People Are The Most Important Decision in your Estate Plan - Naming Executors, Trustees, Beneficiaries and More

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Naming Fiduciaries and Other Persons/Positions: An Important Personal Decision.

The following discussion is intended to help guide you through one of the most important decisions concerning your estate plan and estate planning documents: who you will name to serve in the important positions. While this can be a simple decision of just naming a spouse, child, family member, or friend, the decision should not be made without deliberation. Sometimes, just naming a person in a particular relationship may not be the best decision. You should never name someone out of a feeling of obligation. You should also consider the responsibilities and obligations the person you are considering naming may face in their lives. Will it be practical for them to take on additional responsibilities? Also, there are many more positions that you have likely already filled, and will have to appoint people for, than you might realize.

You might be able to name the same person to serve in many positions (e.g., a spouse, partner or adult child) but that is not always ideal. Someone who can make medical decisions for you if you cannot do so, may not be the best person to make financial decisions. Finally, depending on your circumstances and planning goals, you might need to name an institution in a particular state, someone who is independent of you and the beneficiaries named, etc. That presents its own array of personal, legal and technical tax decisions.

An important goal of this discussion is to give you ideas that might enable you to make decisions you could be struggling with, or to make better decisions. These practical suggestions will be addressed throughout the discussion following.

Once you have selected people to name, you should really take the step of confirming with them that they are willing to serve. It is also important that they are prepared to know if the appointment should actually occur. It is not prudent to designate a friend as your healthcare agent, and they only learn of that when they get a call from a hospital seeking their input. It is unfair to them and you. It also makes it less likely that they can carry out a role that they were not prepared for.

What should you explain to those you seek to appoint? You need to understand some of the general responsibilities the people you appoint will face so that you can explain those points to them. This paper will discuss some of the points you might consider in having those discussions.

This paper will explore these and other considerations to help you make choices that meet your wishes.

Finally, which is not the topic of this paper, once you've selected fiduciaries, had an open discussion with them, and confirmed their willingness to help, you should prepare information to guide them in fulfilling their roles. This might include, as appropriate to the position involved, medical information, financial information, etc.

What Fiduciary and Other Roles Must You Name Persons to Serve In?

In most estate plans, even those for modest estates, positions or roles you may name people to fill include:

- Health care agent. This is a person empowered to access medical information (in a Health Insurance Portability and Accountability Act, or HIPAA Release) and in a health care proxy (or medical power of attorney) and make medical decisions when you cannot do so.
- Financial agent. This is a person charged with making legal, tax and financial decisions for you under a durable power of attorney. This is a role to be served while you are alive but ill or incapacitated.
- Personal representative (executor). This is a person, appointed under your will, who administers your estate, collects (marshal) assets after you die, pay bills, file tax returns, and distribute assets to heirs or trusts for them.
- Guardian. This is a person appointed under your will to be responsible for your minor children after you die.
- Trustee. There are potentially several different trustees appointed under even a simple estate plan, so consider some of the different roles. If you use a revocable trust in your estate plan the person named trustee after you (assuming you are named as the initial trustee, which is typical but not done in all cases) is referred to as a "successor trustee." This person would handle the finances of your trust if you ceased serving as trustee. This might be due to the challenges of aging, health issues, or a traumatic medical event that makes it impractical or impossible for you to continue serving. That may best be filled by a person who will assume responsibility for your affairs. Trustees may also be appointed under your revocable trust for trusts created for your spouse or partner after your death. The persons to be named to those positions may not be the same persons you named to take care of your needs if you were incapacitated. If you are in a second or later marriage you might select someone for these latter roles that would be objective but caring for your current spouse or partner. That may be different than who you name to care for you. Many revocable trusts have a third layer of trusts and trustee positions, namely for the heirs or beneficiaries you designate

In a more complex plan, for example, a plan including a comprehensive irrevocable trust, it could include an array of positions including:

- Trust protector. This person could have a wide variation of powers. There is no uniformity in terminology in practice so you might have one or more people with similar or different names. This person may be given the power to remove and replace trustees or other rights.
- Appointer. This position doesn't have a common or accepted name, so in your plan it may be called a different title, or perhaps none. This is a person may be empowered to add a charitable or other beneficiary. This might be done to provide you with potential access to trust assets, add flexibility, address income tax planning opportunities, etc.
- Loan Advisor. This position doesn't have a common or accepted name, so in your plan it may be called a different title, or perhaps none. This person may be given the power to loan assets from the trust to the person setting up the trust (the settlor or grantor).
- Investment advisor or trustee. This person may either make investment decisions for the trust or direct the trustee as to what to invest in. This can be bifurcated into various sub-roles to serve whatever your particular needs are. For example, you might name a large institutional trustee for the array of services and depth of resources that it can bring to the administration of your trust. However, the institution, despite its extensive skills may not have the expertise to administer a family business, art collection, or other special asset. So, you might have a role for an investment advisor for marketable securities, a separate one for closely held business interests, and perhaps a third for life insurance. In that way you might tailor roles to fit the specific needs of your plan.

There are many more positions that might be useful to plan and implement a complex trust. Others will be discussed blow. The starting point to decide who to name is to understand each position for which you might need to name a person to serve. When you understand the different roles, it may become clear that you may need different people for various positions. You also want to match the abilities and temperaments of the people to the various roles. Someone to care for a minor child as a guardian may not be the best person to make health care decisions for you. The person that can address financial and investment matters may not be the ideal person to grapple with tough personal decisions for a beneficiary with addiction issues.

Who Might You Consider Naming to Fill Various Roles.

The persons you might select for each role in your estate plan could include a number of different possibilities. Below are some of the more common relationships or categories of people named. Your options, however, are not limited to any list. The important point it to pick people that are appropriate to your plan and the specific role you are filling.

- Family. By far the most common selection for most or all roles is family members. But family is not always the answer. You might not have family members to name. You may have a small family, live to far distant from your family or not get along with them. Family is also inappropriate in many situations.
- Friends. Many people name friends to serve in some or all roles. If you don't have family that you are comfortable naming, friends may be a good choice. Just make sure the relationship is solid enough for the roles involved. Also, friends (or more distant relatives) may be a preferable to relatives if the relatives are also beneficiaries.
- Professional Adviser. Some people choose to name their professional adviser in some capacities. That may be fine if you are choosing to make that appointment, perhaps not if the adviser is the one encouraging or pushing their own appointment. Consider how long and how well you know the particular adviser. A CPA or lawyer who has worked with your family for years, perhaps decades, may be a good choice. An adviser you just recently met and have limited experience with, and whose knowledge of your family is limited, may not be a great choice.
- Bank or Trust Company. Naming a professional trustee, such as a trust company, may enhance asset protection planning (preventing creditors from reaching trust assets), the independence that a trust might have to deflect a challenge by the IRS to include trust assets in your estate, etc. To accomplish asset protection or estate tax goals your trust might be formed and operated (administered) in a state that has laws more favorable to your meeting your planning goals. You may require a trustee in that state. With some particularly challenging positions, a professional institution may be better equipped to fill the position well as compared to an individual named. For example, if you create a trust for a special needs child, managing a special needs trust requires specific skills that most individual lack. The trust may have to meet complex government requirements that an expert in that field should be charged with.
- Professional Individual Fiduciary. There are skilled individuals who are willing to serve for compensation in various fiduciary capacities. These might be retired estate planning attorneys or trust officers.

Checks and Balances and Other Steps May Affect Who You Name

Who you select to serve in each fiduciary or other capacity might be affected by other steps you might take. For example, you might trust your sister implicitly and know she is prudent and honorable. However, you also know she has no financial expertise, so you are hesitant to appoint her as a trustee. However, if you factor in her ability to hire a wealth adviser and perhaps the same wealth advisory firm you now work with, perhaps there is less of a concern naming her. You could name her to be a co-trustee with an institutional trustee who brings financial acumen with it. You could alternatively have the trust structured as a directed trust and name an investment trustee to handle investment matters. That way, your sister could address all the personal trust administration decisions you feel she would do a great job at but not have to be involved with investment decisions.

Another approach might be to add a person as a trust protector who can fire and replace a trustee or other appointed person. In that way, if someone takes inappropriate actions, they can be removed without the cost and time of a court proceeding. For example, you would like to name your father as a trustee as you feel he has the knowledge of the family and all the technical skills to serve in that capacity. You are concerned that, given his age, at some point, he may not be able to serve. So, you might provide that at some specified age, say 85, he ceases to serve. Alternatively, you might appoint a trust protector with the power to remove him when appropriate.

There is yet another different approach to providing guardrails on a person you name to a particular position. You might name not one but multiple people to serve. That may provide checks and balances against any one person, perhaps not fulfilling their role appropriately. For example, your trust will empower someone to add a new person as a beneficiary. That might be done for various reasons and in various contexts. But instead of giving one person alone the power to add a beneficiary, you appoint a committee of three people and provide that a majority vote of any two can add a person as a beneficiary to the trust. That multiple-person committee with a majority instead of a unanimous vote requirement might address your concerns.

The point is that there are many ways to structure the various positions you might need to appoint people to fulfill in your estate plan so that you can arrive at an approach that is both comfortable for you and protective of those you are concerned about. A more robust approach may offset or protect against concerns about naming a particular person. This way, you can name people with helpful abilities and backstop areas they may not excel at.

Understanding options so that your plan and documents can be tailored to your needs and circumstances can make your decisions easier and better.

Life Can Be Complicated: Factors That May Affect The Positions and Appointments in Your Estate Plan.

Introduction.

A seemingly infinite number of factors might affect the decisions you make on who to name in each position in your estate plan. Identifying and weighing these factors may be more art than science. But it is essential to take a broad view of your decisions. The following discussion will review many of the considerations you might weigh and explain the possible implications of selecting key people.

Some of the considerations can be pretty technical. For example, if you name a beneficiary as a trustee, that beneficiary will have to have certain restrictions on their ability to make distributions to themselves to avoid having trust assets included in their estate and reachable by their creditors. Not all such nuances can be addressed in this paper.

Holistic Human Planning.

Family. Addressing families, aging, and marital status are only some of the many human factors more commonly addressed in estate planning and trust drafting. The world continues to evolve and become more complex. Societal norms, values, and family structures have changed dramatically recently, and old-style planning and drafting may not meet your needs. One implication is that the stability naming family may have provided in the past may not be something you can rely on in your planning. If that is your situation then naming two or more people in some roles might be prudent. It may increase the need to name a successor for many or even all roles. Having checks and balances is perhaps more critical.

Modern family dynamics are forcing modern trust drafting to evolve. Family relationships are more varied than ever before in history and are likely to continue developing. The number of single people has grown dramatically. The assumption that planning can rely on a spouse or child as your agent is irrelevant to many people. as a source of access to assets in an irrevocable trust or to be a trustee is not valid for many people. That is critical as so much of the information you find on estate planning continues to focus on, even assume, a nuclear family when that is not the norm for most families. When you consider the people you will name, the illustrations you often see will not help much. Once you move beyond a nuclear family for people to appoint to vital positions to your estate plan, e.g., to protect you as you age, it may be more important to consider the safeguards discussed in this article and other positions to provide checks and balances on those you name to various roles.

Reproductive technologies continue to advance and stretch the definitions of “issue.” How should child or heir be defined? What can be done to integrate flexibility to deal with future issues that we cannot envision today? What definitions of “descendant” should be used? Might a Trust Protector or other person be given some latitude to modify the definitions to keep them current with evolving technological options? See the discussion below, for example, of a special LGBTQ Trust Protector to address these issues.

Silver divorce is the fastest-growing demographic for divorce, and if the trend continues, it will require rethinking many aspects of who you appoint in your documents. For example, more trusts utilize the concept of a floating spouse. That is, the person you are married to at any given time is treated as your spouse and, perhaps, as a beneficiary. That concept was rarely used in more traditional trusts. So, is naming a brother-in-law given the high divorce rate, or is using a floating spouse definition really advisable? Relying on the permanency of any relationship for planning purposes may not be prudent in most instances.

State Law. A traditional trust is often named your home state for all purposes and provides no means of changing your trust's governing law or situs (location) to a different jurisdiction. This has evolved in the modern trust to use whatever jurisdiction provides better tax or legal planning benefits and the naming of a trustee (whether merely administrative or something more) to create nexus (connection) to that

favorable jurisdiction. Provisions in a trust document to change the situs are common. These considerations may affect the positions in your trust and who you appoint. For example, adding a person called a trust protector who is empowered to move a trust to a different state may be advantageous. If you decide to have a trust you create in a state that offers tax advantages, you may need to designate a trustee in that state and perhaps avoid naming one in your home state. Your home state may have a limited duration for which trusts can last, and it may be preferable to create the trust in a jurisdiction that permits longer-term trusts (a longer perpetuities period).

Example. You're a resident of State A and set up a trust in State B, which has lower taxes and more favorable trust laws. You are naming an institution (trust company) in State B as the administrative trustee to have State B law apply. You named herself the investment trustee so you can control decisions on the family business you will gift to the trust. You name your sister as the trust protector of the trust. Both you and your sister live in State A. However, having two persons in State A active in the trust's administration may create a risk that the courts in State A will determine that State A law applies. You might trigger the State A taxes you were trying to avoid. Another approach might be to create a limited liability company ("LLC") formed in State B and name that LLC as investment trustee and trust protector. Then, each of you and your sister will fill these roles by being named as managers of that LLC. The theory is that naming the LLC in that role is not equivalent to an individual in State A serving and may minimize the risks of State A asserting tax or legal jurisdiction over the trust. While the result of this is not assured, it does illustrate the myriads of options you might have to try to accomplish your planning goals better.

Aging, Health, and Cognitive Challenges. Addressing the challenges of aging in more robust terms, as it may affect individual trustees and beneficiaries, has become more common. The realization that "incapacity" is not a light switch, and as health issues or aging progress, there may be a slow downward progression in capabilities, has become more commonly reflected in trust clauses. For example, given the expected incidence of chronic illness as the population ages, provisions providing that the named individual trustee will continue to serve through temporary periods of short-term incapacity may be useful. This could affect who you appoint as trustee or how those provisions are tailored. For example, if you are living with Parkinson's disease ("PD"), you might be able to serve as the trustee of your revocable trust and, in that capacity, continue to be involved in managing your financial and legal affairs for decades to come. However, you might realize that you could use help or that you might need that help in the near term. So, you might name a co-trustee to serve with you and assist. That co-trustee might be a friend or family member, even if you chose to name an institutional trust company to serve as the sole trustee if you could no longer act as trustee. There are lots of choices, and they are not only critical to your plan but to your maintaining your independence for as long as possible.

Longevity brings increased cognitive and other health challenges. providing a safe structure to protect against Alzheimer's disease and other challenges of aging, identity theft, and other issues. These issues can be addressed by creating a safety plan with checks and balances to protect you or any aging beneficiary from elder financial abuse and other risks. There are many ways to address this, and often a combination of steps is advisable. One such step may be to mandate that the trustee hire an independent care manager to evaluate the elderly or infirm beneficiary and issue a written report to the trustee. While the trustee can do this at its own volition each year, in some instances, it can be drafted into the governing trust instrument. How does this affect your selection of people to appoint? The people you name as agents under your financial power of attorney, health proxy, and successor trustees under your revocable trust should be young enough (or the successors named after them should be) to be able to help you in future years. Also, you might consider naming two trustees or agents to work

together to create a check and balance. If one person you named proves to be a bad actor who would take advantage of you financially, isn't it less likely that two people would? Hopefully, the honest person you name will prevent the bad actor from harming you. You can name another person as a Trust Protector who has the power to fire and replace trustees. That way, if the bad trustee is identified the Trust Protector can remove them. Absent that safety mechanism, someone might have to go to court to remove a bad trustee, and that might never succeed and would be very costly and time-consuming.

The above example is really important. You may want simple documents, cheap internet documents (or go to the cheapest lawyer), and so on. That just doesn't work to protect you. The above planning ideas are not reserved for wealthy people. Someone of more modest means really needs to protect that wealth if they are to be safe in their later years.

Religion. Religious considerations can be integrated into your planning if that is your wish. Religious considerations could affect every legal document you have as part of your estate plan. If your attorney is not familiar with your beliefs and their impact, you may need to provide that information so that appropriate changes can be made. Given the potential that your religious affiliations may differ from those of fiduciaries you name and from current beneficiaries as family composition continues to evolve, how can this be addressed? This could include special trust protector or power of appointment provisions to address religious dispositive provisions. A trust protector is a person given specific powers to address trust or estate issues and is discussed in later sections of this paper.

Alternative dispute resolution mechanisms, such as arbitration of disputes, are more commonly integrated into trusts. This is not only a result of more humanistic planning, but it reflects the realities of longer-term trusts, which expand the periods over which issues can arise, and the evolution of the family unit to a less cohesive, more diverse structure. For example, religious arbitration provisions are helpful in the context of resolving disputes of provisions based on religious law. But unless those to be bound consent by such provisions, courts may not uphold them. All of this might affect how your planning is structured and who you appoint to various positions. For example, you might want someone of the same faith, or at least is knowledgeable of your faith, to serve in some capacity to orchestrate all of this.

Personal Goals. You might have an important investment philosophy, such as investments that avoid stocks that harm the climate and favor those that help promote climate-friendly activities. That type of philosophy may have to be authorized expressly in all documents that deal with financial investment issues: power of attorney, revocable trust, irrevocable trust, and your will. Also, it may be advisable to have your investment manager create an investment policy statement ("IPS") now and each year reflecting your wishes so that you make a record of what you want to be done from an investment perspective. If you write a letter of instruction to your heirs, it may be essential to explain your philosophy. Thus, your personal or philosophical goals can and perhaps should permeate all your planning and be coordinated to meet your wishes. Might these special goals influence who you select? Perhaps. Or alternatively, you might designate the person you believe has the most financial savvy and just take the steps discussed above to be certain that they are informed of your personal investment wishes.

Charity. For many people, giving back to charities and causes that were important to them is a vital part of their plan. This is not only planning for death but planning for life. For example, if you have tithed to charity during your lifetime, you might want that reflected in your planning. That will require you to coordinate from several perspectives. Your financial planner must know of this goal so it can be factored

into financial forecasts. That is critical to meeting your current charitable goal as well as keeping your retirement and other financial goals on target. If tithing is important to you, then your durable power of attorney and/or revocable trust should permit charitable giving and provide a measure of direction as to how that should be done. If that is not done, then your lifelong goal of tithing could be disrupted in the event of disability. Are the agents you name under your financial power of attorney, and are the successor trustees under your revocable trust understanding these wishes? Are they appropriate to carry out your continued charitable giving? A common way to authorize the agent and successor trustee to gift to charity if you are incapacitated, is to state in the legal documents that the agent can make charitable donations "consistent with your history of giving." Is that something the people you are considering naming are equipped to do?

If charitable giving is so important to you, any irrevocable trusts should consider charitable giving and perhaps should include charitable beneficiaries so your heirs can continue your legacy of philanthropy. You might give some the power to add charities to your irrevocable trust to assure flexibility in future charitable giving. If so, then you will have to designate a person in your trust to do so. See the discussion of "Charitable Designator" below.

Addiction and Other Challenges. If you have an heir who has an addiction issue, coordination of how you provide for that heir and otherwise assist them is critical. These challenging personal issues are too often covered up, which can prevent your advisers from telling you how to coordinate this planning. You might incorporate substance abuse provisions into trusts. If you have named an institutional trustee, they may not be comfortable applying those provisions, so you may have to name an individual to serve in that capacity. Who will you name? While there may not be a specific title for such a person, their appointment could be critical to your heir's well-being. Your attorney must be informed of these issues to draft your documents addressing those points. Your financial adviser may need to understand the financial implications of this or other personal challenges to integrate the costs into financial forecasting. You might need to provide special instructions and powers in your financial power of attorney and revocable trust to assist such an heir. The people you appoint as agent and successor trustee in your financial power of attorney and revocable trust should be equipped to deal with this matter, and if not, other arrangements should be made.

Tax Uncertainty. The tax system is incredibly uncertain. It will likely always remain in flux as each new administration elected to Congress and the Presidency tweak or wholesale change tax rules to accomplish fiscal and societal goals. The estate tax has been repealed and reinstated multiple times. Even if income tax rates are lowered, they may also be increased by a future administration. When trusts are drafted, infusing flexibility to address future income, estate, and other (e.g., a proposed capital gains tax on death) taxes is essential. Many newer fiduciary and non-fiduciary positions can be used creatively to accomplish this goal. For example, it might be useful for someone to be given limited power to appoint a trust principal to others. Someone might be given an express right or power to transform a limited power of appointment into a general power of appointment to cause estate inclusion. You might vest a Trust Protector with powers to defer funding successor trusts or defer when certain descendants might become beneficiaries to avoid negative tax implications. Which position should be given these powers? It might be possible to vest some or all such powers in the person you name to serve as Trust Protector. However, if the Trust Protector is designated as serving in a fiduciary capacity, it may not be optimal or even feasible for the Trust Protector to exercise these powers. A "fiduciary capacity" means the Trust Protector must act in the best interests of the trust beneficiaries. These include acting with regard to duties or obligations of care, loyalty, and good faith. Let's say a tax proposal is enacted that would trigger a transfer tax (generation skipping tax or "GST") whenever, say, a great-grandchild

becomes a beneficiary of a trust. If the Trust Protector were given the power to defer when that great-grandchild could become a beneficiary, that might defer when a costly tax could be assessed on the entire trust. Although that might benefit your heirs overall, because the Trust Protector might owe a fiduciary duty to that great-grandchild, they may not be able to defer when they could become a beneficiary. Even if the Trust Protector were legally able to act, they may not be willing to do so out of fear of that great-grandchild (or a guardian acting on the great-grandchild's behalf) suing them. You might need to designate a different person to hold these tax-sensitive powers who is expressly stated to serve in a non-fiduciary capacity so that they do not have the constraints that a fiduciary would in acting. Thus, you might need to designate two people to serve in two distinct trust protector roles.

The above example shows how complex and intertwined the terms of your legal documents, the people you choose, and tax or other factors can be. Many people want "simple" planning, but life is rarely simple, and tax laws are almost never simple.

Complexity. The modern trust is more flexible than the traditional trust. This results in more complex trust instruments and plans. The uncertainties and rate of change described above are reflected in trust documents that try to anticipate future tax law changes and provide different mechanisms to deal with those changes. State taxation of trusts is evolving. Society has grown more complex. Today, only about 20% of American family units consist of a traditional husband, wife and children from that marriage. All of this brings more complex goals to trust planning and more complicated provisions in trust instruments. The complexity makes it more important to create mechanisms to correct a trust that might prove less than optimal in the future. So, a modern trust is more likely to include a provision permitting the trustee to decant (merge) the trust into a new trust thus permitting the trust administrative, and other, provisions, to be improved if advisable. To make the decanting provision practical it might be helpful, if not essential, that a person has the authority to change trustees, situs and governing law for the trust. The significantly increased complexity of the modern trust might also suggest that including a trust protector and providing the protector the power to correct scrivener's errors, might be useful.

Grantor Trust. A grantor trust is a trust that the IRS ignores for income tax purposes so that you can transact business with the trust without any income tax consequences. However, the trust is respected, if done properly, for estate tax and asset protection purposes. This type of trust has been the foundation for much of estate planning for many years. Tax proposals, however, have suggested restricting or eliminating the benefits of this. However, looking at grantor trusts under current law, achieving the benefits this technique may afford might require you to name various people to special roles essential to that type of planning.

The default approach for most irrevocable trusts is to be structured as grantor trusts for income tax purposes. The advantages of a grantor trust include that the trust's income is taxed to you as the grantor (the person creating the trust). This status enables you to swap appreciated trust assets back into your so those assets can qualify for an increase in income tax basis on your death. Under the current estate tax system, this is a valuable estate planning goal. Even if you are not subject to estate tax, these concepts can provide asset protection and income tax advantages. Grantor trust status may permit you as the grantor to sell appreciated business, real estate, or other interests to the trust without triggering a capital gain. That may prove to be a key to transitioning your family business to the next generation without estate tax costs and protecting the business for those intended heirs. If you plan to transfer a family business or other special assets to the trust you will have to consider the implications to who you chose as trustee and investment trustee (a special trustee, or just a trust advisor) who can be named to manage trust investment decisions.

If you are not subject to the estate tax a grantor trust can be a powerful divorce or asset protection planning tool. If that is your goal you might benefit from naming someone who is independent, perhaps a trust company in a state that has favorable asset protection laws.

A common provision included in trusts to achieve grantor trust status is the power to substitute or swap assets. This provision requires a special trust position, sometimes referred to as the "substitutor," for which you, as the settlor, must appoint a person to serve. The person setting up the trust is typically named, but that is not required. You could appoint another person, such as a sibling if you wish. Who should be named might depend on the nature of the trust, the assets in the trust, and the tax objectives of the trust.

Directed Trusts. Traditionally the trustee of a trust had control over all investment decisions. But you may have to name an institutional trustee to secure a site in a trust-friendly jurisdiction. For example, the settlor might have a long-term relationship with a particular investment advisor. You might want to take advantage of the laws of a more trust-friendly state, but you may still wish to continue the long-term relationship with your wealth advisor. Using a directed trust structure can permit you to have both the advantage of the better state law for the trust and continue the relationship by naming an institutional administrative trustee in the desired state and having the trust direct your long-time investment advisor to invest trust assets. These decisions will significantly impact the positions in the trust you have to fill and who you will name. They will also dictate the structure of the trust created for these purposes. If the institutional trustee is "directed" to follow the instructions of your investment advisor, the institution should have very limited or no liability for that investment and should, therefore, charge you a lower fee.

Dynastic Trust. Modern trusts are often planned so that the assets of the trust will remain outside the transfer tax system and protected within the trust for a very long time (as long as state law permits). Keeping assets inside flexible trusts for long or indefinitely may provide more safety and planning options as the tax system and other circumstances evolve. This long-term approach may require that the trust be formed in a state that permits trusts to last forever or at least a very long time. If your home state doesn't permit that, you'll have to have a sufficient connection (nexus) to a trust-friendly state that does permit very long-term trusts. That generally requires naming a trustee in that state.

Quiet Trusts. As the name implies, a quiet trust is a trust whose existence may not be known to some of the beneficiaries. This might appeal to you for a variety of reasons. Example. You want to protect your assets from lawsuits or claims as you want to safeguard your wealth for your eventual retirement. Part of the plan to accomplish that is to transfer your assets to an irrevocable trust so that it will be protected. The trust is structured in a manner that will enable you to access trust assets, which should hopefully prevent your creditors from reaching the assets. For various reasons, your children are named as beneficiaries of the trust (along with naming you and your spouse in various ways not pertinent to this discussion). While you trust your children, the assets in the trust you hope will be available to you in retirement if you need them. You would prefer not to inform your children about the existence of the trust to avoid them trying to get at the trust assets, which is not the plan's primary goal. Can you simply choose not to tell the children about the trust? Not assuredly. Trustees, especially institutional trustees, are well aware of the advantages of beneficiaries being informed about the existence of a trust and the trust's performance. By doing so, the trustee may be insulated from later claims by the beneficiaries about trust management. Also, there is a potential benefit to all beneficiaries knowing about the trust. If the trustee mismanages it, the beneficiaries who have a direct financial interest in the trust's proper care

can object to the mismanagement, thereby safeguarding the trust. Can you accomplish all of these goals? Yes, but it will require the appointment of another person to a special trust position.

Depending on state law, the terms of the trust instrument, and the parties' preferences, it may be possible (even advisable) to designate a person to receive notice on behalf of one or more beneficiaries. This might reconcile some of the competing goals listed above by providing the protections of someone being responsible for being informed of trust matters but limiting disclosures to a beneficiary who may be harmed by the disclosures. If a beneficiary is incapacitated or has special needs, this structure might be valuable to incorporate into the instrument. The person designated to receive trust information on behalf of someone else might be referred to as a "designated representative" or by other titles. In other cases, this responsibility might be given to another fiduciary, e.g., the trust protector.

The above is yet another example of how your goals can influence both the structure of your plan (in this case, a trust) and, in turn, who you might need to appoint and what positions you need to fill.

Non-Reciprocal Trusts. A common planning technique is for two spouses (or it could be siblings or others with a shared economic interest) might create trusts that benefit each other. Example: You create a trust to benefit your spouse and descendants, and your spouse makes a trust to benefit you and your descendants. You each give significant assets to the trust you create. In this way, a substantial portion of your wealth may be moved outside the estate tax system and into trusts that provide protection from creditors and claimants. If each of you is a physician, this could be a valuable approach to protect assets yet assure that you can still benefit from the assets (as a beneficiary of the trust created for you by your spouse). But to accomplish these goals of protection, estate tax savings, and access, very deliberately planned steps will have to be taken, and each of those steps might result in new positions to which you have to designate people to serve for your plan to function.

Example. For married couples concerned about asset protection (e.g., each spouse is a physician), using spousal lifetime access trusts ("SLATs") may be a valuable planning tool (even if they don't have tremendous wealth). For those with more significant wealth, and with the current high estate tax exemptions, longevity, and tax uncertainty, it is common for married couples to use SLATs rather than merely trust for children or other descendants. In this way, the couples in each situation can remain beneficiaries of trusts. However, the assets in those trusts are arguably outside their estate and secure from the reach of creditors. SLATs may be created by the husband creating a trust for the wife and descendants and the wife creating a trust for the husband and descendants. For SLATs to be effective, the trust instruments and plans should be sufficiently differentiated (there are no bright-line criteria of what that means). If the trusts are identical (e.g., all identical terms and merely different names), they may be disregarded under the "reciprocal trust doctrine." The preferable approach is to draft each trust from scratch, incorporating meaningful legal, tax, and economic differences. Differences may include different fiduciary and non-fiduciary positions, persons named for positions that are the same in each trust, and so on. So, making a couple's SLATs distinct from the other will significantly impact the positions and persons named in each trust. This might mean very different persons appointed in each of the two trusts. Consider:

- You might name different trustees and trust protectors in each trust to infuse independence.
- Each trust might be formed in a different state, and neither in your home state. That might require naming a different institutional trust company for each trust.
- One of the trusts, but not the other, might give someone a special power of appointment (the right to designate who may receive trust assets). You will have to designate a person with that authority in one of the trusts but not the other. Given that a power of appointment can be quite

powerful, resulting potentially in the redirection or redistribution of all trust assets, that must be a person you trust to act appropriately.

- You might name different beneficiaries in each trust. While the primary beneficiaries of your trust might be your spouse and descendants, you might add an elderly aunt or other family member as a beneficiary. In your spouse's trust, you and your descendants might be named as beneficiaries along with your spouse's sibling.
- In your spouse's trust, but not your trust, a person designated to act in a non-fiduciary capacity is given the authority to add charitable beneficiaries to the trust. That person will have to be named.

The key point is that whatever your goals and circumstances, carefully selecting people for the various positions that your estate plan might dictate can help you accomplish much more. The old-style approach of naming one person to serve as your executor and trustee might suffice in the simplest of situations, but for many people, that simplicity will undercut their achievement of important goals.

Discuss Prospective Appointments With Those You Are Naming.

First ensure that the potential fiduciary is made aware of his or her role. While this may seem obvious, it is a step that many people neglect when naming fiduciaries and others. You should ask each person whether they have the time to devote to the role's duties. Understand and relate to the person what their responsibilities will be in the role. Ask a potential fiduciary or other appointee whether they are confident they can properly execute their role. The appointee should be clear as to what responsibilities and time commitments might be required of them before accepting the appointment.

What other potential issues may arise to confront the person you are naming for each role? You should endeavor to objectively discuss any issues that might already exist or that may arise at a later point with the prospective appointee. Not every family dynamic is so simple as the children sharing equally in the estate. The potential fiduciary may encounter a situation where there is inherent conflict. For example, you have three children and leave 70% of your wealth to one child, 30% to the second child, and nothing to the third child. That could create potential conflicts for the fiduciary to navigate. What if one of your heirs has a drug or other addiction? If so, the fiduciary you appoint will likely encounter difficulties, additional tasks, and responsibilities. Discuss whether these potential issues are manageable for the fiduciary.

What is the nature of your assets? Explain the specifics of any special assets and any challenges in the duties of the fiduciary those assets may create.

You might name family and friends to various roles because you trust them and believe that they know your wishes and will be sensitive to your needs and goals. The person you consider may have a rapport with your children or other intended beneficiaries. However, it is still advisable to have a discussion with the individuals named. First and most obviously, they should be aware of the appointment and not only find out about it when they are contacted to assume their role. That is inadvisable as the individual named may be caught off guard and may be wary of taking on a role that was never discussed with them. They will likely be better prepared and do a better job, especially initially, if the role they are going to be asked to assume is explained to them. An open and honest discussion may help secure more positive. Consider:

- An initial opener to the conversation with your prospective trustee or other appointee is asking them to serve and explaining your confidence in them and the immense help they will be to you

and your loved ones. Most individuals like to help. They want to feel useful, and they will be flattered by the responsibility you are giving them.

- A key question for almost every role is what legal document appoints them, where the original is kept, and how and when they can get a copy of it. The legal document appointing each role is really an essential roadmap for each person you name.
- When you name someone to serve as your health care proxy and make medical and health care decisions, can they possibly know your wishes if you don't discuss them? Will they know your preferences for care? How do you feel about experimental medical procedures? What religious beliefs do you want (or do not want) followed? You might also consider leaving a letter of written instructions to them in addition to a conversation so that they have that to remind them of your wishes.
- When you name someone as a guardian for your minor children, can they know what type of education, summer activities, religious upbringing, etc. you wish for them? They need input from you. A conversation and a detailed letter to them is important. And remember to update that letter as your children grow so that your guidance reflects their current circumstances.
- Whoever you name to serve in any of the various financial roles will benefit from knowing who you work with for banking, investment, and insurance matters. They probably need to know who files your income tax returns. It may be helpful to express your views on spending, investing, charity, and other matters to them.
- Anyone named may have questions about their role, the liability they face, whether or not they get paid, and how much time fulfilling the duties will take.
- Non-professional people appointed may not understand that they can, and perhaps should, hire professional advisers to lessen the burdens they face, guide them in fulfilling their role and limit the potential liability they may be exposed to. Even if your situation is simple or the dollars are not large, having one or more professionals (depending on the role involved) explain at least at the outset what needs to be done can be very helpful. The persons named may not understand that. If your situation is complicated, contentious, or involves large dollar amounts, it may be prudent for those you appoint to have ongoing professional guidance. Again, the people you appoint may not realize that initially and initial missteps could harm everyone involved.
- Explain to the prospective appointee that the trust (or your personal assets, if the individual is going to serve as an agent under a power of attorney) can pay for insurance, legal, and other professional fees, and they, in their role, should not be personally responsible for such costs.

Informing those you may appoint to various positions in your estate plan and discussing their role and what you hope they would do is not an easy conversation. However, it could be vital to accomplishing your wishes. It may avoid the surprise when, years later, someone is requested to step into a legal position or act on your or your loved one's behalf.

Corporate Transparency Act May Change the Discussion.

There could be many different tax and legal obligations that a person you appoint in your estate planning documents might have to address. The most obvious might be that a trustee of a trust has to file income tax returns and possibly pay state and federal income tax on trust income. While this discussion focuses on the Corporate Transparency Act ("CTA") there are others. The point is that fiduciaries and others you appoint may face various tax and legal compliance requirements. They will often require professional guidance to comply with these requirements.

In the past, it had been common for whoever set up a trust to perhaps only inform the trustee of their role in an irrevocable trust. Other fiduciaries or appointees (e.g., trust protector, person holding a power to appoint a new beneficiary, a person holding a power of appointment, etc.) sometimes were not informed of their role, nor were they required to sign the trust document. The silence/don't inform approach assures surprise when the appointment becomes real and that the person appointed may have little idea of what their role is or what your wishes are. However, not informing an appointed person may present a hazard beyond the fiduciary's mere discomfort at the prospect of assuming their role.

If the trust is deemed a beneficial owner of a reporting company under the CTA, people named in that trust, or your will, may have to report personal information to the Financial Crimes Enforcement Network ("FinCEN") or provide that information to the reporting company. If reporting is possible, then those involved must not only be aware of their appointment and perhaps should assuredly sign a counterpart to the trust document, but they will have to consent to provide the confidential information required by FinCEN. Rather than providing that personal information (date of birth, home address, Social Security Number, and a copy of personal identification like a driver's license) to the reporting company, they may instead provide that information directly to FinCEN, obtain a FinCEN Identifier number, and then provide that number to the trust or reporting company for CTA compliance purposes. Thus, the CTA may make it more important for you to speak with those appointed in a fiduciary capacity that might be within the ambit of the CTA.

Also, if you ever modify a trust (e.g., from a process called decanting where you pour the existing trust into a new trust) or in other ways or change people appointed to various roles, the information filed with FinCEN may have to be updated in as little as 30 days.

The CTA (and other) governmental reporting requirements may affect who you appoint to different roles in your plan, and even how those roles might be arranged.

Coordination of the People You Name

Coordinating the various positions in your estate plan and the individuals named in those positions is a daunting task, and you might have a conversation with all named people to emphasize that they will need to work together. Even if the individuals in various positions may be appropriate to serve and want to assist you, the way those potential fiduciaries interact with each other is another facet that you must consider. The first step in coordinating all the persons you have or will name in your plan is part of the objective of this paper. You first have to identify all the people who might be involved.

Consider the following examples.

- Your financial adviser might know the names of the people you have designated as beneficiaries of your IRA and the name of your trusted contact person to be called if elder financial abuse is suspected. You authorize your investment firm to call this person if they reasonably believe that your account may have been subjected to financial exploitation or fraud. However, your financial adviser may have no idea who is named in your financial power of attorney, and the agent appointed in that document may be inadvertently different than your financial adviser's contact person. Also, the power of attorney document might give your financial agent the power to change beneficiaries on your IRA. Still, the agent may not know your financial advisor or the people named as beneficiaries.
- You name someone to serve as the agent under your medical power of attorney (health proxy) to make medical decisions. Some of those decisions must be paid for by the agent named under your financial power of attorney. Because the skills and personality of someone making medical and

financial decisions are so different, people commonly name different people to each role. But if the financial agent chooses to contradict or challenge a medical decision made by your health care agent by not paying for it, that could undermine your personal health care wishes or even your care. Discussing with the person you appoint as financial agent how you wish them to defer to the decisions of the health care agent might be important. You might even coordinate that hierarchy of authority in the legal documents.

- It's not uncommon for individuals to name a different person to act as an agent under a medical durable power of attorney, healthcare proxy, or living will (collectively "medical directive"). A different skill set may be required to make medical decisions than those needed for handling finances. Your adult child who can't balance a checkbook may be most attuned to your wishes and end-of-life considerations or likely to carry them to fruition. Not every person has the wherewithal to "pull the plug." But what happens when the agent under a medical directive you decide to stay home and contract for services as authorized under the medical directive, but the trustee or agent under a financial power of attorney believes payment of those expenses is unreasonable? Whose opinion/decision prevails? Might including a clause similar to the following mitigate these issues? "If I have executed a separate financial Power of Attorney form or document appointing any person or entity to serve as my financial agent or attorney, in fact, I request that my Agent appointed herein cooperate with such financial agent and keep such financial agent reasonably advised of expenses incurred, or likely to be incurred, in connection with my health care and related matters by my Agent under the powers granted in this Health Care Proxy."
- If there is tension between the individual named as the trustee and trust protector of a trust, those issues may affect their ability to achieve your goals for the trust.
- Say you created a revocable trust to manage assets during your disability and reduce probate costs. If you transferred your tangible assets (furniture, art collection, etc.) into the name of the trust, the person named as trustee and then the successor trustee will have control over those assets. If you did not transfer those assets, the person named as agent under your financial power of attorney may have control over those assets. Are they the same people? If not, what will happen? What do you intend to happen? Coordination and planning for the people you appoint is critical.

Too often, different people are appointed at different times when different documents are done, and no one takes a step back to look at the big picture of all the people named and what it means. Just naming people you are comfortable with is not enough. The documents, people, and steps must be coordinated and kept current as life and circumstances change. Coordinating the people under the various documents is important to avoid conflicts.

What Might the Prospective Appointee's Responsibilities Include?

One of the most important, and sometimes most difficult, decisions you can make in your estate plan is choosing who to name or appoint to each of the many positions in your plan. Choosing a guardian for a minor child can be a heart-wrenching decision, even when the decision is obvious. However, another dimension to your decisions is the responsibilities each person named to each position will have. It is important to consider this when evaluating who can fulfill each role. Each person you appoint will eventually have to understand what responsibilities they will have. They may not be comfortable with some or many of the tasks that could be required. While it may be uncomfortable to have this discussion now, after all, you might change your will many times before you die and an executor is actually appointed, that may be prudent (see the discussion elsewhere in this paper on that point). Some people

might be concerned about the liability that they might face if they accept the role, you have appointed them to.

Example. Your two nieces are your only heirs. They do not get along and have had an antagonistic relationship forever. You want to leave money in trust for them so that the funds are protected and used prudently. The person you name to be the trustee in charge of that trust might be reluctant to get in between the two combative nieces. Not only could that role be unpleasant, but they might reasonably be afraid that the constant bickering could result in legal battles that could engulf them. The solution may be to name someone else, create a separate trust for each despite the additional cost, or perhaps have an annuity purchased for each of them on your death instead of creating a trust. As with many appointment decisions, the person you name and the role you appoint them to are often entangled with other critical considerations.

While this paper discusses many roles you may name people to, the most common are fiduciary roles like agent under your financial power of attorney, personal administrator or executor under your will, and trustee under a trust. In these roles, the person named will serve in a trusted capacity and have legal duties or obligations to the people named as beneficiaries. The following discussion will focus on the duties and responsibilities of a trustee as illustrative of the requirements applicable to agents and executors. This information will help you better understand the positions involved, evaluate the people you should name, and guide you in explaining to those you name what their serving will involve.

The Legal Document is the Rule Book. The legal document that creates their role is the roadmap of what every fiduciary has to do. For the executor, this is a will; for the trustee, it is a trust; and for a financial agent, it is a power of attorney. The first step any person appointed to serve should take is to review the legal document appointing them. The reality is that these legal documents are usually long and complicated. Given the potential liability exposure the fiduciary might face, they must understand the ground rules. There is another twist to this. The legal documents often refer to state law. For example, a will might state that the executor (personal representative) and trustee have all the following powers. After a long list of steps they can take is listed, the document might say something like "and any other power permitted by a personal administrator under state law." So, even though the legal document is the guide, state laws are often referenced in the documents. However, state law will have a significant impact regardless of whether it is referenced. For example, a will may use a term like "descendants." How is that critical term defined so the executor can determine what to do? If the document doesn't define it, state law likely will. The bottom line in all of this is you should recommend that when the appointment of a person becomes relevant under one of your documents (e.g., you pass away and your executor has to act), the first step of reviewing the legal document should probably be done with an attorney. The family members, friends, or other non-lawyers you appoint may not realize this. So, informing them of that step, and that your estate will cover the cost for them, could be pretty significant. A practical step might be for them, with the attorney's guidance, to annotate the key document (power of attorney, will, or trust document), highlighting and explaining the provisions that will be key to the role they will serve. That way, they have an explanatory guide to refer to as they perform their role. The mere fact that you prepared the document using an online service or that you have a wealth advisor or CPA who is very capable and involved with your family doesn't negate the importance of that initial legal consult.

Example. You have a family business you inherited from your grandfather, and you want to pass it on to your heirs. So, in your will, you bequeath the business to a trust for your descendants and mandate that the trustee can never sell the business. Despite that mandate, and perhaps depending on the language used in the trust about that requirement, state law may override that mandate, at least in some circumstances. If

your trustee relies only on what is stated in your will that creates the trust, they might miss important legal requirements that change what they must do.

The scope of each fiduciary's role will vary depending on the legal document appointing them, the provisions in that legal document, state law, and even the circumstances involved. Even someone who has been an executor for other family members, for example, should review your will when the time comes with legal guidance.

Your Intent. The duties of the trustee you appoint are based on your objectives or intent. What have you indicated that your wishes are in your will, trust or other legal document? The trustee is charged with carrying out your intentions when you created the trust. This is why it is essential that you understand what the document does and that it, in fact, reflects your intent. This is why the trustee must read and understand the trust.

Example. As in the prior example, you inherited a family business from your grandfather, and you want to pass it on to your heirs. If your trustee doesn't read your will, they might miss that provision and not realize it was your express intent. If they sell the business without being aware, they might be liable to your heirs for that failure. Intent is really important. That doesn't mean that state law might not interpret or limit your intent, but the trustee must pay attention to your intent.

Respecting your intent is closely related to but somewhat different from the trustee's other obligation to adhere to the terms of the trust.

Adhering to the Terms of the Trust. The Trustee must carry out the terms of the trust agreement. If the trust document mandates that income be paid annually to a particular beneficiary, that is precisely what the trustee must do. If the trust agreement reflects certain religious requirements, e.g., that lead to or include a prohibition on owning or investing in businesses or stocks that operate bars or alcohol production (e.g., a distillery, etc.), then unless state law overrides that requirement, the trustee is obligated to follow the terms of the trust. Sometimes the trust requirements might not be optimal in the current circumstances. For example, the trust mandates that all trust income be distributed to a named beneficiary. Still, that beneficiary has developed a drug or alcohol addiction, and paying income would fuel that addiction and harm the beneficiary. The trustee should not ignore the trust terms but consult with an attorney to document a basis for avoiding strict adherence. The trust provisions may provide a means to do that. For example, the trust might permit paying income not only to the beneficiary but "for the benefit of the beneficiary." In that case, it may be possible to pay the income to treatment programs to benefit the beneficiary. But if that is not feasible because of the terms of the trust, state law, or the circumstances, the attorney may guide the trustee to petition a court to modify the trust. The critical point is that whoever you appoint as a trustee should understand that it is important to adhere to the terms of the trust and get professional help if an issue arises.

Fiduciaries Must Act Prudently. The Trustee must act in a prudent manner. That means acting in a way that is reasonable and reflects good judgment and common sense. This doesn't require that the trustee have a crystal ball. It is not a standard of performance or result. In other words, would a prudent and reasonable person with good judgment have taken the same actions as the trustee? This means in practical terms to your trustee that they should act in that manner and probably document why they take the steps they are taking when taking them. That way if circumstances work out differently, they can show that they were reasonable when the action was taken. Certainly, a practical way to demonstrate that the trustee has met this standard is to consult with experts in the field.

Example. The trustee buys online property, casualty, and liability insurance on a rental property you owned, which passed to your trust. The property burned down, and it turns out that the insurance was inadequate. Can the trustee demonstrate that their actions were prudent? The mere fact that the property was destroyed or that the insurance wasn't sufficient doesn't mean that the trustee was imprudent. If the trustee documented, for example, how they derived the value of the house they insured at that time, and those steps were reasonable, that might suffice. This is qualitatively different from how many family members or friends appointed as trustees would generally act. If your aunt buys insurance, she might make reasonable decisions but not do more. When she is doing that, as your trustee, it may behoove her to document how she came up with the insurance (and other) decisions so that if the decision proves inappropriate, she can demonstrate why it was reasonable. The people you designate should understand this different mode of operating as a fiduciary than how they would otherwise conduct their own financial affairs.

This prudence concept will be discussed further in the context of the investment of trust assets below.

Loyalty. The Trustee actions must be taken with loyalty to the trust, and hence the beneficiaries of the trust, in all matters. For example, the trustee should avoid self-dealing. The trustee should obviously not receive any personal benefit from serving as trustee other than a trustee fee if permitted by the trust and not in excess of what state law provides. But common sense or reasonable judgment can quickly run afoul of the duty of loyalty.

Example. The trust owns the house you live in. None of the beneficiaries want the house. The trustee agrees to buy the house for its appraised value. That means that the trust will receive the full value of the house unreduced by brokerage commissions. That is a great benefit to the trust. However, it may still violate the trustee's duty of loyalty. No trustee should undertake any such transactions without first having a lawyer confirm whether or not it is feasible. It may be much better for the trustee to avoid doing a wrong act than trying to unwind it later.

If a trustee wants to transact business with the trust, the beneficiaries should be represented by an independent attorney, not the attorney the trustee or trust uses. That attorney should be fully apprised of all of the details of the proposed transaction. After the beneficiaries are advised by that attorney and then they sign off on the transaction, it may be reasonable to be consummated. However, even then, the trustee should discuss with their attorney whether it is appropriate even in those circumstances. This sounds costly, complicated, and time-consuming. It is., That is why the better answer in many cases is for the trustee to not engage in transactions with the trust if it can be avoided.

First, the people you name to serve as trustees should understand how careful they must be. If they or you are concerned that they cannot be, it might make sense to consider a professional trustee, trust company, co-trustees, or other actions to backstop the trustee's role.

Second, this duty of loyalty may significantly impact the arrangement of various positions in your trust.

Example. You want to give someone the power to add beneficiaries. An heir is LGBTQ and is planning to have a family. You feel that giving someone the power to add a beneficiary will assure that your heir's child will assuredly be able to be a beneficiary of your trust. See the discussion below on a special LGBTQ trust protector. You might have already named a person to serve as a trust protector in your trust. That person can remove and replace the trustee. But if the trust protector is designated as acting as a fiduciary, then that same role or person may not be able to add a beneficiary as you wish. That is because they, as fiduciaries, have an unfettered duty of loyalty to the trust and its beneficiaries. If so, they may not be able to add a new beneficiary that would dilute the economic interests of the current beneficiaries. So,

you may have to have your trust contain two different positions not one. The person given the power to add beneficiaries probably should be a non-fiduciary position. You'll probably have to appoint two separate people.

This again demonstrates that many estate planning documents and mechanisms can be incredibly flexible to help you accomplish your goals. But the decisions can be complicated and nuanced to get you where you want to be. Sometimes, you might decide to forgo a particular mechanism or position to simplify your plan and documents. But that should be your intentional decision after you understand the pros and cons involved. Also, while it may be enticing to you to use online forms or the least costly attorney you can find, after all, a "will is just a will," you know that is a fallacy. How important are your goals and loved ones? Reconsidering the above example, how concerned are you that your heir's child may not qualify as a beneficiary? Perhaps very concerned. How can you be assured without the above mechanism in your will that the child will, in fact, be classified as a beneficiary under state law? How can you predict how state law might change in the future? You can't.

Duty to Personally Administer the Trust. The trustee's responsibility to personally administer the trust might sound like it was contradicted by the advice above, which recommended that the trustee have an attorney guide them on specific key actions. Doesn't this duty require that the trustee personally administer the trust? The discussion later about trust investments will suggest that unless the trustee is an investment professional, working with one may be prudent. Doesn't that too contradict the requirement that the trustee personally administer the trust? The answer is no, and it's because of a fine distinction in the concepts. The trustee must personally administer the trust. That means that the trustee can and often should get professional investment advice from a financial professional, tax advice from a CPA, and advice on distributions from a combination of professionals. But in all these cases, the trustee should be personally involved and responsible for the final decisions based on the professional guidance received.

Investing. The trustee must determine an investment strategy for trust assets. This should be documented with the creation of an Investment Policy Statement ("IPS") that is consistent with the terms of the trust (or other governing document), the assets held, the needs of beneficiaries, state law, etc. If the fiduciary does not have the professional expertise to model trust income and expenses and create an appropriate investment plan based on this, they should hire a professional. If an investment professional budgets for trust expenses and beneficiary needs prepares financial forecasts, and, based on that, an investment plan to meet trust objectives, the trustees might reduce their fees to reflect that the trustee has delegated a portion of their duties.

Once an investment plan is created, the trust assets must be invested in accordance with that plan. If there are assets that must be managed and protected, such as a beneficiary's home that is owned by the trust, the fiduciary should create a written agreement detailing the beneficiary's obligation to pay or not pay rent, obtain appropriate insurance coverage, maintain the property, etc.

A common error trustees make is assuming that a house, insurance policy or other asset that was in the trust when they became trustee can simply be held. The language in the trust as to retaining assets, the performance of that asset and other factors should all be evaluated. See the discussion above about the possible issues of even holding a family business when the trust mandates that.

Distributions. Planning for distributions from a trust is one of the most important actions. While traditionally many trusts mandated that income be paid out, unless that is required for tax purpose (e.g. for a marital trusts) more modern trusts often have discretionary distribution standards that leave it up to the trustee to make distribution decisions. That is done because it provides better protection from claimants.

This is because if there were a mandated income stream the claimant might be able to attach that income stream. With distributions in the trustee's discretion the trustee can simply cut off distributions to a beneficiary being sued, going through a divorce, etc. Also, discretion may give more flexibility for tax planning because the trustee can pick which beneficiary will get a distribution. Distributions generally flow trust income out to the beneficiary receiving a distribution so that the trustee can use distributions, for example, to lower the income tax burden between the trust and all permissible beneficiaries. All of this makes the trustee's job more challenging and can require more coordination between the investment advisor, attorney, CPA and trustee on how to achieve the various goals. To administer such a trust the trustee might periodically poll the beneficiaries about their other sources of income and financial status (dependent on what is in the legal documents) and their tax status (e.g., do they live in a high-tax state like NY or CA?). Additional detailed documentation is recommended to show how the trustee made the decisions.

Rules may vary on the distribution of income and principal based on the type of trust. For example, a QTIP marital trust that qualifies for the unlimited gift and estate tax marital deduction requires that all income must be distributed to the spouse/beneficiary. However, the rules on principle are flexible, so the trust document could provide almost any type of standard. Thus, how the fiduciary may distribute income could be quite different than the rules as to whether they can, should, or perhaps must make mandatory or discretionary principal distributions.

Expenses. The trustee is responsible for ensuring that the trust's expenses are paid. These should be documented, and decisions may have to be made as to whether trust expenses are paid from income or the trust's principal, as that might affect the interests of the beneficiaries.

Tax Filings. The fiduciary will need to file income tax returns on behalf of the trust. While the fiduciary can hire an accountant to assist with the filing, they will still need to be involved in the process and provide the accountant with copies of any required documentation to complete the return.

Trust Records and Communication To Beneficiaries and Others

Records and Communications**.** The fiduciary is responsible for maintaining trust records regarding any actions the fiduciary may take. For a trustee, this may include any data collected from expenses paid, distributions made, income earned, and any other action taken in administering the trust.

As a trustee, that is a key responsibility. Keeping clear records of all that was done and communicating those details in an understandable manner to everyone involved (e.g., current beneficiaries, future beneficiaries, co-trustees, and perhaps other individuals like a trust protector) may also be key to avoiding conflict among the beneficiaries and others involved and reducing the risks of facing a lawsuit or claim.

The trustee should get detailed records of trust assets when the trust was created (if serving as the initial trustee) or when the trustee takes over from a prior trustee. This should include a detailed inventory of all assets, a description of the assets, the income tax cost basis of the assets, and so forth. It is often advisable to have a CPA specialized in trust accounting and trust income taxes advise the trustee even on what might seem like a relatively simple trust.

Communication with Beneficiaries. Without clear and periodic communications between the fiduciary and beneficiaries, beneficiaries may conclude that the fiduciary is misappropriating assets, failing to invest appropriately, etc. See the discussion above on "Quiet Trusts." Assuaging these concerns is

beneficial to both the fiduciary and beneficiaries. It may reduce the likelihood of litigation or strife between the fiduciary and beneficiaries and ease any concerns the beneficiaries may have.

As a suggestion, the trustee may consider:

- Send periodic letters to all involved. List each person who receives the letter and what each person receives (e.g., list every enclosure sent). Number the letters sequentially and date each letter. Consider sending each communication via a method that confirms tracking and receipt. Save proof of delivery for each recipient. This can be done via email with read receipts if you are confident that the beneficiaries and anyone else involved are comfortable with that.
- Send copies of key legal documents. The primary document may be a power of attorney if the fiduciary is acting as an agent, a will if acting as executor or as a trustee under a testamentary trust formed under the will, or a trust if they are serving as a trustee (or in another capacity). Other relevant documents might include the deed to a house owned by the trust or a life insurance policy, application, and eventual payment documents.
- Enclose financial data so that everyone understands what is involved. What the fiduciary discloses and to whom may depend on the circumstances. Rather than exercising independent judgment, it may be prudent for the fiduciary to seek legal advice (at the expense of the trust) to avoid the time and cost of litigation.
- Listing all expenses paid and distributions made.

Accounting. An accounting is a formal recording of all receipts and disbursements of a fiduciary arrangement. By way of example, the trustee of a trust might provide an accounting listing all assets given or distributed to the trust, any income and other receipts, all expenses and other disbursements. An accounting may be a formal accounting done in accordance with the laws of a particular jurisdiction or court. Formal accounting is costly and must be done by a professional experienced in the requirements of court accounting in a particular state and perhaps even a specific county. Often, informal accountings give substantial information to beneficiaries and others without the cost and formalities of the formal accounting.

Should a fiduciary choose to resign, an accounting may serve to release a fiduciary from liability and enable a successor fiduciary to resume the former fiduciary's duties. Typically, when someone ceases to serve as a fiduciary, they have the beneficiaries sign a legal document releasing them from further liability. For that document to be effective, the beneficiaries may need to reasonably understand what they release. That requires that the beneficiaries receive informative financial information necessitating the provision of formal documentation. That will typically require the provision of some type of financial information. The information should be presented so beneficiaries without financial acumen can understand the implications. The financial information should be presented in a clear and understandable way. While this might include bank and brokerage statements, clearly summarized information may make it more understandable. The objective is to inform beneficiaries and demonstrate that nothing wrong was done. That might avoid any future claims based on their not understanding the finances involved.

The fiduciary should endeavor to keep detailed records on a regular basis (at least annually). Creating a formal accounting will be easier if the fiduciary has kept impeccable accounting records from the beginning of serving in their position. Records may also be helpful, if not essential, in providing the information necessary to complete annual income tax returns and to communicate with beneficiaries and others, such as co-fiduciaries periodically.

Special circumstances may require the preparation of a formal accounting. For example, if the fiduciary is sued, a formal accounting may be necessary. If there are charitable beneficiaries, the Attorney General of the state where the trust has situs may require reporting that requires a formal accounting.

When the fiduciary begins to serve, they should discuss with a CPA specializing in fiduciary accounting and an attorney to make deliberate decisions about what level of accounting will be done, who will perform each task, and what is involved. It is important to outline specific steps the fiduciary should take.

Receipt and Release**.** If a fiduciary wishes to cease serving or close the estate or trust, the customary approach is to have all beneficiaries sign a legal document that generally acknowledges any disbursements made in their favor and that they are releasing the fiduciary from any claims. However, this is merely the beginning of a well-crafted receipt and release. In some cases, a broader document, called a "receipt, release, and refunding bond," may be used. That document has the beneficiaries agree to refund to the estate or trust what they have received if necessary to meet a newfound expense or a liability of the trust or estate.

A receipt and release might include:

- The purpose of the receipt and release. For example, if the fiduciary served as an agent under your durable power of attorney for 12 years, from the date you suffered a traumatic brain injury until the date of the appointment of a court-appointed guardian, the fiduciary may be seeking to be released for all that they did during that time period. The release sought may be signed by the guardian once appointed and perhaps by family members involved. Whatever the facts and objectives, they should be stated.
- Details of the legal arrangement that created the fiduciary position (e.g., the name of the person creating a trust, the date the trust was created, the name of the trust, the tax identification number for the trust, and, of course, a copy of the trust document).
- Listing of all documents, reports, and statements provided. If the fiduciary adhered to the recommended suggestion of periodic informational letters, providing copies of the letters as an exhibit and referring to the attachments listed in each may suffice. If there are any important documents or statements that were not already provided, they should be listed, explained, and attached to the receipt and release.
- Copies of all income tax returns. For example, if the fiduciary acted as a trustee for a trust, the trust income tax returns for the period served should be provided.
- The beneficiaries signing the release should agree not to request any further disclosures and that the disclosures made in the receipt and release, the attachments, and the documents previously provided that are references in the receipt and release sufficed for them to release the fiduciary from any liability or claims.
- The beneficiaries should acknowledge any distributions or payments made to them.
- They should waive any further rights to seek judicial intervention or other actions.
- Consider having the beneficiaries agree to cover any future identified expenses or liability of the estate or trust.
- Any fees paid for serving as a fiduciary should be indicated along with how they were calculated, the provisions in the legal document and state law that support the fees paid, etc. For example, if the fiduciary was entitled to a fiduciary commission under state law based on the value of assets, they should disclose the values of assets and the calculation. Explain how values were calculated and, if they were based on appraisals or estimates, have those attached. The beneficiaries should acknowledge what the fiduciary was paid, agree to those payments, and waive any rights to contest those payments.

- If any beneficiaries are minors or under a disability, fiduciaries should determine with the guidance of an attorney how they can be bound to the agreement. It may be possible that a parent or other person may be able to sign on behalf of minors who would claim under them through virtual representation. In some other cases, a minor or incapacitated beneficiary may have to have a court appoint a guardian to sign on his behalf. This will be dependent on the state law of where the trust or estate is governed.

The attachments to the receipt and release may be essential to securing and limiting the fiduciary's liability. As noted above, these may include all historical brokerage or other statements and a summary or report that makes clear the totality of what occurred. Other disclosures may also be helpful or critical.

If the fiduciary seeks to be released from liability as a personal representative of an estate, attaching a copy of the estate tax return and all its exhibits may be important or essential. If the return was previously provided, e.g., as part of the periodic reports suggested above, the fiduciary might include a reference to the number and date of the letter where it may be found. If the decedent owned real estate, e.g., a vacation home, a copy of the deed, sales contract, and other relevant information may be included. If there was a closely held business held in your assets that was sold, the sales contract should be included. If the fiduciary was involved in any transactions, detailed and careful disclosure of any involvement might be essential. However, before the fiduciary has any involvement, even tangentially and insignificantly, in any transaction or financial arrangement, they should discuss it with an attorney. The rules are incredibly strict on the care that a fiduciary must exercise to avoid self-dealing.

Roles To Which You Might Appoint People To Serve: By Document Category

While there are many common positions to name people for, there are many less common positions that might be helpful to your documents or plan or to your achieving your goals. The responsibilities, liability and other considerations will vary dramatically depending on the role. The following is a listing of many of the roles you might need to appoint people to serve. These have been organized by document type to help you identify the positions to which you might appoint people. Understand that there are other positions for each document; in some instances, your attorney might tailor a role to serve your unique needs. No one will need all of these positions addressed. However, you might benefit from considering the many options available. Also, consider these in the context of the discussions in the paper above, as that might help you make decisions or modify what might be in a "standard" document you are considering.

Financial Power of Attorney

Agent under Financial Power of Attorney. A power of attorney designates a person you name as your agent and gives them authority to handle your legal, financial, and tax matters. The person you name as agent will be responsible for handling your financial and legal matters, e.g., if you become incapacitated. That role, while similar in some ways to an executor or trustee, is distinct. The role of an agent may be limited if you also create and fund a revocable trust to manage your assets. If you have done that, your agent under your power of attorney will be limited as the trustee under your revocable trust will be responsible for the assets in the revocable trust. Most people do not have revocable trusts, but they can be a powerful tool to protect you as you age or if you have a chronic illness. If you do not have a revocable trust, the agent under your power of attorney is even more important for your protection since if you become disabled, that will be the only person to manage your finances. If you do have a revocable trust, you might name the same person as a successor trustee under the revocable trust and as your agent under

your power of attorney to avoid conflicts. So, you may have to appoint people under each document and consider whether or not there should be consistency between the people named.

Co-agent. You can name a single person to serve as trustee under your revocable trust, agent under your power of attorney, and executor under your will. Whether the same person is appointed under each document is one consideration. But if you are uncomfortable with the people you are naming, or they are busy, and you are concerned about their ability to handle the responsibilities, you might name two people to serve simultaneously in each position. That can provide a check and balance on each person by the other and a sharing of responsibilities. Some people name co-fiduciaries so they can name all their children to act simultaneously. Each of these considerations may affect the positions you appoint people to, who you appoint and how many people you appoint.

Monitor. Because a financial power of attorney is such a powerful document, perpetrators have used it to commit elder financial abuse. There are many ways to try to reduce that risk. Name co-agents or rely on a funded revocable trust with an institutional trustee. Another approach that you might consider is appointing a person to monitor the actions of the agent you appoint under your power of attorney.

Health Care Documents

Guardian. Some people sign separate guardianship designations indicating who they would want a court to appoint as their guardian if incapacitated and require one to be appointed. Others have that person designated in their health care power of attorney (or health care proxy). That is often done because the person most likely selected for a guardianship designation is the same person you appoint to make health care decisions. When designating your wish for a future guardianship designation, you might designate one person as your guardian. However, it may be feasible to designate separate people responsible for personal versus financial decisions.

Guardian of the Person. This is a person you designated as your wish to be in charge of your personal decisions if you are incapacitated and need a guardian appointed.

Guardian of Property. This is a person you designated as your wish to be in charge of your financial decisions if you are incapacitated and need a guardian appointed.

Health Care Agent. This person is appointed to act under your health care proxy or medical power of attorney document. Those are documents in which you name a person or an agent to make health care decisions if you cannot. Many people sign faith-based health care documents, failing to realize that their existing secular documents may have conflicting appointments. Many states recognize a document called a Physician Order for Life-Sustaining Treatment ("POLST"), which addresses medical decisions if you are terminally ill. If you sign more than one of these documents, you should carefully consider whether the same person is or should be named in each.

HIPAA Agent. A Health Insurance Portability and Accountability Act ("HIPAA") release is a legal document in which you authorize a person to communicate with physicians and access medical records. In contrast to the health proxy, this is not a power to make medical decisions for you. Should you name the same person in your HIPAA Releases and Health Care Proxy?

Will

Clayton Executor. The executor is the person named to administer your estate (gather assets, pay expenses and distribute the funds remaining, etc.). This person is also referred to as the "personal representative." A common estate plan for a married couple is to pass assets to a trust for the surviving

spouse that qualifies for the marital deduction. That avoids estate tax and can permit the assets to receive an adjustment in tax basis on the second death. However, in many cases it may be better to shift assets instead to a trust that is not included in the surviving spouse's estate. One technique for doing this is to have a special executor, called a "Clayton" executor after the court case that sanctioned it, have the authority to make an election on your estate's estate tax return (that means one has to be filed) as to what portion of the estate will qualify for the estate tax marital deduction. The mechanism is structured so that any remaining assets in your estate will pass to the trust that will not be included in the surviving spouse's estate. This trust is called a "credit shelter trust," or "family trust," among other names. Important to your decisions on who to name, the person appointed to be the Clayton executor should probably not be your spouse or other beneficiaries of either trust. So, in addition to naming a "general" executor, you might have to name a different person to serve in this tax-oriented role.

Co-Executor. Many times, perhaps most of the time, a single person is named as the executor to administer your estate. However, that might not be the best option for you, depending on the circumstances. Is the individual named 100% reliable and trustworthy? Sometimes, people feel more comfortable naming two people to serve in a role like this so that each can keep an eye on the other. If you're struggling to identify someone you can name and cannot think of someone you are entirely comfortable with, perhaps naming two such people might make you more comfortable. The decision is not only about trust. It may be that each person you are considering has different skills. One might be really astute at dealing with financial matters, and the other may have a close relationship with the people you are naming as beneficiaries. So, it may be about finding the right blend of skills not so much about trust. There is another aspect to this that is often overlooked. Will the people you are considering have the time to serve? Sometimes the best candidate to be your executor is so busy that it may be difficult for them to address the responsibilities involved. Naming two people might divide the workload. Another approach is naming a professional trustee or a trust company. If that is done, will they have a personal understanding of the family and others named as beneficiaries? If not, perhaps the combination of an institutional trustee and a personal friend might be best for you.

So, a co-executor is an individual named as an executor in conjunction with another person named to the same role. The key concept is that by making your decision more flexible, you might be more comfortable identifying people to name for this important role.

Estate Protector. In another section, the concept of a "monitor" for your power of attorney was introduced. The monitor can oversea what an agent does under your power of attorney to provide a check and balance. This is similar to a concept discussed in many sections of this paper on a trust protector who can have some oversight responsibility for the trustee of a trust. A similar concept can be used to administer or manage your estate when you die. Your will can name a person to serve as an "Estate Protector," similar to a trust protector for a trust. While this is not that common, in some cases it may provide the comfort you wish on the various people you are appointing as executor. Also, the estate protector can be given powers to address other issues.

Example: You name a bank or trust company as executor. You have an heir with a drug addiction. The bank or trust company is unwilling to make personal decisions like requiring a drug test. Perhaps that authority and responsibility can be given to the estate protector.

Executor. This is also called a personal representative. This is the person who administers your estate when you die. The executor's duties may include having the will admitted to probate (filed with the court along with required forms and documents), marshaling or collecting all of your assets, paying estate expenses, filing an income tax return for the estate, filing an estate tax return if required (watch state

requirements that may differ), etc. The executor has a role in distributing assets to the beneficiaries or trusts your will creates once the estate is settled (all assets collected and bills paid). Then, the executor's role concludes.

If you have what is called a pour-over will that pours your estate assets into a revocable trust that then provides for primary distribution, your executor's role may be less, perhaps significantly so. Many people name the same person as executor and successor trustee on their revocable trust. Others name a family member as executor and a bank or trust company under their revocable trust. Again, there are many options that you can select from to accomplish your personal goals best.

Funeral Agent. Many states permit the appointment of a funeral agent to make funeral decisions. But caution is in order as the agent under many health care proxies is given those powers or a separate document that only serves to appoint a funeral agent may be used instead of providing for this under your will. Again, there are many options and permutations to choose from. One of the reasons to consider stating funeral requests and appointing a funeral agent under your will is that by doing so that confirms that your executor will have the legal authority to pay for the expenses of your funeral. That could be important if the costs are significant and you have any concern that someone might otherwise object.

Example. Your funeral requests include having your body flown to India so that you can be cremated and your ashes disbursed on the Ganges River. You also want your family flown there to attend the rites. Because of the cost of this, you include these wishes in your will. You also note them in your living will so that if your will is not immediately available, everyone will know your wishes.

Guardian. A guardian for you can be addressed in a separate guardianship appointment or perhaps in your health care proxy (medical power of attorney). If you have minor children, appointing a guardian for them should be addressed in your will. If you also are going to have a revocable trust the will may still be the preferable legal document to contain the guardianship appointment. While who you name can be a difficult and important personal decision, there are some points to consider. You might be tempted to name a couple as guardian. That might present legal issues, such as having two people instead of one in that role. There is also a significant personal issue. What if the couple divorces? Which of them would then be guardian? It is probably best to name individuals and not couples. Be sure to name successors in case the person you name is not able to serve. If you are divorced, your nomination of someone as guardian other than your ex-spouse may be negated by the survival of your minor child's other parent, remarkably if the surviving parent's rights weren't terminated or otherwise suspended. Also, consider that if the minor is over a certain age (14 in some states), the child may have the right to request that the court approve a different individual as their guardian.

If the guardian you want to name resides outside the U.S., that is a legal complication for which you should hire an estate planning attorney.

Another issue that arises is concerns over the minor's money. If you make no provisions, the guardian or even the court may have authority over the funds. Instead, consider creating a trust under your will for minor children (or under your revocable trust). Consider then who to name as trustee of the trust to be in charge of the child's funds. Should it be the same person you name as guardian? Might it be better to have different people so that there is a check and balance on each of them with then two people advocating for the minor child? Will the two people you name get along?

For developmentally disabled adults, separate guardianship proceedings may be required, not merely an appointment in a will as for minor children.

As with so many decisions about who you name in your estate planning documents, there are nuances and options. If you take the time to evaluate the various approaches you can settle on one that will hopefully provide the best result for your minor child.

Trustee, Testamentary. A trustee is a person appointed, as discussed above in the context of naming a guardian, to manage money for the benefit of others. "Testamentary" merely means that the trustee's appointment takes effect on your death. So, a testamentary trustee is a trustee named under your will and that trusteeship becomes effective when you pass. A testamentary trust can also be created under your revocable trust and becomes effective only on your death (the general trustee appointment under the revocable trust is effective when you sign it, but other trusts included under that document might be testamentary in that they become effective only after you die. A key difference between a testamentary trust created under your will versus one created under your revocable trust is the court will be involved with the creation of the trust under your will.

Trusts

Adverse Party. This is a tax concept that may be important for more advanced planning. If this concept is relevant to you, it will be yet another person you have to name or appoint in your estate planning documents. This can be illustrated as follows.

Example. You create a trust that benefits your spouse. However, you want that trust to be characterized for income tax purposes as a non-grantor trust. Grantor trusts were discussed earlier and are trusts that are ignored for income tax purposes. While there are advantages to using grantor trusts, there can be advantages to using the opposite type of trust, a non-grantor or "complex" trust. These are trusts that are recognized for income tax purposes. A possible advantage to creating a non-grantor trust is that you might live in a high-tax state, such as New York, California, New Jersey, Massachusetts, etc. By creating a non-grantor trust in a no or low-tax state like Alaska, Nevada, South Dakota, etc. the trust may enable you to avoid high state income taxation. But under federal tax law, if you create a trust that benefits your spouse, it will automatically be treated as a grantor trust, and your state income tax planning goal will not be achievable. However, if an adverse party must approve any distributions to your spouse, the trust may then qualify as a non-grantor trust and you can achieve your income tax savings. Who is an adverse party? It is someone who could realize detriment by authorizing a distribution to your spouse. A simple example is a child of yours who, along with your spouse, is also your beneficiary. Yes, this is complicated but saving state income taxes could be worth the challenge of more complex planning if you live in a high-tax state. If you wish to address this plan, you will have to name a beneficiary of the trust who can also be treated as an adverse party to this plan. Yes, the decisions about who to name in what roles can be much more complicated than what you read online.

Beneficiary. When you name a person to receive benefits under your will, trust, retirement plan, or another asset, they are referred to as your beneficiary. While this paper has not focused largely on other types of appointments, beneficiaries have been mentioned throughout. The most important people to name in your estate plan are beneficiaries, but the people you will name in that manner are usually pretty obvious. The mentions in this paper of beneficiaries have addressed many of the ancillary consequences and considerations of naming people as beneficiaries. For example, if you name a person as both a trustee and a beneficiary, it is quite a common occurrence that raises special tax considerations.

Example. You have tremendous confidence in your oldest son's financial acumen and stability, but you leave his entire inheritance to him in a trust. In that way, the assets should remain protected if he is ever sued or divorced. Also, barring changes in the tax law, the assets in the trust could remain outside the

transfer tax system forever. But since you have so much confidence in him and are not placing his inheritance in trust to restrict him unduly but to help him, you want to name him as trustee of his trust. That will give him substantial control over the inheritance. However, for the inheritance to remain out of his estate for tax purposes and unreachable by creditors, the trust must contain special provisions restricting his right to distribute to himself to only distributions for his health, education, maintenance, and support ("HEMS").

Another aspect of naming beneficiaries discussed above was naming a "floating" spouse. Rather than your current spouse, a more generic definition is used so that whoever you are married to at a particular time is your spouse. If your current spouse dies or divorces, your next spouse will be a beneficiary. That could be a critical mechanism to provide you with access/benefit from assets in that trust.

Beneficiary, Qualified. There are many aspects of naming beneficiaries, most of which are beyond the scope of this paper. However, to understand whom you should name as trustee and in other positions, understanding aspects of naming beneficiaries can be important. One of the fundamental concepts of a trust is the requirement that the trustee informs beneficiaries of the trust and other key information about the trust. If state law and the trust document permit, the trustee may be able to avoid informing the beneficiaries about the trust. See the discussion above about "Quiet Trusts." One of the points of discussing the rules about informing beneficiaries is to ensure that you understand some of the many requirements trustees face, as the people you name to serve in that role will need to address those requirements. Also, the requirement of reporting to beneficiaries was discussed to highlight the possibility of naming someone, sometimes referred to as a Designated representative, who can receive notice for the beneficiaries. That way, a responsible person can monitor the trust and know what is occurring by their receiving the notice. Still, beneficiaries too young to receive notice might be intentionally kept uninformed until they mature. A related concept that may also impact your understanding of trustee responsibilities and the naming of a Designated Representative is the concept of Qualified Beneficiaries. Not everyone who may ever benefit from a trust must always be informed about the trust. However, those beneficiaries for whom the law may require that the trustee keep informed may be referred to as "Qualified Beneficiaries."

The Uniform Trust Code adopted in some form in most states generally requires that a trustee to keep "Qualified Beneficiaries" of a trust "reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests." They must be informed of the existence of the trust, the identity of the person creating the trust (settlor), and that they, as beneficiaries, have the right to request a copy of the trust agreement and an annual report of the trust's administration. A Qualified Beneficiary a person entitled to receive a current distribution from the trust, someone who could receive a distribution if a current beneficiary's interests ended (e.g., a grandchild if the child beneficiary dies), etc.

Understanding who the beneficiaries are, and what that means to your designating trustees, persons who can receive notice, and other aspects of the trust can have a significant impact on who you name, to what roles, and what they must do.

Charitable Designator. One of the ways to add flexibility to a trust that you create (and that is classified as a grantor trust) is to empower a person to add to the list of trust beneficiaries and charities. If this is done you will have to name a person to hold this power. This is a potentially significant power since if charities are added, the economic interests of the other trust beneficiaries, e.g., your spouse and children, could be diminished. Because such a power would harm beneficiaries, it has to be held by a person who does not act in a fiduciary capacity. The concept of fiduciary responsibilities has been discussed above. But that means that the person named to add charities cannot be a trustee or serve in any other role in your

trust that could characterize that person as a fiduciary. If you and your spouse create trusts you hope are respected for estate tax and creditor protection purposes, the two trusts must be sufficiently different. Unfortunately, as with many tax and legal concepts, there are no clear guidelines on what that means. One of the ways that trust agreements can be differentiated is that the trust of one spouse, but not the other, could include a provision giving someone the power to add charitable beneficiaries. The use of this will have an obvious impact on who you name in each trust and to which positions.

Co-Trustee. A trustee is a person appointed to manage and administer a trust for the benefit of the beneficiaries. A co-trustee, similar to a co-agent and co-executor explained elsewhere, appointing two or more trustees may allow you to add a check and balance on each trustee, facilitate trustees sharing the burdens of the role, and blend complementary skills. As with other "co" arrangements, adding co-trustees to your mix of options might enable you to get past an impasse in trying to name people to administer your plan.

Designated Representative. See detailed discussions above concerning "Quiet Trusts" and notice to beneficiaries. A Designated Representative is a person you designate to receive notice that would otherwise be sent to beneficiaries. For example, it might be best that young adult beneficiaries are not given details about a valuable trust that benefits them as that might depress their desire to accomplish their successes. Until they gain more maturity, the Designated Representative can receive notice for them. You will have to obtain advice from an estate and trust attorney about what state law permits (and perhaps you might consider establishing or moving your trust to a state with more flexible rules on this matter), address this in the trust document, and appoint the person to serve in this capacity.

Disclaimant. Power To Disclaim Gift Transfers to Trust. This is a technical legal and tax planning provision that is intended to provide a safety valve so that if a large value transfer is made to an irrevocable trust, what if there is a significant change in the tax laws after the transfer? What if the value of the asset's changes or your goals change? It may be possible to give one beneficiary a right to disclaim, renounce, or reject the transfer to the trust and have that constitute a disclaimer or reject of the transfer for the entire trust.

Example. You make a gift of a family business to an irrevocable trust out of concerns that the tax laws could be made much harsher in the future. Instead, Congress makes the estate tax more lenient or even repeals it. Your oldest daughter was given the right to be treated as the primary beneficiary of a trust you created and disclaim any transfer to that trust and have her disclaimer treated as if the trust itself disclaimed. If this is done as required under state law and within nine months of the initial transfer (that is what the tax laws require for a valid disclaimer) it will be as if the transfer was never made to the trust. That would permit you to unwind the transfer as if it never happened. That would undo the tax and legal ramifications of the transfer. It effectively gives you the benefit of hindsight for the estate planning you might undertake if this technique is successful. You should review the possible use of such a technique with an estate attorney and then determine who should be designated to have this power.

Distribution Trustee or Advisor. This individual directs the trustee to distribute trust assets to any named beneficiaries. Distributions are a tax-sensitive power, so in many trusts designed to remove assets from an estate or reduce the risk of creditors reaching them, an independent person might be named in this role. You might even choose to vest this power in an independent institutional trustee to enhance the likelihood of achieving your tax goals. Another advantage to naming an institution or professional trustee is the objectivity and process they can bring to determine investments. In traditional trusts, only one

trustee was appointed. Modern trust drafting may permit you to bifurcate trustee functions. While more complex, that approach can give you more flexibility to tailor your trust to achieve your objectives.

Drug Testing and Other Personal Matters. You might choose to name a specific person to mandate that a beneficiary submits to drug or other testing in order to receive a distribution. If you name an institutional trustee, some will address these matters; some may not be comfortable doing so. You might also prefer to designate a particular person who may be more knowledgeable of the beneficiary or sensitive to the issues. Again, you can tailor your planning and documents to address your wishes and the needs of the beneficiaries you name.

Investment Trustee or Advisor. Traditional trust drafting named one trustee who handled all trustee functions. As noted in prior discussions, modern trust drafting can facilitate bifurcating trust functions. You can name a separate person in a distinct position from the general trustee to handle trust investments. This role empowers an individual to exercise some or all investment functions. The settlor may grant the investment trustee or advisor general authority over all investments or authority over a specific class of assets, reserving the remaining powers to the general trustee. If the trust instrument creates co-investment trustees, they will act as such, which will mean a bifurcation of the trustee role. If the person acts as an advisor, they will direct the trustee to take certain actions. The prospective fiduciary may have reduced or no liability for following the directions from that advisor, depending on the specifics of the trust instrument and state law.

Loan Designator. This provision has historically been important for income tax planning, but its use has evolved to deemphasize the income tax consequence and focus on new importance for economic reasons. Let's start with the economic benefit, as that can be reassuring and powerful. If you create an irrevocable trust, you may want a safety valve to access trust assets "just in case" you ever need them. However, you may not be a beneficiary of the trust. While there are mechanisms that might permit you to be a beneficiary of the trust or be added as a beneficiary of the trust, those approaches may create more risk to your plan and potentially complexity and cost. If you are married and your spouse is a beneficiary, that may provide you with some indirect access to benefit from trust assets. But if someone can loan you money from the trust, that might provide you with cash if you need it. Even if you have to pay interest on that loan, and even if you and perhaps eventually your estate may have to repay it, if you have a cash need, it could be important to address that. To accomplish this, the trustee might be able to loan you trust funds. However, if you instead expressly provide a provision in the trust that you can receive a loan that might be more comfortable for you and a better likelihood of receiving funds if needed. But you can go a step further and name a specific person to hold the power to make the trust loan you funds. And if that person is expressly acting in a non-fiduciary capacity, that might be even more reassuring for you. Having the position of the person holding the loan power expressly stated to be in a non-fiduciary capacity means that the person would have no duty of loyalty to the beneficiaries of the trust. That might make it possible for this person to direct funds to you as a loan when the trustee might have a pause in doing so. It is imperative that if the trust does this there is a signed loan document, interest paid, and other indicia of a real loan respected. So, when you are naming positions for your trust, this may be another person you have to appoint. Understanding their role will help you decide who to appoint.

Historically, many trusts created for estate planning were intentionally designed to be characterized as grantor trusts for income tax purposes. If a trust you create can loan you money without adequate security, that power would cause the trust to be treated as a grantor trust for income tax purposes. Many trusts still use this power for this purpose since grantor trust status can be so crucial to the plan. While grantor trust status can, according to most commentators, be assured with a swap power, perhaps a loan provision

could still be included, but now more for providing a means for the settlor to access trust principal than for grantor trust characterization. If the estate tax is repealed the settlor might be more comfortable with the planning knowing that there is a means to provide access to trust funds, even if that is as a loan.

In deciding when to designate a person to hold this loan power, consider that the person named may have to report under the Corporate Transparency Act as a beneficial owner if the trust owns interests in entities.

Non-Adverse Party. Certain decisions or mechanisms to be included in a trust might need tax or legal approval from another person for tax or legal reasons. For example, as illustrated in an earlier discussion, assume you intend for your trust to be classified for income tax purposes as a non-grantor or "complex" trust, meaning the trust pays income tax (you, the grantor, do not report trust income on your personal income tax return). But you also want your spouse to be a beneficiary. Your spouse's status as a beneficiary will cause the trust to be treated as a grantor trust for income tax purposes, which may undermine your intended tax objectives. But, if a "non-adverse party," such as another person who is a beneficiary of the trust, has to approve any distributions to your spouse, this rule will not apply, and you may be able to accomplish both your objectives: non-grantor trust status and spouse as a beneficiary.

You may not have to designate a person to specifically serve as the non-adverse party, but you will have to be certain that the class of beneficiaries includes a person in that capacity. If the only person who might be non-adverse is a minor or other person who cannot act to approve a distribution to your spouse, you may have to designate a guardian or other person who can act on that minor's behalf in the trust.

Powerholders holding Powers of Appointment. A power of appointment ("POA") is a right, granted under a legal instrument such as a will or trust by a person referred to as the "donor" to a person referred to as the "donee" or "powerholder," which empowers that powerholder to designate who should receive interests in certain property, called the appointive property subject to the POA. The person or persons who are eligible to receive the appointive property is called a "permissible appointee(s)." Although the powerholder can designate those who receive beneficial ownership interests in the appointive property, the powerholder does not own the property. If the powerholder does not exercise the power, the appointive property may pass to a default person indicated in the POA, who is called the "default taker." That is a lot of jargon.

Example. You create a trust for your niece. The purpose of the trust is to provide for your niece for her lifetime and thereby protect those funds for her in the event she marries, divorces, is sued, or have other issues. Your niece is only 20, is not in, a committed relationship and has no children, and there is no way to predict the future. If she had a family, you would be pleased with her appointing the assets to them on her death. If she doesn't have a family, you would be pleased with her directing any remaining trust assets to charity. So, the trust you draft gives our niece a power of appointment. She can appoint the assets in the trust to a spouse or descendants or charity. Your niece is the powerholder. The assets in the trust are the appointive property. Her possible future family or selected charities are the permissible appointees. This is a common tool to provide flexibility to your trust and accomplish other goals.

When planning irrevocable trusts, the use of powers of appointment can be really important. You will have to decide who to give powers to, how broad or narrow those powers will be, and which trust assets they will be able to affect. This is yet another layer of important decision-making and naming of people for your plan.

A focus of planning with POAs in the current tax environment is often to obtain a basis adjustment, hopefully, a step-up in basis for appreciated property, on the death of the powerholder who held a GPOA over the property.

Example. You create a trust that holds a stock that is highly appreciated. AI, Inc. was purchased for $1 and is now worth $1 million. You have been helping support an elderly aunt and made her a beneficiary of the trust. She has very modest wealth. If the assets in the trust are included in her estate the AI, Inc. stock will have its tax basis increased from $1 to $1 million and the entire capital gain will disappear. That is a substantial tax savings. Since her estate is modest there should be no estate tax on her death.

This is complicated planning and will require input from an experienced trust and estate attorney. If you pursue this planning, you will have to determine which person or persons you are comfortable giving such power to as that power could subject the trust assets to the person's creditors, or they might exercise power and direct the assets to be distributed in a manner you do not want.

Powerholder to Add Beneficiary. There are many different applications of powers of appointment. Another application, different from those indicated above, is to give a person (or a committee of people) the power to add you back as a beneficiary of a trust you created.

Example. You are creating a trust to benefit your spouse and children, nieces and nephews, or other persons. You do not think you will reasonably have any need to access the assets in the trust, but should you, you would like a mechanism to do so. So, your attorney drafts the trust, giving your college roommate, who you remain close to, the power to add as beneficiaries of the trust any person who is a descendant of your maternal grandmother. That class of beneficiaries includes you. In this way, you can be added back and benefit from trust assets if necessary.

This mechanism is referred to by various names, including a "hybrid DAPT" with "DAPT" standing for domestic asset protection trust. The trust should be formed in one of the states that permit self-settled trusts. A self-settled trust is a trust for which the person creating the trust can be a beneficiary, and the trust assets may still remain outside their estate for tax and creditor purposes. If you reside in a state that does not permit these trusts, some advisers view it as risky to create a DAPT in a state that does. They might view a hybrid DAPT as less risky until you are added back as a beneficiary. Designating who will hold the power is a major decision as your financial security could be in that person's hands. Who would you feel comfortable naming?

Powerholder to Appoint Trust Assets (SPAT). Another mechanism that has an effect similar to the hybrid DAPT discussed above is referred to as a Special Power of Appointment Trust ("SPAT"). However, because you can never be a beneficiary of the SPAT (as you could with a hybrid DAPT), it may be a safer approach to preserving your access to trust assets. In a SPAT an individual you name can appoint assets from the trust to a class of individuals (e.g., descendants of your grandparents), which includes you). This power could be held by a committee and not just one person. You could require unanimous consent of the committee, or only one committee member to approve the payment. This is a way that might allow you to benefit from the assets in the trust without becoming a beneficiary of the trust. This is a "non-fiduciary" power. This means anyone you name in the trust as a trustee or the Trust Protector (if the Trust Protector is serving in a fiduciary capacity) cannot also serve in this position of holding the SPAT power. The person holding this powerful and important right must be designated by you. You must determine if you will name a successor and whether you want to name a committee or just one person to act.

Substitutor. There is another position that can be included in trusts that are to be characterized as "grantor" for income tax purposes (i.e., the trust income is reported on your income tax return instead of the trust's income tax return). This power, in fact, is one of the most commonly used mechanisms to make a trust a grantor trust. It is called a swap power or power of substitution. The person holding this power is sometimes called a "substitutor." This person, who may be the settlor who created the trust (e.g., you), or another person. This is the right or power to exchange or "swap" assets of the trust for assets of equivalent value. This can be a powerful mechanism to move assets between you personally and the trust if it becomes advantageous, or merely desired, to hold an asset personally that is in the trust, or vice versa. The common application of this technique is to swap highly appreciated trust assets back into your estate so that on your death those assets will qualify for an adjustment (step-up) in income tax basis. Assets in an irrevocable trust do not benefit from a basis adjustment on your death. Assets in your estate will qualify for the adjustment. So being able to move assets between you and an irrevocable trust you created can be a powerful tax planning tool. For example, if a capital gains tax on death is enacted the swap power may be used in the opposite manner than it has generally be envisioned, namely, to move appreciated assets out of your estate where they might be subjected to a capital gains tax on death into the trust where perhaps they may not be. Provisions should be added to your durable power of attorney to address this power in the event of disability. If you created the trust and wish to serve in this role you can do so. But even if you do you should name a successor that can hold this power if you do not have the capacity to exercise it. In some situations, you might choose to name a different person to hold this power from inception. So, this is another complex legal and tax power that can add valuable flexibility to your trust plan, but you need to designate the people to serve in this role.

Swap Powerholder. See "Substitutor."

Trustee. A trustee is the person charged with managing and administering a trust you create. You might name it yourself if it is for a revocable trust you create. However, if you have aging, health or other issues you might name a co-trustee to serve with you, or even others to serve if it may be too difficult for you. It would be best if you were not the trustee for an irrevocable trust that you are creating to move assets outside your estate and outside of the reach of your creditors. Who is advisable to name will depend on many considerations discussed throughout this paper. For example, if you wish to create a trust in a state (jurisdiction) with better tax or trust laws, you must name someone in that jurisdiction. If you do not have a close and trusted person to name, you might choose to name a trust company or bank in that state so that your trust can avail itself of the laws in that state. If a parent or third party creates a trust to benefit you (or you and others such as your children), you can be a trustee, but your right to distribute trust income or assets to yourself or for your benefit has to be limited to no more than those payments necessary to maintain your health, education, maintenance, and support ("HEMS"). If you can distribute more than that, all of the trust assets may be reached by your creditors and included in your estate for estate tax purposes. The concept of "HEMS" was discussed earlier. Also, see the discussion of "Co-Trustee" above. Who you choose to name may depend on the powers you give the trustee, and what precautionary measures you might take, as discussed throughout this paper.

Trustee, Administrative and General. A traditional or typical trust had named only one category of trustee. That trustee had all powers given to trustees in the trust. If there were co-trustees, they would share all those powers. Modern trusts more commonly bifurcate trustee functions into different roles to tailor the trustee role to serve your objectives better. For example, an institutional administrative and general trustee may be designated. This position will hold all trustee powers in the governing instrument that have not been allocated to other trustees. For example, if the trust names a trust protector and investment trustee, the general and administrative trustee will have all trust authority not given to those

other two positions. Naming an administrative trustee may permit you to choose to have the laws of any state apply where the trustee is that your name while continuing to have flexibility and control over trust investments through the bifurcated trustee function of investment trustee or investment advisor.

Trustee, Investment - Art. The concept of dividing or bifurcating trustee roles was explained in the discussion of "Trustee, Administrative and General." In that discussion, a general and administrative trustee held all trustee functions, and investment functions were separated out and given to an investment trustee or investment advisor. The slicing and dicing of investment powers can be further divided depending on your objectives and circumstances. If the trust holds an extensive art collection, you might appoint a special trustee or trust advisor to make decisions for artwork.

Trustee, Distributions. The trust could name a person or group of persons acting as a committee to be responsible for trust distributions. If the distribution powers of the trustee are not carved out for a distribution trustee, they can be held by the general and administrative trustee. If you are going to carve out a separate role for a distribution trustee, consider that the power to distribute is a tax-sensitive power that could cause trust assets to be included in the powerholder's estate if not correctly handled. Your trust plan may be safer in terms of accomplishing trust goals of removing trust assets from your estate and the estate of the people holding distribution rights if, instead, those powers are held by an independent or institutional trustee.

Trustee, - Insurance. It might be advisable to bifurcate the investment trustee provision into several investment trustee positions. A person could be designated to be responsible for the life insurance decisions of the trust. This person should not be the insured. By providing a separate person to be responsible for insurance decisions and including prohibitions against the settlor/insured being involved in these decisions, the trust can hold both life insurance and other assets. Some of the advantages of this include the ability to use a single trust instead to hold business interests and life insurance instead of multiple trusts and the ability to use income generated by trust investments to pay for life insurance premiums. If a new trust is created to integrate these characteristics, review existing insurance trusts to determine if they can be decanted (merged) into this new trust to simplify planning. The Insurance Trustee has the authority to purchase life insurance on behalf of the trust and take any actions regarding that life insurance. This power will be held in a fiduciary capacity. Individuals serving in other trustee positions can also serve in this trustee position.

Trustee, Investment. This position has been called by a variety of names, including "investment advisor," "trust protector," and so forth. A person could be designated to be responsible for investment decisions of the trust. This could include investments of securities and business and real estate interests transferred to the trust (e.g., a closely held business or rental real estate). The settlor might serve in this role but caution is in order. If the trust owns stock in a closely held business, the trust's objectives might be better served by proscribing the settlor from voting corporate stock. In some trusts, it might be advantageous to bifurcate the investment trustee provision and provide for a separate trustee to manage marketable securities, which might be the institutional trustee serving, and an investment trustee, which may be a family member, to be responsible for family business or other private equity interests.

Trustee, Investment - Marketable Securities. As discussed above, the trustee function can be divided into various roles to better accomplish your goals, protect tax goals, save fees, etc. How you divide these roles will depend on the persons and institutions you wish to appoint, the nature of your assets, etc. For example, the investment role could be subdivided into several trustee roles. If you retain an institutional trustee, you might carve out a separate investment role for marketable securities that the institutional

trustee will handle and separate private equity, e.g., a family business, that you or another family member or business partner may serve in. This may also be helpful to your succession plan.

Trustee, Investment - Non-Marketable or Private Equity. As discussed under "Trustee, Investment - Marketable Securities," you can divide the trustee role into various roles and sub-roles. For those owning business or investment/rental real estate interests, it is often helpful to designate a special person to handle decisions as to those assets. In that way, you might name the general trustee as an expert in trust administration and the person in charge of making decisions for business or real estate assets as an expert in those matters. You can also name a group of people to serve on a committee as the investment trustee or advisor role. In some instances, you can name an entity to serve in this role and then appoint officers or managers for the entity. In that way, you might create an entity in a state with more favorable laws and try to insulate the people in a less beneficial jurisdiction from serving directly.

Trustee, Successor. You will likely have to name someone to serve as a trustee or successor trustee, replacing the initial named trustee after they can or will no longer serve. In that capacity, the fiduciary might take over the management of trust assets and affairs if the initial trustee can no longer handle those matters. That may be years or decades after the trust is created. One of the more challenging aspects of serving as a successor trustee in a revocable or irrevocable trust may be transitioning from you as the initial trustee to the fiduciary as the successor. The steps and issues will depend on what the trust document stipulates concerning when and how the fiduciary may assume their role. Further, the complexity of passing the trustee position to the successor trustee may depend on the nature of the resignation.

In the context of a revocable trust, you may name yourself as the initial trustee. You may either voluntarily resign (e.g., you realize that because of your advancing age or declining health, you should resign the role before you cannot do so) the role or be ousted from the role once you no longer have the capacity to resign. If you are prudent and realize that you no longer can complete the duties the role requires, you might sign a resignation letter while still well enough to do so, thereby allowing the successor trustee to assume the role of trustee with relative ease. If you continue to serve until you no longer have the capacity to resign the successor trustee might then have to obtain documentation from your physicians confirming he no longer can manage his own affairs. That is not always easy to obtain. On your passing, trust assets may pass to one or more trusts for your heirs, and the trustee may be named trustee of those continuing trusts.

Trust Protector. The trust protector is a more modern role that can be quite important to administrating the trust and providing a check and balance on the trustee. Depending on the terms of the position (as it can be handled very differently in different trusts), this role can provide significant flexibility. A trust protector is a person, other than the trustee or a beneficiary, who holds power over some aspect of a trust. The role of trust protector typically gives the named individual specified powers, such as demanding an accounting from the trustee, removing and replacing a trustee, and changing the law and place of administration of the trust (e.g., to a new state with more favorable income tax rules), etc. The protector can be appointed to act in either a fiduciary capacity or not, depending on state law and the trust document. The trust protector may be given other powers such as correcting scrivener's errors in the trust, modifying administrative provisions, the power to restricting or eliminating the right of the Trustee to use the income of the trust to pay life insurance premiums on the life of the grantor to facilitate turning off grantor trust status if that becomes desirable, and other powers depending on the circumstances and goals. This power should not be held by someone related to or subordinate to you or your spouse. Who would

you appoint? How many different defined trust protector roles will you have and will you appoint different persons to some or each?

Trust Protector, LGBTQ. The concept of a "Trust Protector" was discussed above. That discussion explained that different types of powers and even trust protector roles can be designated depending on your goals and circumstances. The tailoring of trust protector positions can be even more specialized and detailed if helpful to your circumstances and goals. For example, a special Trust Advisor could be appointed to deal with the circumstances of an LGBTQ heir. You could name a special limited trust protector, referred to below as a "Special Trust Advisor," to address a range of issues, such as determining who is a child or heir (does the state law definition of child include one born through surrogacy?), whether someone who transitions still receives a particular bequest (a will leaves a watch to "my son Tom" but Tom transitions, does the bequest lapse?), etc. The idea is to name a person or perhaps an organization or entity (e.g., the law firm that drafted documents and is intimately familiar with your wishes) to act in a non-fiduciary capacity to the extent permitted under state law. Expressly addressing, in the powers granted to this Special Trust Advisor, those matters specific to the LGBTQ community may be a clearer way to provide the appropriate authority to address some of the common issues. Of course, if the drafting attorney knows of concerns particular to you or your family, those should be addressed more specifically in the provisions of the document. However, in many situations, the particular concerns may not be known at the time the document is drafted, and it will be prudent to add provisions allowing flexibility in addressing matters that arise in the future.

Trust Protector, Sharia Law. A special trust protector could be appointed and also given a limited power of appointment ("LPOA") to modify the bequests and or document for compliance with Sharia law. This person could be given the right to change governing law and situs to avoid anti-Sharia legislation and protect the intended Sharia dispositive plan. This person could be authorized to interpret questions of religious law, resolve disputes pertaining to the eligibility of a beneficiary to inherit, or add or remove a beneficiary can provide a private and efficient means of addressing some of the issues that may arise without court intervention.

Other Documents

529 Plan Account Owner. 529 Accounts can be an effective way for you to provide tax-beneficial treatment of funds used for educational expenses. Who will you name as the account owner? That person has extensive power. Will this be the same person named as agent under your financial power of attorney? Have you communicated who these various people are so that there is a listing for reference? If you were to die or become legally incapacitated, who have you name as the successor account owner? This is a powerful role as this person obtains all the rights for the 529 account.

Burial Agent. See "Funeral Agent."

Funeral Agent. Some states permit the appointment of a funeral agent to make funeral decisions. Some states recognize or permit the appointment of an agent to control the disposition of a person's remains. Was the agent under your health care proxy given those powers? Historically, the right to make final arrangements and funeral decisions was within the purview of the executor or perhaps the decedent's spouse, children, or other immediate family members. The funeral directives in your estate planning documents may conflict with the statutory regime provided for in the state in which you reside when you die. What might the impact be if there is a conflict between the designations in your documents and state law? Who have you named? Who might state law authorize?

POD/TOD Account Persons. While how you title bank and other financial accounts doesn't seem like an appointment of a person to your estate plan it may be. How you title an account or whether you add a beneficiary will determine who inherits the account when you pass. But many people use account titles in lieu of making more formal designations in estate planning documents.

Example. You have two children, a son and a daughter. Your daughter lives near you, but your son lives 1,000 miles away. You set up your financial accounts as joint with your daughter because you read online that she can help pay bills if you become incapacitated. While that might be some type of substitute for using a financial power of attorney, it may not be ideal. On your death your daughter not, your son will receive that entire account. If that is a significant asset it may undermine your wishes to have your estate divided equally between your children.

Safe Deposit Box Authorized Signer. Who are the authorized signers of your safe deposit box? The bank application may have been completed decades ago and you may not even recall who you authorized to have access to your box. If a former partner or former close friend is listed, or perhaps a child who is now alienated, what might the consequences be? If the box is jointly titled, will the co-owner be entitled to claim ownership of the box's contents? Will important documents (such as list dispositions, Wills or other documents) disappear when the authorized signer decides they'd fare better if you were instead found to have died intestate or without having designated an agent to act during periods of incapacity? Consider the implications to a now alienated child being listed as successor agent and a different child is named executor and charged with distributing personal tangible property on death. Will that property be there? Is the authorized signer the same as the person you have named as agent under your financial power of attorney? If not, does each know who the other person is? Was the difference in people named intentional?

Social Security Representative Payee. The Social Security's Administration ("SSA") has a Representative Payment Program that provides financial management for a recipient of Social Security and SSI payments who cannot manage their Social Security or SSI payments. The SSA website states that "…we look for family or friends to serve as representative payees." A representative payee completes the Representative Payee Accounting Report online. You must be 18 or older to complete the Representative Payee Accounting Report online. Select someone who knows you and wants to help you. Your payee might be someone who can see you often and knows what you need. For that reason, if you live with someone who helps you, you or the SSA may select that person to be your payee. There is no indication on the SSA website that the agent who is selected with the guidance of legal counsel will be the person named as "Representative Payee," or that your financial power of attorney is even considered in the SSA evaluation. Having a different person named under your financial power of attorney and the person serving as your SSA Representative Payee who receives your benefits could be problematic.

Trusted Contact Person. Your financial adviser is supposed to obtain information on an emergency or trusted contact for you in accordance with FINRA's rule. They are required to make a reasonable effort to obtain the name and contact information for a trusted contact person to contact if they suspect financial abuse. Do you recall the name you provided? Is it the same person named under your financial power of attorney?

One of the concerns in all of this is that you can name one person as the trusted contact when speaking with your financial adviser, a difference person on your safe deposit box as an authorized signer, another as your agent under your financial power of attorney, and so on. Too often the many different appointments that you might make may not be planned and the problems that can create could be

material. So, remember that the people and positions you have to focus on in your planning are much broader then you might realize.

Conclusion

Individuals accepting the appointment to serve as a fiduciary are performing a noble act and be of great help to family members, friends, or loved ones. But improperly handled, it can be a difficult, stressful, and costly endeavor. You should carefully detail potential benefits and challenges that the fiduciary may encounter over the course of serving. A frank conversation may determine whether the fiduciary is able to confidently and adequately handle their responsibilities.