Estate & Legacy Program™ understand that spending valuable meeting time gathering information isn't the best use of time. When the Client Organizer is instead completed ahead of the initial meeting, the attorney and his client are likely to have a more productive initial consultation.

We ask that your completed Client Organizer be returned to our office along with a copy of your current wills and/or trusts at least three business days prior to the initial consultation.

Goals & Responsibility Conversation

We start our initial consultation with a conversation eliciting your goals and concerns. Why are you updating your documents? Did you recently move to Florida? Has your family or financial condition changed? Did you read about tax laws that may affect your family? Are you concerned that one of your children's spouses may have their eyes on your child's future inheritance?

What is it that prompted sitting down with us? We want to hear the answer to that question.

That's because we realize how important it is to listen to your goals and concerns before launching into a discussion as to the advantages of revocable trusts or what provisions you might consider for your will.

It's refreshing to be heard, and to voice the concerns you may have about your estate plan. Once those goals and concerns are thoroughly discussed, your legal team is ready to identify legal and tax opportunities available to you and your family.

A knowledgeable professional will break down the many moving parts that go into a first class estate plan, and explain your choices in simple, easy to understand language. Based upon the contents of this book, you'll see that we will spend time on who will act in what capacity inside of your estate plan.

How are you going to protect yourself during a period of incapacity? Think about those crucial issues to your welfare, who your successor trustee will be, who will hold your durable power of attorney, and who will be making health care decisions for you. Moreover, what powers do you wish to confer on those you name, and what restrictions will be important?

When you leave amounts to your children, other considerations come to the forefront, depending upon their age, financial savvy, marital status and a host of other factors. Too frequently do attorneys gloss over these issues. In The Family Estate & Legacy Program™ we take the time to explore all the possibilities, many of which you may not have previously considered.

Design Plan

Based upon your Client Organizer and the results from our Goals and Responsibility Conversation, we design your estate plan together. We will work together to design a will or trust package that meets your needs, given your family and financial situation, and your goals and concerns. There is no such thing as a "one-size-fits-all" estate plan. The Design element will consider the types of assets you own, how you own them, and the relative tax consequences of your holdings in creating your individualized plan.

Typically, your plan will include a revocable living trust, pour over will, durable powers of attorney, health care surrogate, living will, pre-need guardian and a host of other ancillary documents necessary to effectuate a solid foundation.

For those clients who wish to protect large IRA balances for their loved ones, a Retirement Plan Legacy Trust may also figure into the mix.

While many clients may all have these documents, the contents of each document will be specific to you and your loved one's needs. Married clients may have a variety of marital/credit shelter trusts depending upon their goals and the relative values of their estate. Clients who leave amounts to their children and grandchildren may have continuing trusts to protect the inheritance they leave their loved ones.

All of those marital, credit-shelter, and continuing trusts will have different provisions depending upon the client's goals and concerns. Some distribution provisions may be drafted more liberally, allowing distributions for most any purpose while others may be drafted to be conservative towards protecting a spendthrift beneficiary, or other issues.

Upon zeroing in on a plan, a fixed fee quote is provided. There is no need to worry about how many hours you are spending with the attorney and legal team. The goal of The Family Estate & Legacy Program™ is to provide you comfort and clarity. If you feel that every phone call, every email, and every other contact with the firm will result in a higher fee, you may be unwilling to ask all of your questions.

It's important to us you feel you have adequate time to consider your options during this estate planning process.

Once you sign the Service Agreement, we are on to the next stage.

Document Builder

We build all of your documents and send you a written summary and flowchart. The summary and flow chart gives you an easy-to-read, quick reference of your plan. If you want the actual trust drafts, we will forward those to you, but prefer that we meet with you to review them.

Our experience is that when we forward the trust drafts themselves (as opposed to the summary and flow chart), our clients feel they must first read and understand the entire documents before they visit with the attorney again. While we strive to write documents that can be easily understood, there are legal and tax concepts that require us to use language found in the statute books or in the tax law that aren't intuitive for those not well versed in these laws.

That's why we want to take the time to review the actual documents with you. And if it takes more than one review session, we'll do that.

Once you see the design in black and white, you can change certain details. That is why the review sessions are so valuable.

Once your documents meet with your approval, we'll proceed towards signing. Once signed, your documents will be scanned and coded into our system, and organized into a binder complete with tabs, the summaries and flowcharts.

But we're not done yet.

Advisor Coordinator

We realize that you may have a trusted attorney from your former hometown, a CPA, and maybe a financial advisor that you would like included in this process. We're happy to include anyone you want. If they are local, they can attend our conferences. If not, or if it is otherwise more convenient, we can conference call them into our conferences.

Remember our most ultimate goal is to provide you comfort and clarity. One giant obstacle to this goal is when a client is receiving conflicting advice. This problem is eliminated when those individuals that you trust are involved in your estate planning process, taking part at every opportunity. We value their input.

For those clients in transition that are looking for a trusted CPA or financial professional, we can recommend trusted and reliable firms to you. Since we've been practicing in our communities for decades, we know those who may serve you well.

Funding Process

Transferring (or "funding") your assets into your revocable trust is time consuming, tedious, and fraught with technicalities. It's natural for clients to procrastinate funding their trusts, but assets that aren't properly funded won't avoid the public probate process. So we build into The Family Estate & Legacy Program™ a Funding Process that takes care of these details.

Unlike many firms who hand you a sheet of instructions how to transfer (or "fund") your assets into your revocable trust, we do it for you. Our team includes dedicated funding assistants who are well versed in the intricacies of each different financial firm's requirements. They work with you to ensure that everything is in the right "basket" so your estate plan runs smooth.

This is another way that our unique process provides you confidence, comfort and clarity.

Maintenance Program

One feature of The Family Estate & Legacy Program™ of which we're proudest is our Maintenance Program. This unique feature is built to provide you a cost effective way to ensure that your documents do not fall out of date with the ever changing legal, tax and financial world.

Many clients stick their estate plans in a drawer for years, if not decades. This often leads to disaster when the client becomes sick or dies. We know that you don't want to visit with your estate planning attorney every year, so we created a way for us to come to you.

The Maintenance Program works to ensure that your plan keeps up with the changes to your family and financial situation. When you open a new account or acquire a new asset, our team will work with you to ensure that it's titled correctly and fits into your plan. You'll also review who you've named as successor trustee, and have the opportunity to make changes where necessary.

Near the end of each calendar year, you'll receive a written review of your estate plan. We'll advise as to changes in the trust and tax laws, and if such a law affects your plan, maintenance includes the update. Your estate plan is all about you so the year-end review will provide you the opportunity to tell us about any changes to your family or financial condition that may also affect your planning.

Epilogue

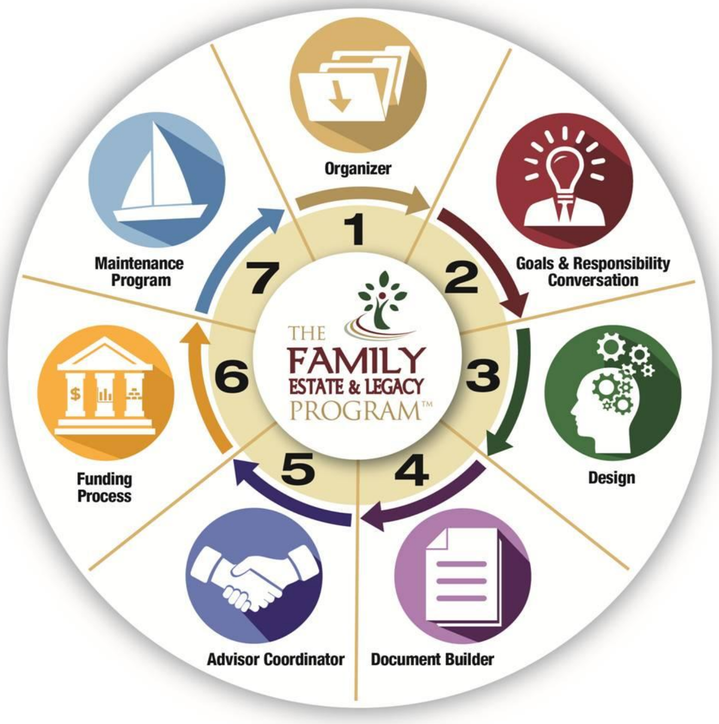
Hopefully after reading this book you understand why your successor trustees have significant responsibilities and require superb decision-making skills. As most of the new clients I see have previously prepared an estate plan, I'm perplexed at how little thought often occurs when naming your successor trustees.

I've had clients tell me that they need to name their oldest child as their successor trustee for fear that the child would otherwise be offended. These decisions should not be based upon those types of considerations. If the oldest child happens to have the proper characteristics, than by all means name her. But if she doesn't, then other parties should be considered.

Naming someone to hold the office of successor trustee, like that of a durable power of attorney or personal representative under a will is not an honor. It is a job.

As I've discussed in these pages, it's vital to consider who is best to serve the role in the different timelines. The party who you name to serve during a period of your disability may not be best suited for the period following your death during your estate administration, and that party may not be the best choice to govern continuing trusts for your spouse and adult children.

Getting Started



Hopefully these pages have encouraged you to get the most out of your estate plan. If you are interested in beginning your Family Estate & Legacy Program™ journey, please contact our office to receive your Initial Client Package. We will send you an email to get things started and ask that you complete three easy steps:

Attend Our Workshop or Watch the Video

Our firm gives workshops several times a year outlining important and relevant estate planning issues we want you to consider and be prepared to discuss at our initial conference.

The initial client digital package contains a link to the video if you can't attend the workshop or if one isn't being provided soon. The video can be viewed on your laptop, tablet or smart phone.

Complete Your Client Organizer

It is important that we receive a completed Client Organizer at least three business days prior to our initial conference. The information you provide us is confidential and is very important in order for us to provide you proper legal advice. We can forward you a hard copy of the Client Organizer, or a digital one is available with the Initial Client package email you can download and print out to complete.

Drop Off or Email Us Copies of Your Current Planning Documents

When getting us your Client Organizer, please also either drop-off copies or email PDF copies of your:

- Current will;
- Trust with any amendments;
- Irrevocable trusts;

- Federal Gift Tax Returns Form 709, if applicable;
- Federal Estate Tax Return Form 706 for your spouse, if applicable

If you don’t have access to all of these documents, please get us what you can. Please email us a PDF copy that would be preferred. If not, we will scan in these items and return them to you.

Appendix A

Corporate Trustee Interview Questions

Sitting across the table from bank and trust officers can be intimidating. You may not be as familiar with the legal, tax and financial world as those you are interviewing so you might feel you're at a disadvantage.

Allow me to level the playing field for you.

Here is a list of suggested questions when interviewing financial advisors, banks and trust companies you are considering naming as your successor trustee. I've provided subheadings based on different topics you may be interested in. Don't be afraid to ask any question, including those not found on this list. If you don't understand an answer, follow up with other questions until you do.

Services

Why should I become a client of your institution?

Are you willing to serve as my successor trustee?

Are you willing to serve as a co-trustee with me? With my spouse? With my adult children? With [name person who you are considering]?

What does it mean to act as my agent? As my trustee? Describe the difference in the level of services you offer.

If I am disabled, do you write my checks and pay my bills? Will you change the bank where my primary checking account is located? What about my automatic deposits and drafts that are established?

Will you interact with my attorney and CPA? Have you had regular interaction with them? Describe your overall impression and experiences.

How do you deliver your services during my lifetime and to my family following my death?

Do your trust officers come to my residence or must we schedule meetings at your office? How do you interact with my family members who are not local?

Who will be my trust officer? My investment officer? How long have those individuals been with your institution? Who are their backups in case they leave your firm or when on vacation?

Will I have to deal with any 1-800 numbers? Will my spouse? Family?

Do you have electronic banking services? Please describe them.

Assets and Investment Philosophy

Where are investment decisions made? In the local office? Somewhere else?

If you were to become my trustee, would you transfer all of my assets from their various institutions to yours?

How do you decide what investments I should own when acting as my trustee?

Do you consider the capital gains consequences before making trades? Do you notify me before acting?

Same question for when you are trustee of a testamentary (after my death) trust? How do you decide what investments are appropriate for my spouse? For my children when serving as their trustee?

Do I own any investments you won't hold in a portfolio? What happens to those investments when you become my agent? My trustee?

What is your policy towards letters of retention?

How do you handle non-investment assets such as my residence, closely held business interests and other properties that my trust owns?

How do you handle my annuities and life insurance policies?

Safety

How safe is my money at your institution? If your institution fails do I lose all of my money?

What is the financial strength of your institution?

Have you been audited by a state or governmental agency? What resulted from those audits? Do you also conduct your own private audits? Please describe.

How do you keep my personal financial information safe from hackers and other online menaces?

Are your employees bonded? Please describe.

Have you ever had an issue with an employee or related party stealing money or assets from a client? What was the result? Was the client made whole?

How is my information kept confidential? Do you have me sign a release that allows you to speak to my family members? If not, how do you keep a record of which family members I would want you to speak with and which I wouldn't?

Does your institution require any special language to be drafted into my trust? Describe it please. If it contains releases from self-dealing or conflict of interest, please describe why this is necessary.

How do you feel about my attorney drafting a clause into my trust that allows certain family members to remove and replace your institution during my disability or death?

Hiring Agents

After my disability and/or death will you continue to work with my attorney to administer my estate/trust?

Does your institution prepare my tax returns or will you continue to use my CPA?

What other agents do you hire? How do you go about hiring them? Who pays for their services?

Trust Administration

Describe your services during the immediate period following my death and during my trust and/or probate administration?

What information is provided to my beneficiaries?

What are the normal timelines?

How do you deal with my non-investment assets owned by my trust (residences, properties, closely held business interests) after my death?

Do you prepare the fiduciary income tax returns and estate tax return if any? Or do you work with my CPA? How is this decision made?

Testamentary Trusts

If I name your institution as a trustee or co-trustee of a testamentary trust for my spouse or any child or other beneficiary, how does that work?

How are investment decisions made?

How are discretionary distribution decisions made? Who makes them? How often are they made? Is there a process for any dispute resolution?

How do you deal with beneficiaries who are not local?

How are the interests of the beneficiaries balanced out? What if my trust contains specific direction? Will you review and comment on my trust now before I become disabled or die?

If my trust provisions call for my spouse and/or adult children to become trustee rather than your institution following my death, how are the accounts turned over to them? When are they turned over? Can my spouse or other beneficiary move the account to any institution they choose?

Fees

How are your fees determined and calculated? When acting as my agent? When acting as trustee or co-trustee?

Do you charge fees when named in my trust but not acting in any capacity?

Are your fees based on all the assets owned by my trust, even non-investment assets such as residences, real estate and closely held business interests? What fees might my trust incur with those assets?

Describe the difference between your administration fees in the period following my death and ongoing trustee investment management fees?

Are my family's assets congregated when determining the marginal rate fee charged? How does that work?

Do you charge fees over assets where I have signed a letter of retention? Please describe.

Are your fees the same for cash and cash equivalents? Do you charge different fees for actively managed accounts and how is it determined what kind of account my trust owns?

Am I paying any other asset management fees to anyone else when you are serving as trustee?

Contrast the fees I am incurring now with your fees, including the difference in services provided.

Are your fees tax deductible?

Appendix B

Conversations with Loved Ones You Intend to Name as Trustee

Rather than the interview questions I suggest you ask corporate trustees, here I list various conversations to have with your loved ones who you intend to name as a successor trustee.

Too often when I ask a client who they wish to name as their successor trustee a conversation like this occurs:

"I want to name my oldest son Robert as trustee," my client directs.

"Tell me about Robert," I ask.

"Well, Robert sometimes gets himself into bad situations. He's been divorced three times, declared bankruptcy twice and has had a couple of failed businesses," client offers matter-of-factly.

"Why in the world would you want to name Robert as your trustee?! If you become disabled he has access to all of your money and accounts! He can even sell your home out from under you!"

"Robert's my first born. He'd be upset if I didn't name him."

I am not exaggerating to say that the fictitious conversation above isn't all that different than several I've had with real clients. When considering naming family members as the successor trustee to your trust in the event of your disability or death, you must first realize that the position is one of significant fiduciary responsibility.

It is not an honor. It's a job.

You're not electing Congress. I've had other clients name all of their children as successor trustee in an effort not to offend anyone. While that can work out, it often does not because of sibling rivalry and baggage dating back to their childhood. If you name all three of your children as successor trustee keep in mind it takes two (if a majority is required) or three signatures to accomplish anything. Think of the logistics when you have family spread across the country.

Instead, I suggest that you consider the following questions for any loved one you intend to name in this important role:

- Is she likely to respond to your attorney, financial advisor and CPA or procrastinate until the issue at hand becomes an emergency?
- Is she likely to fire your professionals with whom you've had longstanding relationships and replace them with her own advisors who you don't know?
- Are the duties and responsibilities associated with serving as a trustee something that your loved one would dread or be comfortable taking on?

- Does he have the time to make sure that your bills are paid, investments are reviewed, tax returns filed, and the host of other day-to-day responsibilities you take for granted?
- Does he have trouble making difficult decisions?
- Will she be able to stand up to a difficult sibling or other beneficiary?
- When taking care of your affairs during your disability would she have your best interests at heart?
- Would his spouse have influence over his decisions?

The above are just a few of the threshold questions to consider. What follows are conversations that you should have with various loved ones. Before engaging in these conversations, I highly suggest loaning this book to your loved one. Have them read it first, so they are most aware of the duties and responsibilities you are about to ask them to consider taking on.

With Your Spouse

Most of my clients name their spouse as the primary successor trustee, and often it works out just fine. I've also seen plenty of instances where it hasn't. Taking the time to have heart-to-heart discussions over the following issues can help.

Questions for the Spouse Who Does Not Handle Most of the Money and Investment Matters

Are you comfortable managing our money and finances? Why or why not?

What help might you need? Are you comfortable with our financial advisor?

For investment do-it-yourself clients — Do you feel comfortable continuing to manage our finances as I have with discount or online brokerage firms? If not, what additional help would you need? Would it be easier for you if we established those relationships now while I'm fine and capable of selecting a good advisor? Do you know where I keep my username and passwords for my online bank/investment accounts?

Are you comfortable with our attorney? CPA? Why or why not? Should we make a change?

For tax return preparation do-it-yourself clients — Do you feel comfortable filing our tax returns if I can no longer do so? Do you know where the copies of our tax returns are kept? Would you feel more comfortable if we established a current relationship with a CPA while I am still fine and capable of selecting a good advisor?

What worries you most about our money and financial matters?

For Those Married Couples Who Have Children of Their Union

If I become disabled or die and you become the trustee, what worries you most about our family relationships?

Are you concerned that any one of our children might ask you for money? How would you react? Would you have trouble saying "no" if doing so would cause financial harm to us, you, or even to the child requesting the money?

If the trust continues on for your lifetime then distributes to our children, how do you feel about managing the investments in such a way to produce the income you need? Would you feel confident balancing your needs against the needs of our children who inherit one day? Should we tell the attorney that your needs are to be considered first and foremost, and give that specific direction in the trust document?

During the aftermath of my passing, will you need help with the legal, tax and financial day-to-day duties given a period when you might be grieving and not capable of making good decisions? If so, would you feel more comfortable naming an impartial trustee or one of our children?

For Marriages with Blended Families – Particularly Where the Trust Benefits the Surviving Spouse for Life and Then the Stepchildren

Please note that the same questions we ask of the spouse above apply to this situation. Add the following:

Are you concerned that my children will look at you as impeding their inheritance? If you are named as a trustee, how likely do you believe it to be that one of the children will claim you have conflict of interest both as a beneficiary and the decision maker over investment and distribution decisions?

Do you feel it would be best to name an independent trustee or co-trustee to serve alongside you to take some of the pressure off?

What other dynamics about our relationships with the children concern you?

With Your Adult Children

It's also common for my clients to name an adult child as the successor trustee. The child doesn't need a legal, tax or financial background as long as she is comfortable working with your professionals.

Do you feel you have enough time to manage my investments, write my checks and pay my bills, file my tax returns, and all the various things I now do for myself if I become disabled? Would it help if you had a professional co-trustee to assist?

How do you feel about dealing with your mother/father/step-mother/step-father in a situation when I am disabled? With your siblings? What concerns you most about that situation?

If you are the trustee during my husband/wife's lifetime, will you put his/her interests at the forefront? The temptation would be to preserve as much of my estate as you can for yourself and your siblings. Can you resist that temptation? What about that concerns you? Does naming an independent professional trustee as your co-trustee help with any of your concerns?

Have you met my attorney, CPA and financial advisor? Do you feel comfortable working with him or her either in the event of my disability or administering my trust estate after my death?

Have I shared enough information about my assets and estate plan with you? What do you want to know now before you have to act?

For investment do-it-yourself clients — Do you feel comfortable continuing to manage my finances as I have with discount or online brokerage firms? If not, what additional help would you need? Would it be easier for you if I established those relationships now while I'm fine and capable of selecting a good advisor? Would you move all of my investments to your broker? Do you know where I keep my usernames and passwords for my online bank/investment accounts?

For tax return preparation do-it-yourself clients — Do you feel comfortable filing my tax return if I can no longer do so? Do you know where the copies of my tax returns are kept? Would you feel more comfortable if I established a current relationship with a CPA while I am still fine and capable of selecting a good advisor? Would you use your CPA in the event of my disability or death or continue to use mine?

What concerns you about your siblings when you are acting as my trustee? Would you be able to tell them "no" if they asked you for an improper or early distribution? Would it be easier if I named an independent co-trustee?

Appendix C

The Transitional Event Sequence™

You may wonder how you may be removed as your own trustee of your revocable living trust, and when the successor trustee steps in, particularly in the event of your incapacity. Within The Family Estate & Legacy Program™, your trust document normally will contain a provision indicating that a doctor's statement confirming your incapacity may remove you as your own trustee. Sometimes physicians are afraid to sign such a document for fear of liability. If your trust is drafted under our system, it most likely also contains a "disability panel" where you name trusted loved ones or friends to determine whether you are no longer capable of acting as your own trustee.

The outcome will always be best if whoever you've named as your successor trustee knows the sequence that's supposed to transpire, and exactly who they are supposed to call and when. But that seldom happens.

Instead, this is what usually occurs:

Gina, my legal assistant, receives a call from an adult child of one of our clients. "Hi, this is Jack Smith. My mother Gladys is a client of the firm."

"What can we do for you, Mr. Smith?" Gina asks.

"I need her DPOA." Jack says.

"Is it because your mother has had problems?"

"Yes," Jack says. "I'm afraid that she may have dementia or even Alzheimer's. We're taking her to the neurologist for an examination."

"We're happy to get you her power of attorney, but you should know that your mother has a trust that holds most of her assets. You're the successor trustee. So there are a few things that need to be done," Gina instructs.

"What's that?"

"It's called the Transitional Event Sequence™, and it's a part of the estate planning program that your mother is a part of. If Gladys cannot manage her own affairs, then we must change the trustee of her trust from her to you. That will enable you to sign on all of her accounts. Between the trust and the DPOA, you can seamlessly handle everything for her."

"So what do I need to do?"

"Provide the necessary documentation, and we'll get the process started. A funding assistant will be in contact with you and all of her financial institutions so you can act for your mother."

"That sounds great. Let me take my mother to the neurologist and I'll call you after that."

This is a common example of how a successor trustee becomes the trustee. You may recall my example of Jerry and his son Kevin in Chapter Four using the same Transitional Event Sequence™.

Sometimes a client will realize that his cognitive capabilities might put him in jeopardy, so he resigns as trustee, allowing the successor trustee to step in and take over. The law office then prepares a simple resignation statement. The Family Estate & Legacy Program™ enables the funding assistants to work with the client's financial institutions, ensuring that the successor trustee is named as the party who can transact business on the accounts.

Sometimes clients will ask me, "What if I'm removed before I'm ready? What if my children on my disability panel of my trust decide that the successor trustee should step in when I believe that I'm entirely fine and capable of handling my legal, tax and financial affairs?"

I will tell you that in three decades of practicing estate planning law I can't recall a single instance when a client was improperly removed as his or her own trustee. But I can recall several instances where the family waited too long to act. The danger of an impaired client continuing to manage his own financial affairs is significant, especially in today's age of electronic fraud. It's just too easy for the bad guys to create financial problems for us.

But if you should ever be improperly removed, keep in mind that as long as you are alive and mentally competent, you retain the power to amend your revocable trust document. You can always amend it to replace yourself as your own trustee, and to change those on the disability panel who removed you.

I would strongly suggest that you have those who you've named on your disability panel read this book and specifically this Appendix so they'll better understand The Transitional Event Sequence™.

Appendix D

Differences Between Durable Power of Attorney and Trustee

DURABLE POWER OF ATTORNEY / TRUSTEE

Many clients become confused between the duties and responsibilities of the person you name as a Durable Power of Attorney ("DPOA") with the person you may name as the Trustee or Successor Trustee to your Revocable Living Trust. Let's review those differences here. Recall in Appendix C where the client's son thought he needed the DPOA to transact business for his ailing mother when he really needed to take over as her successor trustee.

The person you name in your DPOA document is referred to as your "Attorney-in-Fact". Your Attorney-in-Fact does not have to hold a law license to be named as such; they merely need to be named in a duly executed DPOA document. Your Attorney-in-Fact has all the powers enumerated in the DPOA document, which vary from document to document. Some DPOAs contain broad powers to conduct almost anything you could do yourself. These powers may include entering into contracts, enforcing legal rights and selling commercial real property you own.

Other DPOAs are limited in scope. An example would be to name someone to write your checks and pay your bills while you are on vacation for two weeks in Europe, after which time the DPOA terminates.

Keep in mind that even a broadly drafted DPOA is only good so long as you are alive. The "durable" portion in the name of the document indicates that the powers survive your incapacity. If the document is not "durable", then, upon your incapacity, all the powers in the document cease. Even with DPOA documents, upon your death the powers all cease.

The DPOA document often gives the Attorney-in-Fact the powers to transact business on accounts you hold in your individual name (or in certain cases jointly).

So how does the trustee of the trust interact with the DPOA?

When you create a revocable living trust and fund it with your assets that would normally be subject to a probate process, the trustee of the trust governs the investment and distribution of those assets. Your bank accounts, investment accounts, real estate and partnership interests transferred to your revocable trust are usually under the power of your trustee, not your DPOA.

Even when you have a fully funded a trust, however, there remain assets subject to the DPOA. Such assets include IRA and 401(k) accounts, annuities, life insurance policies and other assets that are not normally transferred into your trust. Here you need a DPOA to take care of regular business. Suppose, for example, that you become incapacitated and you have not withdrawn your required minimum distribution for the year under your IRA. Your Attorney-in-Fact under your DPOA could do that for you. Your trustee can't because your IRA is usually not owned by your trust.

Although the state laws surrounding the use of Durable Powers of Attorney have been recently modified and strengthened, it remains difficult to use a DPOA in certain instances. Many brokerage houses and banks, for example, will not honor a DPOA that is stale or not updated to current state law or does not contain certain explicit direction regarding your accounts.

The problem with DPOA documents is that the banks and financial institutions fear liability. If someone presents a fraudulent DPOA and withdraws money from your bank account, the bank could be held liable to you. Banks and other financial institutions accordingly scrutinize DPOA documents, and usually won't immediately act upon them when presented.

Your Successor Trustee seldom encounters the problems that your Attorney-in-Fact encounters when trying to transact business for you if you are incapable. This is because the assets you own are transferred to your Revocable Trust. Brokerage houses and banks **want** a Trustee to tell them what to do with the assets. The brokerage houses and banks are not as fearful of liability for the actions of the Trustee since you transferred the assets during your lifetime when you had full capacity. The brokerage house and banks can hold a copy of your trust or affidavits of your trustee to protect them from liability.

Trusts are therefore preferable vehicles for many of your assets for purposes in the event you should become incapacitated. In most events the person you name as your successor trustee will also hold your DPOA, but this isn't always true. You should discuss whether the same person should hold both offices with your estate planning attorney.

Because both the DPOA and the trust are important documents, The Family Estate & Legacy Program™ includes both documents in our trust package along with pour over wills, health care surrogates, living wills and other ancillary documents.

Appendix E

Interaction between Your Trustee and Personal Representative

TRUSTEE / PERSONAL REPRESENTATIVE

Just as clients often confuse the interaction of your Durable Power of Attorney ("DPOA") with the successor trustee of your trust, they also don't understand the interaction between the personal representative (executor) of your probate estate and the trustee of your revocable trust.

When you have a revocable trust, the hope is that all of your assets subject to probate were already transferred into your trust by the time of your death. That way your estate assets should avoid the probate process; then a court-supervised probate may not be necessary. The assets would fully and completely be distributed pursuant to the terms of your trust.

It's common, however, for a rogue asset or two to be held in your name individually at the time of your death. That asset may be a certificate of deposit, checking account or savings account that somehow never made it into your trust. Less common is when you have a claim such as a lawsuit pending at the time of your death, so a probate needs to be opened for your estate to prosecute that claim. This occurs in a wrongful death lawsuit, for example. In either case a probate is opened.

Whenever you have a probate estate opened at the same time you have assets in your trust that upon your death, there will be interaction between the personal representative of your estate and the trustee of your trust. Often this will be the same individual or entity, but not always. State law usually requires that the personal representative to your will be related to you or a resident of the state in which you reside. That is often more restrictive than who can be the trustee of your trust.

Sam, a resident of Florida, names his friend Todd, a resident of Georgia, as successor trustee of his revocable trust. This is fine under state law, but Todd can't serve as Sam's personal representative under state law. Sam must find a relative or a resident of Florida to serve in that capacity.

Issues arise when creditors make claims against the estate assets, other bills come due, or expenses associated with the probate and trust administration arise. Likewise, estate and income taxes come due. Should bills and expenses be satisfied from the probate estate assets or from the revocable trust assets? State law usually mandates from where these expenses and bills are paid, so working closely with your probate and trust administration counsel will keep you in the clear. What you don't want to happen is to pay a bill from the wrong source that adversely affects a beneficiary's rightful inheritance.

In Florida, for example, state law directs the trustee of the trust to fund amounts that the probate estate needs to pay off creditors if the probate estate is insufficient.

Sam dies. His probate estate only has $20,000 of assets, but Sam's estate owes $15,000 in taxes, $10,000 of medical bills and $7,000 of credit card debt. However, Sam's trust has plenty of money. Under state law, the trustee of Sam's trust pays the debts of Sam's estate.

Whenever you have a revocable living trust, your will is usually a "pour over" will. What this means is that the will doesn't direct who is to inherit which asset. Your trust does that. All your will does is act as a safety net, depositing assets from your probate estate into your trust for distribution. When your will pours into your revocable trust, the beneficiaries of your probate estate and the trust are the same. The will's beneficiary is the trust, and the trust beneficiaries are those that you name in your trust.

Assume instead that Sam's probate estate has a $20,000 bank account and no creditors. Sam's will is a pour-over will, meaning it distributes the bank account to the trust at the conclusion of the probate estate. Sam's trust takes the $20,000 and distributes it as part of the trust assets and pursuant to the trust terms.

Without a pour over will, you could die intestate (without a will), and therefore the distribution of your probate assets would be governed by state law.

You don't want this to happen, and it rarely does, but I've seen clients who don't understand the function of the pour over will go to an attorney and either rip up their pour over will without replacing it or draft a new will that directs distribution to specific beneficiaries as opposed to pouring the assets into their trust. This can cause big problems when the beneficiaries of the will differ from the beneficiaries of the trust. Then the payment of taxes and expenses by the probate estate and the funding of those taxes and expenses by the trust, if the probate estate is insufficient, becomes a much larger issue.

Sam doesn't understand the interaction between his will and trust. Without consulting his estate planning attorney, Sam rips up his will and creates a new will online that leaves everything to his nephew, Ned. On the other hand, Sam's trust leaves everything to his niece Nancy. If Sam's probate assets are greater than his expenses, Ned gets those. But the bulk of Sam's assets that are held in his trust will still go to Nancy. When taxes and expenses are due, Ned and Nancy will hire attorneys that argue whether those should be paid from the probate estate or the trust estate.

In any event, these are important issues to discuss with your attorney.

Acknowledgments

I dedicate this book to my mother, Phyllis Kay Hersch. (1942-2016)

When I decided to write a "short" book on Selecting Your Trustee, I underestimated the scope and value of the information. As I wrote I became more excited about the final product. The "Consider This" sections outlining real-life stories (with names and facts changed to protect identities) were extremely helpful in conveying what would otherwise be difficult concepts. I'm glad to have been able to collect and relay them in an organized manner so that many can benefit going forward. I therefore first thank the many clients, trust officers, CPAs, attorneys and financial firms who indirectly contributed to this work.

Along those lines, I acknowledge the contributions of my father, Joel W. Hersch, who had to endure nearly 11 years of off and on care-giving to my mother while she battled acute myeloid leukemia, allowing me to witness the trustee issues from the "other side of the desk".

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About the Author

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Craig R. Hersch is a Florida Bar Board Certified Wills, Trusts & Estates attorney, CPA, and is a founding shareholder and originating board member of a private trust company in Fort Myers, Florida. Mr. Hersch is a principal in his law firm, and has created several trademarked processes tied to his estate planning and administration practice, including The Family Estate & Legacy Program™, The Estate Settlement Program™, The Advanced Planning Expander™ and The Transitional Event Sequence™. All of these unique processes are designed to provide his clients comfort and clarity when navigating the complex legal, tax and financial concerns associated with planning and administering an estate.

In addition to this book, Hersch has authored *Common Cents Estate Planning*, *Legal Matters When a Loved One Dies*, and *The Florida Residency & Estate Planning Guide*. His work has appeared in several professional journals, including The Practical Tax Lawyer, Trusts & Estates Magazine, and The Florida Bar Journal. Hersch has been a featured lecturer at continuing education programs sponsored by the Florida Bar, the Florida Institute of CPAs, WealthCounsel, The Estate Planning Councils of Lee & Charlotte Counties and The National Business Institute.

Mr. Hersch writes a nationally published column on practice development for wealthmanagement.com, a web site produced by Trusts & Estates magazine, a prestigious trade journal for lawyers, CPAs and trust officers. He is a national practice development expert for the magazine, as well as for WealthCounsel, a software platform used by more than 5,000 attorneys nationwide.

Moreover, he authors a weekly estate planning column geared to laymen published in Sanibel's Island Sun newspaper and which appears on his firm's blog at www.sbshlaw.com/blog.

He is married to wife Patti, and has three daughters, Gabrielle, Courtney and Madison of whom he is very proud.