

# Understanding The Fiduciary Roles In An Estate Plan

*It is our belief that Legacy Planning is one of the four critical areas which needs to be addressed in the development of a Wealth Management Plan. A key component to an effective Legacy Plan is the drafting of integrated estate planning documents. Understanding the various fiduciary roles that need to be filled within those documents is paramount in the development process.*

*This white paper is intended to help the reader understand more fully the various fiduciary roles that need to be filled in Estate Planning documents.*



## **Artisan Wealth Management, LLC**

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From asset protection strategies to professional asset management through LPL Financial, our team of professionals looks forward to helping you define what success means to you and mapping out a course to help you work towards that reality. We invite you to learn more about us and our unique services by reviewing our web site at [www.artisanwealthmanagement.com](http://www.artisanwealthmanagement.com). We look forward to being your guide in your journey toward financial success.

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# Understanding The Fiduciary Roles In An Estate Plan

Artisan Wealth Management, LLC believes that Legacy Planning is one of the four critical areas that must be addressed in the development of an integrated Wealth Management Plan. One task in this overall process which tends to give some clients difficulty in the development stages of the Legacy Plan is the selection of the various fiduciaries which need to be named within estate planning documents. This White Paper will strive to help educate the reader regarding these Fiduciary roles.

Before venturing into the various Fiduciary roles themselves, it is first important to have a brief discussion regarding the term “Fiduciary.” This term has to do with “Fiduciary Duty” which is a legal and ethical relationship of confidence and trust between two or more parties, most commonly a Fiduciary and a Principal.

The Fiduciary is required to act at all times for the sole benefit and interest of the Principal. This legal and ethical obligation also extends to the Principal’s heirs in the event of the death of the Principal until such time as the terms of the Fiduciary relationship expire. The term Fiduciary finds its origin in the Latin words “fides”, meaning faith, and “fiducia”, meaning trust.

When it comes to estate planning there are various documents which may be drafted to assist one in working toward achieving his/her legacy planning objectives. Many of those documents name specific individuals to serve in a Fiduciary capacity of some sort. While it is critical to name at least one person for each Fiduciary role, it is also prudent to nominate contingent/successor Fiduciaries in the event that the primary Fiduciary predeceases you or is no longer able and/or willing to serve in this role at some point in the future.

It is extremely important to note that each State has its own set of laws governing estate planning documents and the provisions which they may contain. If you fail to have your own set of estate documents drafted, and/or you fail to clearly name individuals to serve in various Fiduciary roles, the probate court will have to appoint fiduciaries on your behalf, using a statutory preference list established under your State’s probate law. This may not lead to your desired outcome. Regardless, this procedure will be an expense for your estate.

It is imperative that you seek the counsel of a qualified estate planning professional with expertise in the laws of your State to assist you in the development of an integrated set of estate planning documents. Let us look at each document type and discuss the typical roles which need to be filled.

## WILL

A Last Will and Testament is a legal declaration by which an individual, the testator, names one or more other persons to serve in various Fiduciary roles and provides for the ultimate disposition of his/her probate assets at death. There are two main types of Wills – a Simple Will and a Tax Sensitive Will. A Simple Will, as the name implies, is the simplest form of this estate planning document designed to give the testator the ability to transfer his/her assets to any number of Beneficiaries with little or no regard to estate and gift tax consequences. A Tax Sensitive Will, of which there are many variations, attempts to minimize estate and gift tax exposure through the use of Testamentary Trusts. A Testamentary Trust is a Trust which is drafted within a Will, however, it only comes into existence and gets funded at the death of the testator.

**Executor.** An Executor/Executrix is nominated by the testator to carry out the directions of the Will. Typically, the Executor/Executrix is the individual responsible for offering the Will for probate and administering the distribution of estate assets to heirs. Some of the other typical duties of the Executor/Executrix are:

- Collecting and arranging for the payment of debts of the estate;
- Managing the disbursement of property/assets to the Beneficiaries named in the Will;
- Obtaining information about any other potential heirs;
- Ensuring that all necessary paperwork gets filed with appropriate governmental agencies; and
- Verify that estate and income taxes have been calculated, returns filed and tax payments made.

An individual serving in this role should have good administrative skills. He/she should be well organized and be able to pay attention to detail. If you are considering naming an heir to be your Executor/Executrix, you may want to consider adding a Co-Executor/Executrix to offer some checks and balances. It is important to nominate a Primary and Secondary-Contingent and perhaps even a Tertiary-Contingent Executor/Executrix.

**Trustee.** As mentioned above, some Wills may create Testamentary Trusts. In the event the Will creates a Testamentary Trust, a Trustee must be nominated in the Will. The Trustee of a Testamentary Trust serves in the same capacity as a Trustee of an Inter Vivos Trust (Living Trust). For more information regarding Trustee, please see Trustee under Trust below.

**Guardian.** A Guardian is an individual you nominate to be responsible for your child in the event both parents die prior to that child reaching the age of majority (which varies by State). The Guardian will have every right regarding child-rearing a parent would have, including making health care decisions and educational decisions. Some factors that should be considered when selecting a guardian are:

- Age of the Guardian;
- Child-rearing and social attitudes;
- Relative income and lifestyle;
- The Guardian's own family size and circumstances;
- Location and residence of the Guardian; and
- Religious beliefs and practices.

An individual serving as Guardian for your child should have an established relationship with that child. It is important to remember that there will never be an individual you can nominate that will be a replacement for you. The best you can do is select someone who, in your opinion, will raise your child in a similar manner as you would have raised him/her if you were still living. It is often advisable to ensure that the person serving as Guardian is not the same person named as Trustee over assets benefiting the minor child.

## **TRUST**

A Trust is a legal document which establishes a relationship whereby property (including real, tangible and intangible) is managed by one person (or persons, or organizations) for the benefit of another. A Trust is created by a Settlor, who entrusts some or all of their property to a Trustee of their choice. The Trustee holds the legal title to the Trust property, but they are obliged to hold the property for the benefit of one or more other individuals and/or organizations (Beneficiaries), specified by the Settlor, who hold equitable title.

***Trustee.*** A Trustee is the legal term for the individual named in a Trust to hold property designated by the Settlor for the benefit of one or more individuals and/or organizations named as Beneficiaries of the Trust by the Settlor. Some of the duties of a Trustee include:

- Carry out the expressed terms of the Trust instrument;
- To defend the trust;
- Prudently invest trust assets;
- Maintain impartiality among the Beneficiaries;
- Keep Beneficiaries informed about the Trust; and
- Administer the Trust in the best interest of the Beneficiaries.

A person or organization serving in this capacity should have good administrative skills and a good understanding of financial and investment matters. The Trustee is responsible for the prudent management of Trust property which may involve selecting investments and managing the purchase and sale of assets for the benefit of the Beneficiaries. The Trustee can hire professionals to assist in the management of the assets.

***Trust Protector.*** A Trust Protector is a person appointed under the Trust instrument by the Settlor to direct or restrain the Trustee(s) in relation to their administration of the Trust. This concept originated with Offshore Trusts, where Settlers were concerned about appointing a Trust Company in a small, distant country as sole Trustee of an Offshore Trust. However, Protectors now form a part of mainstream estate planning in those jurisdictions which recognize them. The powers vested in the Protector can vary both in terms of jurisdictional law and the terms of the Trust instrument. Some powers may include:

- Power to remove and appoint Trustee(s);
- Power to approve the addition or removal of Beneficiaries;
- Power to approve proposed Trust distributions;
- Power to approve the appointment of an Advisor;
- Power to approve investment recommendations;

- Power to appoint replacement Protector(s); and
- Power to terminate the Trust or approve the termination of the Trust.

The person serving in this capacity should have a very clear understanding of the intended purpose of the Trust. Often, this is referred to as the spirit of the Trust. This person should have a good attention to detail and be able to handle the administrative task of oversight.

**Trust Advisor.** The Trust Advisor is an individual or firm named by the Settlor to assist the Trustee in the management of Trust assets. The Trust Advisor is responsible for developing an investment policy for the Trust assets and presenting investment recommendations to the Trustee. Some of the duties of a Trust Advisor include:

- Create and monitor an investment policy for Trust assets;
- Select and manage individual investments for the Trust; and
- Develop and present regular reports regarding the performance and allocation of Trust assets.

The person or firm serving in this capacity should be willing to sign a Fiduciary Oath stating that they will operate in a Fiduciary capacity with regard to the asset management service they will be providing. They should be experienced in serving in this role and have the resources necessary to provide the services now and in the future.

## **POWER OF ATTORNEY**

A Power of Attorney is a document authorizing one individual (Attorney-In-Fact) to act on behalf of another – the one having the Power of Attorney drafted (Principal) – in legal and/or business matters. There are two main forms of Power of Attorney – Springing and Durable. A Springing Power of Attorney is one which only becomes effective upon the occurrence of a specified event or date, such as an incapacitating disability. This type of Power usually requires a court proceeding to stipulate to the fact that the specified event or date has actually come to pass and places the Power into effect. The second type, a Durable Power of Attorney, is an immediate authorization to act which survives incapacity of the Principal.

**Attorney-In-Fact.** An Attorney-In-Fact is the individual appointed in a Power of Attorney to act on behalf of the Principal. This individual has the responsibility and legal obligation to act in the best interest of the Principal and to be completely open and honest with the Principal in all matters. Some powers held by an Attorney-In-Fact include:

- Power to transact financial matters on behalf of the Principal;
- Power to make gifts on behalf of the Principal;
- Authorization to open and close bank and investment accounts on behalf of the Principal;
- Authorization to access safety deposit boxes;
- Authorization to buy and/or sell real, tangible and intangible property of the Principal; and
- Power to transact business matters on behalf of the Principal.

A person serving in this capacity should be one who you trust entirely as they essentially have almost every right to handle matters related to your financial life that you yourself hold. He/she should be

knowledgeable of both financial and business matters in general and be aware of specific financial and/or business issues related to your unique situation. He/she should have the expertise to handle these specific issues related to your unique situation.

## **ADVANCE HEALTH CARE DIRECTIVE**

Also known as a Living Will, Health Care Proxy, Advance Directive and/or Advance Decision, an Advance Health Care Directive is a legal document which lays out instructions by an individual specifying what actions should be taken for their medical care in the event that they are no longer able to make their intentions known at the time due to illness and/or incapacity. It often includes information regarding the specific course of medical treatment that is to be followed by health care providers and caregivers. It may forbid the use of various kinds of burdensome medical treatment. It is designed to facilitate the expression of wishes in the absence of an ability to give informed consent due to illness and/or incapacity.

***Health Care Representative.*** A Health Care Representative is an individual appointed in the Advance Health Care Directive to make decisions on behalf of the Principal when the Principal is no longer able to offer informed consent due to illness and/or disability. With the continual advances in health care treatment and technology, it is often difficult in address all the possible situations that could arise. The appointment of a Health Care Representative helps to ensure that your wishes will be honored as this individual can make decisions based on information that may not have been available during the drafting of the Advance Health Care Directive. The Health Care Representative is often referred to as having a Limited Power of Attorney with regard to Health Care Matters. The Health Care Representative is empowered only after a qualified physician treating the Principal determines that the Principal is unable to make decisions regarding his/her health care due to illness and/or disability. Some powers the Health Care Representative may have include:

- Access to all medical information of the Principal;
- Ability to remove or sustain feeding and/or hydration tubes if they are the only thing keeping the Principal alive;
- Approve or disallow certain medical treatment;
- Authorize a “Do Not Resuscitate Order”;
- Sign the Principal out of a health care facility Against Medical Advice; and
- Move the Principal from one health care provider to another.

The person serving in this capacity should have an intimate understanding of your desires regarding medical treatment. He/she should be able to act based on your wishes as opposed to his/her own biases.