



## POWER OF ATTORNEYS AND TRUSTS



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Powers of Attorney and Trusts are two frequently used estate planning instruments. One of the most difficult decisions to make in relation to the drafting of a Power of Attorney or Trust as part of an estate plan is who shall handle your personal and financial decisions. This article is meant to provide ideas to guide this important decision.

A Power of Attorney is a legal document that allows you to officially designate someone as your attorney-in-fact. Your attorney-in-fact can handle financial and legal matters on your behalf in the event that you become physically or mentally incapacitated and their ability to act terminates upon your death. With an attorney-in-fact, you never know when the need for someone to have the capability to act on your

behalf will arise. An attorney-in-fact may only need to pay bills for a short period of time or may need to make key financial decisions. A Trust is a legal document which specifies how trust assets will be managed by a trustee. A trustee is named in a trust agreement and is authorized to carry out your objectives as written under the express terms of the trust. A trustee's obligation to act can begin upon your death, or at a time when you may be unable to unwilling or unable to act as trustee. With a trustee, they will be called upon to carry out your wishes typically over a much longer period of time. Attorneys-in-fact and trustees are fiduciaries, or people who are legally obligated to act in your interests. The following are a number of considerations to keep in mind when making the decision of whom to appoint as your fiduciary.

First, your fiduciary should be someone who knows and understands your wishes, someone you trust to act in your best interests and those of your beneficiaries, and someone who is qualified to make decisions in such a position. Your fiduciary will typically take control over your financial assets at a time when you are unable to oversee what is being done with those assets. It is therefore advisable to discuss your fiduciary's appointment with them and have ongoing discussions with them regarding how you want your financial assets managed.

Second, choosing someone with expertise is necessary only if your financial assets involve a specific business. In such an instance it is important for the fiduciary to have expertise managing the type of business involved, such as a family member involved in the business, a business associate or professional advisor. Otherwise, you should choose someone with good judgment and a business sense who will know when to seek expert help. There are common characteristics of a successful fiduciary: (1) someone who pays attention to details; (2) someone who has the time and inclination to devote to the position; (3) someone who has an understanding of his or her duties and responsibilities; (4) someone who takes their responsibility seriously; (5) someone who has the ability to collaborate with attorneys, accountants and other professionals, if necessary; (6) someone who is honest and loyal; and (7) someone who is able to make decisions. The last characteristic is important in that fiduciary decisions are not always based solely from knowledge but also involve maturity, wisdom and the ability to remain impartial in the face of disagreement.

Third, because your fiduciary will conduct regular banking and other financial and legal transactions, consider choosing someone who lives close to you. Doing so will allow them to handle their responsibilities in a timely fashion and with the least amount of difficulty for the fiduciary.

Fourth, make sure your fiduciary will be available to act. The age and health of a potential fiduciary should be considered in that your chosen fiduciary may be unwilling or unable to act for personal reasons, disability or death. Potential disadvantages of choosing a relative are their lack of expertise, disability or mortality, and an inability or unwillingness to confront family conflicts.

Fifth, we are often asked about appointing co-fiduciaries. The primary advantage of choosing more than one fiduciary is they serve as a check and balance to the other and are not left to make difficult decisions alone. The primary disadvantage can be a failure to agree on what is seemingly an easy or insignificant decision. This can lead to decisions being delayed or derailed altogether if the fiduciaries cannot agree.

Sixth, while it is understandable to look first to a family member to serve as fiduciary, there are circumstances for which a corporate fiduciary such as a banking institution or investment firm is the best choice. The first advantage a corporate fiduciary can provide is expertise. Corporate fiduciaries have the ability to use educated, impartial and reasoned decisions regarding financial matters. Corporate fiduciaries are also more likely to provide consistent accounting, reporting and ongoing communication with beneficiaries as a regular part of their duties. The second advantage a corporate fiduciary can provide is an assurance that the institution will be available to serve in a fiduciary capacity and manage assets for a long period of time. The third advantage a corporate fiduciary can provide is that in families that are prone to disagreement or involve blended families with potential conflict, a corporate fiduciary is a neutral party making decisions that treat all beneficiaries equally. They are objective and have no potential or perceived conflict of interest. The disadvantages to using a corporate fiduciary are that they typically cost more than an individual fiduciary. In addition, they can sometimes be more conservative or inflexible because of their increased liability, regulations and corporate infrastructure.

Finally, your thoughts about an appropriate fiduciary may change over time. It is advisable to revisit your choice after major life changes to you or your nominated fiduciary.

The decision regarding who to name as your fiduciary should be weighed and considered with your attorney. Decisions can involve personal, family, business, investment and tax considerations. Our attorneys are available to work with you to help make the best decision for you as part of your estate planning.