

INSIDE BUSINESS

The most consequential element of estate planning

My first job out of law school was as a law clerk for the chief judge at the Denver Probate Court, which is the only court in the state devoted exclusively to matters relating to wills, trusts, decedent's estates and protective proceedings. When I started, I expected that my time there would be spent deciphering the legal elements of forgery, undue influence, testamentary capacity and the other aspects of so-called "will contests." But the most divisive and hotly contested cases tended to arise in connection with fiduciary administration, including disputes between and among executors, trustees, conservators and other fiduciaries, and their wards and beneficiaries.

Sometimes, these disputes resulted from a gradual deterioration in relationships over time or were simply the product of unforeseeable wrongdoing. But an element common to many of these cases was what I would describe as careless or ill-considered fiduciary appointments.

My takeaway from this experience, and my experience as an attorney now practicing in the field of estate planning, is that careful consideration of fiduciary appointments is an essential, but occasionally under-emphasized, part of the estate

planning process. My advice, in turn, to those who are planning their estates, is to carefully evaluate fiduciary candidates, using relevant criteria applicable to each office.



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Pro Bono Publico

There are basically three situations when a fiduciary will be named or appointed to serve in the context of estate planning: (i) during the life of the principal, to make financial or personal decisions for the principal's benefit (ii) in the aftermath of the principal's death to administer and distribute the principal's estate, and, possibly, (iii) after the death of the principal for the long-term administration and distribution of the principal's property, in a trust established for the benefit of the principal's spouse or descendants.

In evaluating candidates, the principal should first consider whether the candidate is trustworthy and can be relied upon to carry out his or her duties in good faith. This is far and away the most important consideration. If the principal has material concerns about the trustworthiness of a fiduciary-candidate, he or she should try to find someone else for the job.

The principal should also consider whether the candidate is qualified or suited for the duties the candidate will be asked to perform. This consideration depends heavily on the context. A child who is suited to handle the principal's financial

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matters under a financial power of attorney, for example, might not be the best one to handle the principal's personal or medical decisions under a medical power of attorney.

The principal should try to identify a candidate who is likely to form constructive and healthy relationships with the beneficiaries, while still fulfilling the principal's instructions, even the hard ones. This can be tricky because, while the principal may sincerely want everyone to get along, the principal may have established a trust for the specific purpose of creating a check and balance on a beneficiary. If the relationship between a candidate and a beneficiary will likely be adversarial, an institutional fiduciary such as a trust department at a reputable bank might be worth considering.

The principal should carefully address conflicting interests. Conflicting interests commonly arise when a fiduciary-beneficiary and the other beneficiaries are (or may one day be) entitled to draw from the same pool of property. Impartiality can be a lot to expect from

a fiduciary-beneficiary, and favoritism (perceived or real) can be a lot to stomach by the nonfiduciary beneficiaries. Again, an independent or institutional fiduciary might be worth considering if the conflicting interests are substantial.

Finally, a principal should be careful when appointing committees of co-fiduciaries. A capable autocrat may not make the most friends, but functional autocracy is generally preferable to a dysfunctional democracy. Yet democracy is a beneficial institution when the goal is to keep family members involved, achieve buy-in between and among multiple family constituencies, or where many hands are needed to carry the load. It depends on the situation.

These are a few, but not all of the relevant factors that a principal should consider when nominating or appointing his or her fiduciaries. In many cases, the appropriate candidates are obvious, so I don't mean to overly complicate the issue of fiduciary selection. That being said, picking fiduciaries can sometimes be tough work, and no one is better qualified for the job than the principal.

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