

## *Memorandum*

TO: LeBlanc & Young Clients

DATE: January 2018

SUBJECT: Fiduciary Choices

Oftentimes the most difficult decisions clients face in the estate planning process involve the selections of various fiduciaries: who will make health care decisions if they cannot do so themselves; who will administer their estate; who will manage the trust for their children; who will serve as guardian of their minor children? There are up to five fiduciaries who can be involved in your estate plan: (i) attorney-in-fact under a power of attorney, (ii) agent under a health care directive, (iii) guardian of minor child, (iv) personal representative of the estate, and (v) trustee of any trust. This memorandum will briefly summarize what these roles involve as well as who may fill the various roles.

### **I. Agent under Power of Attorney**

The person named as Agent (or Attorney-in-Fact) under a durable power of attorney is authorized to deal with financial and property issues on your behalf when you are incapacitated, otherwise unable to do these things for yourself, or simply as a matter of convenience. It can be as simple as paying bills and moving funds between bank accounts, or range to more complex matters such as attending to the filing of an income tax return, actively managing a portfolio of investments, or continuing a pattern of giving. The Agent is charged with acting in the best interest of the principal or as the principal directs. The Agent's authority under the Power of Attorney ends when the principal revokes the power or when the principal dies. Upon the principal's death, the Personal Representative of his or her estate takes over the responsibilities of wrapping up the principal's affairs, and can examine the acts of the Agent if it appears he or she has done anything improper.

Typically, a trusted family member or advisor would hold a power of attorney (for example, they may well be reciprocal for spouses), and the document would name a successor Agent in case the primary Agent becomes incapacitated or is otherwise unavailable to serve.

## **II. Agent under Health Care Directive or Health Care Power of Attorney**

An Agent under a health care directive or health care power of attorney is authorized to make health care decisions for you if you are unable to make them for yourself. This could include decisions for treatments such as surgery or medication, and can also include whether or not to commence or discontinue life support. The health care directive can also recommend that the Agent would be appointed your guardian if appropriate.

Typically a trusted family member, or two or more serving together, would serve as Agent(s) under a health care directive; and the document would name a successor Agent in the event the primary Agent cannot serve.

## **III. Guardian of Minor Child**

A parent may provide the court with directions concerning who would be appointed Guardian of any minor children. This is usually done in a will, and the parent's directions are most often conclusive on the issue of who will serve as Guardian of minor children. The guardian will make parental-type decisions for a minor child which will include where to live, what schools to attend, what medical treatment to receive, and generally control the child's activities as parental surrogate. The Guardian has no control over significant finances and usually works with a trustee regarding the payment of the child's expenses. This can be the most important and difficult decision for a parent to make; and it should be reviewed periodically to make certain the choice remains appropriate.

## **IV. Personal Representative**

The Personal Representative is responsible for administering your estate and wrapping up any unfinished details left outstanding at your death. Your will names who you would like to have serve as the Personal Representative, and the court will appoint that person or persons if willing and able to serve at the time of your death. The will also names a successor in the event that the first named person cannot serve. In some states, the Personal Representative is called the "Executor" or "Executrix".

The Personal Representative is charged under the law with attending to many details, such as gathering the decedent's assets, paying debts, filing income, estate and gift tax returns, and generally monitoring things during the course of the estate administration. After the business of the estate has been concluded (i.e., tax returns have been filed, debts paid and assets located and brought within the estate), the Personal Representative then distributes the assets according to the terms of the will. In order to carry out a proper administration of the estate, the nonprofessional Personal Representative usually deals with the decedent's professional advisers, such as lawyers, accountants, and financial advisors. By hiring these professionals, and seeing that tax returns are filed, etc., the Personal Representative discharges his or her duties as a fiduciary – he or she need not prepare the tax returns and make the financial decisions alone.

Typically, a trusted family member would serve as Personal Representative; but if no family member would be suitable, you can choose a professional or an institution to serve as Personal Representative of your estate.

## **V. Trustees**

The role of the Trustee is viewed by many as the most significant role of all (other than that of Guardian of a minor child), and can span a long period of time that includes your lifetime and the lifetimes of designated beneficiaries. Many trusts are typically intended to run at least for the lifetime of the surviving spouse. Frequently, both spouses are Trustees during the lifetime of the donor, and the surviving spouse and another person are named as successors. The successor would be put into place upon the death of the donor or upon the donor's incapacity. It is important to examine how long the trust will last and appoint trustees who will be appropriate at different times. The Agent under a power of attorney should have the power to add assets to such a trust if the principal becomes incapacitated; and in the event of advanced age and/or incapacity, revocable trusts sometimes will hold most of a person's investment portfolio.

A Trustee is charged with investing and monitoring the assets of the trust, as well as determining when to make trust distributions consistent with the direction provided by the trust document. The Trustee has a position of responsibility with respect to the trust assets, and thus needs to attend to the various issues that arise within each trust. Typically, the Trustee's major role is to ascertain the needs of the beneficiaries and invest the trust assets (usually with the help of professional financial advisors) to respond to those needs. The Trustee may, however, need to respond to more complex issues. If, for example, an issue arises concerning a closely held business owned by the trust, it would be the Trustee's responsibility to deal with that issue as well. The Trustee must review investment performance of the trust, either with or without the assistance of a professional investment advisor. If the Trustee is not an investment professional, and does not hire an investment advisor to assist in the financial affairs of the trust, he or she could easily be subject to criticism from the beneficiaries if the investments do not prosper. The primary responsibilities of the Trustee are in two areas: one is monitoring investment performance and business (including tax) issues, and the other is discretionary issues that may arise concerning beneficiary distributions (when and to whom).

## **VI. Who Might Serve as Fiduciary**

Legally, there are very few impediments to who may serve in any one of these roles as long as any individual who is chosen is of full legal age and capacity or is an appropriately formed financial institution (obviously a person should be the guardian of a minor). Thus, the range of those who may serve includes trusted family members, friends, known professionals and certain financial institutions that will take on such roles, including banks and trust companies. Documents can include a mixture of family members and professionals. The critical issue in selecting a fiduciary is determining what the likely responsibilities will be, and choosing a fiduciary who can take on these responsibilities most effectively, and in a way that is consistent with your desired treatment of the issues presented.

Fiduciaries need not execute all the technical details themselves. They simply need to choose appropriate professionals and make decisions in conjunction with the advice they receive from these professionals. It is thus important that any person you choose be responsible about choosing advisers and following their advice. A professional fiduciary, including an institution, will make more decisions without additional advice, but will still need some expertise from time to time.

The role of Trustee is often the most difficult to fill because it can cover a broad expanse of time (your

lifetime if you are incapacitated, and possibly the lifetimes of others), and the responsibilities include investment issues, as well as discretionary distribution and business decisions. The fiduciary who is best suited for making investment decisions themselves may not be best suited for making decisions about family distributions. Thus, some combination of individuals and institutions, or making certain that your fiduciaries seek investment advice, may be important. If you choose an institution that will provide fiduciary and investment decisions, then it is important to include the power of some other person to remove and replace that Trustee if the institution's performance is not acceptable.

From a practical perspective, it is important for you to discuss with prospective fiduciaries how decisions should be made, and how fees will be charged. If you choose an institution because of investment issues, how will it deal with family issues? Is it the person you meet at an institution who will make those decisions, or are decisions made by committee? If you choose an individual, how will he or she seek investment advice? In most situations, there is no clear choice that will suit all possibilities, so the key is careful selection, followed by flexibility in the document to remove and replace trustees.