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**A Guide for Choosing an Executor, Trustee or Guardian**

**EXECUTOR.** The position of executor involves substantial responsibilities and potential liabilities. Although the executor's attorney will assist in gathering the assets of the estate, paying the decedent's obligations, and distributing the assets under the testamentary plan, the executor is responsible for the proper administration of the estate. Among those a testator will want to consider the executor of his or her will are a spouse or other family member, friends, business associates, and corporate fiduciaries qualified to act in the estate. The size and complexity of the estate are important considerations. Other factors, such as an individual's familiarity with the testator's property and wishes, or the existence of a closely held family business, may indicate naming a family member or a business associate. On the other hand, a corporate executor may be better equipped to handle investment and record-keeping problems, and the expertise of its staff may make the hiring of separate tax accountants, appraisers, or investment advisors unnecessary. The testator should also consider location, impartiality, business experience, reliability, and physical capability of potential nominees to perform the executor's duties. Other factors to be considered are whether the individual will be able to deal effectively with the beneficiaries and whether he or she may have any major conflicts of interest with the estate or its beneficiaries.

A testator may name a single executor or name two or more persons as co-executors. Nomination of co-executors may encourage more considered judgments because co-executors must generally act together in exercising their powers. For example, nomination of a family member as a co-executor

along with an institutional fiduciary combines both the family members' familiarity with the assets and the institutional executor's experience and expertise in estate administration.

However, such a plan can also result in disagreements, possibly leading to stalemates damaging to the estate, and having multiple decision-makers can make estate administration more cumbersome and less efficient.

In order to reduce estate administration expenses, a testator may nominate a family member or friend on the expectation that the executor will waive his or her statutory commissions. However, that individual may need to retain tax or investment advisors for assistance, thus resulting in additional expenses. The appointment of multiple executors does not increase the total statutory compensation payable because the commissions allowed are divided among those serving.

To be reasonably sure that a nominee will accept the duties of serving as executor on the testator's death, the testator may wish to discuss the matter with the proposed nominee, explaining the time and responsibilities that the position will require. A corporate fiduciary may decline to serve as executor as a matter of policy if the estate is too small to generate sufficient fees. This factor should be kept in mind if the corporate executor is the only nominee or if the corporate fiduciary is the last alternate nominee because a disclaimer by the fiduciary would then result in the need for an administrator to be appointed by the court.

**TRUSTEE.** Although people often assume that the persons named as executor and guardian of the person of a minor child should also be named as trustee, they should be advised that there is an important difference in the qualities desirable in a trustee. An executor's responsibilities are generally short term and demand less investment and management skills than those required for a trustee. A guardian of the person, on the other hand, should be someone who is willing to assume responsibility for the personal welfare of the child, but who need not be concerned with property management. The testamentary trustee must be able to manage property (or at least to supervise the management of the trust property), to respond to the trust beneficiary's personal and financial needs, and to assume long-term responsibility for the administration of the trust. Of course, in many instances the person named as executor will also be named as trustee, and this is often desirable to assure continuity of management between the estate and the testamentary trust.

In general, any individual who has the capacity to acquire title to property and enter into contracts, and who is not a minor, may be a trustee. Any corporation or association (e.g., a bank or trust company) authorized to conduct a trust business in California may also act as trustee. However, no foreign corporation or association, other than a national bank authorized to conduct a trust business in this state, may act as a trustee in California.

A common source of confusion to many of our clients has surrounded the issue of whether or not an institutional trustee should be nominated. Following is a comparison of the advantages offered by both an institutional trustee and an individual trustee.

The advantages of an institutional trustee are:

**Permanence:** An institutional trustee will normally be able to act as trustee during the entire duration of the trust and will thus provide continuity of administration. Moreover, the illness or disability of a particular individual will not significantly impair the administration of the trust.

**Professional Management:** An institutional trustee employs many experienced persons having a wide variety of specialties and has available numerous facilities that cannot be

matched by the typical individual trustee. In addition, most institutional trustees maintain various common trust funds that enable small trust easily to diversify their investments.

**Impartiality.** An institutional trustee is generally thought to be more likely to treat successive or concurrent beneficiaries equitably. While the testator will often consider this to be unimportant when the beneficiaries are in the same family, it may be important when the beneficiaries consist of members of different families, such as the testator's spouse and testator's children by a prior marriage.

**Financial Responsibility.** The financial responsibility of an institutional trustee is normally beyond question, so that the beneficiaries are assured of having an effective remedy in case of breach of trust. Moreover, the fact that institutional fiduciaries are examined by various governmental agencies gives additional assurance that the trust will be properly managed.

**Tax Advantages.** Under the tax laws, especially those dealing with the generation-skipping transfer tax, greater flexibility may often be achieved when an independent trustee, such as an institutional trustee, is used.

The disadvantages of an institutional trustee are:

**Cost of Administration.** Many individuals feel that the cost of an institutional trustee is too great, especially where the individual desires to have the trustee consult with an investment advisor and, thus, not use the investment expertise of the institutional trustee. To make an accurate assessment, however, the cost of an institutional trustee must be compared with the total cost of professional accountants, investment advisors and custodial services that a particular individual trustee might be required to use.

**Conservative Investment Approach.** Many individuals believe that the investment approach of an institution is more conservative than necessary. For example, an institutional trustee will not ordinarily make investments in real property, an investment that has generally kept pace with the current inflationary economy. On the other hand, however, many clients favor a conservative investment approach.

**Institutional Problems.** Institutional trustees have the same problems as other large organizations with changing personnel. They often fail to take a personal and individual interest in their customers and are unable to make swift decisions.

The advantages of an individual trustee are:

**Personal Relationship.** If a close friend or family member is chosen as trustee, he or she is more likely to be aware of the testator's desires and the personal needs of the various beneficiaries. This may be particularly desirable where the testator wishes to have the trustee function as a family advisor.

**Permitting a Beneficiary to Participate in Management.** There is much to be said in favor of permitting a younger beneficiary to act as his or her own trustee or co-trustee and manage, or participate in the management of, the trust assets, especially where the trust is to terminate during his or her lifetime. However, there may be serious tax problems if the beneficiary/trustee's powers are too broad.

**Cost of Administration.** It is often thought that the cost of administering a testamentary trust can be completely eliminated by the appointment of a family member or close friend as trustee. This may often be true, but to evaluate accurately the cost factor, the testator should consider the charges of investment counsel, accountants, and other persons whom the individual trustee may need, to choose, to employ to discharge his or her duties adequately. Depending on the value and nature of the trust assets and the ability and available time of the individual trustee, the total costs of an individual trustee may be more or less than the cost of an institutional trustee.

**Speed.** It is more likely that a quick decision can be reached by an individual rather than by an institution, because the institution frequently must act through committees and must observe other formal procedures.

**Investment Approach.** Although the language used in the will should significantly affect the trustee's investment approach, an individual often will be less conservative in the management of a trust than an institution. Whether a less conservative tendency by the

trustee is an advantage or a disadvantage depends on the testator's point of view.

**Managing an Interest in Closely Held Businesses.** Although a representative of an institutional trustee may sit on the board of directors of a closely held corporation in which the trust holds a controlling interest, this representative will not ordinarily be as effective in that capacity as an individual chosen by the testator who is familiar with the testator's business.

The disadvantages of an individual trustee are:

**Lack of Professional Management.** If an individual trustee is not adequately compensated for his or her services, the quality of the trust management may suffer. It is a fact of life that "volunteer" work is often given low priority. Also, individual trustees tend to neglect keeping adequate records for the trust. Further, unless the individual is well qualified in all areas of trust management or seeks competent advice, the trust will not be properly administered. This may require costly accounting services and, possibly, lead to litigation many years later.

**Difficulty of Finding Competent Individual.** An individual who accepts a trusteeship must make a major commitment of time and responsibility. It is therefore often difficult to find an individual (other than a beneficiary or family member) who is both willing and able to act as a trustee.

**GUARDIAN.** Matching the needs of minors and the qualifications of prospective guardians requires the balancing of complex factors. In counseling our clients, we often suggest that they consider some of the following factors:

While age in itself does not determine a person's fitness or unfitness to be a guardian, the client should consider whether a particular candidate has the necessary maturity, experience, temperament, patience, and stamina to undertake the responsibilities as guardian of the particular child or children. It is generally inadvisable to appoint grandparents or other older persons as guardians of the person or minors. Appointment of grandparents may pose a twofold problem. First, they may be too old to take on the responsibility of young children and, second, where there are two sets of

grandparents, if only one is chosen, the other side may be very upset and cause an immediate conflict and the associated emotional trauma for the ward. Possible rivalries between the ward and guardian's children should also be considered.

The individual selected should have a genuine interest in the welfare of the minor, either through family relationship or personal friendship, and should be an individual in whom both prospective ward and testator have confidence.

In view of the psychological blow the bereaved children are likely to have sustained, the guardian should have some understanding of the emotional problems of children or should be willing and able to obtain skilled guidance on this subject.

Integrity and stability are essential qualities in a guardian of the person, since the individual selected will have the closest contact with, and greatest influence over, the ward. A married person is usually nominated as guardian of the person of a minor. Since stability in the marriage is important for a peaceful and secure environment for the ward, the client may wish to require, as a condition of the nomination, that the nominee be married and living with the nominee's spouse at the time of the client's death. However, a change in marital status does not always make the person unacceptable to the client. A widowed or divorced nominee may still be a satisfactory guardian.

The guardian should be physically able to undertake the care of an additional child or children, and should have the time necessary to devote to this task. A family with a number of children or a family in which both husband and wife work may not be the best choice.

Children deprived of their parents may derive a sense of security from remaining together with their brothers and sisters. If the testator has more than one child, the guardian should be capable of assuming the care of all, if possible.

The guardian's personal situation may be important to the testator, taking into consideration religion, age, marital status, other children, personality traits, and similar factors. The stability of the marriage should also be taken into consideration.

It is important that sufficient funds be available to cover the costs of caring for the ward throughout the period of guardianship and, if the ward is to live with the guardian, to enable the guardian and family to meet the increased strain on their resources of having a new person or persons added to the household. If the testator will not be able to provide sufficient funds to cover all expenses satisfactorily, the person chosen as guardian should be in a financial position to meet the balance of the necessary expenses without subjecting the guardian and family to privation. Financial difficulties owing to the ward's arrival in the guardian's family must be avoided to prevent resentments with the family unit.

The guardian of the person should also be someone who has no economic conflicts of interest with the ward.

The individual nominated as guardian of the person should be consulted in advance so that willingness to serve can be definitely ascertained. Any alternatives or successors should also be consulted. The guardian should be willing and able to give the children an upbringing similar to that which the testator would have provided financially, socially, morally, and in other ways important to the client. Sometimes testators will want the guardian to adopt the children. If this is the case, the nominee should be someone who is willing to do so.

There should be as little delay as possible in providing a guardian of the person of minors following the parents' death. More important, the prospective ward should be spared the agony of a family tug-of-war over who is to be appointed. A clear-cut expression of choice by the deceased parent by will, together with naming alternates in case the first named proves unable or unwilling to serve, is the best way of avoiding such delay or dissension.

If the other parent is living when the will is drafted, the parents should discuss and agree on the proposed nomination before their wills are executed. Normally, both parents will nominate the same persons.

Should you have any questions or need legal advice regarding selecting an Executor, Trustee, or Guardian, please contact Jay D. Fullman, Jay D. Fullman A Professional Corporation at (562) 694-6005.