WHO SHOULD YOU "TRUST"?

The nomination of a successor trustee is one of the most important decisions you make when creating a living trust. After all, a *trust* document is simply an instrument that authorizes someone *you trust* to manage and distribute *your assets.*

Of course, the choice is *yours*, but as a litigator with over twenty-five years of experience handling trust disputes, I can tell you with some authority that some choices are better than others. If you want to avoid family drama and expensive litigation, it is important for you to *choose wisely*.

This article discusses common mistakes people make when selecting who will take over their trust after their incapacity or death.

Mistake #1: Nominating Current Spouse As Trustee of Children From Prior Marriage

Chances are, nobody loves your own kids more than you do. Perhaps the most common kind of trust lawsuit involves the children from a former marriage suing their step-parent (more often than not, their step-mother). This is especially common where the trust instrument gives the step-parent the "power to invade principal for health, support, and maintenance." You may intend such clause only to be invoked if cases of emergency to avoid your spouse becoming destitute, but your surviving spouse may read it as your permission to treat principal as their own and to live large.

The Solution: Either provide that your children from a previous marriage receive their inheritance immediately upon your death, or name an independent trustee such as a licensed professional trustee or an institutional trustee (i.e. your bank). Also, if you are going to allow invasion of principal, be more specific as to what circumstances it is allowed. Your "standard" living trust may not actually be right for you.

Mistake #2: Nominating Co-Trustees

When co-trustees are named, the default rule is that every single action requires two signatures. Requiring dual signatures is cumbersome. On the other hand, if the trust instrument provides actions can be taken with one signature, then there is a risk of inconsistent actions being taken and the power to act independently may result in liability for both co-trustees when the left hand doesn't know what the right hand is doing.

However, the most common problem with co-trustees is *impasse*. What happens if co-trustees disagree? They are supposed to petition the court for instructions. But that is expensive and time consuming. In such a case, the attorney for the trust becomes conflicted, and both co-trustees must hire their own attorneys. It then typically takes *months* to get a judicial decision. Moreover, there is often a long period *before* court intervention is sought where administration is effectively stalled as the co-trustees engage in futile negotiations (or bickering) back and forth.

Sometimes the disputes are legitimate (i.e., reasonable minds could differ), but often they are not and arise from sibling rivalry (e.g., your children simply don't get along with each other), psychological issues (e.g., one of the co-trustees has depression or a hostile temperament), procrastination (e.g., one of the co-trustees has trouble making decisions), different sophistication (e.g., one of the co-trustees just doesn't understand), or greed (one of the co-trustees is attempting to benefit themselves).

The Solution: Pick a single trusted person to be the successor trustee. If you can't decide which family member, or are concerned about hurting someone's feelings, then nominate an independent trustee such as a licensed professional fiduciary, or an institutional trustee (i.e. your bank).

Mistake #3: Nominating Unqualified or Otherwise Inappropriate Trustees

Nominating someone as a successor trustee is not to be confused with bestowing an honor on someone like nominating them for an award. Serving as a trustee is a thankless *administrative* position that requires *skill* and subjects the trustee to potential *liability*. The office of trustee is a *fiduciary* position which means the person who serves is subject to the highest *legal duties* and *ethical standards* that exist under the law.

Your nominee should be *trustworthy*. Is your nominee *honest* and *fair*? This doesn't just mean a lack of criminal record. This means someone with the utmost integrity—someone you can count on to do the right thing when no one is looking. After all, trustees act independently and no one will check the work of your successor trustee unless a lawsuit is filed.

Your nominee should have *proven ability*. Avoid nominating someone who has filed for bankruptcy, engages in risky investments or "get rich quick" schemes, or is otherwise a big spender or too stingy. Avoid someone who is disorganized, indecisive, or unfamiliar with financial management and bookkeeping. Pick someone with business acumen relevant to your estate, who is sophisticated, organized, and diligent. Don't put a novice in charge of your life savings.

Your nominee should have a good *temperament*. An important aspect of the office of trustee is *communicating* with the beneficiaries, lawyers, and accountants. Avoid nominating someone who is secretive, impatient, arrogant or condescending, petty or insecure, and especially someone who is rude, hot-tempered, or has a nasty streak.

The Solution: Be purposeful and practical. Avoid nominating a trustee for arbitrary reasons such as nominating your oldest male child. Being the oldest male child has nothing whatsoever to do with *ability*. On the other hand, *ability* is just one of the factors. The big-shot executive or professional may be a poor choice in terms of *trustworthiness* or *temperament*. If there is no one who checks all the boxes, or you are concerned about hurting someone's feelings, then nominate an independent trustee such as a licensed professional fiduciary, or an institutional trustee (i.e. your bank).

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