



# Designating Fiduciaries

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## WHO IS YOUR PERSONAL REPRESENTATIVE?

**W**hen you die, your estate (the assets you own at death) will transfer to your loved ones one of three ways: 1) by contract; 2) by will; or 3) by the laws of intestacy of the state of your residence at death. Only the first two ways of transferring assets permit you to choose who receives your assets. Under the third method, the laws of intestacy, the state of your residence chooses who receives your assets.

However, if you die with assets in your name alone, generally they can only be transferred through the probate process. This is true whether you have a will or whether you die intestate (without a will). Your affairs will be handled by the Personal Representative of your estate. If you have a will, you are able to choose someone to handle your affairs. That person is called an Executor or Executrix. If you do not have a will, the court will select someone to handle your affairs and that person is called an Administrator or Administratrix. The generic term for these positions is the “Personal Representative.”

Obviously, it is more beneficial for you to choose the person who will handle your affairs by making a will. That person has many duties and responsibilities, and you want to ensure your wishes are carried out properly. They must first gather and marshal all of the assets that are in your name alone. They must also obtain information about any of your assets transferring by a contract, because this may be relevant for death tax purposes. In this process, all of your assets are valued at their fair market value as of your date of death. Included in marshalling your assets is the duty to inventory all of your household furnishings and personal possessions.

The Personal Representative must also diligently search your records to find your creditors. The second function of the Personal Representative is to ensure all your outstanding bills are paid, including those caused by your death.

Another responsibility is sending a notice of death to the post office, utility companies, banks, and credit card companies. Notification of death to the Social Security Administration is required, as well as the civil service or military when applicable, and the Department of Health Services if the decedent was receiving Medicaid.

The third aspect of the Personal Representative's duties deals with the determination and payment of any death taxes that may be due by reason of your death. There are two types of taxes, the Federal Estate Tax and potentially, depending on your state, State Estate/Transfer Tax. All assets must be valued at the date of death value, including those being transferred by contract. Death taxes are generally computed on these values. All payments made to creditors after death are allowed as deductions in computing the amount of death taxes to be paid.

Once these taxes are paid and the clearances are received from the taxing authority, the Personal Representative can take the final steps to fulfill his or her duties. These steps involve distributing the assets of your estate, under the terms of your will or according to your State's laws of intestacy, to those entitled to receive them. Usually, all of these duties are performed with the help and guidance of an attorney who is experienced in the probate process. In addition, the court must approve the Personal Representative's actions before closing the estate.

In distributing estate assets, the Personal Representative should be sure to collect receipts for the estate records, which will be used to file an accounting with the court. When all is complete, the court will issue an order closing the estate. The Personal Representative should be sure to notify the IRS that the estate is closed.

If a testamentary trust needs to be established after the decedent's death or the decedent created a trust before death, a trustee is named to manage those assets. Being a trustee is an honor and a responsibility for the person you have entrusted to carry out your wishes. Serving as an executor or a trustee requires thoroughness and organization. It is an honorable task to be carried out soberly and responsibly.

## **CHOOSING A FIDUCIARY**

In selecting a fiduciary, whether it is an executor named in a will, or a trustee for a testamentary or inter vivos trust, several factors should be considered.

The executor is in charge of the assets in a probate estate, whereas the trustee is the person who is in charge of the assets in a trust. Both are considered fiduciaries. He or she acts as the captain of a ship or the president of a corporation. The fiduciary must manage the assets, invest them, and distribute them in accordance with the will or trust document.

However, who should serve as a fiduciary upon death or incapacity? Here are some factors to consider:

### **Management**

The fiduciary has the responsibility of managing the assets. Ideally, the fiduciary should be someone who can keep records and follow the instructions of the will or trust document. While the fiduciary need not be a financial genius, the fiduciary should know his or her own limits and be able to select appropriate advisors.

## Distributions

The executor will be responsible for following the instructions for distribution in the will while the trustee often has broad discretion in when and how to distribute assets. The trustee should be someone who will exercise discretion fairly, without favoritism or vindictiveness.

## Congeniality

The administration of an estate or trust is a delicate matter. Emotions can run high. The fiduciary should be someone who follows your instructions in the document without unnecessary friction. Can this person get along with the beneficiaries?

## Trust

While bound by a fiduciary duty, the trustee typically has broad discretion in use of the assets. The best way to sum up the qualifications of a trustee is that you trust his or her abilities and discretion to make decisions as you would make them if you were able to do so yourself.

Many people name their son or daughter as successor trustee. This can be an excellent selection if the son or daughter has the aforementioned abilities. However, people often feel obligated to name a child even if he or she lacks some or all of these abilities. There are other options — family members or close friends often make effective trustees. If there are no appropriate family members or friends, a bank trust department or other corporate trustee can be an excellent choice.

If there are complex family dynamics with a history of friction, a corporate trustee can help diffuse family resentments and tensions. A corporate trustee can be unbiased and decide objectively between competing positions of conflicting beneficiaries. A corporate trustee has experience in administering trusts and managing assets.

You can choose one person to serve as a successor trustee or several people to serve as co-trustees. Of course, a single successor trustee will be more efficient. However, co-trustees will be less likely to act impulsively. Appointing more than two or three co-trustees can turn into a logistical nightmare. When appointing multiple trustees, consider the personal dynamics among those trustees. The trustees must work together to accomplish your goals.

Choosing a trustee to succeed you upon your incapacity or death is crucial to achieving your goals and providing a smooth transition. A qualified estate planning attorney can help counsel you in this important decision.

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