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Tapping the family lawyer to be trustee

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When Mom and Dad meet with their lawyer to begin to draft an estate plan, one of the most important questions is, who will be the trustee upon the surviving parent's death? Or upon the death of one and the incompetence of the other? If they have three children, they should pick an independent third party. Were they to name all three children as co-trustees, there may be paralysis since, unless the trust provides for majority rule, unanimity is required. Forcing the children to work together creates the opportunity for fissures in the family relationship. If they have one child, the child may not be sophisticated and may need

protection from the child's own potential problems, e.g., a future bad marriage or other creditors. The parents may be fortunate and have a perfect independent third party - an uncle, aunt, sibling, parent, business colleague or neighbor. However, all too often there is no perfect person, so the options include lumping together two imperfect people as co-trustees or selecting a corporate trustee.

There is often another excellent choice: the family lawyer. Many families have a "family" lawyer. That lawyer might be the business lawyer who has advised the parents regarding the family business for decades. It might be the real estate lawyer who has helped the parents solve problems with their investment real estate for decades. It might even be their estate planning lawyer. However, if the estate planning lawyer is a candidate, there are legislative hurdles to overcome.

In 1992 the Los Angeles Times published a series of articles detailing how probate lawyer James D. Gunderson had improperly benefitted from the estates of many residents of Leisure World whose wills or trusts he or members of his law firm had prepared. As a result, the state Legislature in 1993 passed a law which, among other steps, (i) invalidated most bequests to attorneys who prepare wills and trusts naming themselves as beneficiaries (Probate Code Section 21350); (ii) requires lawyers to obtain approval in order to receive compensation both as trustees and as attorneys for the trust (Probate Code Section 15687); and (iii) presumes that a lawyer who drafted the trust and is named as trustee should be removed (Probate Code Section 15642(a)(6)).

Many parents believe that they do not need an independent trustee because the estate plan provides that, upon the surviving parent's death, the assets are to be distributed outright, free of trust, to the children. However, they do not realize how long an "immediate distribution" might take. An estate that is not subject to estate tax may take a year due to decisions about valuing assets and potentially selling some to effect a fair distribution among the children. If the estate is of a size such that an estate tax return (IRS Form 706) should be filed, the period stretches out for many years. Assume the surviving parent dies on Jan. 1, 2014. The estate tax return is due nine months later, Oct. 1, 2014. Those returns are often put on extension (six months), which extends the period to April 1, 2015. The IRS is likely to issue an audit notice 12 to 18 months after the return is filed, Oct. 1, 2016. IRS audits typically take the better part of a year, Oct. 1, 2017. The 3-year statute of limitations cannot be extended, so it ends on April 1, 2018. If agreement is not reached at audit, the estate must file a tax court petition, so the estate will be on a double-track: preparing for trial and negotiating with IRS appeals. From the filing in tax court to the trial may be 30 months, Oct. 1, 2020. From the time of the hearing to the decision is often one year, Oct. 1, 2021. So the total time from the date of death to the end of the dispute can be three years nine months if resolved at audit, and seven years, nine months if the dispute continues into tax court.

What will the lawyer, as trustee, charge? The trust can provide for an hourly basis. Or the lawyer can reach an agreement with the beneficiaries. Most often compensation is based what a corporate trustee would charge, e.g., 1 percent for the first \$5,000,000, with the percentage falling for the next \$5,000,000, and the percentage negotiated for amounts above that. Any fee is subject to a court's review.

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How is the lawyer protected from the beneficiaries? An errors and omissions policy is a must. Most property and casualty agents have never sold a trustee's E&O policy, and the applications are geared to professional trustees and directors and officers of public companies. The policies are inexpensive compared to the risk.

The "gold standard" in protecting a trustee is a court order approving the trustee's action. Probate Code Section 17200 gives the trustee (and the beneficiaries) many ways to put issues in front of the judge. Also, in 2004 the Legislature added a new method to gain approval for certain types of actions without the need to go to court. Probate Code Section 16500 et seq. authorizes the trustee to give notices of certain types of proposed actions to the beneficiaries. If the beneficiaries do not object within 45 days, the trustee is protected.

Lawyers make good independent trustees for their clients. There are rules which must be carefully observed, of course, for the protection of the lawyers, their clients and the beneficiaries. However, when that obstacle course is carefully run, the result for all parties can be an excellent one.

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