

They are Willing to Serve, But What Do My Trustees Do?

Apr 27 2021

Practice Area: Trusts and Estates & Estate Planning & Estate and Trust Administration

You've heeded the expert advice and created an estate plan. Your plan includes a revocable trust as its cornerstone. In preparing your plan, you've thought long and hard about who to appoint for all the important decision making roles – including who will serve as successor trustee of your revocable trust. Your thoughtfully selected family members or friends are now asking you, "What do I have to do?". Though every plan is different this *Legal Update* is intended to give you and your trustee an overview of their role.

The Successor Trustee's Job During Your Lifetime.

A successor trustee's duties typically begin after your death, but in certain circumstances, a successor trustee may be required during your lifetime. If you become incapacitated and cannot continue to act as trustee of your trust, whether temporary or longer term, your successor trustee will step in to manage the assets already titled in the name of your trust. If you hold assets outside the trust, then your financial agent (appointed under your financial power of attorney) will have authority over those assets. In this instance, the trustee and the financial agent, if not the same person, will need to coordinate their efforts, and the trustee may request the financial agent to transfer assets into the trust. Your trustee and agent will work together to pay your bills, file your income tax returns, make investment decisions and generally do all of those things that you would do with your finances if you were able.

Duties of Trustee After Your Death

First, know that the trustee will have many duties. The basic steps after death are to collect your assets (a task which you can do during your lifetime by titling assets in the trust and updating beneficiary designations), paying your final bills and expenses, and distributing what is left according to the terms of the trust. The trustee will likely need to work with an attorney to make sure that he or she understands the specific tasks required in administering the trust and will need assistance to complete those tasks. It may sound like a daunting job, but with help, it will be manageable.

Is there a Personal Representative? The duties of a trustee after your death may depend upon whether there is a probate of your estate initiated in court. Keep in mind that you **nominate** a personal representative in your Will, and the Court **appoints** the nominated individual as the personal representative. That means that unless there is a court proceeding, there is no personal representative with power to act. If you have done what is necessary during lifetime to avoid probate (i.e. funded your trust and updated beneficiary designations), then the trustee will take care of everything, including those things that a personal representative would otherwise do and no court process will be necessary. If a probate proceeding is necessary, then the trustee and the court appointed personal representative will work together. Often, it is most efficient to nominate the same person as your trustee and your personal representative to streamline this coordination. For this *Legal Update*, we will assume that you have avoided probate and your trustee will be solely responsible to administer your assets.

Review and Notices. The trustee must carefully review the trust document to determine who the beneficiaries are and the extent of their interests in the trust assets. In most cases, the trustee is required to send notices to all beneficiaries of the existence of the trust.

The trustee will review the trust document to see if there are assets specifically designated to certain individuals or charities (called specific bequests). For instance, there may be specific bequests of items of tangible personal property, like jewelry, antiques, cars, etc. There may also be specific monetary bequests to individuals or charities or specific bequests of stock or a residence.

The trustee may also publish a notice to creditors. A notice to creditors provides a date before which creditors must submit a claim or they will be barred from receiving payment. The date is 4 months from the publication date. Publication in a local newspaper will serve to put unknown creditors on notice of the claims date. If the trustee has knowledge of a creditor, then the trustee must send that creditor a notice with the claims date for the creditor to be barred from filing a claim after that date. Otherwise, the creditor will have a full year from your date of death to file a claim.

Inventory Assets. The trustee will then identify all of the assets owned by the decedent at his or her death, and how they are titled; for instance, whether the assets are managed in trust subject to beneficiary designations or titled jointly with another person. The trustee must obtain information to value those assets as of your date of death. The trustee will arrange for appraisals of assets that are not readily determined. Most assets that are included in your estate will receive a new basis equal to the value at your death, and the trustee will work with your investment advisor or the investment institution to make sure basis is adjusted.

The trustee will also "collect" your assets. This entails opening new accounts in the name of the trust with the trustee's name and a new tax identification number for the trust.

The trustee will make sure that any accounts in joint name or for which a beneficiary designation is in place are properly transferred to the next owner by supplying a death certificate to the account holder. If there are assets that would otherwise be subject to a probate proceeding but prior to your death you executed a non-probate transfer document such as a Wisconsin Marital Property Agreement, the trustee will use efforts to retitle those assets into the trust outside of the court process.

Tax Returns and Bill Paying. The trustee is also responsible for ensuring that all of your final debts and expenses are paid. This includes any medical bills, funeral bills, outstanding taxes (property, income, etc.), utilities and the like. If the debts and expenses exceed the assets, then debts get paid in a certain order, so it is important to consult the attorney assisting with the administration before satisfying any obligations. Any subscriptions or automatic withdrawals should be cancelled, and statements should be reviewed to determine what, if any, refunds need to be obtained. The trustee will pay current bills and keep detailed records of all of the activity of the trust. An accounting of the activity will be prepared, beginning with the initial inventory, adding any income or other receipts, and subtracting payment of all expense and distributions. The accounting will be distributed to the remainder beneficiaries.

The trustee will need to arrange for the preparation and filing of your final income tax returns and any income tax returns due for the trust after your death. The trustee will also file a federal estate tax return if one is due, and any state estate tax returns that may be due.

Distributions and Liquidations. The trustee will distribute the assets subject to specific bequests, and it is possible that the trustee may need to sell some or all of the trust property not subject to a specific bequest. For instance, if the residence is not to be distributed to one or more beneficiaries, the trustee will have the responsibility of determining whether the residence will need to be sold and, if so, readying the home to be put on the market and selling the home and collecting the sales proceeds. Alternatively, the trustee may distribute the home to the beneficiaries and the beneficiaries will then have that responsibility, though this can be much harder to coordinate.

When all other duties of the trustee are completed, the trustee will divide the remaining assets as provided in the trust document. This may mean distributing assets outright to beneficiaries or creating new trusts for beneficiaries. If new trusts are created, the trustee may need to apply for new tax identification numbers and open new investment accounts for the new trusts. The trustee may also be responsible for administering those new trusts or there may be a new trustee to step in. That depends upon what you have provided in the document.

Your Trustee is Not Alone.

Remember, your trustee is not alone. We will be here to make sure that the trustee is not overwhelmed and receives the support and protection that he or she deserves for accepting this responsibility. The costs related to obtaining professional assistance, such as help from lawyers and accountants, are expenses of the trust not of the trustee personally, so those fees will be paid from the trust assets before final distributions are made.

The Future of the Estate and Gift Tax

On March 25th, 2021, Senator Bernie Sanders released his proposed estate and gift tax reform legislation. The "For the 99.8% Act" includes a reduction of the current \$11,700,000 federal estate tax exemption to \$3,500,000. Under current law, this exemption is scheduled to expire on December 31, 2025 and be reduced to approximately \$6 million. The new proposed legislation also includes a reduction of the federal gift tax exemption to only \$1,000,000 in 2022. It also includes a significant increase in the estate tax rate from a current rate of 40% of property in excess of the exemption to 45% for property in excess of the \$3.5 million proposed exemption up to \$10 million and 50% on the next \$40 million and further increases up to 65% for over one billion in assets – not something most of us need to be concerned with. These changes would not take effect until January 1, 2022, giving taxpayers time to make gifting decisions. There are other more complex techniques using various Grantor Trusts, and family entity discounts that would be greatly curtailed with the new legislation and the effective date of those changes would be the date of passage of the Act. Ultimately, we do not know whether there will be legislation or whether the current exemptions will simply be allowed to expire on December 31, 2025. Whether it is current law that causes a reduction in exemption or new legislation, for those who would have taxable estates under a reduced exemption and want to take advantage of our current laws, the clock is ticking.

von Briesen & Roper Legal Update is a periodic publication of von Briesen & Roper, s.c. It is intended for general information purposes for the community and highlights recent changes and developments in the legal area. This publication does not constitute legal advice, and the reader should consult legal counsel to determine how this information applies to any specific situation.