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Perils of the amateur executor or trustee

This is a true story.

Virginia Escher died on December 30, 2008, at age 92, with an estate worth some $12.5 million. She nominated her cousin, Janice Specht, to be the executor of the estate. Janice had no experience at being an executor, never had owned stock, and, in fact, never had been in an attorney's office. Nevertheless, she accepted the job. Ms. Escher's lawyer was Mary Backsman, who had 50 years of experience in estate planning. Ms. Specht retained Ms. Backsman as the estate's attorney, which is customary.

Backsman did not reveal that she was battling brain cancer at the time.

Specht knew that a substantial estate tax was going to be due, and she knew the due date. She also knew that shares of UPS stock would have to be sold to raise the needed cash. Specht followed up with Backsman concerning progress on administering the estate, and she was assured that everything was fine. The assurances continued after Specht received notices from the probate court that estate accountings had not been timely filed. When the deadline for the estate tax went by, Backsman reported that she had filed for an extension, but she had not. Additional irregularities piled up, but Specht did not act.

Fourteen months after the estate tax should have been paid, Specht obtained a new attorney, who filed an estate tax return within 90 days. The IRS assessed some $1.1 million in penalties and interest, which the estate paid. The estate in turn sued Backsman for malpractice, a suit that was settled about a year later.

Next the estate sought a refund of the penalties and interest, because the estate had relied upon the advice of counsel. No such relief is available, the District Court held, even if the attorney involved were incompetent. The Court of Appeals affirmed the decision. Specht had many warning signs of trouble. Her failure to act sooner amounted to willful neglect of the problem. The disability of the attorney did not render Specht disabled.

Ordinary situations

The stakes are high for multimillion-dollar estates, but amateur executors have run into trouble managing moderate-sized estates. The website erassure.com details some examples of executors being sued for their missteps:

- An executor held a garage sale to turn the decedent's "junk" into dollars. Unfortunately, the executor failed to recognize the true value of an oil painting, and he sold it for $10. Actual value: $65,000.
- The son of the decedent was allowed to live in the decedent's home rent free for a year. Lost income to the estate came to $15,000.
- While settling an estate, the executor made a gift of the decedent's boat to his brother-in-law. The estate's

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beneficiaries brought a lawsuit alleging that the executor was not impartial. The lawsuit was not successful, but the executor incurred $84,000 in legal expenses defending his actions. Who paid the $84,000? The estate had to, reducing what was left for the beneficiaries.

Rules of thumb

Here are six rules that will help the amateur executor or trustee stay out of trouble.

You may need professional help in managing the estate or trust. A trustee must safeguard and invest trust assets, prepare tax returns, and keep meticulous records of distributions of trust income and principal. The amateur trustee can hire experts for assistance, and the fees for the experts generally can be charged to the trust.

A corporate fiduciary, such as us, has substantial expertise in-house, which may reduce the costs for outside experts. More importantly, we already have trust accounting systems in place. We keep meticulous records as a matter of routine. We are also supervised by banking regulators in the discharge of our duties.

You must be impartial. The duty of impartiality is the essence of "fiduciary duty," a legal standard of performance that all trustees must meet. That may not sound difficult, but it can be a source of conflict. Some trusts have very general guidelines for distributions, such as to "maintain reasonable comfort" or provide for an "accustomed manner of living." That standard can be tricky to interpret, and beneficiaries may not always see eye-to-eye with the trustee. More specificity isn't always helpful. If a trust is to provide for education expenses of a beneficiary, what should be done about a perpetual student who seems to have no plans for ever completing studies and getting a job? What was the trust creator's intent in that situation?

Sometimes the best way to avoid family disputes is to vest a neutral third party, such as us, with the decision-making authority. When a young adult beneficiary tells us that "Grandpa would have wanted me to have a Mercedes," we have the ability to discern the truth of the assertion. We have the ability to say, "No."

Choosing investments can be tricky. Trusts normally are invested in a diversified portfolio of securities. However, that doesn't tell us much. What will be more important, current income for current beneficiaries, or asset growth for future beneficiaries? Should value stocks be preferred to growth stocks? How important are preservation of trust principal and risk minimization?

Concentrated assets can be especially problematic, such as when a trust holds shares of a family business. The trust needs to be clear on whether diversification is required, or if certain large holdings will be acceptable. As important as this issue is, managing an ordinary securities portfolio can be very challenging in today's financial markets. We are prepared for that challenge, as we meet it every day. A family member trustee may need to turn to outside experts for this task as well.

You could get sued. Every potential trustee should first read the trust instrument carefully, then hire a lawyer to explain anything that is unclear. The risk of a lawsuit from a disgruntled beneficiary is very real. To minimize conflicts, all decisions need to be thoroughly documented, with the explanation and reasoning provided.

One of the little-known benefits of using a corporate fiduciary is that if a mistake should be made in trust administration, the fiduciary has the resources to make good. Although trust departments do not care to advertise this fact, it is often mentioned by estate planning attorneys when they consult on the question of choosing a trustee.

Don't expect to enjoy it. The family trustee is entitled to compensation, just as we are. Sometimes family members do not ask for pay, even though the work may go on for years. As a result, it may seem like a thankless job.

Make sure there's an escape hatch. You may decline an appointment as trustee, but once you have accepted the responsibility, it may not be so easy to surrender. Again, the terms of the trust document will be key. In many cases your fiduciary obligations will continue until your successor has agreed to take over.

Whom will *you* choose?

Have you nominated a family member to serve as executor of your estate, or as your trustee? Are you confident that the person has the ability to handle the job?

We have the skills, the experience and the knowledge to handle properly the job of estate settlement. Trusteeship is our everyday business. We are available and we are impartial. We understand the nature of fiduciary responsibilities, and we know how to discharge them.

And for all this, our fees are generally comparable to what an inexperienced individual would receive. In some cases our experience will help to reduce estate shrinkage, increasing the amount available for beneficiaries.

Would you like to learn more? Please call on us for more details about our estate settlement service. ☐

Core competencies

Here are the basic benefits that a corporate fiduciary, such as us, provides in estate settlement:

- We treat estate and trust administration as a full-time job.
- We have facilities and systems for asset management that individuals lack.
- Estate assets and trust funds in our care are doubly protected, by both internal audits and regulatory oversight by state or federal officials.
- We have an unlimited life, while an individual may die, become incompetent or just disappear.
- We bring long experience and group judgment to the job of investment management.
- We will treat all beneficiaries impartially, and most beneficiaries will appreciate that.
- We can withstand pressure when a wayward beneficiary asks for more from a trust than was intended, while an individual trustee might give in to requests for "more."

Holographic wills

Because a will is a vitally important document, one that controls the disposition of property interests and may have significant tax consequences as well, the requirements for the valid execution are formal. The specifics vary from state to state, but in general two witnesses and the signature of the testator are required, as well as the date of execution.

In many states an exception to these formalities is provided for an entirely handwritten will, known in legal circles as a holographic will. Again, the rules vary from state to state, but a signature and a clear expression of testamentary intentions are normally essential. Traditionally, the entire document must be in the testator's handwriting, but witnesses are not required.

A will that is created by filling in the blanks on a preprinted form is in a gray area. Arguably, the testator's handwriting has been used for the most important parts of the will, but probate courts are more comfortable if such do-it-yourself efforts are witnessed.

A will on a phone?

A recent case from Michigan put a new light on these issues.

Duane Horton, age 21, was a trust beneficiary and in the care of a conservator. In his journal Duane wrote: "I am truly sorry about this. . . . My final note, my farewell is on my phone. The app should be open. If not look on evernote, 'Last Note.' " Duane then killed himself.

The "Last Note" was an electronic file containing apologies, religious thoughts, messages to specific individuals, typos, and the following paragraph:

"Have my uncle go through my stuff, pick out the stuff that belonged to my dad and/or grandma, and take it. If there is something he doesn't want, feel free to keep it and do with it what you will. My guns (aside from the shotgun that belonged to my dad) are your's to do with what you will. Make sure my car goes to Jody if at all possible. If at all possible, make sure that my trust fund goes to my half sister Shella, and only her. Not my mother. All of my other stuff is you're do whatever you want with. I do ask that anything you well, you give 10% of the money to the church, 50% to my sister Shella, and the remaining 40% is your's to do whatever you want with."

The note had Duane's full name typed at the end. The conservator offered the journal entry and the note as Duane's last will and testament, even though it did not meet the statutory requirements for either a formal will or a holographic will. Duane's mother opposed the acceptance of these documents. If they were rejected, the mother would inherit the entire estate under the laws of intestacy, as Duane had no other heirs.

The probate court found that under Michigan law, there was clear and convincing evidence that Duane intended the electronic document to communicate his testamentary intentions. It was accepted as his will, so the mother lost out. The Michigan Court of Appeals recently affirmed that decision.

Consequences

Estate planners have expressed concern about what this decision may mean for the executors of future estates. Will the executor now have a duty to go through a decedent's papers and electronic files in search of documents that might constitute a will? What if an individual who already has a will creates a handwritten "amendment," altering the dispositive provisions? What if such a handwritten note were the result of undue influence or a delusion?

Uncertainty about testamentary intentions is what sometimes causes probate to become prolonged. The best way to be confident that one's estate plans will be implemented without undue delay is to obtain the services of an experienced estate planning attorney for the drafting and execution of one's last will and testament. ☐

Rollover permitted

Husband and Wife placed their property in a revocable trust. When Husband died, Wife became the trustee of the trust. Husband owned an IRA, which listed the revocable trust as its beneficiary.

A survivor's trust was created for Wife, and the IRA became an asset of that trust. Wife was entitled to all the income of the survivor's trust, to any principal needed for her health and happiness, and she had the power to invade the trust, taking possession of any trust assets. Wife exercised her power to invade to direct the IRA to distribute all of its assets to a non-IRA account in the survivor's trust. That money was then, within 60 days, rolled into a new IRA in Wife's name.

Tax consequences? Wife has died, and her executor asked the IRS for guidance.

The news is all good. Husband's IRA will not be treated as an inherited IRA, but as the Wife's IRA, because she was the sole beneficiary of the survivor trust. As such, she is allowed to roll the money into a new IRA, so her rollover was valid. Therefore, there will be no income tax on the amounts temporarily held outside the IRA awaiting the rollover.

Backdoor Roth IRA contributions

Under current law, higher-income individuals are not permitted to contribute to a Roth IRA. The limit for single filers is $135,000, and $199,000 for married couples with a joint return.

However, a work-around is available. Big earners are allowed to make non-deductible contributions to traditional IRAs. The traditional IRA may later be converted to a Roth IRA, and there is no income restriction on the conversions.

The IRS generally is not happy when a taxpayer uses a series of steps to get around limitations in the tax code. However, this particular strategy has been implicitly blessed by the Congress. The Conference Report explaining the Tax Cuts and Jobs Act includes this footnote: "Although an individual with [adjusted gross income] exceeding certain limits is not permitted to make a contribution directly to a Roth IRA, the individual can make a contribution to a traditional IRA and convert the traditional IRA to a Roth IRA."

The Tax Cuts and Jobs Act made conversions from traditional IRAs to Roth IRAs irrevocable—there's no going back just because the tax cost of the conversion turned out to be higher than expected. However, the IRS clarified earlier this year that the new rule applies to 2018 and future conversions. Conversions from 2017 may still be reversed if appropriate. ☐