

*Choosing a Fiduciary: Professional Over Progeny*

By JONATHAN MILLS

When planning for the administration of an estate or trust, clients often are faced with the difficult but necessary choice of selecting a family member, a professional advisor, including a lawyer, or a financial institution to serve as an executor or trustee.

These positions, often referred to as "fiduciary" roles, carry significant duties for the fiduciary overseeing the estate settlement or trust administration at issue. Selecting

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a professional or corporate fiduciary in addition to (or in lieu of) a family member may offer advantages.

Settling estates or managing trusts can be complex tasks, particularly given attendant tax and accounting issues, as well as the scope and complexity of underlying assets, the disposition requirements of the estate or trust, the reporting duties to the probate court, and the rights and needs of stated beneficiaries. Family members often lack the time, expertise or experience to discharge executor or trustee duties. In addition, individuals accepting fiduciary roles may assume personal liability for such services, without the protections maintained by professional or corporate fiduciaries.

An attorney appointed as executor or trustee has the responsibility to oversee the legal, tax and accounting work required for the estate settlement and trust administration. Attorney fiduciaries affiliated with law firms having extensive fiduciary practices can draw upon the support of other experienced lawyers, executors, trustees and fiduciary accountants and paralegals within their organization.

In selecting professional or corporate fiduciaries, clients generally consider attorneys, banks or trust companies. Sometimes, a combination of these parties are appointed to serve as co-executors or co-trustees.

■ See FIDUCIARIES on PAGE 20

20

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## FIDUCIARIES OFFER ACCESS TO EXPERTISE

■ From CHOOSING on PAGE 18

A potential fiduciary's trustworthiness, judgment and responsiveness, as well as an understanding of the client's objectives (and meaningful executor or trustee experience), are attributes a client should assess in making such appointments. Access to appropriate legal, tax and accounting expertise, as well as to investment, custody, reporting and asset management services, are also important considerations.

### Careful Selection

Attorneys serving as fiduciaries should retain outside, independent investment advisors for investment advice and portfolio management when dealing with significant estates or trusts. In reviewing a client's investment management needs, an experienced, professional fiduciary may have access to numerous investment advisors with the expertise, resources and track record to provide appropriate investment advisory services.

Corporate fiduciaries, such as financial institutions, often have access to high expertise, but may be limited in their investment advisory selections, or face pressures to keep such business "in-house." An attorney fiduciary's independence may offer the advantages of greater financial advisor choices, more flexibility to make necessary advisor changes, and the ability to achieve favorable pricing.

The fees charged by investment advisors vary widely and may be negotiable, depend-

ing on the advisor and the value and complexity of the assets involved. An experienced, professional fiduciary with a network of such advisors may be best positioned to recommend investment advisor selections and changes, as well as to evaluate advisor performance and negotiate reduced fees for such services.

A professional or corporate fiduciary may be preferable to a family member (or non-professional individual fiduciary) due to the institutional resources backing such services. Corporate fiduciaries, such as banks and trust companies, typically must meet substantial capital requirements to serve as trustees.

An attorney selected as a fiduciary, depending on the size and resources of his or her law firm, may have the firm's assets, inventory and malpractice or professional liability insurance coverages, in addition to the attorney's personal assets, should there be problems.

These client recourse protections are generally not available to non-professional fiduciaries. Moreover, if the professional or corporate fiduciary holds any estate or trust assets in a bank or brokerage firm, there may be insurance coverages offered by such institutions that protect the assets so maintained.

### How They're Paid

An executor's compensation is generally charged as a percentage of the fair market value of the gross estate for federal estate tax purposes, including both probate and non-probate property. Often, a sliding scale

of tiered fee percentages is used, based on the size of the estate assets, with a reducing percentage applied to portions of the estate assets exceeding various thresholds, such as \$5 million, \$10 million and higher.

The executor's compensation typically covers all of the executor's responsibilities, including overseeing asset inventories, addressing debts and claims, preparing tax returns, accountings and court filings, as

cal fiduciary and asset management services (other than investment advisory advice) are generally included in the trustee's compensation. These services include the identification, management, protection, and distribution of the trust assets and income, as well as filing tax returns and accountings.

As is the case for an executor, a trustee's fee is generally charged as a percentage of the market value of the trust's assets, with a

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well as marshalling, managing and distributing assets during the estate administration process. Investing liquid estate assets in appropriate government securities, money market funds or diversified mutual funds may be involved.

If a client prefers to have assets invested in a portfolio of individual stocks, bonds, hedge funds, venture capital, private equity or other complex investments, then outside investment advisors are engaged and the resulting investment fees are generally payable directly by the estate in addition to the executor's fees.

In situations where an attorney acts as a co-executor with a bank, trust company or other corporate executor, the attorney's executor fees may be proportionately reduced to reflect shared roles, unless there are necessary, duplicate responsibilities or the attorney is asked to assume a greater executor role in the estate settlement than is customary.

When an attorney acts as a trustee, typi-

sliding scale and a decreasing percentage applied to tiered values of the trust. If a qualified corporate fiduciary (such as a trust company) is acting as a co-trustee with the attorney, the corporate co-trustee's fees are generally compensated directly from the trust, and a reduction in the attorney's trustee compensation may apply to the extent the attorney's fiduciary responsibilities are reduced. Extraordinary trustee services involving complex assets, such as managing closely-held businesses or commercial real estate, may carry increased trustee fees.

Clients who make fiduciary appointments in their estate or trust planning should consider experienced, professional and corporate executors or trustees in addition to family members. Depending on the choices available, attorneys or institutional fiduciaries can offer the expertise, resources and services that best serve a client's needs. ■