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I'm Responsible for What?

Counseling Your Clients About Utilizing a Corporate Fiduciary as a
Trustee or Executor

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The viability of your client's estate plan will depend, among other things, on the person(s) responsible for carrying it out. Selecting the appropriate fiduciary to administer your client's trust or estate plan is equally as important as the plan itself. Even a perfect, expertly-drafted document will be of little use if the appointed fiduciary does not or cannot effectively carry out the responsibilities, duties, and intentions set out in the document and under applicable laws and regulations.

As you counsel your clients in choosing a trustee or other fiduciary, it is important to consider and review together (i) the fiduciary's responsibilities both under the law and under the governing document, (ii) how those responsibilities will play out for either an individual or corporate fiduciary given the nature of your client's specific trust or estate and beneficiaries or other interested parties, and (iii) with these factors in mind, who is the best person to carry out those responsibilities?

This paper sets out key points and considerations to review with your clients as they work through the important decision of who to select as trust or estate fiduciary and whether a corporate fiduciary might, in certain instances, be a preferable option over naming an individual.

***NOTE that this paper and presentation is for informational purposes only and is not a "commercial" for corporate fiduciaries – appointing a corporate fiduciary will not always be necessary or appropriate. There are many instances where an individual fiduciary¹ will be the superior choice after weighing all factors. ***

STEP 1: REVIEW THE FIDUCIARY'S DUTIES AND RESPONSIBILITIES

Many clients may be tempted to name a friend or family member as the fiduciary for their estate or trust without fully understanding the risks, responsibilities, and obligations that appointment will entail. Thus, the client may not realize the extent and magnitude of the responsibility that they are conferring onto their friend or family member.

Below is an outline of some of the key trustee and estate representative fiduciary duties and responsibilities you may want to review with your clients to ensure the named fiduciary has the skills, knowledge, time, and ability to focus on and comply with them.

¹ There are various kinds of "individual" fiduciaries. This term may cover any individual, non-entity person such as a friend, family member, or even an individual, professional fiduciary such as an attorney specializing in trust or estate administration. For purposes of this paper, our reference to "individual" fiduciaries is generally describing the client's selection of a friend or family member who is not a professional fiduciary.

ANOTHER NOTE: this is not intended to be an exhaustive compilation or discussion of a trustee or personal representative's fiduciary duties and responsibilities. Rather, the sections below are intended as a guide for practitioners advising clients who are considering the best fiduciary (whether corporate or individual) to appoint in their particular situation

Trustee - Fiduciary Duties & Responsibilities

In accepting a trustee appointment, it is important that the named trustee understand the extensive obligations they are undertaking. The trustee will generally be tasked with holding, maintaining, and administering property in a fiduciary capacity for the benefit of one or more beneficiaries. This important role brings with it various duties and responsibilities under the law and the trust agreement.

A “fiduciary duty” may be an obscure concept for an individual who lacks experience in the area. What exactly is a fiduciary duty as it pertains to a trustee? What types of duties are owed and where does one look to find them? The duties of a fiduciary are derived from both common law and the Texas Trust Code, which requires a trustee to administer the trust in good faith and perform all of the duties imposed on trustees by the common law. TEX. PROP. CODE § 113.051. Those duties imposed on trustees under the common law include, but are not limited to, the duties of care, loyalty, impartiality, and full disclosure. Although these basic duties *may* be able to be modified in the trust document, it is important for the trustee to understand that the concepts described below will apply absent any contrary language in the trust.

I. Duty of Care & Prudent Investor

How careful, skilled, and competent is the proposed trustee? Will the proposed trustee be capable of prudently managing trust assets as required under the law? As a default rule, a trustee will be expected to administer the trust with the same level of care, skill, and prudence that a capable person would use to manage their own affairs. *Interfirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882 (Tex. App. –Texarkana 1987, no writ) (“The fundamental duties of a trustee include the use of the skill and prudence which an ordinary capable and careful person will use in the conduct of his own affairs.”). This means that, even if the trustee is inexperienced in managing assets in a fiduciary capacity, there is an expectation under the law for the trustee to uphold a certain standard of prudent and careful performance in administering the trust. *See In re Estate of Benson*, No. 04-15-00087-CV, 2015 Tex. App. LEXIS 9477 (Tex. App.—San Antonio Sept. 9, 2015, pet. diss. by agr.) (finding “evidence of actions a person of ordinary prudence and discretion would not take when managing his own affairs” after the trustee, among other things, took drastic actions adversely affecting the trust’s assets).

In managing trust assets, the trustee will owe a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in Texas Property Code § 117 (the Uniform Prudent Investor

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