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ISABELLA BANK

Investment & Trust Newsletter

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Choosing a trustee

Many wealth management plans are built around family trusts. Selecting the right trustee is a key element for success.

So you've decided on a trust plan. Perhaps it's a trust for a surviving spouse, one that will qualify for the marital deduction. Or a bypass trust, to bring a measure of control to the impact that death taxes could have on the family fortune. Maybe you've decided that a charitable trust is an excellent approach to meeting private and philanthropic financial goals. Or you might simply be looking to arrange for yourself the many benefits of a living trust.

That decision leads to another, equally important one. Who should be your trustee?

What does a trustee do?

The American College of Trust and Estate Counsel (ACTEC), a professional organization of lawyers dedicated to improving probate and trust practices, has created "What It Means to Be a Trustee: A Guide for Clients." The purpose of the Guide is to familiarize nonlawyers with the true dimensions of trusteeship, as well as to assist them in selecting the right fiduciary for their families. One key task was translating the "fiduciary duty" that every trustee owes to trust beneficiaries into specific tasks. The group identified 13 distinct duties.

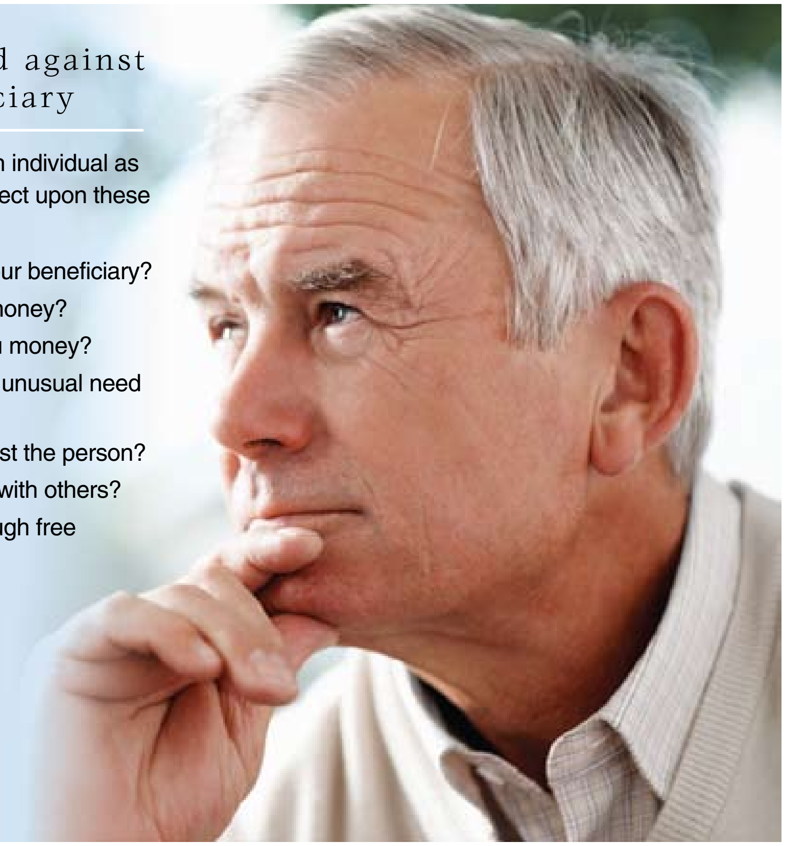
- ***Duty to administer a trust by its terms.*** Every trust agreement should make plain the purposes of the trust, as these terms provide the critical benchmarks for evaluating the trustee's actions.
- ***Duty of skill and care.*** A high standard of performance is required, even if an amateur is named who has no prior

If you've decided against a corporate fiduciary

If you've decided to name an individual as your executor or trustee, reflect upon these questions:

- Will the person also be your beneficiary?
- Do you owe this person money?
- Does this person owe you money?
- Does the person have an unusual need for money?
- Can your beneficiaries trust the person?
- Will the person work well with others?
- Will the person have enough free time to handle the job?

As you can see, there is a potential for conflict of interest and other difficulties when one turns to a friend, even one with excellent credentials.



***Choosing a trustee**. . . continued*

experience as a trustee.

• ***Duty to give notices.*** Notices may concern legal rights of the trust beneficiaries, such as a power to make withdrawals, or they may cover such ministerial matters as designating a successor trustee or an agent to assist in trust administration.

• ***Duty to furnish information and to communicate.*** The trustee must respond to requests from beneficiaries concerning the trust and its administration.

• ***Duty to account.*** A written accounting of the assets, liabilities, receipts, and disbursements of the trust must be provided to the beneficiaries regularly.

• ***Duty not to delegate.*** Although a trustee may employ professionals to assist in trust administration, the trustee may not accept blindly the advice of such persons. The trustee retains supervisory responsibility. Matters concerning the exercise of judgment and discretion generally cannot be delegated.

Your trustee needs:

• integrity;
• investment experience;
• administrative know-how;
• tax and accounting capabilities; and
• people skills.

Those attributes describe us well.

• ***Duty of loyalty.*** Trusts must be administered solely for the benefit of the trust beneficiaries.

• ***Duty to avoid conflict of interest.*** This is closely related to the duty of loyalty and may come up when a beneficiary is named as cotrustee. Generally, the trustee should not engage in transactions with the trust unless such activities are authorized by the trust.

• ***Duty to segregate trust property.*** Trust assets must not be commingled with personal funds or other nontrust assets.

• ***Duty of impartiality.*** The trustee must not favor one beneficiary over another, unless the trust document directs that providing for a particular beneficiary is a principal purpose of the trust.

• ***Duty to invest.*** Trust assets must not be left idle. In addition to making the trust investments, the trustee has a duty to diversify the investments and develop an asset allocation plan. This is a job for professional investors or corporate fiduciaries.

• ***Duty to enforce and defend claims.*** Reasonable steps must be taken to protect the trust from adverse claims and enforce the rights of the trust and its beneficiaries.

• ***Duty of confidentiality.*** Normally, the terms of a trust, the identity of its beneficiaries and their respective interests, and the nature of the trust assets cannot be disclosed to anyone except the beneficiaries and those who need such information in order to be able to administer the trust.

Who will you trust?

Given this list of responsibilities, one quickly can see the value of corporate fiduciaries, organizations such as ours, dedicated to trust administration as a business. We are staffed for this. We have trained for it. We do it every day.

To learn more about how seriously we take our trusteeship responsibilities, we invite you to arrange a meeting with one of our officers at your earliest convenience. Talk over your family financial objectives. See how we can help. ☐

Lights, camera, action!

Video recording and wills

As video recording has become ubiquitous in recent years, more and more people have considered adding a video element to their estate plans. Such a video could be simply a final farewell or an exhortation to heirs to use their inheritance wisely.

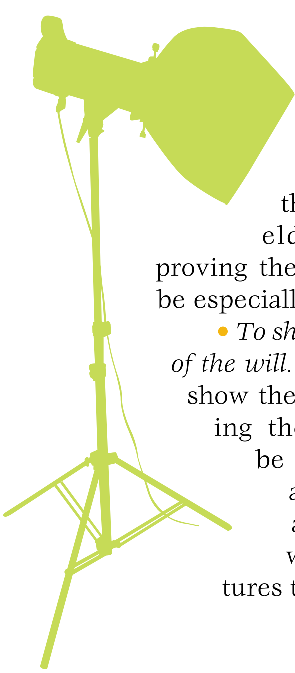
Or the video could have important legal consequences.

If heirs don't get along, if there is a chance that the will might be contested, a video of the will execution ceremony can prove indispensable in fulfilling the wishes of the testator.

Video impact

A video that is created at the time that a will is executed, under the supervision of an attorney, might be used for any or all of the following purposes in subsequent litigation:

- *To show testamentary capacity.* The will maker can be questioned and the answers recorded, proving that he or she understands the effect of making a will, comprehends the nature and extent of the property being passed by the will, realizes that a will is being executed, and demonstrates an appreciation of the family situation sufficient to form a coherent plan for the distribution of the estate. When the will maker is elderly, a video proving these points could be especially useful.



- *To show due execution of the will.* The video may show the testator declaring the document to be his or her will and signing it, along with the witnesses' signatures to the will.

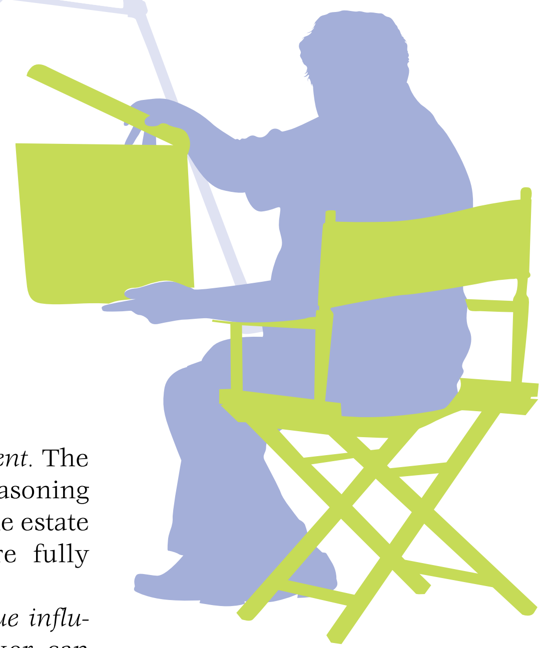
- *To show testamentary intent.* The testator may discuss the reasoning behind various elements of the estate plan to prove that they are fully understood.

- *To show the lack of undue influence or fraud.* The will maker can explain on the video that the will is being made voluntarily. If there will be an unexpected provision, such as a disinheritance, the reasons may be articulated.

- *To assist in will interpretation.* Statements made by the testator contemporaneously with the will execution could prove helpful if any will provisions subsequently appear to be ambiguous. By explaining exactly what he or she means by certain words and phrases, the testator can preserve evidence of his or her intent, which could be invaluable if a dispute later arises.

Violets are blue,
Roses are red,
I'm sorry
you're viewing,
Because it means
that I'm dead.

—Excerpt from an actual videotape of a will execution ceremony



To learn more

If you want to create a video memorial to be shown at your funeral, a talented family member can be a great resource. However, to add an element of certainty to an estate plan with a video, consult with your estate planning advisors at your earliest convenience. A variety of formalities will need to be followed to be confident that the video will have the desired legal effect. ☐

Residence, for tax purposes

Hedge fund manager Julian Robertson and his wife reside part-time in New York City. In 1999, while Mrs. Robertson was battling cancer, Mr. Robertson did not keep track of his daily comings and goings, and so he paid New York City income taxes for that year.

In 2000, he took a different approach, employing his staff and a complicated, computerized calendaring system to track his whereabouts throughout the year. At the end of 2000, all but four days were clearly documented, with 183 days spent within New York City and 179 days spent outside of it. The remaining four days were ambiguous, and a trial ensued. Phone records and travel vouchers were examined in detail, and testimony was taken from witnesses. (Only New York City income taxes, not those of New York State, were at issue in this case.)

According to the Court, "Any day the petitioner was physically present in New York City, even for five minutes, was a 'New York City' day unless he was in transit between two points outside New York City."

The judge's ruling, running to 77 pages, held that during the four disputed days, Robertson was *not* in New York City. As a result, he did not owe any New York City income tax for that year, a savings for him of more than $27 million.

The case points out the importance of excellent records when it comes to resolving residency questions in tax disputes.

The death tax angle

Residency and taxation questions are not of concern only to the super-rich, such as the Robertsons. State death taxes (estate taxes, inheritance taxes, or both) vary widely around the country. Some states have eliminated their death taxes; some have matched the federal exemptions; still others have "decoupled" from the federal estate tax-exempt amounts. These latter states may impose significant death taxes on estates too small to be subject to federal estate tax.

The issue is especially thorny for families that own property in more than one state. They may be subject to death taxes in each of the states where property is situated. In rare cases, more than one state may claim the authority to impose death taxes on the entire estate.

If there is a chance that your estate might be subject to avoidable taxation, be sure to consult with your tax advisors about your tax planning choices. These may include, as for the Robertson family, documenting your primary residence for tax purposes. ☐