SMITH LAW, P.A.
49 Pleasant Street
Brunswick, Maine 04011

Selecting Fiduciaries

The typical will requires you to select at least one fiduciary – the "personal representative" – and may also require you to select a successor fiduciary. You may also want to designate a "guardian of the person" for your minor children, should you and your spouse both die before they reach the age of majority. If you are executing a Financial Durable Power of Attorney or Advance Health-Care Directive, you must choose an "agent" or "attorney in fact." These are important decisions and the purpose of this memorandum is to help you make them intelligently.

In some situations, such as the nontaxable estate where a competent, relatively youthful (compared to yourself), close relative is available and willing, the same person may be selected to fill each of these fiduciary roles. In other cases, different individuals, or even banks or other institutions, may be appropriate.

The Personal Representative. The personal representative is the person who is in charge of winding up your affairs, paying your last debts, collecting your life insurance, filing your final income tax returns, identifying and appraising the property in your estate, paying any estate taxes (if applicable), and distributing your estate in accordance with your will. The more complicated your estate, the more work the personal representative will have to do. He or she may hire an attorney (and usually does) and an accountant, an appraiser, or other agents to assist in this process. If you select a person to serve as your personal representative, pick someone who is honest and good at attending to details. Financial and administrative knowledge is not required, as long as the personal representative has the good sense to hire the expertise that he or she may lack. In many cases husbands and wives select each other to be personal representative. A sibling or adult child of demonstrated maturity may also be a good choice. For more complicated estates, a bank or other institutional fiduciary may be a good choice. Individuals are often preferred to institutions because they may not charge for their services (or will charge less than an institution would under the same circumstances). If you are contemplating using a bank as your personal representative, you should contact its trust department and inquire about their usual charges for such services.

I am sometimes asked to serve as personal representative for my clients. I am generally willing to do this, with the understanding that my charges will be based upon my hourly rates at the time the services are rendered, sometimes adjusting up or down according to the responsibilities involved, the difficulty or novelty of the issues that occur during administration, and other factors permitted by the Maine Probate Code. In such cases, I normally hire myself as attorney for the estate. In every case, I take care to see that I never bill twice for the same thing – i.e. once as an attorney and once as personal representative.

Successor Personal Representative. The selection of a successor personal representative is especially important if spouses designate each other as personal representative. When the first spouse dies, the surviving spouse will serve as personal representative of the estate. If no change is made to the surviving spouse's will, the named successor personal representative will handle the administration of his or her estate. A common plan is to designate the spouse as personal representative and a responsible child or sibling as successor. The same considerations applicable to selection of a personal representative apply to the selection of a successor. It may be appropriate to

designate banks or other financial institutions as successor personal representative since the institution or its successor will likely be available and equipped to do the job, whereas an individual named as successor personal representative may be deceased by the time the will is probated.

Trustee. If you create an *inter vivos* ("living") trust, or if your will contains a trust, a trustee must be selected. The trustee is responsible for administering the property placed in the trust according to the terms, restrictions and powers specified. A trustee ought to have more financial acumen than the personal representative, because the trustee is generally responsible for investing the trust funds. A trustee should also be wise. The trustee is frequently called upon to determine whether or not a certain discretionary payment should be made from the trust, so he or she should be able to make logical independent decisions while taking into account the circumstances.

Although many clients prefer individual over institutional trustees, there are some income and estate tax issues that arise if named trustee is also a beneficiary of the will or the trust. For this reason, and because of the degree of financial sophistication involved, we sometimes recommend banks or other institutional trustees. We might also suggest that a bank or other institution be named as co-trustee, or as alternate or successor trustee in the case of the death, resignation, or disqualification of the primary trustee.

Banks normally have a standard fee schedule for acting as trustee. You should discuss this with the bank's trust officer. Any fee quoted by the bank may be negotiable, especially if the trust is to be a large one.

Guardian of the person of minor children. The guardian of the person of a minor child is that person with whom you would like the children to reside if both you and your spouse die before the children reach the legal age of majority (18). The guardian, once appointed by the Probate Court, has all the legal rights and responsibilities of a parent with respect to your child. He or she can make decisions about school, medical treatment, and set the appropriate boundaries for your child's behavior. I normally tell my clients that they should select a guardian who would raise their children the way they themselves would.

Guardianship is determined by the Probate Court, which will follow the wishes expressed in your will unless the court is convinced that the best interests of your child (or children) dictate otherwise. The Probate Court can always require the guardian to explain his or her actions, and the court can remove a guardian and appoint a new one, if necessary.

The guardian does not have to be the same person who is named trustee of any funds passing to your minor child upon your death. Obviously, the skills required of guardians and trustees are quite different and often do not exist in the same person. Our clients frequently select a close relative of similar age as guardian of their minor children, and name an older relative or bank as trustee of the minor's trust. In such a situation, the trustee and guardian would get together and establish a regular monthly payment made by the trustee to the guardian to pay for the general needs of your child. Any special needs, like school tuition or extraordinary medical services, would be dealt with on a case-by-case basis.

The selection of a guardian is possibly the most important decision to make in planning your estate. You and your spouse should agree on the decision, if possible, and name the same person. Before executing your estate plan, you should discuss with your prospective guardian the responsibilities involved and ensure that he or she is willing to take the job.

Agent/Attorney in Fact. "Agent" or "Attorney in Fact" is the legal term for the named fiduciary under a Power of Attorney. I generally prepare a Financial Durable Power of Attorney which gives your named agent the power to do any act or sign any document that you could, personally, that is necessary to manage your financial affairs. "Durable" means that the Power of Attorney will continue to be effective even if you become incapacitated (e.g. mentally disabled, comatose, etc.). Although Powers of Attorney are generally broad in scope, you can limit your agent's powers if desired. You should evaluate your reasons for limiting these powers, however, because the basic purpose of appointing an agent is to carry on your affairs in the event you become disabled. Each limitation of powers increases the risk that your agent will not be able to properly carry on your affairs and be forced to petition the court for appointment as conservator. A conservatorship proceeding is not a desirable outcome; they are public, expensive, and oftentimes lengthy.

If you control a business, or are an active investor, or manage real estate, or engage in similar business activities, your agent should be familiar with them. It is often a good idea under such circumstances to prepare a letter of instruction that your agent may consult for relevant information and guidance for making important decisions.

The Power of Attorney can be effective at the moment it is signed by you (and its use dependent upon the agent's discretion not to exercise the power when you do not want him to), or it can be "springing," which means it is effective upon a showing of your mental incapacity. "Springing" Powers of Attorney can be cumbersome and sometimes even defeat the purpose of executing the document in the first place. For example, a third party such as a bank or title attorney may continue to question whether the principal is incapacitated, even after reviewing a doctor’s note indicating as much. If you end up in Probate Court seeking a determination that a springing power has "sprung" (which can happen if the third party will not accept the attorney-in-fact's signature), you will have defeated the purpose of creating the power. For this reason, many clients forgo springing Powers of Attorney and instead select the agent with care and make the power effective immediately. Alternatively, I utilize an escrow approach whereby the Power of Attorney is left with the attorney (or another agreed-upon escrow agent) with instructions to deliver the document to the agent when the escrow agent determines that incapacity exists.

The Advance Health-Care Directive combines a medical Power of Attorney and a living will. The agent you name in the document is empowered to make medical decisions on your behalf. You may authorize your agent to make the decision to terminate life support systems if you are comatose and terminally ill, or you may make a declaration to this effect in the document itself. There are several other optional provisions that the attorney will review with you at the time of signing. The decision to appoint a healthcare agent is a highly personal one, and you should ensure that your named agent knows your wishes and be confident that he or she will carry them out.