

FIDUCIARIES

Fiduciaries are individuals or trust companies that act for the benefit of another. Executors, trustees, and personal representatives are all fiduciaries. An executor or personal representative is the individual or trust company that settles the estate of a testator according to the terms of the will. A trustee is an individual or trust company that holds legal title to property for the benefit of another and acts according to the terms of the trust. You nominate these fiduciaries, if applicable, in your will or trust document. After the probate court admits the will to probate, the probate court will issue letters testamentary that give the executor the power to act on behalf of the estate. If no will exists, the court will provide letters of administration to the executor providing the power to act on behalf of the estate.

Fiduciaries can accept or decline to serve in that capacity and can be compensated for their time. Consequently, you should name a primary and an alternate in your will or other document. Fiduciary work is time-consuming and can be difficult but the fiduciary can pay a professional out of the estate or trust assets to assist them with the tasks requiring legal or financial expertise. Of course, these fees will reduce the amount of money or assets available for the beneficiaries of the trust or estate. When choosing a fiduciary, you should nominate someone who is trustworthy, responsible, and capable of handling the job. There may also be state law requirements that impact who can act in a fiduciary capacity. Before you nominate a fiduciary in your will, you should specify the job requirements and ask the person's consent to perform those activities.

EXECUTORS/PERSONAL REPRESENTATIVES

Q: WHO SHOULD I NOMINATE AS MY EXECUTOR?

A: It depends on your individual circumstances. One approach is to appoint someone with no potential conflict of interest – that is, someone who doesn't stand to gain from the will. This individual could be a friend, lawyer, or bank. Individuals can be paid for their service and any professional or commercial institution will require a fee but if the estate is large or has other complicating issues (i.e. someone will likely contest the will), a paid professional is often advisable. In situations where there is little possibility of a will contest or when the estate value is relatively small (less than \$500,000), a mature friend or family member who will waive (refuse) the fee to which he would be entitled, may be the best solution.

Q: WHAT DOES AN EXECUTOR DO?

A: An executor is responsible for guiding the will through probate to legal acceptance of its validity, including defending it against will contests; collecting the assets of the estate; evaluating and paying claims against the estate, filing the estate tax return and estate's income tax return and paying the taxes; distributing money and assets to beneficiaries; raising money to pay claims by selling assets, and preparing and filing a budget and accounting for the court. Once the executor had closed out the estate, their duties are over. Most estates can go through probate in less than a year, although some estates may take a few years to close.

Q: ARE THERE ANY RESTRICTIONS ON WHO I CAN NOMINATE AS MY EXECUTOR?

A: Yes. The executor cannot be a minor (under 18), a convicted felon, or a non-US citizen. All states allow nonresidents to act as executors but some require a nonresident executor to be a primary beneficiary or close relative and others require a surety bond or require that the out-of-state executor engage a resident to act as his or her representative.

TRUSTEES

Q: WHAT ARE THE DUTIES OF THE TRUSTEE?

A: Your trustee will collect the trust assets, investing the assets, paying bills, file accountings and tax returns, make decisions about distributions to the beneficiaries and manage the trust assets according to the trust agreement and local law. The duties will also vary with the nature of the trust property. Your trustee has the legal right and responsibility to manage and control the trust assets and the trustee will have the powers provided by state law and enumerated in the trust document to accomplish this mission. The trustee is a fiduciary and is subject to strict responsibilities and higher standards of care and performance than someone who is dealing with his or her own property. Since your trustee is not required to accept your nomination, you should name an alternate trustee in your will or trust agreement.

Q: WHO SHOULD I APPOINT AS MY TRUSTEE?

A: This decision depends on your individual circumstances and the value and type of trust assets. Ability, durability, integrity, experience, judgment, understanding, and solvency are all qualities to look for whether the trust is big or small. Because a trust can last for several generations, you should choose someone who will outlive the trust beneficiaries or in the alternative name a commercial institution or trust company as a successor trustee. There are several options:

Many people choose family members to serve as trustees. If the family member is competent to handle the financial matters involved, has the time and interest to do so, and if you're not afraid of family conflicts if one relative is named trustee, a family member trustee for a small to medium sized trust may save administration costs. You should consult with an attorney before nominating a family member (if also a beneficiary of the trust) as a trustee because this can create adverse estate tax consequences for your estate or income tax consequences for the trustee if not properly drafted.

You can name a bank or trust company to manage the assets and in certain situation you must name a domestic bank as trustee. Although you will pay a fee for this service, one benefit of an institutional trustee is permanency. Banks and trust companies are permanent institutions that can manage your trust for decades. Additionally, they also have professional knowledge of and experience with investment options and are objective and regulated by law. However, most institutions require the trust assets be a certain amount (generally \$500,000 or more) before agreeing to act as trustee.

You could name a family member and an institution as co-trustees. This option allows for a certain comfort level for beneficiaries dealing with the trustee regarding distributions from the trust assets, while providing financial expertise for investing and preparing income tax returns and other required documents. However, this option may be more expensive if both trustees are to receive full fees.

Q: WHAT IF MY TRUSTEE MISMANAGES MY TRUST ASSETS?

A: You can provide in your will or trust agreement a procedure for removing a trustee if the beneficiaries become dissatisfied. There could be adverse tax consequences to the beneficiaries with the power to remove so it is important to discuss this with your attorney.