



Corporate Fiduciaries for Estates & Trusts: Reliability, Prudence, Reasonableness, Protection and Peace of Mind

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Choosing the fiduciaries to carry out your estate plan can be the most important decisions you make in structuring your estate plan. Why is this issue so important? We start with the premise that most clients will want to maximize flexibility and minimize costs and hassles unless a reason exists to be more restrictive. With maximum flexibility comes a lot of power and discretion in your fiduciary, be it an Executor, a Trustee, an attorney-in-fact under your Power of Attorney or an agent under your Advance Directive for Health Care. Used properly, this power and discretion enables your fiduciaries to carry out your estate planning intent with the least cost and hassle, but if misused, your fiduciaries can cause significant damage not only to your hard-earned life savings but also to your family as well. An important part of the estate planning process is to counsel our clients in the importance of proper fiduciary selection so their estate plan can be carried out as intended and as smoothly as possible. We discussed this topic in our April 2010 Newsletter, which can be found [here](#).

In our prior Newsletter, we discussed what type of individual would make a good choice to serve in one or more fiduciary positions and offered criteria for making a prudent choice. A summary of those criteria follow:

1. Is the nominee honest and trustworthy beyond doubt?
2. Is the nominee responsible and willing/able to spend the time and effort to manage all needed tasks?
3. Is the nominee generally reasonable and willing to work out disputes in a calm and logical manner?
4. Is the nominee someone who is good with financial issues?
5. Is the nominee someone who is not likely to create disharmony among your beneficiaries, and who does not have any strong conflicts of interest?

While some clients have the perfect family members, friends or professional advisors to serve in the various fiduciary positions, this is definitely not the case for many clients, especially considering all of the suggested qualifications and the concerns in the client's particular family. In cases where the perfect individuals are either not available or where no individual would be a good choice in the client's particular situation, selection of a corporate fiduciary should be seriously considered.

What (and Who) Is a Corporate Fiduciary?

Corporate fiduciary is the generic term given to various types of trust companies, i.e. banks and other financial institutions with trust powers. Being involved in this area of the law since the 1980's, we have seen dramatic changes for the better in the number and quality of corporate fiduciaries.



Historically, corporate fiduciaries were primarily large banks. However, without sufficient competition, over the years they suffered from a lack of service and inadequate investment success. This void opened the door to both competition and eventually many changes in the trust law landscape.

As for competition, we first saw the big brokerage houses enter the field, then small groups of big-bank trust company professionals decided they could do it better in a boutique, trust-company-type setting. Finally, we had specialty trust companies enter the field. The specialty trust companies included those that would limit their services so the client could retain their existing financial advisors to work along with the trust company.

Another type of more specialized or opportunistic trust company was created to enable clients to use another state's laws since the trend had started for states to improve their trust laws to attract more trust business. Normally, in order to use another state's laws, you will either need an individual resident of that state or a trust company located in that state. Finally, large Wall Street financial institutions and trust companies that historically catered only to a number of ultra-wealthy families began to offer their services both throughout the United States and, later, throughout the world.

The Modern Corporate Fiduciary

Beyond an expansion of the types of entities that serve as Corporate Fiduciaries, there has been an important trend in estate planning regarding the durability of a decedent's choice of corporate fiduciary. It has now become more common to incorporate into estate planning documents the power to remove one corporate fiduciary and replace it with another one for any reason—or no reason. This has significantly changed the dynamics between beneficiaries and corporate fiduciaries.

Where previously beneficiaries felt stuck with a particular corporate fiduciary, now corporate fiduciaries understand they need to provide good service and continually earn the beneficiary's business. If a corporate fiduciary proves to be a bad fit, the beneficiaries can move on without needing to hire lawyers and fight it out in court, leading to substantially fewer disputes and, generally, happier beneficiaries. Of course, in cases where it would not be prudent to give this power to the beneficiary(ies), this type of removal and replacement power can also be given to another party. It should also be noted that while this power looks unlimited it actually contains a check and balance criteria. If the beneficiary wants to simply change the chosen corporate fiduciary for an unreasonable reason, for example where the corporate fiduciary refuses to provide for unreasonable spending habits, it is likely the case that the beneficiary will not be able to find another one to do it for them either, unless the other corporate fiduciary wants to open themselves up to liability. In fact, this just proved to be true in a recent GA case. In this case, the beneficiary went Trustee shopping since the existing corporate Trustee refused to make the requested unreasonable distribution. After a search, the beneficiary found a taker and the unreasonable distribution was made, but the corporate Trustee was later sued by the remainder beneficiaries. The corporate Trustee lost the lawsuit and owed a significant sum to pay for its imprudent action. I would think that this particular corporate fiduciary will never do such a thing again, and it will serve as a warning to any other in the industry as well.



So, where are we today with corporate fiduciary options? Clients now have a multitude of options from which to choose and the right choice will depend on the client's particular situation. The bottom line is that competition caused an explosion in development of the corporate fiduciary model, resulting in much more user-friendly options and pushing the once-stodgy trust companies into the present.

It should be noted that corporate fiduciaries can normally serve as Executors and Trustees, but some can only serve as Trustees and then only as to liquid assets. Corporate fiduciaries will, in general, neither serve as an attorney-in-fact under a Power of Attorney nor as a health care agent under an Advance Directive for Health Care. The corporate fiduciary can either serve as the sole Executor or Trustee or as a co-Executor or co-Trustee along with another individual.

How Much Does a Corporate Fiduciary Cost?

Because of ongoing competition, the cost for a corporate fiduciary is quite reasonable and is often less than the statutory fees that an individual fiduciary would otherwise be paid. While each corporate fiduciary has its own fee schedule, they all generally charge a fee that covers asset management (for example, 1% annually for assets under management) plus an extra .2% to .6% for the additional fiduciary services. If the corporate fiduciary is not responsible for the asset management, it will normally charge .5% to .6% in addition to the fees charged by the asset manager.

The practical effect is that most corporate fiduciaries make their money on asset management services and hope to break even on non-investment-related fiduciary services. As a result, corporate fiduciaries are generally fairly low cost, especially where professional asset management services are desired.

Situations Particularly Suited to a Corporate Fiduciary

There are a number of situations especially suited to the use of a corporate fiduciary. The primary ones we encounter are outlined below.

1. **No Appropriate Individual(s) to Serve.** You do not have good individuals to serve, either as the initial or the successor Executor or Trustee.
2. **Second Marriages:** You want to take care of your spouse if he or she survives you, but you also want to provide some protection for your successor beneficiaries, such as your children from a prior marriage. This protection can include ensuring that assets benefiting your spouse are only used in a reasonable and prudent manner. In addition, having a corporate fiduciary involved can prevent disputes and family dysfunction between your surviving spouse and your children from a prior marriage, which might otherwise occur if the spouse and/or a child (or any other individual who may favor one beneficiary over another) serves as the fiduciary.
3. **Protect Against Predators.** Corporate fiduciaries provide significant added protection (and peace of mind) where there is a concern that a surviving spouse or child (or other beneficiary) could be unduly influenced in a negative way by a predator, such as a future spouse, "friend" or any number of persons who may wish to take advantage of someone with wealth.



4. **Added Peace of Mind that Your Beneficiaries Will Be Financially Secure for as Long as You Want the Trusts to Last.** Corporate fiduciaries are subject to significant fiduciary duties, governmental regulations and ongoing audits, in addition to having liability insurance to cover serious breaches of their fiduciary duties. Their job is to take care of your beneficiaries, and they will either do that job or be replaced by another corporate fiduciary and/or be sued for a significant breach of fiduciary duty. Conversely, if you make a bad choice of individual fiduciary, the odds are higher that a breach and dispute will occur. By far the most disputes with fiduciaries involve individual fiduciaries. It is also more likely that an individual fiduciary will not have the personal funds available to make your beneficiaries whole again if a significant breach does occur.
5. **Back-Up Trustee:** In cases where you have chosen one or more individuals to serve, but it is possible that they may not be able to serve throughout the likely term of the trust(s), a corporate fiduciary is an excellent option as a back-up.
6. **Dynasty or Perpetual Trusts.** When you intend to use another state for its much longer-term or eliminated “rule against perpetuities” so your trust can continue for 300 years or more (or any amount of time well beyond the normal 90-year rule common in most states), you will likely need a Trustee in the desired state. This scenario normally requires you to select a corporate fiduciary in that state.
7. **Access Other Beneficial Laws in Another State.** In addition to possibly wanting longer-term trusts, you might also want to access more favorable state income tax rules (i.e., avoiding state income tax) or the state-specific asset protection and estate tax savings you could enjoy as the discretionary beneficiary of an irrevocable trust you set up during your life.
8. **Large or Complex Estates:** Corporate fiduciaries can often be very beneficial where the estate includes significant complexity, especially with assets that are difficult to manage or dispose of. Some Corporate Fiduciaries have special expertise in particular types of assets, such as forestry land.
9. **Special Needs Trusts:** Administering trusts for disabled beneficiaries with special needs can be very complicated. Corporate entities that specialize in the administration of special needs not only can ensure your beneficiary is adequately cared for; they can also ensure the trust meets complex government regulations that enable continued access to government benefits. You can still designate (and compensate) an individual to focus on the beneficiary’s emotional well-being and who makes specified or important decisions jointly with the corporate fiduciary.
10. **Difficult or At-Risk Beneficiaries:** If one or more of your beneficiaries has mental or emotional challenges that encourage addictive or compulsive behavior, a corporate fiduciary is often the best choice to deal with these difficult issues. If you wish to have a family member or friend help, you can name them as an advisor or co-Trustee and thereby shield them from some of the emotional, drama-filled tension that these scenarios usually involve.



11. **Foreign Beneficiaries (Spouse or Other):** The rules that apply when foreign beneficiaries are involved can be very complex. Using a competent U.S. corporate fiduciary may be legally required or simply the most prudent choice in this situation.
12. **Limited Distributions:** If you wish to significantly limit distributions for specific purposes, such as providing for education, extraordinary medical expenses and as a limited safety net, a corporate fiduciary can remain dispassionate, take the inevitable heat from the beneficiary and ensure that your wishes are met.
13. **Incentive Trusts:** To help positively effect a beneficiary's behavior after you are gone, you may wish to set up incentives where the beneficiary benefits from positive behaviors and suffers financially for poor choices and behaviors. For example, the trust could match a beneficiary's earnings on the positive side, but could also postpone or reduce payouts or stop them altogether if the beneficiary goes to jail for a felony or fails a drug test, etc. Using a corporate fiduciary rather than an individual helps ensure your intent is carried out. It also reduces the chances of family disharmony, since any negative interactions will occur between the possibly underachieving beneficiary and the corporate fiduciary.
14. **Asset Protection.** While well-drafted trusts can provide significant asset-protection benefits, this type of protection can be enhanced and strengthened when an independent corporate fiduciary is serving as the Trustee.

The Choice Is Yours

Who you choose to serve in your various fiduciary positions is a very important question—you are giving them a lot of power and you do not want it misused or even abused. If you choose someone who ends up cheating you, your estate or your trust, is too easily swayed by the unreasonable desires of your beneficiaries (or conversely is too strict), or fails to timely carry out his or her duties, all your hard work could be for naught. You are gone, but your estate will potentially suffer significant damage and destructive litigation.

We at Morgan & DiSalvo have years of experience helping our clients evaluate these issues. We also have additional materials that discuss fiduciary roles and fiduciary selection. To request further information or to schedule a meeting with us to review your current fiduciary choices and consider any necessary or desirable changes, we invite you to call (678) 720-0750 or email sollila@morgandisalvo.com.