6 Things to Ask Before Agreeing to Be a Trustee

Being asked to serve as the trustee of the trust of a family member is a great honor. It means that the family member trusts your judgment and is willing to put the welfare of the beneficiary or beneficiaries in your hands. But being a trustee is also a great responsibility. You need to go into it with your eyes wide open. Here are six questions to ask before saying “yes”:

1. **May I read the trust?** The trust document is your instruction manual. It tells you what you should do with the funds or other property you will be entrusted to manage. Make sure you read it and understand it. Ask the drafting attorney any questions you may have.
2. **What are the goals of the grantor (the person creating the trust)?** Unfortunately, most trusts say little or nothing about their purpose. They give the trustee considerable discretion about how to spend trust funds with little or no guidance. Often the trusts say that the trustee may distribute principal for the benefit of the surviving spouse or children for their “health, education, maintenance and support.” Is this a limitation, meaning you can’t pay for a yacht (despite arguments from the son that he needs it for his mental health)? Or is it a mandate that you pay to support the surviving spouse even if he could work and it means depleting the funds before they pass to the next generation? How are you to balance the needs of current and future beneficiaries? It is important that you ask the grantor while you can. It may even be useful if the trust’s creator can put her intentions in riding in the form of a letter or memorandum addressed to you.
3. **How much help will I receive?** As trustee, will you be on

your own or working with a co-trustee? If working with one or more co-trustees, how will you divvy up the duties? If the co-trustee is a professional or an institution, such as a bank or trust company, will it take charge of investments, accounting and tax issues, and simply consult with you on questions about distributions? If you do not have a professional co-trustee, can you hire attorneys, accountants and investment advisors as needed to make sure you operate the trust properly?

4. **How long will my responsibilities last?** Are you being asked to take this duty on until the youngest minor child reaches age 25, in other words for a clearly limited amount of time, or for an indefinite period that could last the rest of your life? In either case, under what terms can you resign? Do you name your successor or does someone else?
5. **What is my liability?** Generally trustees are relieved of liability in the trust document unless they are grossly negligent or intentionally violate their responsibilities. In addition, professional trustees are generally held to a higher standard than family members or friends. What this means is that you won't be held liable if for instance you get professional help with the trust investments and the investments happen to drop in value. However, if you use your neighbor who is a financial planner as your adviser without checking to see if he has run afoul of the applicable licensing agencies, and he pockets the trust funds, you may be held liable. A well-respected Massachusetts attorney who served as trustee on many trusts used a friend as an investment adviser who put the trust funds in risky investments just before the 2008-2009 stock market crash. The attorney was held personally liable and suspended from the practice of law. So, be careful and read what the trust says in terms of relieving you of personal liability.

6. **Will I be compensated?** Often family members and friends serve as trustees without compensation. However, if the duties are especially demanding, it is not inappropriate for trustees to be paid something. The question then is how much. Professionals generally charge an annual fee of 1 percent of assets in the trust. So, the annual fee for a trust holding $1 million would be $10,000. Often, professionals charge a higher percentage of smaller trusts and a lower percentage of larger trusts. If you are doing all of the work for a trust, including investments, distributions and accounting, it would not be inappropriate to charge a similar fee. However, if you are paying others to perform these functions or are acting as co-trustee with a professional trustee, charging this much may be seen as inappropriate. A typical fee in such a case is a quarter of what the professional trustee charges, or .25 percent (often referred to by financial professionals as 25 basis points). In any case, it's important for you to read what the trust says about trustee compensation and discuss the issue with the grantor.

If after getting answers to all these questions you feel comfortable serving as trustee, then by all means accept the role. It is an honor to be asked and you will provide a great service to the grantor and beneficiaries.

For more on the different kinds of trusts, click here.

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How Your IRA Can Benefit Both Your Heirs and Charity

Do you want to use your IRA to help a charity, but also benefit your heirs? Instead of leaving your IRA directly to your children, you can leave it to a charitable remainder unitrust (CRUT) while still benefiting your children. With rules about inherited IRAs potentially in flux, this may be an attractive estate planning option.

Currently, when a non-spouse inherits an IRA, the beneficiary can choose to "stretch" out the IRA by taking distributions over his or her lifetime and passing what is left onto future generations. This allows the money to grow tax-deferred over the course of the beneficiary's life and to be passed on to his or her beneficiaries.

While a stretch IRA can be a good deal for your beneficiaries, it isn't always taken advantage of. If the inherited IRA isn't retitled properly, the IRA will have to be liquidated. In addition, it may not be an option for much longer because both Congress and President Obama have proposed changing the law to limit distributions to non-spousal beneficiaries to five years.

Instead of leaving an IRA directly to your heirs, an alternative is to leave the IRA to a CRUT. A CRUT is an irrevocable trust that provides the beneficiaries with income for a set number of years or for life. The beneficiaries receive a set percentage from the trust during their lifetime. When they die, the remainder in the trust goes to the charity (or charities) of your choice.

To name a CRUT as the beneficiary of an IRA, you must first put a provision in your will creating the CRUT. This needs to be done by an attorney. Then you can change the beneficiary on

the IRA to the CRUT. While your heirs may receive less money overall than if they had stretched out the IRA, they should receive more money than if they were required to cash out the IRA after five years. Naming a CRUT as a beneficiary on an IRA also has positive estate tax implications. The estate will receive a deduction based on the remainder interest of the CRUT.

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How to Choose a Trustee

If you create a trust, you will need a separate person or institution, called a "trustee," to manage the trust either now or in the future, depending on the type of trust. Choosing the right trustee is crucial to making sure your wishes are carried out. The choice is important because being a trustee can be a difficult job, with a trustee's duties including making proper investments, paying bills, keeping accounts, and preparing tax returns.

A trust is a legal arrangement through which a trustee holds legal title to property for another person, called a "beneficiary." The trust document will name the trustee, although there are several different types of trusts. The simplest one is a revocable living trust in which the person who creates the trust maintains control of the trust while he or she is alive. In this situation, the trust document will

name a successor trustee to take over after the original trustee dies or becomes incapacitated. Other trusts – such as an irrevocable trust or special needs trust – may have a separate trustee from the start.

The law isn't very strict about who may serve as your trustee, as long as the person is legally competent, meaning he or she is over 18 years of age and is capable of managing his or her own affairs. The main consideration when selecting a trustee is picking someone who is trustworthy. The trustee has a duty to manage the trust in the beneficiary's best interest. The trustee does not need legal or financial expertise, but he or she must have good judgment. In the case of a special needs trust, the trustee should have knowledge of federal benefits programs.

Another consideration is that the trustee be able to manage the trust for an extended period of time. Your choice of trustee should be someone who will likely be around for a long time and who has the time to devote to trustee duties. It is important that the trustee be of sound mind and body.

If you don't know anyone who meets these qualifications, you can look into hiring an independent trustee. This can be an individual or an institution with no beneficial interest in the trust. Some examples include: a bank or trust company, a professional trustee, an investment advisor or manager, an investment banker, an accountant or a lawyer. In addition to being independent, a professional trustee will usually have experience and expertise in managing trusts. If you aren't comfortable with having a stranger manage the trust, it may be possible to choose a family member and a professional trustee as co-trustees. The downside to hiring an independent trustee is that the trustee will charge a fee, which is usually a percentage of the trust.

Whomever you choose as trustee, it is important to revaluate your choice every few years. The person who is right today may

not be right tomorrow. Your attorney can help you determine who is the best trustee for you.

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What Is Cost Basis and How Do You Prove It?

Knowing the "cost basis" of your property is important for tax purposes, but proving cost basis can be difficult. Cost basis adjusts at death, so it is a good idea to appraise property when a joint owner dies.

Cost basis is the monetary value of an item for tax purposes. When determining whether a capital gains tax is owed on property, the basis is used to determine whether an asset has increased or decreased in value. For example, if you purchase a house for $150,000, that is the cost basis. The cost basis can be increased by improvements to the property. If there are no improvements and you later sell the house for $250,000, you will have to pay taxes on the $100,000 increase in value. (However, if the property is your principal residence, you can exclude up to $250,000 in gain, or up to $500,000 for a couple.)

When a property owner dies, the cost basis of the property is "stepped up." This means the current value of the property

becomes the basis. For example, suppose you inherit a house that was purchased years ago for $50,000 and it is now worth $250,000. You will receive a step up from the original cost basis from $50,000 to $250,000. If you sell the property right away, you will not owe any capital gains taxes.

When a joint owner dies, half of the value of the property is stepped up. For example, suppose a husband and wife buy property for $200,000, and then the husband dies when the property has a fair market value of $300,000. The new cost basis of the property for the wife will be $250,000 ($100,000 for the wife's original 50 percent interest and $150,000 for the other half passed to her at the husband's death).

The burden is on the property owner to prove cost basis, and it isn't always easy to prove, especially if it has been awhile since the property was purchased or improvements were made. Homeowners should keep good records of improvements to a house, which means keeping receipts and purchase orders. If a joint owner of property dies, you should get the property appraised to show the value at the time it is "stepped up" in basis. Be sure to save the documentation so you can use it later.

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Woman's Efforts to Change

Will Without Professional Assistance Backfire

Just as making a will without the help of a qualified attorney can be dangerous, trying to change an existing will on your own can fail as well. A recent court decision in Minnesota serves as a cautionary reminder to anyone thinking of altering their estate plan on their own.

Esther Sullivan executed a will in 2006, that gave half of her property to a former employee of hers, Tara Jean Johnson. The grandson of Ms. Sullivan, Joseph VanHale, received a lesser share. Two years later, in 2008, Ms. Sullivan allegedly attempted to change her 2006 will by marking up a photocopy of it and writing her initials next to each change and signing and dating the bottom of each page. She allegedly wrote on top of the 2008 photocopy, "[t]he Will dated January 19, 2006 is void and to be replace[d] with this and all written in changes." Among the changes was that Mr. VanHale would replace Ms. Johnson as the beneficiary of half her estate. In 2010, Ms. Sullivan allegedly attempted to execute another will using a form she downloaded from the Internet. This document named Mr. VanHale as her only beneficiary.

After Ms. Sullivan's death in 2013, the probate court had to decide which of the three wills should be followed. Mr. VanHale contended that the 2010 document was a valid will, while Ms. Johnson argued for the 2006 will. The probate court ruled that the 2008 photocopy and the 2010 downloaded document were invalid because they did not comply with the state's requirements for a valid will, which include that the will must be signed by at least two witnesses. The court held that although Ms. Sullivan probably intended to revoke the 2006 will, she did not do so successfully. Mr. VanHale appealed, arguing that Ms. Sullivan clearly intended to revoke the 2006 will and that the 2010 document was valid.

On August 17, 2015, the Court of Appeals of Minnesota agreed with the lower court that the 2006 will should be the one admitted to probate. The court ruled that only an original will, not a photocopy, can be revoked. The court also agreed with the lower court that the 2010 document had not been validly executed.

If Ms. Sullivan did change her mind and decide that she wanted her grandson to inherit her estate, the fact that she didn't do it properly meant that far from helping her grandson, she cost him a tidy sum in legal fees. People change their minds, and circumstances can change as well – marriage, divorce, the birth of children – and estate plans need to be revised along with these changes.

To read the court's decision in the case, *In re the Estate of Sullivan* (Minn. Ct. App., No. A14– 2112, Aug. 17, 2015), click here.

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