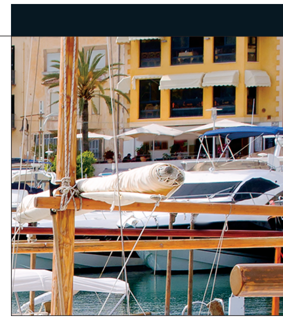

When Should Clients Be Advised to Use a Corporate Trustee?

Appointing a family member as trustee can save on trustee fees, but can also sacrifice trustee objectivity and produce a need for other paid advisors.

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The situation is easy to visualize: Mom and Dad have passed away, and the spendthrift kids' inheritance is subject to the whim of the big, bad corporate trustee. Decades of frustration, ill feelings, and significant expense ensue. Events really should not have happened like this—or should they have?

As estate planning professionals know, selecting the trustee is the most difficult decision many clients face. Typical client responses are: "I don't have any family members who can serve." "I don't have any family members I trust." "Banks are greedy and faceless institutions, interested only in making a buck." "My financial planner, accountant, and attorney are all unwilling to serve."

Early in his career as an estate planning attorney, the author typically hesitated to recommend corporate trustees unless no other option was available, reasoning that the trustee can engage professionals to perform those tasks beyond his or her skill. This mentality, however, can underestimate the personal strain an individual trustee may experience. With experience, the author moved more in the opposite direction because corporate trustees can be valuable, and perhaps indispensable, parts of certain clients' estate plans.

Estate planners all have experienced some of the dynamics involved. Beneficiaries, including surviving spouses and children, do not distinguish between their personal assets and assets held in trust for their benefit, thinking, incorrectly, "Those trust assets belong to me." The beneficiaries have no interest in dealing with a trustee to "get what's mine."

The discussion that follows is a non-exhaustive analysis of issues regarding when estate planning professionals should and should not recommend their clients use corporate trustees.

Reasons to appoint a corporate trustee

Corporate trustees are professionals at managing assets. With their extensive resources, they often produce better investment returns than a nonprofessional. They have experience with all kinds of assets, including everyday investments like stocks, bonds, and real estate, as well as with more uncommon investments like closely held businesses, oil and gas interests, mineral properties, international investments, and collectibles. Banks and trust companies are "built" to serve as trustees and can discharge the full range of trustee duties, including preparing accountings and filing tax returns.

Corporate trustee employees are (or at least should be) experts on investments, income, gift, estate, and generation-skipping transfer

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tax matters and notices, accountings, and reporting required under the trust agreement and applicable law.

A corporate trustee will follow trust instructions objectively, something family members are often unable to do because they may be too busy with their own affairs or may not get along with other family members. Although bank and trust company employees are human too, they will not be as affected by emotion as an individual related to the family. Further, those employees are less likely to be influenced by the nature of their personal relationships (or lack of relationship) with the trust beneficiaries.

A corporate trustee can provide objective decision making based on the terms of the trust and applicable trust law. This may be particularly important where a beneficiary is aggressive and may be likely to contest the terms of the trust. A corporate trustee is less likely to "cave" to the demands of the aggressive trust beneficiary and will strictly adhere to the terms of the trust agreement.

A corporate trustee "will always be there" and can manage a trust for generations. Service will not be interrupted as would be the case in the disability or death of an individual trustee. This characteristic makes them ideal trustees of "last resort" if the client nevertheless has a preference for individual trustees, particularly where the trust is structured to continue for many years.

If there is a fear the corporate trustee may be unresponsive, the trust agreement can give the beneficiaries, or a third party, the power to replace the corporate trustee with another corporate trustee. This may keep a corporate trustee responsive and can avoid an uncomfortable situation in which the corporate trustee refuses to resign after request by the beneficiaries. The professional should give careful thought to the qualification requirements of the successor corporate trustee. Should there be a requirement of minimum assets under management by the corporate trustee? This makes sense for a $50,000,000 trust but much less sense for a $500,000 trust. Even if the corporate trustee would take on the $500,000 trust, would the trust officers provide appropriate attention to the trust beneficiaries?

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Reasons to appoint a family member as trustee

Notwithstanding the advantages of corporate trustees, most people choose family members to serve as trustees. The two main reasons for this choice are fees and familiarity.

Clients generally expect family members will not charge a fee for serving as trustee, even though trustees are entitled to reasonable compensation. Fees for corporate trustees generally are based on the value of the trust assets and normally range from 1% to 2.5% per year. They sometimes have a minimum annual fee, which may quickly deplete the assets of a small trust and a termination fee when the trust terminates or the trustee is removed.

On the other hand, most family members lack the sophistication to discharge the more technical requirements of serving as trustee, such as investing trust assets, ensuring beneficiaries are provided all accountings and other information required under the trust agreement and applicable law, and filing tax returns. Even if the family member does not charge a fee for serving as trustee, the fees incurred by the trust for investment advisors, attorneys, and accountants engaged by the trustee may exceed those a corporate trustee may have otherwise charged.

While banks do not die, their employees change jobs. If the client likes trust officer Lois Lane at Metropolis Bank because he believes she will adhere to the trust terms and treat the beneficiaries fairly, there is no guarantee the beneficiaries will feel the same way. There is also no guarantee Ms. Lane will be around after the client's passing, and Ms. Lane's replacement may be someone with weak interpersonal skills who is unwilling to listen and be responsive to the beneficiaries' questions and needs.

What if the client is a sole proprietor or owns an interest in a closely held business? Most individuals not involved in the business would not have the ability to manage the interest effectively. The same is also true of most corporate trust officers, who might simply seek to dispose of the interest expeditiously and in a manner not necessarily in the trust beneficiaries' best interests.

While some clients will not consider a corporate trustee because of fees, perceived family harmony, or a desire for the trustee to have a personal relationship with the beneficiaries, some clients' family situations lend themselves to, or even require, the presence of a corporate trustee.

Trust officers—what say you?

The author asked several trust officers for their thoughts on the subject matter of this article, posing some open-ended questions:

- When should clients nominate corporate trustees, either alone or with one or more individuals?

- When should clients not nominate corporate trustees?
- What are some success stories?
- When did things not work out?
- What provisions do you like to see in the trust agreement?

Their answers were consistent among themselves and consistent with the reasons mentioned above. Many believed corporate trustees are a good choice in almost all circumstances, given they are professionals, this is what they are built to do, they do not die, and they administer trusts objectively. They said corporate trustees are highly desirable in certain circumstances, such as blended families, particularly when a surviving spouse and step-children are beneficiaries during the surviving spouse's lifetime because each side can simply "blame the trustee" for matters the other side deems unfair or abusive. However, a couple of officers acknowledged the corporate trustee would not be able to solve disputes or ease tensions unrelated to the administration of the trust.

Unsurprisingly, the circumstances in which a corporate trustee is appropriate greatly outnumbered those in which it was not. The most common circumstance in which the corporate trustee is deemed not appropriate is when the value of the trust simply does not justify using a corporate trustee.

The success stories always revolved around the professional nature of corporate trustees. Many involved the objectivity of a corporate trustee; special needs beneficiaries, beneficiaries with substance abuse problems, beneficiaries with creditor issues, and incarcerated beneficiaries all benefitted from the corporate trustee's ability to "just say no" when distributions were requested. Another success category is where the corporate trustee is able to provide services to multiple generations of a family, something with which estate planning professionals are well aware. A few officers prided themselves on their efforts to teach younger beneficiaries about reading financial statements, evaluating investments, and financial planning generally.

When did things not work out? Again, unsurprisingly, the responses were anywhere between never and virtually never. The one example given was not necessarily a result of a corporate trustee serving. The officer made multiple distributions to enable a widow who was about age 70, to take extended, exotic trips. The problem was that the 30-ish-year-old trust officer regularly accompanied the widow on her journeys. There was a positive spin to this anecdote. The corporate trustee's internal controls, policies, and procedures lead to the discovery of the rogue trust officer's actions, something that likely would not have occurred had the trustee been an individual.

When asked what provisions trust officers like to see in the trust agreement, nearly all responses involved a desire for flexibility. The message inferred was not that the trustee was simply looking to indulge its whim. Instead, among other things, the trustee is looking to have a broad range of allowable investments, to be able to cope with beneficiaries' changing circumstances (e.g., marriage, divorce, and creditor or drug problems), and to minimize income, gift, estate, and generation-skipping transfer taxes.

Trust advisors—can we split the baby?

Can clients get the best of both worlds by combining the professionalism of the corporate trustee with the direction or guidance of one or more individuals close to the client's family? This might not be a perfect solution, but it might provide an ideal balance between the skill of the corporate trustee and the personal touch of those close to the beneficiaries.

The professional should walk the client through the infinite combinations of who does what, and what is required or permissive. For instance:

- Will the advisor's directions be mandatory or permissive?
- Will the advisor's directions apply to all matters or only specified matters (e.g., distributions)?
- Is the trustee liable in connection with mandatory directions of the advisor if the trustee knows or should know that the advisor directives are contrary to the trust agreement or applicable law?
- What are the relative liabilities for the advisor and the trustee?

Whatever choice the client makes, the rights and responsibilities of the advisor and the trustee must be clearly defined in the trust agreement.

Clients often ask whether the trustee should be one individual or entity or two or more individuals or entities. The author's response, in typical attorney fashion, is "it depends." Advisors can point out that while multiple trustees can provide valuable and specialized insights, whenever more than one is involved, disagreements are possible. This conflict can cause delay to the detriment of trust beneficiaries and can make trust administration more expensive. Nevertheless, an argument can be made that where a corporate trustee should be considered, use of one or more trust advisors should also be considered.

Conclusion

Assuming clients are advised to consider using a corporate trustee, the best way to evaluate corporate trustees is to talk with as many trust officers as possible and to ask a lot of questions. The client should ask questions about how long the corporate trustee has been in business, the experience level of the employees, the number and the average size of trusts being managed, the fees, the investment returns, and other services the corporate trustee provides. The answers can provide a sense of how responsive the trustee will be to the beneficiaries' needs. As experienced estate planners know, much depends on the particular individuals involved and whether there is a perceived fit. ■