

DAVID HERRMANN

President and Head of Personal Trust, Delaware

Naming a Fiduciary: A Practitioner's Perspective

Thoughtful selection of a fiduciary should be a core part of the estate planning process.

Over the years, I have found that clients and advisors often do not focus on the importance of choosing an appropriate fiduciary. In my past life as a practicing attorney for more than a decade, when I met with clients to discuss an estate plan, the focus was often on saving federal estate tax, developing a gifting strategy, capitalizing on the unlimited marital deduction and the credit shelter trust, and creating trusts for children. Toward the end of the planning meeting, we would touch on whom to name as a fiduciary (typically the executor of an estate or the trustee of a trust), and the client would often suggest a spouse, one or more children, an in-law (if the children were younger) or even a family friend.

Unfortunately, in making such choices, clients would typically bypass consideration of a number of important issues: the qualifications of their selections; the time, effort and expertise required for the complex tasks that often arise during the administration of an estate or trust; the actual interest level of those named; and, finally, the potential financial implications of getting things wrong. The idea of selecting an institution for this role only sometimes was considered.

After leaving private practice, I came to work at the Neuberger Berman Trust Company. Over the past 20 years, and since 2005 serving as Head of Personal Trust for our Delaware trust company, I have worked (along with my colleagues) with clients and their attorneys to save federal and state estate taxes, and to create and administer trusts for their descendants and other beneficiaries. In this process, I have found that it is hard to underestimate the importance of selecting an appropriate fiduciary—and that it can be well worth considering an institution for this role.

Issues to Keep in Mind

In my view, naming a corporate fiduciary may be valuable for numerous reasons, including the ability to treat beneficiaries with **impartiality**, capitalize on potential **tax savings**, and deliver the **expertise** and **continuity** needed to handle complex issues that come up over the course of administration—often over many years and across multiple generations.

Impartiality

Naming a child or even multiple children as a fiduciary often seems like the obvious choice. However, it can lead to family disagreement regarding important decisions, especially when the children involved already have a history of tension.

For example, when serving as a personal representative for an estate, one child might want to keep the family home while another might want to sell it. This could lead to arguments, the retention of an unproductive asset or (in a worst-case scenario) costly litigation to determine its disposition. Such a dispute can strain relationships, delay the estate's administration and lead to significant unnecessary expenses.

Similar issues may arise when family-member trustees decide whether to make certain distributions from a trust. Suppose a trust was created for a child who is the sole current beneficiary, with the remainder passing to the trust settlor's (creator's) other descendants. A child serving as sole trustee may have authority to make a distribution without consulting anyone. As a result, that child may not properly take into consideration all of the terms of the trust and how such a decision may affect the interests of the others.

In both of these scenarios, a corporate fiduciary is in a position to act impartially, considering the interests of current and remainder beneficiaries and avoiding scenarios where one child's decisions lead to conflict with other family members.

Potential Tax Savings

As a practicing attorney, I often found that fiduciaries were also named without considering the potential tax ramifications. In particular, where an individual lives may require that certain income taxes be paid as long as he or she serves as trustee.

Drilling down, each state applies its own laws to determine a trust's income tax for the year. For example, in New York, an irrevocable non-grantor trust created by a New York resident pays New York state income tax if there is a New York trustee, trust property located in New York or if the trust has New York source income. In the absence of the latter two criteria, the trust would pay no New York income tax if the settlor named a trustee located outside of New York. Further, a trust located in Delaware with a Delaware corporate trustee and no Delaware resident beneficiary would pay no Delaware state income tax.

The absence of current New York and Delaware state income tax allows for much greater accumulation potential than if such taxes are due each year. In our view, it is generally a good idea to consider whether to name a corporate trustee to achieve this significant benefit.

Expertise

Administering an estate or trust can be extremely complex, but often the potential issues involving legal, tax and investment matters are not considered when trusts are created. Of course, individual fiduciaries who are not well versed in these areas can always consult with competent attorneys, tax professionals and investment advisors; however, a corporate fiduciary who serves as an executor or trustee on a regular basis may be in a better position to identify potential issues and plan accordingly.

The stakes are high. For example, the failure to secure effective legal counsel may trigger unnecessary liability, while the lack of qualified portfolio managers may lead to lower investment returns over time—leading to loss of trust principal, reducing funds available to beneficiaries and/or potentially frustrating the settlor's intentions. A corporate fiduciary appointed from the outset can help avoid these and other unnecessary risks. Further, the all-in fees of a corporate fiduciary providing the required services can often offer an advantage over situations in which the individual fiduciary pays for them one-by-one.

Continuity

Another often-overlooked benefit of naming a corporate trustee is the stability and reliability that an institution can provide. If only individuals are named, they may eventually wish to resign due to age or other obligations; appointing a successor executor can be costly and time-consuming, and a new individual trustee may not have the requisite knowledge or access to information maintained by the prior trustee. In contrast, a consistently serving corporate fiduciary ensures continuity of expertise that can last for years, across all aspects of its duties.

Conclusion: Considering the Merits

In all cases, it is important to consider the benefits of naming a corporate fiduciary during the planning process and administration of an estate or trust. Focusing on the selection of the appropriate fiduciary is something that I can now fully appreciate, in light of what I have seen over the past 30 years in seeking positive outcomes for many complex trusts and estates.

Middle Ground

For those who wish to maintain a middle ground, it is possible to appoint both an individual and a corporate fiduciary. This can allow the beneficiaries to draw on the institution's knowledge and expertise, while the corporate fiduciary can access valuable information that the child, relative or family friend, as the individual fiduciary, may be able to provide.

If a corporate fiduciary is not named at the outset, it may be wise to leave open that option: The governing instrument can contain a provision allowing an existing fiduciary to resign or be removed with the appointment of a successor corporate fiduciary.

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1290 Avenue of the Americas
New York, NY 10104-0001
www.nbprivatewealth.com

