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The Art of Choosing a Fiduciary

In making potentially life-changing decisions for you or your family, the trustee of your trust, the executor of your estate or the agent under your power of attorney is acting in a fiduciary capacity. That is, she is acting not for her own benefit but rather for the benefit of another person. The fiduciary must always abide by the various duties imposed under the law and under the governing document (loyalty, impartiality, prudence and avoiding self-dealing and personal enrichment, for example).

Given the broad powers and duties, selecting a fiduciary is one of the most important decisions to be made in estate planning. While there are times when appointing a family member or friend may be the best choice, there are other times when a professional fiduciary might be a better choice. Sadly, we have seen how a bad fiduciary choice can result in improper conduct, family conflict and excessive legal costs.

Here are some things to think about as you consider whether a friend or family member should take on the important role of a fiduciary:

- *Impeccable character.* Your fiduciary may take over the management of your assets and may make critical decisions affecting the lives of you and your family. You must have complete confidence that he will never inappropriately apply your assets for his own needs or make a decision based on his personal benefit. If the person you have in mind for a fiduciary has already shown you in his personal life that he is capable of self-dealing or secrecy, manipulation or irresponsibility around financial or personal issues, he likely is not right for the job.
- *Good judgment and organization skills.* As noted below, a fiduciary can hire professionals to assist with investments, taxes, legal matters and business issues; she need not be an expert in these matters. But she must also have a good sense for decision-making, be attentive to the needs of those she is acting for, dedicate the time required to carry out the necessary tasks and keep careful records of her actions and expenditures.
- *Willingness to work with advisors.* Being held to a high standard of care, your fiduciary should be open to working with legal, tax and investment professionals to ensure that he is following all appropriate fiduciary protocols. This is an area where a fiduciary can be penny-wise and pound-foolish. If he fails to get proper counsel early on, it could create serious legal and financial problems, and increased costs, later.
- *Communication and flexibility.* Your fiduciary will likely have to have at least one difficult conversation with, or make at least one difficult decision affecting, a beneficiary, co-fiduciary or other person involved in your affairs; she should not be a communication or decision-making "avoider." She should sincerely listen to the thoughts of those she serves. If there is an honest



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disagreement, she should be open to a reasonable compromise. Of course, ultimately your fiduciary will have to exercise her discretion as she sees fit (and in accordance with her fiduciary duties), but if she does so after an open and honest process, your trust in her will not be misplaced. A person who tends to think “it’s my way or the highway” is usually not an ideal fiduciary.

- *Time constraints.* Acting as a fiduciary is very time-consuming and can be stressful. It also creates exposure to personal liability. The person you wish to appoint should have the time to willingly commit to doing this important job properly. Forcing the job on a person you think is obligated to act under familial duty is often a recipe for failure. If the person you have in mind is already intellectually, emotionally and physically maxed-out with his own family, work, social and charitable obligations, or if he is dealing with health issues, think carefully about whether he is right for the job.

So what do you do if you do not have anybody in your family or friend circle to act as your fiduciary? Perhaps you have two candidates who can work together, each bringing different skills? A co-fiduciary arrangement is not uncommon, but it creates its own set of issues that warrant further consideration.

Another option may be the use of a professional trustee (an individual private professional fiduciary or a corporate trust department). Fortunately, in the San Francisco Bay Area we have access to many experienced and excellent professional fiduciaries. A discussion of the benefits these professional fiduciaries can provide is beyond the scope of this article, but if you think this may be the solution for you, please contact our office and we will be happy guide you further.

To wrap up this discussion, here are several common pitfalls in choosing a fiduciary:

- *Choosing your children based solely on birth order:* Falling back on the default “oldest child acts first” is convenient, but it ignores a thoughtful consideration of the points discussed above. Also, sibling relationships must always be taken into account. Even with the most loving of siblings, putting one in the position of making important decisions for the other may cause an end to their friendship.
- *Choosing all of your children together so there are no hurt feelings.* As noted above, a co-fiduciary arrangement is possible, but if your children do not have a history of cooperation, trust and harmony, these bonds will not magically be created on your incapacity or death. In fact, our experience shows the opposite to be true – frayed relationships often do not survive the incapacity or death of the parents, as bad feelings from childhood rivalries and perceived injustices are revived.



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- *Choosing your caregiver.* You may trust the person who comes into your house every day to help with your most intimate needs. However, due to the frequency of financial elder abuse by caregivers, California law now limits the ability of caregivers to act as a fiduciary for those they care for.

- *Choosing a "cheap" fiduciary.* While California law entitles all fiduciaries to be compensated for their time, often a family member or friend who acts will waive the right to compensation. However, this is no guarantee that cost savings will result when compared to the appointment of a professional fiduciary. For example, an inexperienced family member or friend acting as your fiduciary will likely need far more attorney and accountant hand-holding than a professional fiduciary. Also, a family member or friend who fails to get and follow proper guidance, or who does not possess the character traits described above, is more likely to make misjudgments and mistakes that require costly remediation down the road.

Do not hesitate to contact our office if you would like to review your fiduciary appointments.

