

# It Takes More Than Trust To Be A Good Trustee

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In 33 years working with hundreds of families planning their estates and deciding on fiduciaries, I have seen what works. Families who use a thoughtful process will avoid surprises, build in contingencies and end up in a good spot.

## What is a trust and what does a trustee do?

**Trust.** A trust is a legal entity created by the “grantor”, aka the person who contributes the assets and decides on the terms, for a specific purpose.

**Trustee.** A trustee is the legal representative who controls the trust and is empowered to carry out the terms for the benefit of the beneficiaries. There are many types of trusts and hundreds of ways they can be structured. For illustration purposes, let’s assume that assets are put in trust for the general benefit of children or grandchildren.

## Trustee selection can be tricky

### Family, friend or financial institution?

Who should be the family's trustee is among the most important decisions a family must make. The inclination to select a family member or family friend is high.

**Family or friend.** When a non-professional is named trustee the assumption going in is that they understand the family dynamics and will “do the right thing” if extenuating circumstances arise. They may also choose to not charge a fee to the trust so it may be less expensive. However, requirements of the trustee are extensive, and unless the trustee has reasonable knowledge of the requirements, or commits to learning it, the pitfalls could outweigh the benefits. Secondly, the ability or capacity or the named individuals may diminish or the relationship with the family may go sour years after they were named. It happens, believe me.

**Corporate trustee.** Trust departments are knowledgeable about the laws, restrictions, and requirements. If they do something wrong there is a deep pocket to make it right and they will be around in 30 or 40 years when the terms of the trust need to be followed. That is why they charge fees. However, unless your relationship is large,

the service can be impersonal and the individual administrator often rotates regularly.

## A little history first

As recently as 40-50 years ago, it was common for people to open a trust relationship with a local bank and when the parents died the institution managed the money and charged fees for decades.

**It was a very good business.** Additionally, the language of the documents the trust companies provided made it difficult or near impossible for the trust department to be removed. That created an uninterrupted ongoing revenue stream, a very good business indeed.



**People got lazy.** When you know the clients can’t leave regardless of investment returns or service levels things can go poorly for the client. And they did. Eventually, courts required the trust departments to relinquish control and those practices, dare I say abusive, are long gone.

**Things are a lot better.** Today almost all new trust documents allow the trust to be moved from one institution to another quite easily. Most documents specify how a trustee can be changed and trust companies have realized the short-term revenue gains achieved by keeping business against the desires of the beneficiaries are not worth the reputational damage.

## Factors to Guide Selection

**Complexity, size and horizon.** Common factors guiding the trustee selection are the trust's

complexity, size and the expected time horizon. If the trust or trusts own significant assets to benefit many generations, it likely will require subjective assessments in the future. For this reason a professional trustee can be very helpful. Stories of well-intended family friends serving as trustee, and being too hard, too soft or negligent, fill volumes (and court dockets). On the other hand, the poor reputation earned by large bank trust departments over the years are equally numerous. So what is one to do?

**If the non-professional is chosen,** the first course of action is to have a qualified lawyer explain the terms, requirements, and expectations to all concerned. The second is to have a mechanism in place to regularly ensure all that should be done is being done: required distributions, waiver letters, tax return filings, and proper documentation of requests, deliberations and decisions.

**Schedule annual meetings.** Include at the meeting the drafting trust attorney, the trustee(s) and all adult beneficiaries. The trust attorney should review the terms of the trust, conditions for disbursements and offer general updates to all concerned. This allows the beneficiaries direct access to an informed neutral party and should reinforce the actions and decisions of the trustee, if any are in doubt.

**Corporate trustee.** If a professional trustee or corporate trust company is selected, a few considerations:

**1. Co-trustees.** Name a family friend and a corporate trustee to work together. It doesn't save any money but it helps ensure taxes will be filed on time and any non-standard disbursements will be handled correctly. It also affords the individual trustee “air cover” if discretion is required and requests are denied. This is my clear favorite option.

**2. Replacing your trustee.** Ensure there are provisions and a process in the trust document to replace the corporate trustee with a qualified successor trustee. This encourages good service. Today the better trust companies will not accept an assignment without this type of provision. If an unpopular decision is rendered

by the corporate trustee, odds are pretty good it is driven by law and not motivated by retaining assets on which to bill fees.

**3. Trust protectors.** Consider appointing a "trust protector". This is usually a person who is empowered to be informed of the activities of the trust and can advise beneficiaries. This can carry an additional expense and complexity but in larger situations is a good option to have.

**How to avoid being "hit up" from family.** This tactic is especially valuable when one family member is substantially wealthier than others and is regularly being asked to pay for the misfortunes of relatives. Consider establishing a "buffer trust". This is where you put money in a trust to take care of unspecified future family needs. Tell your relatives the trust company decides if their request qualifies for support and for how much. This demonstrates your concern for family members yet gets you off the hook for individual decisions. There are a few twists involved so ask your T&E attorney how to do it.

### Final Thoughts

The financial and emotional costs of an incorrectly administered trust can be very high. Tax penalties, disqualification, or litigation can be emotionally draining and expensive. More importantly, misunderstandings among family members, especially a generation down the line, can be devastating.

As the size, complexity and time horizon of the trust increases, the importance of proper communication and administration becomes exponential. The selection of the right trustee - personal or professional - is as important as the terms of the trust. Make it wisely.

### Is this all there is?

These findings apply to most situations, but not to all. A body of knowledge has been gathered through thousands of interactions with sophisticated accomplished professionals.

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