

Trust planning

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When is a corporate fiduciary right for your family?

Wealth management with us is a bit different.

When a financial professional provides investment advice, one of two standards applies:

1. the recommendation is “suitable” for the client; or
2. the recommendation is in the client’s best interest.

To the layman, the difference between these two statements may not seem great. To lawyers and regulators, there is a world of difference. Standard 2 is the “fiduciary” standard. The Securities and Exchange Commission issued a study last January recommending that Standard 1 be dropped and that the fiduciary standard apply to all those who give investment advice. In July, the Securities Industry and Financial Markets Association made known its opposition to the SEC plan. All this controversy arises from the implementation of the Dodd-Frank Wall Street overhaul law.

Those in the trust industry are not affected by these developments, for the simple reason that we are already governed by fiduciary standards and always have been.

You could say that we were the pioneers of fiduciary responsibility.

When might you want to turn to a corporate fiduciary, such as us, for help with your wealth management issues? To sum up, we offer the following:

- professional investment management;
- experience in estate settlement; and
- unbiased trust administration.

When is a trust appropriate?

Trusts can be used to achieve some or all of the following objectives.

- provide lifetime financial protection for a surviving spouse
- establish inheritance management for minors and incapacitated or disabled family members
- protect heirs’ assets from creditors
- reduce or eliminate transfer taxes

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- increase financial privacy and confidentiality regarding wealth distribution
- implement a program of philanthropy
- protect an estate plan from claims by disgruntled heirs
- provide complete financial management in the event of your own incapacity

Whatever the reason for creating your trust, the next question is crucial: Whom should you choose as your trustee? Who has the qualifications to see to it that your trust plan will succeed? Where do you look to find the right trustee?

Typically, a trust grantor decides between a corporate fiduciary (a company that has been granted the legal right to act as a trustee, such as us) and an individual, such as a family member, friend, or business associate. Factors that should be considered include the following:

Judgment and experience. Inexperienced trustees may dissipate the trust assets or make administrative mistakes that result in delays or other problems.

Impartiality. A trust typically has current income beneficiaries and future or remainder beneficiaries. The interests of both types of beneficiaries must be balanced carefully. Conflicts need to be resolved by a trustee whom all the beneficiaries can respect.

Investment sophistication. The Uniform Prudent Investor Act and other laws governing the investment of trust assets must be adhered to. The trustee should be

able to increase returns or reduce portfolio volatility, and must be able to diversify the portfolio.

Permanence and availability. Many trusts are expected to last a decade or more. Corporate trustees have the advantage of perpetual existence.

Sensitivity to individual beneficiaries' needs. Understanding the individual needs of trust beneficiaries is very important; on this issue, many will assume that the friend or family member has the advantage. This is not necessarily the case, but sometimes an individual will be made cotrustee to handle such decisions. Even so, a corporate trustee might be brought into the process for an objective voice and to prevent unreasonable distributions.

Accounting and recordkeeping. Detailed trust records are required, and few individuals are equipped to handle this chore properly.

Fees. There is a chance that the fees charged for trust administration will be lower when a friend or family member is named as trustee. However, when a trustee is serving for little or no compensation, it becomes hard to give the trust the attention that it deserves.

In the usual case, the trust assets consist of ordinary investment assets, such as stocks, bonds, or mutual funds. In that situation, a corporate trustee is likely to be a very cost-effective alternative.

Special considerations

In addition to personal characteristics, there are situations in which having an independent and professional trustee will be important.

• **Potential for self-dealing.** Will the trustee be purchasing assets from related parties or affiliates? The trustee should not be on both sides of these transactions, and many states have statutory restrictions on self-dealing.

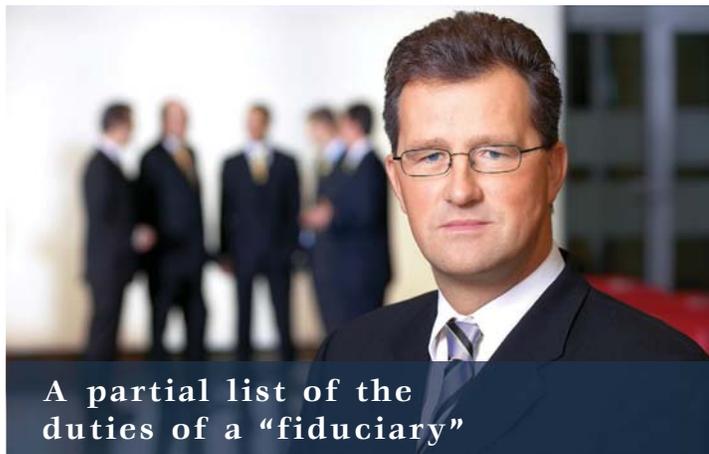
• **Power to allocate gains to income.** The Uniform Principal and Income Act, which applies in many states, permits (but does not require) the trustee to allocate realized capital gains to income. In a trust that distributes all of its income every year, such as a marital deduction trust, the trustee will be greatly favoring the income beneficiary by allocating gains to income. Such a decision should not be made by a party with an interest in the trust.

• **Discretionary distributions.** If the goal of the trust is to provide for long-term protection against the squandering of an inheritance, the best course may be to have an independent corporate trustee with wide discretion over distributions. Such an approach minimizes the chance that the beneficiary might be able to force a distribution through the courts.

Can we tell you more?

We are well qualified for all the tasks of trusteeship. It is a job that we do every day, with our full attention. We are staffed for it, experienced, and always ready to serve.

When you are ready to take the serious step of including a trust in your long-term financial and wealth management plans, please call us to learn more about how we may be of service to you. □



A partial list of the duties of a "fiduciary"

To help the general public better understand the meaning of "fiduciary duty," the American College of Trust and Estate Counsel (ACTEC) came up with the following list of duties that every trustee performs.

- Duty to administer a trust by its terms
- Duty of skill and care
- Duty to give notices
- Duty to furnish information and to communicate
- Duty to account
- Duty of loyalty
- Duty to avoid conflict of interest
- Duty to segregate trust property
- Duty of impartiality
- Duty to invest
- Duty to enforce and defend claims
- Duty of confidentiality

If you find any of these duties confusing, ask your trustee for an explanation. Or ask us. We'd be pleased to tell you more about our qualifications to assist with your family's wealth management.

Beneficiary designations

Having a will is important, but simply having a will is not enough. Another key item that controls the passage of one's property at death is the beneficiary designation. Life insurance proceeds, retirement plan accounts, and IRAs are all examples of property that will not pass through the probate estate unless the estate itself is designated as the beneficiary.

A recent court case shows how even a well-planned beneficiary designation may go awry. Leonard Kidder named his wife to be the sole beneficiary of his company's 401(k) plan. However, his wife died before Leonard did. He then updated the beneficiary designation, naming his three children to share the account equally. So far, so good.

Some years later, Leonard remarried. He didn't change his beneficiary designation, but ERISA (the Employee Retirement Income Security Act that governs retirement plans) did. To comply with ERISA, the company 401(k) plan provided that a surviving spouse will inherit any plan balance unless the spouse has filed a waiver of his or her rights. Leonard's second wife did not file such a waiver. Although they had been married for just six weeks when Leonard died, the second wife claimed the 401(k) balance as hers.

The children objected but to no avail. The plan terms were clear and unambiguous. ERISA allows for a one-year waiting period for spousal rights to vest but does not require such delay. Leonard's plan did not include a waiting period. If Leonard really wanted to preserve the inheritance for his children, he needed to take appropriate steps before he remarried.

401(k) versus IRA

The outcome was different in another court case pitting a second wife against children from a first marriage. Wilson began living with Chandler in 1990. In 1994, he took a lump sum distribution of his 401(k) money and rolled it into an IRA. He made additional IRA contributions from 1995 to 1999. Wilson and Chandler married in 2000.

Two years later, anticipating a possible divorce, Wilson transferred half of the IRA money into a new account. His four adult children from a previous marriage were the beneficiaries of this account. Wilson died in a flash flood in 2005, at age 65, before getting divorced. Chandler filed suit to claim all the IRA money, alleging that Wilson could not deny her right to the funds that originated in an ERISA-qualified plan.



Not so, the Court ruled. The spousal rights accorded to ERISA plans do not extend to IRAs. What's more, in this case, the rollover of the funds to the IRA occurred long before the marriage took place, so there was no spousal consent possible when the transfer was made.

Don't leave it to chance

We can be pretty confident that Wilson achieved the result he intended with his IRA. About Kidder, there is less certainty. Did he know that his new wife would get his 401(k), and would have been happy with the result? If so, he would have been well advised to have changed the beneficiary designation, so as to remove all doubt and avoid the expense of litigation. On the other hand, perhaps Kidder was ignorant of the plan rules that vested his 401(k) money in his wife upon the moment of his remarriage. Consultation with an estate planning attorney might have set him straight.

When you are meeting with your estate planning advisors, don't overlook the importance of beneficiary designations in the implementation of your testamentary plans. □

Tax expenditures

In the debate over raising the debt ceiling, President Obama called for a reduction of federal spending done through the tax code. What exactly does that mean?

The concept of "tax expenditures" dates back to the 1974 Budget Act, when the Congressional Budget Office and the Treasury Department were directed to publish each year the amount of revenue "lost" as a result of various tax code provisions. The items for review include special exclusions, exemptions, or deductions from gross income, as well as special credits, preferential tax rates, or deferrals of tax.

Here are some "costs" of sample tax expenditures:

Tax expenditure	Projected cost (billions of dollars)
Housing	
Mortgage interest deduction	\$80
Exclusion of gain on sale	\$30
Real property tax deduction	\$14
Housing subtotal	\$124
Pension and retirement savings	
Employer pension plans	\$114
Inside build-up in life insurance	\$27
IRA and self-employed plans	\$27
Retirement savings subtotal	\$168
Health	
Employer-provided plans	\$117
Exclusion of Medicare benefits	\$43
Medical expense deduction	\$10
Exclusion under worker's compensation	\$8
Self-employed health insurance	\$4
Health subtotal	\$182
Capital gains and dividends	
Reduced rates	\$128
No tax on unrealized appreciation for transfers at death or by gift	\$59
Capital gains and dividends subtotal	\$187

Source: Joint Tax Committee; M.A. Co.

These tax expenditures add up pretty quickly, and most would not qualify as "loopholes" in the mind of many taxpayers.

Writing in *Tax Notes Today* (July 19, 2011), former House Ways and Means Committee Democratic tax counsel John L. Buckley reviewed the history of tax expenditures and past attempts to limit them. Most notably, many changes were made in 1986, as deductions were scrapped in favor of lower rates.

In 2008, Buckley observed, only 8% of tax expenditures benefitted corporations, even though corporate tax receipts amounted to 25% of individual tax receipts. Accordingly, if there is to be meaningful reform of tax expenditures, the changes will fall largely on individuals. Tax expenditures are estimated on a static basis; that is, the estimators do not try to factor in behavioral responses. When taxpayers react to tax code changes, as they always do, Buckley expects that the new revenue will be very much less than projected. □



Who will be your trustee?

Some jobs are just too important to entrust to amateurs who will require on-the-job training. When it comes to your family's financial security, consider putting a professional into this important position.

Ask us today about our credentials in estate settlement and trusteeship.

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WEALTH MANAGEMENT

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- May Go Down in Value • Not Guaranteed by The Bank
- Not Insured by Any Federal Government Agency