



Living Trusts: Who is Your Trustee?

Most people spend a lot of time thinking about the details of their wills or living trusts ([except for Prince](#)). Most of the deliberation is, “*Who should get how much, and when?*” A second consideration is, “*Who should I leave in charge of carrying out my wishes?*” The person who carries out your wishes is known as the “*executor*” if you have a will or the “*trustee*” if you have a [trust](#). It is very important to pick the right person as your trustee.

It is not the trustee’s role to make any changes to your instructions based on what he thinks is fair, or what he thought you meant or may have said to him at one time. The trustee is simply responsible for carrying out the terms that are written in the trust. This is a big responsibility, and sometimes, the trustee screws it up.

Living Trusts: specific instructions vs. trustee’s discretion.

Most people who create living trusts (Grantors) will leave specific and definite instructions for the trustee (e.g., my house is to be sold and the proceeds distributed evenly to my three children). In other situations, the trustee may be given “*discretion*” (e.g., distribute up to 10% of my trust assets per year as deemed necessary by the trustee’s sole judgment for my child’s education or healthcare needs). Discretionary language is sometimes necessary, but it is much more likely to lead to conflict between trustees and beneficiaries.

It is an honor to be selected as a trustee, but it can also be a lot of work. The other consideration is you can be sued by beneficiaries who are not happy with the job you do. Shockingly, not all beneficiaries are appreciative and/or even reasonable. Trustees are held to a [fiduciary](#) standard. Fiduciary is a legal term that means you must put the interest of the people you are serving before your own interests. The trustee must be very careful to avoid any actions that could possibly be construed as “*self-dealing*” or “*conflicts of interest*”.

A breach of fiduciary duty usually means that the trustee acted in a way that is perceived as disloyal, careless, or negligent. The root of the word “*trustee*” is trust, and for good reason. Sometimes, a trustee’s breach of fiduciary duty is not easy to recognize and can have substantial impact on the beneficiary.

In my own experience, I have seen a trustee distribute over \$100k to the wrong person. This was not done intentionally, but the living trusts’ language was difficult to understand. I have also seen situations where the trustee is not emotionally ready or competent to serve as trustee and also situations where people did not even know that they had been named as trustee.

The two most common trustee breaches of fiduciary responsibility are:

1. The trustee co-mingles his personal finances with the finances of the estate. This is very common, especially when the trustee is a family member. A trustee must keep separate accounts and records for the finances of the trust. It is easy to claim that there has been a breach of fiduciary duty if finances are co-mingled.
2. The trustee engages in a conflict of interest. A trustee cannot borrow from the trust, profit from it, or do anything with the trust money that would benefit him personally (e.g., hire his own construction firm to remodel the house).

Mistakes made by trustees may never be recognized, and even if they are, sympathetic beneficiaries (usually family members), may let it slide. Alternatively, beneficiaries can hire an “*abuse of trust*” lawyer to sue a trustee in order to protect their inheritance. The trustee can be removed from his position and ordered to pay back any lost funds if the court finds that the trustee has breached his duty to the beneficiaries.

Final Thoughts:

1. Select the most honest and competent person you know to serve as your trustee.
2. Make the instructions for your trustee as clear as possible, including specific bequests of jewelry, artwork and family heirlooms. Verbal instructions are much less likely to be followed.
3. [Hire an independent company to serve as your trustee if you do not have a good candidate among your friends or family.](#) A corporate trustee gets paid from the assets in the trust, but it may be well worth the money, especially if you have a complicated family situation. A corporate trustee is a good idea if your beneficiaries do not get along or you have complex family dynamics that often accompany second or third marriages.
4. If you are the trustee, give each beneficiary a copy of the trust and a list of assets and a financial accounting. It is often a good idea to redact the parts that show what other beneficiaries are receiving (if it is not equal). Then have each beneficiary sign a release when they receive their share of the estate.

Call or email if you have any estate planning questions or need the name of a good estate planning attorney.

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