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## Fiduciary Selection - A Critical Part of Any Well-Prepared Estate Plan

*by Richard M. Morgan & Loraine M. DiSalvo*

In the estate planning context, a “fiduciary” is someone who will serve in a role of authority with regard to you, your assets, or your minor children. Fiduciary roles which may be part of an estate plan can include an Executor, a Trustee, a Guardian and/or Conservator, an Attorney-in-Fact, and a Health Care Agent. Deciding who will serve in these roles can be one of the most critical decisions you need to make as part of creating your estate plan.

Some fiduciary positions must generally be filled by individual appointees, such as the roles of Attorney-in-Fact, Health Care Agent, and Guardian. Other fiduciary positions, such as the roles of Executor, Trustee, or Conservator, can be filled by individuals, but in some cases it may be better to use a corporate fiduciary, such as a bank or trust company. A corporate fiduciary can also be used along with an individual co-fiduciary in certain cases.

**How do you select a fiduciary?** Certain criteria apply to any fiduciary choice, and the consideration process should look at the following factors:

- **Is the nominee honest and trustworthy beyond doubt?** A fiduciary role generally carries with it a lot of power, often coupled with low or no outside supervision. You do not want a fiduciary role filled by someone who may be tempted to abuse its power.
- **Is the nominee responsible and willing/able to spend the time and effort to manage all needed tasks?** A fiduciary is responsible for carrying out a number of tasks, many of which have strict timing requirements, and many of which are tedious and potentially time-consuming. You need to be sure that the nominee will do everything needed in a timely manner, and with great attention to detail. The fiduciary will often be able to hire people to assist with tasks, but the fiduciary is still responsible for ensuring everything gets done on time and correctly.
- **Is the nominee generally reasonable and willing to work out disputes in a calm and logical manner?** If disputes or concerns arise, you want the fiduciary to be someone who will deal with the issues in a reasonable manner and help keep the various parties calm so the issues do not get out of hand. Part of the fiduciary’s job is to help avoid potentially destructive litigation, not to throw fuel on any fires.
- **Is the nominee someone who is good with financial issues?** Many fiduciary roles involve

dealing with assets - either your own or ones you have left to loved ones. Any nominee for such a fiduciary role needs to be able to handle financial and economic issues with safety and being conservative in mind. The fiduciary should not be someone who will make high-risk investments or take imprudent risks with the assets, and the fiduciary should also be someone who has enough sense to hire appropriate advisors, such as investment advisors, lawyers, and CPAs, when dealing with issues the fiduciary is not fully equipped to address alone.

- **Is the nominee someone who is not likely to create disharmony among your beneficiaries, and who does not have any strong conflicts of interest?** Some fiduciary roles, especially those of Executor and Trustee, have powers and responsibilities over beneficiaries and can affect the beneficiaries' interests in ways which the beneficiaries may not like. If the fiduciary is someone who is also a beneficiary, or who has a family relationship with the beneficiaries, the chance that the fiduciary's actions will make the beneficiaries unhappy may be significantly increased. For example, if one child is named as Executor or Trustee, where he or she needs to deal with issues such as how assets are invested or distributed, the other children may be unhappy even if all of the fiduciary child's actions are perfectly reasonable, simply due to resentment that the one child was given power over them. An all out family dispute can be the result of this situation. As another example, if a child is both the fiduciary and one of the beneficiaries, that child has to balance his beneficiary interest with his fiduciary duty to treat all beneficiaries fairly. If the other beneficiaries perceive the fiduciary child's actions as benefitting that child over other beneficiaries, it could lead to accusations that the fiduciary child breached his fiduciary duties, which can again lead to resentments and potentially destructive litigation.

**How do you decide to select a corporate fiduciary instead of, or in addition to, an individual?**

If there are insufficient assets available, then a corporate fiduciary may not be a realistic option (normally at least \$500,000 - \$1,000,000 in asset value, depending on the desired corporate fiduciary). However, if there are sufficient assets, you should consider selecting a corporate fiduciary, especially where there is not an obvious individual choice available. Corporate fiduciaries generally meet the criteria for fiduciary selection discussed above. In addition, the corporate fiduciary usually provides a team of dedicated professionals who are used to dealing with estate or trust administration issues, who have extensive experience and resources behind them, and who are dedicated to maintaining contact with the beneficiaries. Many people are afraid that a corporate fiduciary will cost too much. However, the fees charged by most corporate fiduciaries are often lower than the fees which would be paid to an individual fiduciary under Georgia statute, and the corporate fiduciary often provides many services for which the individual fiduciary would have to hire third parties, such as investment management and tax return preparation.

Corporate fiduciaries provide a neutral, third-party perspective, which can be very helpful when dealing with potentially sticky issues such as when and how to make distributions to different beneficiaries of an estate or trust. However, for situations where the advice of a family member, close friend, or an individual advisor who knows the beneficiaries well may also be helpful, a corporate fiduciary can be named along with the desired individual(s) as co-fiduciaries. In such a

situation, the corporate fiduciary can focus on the more routine tasks such as investment management, bill paying, and records maintenance, leaving the individual fiduciary free to focus on the beneficiaries' needs and wants. A great example of a situation where it can be beneficial to have both an individual and a corporate fiduciary would be a supplemental needs trust, where the trust is intended to provide for a disabled beneficiary without causing the beneficiary to lose eligibility for needs-tested benefits such as Medicaid. The corporate co-trustee of a supplemental needs trust can generally be counted on to ensure that the trust meets all restrictions and requirements, and the individual co-trustee can focus on communicating with the beneficiary and his caregivers to ensure that any needs or wants which the trust could fulfill are known, and that the beneficiary is receiving appropriate care and services, as well as companionship and fun.

### **What specific tasks do the different fiduciaries handle?**

- An **Attorney-in-Fact** is someone who can handle your finances and property matters on your behalf without court approval or oversight while you are still living. Having a Durable Power of Attorney which appoints an attorney-in-fact can help avoid the need for someone to be appointed as your conservator if you become incapacitated on a long-term basis during your lifetime. However, if you do not have someone who is completely trustworthy to serve in this role, you may be better off not creating a Durable Power of Attorney, since this position is easily abused.
- A **Health Care Agent** works with your doctors, hospital personnel, other health care providers, and health insurance companies on your behalf if and when you are incapacitated or otherwise unable to deal with these matters on your own behalf. Having an Advance Directive which appoints a Health Care Agent can help you avoid the need to have someone appointed as your guardian. It can also help ensure that the person making these decisions for you is the person you would want making them.
- A **Trustee** handles the long-term administration of any trusts created under your estate plan, including deciding how trust assets are invested and used for or distributed to the trust's beneficiaries. **Please note**, a Trustee can serve either for you, during your lifetime, if you have created a revocable living trust, or for your desired beneficiaries after your death.
- The **Executor** handles the probate and estate administration processes after your death, if there are any assets which need to be distributed under your Will. This is a relatively short term position. If the Will provides for assets to be distributed to any trusts, the Trustee appointed will take over eventually.
- The **Guardian** will take custody of any minor child or children who survive you (if the children's other parent is not still living), and effectively acts as a replacement parent.
- A **Conservator** is appointed to take care of any assets which may pass to a minor child outright; if you have a well-drafted estate plan which provides for trusts to be created for

minor children, a conservator may not be needed, unless the children already have assets in their names before your death.

As part of developing an estate plan, it is critical to consider fiduciary selection issues and select appropriate nominees for the various fiduciary roles. We at Morgan & DiSalvo have lots of experience in helping our clients think about these issues. We also have additional materials which discuss fiduciary roles and fiduciary selection. To request further information on these issues, or to schedule a meeting with us to review your current fiduciary choices and consider any necessary or desirable changes, please do not hesitate to contact us at (678) 720-0750 or by e-mail to [sollila@morgandisalvo.com](mailto:sollila@morgandisalvo.com).