Personal Representatives and Fiduciaries: Executors, Administrators and Trustees and Their Duties

Tax and Estates Alert
By: William C. Hussey, II

The death of a loved one or close friend is a traumatic experience. In addition to the emotional anguish, those who are charged with dealing with the decedent’s personal and financial affairs following death are often left with many more questions than answers regarding their duties and responsibilities. This article explores some of the basic aspects of estate administration and describes the general duties of a personal representative, be it an executor, an administrator or a trustee, following death.

Introduction

After an individual’s death, his or her assets will be gathered, business affairs settled, debts paid, necessary tax returns filed, and assets distributed as the deceased individual (generally referred to as the “decedent”) directed. These activities generally will be conducted on behalf of the decedent by a person acting in a fiduciary capacity, either as executor (in some states called a personal representative), an administrator (if the person dies without a will) or as trustee, depending upon how the decedent held his or her property.

In most instances, when a person dies owning property of more than a de minimis value, it is necessary to appoint someone to administer the estate. That person (it could be one or more individuals, a bank or trust company, or both) who acts for, or “stands in the shoes of,” the deceased is generally called the personal representative. If the decedent dies “testate” – that is, with a Will – an Executor is appointed as the personal representative. If the decedent dies intestate – i.e., without a Will – an Administrator is appointed as the personal representative. The duties and responsibilities of the personal representative, and even the title of the personal representative, may change depending on the state laws and circumstances involved, but the need for such a person (or persons) is shared by all.

There can be other issues for the personal representative to handle aside from those involving financial considerations. For example, a decedent might have had a child from a previous marriage for whom he was paying support. There could have been an outstanding agreement under which the decedent, or the decedent and his wife, was to purchase real estate, with the settlement or closing date after the date of the decedent’s death. Even if the decedent’s affairs were precisely in order and there were no outstanding personal or business debts, a personal representative might be necessary to distribute the decedent’s assets among his spouse and the children. There are, in fact, few situations in which property of a decedent can be transferred at death without the appointment of a personal representative.

As a first step, it is helpful to know the meaning of a few common terms:

“Administrator” – (A woman is sometimes called an “administratrix”) An individual (or sometimes a trust company) that settles the estate of a decedent who dies without a will according to the state laws of intestacy.
“Fiduciary” - An individual or trust company that acts for the benefit of another. Trustees, executors, administrators and other types of personal representatives are all fiduciaries.

“Grantor” - (Also called “settlor” or “trustor”) An individual who conveys property by means of a trust; the person whose wishes are expressed in the trust.

“Testator” - A person who has made a valid will (a woman is sometimes called a “testatrix”).

“Beneficiary” - A person for whose benefit a will or trust was made; the person who is to receive property, either outright or in trust, either presently or at a future date.

“Trustee” - 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.

“Executor” - (Also called “personal representative”; a woman is sometimes called an “executrix”) An individual or trust company that settles the estate of a testator according to the terms of the will.

“Principal and Income” - Respectively, the property or capital of an estate or trust and the returns from the property, such as interest, dividends, rents, etc. In some cases, gain resulting from appreciation in value may also be income.

**Personal Representatives of an Estate**

**THE EXECUTOR OR EXECUTRIX**

The title of the personal representative depends on the method by which he or she (or it, in the case of a bank or trust company) was selected or appointed. If a deceased specifically names a person or institution to act for him or her in his or her will, and if the will is accepted as valid, the named personal representative is known as the executor (male) or executrix (female). In cases when more than one individual or an individual and an institution are appointed to act, the joint designation is usually executors. Corporate entities (banks and trust companies) are also called executors.

**THE ADMINISTRATOR OR ADMINISTRATRIX**

If the deceased left no valid will, and therefore has failed to designate his or her personal representative, a personal representative (called an administrator) is appointed by the Probate Office or the Register of Wills office having jurisdiction over the decedent’s estate. This usually takes place in the state and county of the decedent’s domicile. In most instances, state statutes stipulate the person who is entitled to be the administrator.

Usually, the order of preference is similar to the order in which an estate passes to the family of someone who dies without a will. In other words, the spouse or adult children are usually named administrator. It is possible, however, that a more distant family member could be named, or even creditors or other strangers to the estate and to the decedent. If the decedent failed to take advantage of his right to name a personal representative, and if no persons with close relationships are available, the court, in its discretion, might appoint someone unknown to the decedent and unfamiliar with his affairs. This is often the case when the court is concerned about possible conflicts of interest or the rights of creditors or other beneficiaries.
DUTIES AND RESPONSIBILITIES

When a person dies, his or her property must be collected by the personal representative. After debts, taxes, and expenses are paid, the remaining assets are distributed to the decedent’s beneficiaries. Distribution is determined by the person’s will, or the intestacy laws (laws that govern the distribution of your estate if you die without a valid will) of the state in which the decedent was living at the time of death. It is the executor’s or the administrator’s responsibility to collect and distribute the assets and to pay any death taxes and expenses of the decedent.

While many executors and administrators perform these designated tasks in an expeditious and prudent manner, this is not always the case. Moreover, state law usually holds the personal representative to the standard of care of a “reasonable, prudent individual” under all circumstances. What is reasonable and prudent to the personal representative when performing his tasks, however, is not always so to the beneficiaries, especially retrospectively.

The various decisions to be made by the personal representative can often cause complaints by the beneficiaries. Sometimes complaints escalate into lawsuits against the personal representative(s). If the court feels that the personal representative has not acted reasonably and in the best interests of the estate and beneficiaries, the personal representative can be surcharged, which means that the personal representative is personally liable for undue mistakes made in the administration of the decedent’s estate.

Administration of the Estate

As a general rule, the administration of an estate or trust after an individual has died requires the personal representative to address certain routine issues and follow several standard steps to distribute the decedent’s assets in accordance with his or her wishes. These guidelines focus on activities that occur in an estate or trust immediately after the individual has died.

UNDERSTANDING THE WILL

It is very important to read and understand the will or trust so that the you personal representative will know:

- Who the beneficiaries are
- What they are to receive and the dates of distribution
- How many years a trust, if any, will be ongoing
- Who, if anyone, are co-fiduciaries
- Does the will give everything outright, or does it create new trusts that may continue for several years? Does a trust mandate certain distributions (“All income earned each year is to be paid to my wife, Nancy”) or does it leave this to the trustee’s discretion (“My trustee shall distribute such income as she believes is necessary for the education and support of my son, Alan, until he reaches age 25“)? The document often imparts important directions to the fiduciary, such as which assets should be used to pay taxes and expenses; and the document will usually list the fiduciary’s powers in some detail.

Most fiduciaries retain an attorney who specializes in the area of trusts and estates to assist them in performing their duties properly. An attorney’s advice is very helpful in ensuring that the fiduciary understands what the will or trust and
applicable state law provides.

**IS A PROBATE NECESSARY?**

Probate is the formal legal process that gives recognition to a will and appoints the executor or personal representative who will administer the estate and distribute assets to the intended beneficiaries. The laws of each state vary, so it is a good idea to consult an attorney to determine whether a probate proceeding is necessary, whether the fiduciary must be bonded (a requirement that is often waived in the will) and what reports must be prepared. Most probate proceedings are neither expensive nor prolonged.

**MANAGING ESTATE ASSETS**

It is the fiduciary’s responsibility to take control of all assets comprising an estate or trust. Especially when a fiduciary assumes office at the grantor’s or testator’s death, it is crucial to secure and value all assets as soon as possible. Some assets, such as brokerage accounts, may be accessed immediately; others, such as insurance, may have to be applied for by filing a claim. The usual practice is to engage a professional appraiser to value the decedent’s tangible property, such as household furniture, automobiles, jewelry, artwork, and collectibles. Depending on the nature and value of the property, this may be a routine activity, but you may need the services of a specialist appraiser if, for example, the decedent had rare or unusual items or was a serious collector. Real estate, whether it is a home or commercial property, and any business interests must also be valued. Besides providing a valuation for assets that may be reported on a court-required inventory or on the state or federal estate tax return, the appraisal can help the fiduciary to gauge whether the decedent’s insurance coverage on the assets is sufficient. Appropriate insurance should be maintained throughout the fiduciary’s tenure. The fiduciary also must value financial assets, including bank and securities accounts.

**HANDLING DEBTS AND EXPENSES**

It is the fiduciary’s duty to determine when bills unpaid at death should be paid, and then pay them or notify creditors of temporary delay. In some cases, such as property or casualty insurance bills or real estate taxes, the estate may be harmed if the bills are not paid promptly. Most states require a written notice to any known or reasonably ascertainable creditors. While most bills will present no problem, it is wise to consult an attorney in unusual circumstances, as the fiduciary can be held personally liable for improperly spending estate or trust assets.

The fiduciary is responsible for a number of tax returns. First are the personal returns of the decedent: the final income tax return for the year of the decedent’s death; a gift or generation-skipping tax return for the current year, if needed; and prior years’ returns that may be on extension all may need to be filed. In addition, if the value of the estate (whether under a will or trust) before deductions exceeds the amount sheltered by the “applicable exclusion amount,” which is $2,000,000 in 2008 and due to increase to $3,500,000 for 2009, with further changes possible thereafter.

Since the estate or trust is also a taxpayer in its own right, a new tax identification number must be obtained and a fiduciary income tax return must be filed for the estate or trust as well. It is important to note for planning that the estate or trust and the beneficiaries may not be in the same tax brackets. Thus, timing of certain distributions can save money for all concerned. Some law firms (such as White and Williams LLP), and other tax preparers and accountants specialize in preparing such fiduciary income tax returns and can be very helpful. They are familiar with the filing deadlines and will
be able to determine whether the estate or trust must pay estimated taxes quarterly.

Most expenses that a fiduciary incurs in the administration of the estate or trust are properly payable from the decedent’s assets. These include funeral expenses, appraisal fees, attorney’s and accountant’s fees, insurance premiums, etc. Careful records should be kept and receipts should always be obtained as most of such expenses are also deductible either for income or death (federal and state inheritance and estate) tax purposes.

**FUNDING THE BEQUESTS**

Wills and trusts often provide for specific gifts of cash (“I give my niece $50,000 if she survives me”) or other personal or real property (“My grandfather clock to my granddaughter Nina”) before the balance, or residue, of the estate is distributed. The residue may be distributed outright or in further trust, such as a trust for a surviving spouse or for minor children. Be sure that all debts, taxes, and expenses are paid or provided for before distributing any property to beneficiaries. Although it is usual to obtain a receipt, release and refunding agreement from the beneficiary that states that he or she agrees to refund any excess distribution made in error by the fiduciary, as a practical matter it is often difficult to retrieve such funds. In some states, the fiduciary will need court approval before any distributions may be made. Where distributions are made to ongoing trusts or according to a formula described in the will or trust, it is best to consult an attorney to be sure the funding is completed properly. Tax consequences of a distribution sometimes can be surprising, so careful planning is important.

**CLOSING THE ESTATE**

Estates close when the executor has paid all debts, expenses, and taxes; received tax clearances from the IRS and state taxing authorities; and all assets on hand have been distributed. Trusts terminate when a date or event described in the document occurs, such as the death of a beneficiary or the date the beneficiary attains a stated age. Some states require a petition to be filed in court before the assets are distributed and an estate or trust can be closed. When such a formal proceeding is not required, it is nevertheless good practice to require all beneficiaries to sign a document, prepared by an attorney, in which they approve of actions as fiduciary and acknowledge receipt of assets due them. This protects the fiduciary from later claims by a beneficiary. A final income tax return must be filed and a reserve kept back for any tax that may be due.

**FEES AND COMMISSIONS**

A question often arises concerning the fees or commissions to which a personal representative is entitled for services rendered to the estate. The first place to check is the statutory law of the state where the estate is probated. Some states have standard fixed fees. There are also local county rules and customs that govern what the personal representative is entitled to charge.

Professional executors such as banking and trust institutions advertise fixed-fee schedules. However, with estates in excess of $1 million it may be possible to negotiate a lower fee. These negotiations occur between the prospective executor and the person making the initial designation (the individual desiring to name the institution as personal representative in her will). An attorney who specializes in estate administration may be helpful in negotiating a lower fee for a large estate.
In all cases, the executor or administrator is entitled to reasonable compensation for services. Fees should not be determined solely on the basis of the assets of the decedent; they should also take into account the nature of the work involved, the time spent, the complexity of the problems, the professional background and competence of the executor, and the ultimate results and benefits passed on to the heirs.

Remuneration for services should bear a reasonable relationship to the time spent as well as the quality of work and results achieved. The personal representative should keep a detailed record of time spent, services performed, and expenses paid on behalf of the estate. Furthermore, the personal representative should make periodic written progress reports to the beneficiaries and, if the situation permits, submit periodic bills for services rendered. In any event, before any work is begun, negotiate and settle (in writing) the issue of fees based on an estimate of complexity and other issues.

Psychologically, many beneficiaries have their shares “spent” before they receive them. The subsequent announcement that the personal representative expects to receive a significant portion of that amount for services performed doubtless will be met with some serious resistance. This is especially true if the beneficiaries were not periodically apprised of the work being performed and had no prior knowledge of the anticipated amount of the personal representative’s fee. It is much easier to have a frank discussion of fees early on when the beneficiaries are aware of the complexities of the personal representative’s duties and are anxious to have someone else take on this responsibility.

When the personal representative is an immediate member of the family, problems about fees are less likely to occur. For example, if the widow is the executrix and the sole beneficiary, it might be far more advantageous for her to receive the net proceeds of the estate as an inheritance rather than to charge an executor’s fee that will ultimately come out of her own pocket. The executor’s commissions or fees are taxable for income-tax purposes, and often at a higher rate than if the sole tax involved is the state inheritance tax—or even, in some instances, the federal estate tax.

Finally, there is the question of the division of the fee when two or more individuals are serving as co-executors or co-administrators. When they are individuals, the fee usually is divided equally (although in a few states each executor could receive a full commission). But when a corporate executor is serving with an individual co-executor, courts often award the corporate executor (bank or trust company) a higher percentage. For example, in Pennsylvania the bank would receive its usual fee and the individual executor would be awarded one half of the bank’s fee. Of course, if the decedent has specifically provided for the payment of fees in the will, the courts in most instances are guided by the decedent’s wishes.

**Trust Administration**

Trusts are designed to distinguish between income and principal, as many of them, especially older trusts, provide for income to be distributed to one person at one time and principal to either that same person at a different time or to another person entirely. For example, many trusts for a surviving spouse provide that all income must be paid to that spouse, but only pay the spouse principal in limited circumstances, such as a medical emergency. At the spouse’s death, the remaining principal may be paid to the decedent’s children, to charity, or to other beneficiaries. Income payments and principal distributions can be made by check, or at the trustee’s discretion by distributing securities as well as cash.
Unless a fiduciary has experience in this area, it is recommended that he or she seek professional advice regarding the investment of trust assets. In addition to good investment results, the fiduciary should invest within the applicable Prudent Investor Rule that governs the trust or estate. A skilled investment advisor can help the fiduciary decide how to invest, what assets to sell to provide for expenses, taxes, or outright distributions, and how to minimize income and capital gains taxes.

During the period of administration, the fiduciary must provide an annual income tax statement (called a Schedule K-1) to each beneficiary who is taxable on any income earned by the trust. The fiduciary can be held personally liable for interest and penalties if the income tax return is not filed and the tax paid by the due date, generally April 15th of the following year as is the case with individual income tax returns.

Commonly Asked Questions


How do I sign my name in a fiduciary capacity? An executor signs: “Alice Carroll, Executor (or Personal Representative) of the Estate of Lewis Carroll, Deceased”. A trustee signs: “Alice Carroll, Trustee”.

Where do I hold the estate or trust assets? If you engage a trust company, they will open an account in the name of the estate or trust and provide regular statements showing all income and disbursements. You can open an investment account with a bank or brokerage company in the name of the estate or trust. All expenses and disbursements must be made from these accounts, and you should receive regular statements.

How (and how much) do I get paid? Fiduciary work is time-consuming and can be difficult; it is appropriate to seek payment for your services. The will or trust agreement may set forth the compensation. If they do not, many states provide either a fixed schedule to which you must adhere, or allow “reasonable” compensation, which usually takes into account the size of the estate, the complexity involved, and the time spent by the fiduciary. Executor’s or trustee’s fees are taxable compensation to you. As stated above, several states do not permit the fiduciary to pay his or her own compensation without a court order; check with your attorney before you write yourself a check.

What if a beneficiary complains? Even professional fiduciaries, such as trust companies, receive complaints from time to time. The best way to deal with them is to do your best to avoid them in the first place by following these guidelines and consulting with an attorney experienced in estate administration. Many complaints arise because beneficiaries are not kept up to date on the administration of the trust or estate. Frequent communication with beneficiaries is a must. Whenever possible, consult with an attorney who specializes in trust and estate matters when a complaint involves more than routine issues.

Can I be sued or be held personally liable? Your errors or mismanagement of a trust or estate can indeed subject you to personal liability. Common pitfalls include not paying tax or filing returns on time, improper investment choices (whether too conservative, too speculative, or favoring one beneficiary over another), self-dealing (buying assets for yourself or
your family from the estate or trust, whether or not at market price), or allowing property or casualty insurance to lapse, resulting in a loss to the account. Your best protection is to get good professional advice and to fully document your actions and decisions.

How am I discharged as fiduciary at the end of the administration? What if I want to resign? Whether you stop acting because the estate or trust has terminated, or you wish to resign before the conclusion of your administration, you must be discharged, either by the local court or by the beneficiaries. In some states, this is a formal process, involving the preparation of an accounting. In others, a relatively simple document signed by the beneficiaries can be used. If you are resigning prior to the conclusion of your administration, check the document to see who succeeds you as fiduciary. If no successor is named, you may need a court proceeding to appoint a successor before you can be discharged.

**Conclusion**

The administration of an estate or trust can be a daunting task for some fiduciaries. While other fiduciaries will find the process to be more routine. The overview above is intended solely to highlight the general tasks that the fiduciary will have to undertake. However, with the proper guidance from an attorney or other professional skilled in trust and estate administration, the basic tasks of estate and trust administration, as well as any more complex issues that may arise along the way, can generally be handled with relative ease.

If you would like to discuss any aspect of estate or trust administration, or your duties as a fiduciary or have any other tax or estate planning questions, please contact Bill Hussey (215.864.6257; husseyw@whiteandwilliams.com). Kindly note that Mr. Hussey is currently licensed to practice only in the states of Pennsylvania and New Jersey. White and Williams LLP also has attorneys licensed to practice in Delaware, Florida, Massachusetts and New York. Questions regarding these estate, trust and fiduciary matters in other states should be directed to experienced attorneys in those locations.

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