

INFORMATION TO ASSIST IN SELECTING A TRUSTEE

- A. Responsibilities of a Trustee. The following is a brief summary of a trustee's responsibility.
1. Investing. A trustee is not a mere custodian of the trust assets, but has a duty to make the property productive.
 - a. A trustee must invest the trust fund in such a way as to balance the need to produce reasonable income without improperly risking the loss of capital.
 - b. The trustee owes a fiduciary investment responsibility to both the current income beneficiary, as well as to the remainderman.
 2. Legal Issues. The trustee is responsible for the tax planning and management of the trust, including the preparation and/or filing of fiduciary income tax returns. The trustee must also see to it that the administration of the trust conforms to state law. The trustee must also interpret the trust document and resolve ambiguities. In addition, it is a duty of the trustee to defend or prosecute actions affecting the trust estate.
 3. Recordkeeping, Accounting and Custody. The trustee is under a duty to keep custody of the trust assets, as well as accurate records of all transactions in the trust. This would include changes in the assets held in the trust and changes in the value of the trust's assets. It is also the duty of the trustee to prepare and render periodic accounts.
 4. Decision-Making. A trustee is often given discretionary authority over distributions of income or principal, or both. This requires an understanding of the donor's intentions, as well as the needs and expectations of the beneficiaries.
- B. Qualities of the Fiduciary. There are many attributes that should be considered when choosing a trustee. The following are some of them.
1. Personal Characteristics. In addition to fundamental honesty and integrity, the trustee should be able to handle significant responsibility and act decisively and fairly. The trustee should keep the lines of communication open with the beneficiaries, yet maintain confidentiality while dealing with outsiders.

2. Impartiality. The trustee should hold no bias with respect to any of the beneficiaries, nor should the trustee have interests adverse to the trust as a whole. The trustee's loyalty must be to act in a manner that is wholly consistent with the donor's intent and the best interests of the beneficiaries.
3. Specialized Knowledge and Experience. The fiduciary must possess the knowledge and expertise required to be an effective custodian and manager of the trust. This involves varying degrees of familiarity with estate, trust and tax laws, accounting principles and investments. Not only should the trustee's judgment be informed and experienced, but also reliable.
4. Administrative Capabilities. The trustee must have adequate resources to handle the responsibilities of the office. The trustee cannot delegate his fiduciary responsibilities to others. Also, the trustee must have the resources to maintain accurate records and to safeguard the trust assets.
5. Time. Depending on the size of the fund and the number of beneficiaries and complexity of the trust, the administration of the trust may require a significant time commitment on the part of the trustee. The trustee should understand this and be prepared to devote the time necessary to carrying out those responsibilities.
6. Costs and Fees. Of course, if the trustee charges a fee, it should be reasonable and commensurate with the size of the fund and the nature of the assets.
7. Characteristics of the Trust.

The following considerations, some of which are discussed in more detail later in this outline, must be kept in mind in deciding the appropriate fiduciary for a particular trust fund:

- a. Size of the trust fund;
- b. Nature of the assets;
- c. Duration of administration and need for continuity;
- d. Special needs of the beneficiaries with respect to support, etc.;
- e. Mobility of the beneficiaries and location of the trustee.

C. Family Trustee vs. Professional Trustee.

1. Family Trustee.

- a. Family members are often first thought of as logical candidates to serve as trustees because they are familiar with the donor, the donor's intentions, and the family situation. Family members are also thought of because they are often willing to assume the role of trustee with little or no charge for their services. Such a personal relationship, coupled with a high degree of trust and confidence, are advantages of selecting this type of trustee.
- b. Several potential limiting factors, however, are associated with naming a family trustee.
 - (1) The family member, while well-intentioned, may lack the requisite expertise (and/or the time commitment) to deal with the investment, bookkeeping, tax planning, and other administrative responsibilities of a trustee. For suggestions to help individual trustees fulfill their fiduciary duties and avoid personal liability.
 - (2) The family trustee can seek professional assistance with some of the custody, bookkeeping, investment, and accounting responsibilities, but since one of the reasons for naming a family trustee is often cost savings, it may be that the aggregate charges for these outside professionals will significantly erode the actual "savings."
 - (3) A family trustee who also has a beneficial interest in the trust may be placed in a difficult personal position with other members of the family when discretionary decisions with respect to the trust property must be made. (For example, if one trustee/sibling has discretionary authority over distributions from trusts for the benefit of his or her other siblings and their families, or if a decision must be made to retain or sell the family business or to reinvest the earnings in the family business rather than declare a dividend.)
 - (4) Related to the above is the question of the ability of the family trustee to act with true impartiality.
 - (5) Another limiting factor in using a family member as a trustee will exist if that family member is also a beneficiary under the trust. If the family trustee is given discretionary authority to make distributions from the trust, the trustee's discretion will have to be limited to avoid adverse estate, gift and income tax consequences. This subject is also discussed elsewhere in this outline.

2. “Professional” Trustees.

- a. A “professional trustee” can include banks, trust companies, accountants, private trustees and law firms. The professional trustee is usually well versed in the complexities of trust administration, including investments, taxation, and property management. In addition to expertise, the professional trustee can provide impartiality, continuity of operation, and often has substantial capital backing in case of “fault” - a fact that is reassuring to many clients.
- b. Professional trustees charge fees for their services that are usually based on the size of the fund and, in some instances, the income produced. Whether the client will be getting his or her money’s worth will, to some degree, depend upon what responsibilities the professional trustee will be assuming.
- c. If the donor chooses to select a “professional” trustee, the question still remains “which one?” The following are some of the considerations that should be taken into account:
 - (1) how the professional trustee is organized to handle the client’s trust business;
 - (2) the depth of the investment research capabilities;
 - (3) the importance placed upon the personal relationship;
 - (4) the frequency of portfolio review;
 - (5) how investment performance is measured;
 - (6) how discretionary powers to pay out income or principal are exercised;
 - (7) frequency of the reports and the extent to which the reports are clear and understandable; and
 - (8) competitiveness of fees.

3. Co-trustees.

Naming a family trustee and a professional trustee as co-trustees is an option that has both advantages and disadvantages.

- a. An advantage to this arrangement is that it seems to provide the best of both worlds. The family trustee can provide insight with respect to the family needs and dynamics, while the professional trustee can provide the requisite administrative expertise and objectivity.
- b. A potential disadvantage of this arrangement is that there is unlikely to be any fee saving if the professional trustee is named. Moreover, if the family trustee intends to charge for his or her own services, the total cost could be greater since some professional trustees will not split their fee with a co-trustee.
- c. While a family co-trustee will participate in most of the administrative decisions, the family trustee cannot participate in decisions regarding discretionary distributions from the trust without potential adverse tax consequences, unless the trust contains an “ascertainable standard.” Paradoxically, a reason to use a professional trustee is to avoid having to use a limited standard.
- d. When more than one trustee is named, it is important to keep in mind the fact that the trustees must act unanimously unless the trust instrument provides otherwise. Proximity and availability (as well as the number) of the family trustee or trustees should, therefore, be kept in mind.