

OAK STREET
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SELECTION OF FIDUCIARIES

The preparation and implementation of a personal estate plan involves the careful selection of fiduciaries. We must consider the designation of individuals and/or entities (e.g., banks and trust companies) to serve in various capacities. This memorandum focuses on the selection process by describing the role and responsibilities of all fiduciaries designated in a comprehensive estate plan.

WHAT IS A FIDUCIARY?

A fiduciary is a person or entity that is designated to act on behalf of another with respect to financial or health care matters. The fiduciary must act with undivided loyalty in a thoughtful and careful manner; is fully accountable for the decisions made in a fiduciary capacity; and may be personally liable for improper actions.

ROLE OF THE FIDUCIARY

The most common fiduciary roles in a comprehensive estate plan are (1) Personal Representative (historically referred to as executor); (2) health care attorney-in-fact (agent); (3) financial attorney-in-fact (agent); (4) trustee; and (5) guardian. Generally, fiduciaries are given broad authority under Washington law and under the legal document designating the fiduciary. In this regard, the fiduciary will be authorized to, and in most cases should, retain the services of professional advisors to assist the fiduciary with respect to legal, tax, and investment matters. The fiduciary may then rely upon the advice of those advisors.

THE ATTORNEY-IN-FACT

The attorney-in-fact (also referred to as the "agent") is the fiduciary designated under a power of attorney to act on behalf of the principal executing the document. There are generally two powers of attorney, a power of attorney for finances and a power of attorney for health care. The attorney-in-fact for health care will make health care decisions on behalf of the principal only in the circumstance where the principal is unable to communicate. The power of attorney for finances is generally drafted to become effective upon the incapacity of the principal; that is, the attorney-in-fact will make financial decisions and manage the principal's financial affairs only upon the principal's incapacity. These documents are intended to preclude the need for a court supervised guardianship proceeding.

The attorney-in-fact for finances is generally given all of the authority and power of the principal's property that the person would have as the absolute owner. Those powers include the ability to pay the individual's bills, make deposits and handle banking matters, sign contracts, initiate and defend the person in legal proceedings, and engage in the purchase and sale of the principal's investment assets.

The primary responsibility for the attorney-in-fact is to preserve the principal's assets and to act prudently in all financial matters. In short, the attorney-in-fact is expected to preserve and maintain the principal's financial position while providing the funds necessary to care for him or her.

THE PERSONAL REPRESENTATIVE

The Personal Representative is the fiduciary designated in a Will to settle a person's estate and effect the distribution of the estate's assets pursuant to the terms of the Will. The duties of the Personal Representative include locating and keeping the estate beneficiaries advised of the estate's status; marshalling and managing the assets and liabilities of the estate; valuing the assets of the estate for estate and income tax purposes; preparing and filing the appropriate estate tax and income tax returns; resolving any tax liabilities; resolving the decedent's outstanding obligations and settling any claims that may be filed against the estate; and, finally, transferring all of the remaining assets of the estate to the designated beneficiaries.

The duties of the Personal Representative and the estate settlement procedures are specifically delineated under Washington law. In most cases, the Personal Representative will be granted "non-intervention" powers so that the Personal Representative can act without having to seek court approval. The designated Personal Representative should select an attorney at the outset to assist in admitting the Will and confirming the Personal Representative's appointment to serve. The attorney will then guide the Personal Representative through the entire estate settlement process and highlight the decisions that must be made. In particular, depending upon the nature and value of the estate, there may be complex valuation and tax related considerations. Experienced attorneys can provide helpful suggestions in these areas.

The primary duty of the Personal Representative is to ascertain and carry out the decedent's intentions. The Personal Representative must be loyal to the beneficiaries of the estate and act in an impartial manner, not favoring one beneficiary over another unless specifically authorized.

From a financial standpoint, the Personal Representative has the responsibility to protect and preserve the assets of the estate. Accordingly, unlike the duty of the trustee as discussed below, the Personal Representative is more of a "caretaker" of the assets during the period of estate administration.

THE TRUSTEE

The role of the attorney-in-fact and of the Personal Representative may be of a relatively short duration. A trustee, however, may serve as a fiduciary for an extended period of time.

As with the Personal Representative, the trustee must ascertain and carry out the intentions of the person establishing the trust. As with other fiduciaries, the trustee also has the duty of loyalty and impartiality to the beneficiaries of the trust. The trustee must also act prudently with respect to the management of the assets of the trust but, as discussed below, the trustee's reasonableness in this regard is broader.

Because a trustee will have responsibility for the management of the assets of the trust for an extended period of time, the trustee's fiduciary obligation extends beyond the mere preservation of the trust assets. The trustee must generally invest the assets so that they keep pace with inflation and attain a level of investment performance that would be considered appropriate based upon the performance of the financial markets. This responsibility will often involve the selection of investment professionals to provide guidance. A trustee has a duty of diversification of the assets and must avoid risk that would otherwise be considered imprudent.

Another area of responsibility that is somewhat unique to the trustee involves making discretionary distributions to beneficiaries pursuant to the standards and circumstances described under the terms of the trust. For example, a trustee will often be called upon to determine whether a distribution should be made to provide assistance to a beneficiary in the context of the other assets and financial resources available to the particular beneficiary.

THE GUARDIAN

The person designated to serve as the guardian of a minor (in Washington, a person under the age of 18) has the responsibility to see that the minor receives proper care on a day-to-day basis, medical attention as needed and appropriate education. The trustee of the trust holding assets for the minor's benefit and the designated guardian should coordinate with one another in providing for the minor. In effect, the guardian assumes the parental responsibility for the minor's well-being.

CO-FIDUCIARIES

It is becoming increasingly common to consider selecting co-fiduciaries to serve, especially as co-trustees. A person will often want to have a family member or individual familiar with the family to serve with a professional trustee who will assume primary responsibility for the custody, accounting and management of the trust's assets.

COMPENSATION

A fiduciary is entitled to be reimbursed for reasonable out of pocket expenses incurred in carrying out the fiduciary's responsibilities. Additionally, the fiduciary may be compensated for the amount of time spent and the responsibilities assumed by the fiduciary. The amount of the fee must be reasonable. The legal document appointing the fiduciary may also specifically provide for fee amounts or fee structures. A professional fiduciary generally charges fees based upon its published fee schedule that is primarily a function of the value of the trust's or estate's assets.

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