



Choosing Executors, Trustees, and Guardians for Your Estate Plan

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Who would you trust to take care of your children if something happened to you? Who would you trust to manage their finances? Who in your life would be capable of administering your estate if you pass away? For some fortunate people, the answers to these questions are clear. For many others, however, answering these questions is far from easy.

When clients are crafting or revising their estate plans, there are a lot of questions to answer and a lot of decisions to make. As a starting point, we suggest that clients start the planning process by considering the people in their lives who they would like to act in these roles. If you cannot decide, we can help. Don't let the lack of the "perfect person" prevent you from having a plan.

When you are creating your estate plan, there are generally no more than three roles that must be filled: Guardian, Executor, and Trustee. Each is discussed below.

GUARDIAN

If you have minor children, the Guardian is the person who will step in and take custody of those children in the event of the death of both parents. Not surprisingly, then, this fiduciary appointment is often the one that clients spend the most time considering. Think of the Guardian as the person who will step into the shoes of the parent on a daily care basis.

Often the selection of Guardians will mirror the selection of the Trustees, but this does not have to be the case. The person you choose to parent your children may not be the person you choose to manage their trust funds. Sometimes, clients prefer that these roles be filled by two different people in order to have a system of checks and balances and avoid any potential conflicts.

However, when you choose a Guardian who is different from the Trustee, be sure that you have considered their ability to work together to provide for your children. For example, a Guardian in New York may need a distribution to pay for a medical or educational expense, and a California Trustee may not be able to sign and deliver an urgent document as quickly as a New York Trustee.

EXECUTOR

An Executor¹ is the fiduciary in charge of your probate estate. The Executor's role is typically short in duration but can be time intensive. When you die, this is the person who must determine what property you owned, compile a list of your creditors and debts, take control of all of your assets, and protect your estate assets from waste or loss until your estate is distributed to your beneficiaries. In most states, this can be a fairly tedious job that requires court filings and, depending on the size of the estate, tax returns. In many cases, however, many aspects of the job can be delegated to accountants and probate attorneys, which make it more manageable.

In some cases, being an Executor can be very demanding. If you own a business, for example, the Executor would have to take over that business for some period of time and try to get the most value out of it for the estate. In most cases, however, being an Executor does not require any special business or financial acumen.

In the end, no matter how annoying, complicated, or time-consuming this position is, it is a temporary job. Most probate estates are not open for more than three years. When choosing an Executor, take into account location, the amount of time your potential Executor will have on his or her hands, and, if choosing co-executors, the dynamic of the relationship between the two parties along with their ability to sign necessary documents on a timely basis.

TRUSTEE

A Trustee is charged with overseeing the administration of trusts created by you during your life and at death. In comparison to the job of Executor, the job of Trustee is generally longer in duration but narrower in scope.

The Trustee's authority over the trust funds will depend on the language in the trust agreement. A Trustee can be given a broad scope of discretion, ranging from absolute control over all trust assets and their distribution, to virtually no control. In the latter scenario, the creator of the trust may have mandated certain

trust distributions in the trust agreement (e.g., “one-half of the trust must be distributed when the beneficiary turns 40 years old”), and the Trustee’s job is to follow those specific instructions.

Like Executors, Trustees are often required to submit court filings, trust accountings, and report on the performance of the trust to beneficiaries and other interested parties. Trustees owe a duty not only to current beneficiaries, but also to remainder beneficiaries. They must not only conserve and protect trust assets, but also make them grow. Trustees may be given specific directions in the trust document and must take care to obey the terms. Fortunately, most Trustees rely on assistance and advice from legal and financial professionals and are able to properly administer the trust without any issues. You can also provide compensation to the Trustee in the trust document, which will depend on the nature of your relationship with the trustee (personal or professional), and whether the position will entail a significant amount of work. When choosing a Trustee, consider the terms of the trust you have created, the relationship between the Trustee and the beneficiaries of the Trust, the location of the Trustee, and the

amount of time the Trustee will have to devote to the position. For example, if you have given your Trustee discretion over distributions to your children, will he or she make distributions in a manner you would feel comfortable with, or would he or she be too strict/lenient? While a thoughtfully drafted trust is essential, the selection of the right person can be a crucial component to the success of an estate plan.

Keep in mind that a non-professional friend or family member can serve as a Trustee alongside a professional trustee (such as an attorney or advisor). This way, you can implement a system of checks and balances in your own plan to safeguard your wishes.

OVERALL CONSIDERATIONS

It’s important to consider the choice of your fiduciaries from an objective point of view and select the people you feel are best equipped to fill the position. This is easier said than done. A consultation with your estate planning attorney or advisor will be well worth the time you spend to ensure the proper administration of your estate.

1 In some states (e.g., Florida) the Executor is referred to as a “Personal Representative”.

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