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Estate Planning Series

TRUSTEES IN ESTATE PLANNING DOCUMENTS

One of the most important decisions you will have to make in your estate plan is selecting a trustee to manage the trusts you establish for your children and grandchildren. Since the control of a trustee is significant, you need to identify someone with: the integrity to carry out the functions appropriately, the sensitivity to the beneficiaries, and the sophistication to deal with tax, legal and other complex matters. Careful planning and drafting can often address the concerns you have with this decision, such as whether the trustee has all the requisite attributes and whether the trustee will perform his or her duties as expected.

Role of a Trustee

The trustee you designate will be charged with managing the trust and implementing your wishes as expressed in the trust contained in your Will or in a separate trust document. Trustee responsibilities vary depending on the nature of the particular trust. However, there are duties which are common to most trusts: investing trust assets, making distributions to beneficiaries, coordinating investment decisions, beneficiaries, recordkeeping, filing trust income tax returns, and communicating with beneficiaries. The trend is that the terms of the trusts are getting longer, not shorter. The difficulty of the tasks and time periods faced by trustees are compounded by diversity or even hostility, amongst beneficiaries. Identifying a perfect trustee is almost impossible.

Changing Trustees

Sometimes different trustees are appropriate for different phases of your trust. You can name an initial trustee when a child is young, then when a child reaches a specified age, he or she can be given access to or input in the investment decisions of the trustee.

Use of a Co-Trustee

Using two trustees to serve together as co-trustees often provides a check and balance. Each trustee can bring a different skill set to the trust management function. One might be compassionate and empathetic towards the beneficiaries; the other may bring investment and other technical expertise. Having two trustees may also provide greater assurance that the trustee will perform his or her duties as expected.

Use of Corporate Trustee

A corporate trustee can provide the objectivity, professionalism and longevity that a relative or friend may just lack. Sometimes when a corporate trustee is used as a trustee of a trust, a family member can be named as co-trustee or advisor to provide guidance to the corporate trustees on distributions to the beneficiaries or to help achieve the personal touch you may want. If the trust you are forming is long term (lifetime or perpetual), a corporate trustee provides the certainty of having a reliable trustee for the duration.

Use of Additional Fiduciaries

Where you do not have a longstanding relationship with a corporate trustee and have a qualified friend or family member, you can name the qualified friend or family member as a trustee, but carve out the investment role for an institution who has investment and administrative expertise. You can also remove the distribution decision from the trustee and name a separate distribution committee. You can name a trust protector or family trustee and grant specified oversight powers (such as change the corporate trustee). A combination of trustee, and one or more of: an investment advisor, distribution committee and trust protector, each with specified powers and responsibilities, can also provide a structure to address a situation when you do not have one person who can fulfill all the roles of a trustee.

Powers of the Beneficiaries

In appropriate situations, you can consider giving the beneficiaries a right to replace the trustee. In many cases this may be limited to replacing an corporate trustee with another institution. This power, however, should be tempered to avoid empowering beneficiaries to trustee shopping.

Distribution Objectives

Distribution provisions do not have to be limited to legalese. You can provide some level of detail as to distributions you want in order to more clearly guide the trustees as to the lifestyle you want for the beneficiary (e.g., a car and overseas travel), or that you don’t want (e.g., no purchase of motorcycles or boats). You can even specifically authorize a trustee to use trust funds to buy a house for a beneficiary. Reasonable detail can mollify worries over the trustee not distributing funds in the manner you wish.

Investment Parameters

Sometimes trusts mandate that a diversified investment portfolio be held as mandated under the Prudent Investor Act. Other trusts simply provide that state law governing investments can be ignored. That might be acceptable, or not depending on the circumstances. If you want to tailor the investment provisions more carefully, the decision as to who manages the trust investments can be less difficult to make. For example, if you have a family business, you could authorize the trustee to hold that business without regard to any legal diversification requirements. You could even provide parameters as to when the business can or should be sold. Reasonably limiting and guiding what investments can and cannot be made can provide greater assurance that the trustee will carry out your investment wishes.

Trustees are key to proper trust implementation. It is therefore important that you carefully review the selection process with your attorney and other advisors.

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