



FIDUCIARIES



The information provided in this document is meant for the sole use of Active Duty service members, retirees, their families, and those individuals eligible for legal assistance. The information is general in nature and meant only to provide a brief overview of various legal matters. Rights and responsibilities vary widely according to the particular set of circumstances in each case. Laws can vary across states, services, and civilian jurisdictions and laws are changed from time to time. Do not rely upon the general restatements of background information presented here without discussing your specific situation with a legal professional.

General Information

Fiduciaries are individuals or trust companies that act for the benefit of another. Executors, trustees, and personal representatives are all fiduciaries. An **executor** or **personal representative** is the individual or trust company that settles the estate of a testator according to the terms of the will. A **trustee** is an individual or trust company that holds legal title to property for the benefit of another and acts according to the terms of the trust. You nominate these fiduciaries, if applicable, in your will or trust document. After the probate court admits the will to probate, the probate court will issue letters testamentary that give the executor the power to act on behalf of the estate. If no will exists, the court will provide letters of administration to the executor providing the power to act on behalf of the estate.

Fiduciaries can accept or decline to serve in that capacity and can be compensated for their time. Consequently, you should name a primary and an alternate in your will or other document. Fiduciary work is time-consuming and can be difficult, but the fiduciary can pay a professional out of the estate or trust assets to assist him with the tasks requiring legal or financial expertise. Of course, these fees will reduce the amount of money or assets available for the beneficiaries of the trust or estate. When choosing a fiduciary, you should nominate someone who is trustworthy, responsible, and capable of handling the job. There may also be state law requirements that impact who can act in a fiduciary capacity. Before you nominate a fiduciary in your will, you should specify the job requirements and ask the person's consent to perform those activities.

Frequently Asked Questions

Q: WHOM SHOULD I NOMINATE AS MY EXECUTOR?

A. It depends on your individual circumstances. One approach is to appoint someone with no potential conflict of interest—that is, someone who does not stand to gain from your will. This individual could be a friend, lawyer, or bank. If the estate is large or has other complicating issues (e.g. someone will likely contest the will), a paid professional is often advisable. In situations where there is little possibility of a will contest or when the estate value is relatively small (i.e. less than \$500,000), a mature friend or family member who will waive (refuse) the fee to which he would be entitled, may be the best solution.

Q: WHAT DOES AN EXECUTOR DO?

A. An executor is responsible for guiding the will through probate to legal acceptance of its validity, including defending it against will contests; collecting the assets of the estate; evaluating and paying claims against the estate; filing the estate tax return and estate's income tax return and paying the taxes; distributing money and assets to beneficiaries; raising money to pay claims by selling assets; and preparing and filing a budget and accounting for the court. Once the executor has closed out the estate, his duties are complete. Most estates can go through probate in less than a year, although some estates may take a few years to close.

Q: ARE THERE ANY RESTRICTIONS ON WHOM I CAN NOMINATE AS MY EXECUTOR?

A. Yes. An executor generally cannot be a minor (under 18), a convicted felon, or a non-US citizen. Additionally, some states require the executor to be a resident of the state where the property is being probated. If the executor is not a resident of the state, they can usually appoint a resident to serve as their agent for service of process.



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Q: WHAT ARE THE DUTIES OF THE TRUSTEE?

A. Your trustee will collect the trust assets, invest the assets, pay bills, file accountings and tax returns, make decisions about distributions to the beneficiaries, and manage the trust assets according to the trust agreement and local law. The duties will also vary with the nature of the trust property. Your trustee has the legal right and responsibility to manage and control the trust assets and the trustee will have the powers provided by state law and enumerated in the trust document to accomplish this mission. The trustee is a fiduciary and is subject to strict responsibilities and higher standards of care and performance than someone who is dealing with his or her own property. Since your trustee is not required to accept your nomination, you should name an alternate trustee in your will or trust agreement.

Q: WHO SHOULD I APPOINT AS MY TRUSTEE?

A. This decision depends on your individual circumstances, especially the value and type of your assets. Ability, durability, integrity, experience, judgment, understanding, and solvency are all qualities to look for whether the trust is big or small. Additionally, because a trust can last for several generations—and to ensure your trust is protected from unforeseen events like the death of your trustee—you should choose multiple successor trustees to take over in the event your trustee is no longer able to perform his or her duties. There are several options:

- (1) Many people choose *family members* to serve as trustees. If a family member is competent to handle the financial matters involved, has the time and interest to do so, and if you are not afraid of family conflicts, a family member trustee for a small to medium sized trust may save administration costs. You should consult with an attorney before nominating a family member if the family member is also a beneficiary of the trust; this can create adverse estate tax consequences for your estate or income tax consequences for the trustee if the appointment is not properly drafted.
- (2) You can name a *bank or trust company* to manage the assets, and in certain situations you *must* name a domestic bank as one of your trustees. Although you will pay a fee for an institution's services, one benefit of choosing an institutional trustee is permanency; banks and trust companies are permanent institutions that can manage your trust for decades. Additionally, they have professional knowledge of and experience with investment options, are nonbiased, and are regulated by law. However, most institutions require the trust assets be a certain amount (generally \$500,000 or more) before agreeing to act as trustee.
- (3) You can name a *family member and an institution as co-trustees*. This option can be more comfortable for beneficiaries, since the person distributing assets is someone they know and trust, while also having the advantage of institutional expertise and permanence. However, this option may be more expensive if both trustees receive full fees.

Q: WHAT IF MY TRUSTEE MISMANAGES MY TRUST ASSETS?

A. You can provide in your will or trust agreement a procedure for removing a trustee if the beneficiaries become dissatisfied. There could be adverse tax consequences to the beneficiaries with the power to remove a trustee, so it is important to discuss this with your attorney.