

AUGUST 2024

EXECUTOR AND TRUSTEE SELECTION

Authors: Kaitlyn A. Pacelli and Mi-Hae K. Russo

If you have any questions about this Advisory, please contact:

MICHAEL T. CLEAR
203.363.7675
mclear@wiggin.com

ROBERT W. BENJAMIN
212.551.2602
rbenjamin@wiggin.com

DANIEL L. DANIELS
203.363.7665
ddaniels@wiggin.com

SETH E. ELLIS
561.910.7510
sellis@wiggin.com

HELEN C. HEINTZ
203.363.7607
hheintz@wiggin.com

DAVID W. KESNER
203.498.4406
dkesner@wiggin.com

LEONARD LEADER
203.363.7602
lleader@wiggin.com

VANESSA L. MACZKO
203.363.7667
vmaczko@wiggin.com

ERIN D. NICHOLLS
203.498.4319
enicholls@wiggin.com

CAROLYN A. REERS
203.363.7668
creers@wiggin.com

Who should I nominate as the Executor of my Will? Who should be the Trustee of my Trust? Should the Executor and Trustee be the same person? Should I nominate my children? Can I name multiple people in these roles? What if I don't have anyone appropriate to name?

These are questions that every estate planner is accustomed to hearing after describing the critical roles of an Executor in administering an estate and a Trustee in administering a trust. Choosing the right Executor and Trustee is an important decision and one that involves the consideration of numerous factors.

EXECUTOR RESPONSIBILITIES

The Executor is the person named in a Will who is responsible for managing and administering the estate while the Will is being probated. When someone dies, the Executor is tasked with a multitude of responsibilities – including locating the decedent's Will, filing paperwork with the probate court, locating and safeguarding the decedent's assets, obtaining appraisals of estate assets, paying debts and expenses, filing estate tax returns, and hiring attorneys, accountants, or other professionals to assist in those efforts, and ultimately distributing the assets of the estate as directed by the Will. There is a personal element as well. The role may involve managing the expectations and needs of grieving heirs.

In short, nominating an Executor bestows more than an honorary title upon a family member, friend, or trusted advisor. It enlists that individual for an assignment that may last for several years depending on the size and complexity of the estate.

TRUSTEE RESPONSIBILITIES

The duties of a Trustee arise from the Trustee's obligation and fiduciary duty to carry out the Grantor's intentions and to adhere to the terms of the trust agreement. The scope of the Trustee's responsibilities not only entails the management of trust assets on behalf of the trust's beneficiaries, but also investing and preserving the trust assets, filing trust income tax returns, and distributing trust income, principal, or both, to its beneficiaries. Often, this requires that the Trustee make appropriate judgment calls on what they consider to be prudent based on the terms of the trust agreement and the needs of the beneficiaries. The Trustee may hire competent legal, financial and accounting expertise, but may not delegate the administration of the trust or any

CONTINUED

EXECUTOR AND TRUSTEE SELECTION

MATTHEW E. SMITH
203.363.7639
msmith@wiggins.com

GEORGE R. FREUND
561.910.7512
gfreund@wiggins.com

SCOTT G. RICHMAN
561.910.7516
srichman@wiggins.com

KATERYNA BAKHNAK
212.551.2855
kbakhnak@wiggins.com

JOSEPH BENDEL
561.910.7544
jbendel@wiggins.com

MARY MARGARET COLLEARY
212.551.2637
mcolleary@wiggins.com

RUTH FORTUNE
203.363.7658
rfortune@wiggins.com

ASHTON C. MALKIN
561.910.7511
amalkin@wiggins.com

MARISSA A. O'LOUGHLIN
203.363.7674
moloughlin@wiggins.com

KAITLYN A. PACELLI
203.363.7635
kpacelli@wiggins.com

ANDREW S. PHILBIN
203.363.7606
aphilbin@wiggins.com

MI-HAE K. RUSSO
212.551.2619
mrusso@wiggins.com

matters of discretion to others. The Trustee must also account for his or her management of the trust to the beneficiaries. This is in the form of written records and periodic accountings of the trust assets showing the nature, amount, and handling of the trust assets, along with a summary of the receipts of principal and income, payments from principal and income, and the principal and income on hand.

A Trustee is meant to have a longer-term role than the Executor, as trusts are often meant to last for a certain number of years or even for the lifetime of a particular beneficiary or multiple beneficiaries, whereas an Executor's role ends upon the completion of the estate administration and distribution of assets to the beneficiaries.

SO WHO DO I CHOOSE FOR THESE ROLES?

Serving as an Executor is not for everyone. It is a job that requires a certain skill set. Those who are best equipped to handle the duties of an Executor are typically highly responsible and detail oriented. They can set and meet deadlines. It can be helpful if an Executor has financial experience and/or familiarity with the assets of the estate, especially if you own or operate a business. It can also be a good idea to nominate an Executor (or one or more successor Executors) younger than yourself with the expectation that at least one of your nominated Executors will outlive you and be willing and able to serve.

Similarly, a Trustee who has the financial acumen to properly invest and protect the Trust property from depletion is beneficial. You should also consider whether the Trustee has an existing relationship with your children or would otherwise have a cordial relationship with your beneficiaries. Many beneficiaries are unfamiliar with trusts and anxious about their lack of direct control over trust assets. A Trustee who can facilitate good communication with the beneficiary, educate the beneficiary about the role of the Trustee, and manage expectations would make the relationship infinitely easier for both parties.

HOW MANY EXECUTORS OR TRUSTEES CAN I NOMINATE OR APPOINT?

While you may nominate as many Executors or Trustees as many as you like, this is not always advisable. While it is common to nominate co-Executors, having multiple Executors may be cumbersome and problematic. For example, nominating several children who harbor old rivalries could thwart the administration of the estate. But this cuts both ways: naming one child over another could also have the unintended consequence of reigniting past tension or even creating new ones where none previously existed. Consider, for example, that the Executor has the ultimate say over who receives the tangible personal property in your home in the event of a disagreement over specific items. Thus, the decision to name multiple Executors or in choosing one Executor or Trustee over another often requires careful consideration of family dynamics.

CONTINUED

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

EXECUTOR AND TRUSTEE SELECTION

A beneficiary can also be a Trustee, with some limitations. The surviving spouse, for example, is almost always both the successor trustee and beneficiary of a marital trust or family trust. It's also quite common for an adult child to be the beneficiary of his or her own trust. Note, however, that a Trustee who is also a beneficiary of a trust is precluded from participating in discretionary decisions over distributions to themselves, but they could participate in the general management and investment of trust assets.

DOES IT MATTER WHERE MY EXECUTOR OR TRUSTEE LIVES?

Jurisdiction may be a relevant factor to consider. Some jurisdictions impose extra burdens or restrictions on who can serve as Executor. For example, the State of Florida presumptively disqualifies out-of-state Executors who are not close family members.

Naming a non-U.S. person as an Executor or Trustee could also have unintended and adverse tax consequences. For example, if a Trustee has substantial decision-making authority over the trust, the trust can be deemed a foreign trust. A foreign trust is subject to withholding on U.S. source income, such as dividends from U.S. stocks and passive rent from U.S. real property, and income effectively connected with a U.S. trade or business. U.S. beneficiaries of a foreign trust who receive distributions from the trust are subject to U.S. federal income tax on such distributions, with interest charged on the tax associated with distributions of income accumulated from prior years. Foreign status may also subject the trust to additional reporting requirements that carry hefty penalties for noncompliance.

DOES IT MAKE SENSE TO NAME A PROFESSIONAL EXECUTOR OR TRUSTEE?

While many clients will name a family member or a trusted friend as Executor or Trustee, some clients do not have someone who would fit the role or someone to name as the successor. Still, others would simply prefer to take family out of the equation (perhaps to avoid any risk of family tension or to spare family members the responsibility). In such circumstances, a professional Executor or Trustee such as an attorney or a bank may be the best option. A professional Executor or Trustee provides expertise, a high standard of care, and neutrality. However, they may come with additional expenses. Individuals, including family members, are typically entitled to charge commissions for serving as an Executor or Trustee. Professional Executors or Trustees may charge their customary hourly rates or may have special rates for serving in that role.

The selection of your executors and trustees requires careful thought and consideration. Choosing the correct executor and trustee is critical not only to ensuring the smooth administration of your estate and trust, but also to provide you with the peace of mind that your testamentary wishes will be carried out efficiently when you are gone. Your Wiggin and Dana attorney would be happy to discuss these matters with you further and in light of your own personal circumstances.