

Wealth management

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YourMONEY MATTER\$

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Who should be your trustee?

Bank trust departments and trust companies are already fiduciaries and always have been. You could say that we were the pioneers of fiduciary responsibility.

So, you've decided on a trust plan. It may be a living trust for yourself, a marital trust for your spouse, testamentary trusts for your heirs, or one of the many other possible wealth management needs that are best addressed with a trust.

Next question. Who will be your trustee? The choice of trustee may be crucial to the success of your plan.

"Fiduciary duty—what's that?"

Trusts are not ordinary investment accounts, even though sound asset management is central to every trust. The trustee of every trust has legal duties to the trust and to its beneficiaries. (See "The fiduciary duty checklist" on page 2 for an itemization.) Most importantly, a fiduciary must put the interests of trust beneficiaries ahead of his or her own. Under the Dodd-Frank legislation overhauling regulation of Wall Street, the SEC has been mulling whether to extend the concept of fiduciary duty to all investment advisors, which might better meet the public's expectations. No final decisions have been announced as of this writing.

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The management of a trust involves much more than day-to-day investment supervision, important though that may be. Trusts typically have several beneficiaries, and these beneficiaries often have interests that are adverse to some extent. The trustee has fiduciary obligations to each of the beneficiaries, and satisfying these disparate agendas is one of the core responsibilities of trusteeship.

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The fiduciary duty checklist



The American College of Trust and Estate Counsel, a professional organization of lawyers dedicated to improving probate and trust practices, created *What It Means to Be a Trustee: A Guide for Clients*. The Guide

notes that the following obligations are imposed upon the trustees of most trusts:

- Duty to administer the trust by its terms.
- Duty of skill and care.
- Duty to give notices.
- Duty to furnish information and to communicate.
- Duty to account.
- Duty of loyalty.
- Duty to avoid conflict of interest (applies when a trustee is also a beneficiary).
- Duty to segregate trust property.
- Duty of impartiality.
- Duty to invest.
- Duty to enforce and defend claims.
- Duty of confidentiality.

Although one might have an intuitive understanding of what each of these duties might entail, they can be quite complex in specific cases. Entire legal treatises might be written about any one of these duties, as well as upon their interactions. Every trustee is charged with having this body of legal knowledge at his or her fingertips at all times.

Trustee . . . continued

Some trusts permit invasion of principal, either subject to a standard or in the trustee's sole discretion. Some trusts "spray" their income beneficiaries, in amounts determined appropriate by the trustee. Some trusts include accounting flexibility; that is, items that normally might be credited to principal (such as capital gains) may, should the trustee so decide, be applied instead to income. Decisions such as these are essential to the success of the trust plan.

One might expect the job to be time-consuming, and one would be entirely correct. It's understandable, then, that any individual would hesitate to take on the burden of trusteeship when there is an alternative available.

The ability to say no

A trust is, essentially, a long-term wealth management plan created by a trust's grantor. The plan implements the grantor's values and vision. The trustee promises to

implement that plan, in a manner consistent with the trust's purposes and instructions.

Does it ever happen that events outstrip the grantor's vision, so that some modifications are needed? Of course. A wide range of developments, from the very good to the very bad, may make the exercise of prudent judgment by the trustee necessary to further the trust's purposes.

Does it ever happen that beneficiaries would like to have the plan modified because they don't agree fully with the grantor's vision? Yes, that happens as well. It may happen that a beneficiary wants access to trust capital earlier than provided in the trust, or for purposes outside the trust's limits. Very often beneficiaries don't fully understand the benefits of a trust-based wealth management plan. The trust document should address this possibility. Its provisions must be followed to the letter.

Making your choice

Selecting your trustee will be among the most important decisions that you make, after you've decided that a trust is right for you. Here are some questions that you might put to the potential candidates:

- For how many trusts have you served as trustee?
- What size trusts have you managed?
- How is your trust division staffed?
- What happens if my regular trust officer is unavailable?
- How will conflicts among beneficiaries be handled?
- Can I have a family member serve as cotrustee?
- Where are your offices? Are they close to the beneficiaries?
- Tell me about your recordkeeping systems.
- How frequently will I meet with a trust officer?
- What do you charge for trusteeship?

May we tell you more?

We are well qualified for all the tasks of trusteeship. It is a job that we do every day, with our full attention. We are staffed for it, experienced, and always ready to serve.

When you are ready to take the serious step of including a trust in your long-term financial and wealth management plans, please call upon us to learn more about how we may be of service to you. We look forward to answering all of your questions. □

How we are different



There are many important, built-in benefits to choosing a corporate fiduciary, such as us, as your trustee. For example:

- We treat estate and trust administration as a full-time job.
- We have facilities and systems for asset management that individuals lack.

- Trust funds in our care are doubly protected, both by 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 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."

Art and taxes

Day to day, the issue of the value of a work of art is worked out in the free market, with auction houses, galleries, museums, and collectors as active participants. But there are moments in which the value of art becomes an IRS concern: when art is donated to a museum and generates an income tax deduction; when an owner dies owning a very valuable piece, triggering estate taxes; or when a gift of art to an individual or heir creates a gift tax liability.

To resolve the question of value, the IRS employs an Art Advisory Panel of 25 leading experts in the field, such as gallery directors and historians. When an audit includes artwork with a claimed value of \$50,000 or more per item, the issue must be referred to the panel. To ensure objectivity, the panel is told nothing about the underlying tax issue. For deductions, the taxpayer wants a maximum value, while for gifts and estate transfers, the minimum value would be preferred.

The panel meets twice each year in Washington, D.C. The proceedings are secret, to preserve taxpayer privacy. However, details of one very unusual case recently became public.

The valuable piece that can't be sold

Ilena Sonnabend, a renowned dealer in modern art, died at age 92 in 2007. Her personal collection of modern art was worth a fortune—\$876 million, to be specific, according to the appraisers hired by the estate. The estate paid \$331 million in federal estate taxes and another \$140 million in death taxes to the state of New York. The heirs had to sell part of the collection to raise the money.

One piece generated controversy. Robert Rauschenberg's collage, *Canyon*, included a stuffed bald eagle. Although it may have been the most famous work in Sonnabend's collection, the estate assigned it a value of \$0, based upon expert advice. That's because under long-standing U.S. laws, trafficking in stuffed eagles is illegal, punishable by a stay in a federal penitentiary. In 1981, the Fish and Wildlife Service raised the issue with Sonnabend. She obtained permission to continue owning *Canyon* and lending it to museums, with the explicit restriction that she could never sell it or export it for sale. *Canyon* is currently on loan to the Metropolitan Museum of Art in New York City.

Under the tax code, the value of any asset is what a willing buyer would pay a willing seller, with neither being under pressure to close the deal. Obviously, if an item cannot be sold under any circumstances, its monetary value is zero.

That's not how the IRS sees it. There have been cases when the black market value of restricted items, such as protected Native American antiquities, has been held



Robert Rauschenberg, *Canyon*, 1959

Combine painting: oil, pencil, paper, fabric, metal, cardboard box, printed paper, printed reproductions, photograph, wood, paint tube, and mirror on canvas, with oil on bald eagle, string and pillow; 86 3/4 x 70 x 24 in. Sonnabend Collection, New York.

Art © Estate of Robert Rauschenberg/
Licensed by VAGA, New York, NY



subject in full to the estate tax. The Art Advisory Panel valued *Canyon* at \$65 million. Adding that figure to the Sonnabend estate meant another \$29 million in estate taxes, and the IRS also tacked on \$11.7 million as a gross undervaluation penalty.

Where is the willing buyer in this equation? Who would risk prison to make a purchase of an asset that could never be sold without additional jeopardy? According to an attorney for the estate, as reported by *Forbes* magazine, the IRS said that there could be a reclusive Chinese billionaire who might want to add this piece to his collection!

The estate is taking the issue to the Tax Court.

Estate planning is critical

What should Sonnabend have done with *Canyon* to resolve the thorny tax questions before her death? Not much, because this is a most unusual situation. She could have given the collage to a museum, and perhaps she should have, but under the tax law she could not have claimed an income tax deduction for doing so. The controversy was left for her heirs to grapple with.

If you have valuable assets, especially if there are items of great but uncertain value, such as fine art, do your heirs a great favor. Work with an experienced estate planner on documenting what you own and preparing a clear plan for its disposition. □

Horsing around

As a young man, Robin Trupp competed in equestrian events. He did well enough to be considered for the U.S. Olympic equestrian team. Robin's horse-riding days ended when he entered law school.



But his interest in horses remained and was renewed when his son Austin began to ride in equestrian shows. In the 1990s, Trupp began to represent clients in the equine industry, establishing a solo practice in that field. He joined a law firm in 2004 and continued to practice equine industry law, as well as doing other legal work.

Trupp attended equestrian shows with his son, which usually ran Fridays through Sundays. He was known as the attorney father of Austin Trupp, so people would approach him with their legal problems at the shows. He claimed to have acquired 40 clients in this manner over the years.

In the 2005 tax year, Trupp agreed to pay certain equestrian-related expenses to people who allowed his son to ride their horses at shows. He now proposes to deduct \$71,836 as "business promotion" expenses in that year.

It's not a winning argument, the Tax Court has ruled. The equestrian activities were not engaged in for profit, at least not enough to support the deduction. Factors that the Court considered included:

- the manner in which the activity was carried out;
- expertise of the taxpayer in the field;
- time and effort invested in the activity;
- expectation that assets used in the activity might appreciate in value;
- success of the taxpayer in carrying out similar or dissimilar activities in the past;
- history of income or losses in the activity;
- amount of occasional profits;
- financial status of the taxpayer; and
- elements of personal pleasure or recreation.

Although Trupp claimed 40 new clients in the equine field, he only documented income from four such, and the most important of these was unrelated to his attendance at horse shows. He did not advertise his presence at the shows but waited for potential clients to approach him. Given Trupp's background as a distinguished equestrian, he must have taken great pleasure in attending the events in which his son participated. Although Trupp may have gained some business through attendance, it was not sufficient to support the tax deduction. □



William G. Middleton, CFA, CFP
*Vice President,
Trust Officer*



Donna L. Chapman, CTFA
*Vice President,
Trust Officer*



Brian C. Ulch, MBA
*Vice President,
Trust Officer*



Lori J. Wilson, CPA, CTFA
*Vice President,
Trust Officer*



Carol Shira
*Vice President,
Trust Officer*

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