

# To Trustee or Not to Trustee?

That is the question.

BY MICHAEL P. HATCH, CFP, JD



Many individuals have established an estate plan using standard revocable trusts, as well as other trusts, to provide for themselves and their loved ones. Trusts, if properly set up and funded, have the advantage of avoiding probate, can provide ongoing management of your assets if disabled, and

can potentially save your family significant estate and income taxes. With the sweeping tax changes that have taken place in the last 5 or 6 years, not to mention any changes that may have occurred in your personal situation, now may be an excellent time to review and update your estate plan to reflect changes in federal estate tax laws (which have also impacted state tax law).

Table 1 illustrates the currently enacted law that increases the amount of assets you can leave to your beneficiaries at death (or gift during life), free from federal estate taxes, and the decreasing estate tax rates. Of course, under this law, everything changes after 2010, and returns to the pre-2000 tax rate and 2002 exemption amounts. No one knows the outcome of the debate on federal estate taxes; however, this chart certainly points out the vastly differing estate tax regimes that you may be exposed to, and provides ample reason to keep your estate plan current.

## CHOOSING A TRUSTEE

Besides the estate tax implications that make updating your trust a good idea, many couples are rethinking their choice of trustees because most often they have chosen themselves as the initial trustee, and a child as the successor trustee. Because estate tax burdens are generally declining, many people are reconsidering the purpose of their trusts, and rather than merely helping them avoid probate or saving some estate taxes, are tinkering with their estate plan to provide more long-term financial security for their families. Rather than paying out to beneficiaries all at once, many people are choosing to keep assets in trust for their beneficiaries over many years, or perhaps an entire generation or more. The benefits of this strategy may include potential additional estate tax savings, creditor and asset protection,

and continuity of management for assets, oftentimes resulting in more efficient uses of bequeathed assets. With more assets remaining in trust, your choice of successor trustees takes on a greater level of importance. Although you may be perfectly willing and capable to serve as your own trustee, naming one or more of your children as successor trustees can have several pitfalls.

A successor trustee that is required because of your incapacity generally should live sufficiently nearby to facilitate the orderly management of your routine business and financial affairs. While it is not an absolute necessity that your trustee live nearby, if your children are not conveniently located to allow such access, think twice before naming them as successors. Someone who is unfamiliar with your affairs and cannot easily observe your mail, potentially your housing, and meet with your professional advisors, may have difficulty in acting as successor trustee.

Does your son or daughter have the experience, competence, and time to devote to the task? Managing your own trust is very different from managing a trust for another person. For example, managing a trust for another individual

**TABLE 1. FEDERAL ESTATE TAX RATES AND EXEMPTIONS**

Year of Death	Credit Amount	Equivalent Exemption Estate Tax Rates
2000-2001	\$220,550	\$675,000
2002-2003	\$345,800	\$1,000,000 (49%)
2004-2005	\$555,800	\$1,500,000 (48%-47%)
2006-2008	\$780,800	\$2,000,000 (46%-45%)
2009	\$1,455,800	\$3,500,000 (45%)
2010	Repeal, zero estate tax this year	
2011+	\$345,800	\$1,000,000 (55%)

usually involves requesting new tax payer identification numbers, the estate may have been split, resulting in accounting that is much more detailed and formalized, and investment policies and procedures should be written out. A successor trustee needs to become sufficiently familiar with the basic issues involved in managing a trust for another person, and be competent in dealing with professionals such as attorneys, accountants, and investment advisors, depending on the assets in the trust. If you have a \$1 million trust primarily invested in stocks and bonds, you would likely want a successor trustee who, at a minimum, has some investment experience of their own. A successor trustee is acting in a fiduciary capacity and must follow the trust document and legal and tax formalities. Of course, all this takes time, and thus if your child has a high-powered career or is raising children, you may wish to reconsider whether you want to add this task to their already full schedule.

“Because estate tax burdens are generally declining, many people are reconsidering the purpose of their trusts . . .”

Family conflicts can be created in which one child is serving as successor trustee over assets that ultimately may go to another child. Many trusts allow for discretionary distributions for health, education, maintenance and support, but those categories can provide for a great amount of latitude on the part of the trustee. For instance, if the oldest child is serving as trustee and has always been very frugal, how likely is he or she to provide a discretionary distribution to a sibling whom they consider to be a spendthrift? Furthermore, with second marriages and blended families, one child's idea of what the original creator of the trust would consider an acceptable expense could be very different from another child's perception. Also, children can have very different investment philosophies, some favoring conservative strategies and some who may be much more comfortable with aggressive strategies.

### BEING CHOSEN AS TRUSTEE

Perhaps you are on the other side of the coin and are either named as a successor trustee or are considering accepting such an “honor.” You should carefully consider your unique family situation, the types of assets involved in the trust, the complexity of the situation, and whether you have the time to manage such an endeavor. If the situation is fairly routine, the assets are standard investments with which you are already familiar, and your family is especially tight-knit and even-keeled, then it probably is not a big issue

for you to help out in this manner. However, most individual trustees garner little, if any, income from such activities and are exposed to time demands, as well as personal financial liability (in most states) for their actions as trustees. This means that if it has been determined that you have made improper decisions or have been negligent as to trust assets, you could have to make up any deemed shortfall out of your own personal assets. This is a pretty substantial burden for helping out a family member! Keep in mind, if you are already named in a trust document or are already acting as a successor trustee, you can always decline to serve in the position or resign from the position (sometimes resigning may require approval of all interested parties or judicial consent). When considering whether to accept a position as successor trustee, you should carefully consider the famous words, (taken out of context and slightly modified): “To trustee or not to trustee? That is the question I ask of thee.”

### PROFESSIONAL TRUSTEES

Many of our clients are finding that the naming of children as successor trustee may not be the best option. This is where the idea of the professional or corporate trustee can come in. Who, where, and how would such corporate or professional trustees help carry out your wishes? Without knowing your specific personal situation, how can a professional or corporate trustee effectively carry out your wishes? As the needs of clients have increased and technology has grown increasingly sophisticated, more entities have arisen that are capable of providing trustee services for all different types of families in nearly every area of the country.

For instance, in California, there's an association of trustees called the Professional Fiduciary Association of California, which is composed of attorneys, accountants, and the like, who are familiar with the local rules, as well as the local courts, so that they may be appointed as outside professional trustees. Your local association of Certified Public Accountants, or the local Bar Association, may have additional referrals for you in this area. Using an individual professional such as an attorney or accountant may have the benefit of more personalized service. However, this arrangement may subject you to that individual professional's unique strengths and weaknesses.

In addition, certainly banks and trust companies in your local community may offer such services. While these institutions may offer comprehensive services, they can be inflexible and somewhat impersonal.

Another avenue to explore is independent corporate trustees. I say “independent” because I am referring to a trust company whose sole purpose is to serve as corporate trustees, not in the banking or money management fields.

The use of an independent corporate trustee, I believe, provides several advantages. First, you have the inherent

advantage of an unlimited life corporate form. This usually means that there is significant expertise in knowing how to review legal documents and how to implement the trust language and investment parameters, and that knowledge all resides within the company as a whole, not just a single individual. Second, these independent corporate trustees are in the business to be trustees—they are not involved in the asset management business. This allows for the use of an asset allocation strategy and a best-in-class money manager for each asset category. In this way, the independent corporate trustee is then just another provider of specialized service to the trust, and like all service providers, can be hired and fired at will.

The ability of the trust maker or beneficiaries to hire and fire professionals, including trustees, investment managers, accountants and attorneys, leads all service providers to continue providing meaningful client service, regular communication, and specialized expertise that comes to be relied upon. This team approach provides clients with multiple advisors working together from their unique discipline's perspective, to provide the client with a total and comprehensive solution.

## CONCLUSION

There are several steps to consider when updating your trust. While we cannot say with certainty where estate tax laws will end up, certain modifications to trust documents may be very prudent at this time, depending on your situation. This may include reassessing who you have named as successor trustee, who has the ultimate responsibility for management of your trust. Although no one choice is right for everyone, the most often designated choice (the children or eldest child) may not be the only valid choice for your family. ■

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