

## **USE OF INDEPENDENT PROFESSIONAL TRUSTEES IN ESTATE PLANS <sup>©</sup>**

We estate planning attorneys spend a lot of our time preparing documents – wills, trusts, powers of attorney and others, which will hopefully carry out the client’s wishes when there is a death in the family. However those of us who have settled, as well as planned, many estates know that how well the plan works when the time comes may depend as much on *who* is put in charge of carrying it out as on the quality of the documents.

The choice of a person or organization to execute the client’s estate plan when the time comes is critical to the success of the plan and deserves much more careful thought than it typically receives. For the reasons stated below, the best choice for many plans may be an independent professional trustee. A second choice which also works in many situations is to nominate a family member who then retains a professional trustee in an agency capacity to assist with administration of the trust.

### **FAMILY MEMBERS AS TRUSTEES**

For many years it has been standard practice for clients to designate one or more family members as successor trustees of the family revocable trust – typically children in age order. Since many clients set up their trusts with a view to saving money, they may reason that it makes sense to save even more money by not hiring a professional to manage settlement and distribution of the trust when they are gone. However this reasoning often involves a mistaken assumption that a family member who serves will not collect trustee fees.<sup>1</sup>

While there is no doubt that some family members make good trustees, it is also clear that many of them do not, and that many estate settlements are more contentious, time-consuming and expensive than they need to be because the appointed successor trustee is unable or unwilling to do his or her job. Some of the main problems are discussed below.

### **PERSONALITY TRAITS; AVAILABILITY**

Being a good trustee is not only a matter of intelligence and training but is at least in part a function of the personality of the proposed trustee. Is this person honest, conscientious, dependable, organized and fair-minded? Is he or she adaptable and good at listening to the opinions of others, yet willing to draw lines in the sand when that is required?

Direct questions on these matters may not necessarily yield reliable answers, but there are ways of getting the basics in an initial interview – e.g., does the proposed trustee have a stable family life, steady employment, stay out of financial trouble, get along with siblings and so forth. If the

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<sup>1</sup> Most trust documents contain language authorizing the successor trustee to charge “reasonable” fees without prior court order. If the trust document does not provide for fees, the Probate Code provides that the trustee is entitled to “reasonable compensation under the circumstances” [Cal. Prob. Code § 15681].

A family trustee who is also a residual beneficiary may elect to waive a fee to keep peace in the family or for other, less philanthropic reasons, namely that (a) part of the fee will come out of the trustee’s share of the estate and (b) the fee is taxable income whereas an inheritance is not [I.R.C. § 102]. However, there is no guarantee that a family successor trustee will not charge fees, particularly if relationships with the other beneficiaries are not close.

answers to these questions raise red flags, e.g., multiple divorces, financial difficulties, etc., then the client should be counseled on the advisability of using another trustee.

A related inquiry is whether the proposed trustee will be available to do the job when the time comes. A retired schoolteacher who lives in the same city as the clients will be a solid choice in this regard, but a busy doctor who lives at the other end of the country may not be.

Even if the proposed family trustee checks out in these areas, there may be other reasons that it would be better to choose an independent trustee to administer the client's trust.

### **CONFLICTS OF INTEREST**

A family member who undertakes the role of trustee is usually a residual beneficiary of the trust, meaning that he or she arrives at the job with built-in conflicts of interest. On the one hand, the trustee is required to administer the trust in a way which is fair and impartial and to treat all beneficiaries equally. On the other hand, being unduly scrupulous about fairness may often adversely affect the interests of the trustee as beneficiary of the trust.

Such conflicts are not merely theoretical but arise in many, if not most, trust administrations. For example, the trustee will have conflicts where:

- The trustee needs to decide whether or not to charge trustee fees and, if so, in what amount;
- The decedent maintained a substantial joint bank account with the successor trustee where there are indications (e.g., "I want all of my children to share equally") that the decedent intended the account to be an estate asset;
- The plan of distribution calls for distribution of property to the trustee in kind and there are issues about valuation of the property for distribution purposes;
- The trustee is a professional (e.g., lawyer, accountant, real estate broker) who renders services to the trust and has to decide whether and how much to charge for those services; and/or
- There is a dispute with one of the beneficiaries and the trustee needs to decide whether to treat the costs of settling the dispute as a general administration expense or as a charge against the share of the troublesome beneficiary.

In fact, these conflicts are so substantial and continuing that counsel to a family trustee should make it clear in the engagement agreement that he or she represents the trustee only in his or her capacity as such and not as a beneficiary of the trust.<sup>2</sup>

It will always be possible for a dedicated and conscientious family trustee to manage around these issues, but the fact that the role of trustee/beneficiary has such *potential* for abuse may result in perceptions that abuse is happening even when it is not.

### **SIBLING RIVALRIES AND OTHER RELATIONSHIP ISSUES**

The other important fact of life for many, if not most, family trustees is that they have a history of less-than-cordial relationships with the other beneficiaries. In traditional families, the fact that eldest daughter has been named as trustee may reinforce perceptions by younger siblings,

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<sup>2</sup> California Rules of Professional Conduct, Rule 3-310.

justified or not, that the parents have always favored her interests over theirs. In fact, some clients want to name *all* of three or five of their children as successor co-trustees to avoid perceptions of favoritism despite the obvious logistical challenges of such an arrangement.

The relationship issues are typically even more difficult in blended families where beneficiaries include step-parents or children by prior marriages. While not all stepmothers are evil, they are often perceived to be interlopers and inheritance-spenders by the children of the deceased husband.<sup>3</sup>

## **EVALUATING POTENTIAL TRUSTEES**

At a minimum, the factors discussed above warrant a searching review and analysis of the likely consequences of naming a family member as a successor trustee. In particular, clients should be advised to carefully consider whether, taking into account intelligence, personality type, historic relationships with other beneficiaries and potential conflicts of interest, it is reasonable to expect that a proposed family member trustee will do an adequate job. If the analysis raises serious questions based on any of these factors, the clients should be advised to consider naming an independent party as successor trustee.

Further, and even if a family member is nominated as successor trustee, estate planning documents should provide that a named family member may nominate an independent trustee to serve in his or her place if the earlier analysis proves to be flawed or if circumstances arising later warrant the appointment of an independent trustee. Samples of language that addresses this issue are appended to this article.

## **WHO MAKES A GOOD TRUSTEE?**

### **BANKS AND TRUST COMPANIES**

Until fairly recently, clients who wanted a professional trustee had few choices, most of which were banks or trust companies. However, banks seem to have largely withdrawn from the trust business, at least to the extent that it involves settlement and distribution of small to medium-sized estates on the death of the settlor.<sup>4</sup> The work of settling these estates is labor-intensive and not particularly profitable, and also involves potential conflicts of interest with the lending and investment activities of the institution.<sup>5</sup> Banks that have continued in the trust business typically are interested only in larger estates with substantial investable assets, and prefer trusts that will be administered over a substantial period of time over trusts that will be distributed shortly following the death of the settlor.<sup>6</sup>

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<sup>3</sup> A probate judge who shall remain anonymous once remarked, “All of these trust cases fall into one of three categories, those being (1) Cain and Abel, (2) the wicked stepmother, and (3) the trustee who couldn’t be trusted.”

<sup>4</sup> As of this writing, the only local bank that does trust business in San Luis Obispo reportedly wants a minimum of \$500k in investable assets for each account and charges statutory probate fees for trust settlements if it accepts them at all.

<sup>5</sup> One problem is that lending officers and investment bankers have access to non-public information which could be illegally used by trust managers to make investment decisions. The bank must maintain a so-called “Chinese Wall” to avoid this problem, and due to several scandals in recent years not all customers believe in the efficacy of such walls.

<sup>6</sup> There is law to the effect that the duty of an executor of an estate is to preserve rather than grow estate assets. See, for example, *In re Smith’s Estate* (1931) 112 Cal.App. 680, 297 P. 927; *Estate of Kampen* (2011) 201 Cal.App.4<sup>th</sup> 971, 135 Cal.Rptr.3d 410. Thus where the trustee acts as the functional equivalent of an executor and is directed by

Many major brokerage firms have trust company affiliates who will serve as trustees.<sup>7</sup> However, all of these companies have substantial and continuing conflicts of interest in that their banking and investment services are provided through the companies that own them. At least one of them, which shall remain anonymous, required the client's trust to contain comprehensive language authorizing the purchase of in-house funds and other self-dealing by the trustee. Further, these companies typically have offices only in major cities and target their services at high net worth clients, making them unsuitable for mid-size estates, especially ones located outside major urban centers.<sup>8</sup>

#### **ACCOUNTANTS, ATTORNEYS AND FINANCIAL ADVISORS**

Until recently, clients who wanted a non-family trustee other than a bank or trust company often sought the services of trusted professionals, such as lawyers, financial advisors and accountants. However, the current risk-adverse environment in which these professionals operate precludes or at least discourages most of them from acting as trustees.

Financial planners generally operate under policies of their broker-dealers which prohibit or strongly discourage their brokers from acting as trustees for clients of the firm.<sup>9</sup> Similarly, an informal poll of local accountants showed that most of them decline to serve as trustees because they normally provide accounting services to the trust and therefore have a conflict of interest. One local accountant advised that the accountants' mutual insurance company, CAMICO, requires them to notify the company of each case in which a member accepts an appointment to act as trustee. The exact effects of such notices on errors and omissions premiums are unknown but are not likely to reduce the cost of insurance.

Lawyers have the same, and other, constraints. First, lawyers are normally in the position of providing legal services to the trust, in which case they have a conflict of interest like any other provider of goods or services to the trust. Second, the legislature has taken such a dim view of lawyers serving as trustees that it has enacted special statutes which provide, among other things, that the appointment by a drafting attorney of himself/herself as trustee is presumptively the result of fraud or undue influence<sup>10</sup> and that a lawyer may not be paid both as a trustee and as an attorney without either unanimous beneficiary consent or a court order.<sup>11</sup>

Another problem for lawyers is that those who are asked to be trustees typically have a pre-existing relationship with one or more of the beneficiaries. Unless this relationship was with all of the beneficiaries, the lawyer may not be perceived as neutral despite his or her best efforts to be fair to all parties. For these reasons, most lawyers typically decline to serve as trustees of their clients' trusts.

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the trust document to promptly settle and distribute the estate, there is not much opportunity to use the investment services of the bank's trust department.

<sup>7</sup> E.g., Merrill Lynch Trust Company; Edward Jones Trust Company; Morgan Stanley Trust National Association.

<sup>8</sup> As of this writing, only one bank has locally based trust officers in the author's home city of San Luis Obispo.

<sup>9</sup> At least two registered representatives with major firms, who asked not to be named, informed the author that their employers do not permit representatives to serve as trustees or executor for any client which has an account with them.

<sup>10</sup> Cal. Prob. Code §§ 15642, 21380

<sup>11</sup> Cal. Prob. Code § 15687

## LICENSED PROFESSIONAL FIDUCIARIES

In light of all of the above, a promising current source of independent professional trustees may be individuals who are licensed to act as professional fiduciaries by the State of California. In 2006 the California legislature enacted the Professional Fiduciaries Act which, starting in 2009, requires the licensing of individuals who serve as private professional trustees.<sup>12</sup>

The Act defines a professional fiduciary as (i) a person who acts as a conservator of the person, the estate, or person and estate, or guardian of the estate, or person and estate, for two or more individuals at the same time who are not related to the professional fiduciary or to each other and (ii) a person who acts as a trustee, an agent under a durable power of attorney for health care, or an agent under a durable power of attorney for finances for more than three individuals at the same time.<sup>13</sup>

Licensees must pass a background check and must meet specific education requirements to qualify for a license. Bus. & Prof. Code § 6533 requires that each licensee have at least one of the following:

- (1) A baccalaureate degree of arts or sciences from a college or university accredited by a nationally recognized accrediting body of colleges and universities or a higher level of education; or
- (2) An associate of arts or sciences degree from a college or university accredited by a nationally recognized accrediting body of colleges and universities, and at least three years of experience working as a professional fiduciary or working with substantive fiduciary responsibilities for a professional fiduciary, public agency, or financial institution acting as a conservator, guardian, trustee, personal representative, or agent under a power of attorney; or
- (3) Experience of not less than five years, prior to July 1, 2012, working as a professional fiduciary or working with substantive fiduciary responsibilities for a professional fiduciary, public agency, or financial institution acting as a conservator, guardian, trustee, personal representative, or agent under a power of attorney.

In addition, licensees must pass a licensing exam administered by the Professional Fiduciaries Bureau (“Bureau”), which currently administers the Professional Fiduciaries Act.<sup>14</sup>

A searchable database of current licensees may be found on the Bureau’s website, [www.fiduciary.ca.gov](http://www.fiduciary.ca.gov). Since the Professional Fiduciaries Act is fairly new the number of licensees, and experience with them, is limited. A recent check of the website listed only 121 licensees for Los Angeles County, of whom 13 were delinquent, two were retired and one was deceased. The Bureau’s website lists only 700-odd licensees for the entire State of California as

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<sup>12</sup> Cal. Bus. & Prof. Code §§ 6500 et seq.

<sup>13</sup> There are exemptions for public officers and agencies acting in the course and scope of their official duties, trust companies and specified financial institutions and their employees acting in the course and scope of their employment, nonprofit corporations and charitable trusts that meet specified requirements, and broker-dealers, agents, investment advisers, and investment adviser representatives registered and regulated under specified statutes. Also, the licensing requirements does not apply to attorneys and certified public accountants licensed in California or to agents enrolled to practice before the Internal Revenue Service.

<sup>14</sup> The law as currently written provides that the Bureau will sunset as of January 1, 2015 and that the law will thereafter be administered by a Professional Fiduciaries Advisory Committee. Bus. & Prof. Code §§ 6510, 6511.

of this writing. However, given the continuing need for independent trustees and the limited availability of institutions and other licensed professionals, the number of licensees is likely to increase substantially in the next few years.<sup>15</sup>

### **COSTS OF APPOINTING PROFESSIONAL FIDUCIARIES**

One of the standard client objections to appointing a professional fiduciary as trustee (i.e., a ‘professional trustee’) is that the fees and costs charged by the trustee will reduce the inheritances which ultimately pass to the beneficiaries. In practice, this is rarely the case.

First, the fees charged by professional trustees are usually not huge when viewed as a percentage of the total estate. Even bank trustees that charge statutory probate fees on trust settlements charge only slightly more than 2% of the total estate on an estate of \$1 million.<sup>16</sup> The percentage goes down for larger estates since statutory fees are 1% of the estate to the extent that it exceeds \$1 million.<sup>17</sup> Fees of most private professional trustees are charged on an hourly rate basis and, at least in the author’s experience, are usually less than the percentages which would be charged by an institutional trustee.

Second, and of greater significance, the cost objection assumes that the services of the professional trustee add no value and that payments of trustee fees will reduce distributions to beneficiaries. This assumption is wrong, or at the least unwarranted, without further inquiry in most cases.

Professional trustees typically maintain relationships with service providers, e.g., contractors, realtors, appraisers, and others who are good at what they do and who price their services aggressively to attract future business from the trustee. The result is that the estate gets better deals on these services than it would otherwise and ends up with more money for distributions to beneficiaries than it would have had without the trustee.

Further, a good professional trustee is often able to avoid or mediate disputes between beneficiaries, which would otherwise result in litigation or at least long-term damage to family relationships. Taking all of these matters into account, and even assuming that a family trustee would not charge fees, it is at least as likely that retaining a professional trustee will increase rather than reduce final distributions to the beneficiaries of the estate.

### **PROBLEMS WITH INDIVIDUAL PROFESSIONAL FIDUCIARIES**

The fact that an individual is a licensed professional fiduciary is by no means a guarantee that the person will be a good trustee, either generally or in any particular situation. The website of the Bureau ([www.fiduciary.ca.gov](http://www.fiduciary.ca.gov)) already lists 30 disciplinary actions against licensees. In addition, the Bureau has been roundly criticized as ineffective and underfunded and concerned mainly with issuing licenses rather than protecting the public.<sup>18</sup>

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<sup>15</sup> The author is personally aware of several retiring accountants and business executives are currently preparing to obtain licenses. This makes sense since they bring needed skills to the position but do not have the conflicts of interest which would be problematic for active practitioners.

<sup>16</sup> Cal. Prob. Code § 10800.

<sup>17</sup> Ibid.

<sup>18</sup> See, for example, [fiduciarywatch.org](http://fiduciarywatch.org), *Dysfunction at the Professional Fiduciaries Bureau* (Oct 21,2013); [estateofdenial.com](http://estateofdenial.com), *California’s Professional Fiduciaries Bureau Appears Ineffective in its Mission* (Nov. 20, 2010)

Further, there have been well-publicized reports of alleged excessive billing by court-appointed individual fiduciaries and their attorneys.<sup>19</sup> These reports resulted in a proposal to amend the Probate Code to provide that any fiduciary whose fee request was denied or reduced by a court would not be allowed any compensation for the costs of defending the fee request.<sup>20,21</sup>

In short, the fact that an individual being considered for nomination as a trustee holds a professional fiduciary license cannot in any way be considered a substitute for an independent evaluation of that person. Given the fact that private professional fiduciaries are relatively new, and that quality problems are known to exist, their use should be approached with caution and only after the qualifications and reputation of the candidate have been thoroughly reviewed.

In addition, and as discussed further below, the terms of engagement of the professional should be documented with an appropriate agreement which (1) spells out the basis of the trustee's compensation, (2) requires periodic reports of the amounts being paid to the trustee, (3) requires the trustee to carry errors and omissions insurance and (4) requires a fidelity bond.

### **COUNSELING THE CLIENT ON USE OF AN INDEPENDENT PROFESSIONAL TRUSTEE**

The selection of the person or institution who will administer a client's trust and estate should be the subject of very thorough counseling at the time the plan is prepared. The attorney should ask many questions about any family member whom the clients want to nominate, including questions about things that could be indicators of personality type (hobbies, habits, etc.) as well as questions about historical relationships between the nominee and siblings or other family members. An eldest son who does paintball on weekends and doesn't agree with the politics of his siblings is probably not an ideal nominee.

Where the client interview indicates that an independent trustee is needed, the client should be further counseled on the choices, including banks and trust companies where they are available as well as licensed private professionals. Where, as is often the case, the client has reservations about using a professional, it is helpful to arrange an interview with the professional so that the client can personally evaluate the prospective nominee.

### **USING THE PROFESSIONAL AS AGENT OF A FAMILY TRUSTEE**

The client should also be advised that professionals cannot only be nominated as trustees but may be retained by a family member to assist him or her with administration of the trust. Most professional trustees, including at least some banks, will act in this capacity and in fact several individual trustees have indicated that nearly one-half of their practice involves being retained by one or more family trustees as agents rather than acting as trustee.

A local bank trust department has indicated that it will handle investments for either family or individual professional trustees on an agency basis. This service may be useful in situations where a trust is not to be distributed immediately but administered over a substantial period of time.

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<sup>19</sup> See Special Report: Loss of Trust at <http://www.mercurynews.com/trust>.

<sup>20</sup> S.B. 156 (Beall), vetoed by Governor Brown on September 24, 2013.

<sup>21</sup> The law is currently to the effect that a guardian or conservator shall not be compensated from the estate for any costs or fees that the guardian or conservator incurs in unsuccessfully opposing a petition, or other request or action, made by or on behalf of the ward or conservatee, *unless the court determines that the opposition was made in good faith, based on the best interests of the ward or conservatee*. [Cal. Prob. Code § 2640(d)] (emphasis added).

Retaining a professional as an agent allows the family trustee to make the big decisions while leaving much of the day-to-day work of administration (bookkeeping, appraisals, property sales, periodic reports, etc.) to the professional. Among other things, the fact that a professional is involved may assure the beneficiaries of the trust that it is being competently administered – particularly if the professional generates periodic reports to the beneficiaries and is available to answer their questions.

From a legal standpoint there do not appear to be any big problems with hiring professional trustees to act as agents of the family trustee, at least if the relationship is documented with an appropriate agency agreement that spells out what services the professional will perform and what his or her compensation will be for those services.

The Probate Code provides that the trustee cannot completely delegate the trustee's responsibilities to a co-trustee or any other person, and that where the trustee has properly delegated a matter to an agent, the trustee has a duty to exercise general supervision over the person performing the delegated matter.<sup>22</sup>

However, section 16247 of the Code provides that “the trustee has the power to hire persons, including accountants, attorneys, auditors, investment advisers, appraisers. . . or other agents, even if they are associated or affiliated with the trustee, to advise or assist the trustee in the performance of administrative duties.” These provisions would appear to clearly authorize retaining a professional trustee in an agency capacity.

Since the family trustee is, or at least may be, liable for any errors or omissions of the professional, the agency agreement should require the professional to indemnify the trustee against any claims arising from errors and omissions of the agent and, in the case of an individual professional, to have errors and omissions insurance.<sup>23</sup>

## **DOCUMENTATION**

Documentation of the client's estate plan should contain provisions which reflect whatever choices the client makes regarding the nomination of trustees and the use of professionals, either as successor trustees or as agents. Documentation for some of the more common situations is discussed below.

## **OPTIONAL APPOINTMENTS BY FAMILY MEMBERS**

Even when thoroughly counseled about the risks and problems of family trustees, many clients still feel that putting a child in charge of the estate is their best option. In these cases, the trust document and other estate plan documents (particularly wills and powers of attorney) should contain provisions which allow, but do not require, a family member nominated as successor trustee to either substitute a professional trustee or retain a professional in an agency capacity. This may be useful, for example, where the person nominated has health issues, is a busy

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<sup>22</sup> Cal. Prob. Code § 16012.

<sup>23</sup> See *Estate of Taylor* (1877) 52 Cal. 477, holding that an executor is not responsible for the loss of property resulting from the acts of an agent so long as he acts in good faith and with ordinary discretion. See also *Borissoff v. Taylor & Faust* (2004), 33 Cal.4th 523, 93 P.3d 337, 15 Cal.Rptr.3d 735.

professional in a distant city, has interpersonal problems with beneficiaries and in many other situations.<sup>24</sup> Sample documentation for this situation is set forth in Appendix A.

#### **NOMINATION OF PROFESSIONAL AS FIRST SUCCESSOR TRUSTEE**

Where the client is persuaded after careful consideration that nomination of a family trustee would be inadvisable, the trust document and related documentation should provide for appointment of a professional trustee in the first instance. Two of the more common ways of doing this are (1) provide for nomination by a majority in interest of the beneficiaries, or (2) designate a trusted person (friend, relative, attorney, accountant, etc.) to make the nomination. Sample documentation for these cases is set forth in Appendix B.

#### **NOMINATION OF MULTIPLE FAMILY MEMBERS AS TRUSTEES**

Another common situation arises where a client wants to name several children or other family members as successor co-trustees, usually to avoid the appearance of favoring one child over the others. Such provisions are frequently unworkable, either because the nominees live in different cities, do not get along or for other reasons.

One way to deal with this situation is to require the nominees to meet and confer and to nominate one of themselves as successor trustee by unanimous written consent. In the event that the beneficiaries are unable agree on a successor, the document then provides that the successor will be a professional nominated by a majority interest of the beneficiaries. Sample documentation for these cases is set forth in Appendix C.

A not insignificant advantage of this approach is that if a family member is nominated, he or she at least receives an up-front vote of confidence from the people he or she is nominated to serve. In addition, the family conference creates an opportunity to identify and discuss conflicts of interest that may arise during administration and, hopefully, to reach agreements regarding those matters.

#### **NOMINATION OF PROFESSIONAL AS AGENT OF A FAMILY TRUSTEE**

As noted above, there are many situations in which a family trustee may wish to retain a professional trustee as an agent to assist with administration of the Trust but to retain the title and responsibilities of trustee. A sample of an agency agreement covering this situation is attached as Appendix D.

#### **APPOINTMENT OF TRUSTEE BY COURT ORDER**

Since the use of individual professional trustees is relatively new, there will be many trust administration cases in which the trust document does not contemplate or provide for the use of an individual professional trustee. In these cases it may be possible to get a professional trustee, institutional or individual, appointed by court order under certain conditions.

Section 15660 of the Probate Code provides that if the trust instrument provides a practical method of appointing a trustee or names the person to fill the vacancy, the vacancy shall be filled as provided in the trust instrument. If the trust does not provide a practical method of appointing

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<sup>24</sup> The documentation should make it clear that the power to appoint professionals may be exercised with respect to all or any part of the trust. For example, a family member may be willing to settle the client's estate but does not want to be the trustee of a life income trust for his alcoholic younger sister. Appointment of a professional to manage the sister's trust is a no-brainer in that situation.

a trustee, then the vacancy may be filled by a trust company that has agreed to accept the trust on agreement of all adult beneficiaries who are receiving or are entitled to receive income under the trust or to receive a distribution of principal if the trust were terminated at the time the agreement is made.<sup>25</sup>

If neither of these options is available, section 15660(d) provides that the court may fill the vacancy upon the petition of any interested person. The section provides that in selecting a trustee, the court shall give consideration to any nomination by the beneficiaries who are 14 years of age or older.

The provisions of section 15660 are broader than they first appear because the method of appointment provided for in the trust document must be “practical” and because the appointment of an institution may not be possible (see above) – and in any case must be approved by all of the adult beneficiaries of the trust. Thus it may be possible in most cases to utilize the provisions of section 15660(d) to appoint a professional because the other alternatives provided in the section are not applicable.

## **CONCLUSION**

The end goals of any estate plan are (hopefully) to get the client’s estate distributed in a timely and cost efficient manner and in a way which is consistent with the client’s wishes.<sup>26</sup> Thorough counseling on the choice of trustees and on the appropriate use of professional trustees should contribute importantly to the achievement of these goals.

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<sup>25</sup> Cal. Prob. Code § 15660(c)

<sup>26</sup> Well, these are the goals of most but not all clients. We have all heard of the vindictive parent who leaves a huge fortune and an unwitnessed holographic will naming friends and not the kids as beneficiaries. The proposals set forth here are obviously inapplicable to such cases.

**Appendix A**  
**Optional Appointment of Professional by Family Trustee**

**Trust Provisions**

**POWERS OF THE TRUSTEE**

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Power to Employ Agents. To employ any custodian, attorney, accountant, corporate or licensed professional fiduciary, or any other agent or agents to assist the trustee in the administration of this trust and to rely on the advice given by these agents. Reasonable compensation for all services performed by these agents shall be paid from the trust estate out of income first and if insufficient, out of the principal and shall not decrease the compensation to which the trustee is entitled.

**NOMINATION OF PROFESSIONAL AS SUCCESSOR TRUSTEE**

Any person currently serving as successor trustee of this trust may, in his or her sole discretion, nominate a professional, individual or institutional trustee to serve in his or her stead as successor trustee with respect to all or any portion of this trust. In the event such authority is exercised, the individual who made the nomination shall have the right to remove the professional trustee at any time and to replace that trustee with another professional trustee, or to nominate another successor trustee named herein to act as trustee.

In the event of the death or incapacity of the individual who nominated the professional trustee, the power of removal may be exercised by a majority in interest of the beneficiaries of this trust, provided, however, that in such event the professional trustee may only be replaced by another professional trustee or another successor trustee nominated in this document.

**TRUSTEE'S BOND**

No bond shall be required of any person named in this instrument as trustee for the faithful performance of his or her or their duties as trustee or trustees; provided, however, that any professional trustee appointed pursuant to paragraph \_\_\_ above other than an institution shall post such bond, if any, as may be required in the instrument appointing such trustee.

**Will Provisions**

I nominate [family member] to serve as my Executor without bond. If [family member] does not survive me or fails to qualify for any reason I nominate \_\_\_\_\_ to serve as my Executor without bond.

Any individual nominated to serve as Executor of this Will may, in his or her sole discretion, nominate an institution qualified to do trust business in the state of my residence or an individual professional fiduciary to serve in his or her stead as my Executor subject to confirmation of court as required by law. In the case of an individual professional fiduciary, bond shall be required unless waived in writing by the person authorized to nominate such fiduciary.

### **Durable Power of Attorney Provisions**

I, [client], a resident of \_\_\_\_\_ County, California, hereby appoint [family member], [address], [telephone], as my attorney in fact. In the event [family member] fails to qualify or ceases to act as my agent, I hereby appoint [alternate family member], [address], [telephone] as my attorney in fact. In the event that [both family members] fail to qualify or cease to act as my agent, I hereby appoint the trustee then in office of the \_\_\_\_\_ Family Trust dated \_\_\_\_\_ as my agent.

The presentation of this power of attorney by any agent named herein shall constitute the representation and warranty of such agent that he or she meets the conditions for qualification stated above and may be relied on by third persons without further inquiry of any kind. In the case of an agent appointed by reason of his or her position as trustee of the \_\_\_\_\_ Family Trust, the qualification of such person may be established by presentation of a trust certificate conforming to the requirements of section 18100.5 of the California Probate Code.

## **Appendix B**

### **Appointment of Professional by Designated Person or by Beneficiaries**

#### **Trust Provisions**

##### **POWERS OF THE TRUSTEE (per Appendix A)**

##### **DEATH OR INCAPACITY OF TRUSTEE**

In the event that the settlor ceases to act as the trustee, as a result of death, resignation or incapacity, then a professional institutional or individual trustee appointed by [authorized person] shall act as trustee. In the event that [authorized person] fails to appoint a professional trustee within \_\_ days following a written request by any beneficiary of this trust, then a professional institutional or individual trustee shall be appointed by a majority in interest of the beneficiaries of this trust. In the event that any trustee appointed hereunder shall fail to qualify or cease to act as trustee for any reason, then a successor trustee shall be appointed by [authorized person] or, if [authorized person] fails to appoint a professional trustee within \_\_ days following a written request by any beneficiary of this trust, then by a majority in interest of the beneficiaries of this trust.

[OR]

In the event that the settlor ceases to act as the trustee, as a result of death, resignation or incapacity, then a professional institutional or individual trustee appointed by a majority in interest of the beneficiaries of this trust shall act as trustee. In the event that any trustee appointed hereunder shall fail to qualify or cease to act as trustee for any reason, then a successor trustee shall be appointed by a majority in interest of the beneficiaries of this trust.

##### **TRUSTEE'S BOND**

No bond shall be required of any person named in this instrument as trustee for the faithful performance of his or her or their duties as trustee or trustees; provided, however, that any professional trustee appointed pursuant to paragraph \_\_\_ above other than an institution shall post such bond, if any, as may be required in the instrument appointing such trustee.

#### **Will Provisions**

I nominate the trustee then in office of the \_\_\_\_\_ Family Trust to serve as my Executor. In the case of any nominee other than an institution, bond shall be required unless waived in writing by all beneficiaries of such Trust.

#### **Durable Power of Attorney Provisions**

I, [client], a resident of \_\_\_\_\_ County, California, hereby appoint the trustee then in office of the \_\_\_\_\_ Family Trust dated \_\_\_\_\_ as my attorney in fact. The qualification of such person may be established by presentation of a trust certificate conforming to the requirements of section 18100.5 of the California Probate Code.

## **Appendix C**

### **Nomination of Multiple Family Members as Trustees**

#### **Trust Provisions**

##### **POWERS OF THE TRUSTEE (per Appendix A)**

##### **DEATH OR INCAPACITY OF TRUSTEE**

In the event that the settlor ceases to act as the trustee, as a result of death, resignation or incapacity, settlor directs [all surviving children] to meet and confer as soon as practicable and to select [one or two] of themselves to act as successor trustee(s). Such selection shall be made in writing by unanimous written consent of all persons named in this paragraph who survive the settlor. If any such person is incompetent, the selection may be approved by the conservator of such person if one has been appointed or, if not, by the remaining persons named in this paragraph. In the event that any trustee appointed hereunder shall fail to qualify or cease to act as trustee for any reason, then [one or two a successor trustee shall be appointed by a majority in interest of the beneficiaries of this trust.

If the beneficiaries named in this Article are unable to select [one or two] of themselves to act as successor trustee(s) within \_\_\_ days following the death, resignation or incapacity of the settlor, or at such earlier time as a conference attended by all such beneficiaries is held to nominate a successor trustee, then a professional institutional or individual trustee appointed by a majority in interest of such persons shall act as trustee.

##### **TRUSTEE'S BOND**

No bond shall be required of any person named in this instrument as trustee for the faithful performance of his or her or their duties as trustee or trustees; provided, however, that any professional trustee appointed pursuant to paragraph \_\_\_ above other than an institution shall post such bond, if any, as may be required in the instrument appointing such trustee.

#### **Will Provisions**

I nominate the trustee then in office of the \_\_\_\_\_ Family Trust to serve as my Executor. In the case of any nominee who is a professional fiduciary other than an institution, bond shall be required unless waived in writing by all beneficiaries of such Trust.

#### **Durable Power of Attorney Provisions**

I, [client], a resident of \_\_\_\_\_ County, California, hereby appoint the trustee then in office of the \_\_\_\_\_ Family Trust dated \_\_\_\_\_ as my attorney in fact. The qualification of such person may be established by presentation of a trust certificate conforming to the requirements of section 18100.5 of the California Probate Code.

## **Appendix D**

### **Agency Agreement**

THIS AGREEMENT ("Agreement") is made as of this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_, by and between [CLIENT], hereafter referred to as "Client," and [AGENT], hereafter referred to as "Agent."

#### **RECITALS:**

- A. Client is the duly qualified and acting trustee of the \_\_\_\_\_ Family Trust dated \_\_\_\_\_ ("Trust").
- B. Client requires assistance to perform his/her duties as trustee of the Trust;
- C. Agent has extensive training and experience in accounting, business, real estate management and trust administration;
- D. Client desires to engage Agent as Client's independent agent to assist Client in the administration of the Trust;
- E. Agent has agreed to assist Client in the administration of the Trust on the terms hereinafter set forth.

NOW, THEREFORE, it is mutually agreed as follows:

#### **1. AGENCY**

Client hereby retains Agent to assist Client in the administration of the Trust including, but not limited to, setting up and maintaining books of account, monitoring receipts and disbursements, preparing periodic financial reports, and performing such other duties as may be identified by the Client from time to time.

#### **2. PERFORMANCE OF SERVICES**

Agent shall use best efforts to perform such services in a competent, timely and professional manner.

#### **3. TERM**

This Agreement may be terminated by either party at any time, with or without cause and with or without notice; provided, however, that

3.1 Agent shall be paid for services rendered up to and including the date of termination and for any services rendered thereafter that may be necessary to transfer Trust records and documents to the Client or Client's designated representative;

3.2 The parties shall use best efforts to arrange any termination in such a manner as not to expose the Client or the Agent to loss or liability.

#### **4. COMPENSATION**

4.1 Client agrees to pay Agent a retainer of \$\_\_\_\_\_ upon the signing of this agreement, which will be applied against Agent's hourly charges and expenses as incurred. In the event that this agreement is discontinued for any reason, any unused balance of the retainer will be refunded.

4.2 Client agrees to pay to Agent the sum of \$\_\_\_\_\_ per hour, plus expenses. Agent will

submit to Client, monthly or as otherwise agreed upon by the parties, a statement of hourly charges and expenses incurred. Agent's expenses billable under this Agreement shall include expenses directly related to performance of Agent's duties hereunder but shall not include expenses of maintaining Agent's office or other general overhead expenses of Agent.

4.3 Statements are due upon presentation. A late payment charge of 1.5 % per month (18 % per annum) will be assessed on amounts that are more than 30 days past due.

## **5. BUDGETS**

5.1 Upon the request of Client, Agent shall prepare and submit for approval an annual or other periodic budget setting forth the services that Agent expects to perform and the estimated cost of such services. Agent's hourly charges under this Agreement for the budgeted period shall be at or below the budgeted amount unless otherwise agreed with Client as provided below.

5.2 Agent shall promptly notify Client if Agent has reason to believe at any time that Agent's billings for the budgeted period will or may exceed the budget for that period. In such event Client may either approve disapprove modifications to the budget, and in the event of disapproval either party may exercise its termination rights as provided in this Agreement.

5.3 Both parties shall use best efforts to insure that billings for Agent's services hereunder are reasonable in terms of the services provided and in proportion to the value of the Trust estate.

## **6. NON-EXCLUSIVITY**

The parties acknowledge that Agent is a licensed professional fiduciary under the laws of the State of California and that Agent serves as trustee and/or assists in the administration of trusts other than the Trust. Nothing in this Agreement shall be construed as requiring Agent to work exclusively for Client, except that Agent shall not undertake other assignments which materially interfere with the performance of Agent's duties under this Agreement.

## **7. STATUS AS INDEPENDENT CONTRACTOR**

The parties intend that Agent shall perform services hereunder as an independent contractor and not as an employee. Nothing in this Agreement shall be deemed to constitute Agent as an employee of Client, or as establishing a partnership or joint venture relationship with Client.

Without limiting the above, Client shall not withhold state or federal income taxes, social security taxes, or any other amounts which would be withheld from compensation paid to an employee. In addition, Agent specifically acknowledges that he/she shall not be entitled to claim benefits under any workmen's compensation law by reason of any services rendered to Client, and that Client does not and will not carry workmen's compensation insurance covering Agent.

## **8. INDEMNITIES**

8.1 Client shall indemnify and hold harmless Agent from and against all expenses incurred in the defense of any claims or proceedings against Agent, including reasonable attorney fees, arising out of actions undertaken by Agent acting in good faith in the performance of his/her duties as Agent of Client under the terms of this Agreement.

8.2 Agent shall indemnify and hold harmless Client from and against all liability, cost, expense or damage arising out of errors and omissions of Agent in the performance of this Agreement. Agent shall maintain at all times during the term of this Agreement errors and omissions insurance with a carrier and in an amount approved by client; provided, however, the obligation

of Agent to indemnify Client shall not be limited to the amount of such insurance.

**9. FIDELITY BOND**

Prior to the performance of any services under this Agreement, Agent shall obtain and keep in force a bond issued by a carrier approved by Client in the sum of \$\_\_\_\_\_insuring the faithful performance of Agent’s duties under this Agreement. Expenses of obtaining and maintaining such bond shall be deemed an expense of administration of the Trust and shall be billed to Client as provided in this Agreement.

**10. RESOLUTION OF DISPUTES; VENUE; FEES**

10.1 Any dispute based upon or arising out of this Agreement shall be heard and determined by the Superior Court, County of \_\_\_\_\_, pursuant to a petition brought under the provisions of sections 17200 and following of the California Probate Code.

10.2 The prevailing party in any such proceeding shall be entitled to reasonable attorneys’ fees in addition to such other relief as may be allowed by law.

**11. GOVERNING LAW**

This Agreement shall be construed in accordance with, and governed by, the laws of the State of California as applied to contracts that are executed and performed entirely in California.

**12. MISCELLANEOUS**

12.1 No change in the terms of this Agreement shall be effective unless made in writing and signed by Agent and Client.

12.2 Agent's rights and obligations under this Agreement are personal and not assignable, and any attempt to assign such rights and obligations shall be void.

12.3 This Agreement contains the entire agreement and understanding between the parties to it and shall be binding on and inure to the benefit of the heirs, personal representatives, successors and assigns of the parties, subject, however, to the restrictions on assignment contained herein.

12.4 The paragraph headings used in this Agreement are for reference and convenience only, and shall not in any way limit or amplify the terms and provisions hereof, nor enter into the interpretation of this Agreement.

IN WITNESS WHEREOF, the parties to this Agreement have duly executed it on the day and year first above written

\_\_\_\_\_  
Client

\_\_\_\_\_  
Agent