



selection of trustees - important questions; difficult answers

MSK Client Alert

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We often are asked a number of questions by clients about who should serve as Trustee(s) of the client's living trust: "Should it be an individual or a bank/trust company?" "Should I have one Trustee or should I have Co-Trustees?" "How many backup Trustees do I need?" First, keep in mind what the Trustee's job will be. Simply put, the Trustee will manage all of your finances (a) if you are alive but incapacitated, (b) upon your death, and (c) after your death, depending on how long thereafter the trust lasts for the benefit of your beneficiaries. More often than not, a client generally wants one Trustee because it is thought that one person acting alone can by definition act more easily; there is no one else to ask. In addition, most often the client desires that one trustee to be an individual and, more specifically, a family member or close friend. There are no "right answers" to these questions, so instead we'll provide some considerations to take into account when trying to answer them.

1. A Trustee needs to have a varied skill set. The Trustee should have reasonably good business acumen. The Trustee also should be good at supervising and in some cases delegating responsibility to others (e.g., investment advisors, accountants, lawyers). The Trustee should be someone who is not contentious, who communicates well, and who can be sensitive and empathetic to the needs of the beneficiaries. Finally, and perhaps most importantly, the Trustee must have the time to devote to do what is necessary in the trust administration. (Most people greatly underestimate the time and emotional commitment required in connection with acting as a Trustee and managing assets for someone else.)

If one individual has all of the above capabilities, then you are in luck, and also in the minority. Having said this, there still are a number of factors that might suggest that a single individual trustee is not always the best solution.

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2. When you have one individual Trustee, that individual will always need to be available to participate in the administration of the trust (help manage trust assets, deal with beneficiaries, etc.). This means that the Trustee needs to be available notwithstanding illnesses, personal and business travel, marital problems, problems in the Trustee's own family and/or business, and anything else that might divert the Trustee's attention from focusing on what is required in connection with the trust administration. Nothing makes a beneficiary more suspicious or upset than a Trustee who is not available to communicate with him/her.
3. Many times two heads are better than one. Having two Co-Trustees has several advantages. It offers the opportunity to combine in two people all of the skills that are necessary for a good Trustee. It allows each Trustee to serve as a sounding board for, or a check and balance for, the other Trustee. It allows one Trustee to do what needs to be done if the other Trustee is temporarily distracted or unavailable (though, under California law, both Co-Trustees generally are responsible for the actions of one of them).
4. The most obvious downside of Co-Trustees is the potential for deadlock if they disagree on a particular action. If they cannot agree, a court order may be the only way to resolve the dispute. On the other hand, you should select Co-Trustees who are problem-solvers and less likely to be contentious or difficult to get along with. Three Co-Trustees can act by majority decision, but this can get cumbersome and, with the wrong parties, can become the famous committee that set out to design a horse but produced a camel.
5. In many cases clients do not have enough trustworthy individuals to serve as further successor Trustees if the initially named Trustee ceases to act, or can't or won't act in the first place, to form this list. This suggests consideration of a bank/trust company (also known as an "institutional trustee"). While it is true that an institutional Trustee will charge a fee, expecting an individual Trustee to act without compensation may be unrealistic. In fact, when we represent individuals acting as Trustees, one of the first questions we're usually asked is "What is the appropriate fee I can be paid for doing all this work?" And to a certain extent you get what you pay for. If an individual is not being compensated as a Trustee, he or she likely will not spend an appropriate amount of time doing his or her job. On the other hand, people who are being compensated as a fiduciary tend to take their jobs more seriously.
6. Institutional Trustees bring expertise to the table that many individual Trustees may lack. They provide all of the "back office" work, producing monthly professional statements showing all of the Trust's assets valued as of the end of the month and showing each transaction that took place in the trust during that month. This is a very valuable communication tool with beneficiaries. Institutions have the ability to professionally invest the trust's liquid assets, and they have specialty divisions to deal with real estate and other business assets. In short, an institutional Trustee can do a lot of the "hard work" that an individual may not have the time, skill, or inclination to do, all wrapped within the Trustee's fee.
7. Quite frankly, institutional Trustees also are a "deep pocket." If an individual Trustee performs negligently (or worse), that individual may not have the wherewithal to compensate the trust for the loss. An institutional Trustee has the capacity to do that.



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8. One solution that often works well for clients is to have an individual serve as a Co-Trustee with an institution. This can lead to a "best of both worlds" situation. The institution takes care of all the "paperwork" described above and consults with the individual Co-Trustee regarding investment policy, so the individual doesn't have to "go it alone." The individual Co-Trustee likely will be familiar with the needs of the beneficiaries and will be able to guide the institutional Co-Trustee through the process of deciding how and when to distribute trust funds to the beneficiaries. Some clients even make it so that the individual Co-Trustee makes the distribution decisions alone; this is allowed under California law, and most institutions are fine with that arrangement.

9. The individual/institutional Co-Trustee relationship also deals with what many clients perceive to be the main downside of an institutional Trustee — "they don't know the family." Finally, to control the fees of the institution and the prospect of "turnover" (the institution's trust officer who the Co-Trustee/beneficiaries like leaves for another institution), either the individual Co-Trustee or the beneficiaries can be given the power to replace one institutional Co-Trustee with another institution.

The bottom line is that there is no perfect solution to the important question of who should serve as Trustee. There are a number of different alternatives that are available to address the concerns of most clients regarding Trustee selection. If this is something you would like to discuss further with us, please feel free to contact any of the members of our Trusts & Estates group.