

# Trustee Selection

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Estate planners are aware of the often complex nature of the role of the trustee, yet individuals continue to name family members or friends for this role. For our purposes, let's assume the term trustee means the successor trustee when the settlors have passed on or become disabled.

Just a few years ago, the issue of trustee selection did not pose much of a question. The attorney would ask their client, "Which bank do you want to be trustee?" We all knew the people that ran the trust department, we knew the bank president, and they were quite competent to perform the duties set out in the trust document. Within the past 25 years, the local banks were merged into much larger organizations with a combined trust department. That much larger organization was bought out by an even larger organization. Eventually the megabank announced that it was closing the local trust operation and you could call a toll-free number. Other financial organizations got into the business, assuming that profits could be made, but the actual operation and administration of trusts was performed at remote locations, often in other states or time zones.

One response to the removal of local trust services was for individuals to consider the use of family members and friends as trustees. These people were financially responsible and were willing to act. However, one can lose sight of the important role of the trustee and the duties and responsibilities that are asked of these family members and friends.

## **DUTIES AND RESPONSIBILITIES**

If you have made the decision to name your friend, Jim, who used to be a CPA, but is now a "financial advisor" that sells certain lines of investment products; let's look at some of the duties and responsibilities he will face as trustee when the time comes.

1. The first thing a trustee must do is examine the trust document. This is the guide for the trustee in the administration of the trust, investment decisions, the timing and amount of distributions, creation of sub-trusts, and other issues determined by the document.
2. Once the trustee has an idea of what the document requires, the inventory and gathering of assets must be completed. Marketable and unmarketable securities may need to be re-titled, real estate interests determined, bank accounts re-registered, life insurance proceeds collected, appraisals made, and retirement/employee benefit elections made and reconciled. A decision will need to be made whether a probate proceeding is necessary. Finally, the trustee has to "book" all of the assets at fair market value.
3. The document may require the creation of sub-trusts, such as with a family trust, a grandchild's trust, or a credit shelter trust. The trustee is responsible for this

and has a duty to correctly fund and separately account for each of these sub-trusts. The issues involved in funding a credit shelter trust are so complex that they fill entire seminars for attorneys and CPAs.

4. The trust must use the document and the nature and station in life of the beneficiaries in making investment decisions. Income and remainder beneficiaries may have different and conflicting investment strategies. The trustee must consider performance and risk factors for each beneficiary. Investment decisions must be based upon the best interests of the beneficiary and not upon any remuneration, disclosed or undisclosed, to the trustee.
5. The trustee owes a duty of loyalty to the beneficiaries and must avoid self-dealing and conflicts of interest. For example, when one sibling has discretionary distribution authority as trustee over other siblings, it can create difficult situations for everyone involved.
6. The trustee must render periodic accountings to the beneficiaries, under the Income and Principal Acts in Iowa and Illinois. This can be difficult as trust accounting does not coincide with generally accepted accounting principles.
7. The trustee has the additional responsibility to take care of all tax matters, including filing tax returns, supplying the appropriate tax information to the beneficiaries and payment of any taxes that may be due.

This is not intended as a complete list of trustee duties nor does it cover all of the situations that may arise. For the privilege of acting as a trustee, your trustee runs the risk of personal liability for any mistakes that might occur. This means that not only are the assets of the trust at risk but your trustee's personal assets are also at risk. There are fiduciary insurance policies available but your trustee must first qualify for coverage and the premium is an additional cost of administration.

## **CORPORATE TRUSTEE**

There are situations where there will be no need for a corporate trustee, such as when the document calls for an outright liquidation and distribution immediately upon the demise of the settlor. There are situations when it is advisable to employ the services of a corporate trustee.

- **A long-term trust.** If the document does not require the immediate distribution of assets, this may indicate a need for a corporate trustee. The corporate trustee will have the experience and knowledge to handle the assets over a period of time. There may be institutional investment opportunities that provide an edge over individuals.
- **Keeping the peace.** There is a growing trend to provide behavior incentives or disincentives for beneficiaries. Some documents permit additional distributions upon a beneficiary attaining certain goals such as college graduation; or providing disincentives, prohibiting distributions due to substance abuse. Some trusts contain terms that protect a beneficiary from their own behavior such as insulating assets from creditors. A family member may be motivated to keep the

peace in the family while the corporate trustee will be able to make these decisions in an impartial manner and avoid the family member from taking the heat for decisions.

- **Diversity.** Beneficiaries can be divided by geography, interest (income or remainder), or just not able to get along with each other. The experience, expertise, and impartiality of the corporate trustee may provide a solution to balancing these competing interests.
- **Marketable Securities.** The experience of a corporate trustee in dealing with issues involving marketable securities will work further for the best interest of the beneficiaries.
- **Charitable Trusts.** Because of the inherent conflict between income and remainder interests, many charities are more comfortable with a corporate trustee than an individual.
- **Accountings.** A corporate trustee will have the experience in trust accounting matters and have in place the means to provide time and accurate information to the beneficiaries.
- **Continuity.** The corporate trustee will be in place regardless of whether a particular individual is present. An individual trustee is subject to same periods of illness. If the trust is a long-term trust, you will have to consider the possibility that an individual trustee will not be able to serve for the entire period of the trust.

Corporate trustees are regulated by state and federal agencies and are periodically audited. They have the assets necessary to provide financial responsibility. No such protections exist for the individuals that serve as trustees.

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Clinton National Bank  
Trust Department  
235 6<sup>th</sup> Avenue South  
Clinton, IA 52732  
563-243-1243  
[www.clintonnational.com](http://www.clintonnational.com)