

Considerations in selecting a Trustee

- **Prudent Judgment.** The Trustee should have good judgment.
- **Impartiality.** The Trustee should treat the beneficiaries fairly and impartially without favoring one beneficiary over another.
- **Expertise.** If the nature of the assets requires a particular expertise (i.e., oil and gas or a closely held business), it may be advisable to appoint a Trustee with a particular expertise in that area.
- **Financial Responsibility.** A person who has been successful in managing his or her own investments and is credit worthy may make a good choice, since a Trustee's primary duty is to preserve the assets and make them productive through prudent investments.
 - **Child as a Co-Trustee or Sole Trustee.** If it is desirable for each child to elect to be Co-Trustee of his or her own trust at a certain age and then sole Trustee at a later age, consideration should be given to limiting an irresponsible child to remaining a Co-Trustee and foregoing the appointment of that child as a sole Trustee.
 - **Honesty.** A Trustee should be honest and trustworthy. This is the most important factor. An unworthy Trustee may be able to dissipate the trust assets long before the beneficiary becomes aware that there is a problem. Most trusts do not require a bond for the Trustee, and many individuals have difficulty qualifying for a bond. However, a bond is no cure for a dishonest Trustee. With a corporate Trustee, there is little risk of dishonesty. Corporate Trustees have deep pockets and insurance, whereas an individual Trustee may lack the financial resources to make restitution for stolen assets.
 - **Empathy.** A good Trustee is a person who has empathy and knows when to say "yes" as well as "no." A good Trustee is also someone who can work with others and get along.
 - **Conflicts among the Beneficiaries.** Whether a proposed Trustee gets along well with the beneficiaries, is an important factor. Conflict may lead to mistrust and litigation. If the appointment of a Trustee is likely to force persons who do not get along to deal with one another, then naming that person as a Trustee would be inadvisable.
 - **Age.** Sometimes the most qualified Trustee is elderly. If that Trustee is designated, then it is also important to name alternate Trustees in the event that the Trustee predeceases or becomes incapacitated. Conversely, if the Trustee designated is very young, the Trustee may lack the maturity to make good decisions regarding the trust and its beneficiaries.

- **Size and Complexity of the Estate.** An individual might not be the best choice where the estate is large and complex. On the other hand an individual would be the best choice if the estate is small. The minimum fees charged by a corporate Trustee may make it uneconomical for a corporate Trustee to serve. Several individual Trustees may work best in managing a number of business enterprises held in the trust. A partnership or sole proprietorship may be best served by a knowledgeable individual Trustee.
- **Experience.** Corporate Trustees may have the special expertise in oil and gas or commercial building management but managing a Decedent's small business might be handled better by a partner or employee. Experience and knowledge may be critical. If not, it may be possible for the individual Trustee to hire the expertise needed in a particular circumstance. For example, both individual and corporate Trustees typically hire attorneys, accountants and appraisers to assist them in discharging their duties.
- **Continuity.** Often the corporate Trustee is designated as a back-up Trustee so that it will not be necessary for the beneficiaries to apply to a Court to appoint a successor. Corporate Trustees do not die and may provide continuity. On the other hand individual trust officers may move to other banks. In that event, to maintain continuity, a provision permitting the firing of the corporate Trustee coupled with the ability to appoint a successor should be given to one or more persons.
- **Flexibility.** The Trustee should be given some discretionary powers to enable the Trustee to adapt to changing circumstances. Where once investing in derivatives was desirable, it is now highly inadvisable. Thus, the Trustee should have some flexibility.
- **Trustee of Inter vivos Trust vs. Testamentary Trust.** The Grantor who resigns as Trustee of an inter vivos trust may monitor the administration of the trust by the successor Trustee. Such monitoring is not available to the Testator/Testatrix of a testamentary trust.
- **Short-Term vs. Long Term Trust.** The considerations for appointing a Trustee of a short term trust are different from the considerations for appointing a Trustee of a long term trust, such as life time trusts for children. For example, the age of the Trustee of a short-term trust would be less of a consideration than it would with respect to a lifetime trust.
- **Trustee's Discretion.** If the Trustee is given broad discretion he may receive more challenges than where the Trustee's discretion is circumscribed. A corporate Trustee may be more impartial in exercising discretion than individual Trustee. An individual Trustee may be more aware of the beneficiary's needs and circumstances, especially if the individual Trustee is a family member or friend of the testatrix.

- **Trust Purpose.** If the purpose of the trust is to benefit a charity, then the charitable organization might be a good choice of Trustee. If the purpose of the trust is to manage assets of children where the parents are divorced, the purpose of the trust would most likely not be met by having the former spouse appointed as a Trustee. A relative or employee of the former spouse would also not be a good selection of a Trustee. Any person who is adverse to the Grantor or testator would not be a good choice as a fiduciary.
- **Investment Guidelines.** Providing investment guidelines in the trust instrument may assist the individual fiduciary in managing the assets in a prudent manner.
- **Borrowing Prohibited.** TEX. PROP. CODE § 113.052 prohibits a Trustee (or his relatives or affiliates) from borrowing trust funds. Individual Trustees may find it very tempting to “borrow” trust funds without realizing that such borrowing violates the Texas Trust Code and is criminal. This temptation is not an issue with a corporate Trustee.
- **Lawyers, Accountants and Investment Advisors as Fiduciaries.** It is a problem for a lawyer to serve as a fiduciary although some lawyers do so. It is a problem to defend a malpractice suit brought by a beneficiary who simply disagrees with the Trustee’s decision on a distribution or investment. The lawyer risks being put out of business as a lawyer by serving as a fiduciary. A lawyer may be held to a higher standard than that of a corporate fiduciary where the trust officers are backed up by Trust committees with years of experience in trust administration. An accountant may be a better choice of fiduciary. However, the busy practice of an accountant may leave the accountant with little time to manage investments on behalf of the trust. An investment advisor is generally prohibited from serving as a fiduciary (because of the liability issues). An advisor to the Trustee may be named to provide advice to the Trustee on buying and selling assets. However, this appointment will increase fees. A corporate fiduciary would find such an expense redundant and unnecessary. An advisor is better paired with an individual Trustee. Again, professionals will need to be paid their hourly rates for serving as Trustees which may significantly drive up the cost of their services.
- **Location of Assets.** If the trust properties are wide scattered over a number of states and/or countries, then the corporate Trustee may be better suited to administer those assets.
- **Fees.** The Texas Trust Code only provides that Trustee fees be “reasonable.” § 114.061. Generally the individual Trustee will use the corporate trustee fee schedule as a guide to what is reasonable. Appointing an individual Trustee may not provide savings in the fees charged. Many if not most clients disapprove of corporate fiduciary charges because they are viewed as “high.” However, at the 1.25% or thereabouts rate, such charges are competitive with the administrative fees charged by managers of mutual funds. Corporate fiduciaries provide much greater services

for the money than do mutual funds. On the other hand some corporate fiduciaries are employing call centers where no particular trust officer is assigned to the trust and such an arrangement may not provide the continuity desired.

- **No Fee.** Where an individual is prohibited from charging a fee for her services, the adage, “you get what you pay for” may apply. It is difficult for individuals to handle their own affairs without having to act as volunteers to manage other’s affairs. There is such a high standard of performance required by law of fiduciaries, that it is unfair to hold them to such an exacting standard without pay.
- **Small Trust Termination.** If the trust instrument permits a trust to be terminated if the trust grows too small for continued management by a corporate Trustee (because of large “minimum fees”), then the Trustee should be authorized to terminate the small, uneconomical trust and distribute the proceedings to the primary beneficiary or current income beneficiary.
- **Tax Aspects.** There are tax implications with respect to a related Trustee. See section 671 through 678 of the Internal Revenue Code of 1986, as amended (the “Code”). For example, a beneficiary who serves as the Trustee of his or her own trust. If the beneficiary may vest income in himself, he will be taxed on that income. Section 678 (a)(1) of Code. To avoid this result, the beneficiary’s ability to make distributions to himself should be limited by an ascertainable standard—distributions for health, support, maintenance and education (“HEMS”). Section 2041 of the Code. A way of avoiding the § 678(a)(1) issue is for co-trustees to be appointed, with the trustee other than the beneficiary making the decision with regard to distributions to the beneficiary. A corporate Trustee may make distributions that are not limited by the HEMS standard. Moreover, a parent whose legal obligation of support is discharged by the distribution from a trust for a child must report all the income distributed for that purpose. Section 678(c). Generally, trusts prohibit the use of funds to discharge a legal obligation of support of a parent.
- **Co-Trustees.** Some problems with an individual Trustee may be resolved by permitting the beneficiary to elect to be a Co-Trustee at a certain age (25) with the individual or corporate Trustee then serving. This would provide the beneficiary with an opportunity to participate in the decision-making. This opportunity would give the individual Trustee an opportunity to help the beneficiary learn to administer the trust. If the beneficiary is also given the power to elect to be the sole Trustee of his or her own trust (at age 30), then the experience as a Co-Trustee will be advantageous. A poor money-manager may be paired with a sibling or other relative serving as a Co-Trustee who may provide the skills to manage the trust funds while giving the poor money manager in-put in the decision-making. Likewise, if one child is a poor manager, the appointment of a corporate Co-Trustee of each child’s trust will provide needed assistance while treating the beneficiaries impartially. A poor money manager may be permitted to fire the corporate or individual co-trustee but be required to appoint a successor corporate co-trustee. The Trustee may be given the power to appoint a co-trustee to serve with him or her. This is usually given to

the surviving spouse serving as the sole trustee. As the surviving spouse ages, he or she may wish to obtain assistance without giving up the trusteeship. A corporate co-trustee may be helpful in paying the bills and providing monthly statements, but without taking away the right to participate in the decision-making.

- **Special Trustee.** A Trustee may be given the power to appoint a “special Trustee” to manage certain assets, such as oil and gas properties. That flexibility would permit the Trustee to delegate the management of certain assets.
- **Trust Committee.** A Trust Committee may be appointed in the trust instrument to remove the trustee and appoint successors or to fill vacancies. The Trust Committee may also fill vacancies on the committee.