

Choosing the Right “Helpers”

By **Richard J. Shapiro, J.D.**

Naming the right “helpers” is a critical component of a successful estate plan. By “helpers,” we mean the successor trustees, executors, health care agents and other fiduciaries who are responsible to assist with your personal and/or financial affairs upon your disability or death.

In a typical revocable living trust, most people serve as their own trustees so long as they remain “alive and well.” Because of longer life spans and medical advances, however, more of us will suffer periods of disability requiring the assistance of others to manage the living trust and its assets. One or more **Disability Trustees** must be named in the trust document to take care of the trustmaker’s personal affairs and assets upon a stated event of disability or mental incapacity. It is critical that the trust document include detailed instructions for your care and the care of your loved ones in the event of your disability. The trust should spell out who are the permitted trust beneficiaries during your disability, and whether there is a priority for trust distributions (e.g., “provide for me, then my spouse, then my children, in that order of priority”). It is also a good idea to include a description of your hobbies and interests that you enjoy and that you would like to continue during a period of disability, to the extent possible. The trust should also include your preferences for gifting of assets during a period of disability.

The trustmaker will also name one or more **Death Trustees** who will assume management of the trust upon the trustmaker’s death. The Death Trustees are responsible for all phases of trust administration, including identifying assets, working with professional advisors (e.g., attorney, accountant and financial advisor) to prepare tax returns and distribute the trust assets to the named beneficiaries. If assets are to remain in trusts for one or more trust beneficiaries, the Death Trustees may be appointed as trustees of the beneficiary’s trust share, or other trustees may be named.

It is also possible to name different Trustees to handle different aspects of the Trustee duties. For example, you may name an “Administrative Trustee” whose duties might include maintaining the trust’s books and records, and preparing and filing the trust income tax returns. An “Investment Trustee” might handle all investment powers authorized by the trust instrument.

The **Executor** (also called the **Personal Representative**) is responsible for handling administrative duties associated with a will submitted to probate. The Executor’s duties are similar to that of a Death Trustee, except that the Executor’s administrative duties terminate once the probate assets have been distributed to the beneficiaries and all claims have been paid, while the Trustee may have an ongoing obligation to administer trusts established for one or more trust beneficiaries. Note that many wills contain trust provisions for beneficiaries; Trustees for such “testamentary” trusts should be named in the will, and the Trustee’s duties and obligations will be the same as with any other trust.

In almost any estate plan the client will sign powers of attorney that authorize one or more **Agents** to manage the client's financial affairs. Most clients elect to execute powers of attorney that are effective immediately upon signing; an unwise choice of Agent could conceivably result in the looting of your assets! To help prevent this result, some clients specify that two Agents must act jointly to carry out any power designated under the power of attorney. While undoubtedly more protective of the client's assets, use of multiple agents may cause a delay in taking needed action. The client must weigh these factors carefully before choosing the method that is right for them.

Not to be overlooked is the importance of naming a **Health Care Agent** in your Health Care Proxy. The Health Care Agent (naming a successor Agent is also recommended) should know your specific wishes for termination of life support in an end-of-life scenario. Such wishes can either be specified in a companion Living Will, or you can state in the Health Care Proxy that the Health Care Agent knows your wishes and that you authorize the Health Care Agent to act on your behalf. It is critical to select a person who you are confident will carry out *your* wishes, even if they may have a different opinion regarding end-of-life treatment.

Richard J. Shapiro is a partner with the Middletown law firm of Blustein, Shapiro & Rich, LLP. Mr. Shapiro is a member of the National Network of Estate Planning Attorneys, the National Academy of Elder Law Attorneys, the New York State Bar Association (Trusts and Estates and Elder Law Sections), and the Hudson Valley Estate Planning Council. He can be reached at (845) 692-0011 or at rshapiro@mid-hudsonlaw.com. The information in this article is for general information purposes only and is not, nor is it intended to be, legal advice, including legal advice for Internal Revenue Code purposes as described in IRS Circular 230.