



The Who, What, When, Where, Why and How of Trusteeship

MAY 18, 2018



Roger A. James, Jr., JD, CTFA

What is the history, role and purpose of trusteeship?

The origin of Trusteeship is believed to have started almost four thousand years ago in ancient Egypt where the first wills were discovered. These well written documents described the passage of assets upon death in such great detail that they could have been written today. The idea of the proper stewardship of assets continued into the Roman Empire when it was customary to leave directives in wills to fraternal organizations and trade unions. These wills contained instructions on the administration and use of the assets in trust. From the eighth to the twelfth century in England, the idea of trusteeship built a great deal of momentum as individuals began to describe how they wanted assets managed for beneficiaries. The British courts finally began to recognize the executor, not as the owner of the assets, but rather the trustee.

Today's revocable trusts, which become irrevocable upon the testator's death, have three primary parties: a trust maker, a trustee, and a beneficiary. This separation in interest and title make up the very core of why trusteeship is so important. The idea that a trust maker gives a set of rules and instructions for how assets are to be held by a trustee for the benefit of a beneficiary, represents the central mission of trusteeship. This mission being the idea that a fiduciary holds the legal title to the assets, but standing above him is the beneficiary who has the equitable ownership of the property. The fiduciary trustee has a duty to provide for the beneficiary in a manner that is in keeping with good stewardship and the terms of the trust.

The trustee has a large number of duties and responsibilities to the trust maker and the beneficiaries. Some of these duties and responsibilities include: duties of loyalty, prudence, impartiality, administration of the trust, protection, investment management and control of trust property, diversification of investment assets, record keeping, reporting, communication with beneficiaries, non-commingling of trust assets with outside assets, and trust accounting.

WHY WOULD SOMEONE NEED OR WANT TO INVOLVE A TRUSTEE IN THEIR ESTATE PLAN TO SERVE UPON DEATH TODAY?

In today's complex world, there are many reasons why having a trustee can be important. Perhaps the primary overarching reason for involving a trustee is to maintain control and management of assets in accordance with the trust maker's terms after his or her death.



Some examples of why maintaining control can be important are in the protection of minors, disabled beneficiaries, those struggling with addiction, asset protection, marital protection, creditor protection, and in providing multi-generational tax planning. Anytime someone wishes to provide management and protection of assets for the benefit of a beneficiary in a structured way, as opposed to leaving the assets outright to the beneficiary, a trust and a trustee are warranted. A trustee can also be warranted when there is a unique type of asset to be held and maintained for the benefit of the beneficiary, such as a closely held business, mineral rights, or a unique type of real estate asset.

WHEN SHOULD A TRUSTEE BE INVOLVED?

A trustee can serve for a term that is short in duration, or a trustee can be involved over multiple generations of beneficiaries. Trustees usually step in when a trust maker becomes disabled and thus unable to manage affairs or upon the trust maker's death.

The timing of when a trustee is called to serve is controlled by the intent of the trust maker. In the case of minor children as beneficiaries, the trust may warrant that the trustee serve until the children reach a certain age, or the trustee might be called upon to serve over the lifetime of the beneficiaries. The intent of the trust maker governs how the trustee provides income and principal of the trust to the beneficiaries and for what duration.

In some instances, corporate trustees can manage assets for multiple generations of beneficiaries, supplementing lifestyles with income and principal as needed, while also preserving assets multi-generationally from estate tax.

WHO SHOULD CLIENTS CONSIDER WHEN SELECTING A TRUSTEE?

Individuals such as a close friend, sibling, child or spouse can serve in the role of trustee. While this may be the easy choice from a legal and personal perspective, this may not be a good choice for other reasons. The extensive nature of a trustee's duties and responsibilities make this a difficult and involved job to fulfill. Individuals who lead busy lives may not have the time or expertise to handle the complexities involved in administering a trust. Individuals serving may find that they feel a lack of expertise and are overworked and underpaid as they deal with unappreciative beneficiaries.

A professional trustee comes in the form of a corporate entity or trust company. This type of trustee can be beneficial in that it does not die, and thus can serve over longer periods of time. Also, this type of trustee has more expertise in the areas of trust administration, investment management, and accounting. Corporate trustees typically cost more in the way of fees, but this cost may be justified in the way the trust company is set up to handle the complexities of trust management.

Whether an individual or corporate entity is chosen, the trustee should be available, impartial, have strong management skills and provide good communication to the beneficiaries of the trust.

Individuals such as a close friend, sibling, child or spouse can serve in the role of trustee.



WHERE SHOULD A TRUSTEE BE LOCATED?

The key in any trustee-to-beneficiary relationship is good communication. With this in mind, it could be helpful to have a local trustee who is closer to the named beneficiaries of the trust. In today's world, this is not only difficult, but becomes almost impossible as the next generation of beneficiaries may live all over the country or even the world. The role of trusteeship can be served from any location, as long as the impartial investment of trust property is taking place in a prudent way and is being reported to beneficiaries regularly.

National trust companies can provide expertise and quality trust services from a national location to beneficiaries in any state and even in foreign locations.

Certain trust locations can provide favorable benefits to beneficiaries in the areas of trust taxation, asset protection, and longevity. States such as Alaska, South Dakota, Nevada and Delaware provide these types of trust advantages and may be worthwhile as a preferred trust situs. The trust's situs, for tax purposes, may be shifted to a different state in order to provide a lower income tax rate. Those creating these types of trusts should consider options for state trust situs depending on what types of benefits they hope to provide.

The key in any trustee-to-beneficiary relationship is good communication.

HOW DOES ONE GO ABOUT APPOINTING AND IMPLEMENTING THE USE OF A TRUSTEE?

A trust maker formally names a successor trustee to themselves in their revocable trust document. This trust document is typically drafted by an estate planning attorney and specifies when the trust maker will be deemed disabled, as well as when and how the trustee will serve upon the trust maker's death.

The trust document spells out in writing the trustee powers, guidelines and directives as how to handle the trust administration. Trustees will begin with an inventory of trust property and an identification of how to prudently manage, invest, and care for this trust property. The trustee's name will be added in the titling of trust assets to indicate the control and management authority of the trustee over trust assets. This process can involve new real property deeds, investment management account retitling, and proper retitling of any other trust assets.

The trustee can then oversee the management of all trust assets, whether handled by the trustee directly or by delegating responsibilities to another independent party. The trustee obtains a new tax identification number for the trust, once the trust becomes irrevocable. The trustee will also need to properly handle the income and principal of the trust assets, in keeping with the directive language of the trust. In some trust accounts, this can mean communicating with beneficiaries regarding their needs for income and/or principal for their health, education, maintenance and support needs.

A trust maker can also spell out how a trustee may be removed and replaced. Some trust makers may not want to allow beneficiaries the right to remove and replace a trustee. A common reason for this is for the protection of the control of assets. Others may wish

to not give all power to the trustee for fear they may be less responsive or provide less attention to detail with regard to investments. Many trust makers will only allow beneficiaries to be removed for what is defined by state statutes as just cause.

Trusteeship has grown more involved and detailed over the years, just as our lives have become equally more involved and detailed. The choice of who will serve as trustee has become almost as important as the terms of the trust and how to provide for trust beneficiaries. In estate planning today, trusteeship continues to play a vital role in the ongoing stewardship, control, and passage of assets to future generations.

