SELECTING THE RIGHT PEOPLE

SELECTING AN EXECUTOR (OR SUCCESSOR TRUSTEE UNDER A REVOCABLE LIVING TRUST)

Duties of the Executor

An executor is the person (and/or institution) named in a valid will to serve as the personal representative of a testator when his or her will is being probated. At one time, this person was referred to as the "executor" if male and "executrix" if female, but now is commonly referred to as the executor or personal representative regardless of gender.

In cases where the will or portions of it are invalid or incomplete or where there is no will, the personal representative is known as the estate's administrator(trix). Many people use revocable living trusts as will substitutes, so their estates are managed by the person(s) named as successor trustee. Even though our comments here apply to and reference only executors, just about all of this part also applies to successor trustees in a revocable living trust that becomes irrevocable at the decedent grantor's death.

When death occurs, the executor must locate and probate the decedent's will (prove that it was the decedent's will and that it in fact was his or her last will). At the time of appointment, the executor will take an oath before an officer in the local probate office promising to uphold the provisions of the decedent's will. The executor must then collect and safeguard the decedent's property; pay debts, taxes, and expenses; and finally distribute any remaining assets to the beneficiaries specified in the decedent's will.

An executor's responsibilities typically last from nine months to two or three years. In rare instances (such as when there is a contest of a will or the estate remains open for tax or other reasons), the executor's duties can continue for a period of years. While this focus is on the executor, it should be noted that the successor trustee of a revocable living trust usually has the same duties to perform and must possess the same skills, as well as the skills of a good trustee.

Attributes of a Good Executor

When choosing an executor, the major attributes to consider are:

1. Sensitivity;
2. Competence;
3. An understanding of the needs and appreciation of the circumstances of the beneficiaries;
4. Knowledge of the nature, value, and extent of the decedent's assets;
5. Experience in the administration of estates;
6. Business and investment experience;
7. Familiarity with the decedent's business;
8. Ability to serve;
9. Willingness to serve;
10. Geographic proximity to the estate's beneficiaries and the estate's assets;
11. Lack of any conflict of interest; and
12. Integrity and loyalty.

Sensitivity

Although the intangible attribute of "caring" both about the people involved and the performance of one's duties cannot be accurately or objectively measured, this single quality is perhaps the most important of all the factors in the selection process. It is always possible for the personal representative, if lacking

knowledge in certain areas, to learn more about the subject or hire others with expertise. However, if the executor lacks empathy with the beneficiaries and for the situation, problems can result.

The highest preference should be given to the identification of an individual who is willing and able to give concerned personal attention and extra effort to the psychological as well as financial needs and individual circumstances of the beneficiaries. Often this individual will be the beneficiary with the largest share of the estate and almost always will be a close relative or friend of the decedent.

Competence

Competence encompasses both the legal ability to serve and the intellectual and emotional capacity to serve effectively.

Legal capacity entails U.S. citizenship in some jurisdictions and the satisfaction of state law requirements such as:

- age (twenty-one or eighteen in most states).
- mental competency (generally, the same required to be a testator or in some states a higher capacity, the ability to contract).
- domicile (some states require that the executor be a domiciliary of the state in which the will is probated while others allow executors from other states but may require that an out-of-state executor post a bond).

Intellectual capacity in a general sense does not require that the executor be completely aware of all the decedent's personal affairs or the intricacy of the decedent's business. What is necessary is that the person selected has the ability to analyze the situation as quickly as possible under the circumstances, determine what facets of the estate administration can be handled within the bounds of the executor's personal knowledge and capabilities, and then secure the appropriate professional assistance in these areas in which the executor knows he or she lacks experience. In other words, the executor must have the ability to organize both facts and people and understand and follow through with what must be according to state law and local probate (sometimes called Orphans' Court) rules. The executor must be able to ascertain when he or she (or even the current members of the executor's professional advisory team) does not know the answer to key questions and quickly obtain competent assistance. The executor also must know how to quickly assess whether the advice being given from the professional advisors is wise and prudent **before** acting on that advice.

Emotional capacity involves the ability to make a multitude of important decisions. Often these decisions (e.g., the selection of and negotiations with the estate's attorney and tax elections) must be made within a relatively short time span and yet may have tremendous financial significance to the estate and its beneficiaries. An intelligent individual capable of making quick, well-considered decisions will more than make up for an initial lack of experience.

Knowledge of the Beneficiaries

Personal knowledge of the beneficiaries, their ages, health conditions, income requirements, strengths, weaknesses, and eccentricities is extremely helpful to an executor. One child, for instance, may need immediate and continuing medical care, while another may be a highly successful surgeon. An elderly parent may need cash to meet the daily necessities of life or be so wealthy that a delay in the distribution of assets from a deceased child may have no adverse effect.

Knowledge of the Decedent's Assets

If an executor is familiar with the specific assets that comprise the estate, that information can be of great use in performing each of the most essential of his or her duties. For example, if one of the principal assets of the estate is a business in which the executor was active in the management, the advantage to the estate of that experience and continuity could be quickly translated into dollars.

Many individuals invest in or amass collectibles for pleasure. An executor with expertise in this area would know how to safeguard, transport, insure, have appraised, and sell such items far more readily than an executor with no particular knowledge of the subject matter. This is particularly true with respect to large collections of art, precious gems, stamps, coins, weapons, and many other similar items, although there is generally available independent expertise in the marketplace for the executor who lacks this expertise.

One of the most troublesome responsibilities of an executor is also one that must be started early in the estate administration process-the discovery and assembly of all the decedent's assets. An executor who is privy to the extent of the estate and knows the location of all of the assets or the names of those persons who can help in this key part of the estate's probate will have great advantage. This should simplify the tasks and enable the executor to realize a great deal more from those assets. Prior familiarity is of considerable benefit if the decedent's assets were varied and located in different states or overseas.

While prior familiarity as to the assets is helpful, there are steps which can be taken to help identify the assets. For example, the income tax returns can be examined to determine which financial institutions were paying dividends and interest to the decedent. Also, the decedent's checkbook can be reviewed to see if certain entries indicate the existence of additional assets. For example, there may be an entry indicating the payment of a fee for a safety deposit box rental or the payment of a property or life insurance policy premium.

Given that an increasing amount of property is accounted for in the "cloud" of the internet, it almost always is advisable and necessary for the executor to take control of the decedent's computers and to locate account passwords in order to deal with that property. It may be necessary to engage an IT security professional to assist with the computer work if the passwords are not readily available.

Estate Administration Experience

Although death is a common occurrence, few individuals have experience in being executors. Obviously, if an individual has probated at least one or two estates, he or she is an ideal candidate. Note that this criterion emphasizes one of the major strengths of a corporate fiduciary vis-à-vis an individual. Few, if any, individuals have probated as many estates as a bank or trust company specializing in estate planning and administration. In ultra large or highly complex estates this consideration should be given high priority although it may be a more costly option.

Business and Investment Experience

Intelligence and emotional maturity may not be enough to handle successfully the administration of an estate. The brightest spouse or most intelligent child may lack the business or investment experience to handle a large corporation or a sizable stock and bond portfolio. The experience-tested executor clearly will have an edge in a case where significant business or investment decisions will have to be made. Professional executors such as banks and trust companies are in the business of collecting, managing, and investing securities. They typically have separate departments to handle, analyze, and evaluate securities, supervise and sell real estate, and run businesses. To a lesser degree, professional advisors and associates (even friendly competitors in rare cases) who knew the operation of the decedent's business can provide invaluable service to the estate.

Obviously, a buy-sell agreement can incredibly simplify the task of an executor where a business interest comprises the bulk of an individual's estate. However, where there is no such agreement, the executor must-at least temporarily-assume whatever role the decedent had in the business.

Depending on the circumstances and nature of the business, it could be either continued or terminated. However, without knowledge of the details of the business or expertise in the specific area involved, the executor or administrator would obviously be working under a considerable handicap. Even a professional executor such as a bank or trust company may not have the requisite expertise if the decedent's business was in a specialized or personalized area in which particular or unique knowledge was necessary to survive in the marketplace. This often is an area where outside expertise is necessary.

Clearly, the executor who has an in-depth understanding of the inner workings of the decedent's business or profession has a tremendous edge over the neophyte. Although there is no substitute for experience, intelligent individuals who have the ability to obtain the necessary information and experience as well as the time and inclination to administer the estate can usually do a credible and often an outstanding job, if they are willing to put time and effort into the performance of their duties and have the assistance of an attorney experienced in estate administration.

Consider also that individuals or banks with strong investment or business expertise can be named as co-executors or can be hired on an hourly or annual retainer basis by the estate's executor. Certainly, any executor without extensive investment knowledge should secure the services of skilled advisors and investment personnel where appropriate. An executor who makes a mistake of omission-to the detriment of the estate's beneficiaries-is just as liable to surcharge as the executor who makes a mistake of commission. So it is essential for a nonprofessional executor to secure competent advice when dealing with an estate largely composed of securities.

Ability and Willingness to Serve

Most laypersons believe that being named the executor of an estate is a great honor. To the extent the term *executor* carries with it the ultimate in trust, this impression is justified. But with that honor, the personal representative must accept an awesome measure of responsibility and potential liability. The duties and responsibilities of an executor can amount to considerable time and effort, ranging from dozens of hours to hundreds and even thousands of hours. The duties range the entire gambit from the exciting and interesting to the arcane, tedious and mundane, even including duties such as getting up on a roof to look at a leak in the roof of the decedent's home or rental property. The decedent's heirs suffer the consequences if the designated executor is unable or unwilling to perform the necessary tasks. So it is extremely important in selecting a personal representative to consider the ability and probable willingness of the chosen person (or persons) to serve. (or oversee their performance by competent agents). Ability without willingness is meaningless, because the competent executor who is ambivalent about serving could resign and leave things in an uproar if the going gets tough during the administration of the estate or trust.

Most laymen are under the impression that to name someone the executor of an estate is to bestow upon them a great honor. To the extent that the term *executor* carries with it the ultimate in trust, this impression is justified. But with that honor, the personal representative must accept an *awesome* measure of responsibility and potential liability.

An executor is considered a *fiduciary*. This means a potential lawsuit by beneficiaries for breach of confidentiality, conflicts of interest, failure to exercise due care or diligence or prudence, failure to properly preserve or protect estate assets, failure to file timely and proper tax returns or maintain adequate records, and the breach of the duty to make all major discretionary decisions personally and not to delegate such decisions. This responsibility and potential personal liability may drastically reduce the willingness of the nominee to accept the position. For this reason, no one can be *forced* to accept the position of executor. Every will should provide at least one—and preferably more than one—backup executor in case the one named fails to qualify or ceases to act.

Geographic Proximity

Testators should consider, when selecting an executor, the physical distance the executor may have to travel and the time the executor may have to spend away from home. For example, New York state law may allow a son who lives in California to be the executor of his father's estate. But will the son be able to take the time away from his own job (not to mention his family) to serve properly – and at what cost? What expenses will be incurred out of the son's pocket or what nonreimbursable income will be lost by the son because he must be handling an estate on the opposite end of the continent? Quite often, the executor's fee or the size of the estate will be insufficient to economically justify the executor's expenditure of time. In such instances it may be preferable to appoint a local executor-perhaps a bank or a trust company-and to have the distant relative serve as an unofficial advisor to the executor or as a co-executor.

The extent to which geographic proximity for the executor is an issue may depend upon the nature of the assets within the estate. If the estate is primarily comprised of brokerage and bank accounts, it is not a problem for an executor to be located far away. However, if the estate is comprised of a closely held business or real estate which requires hands-on management, or if a primary beneficiary has special needs, it may be better to have a local executor.

In some jurisdictions certain non-resident personal representatives may have to post a bond whereas a resident would not.

Conflicts of Interest

An otherwise logical choice of a particular individual or individuals may fail to consider potential conflicts of interest. For example, an older child may well be qualified to manage her father's affairs. But will a conflict arise between the personal interest of that older child and a surviving parent or younger siblings? Such problems can easily occur when the executor makes decisions on where to take certain deductions or other tax-oriented elections. This problem can be intensified if the relatives are stepparents or stepchildren or if the decedent's intended recipients are friends rather than family. In fact, where the surviving spouse is not the other parent of the decedent's children, we generally recommend that someone *other* than the surviving spouse serve as executor because of the potential for post-death problems between a step-parent and step-children.

The problem of a potential conflict of interest is particularly acute where a business associate is named as executor. It is imperative to consider in advance of such a nomination the effect that the associate's handling of the business ("to sell or not to sell," and if so, to whom and at what price?) will have on the testator's beneficiaries – as well as on the business associate. What if the most likely purchaser is the associate himself? Wanting to pay the lowest possible price and yet obligated as executor to obtain the highest, the business associate as executor is placed in an almost certain conflict of interest. How can the beneficiaries be assured they have received a fair price for the business interest? Or how can they know the right decision was to sell rather than to retain the business? How do they know he did not pay himself an exorbitant salary (as well as an exorbitant executor's fee)? How could the business associate not resent the personal cost of "doing the right thing?" Conversely, how can the client be sure that the associate will not do financial harm to himself by going out of his way to get the best price possible for the client's heirs? The choice of a business associate as executor can easily put that person in an uncomfortable and often untenable situation. It is inevitable that doubt will linger when a partner or co-shareholder is named as executor, regardless of how careful that person is to make decisions impartially and in the best interest of the beneficiaries.

Another area in which a conflict of interest can easily occur is where a client names the attorney who drafted the will as executor. In our opinion—unless there is no choice or the parties are closely related—the will drafting attorney who unilaterally names himself or his law partner as attorney has committed a

breach of ethics and has clearly acted improperly. This is arrangement is particularly troubling if it is done without the knowledge or express direction of the client.

If the attorney who drew the will is named as executor, then, technically, he or she is not an employee or agent of the beneficiaries. That means they have no power to fire him as executor if he doesn't answer phone calls or if letters requesting information about the estate go unanswered. It will be difficult for beneficiaries to challenge his/her actions or lack of action. If that person hires himself or his business partner as the estate's attorney, beneficiaries have little right to question the legality, and often little recourse save the lodging of an ethics complaint against the lawyer. Who, aside from the court upon final audit of the estate, can question the fee that such an executor pays himself as attorney? The appointment of the will drafting attorney as executor drastically reduces the checks and balances desirable in the probate of an estate and-aside from the other issues of competency, ability, and willingness to take the time away from the practice of law to do a proper job-creates inevitable conflict of interest.

As noted above, there are, of course, exceptions to the general rule that the attorney who draws the will should not be named as the estate's executor. For instance, if the attorney is a child or close relative of the testator or the natural object of his bounty, it may be proper and appropriate for that attorney to be named as executor. If the attorney is the one individual most familiar with the decedent's assets, family, and business, then the attorney may be a logical choice, but in this case it may be best to name the attorney as co-executor with a family member, or, at the very least, make the attorney accountable to someone and give that person the power to remove the attorney or even a veto right over the attorney hiring his or her own law firm as attorneys for the executor or successor trustee.

Another situation where it may be appropriate to name the attorney as executor is if the client is concerned about how the beneficiaries will get along. In these situations, the attorney can act as an objective outsider to make sure that everyone is treated fairly. Even in these situations, it is still a good idea to name a family member or bank as co-executor with the attorney.

The very possibility of a conflict of interest may put the potential executor in an uncomfortable and even dangerous situation. In many cases such an individual will injure his own interest in the attempt to bend over backwards to avoid the appearance of impropriety. Nevertheless, he will always be conscious of the likelihood of second guessing by beneficiaries if they feel the apportionment of profits or proceeds was inadequate. Such an individual should, in many cases, properly and promptly refuse to serve as executor.

One possible solution to a potential conflict of interest is to name a business associate as an advisor or as co-executor with a bank and to name some third co-executor so there could not be a tie vote. In fact, wherever there is any potential for a conflict of interest a professional fiduciary should be considered. Impartiality is one of the major strengths of having a bank or trust company serve as executor.

Integrity and Loyalty

These are among the duties owed by a fiduciary to the beneficiaries of the estate. However, it is as essential that the testator have absolute trust in the honesty and loyalty of the executor for reasons that go beyond the obvious legal or ethical implications; an important part of the estate planning process is the peace of mind an individual obtains in knowing that his or her affairs are in order and that the financial security he has paid for during his lifetime will serve those he loves and wants to benefit in the years beyond his lifetime. For these reasons, it is essential that the testator have absolute trust that his will shall be carried out as he intended to the best of the executor's ability.

Fees

Although fees are not among the listed attributes of a good executor, they are an important consideration in the selection process. The amount of fee a personal representative is entitled to may be determined by:

- the statutory or case law of the state where the estate is probated;
- local county rules or customs governing what the personal representative is entitled to charge to services rendered to the estate;
- in the case of professional executors such as banks or trust companies, an advertised fixed and scheduled fee (for a large estate the scheduled fee may possibly be lowered by negotiation, in which an attorney specializing in estate administration can be invaluable);
- provisions in the will; and
- separate contractual agreements between the testator and the nominated executor.

An executor is entitled to reasonable compensation for services rendered. Fees should not be determined solely on the basis of the monetary amount of the decedent's probate assets but should take into account the nature of the executor's tasks, the time spent, the complexity of the problems and decisions that have to be made, the professional background and competence of the executor, and the ultimate results and benefits obtained for the heirs.

There are valid tax and nontax reasons why an executor who is a relative or friend of the testator may or may not accept a fee. Although the selection process should encompass the likely course of action the executor will take in this regard, it is important that this factor not override or take the place of the other selection criteria.

In many cases testators expect that family members named as executors will charge no fees but that professional fiduciaries will. Although in many situations this assumption will be correct, this selection criterion should be tempered by considering the mistakes the nonprofessional may make that the professional would not and the opportunities the nonprofessional may miss that the professional would not. Additionally, most professional fiduciaries are associated with large financial institutions or trust companies that have significant assets and liability insurance to cover any mistakes that the professional fiduciary makes.

It is important to keep in mind that to the extent the executor does get paid, this payment will be taxable income to the executor. Also, if it is a large estate and subject to the federal estate tax, even though the fee will be income to the executor, it will also qualify as either a deduction for federal estate tax purposes or a deduction on the estate's fiduciary income tax return. Therefore, a consideration of the difference between the estate and income tax effects of the deduction will be necessary to determine if there will be an overall tax savings by having the executor take a fee (at least in the situation where the executor might not have otherwise chosen to take a fee) would otherwise receive the assets – income tax free - by virtue of being a beneficiary. If the estate is not taxable for federal estate tax purposes and if the executor also is a beneficiary, it generally makes little sense for the executor to take a fee, which is income. Generally, in such situations, it is better planning to forego the executor's fee and simply receive the legacy, which will generally be exempt from income tax.

Summary

The choice of executor(s) and backups (there should always be at least one and preferably two backups) is complicated by a combination of family, personal, tax, and nontax considerations both tangible and intangible. All of these must be considered and balanced, for the executor's tasks and responsibilities are often complex and their successful and prompt completion is always-from the heirs' viewpoint-crucial.