



NAMING AN EXECUTOR:

The Most Underrated and Most Important Consideration in Estate Planning

Most people do not like to think about death and taxes, but those are the primary concerns of an estate planner. Along with these concerns, we often ask some truly intimate and difficult questions to aid us in drafting an effective, efficient estate plan. These questions pry into a family's dynamics, the values it desires to pass onto descendants and the vehicles it wishes to use to transfer its wealth. Often buried in this slew of imposing questions is one that is regularly overlooked or answered by default: Whom would you like to name as executor of your estate? The most common answer to this question is overwhelmingly "My spouse, and if he or she predeceases me, my eldest child or children." As a formerly practicing trusts and estates attorney, I would often accept that answer, fill in the proper blanks on the will or trust document and move onto other pressing, and what I thought were considerably more important, issues surrounding estate and gift taxes or creditor protection.

Five years after leaving private practice in trusts and estates and coming to Brown Brothers Harriman (BBH), where I see much more often what happens to those executed estate planning documents when they are actually implemented, I now realize that all of our clients should linger a little (or a lot) longer on the question as to who will serve as executor of their estate. Making the right choice might mean the difference between a harmonious family and a litigious one. The decision could have severe financial ramifications for the estate and its ultimate beneficiaries. In short, the answer to a deceptively simple question could potentially make or break the family's harmony and financial success.

I recently met a woman whose husband had unexpectedly died. Because he did what most people do, he named her as executor of his estate, with his three children as backup in the event that she was unable to act. The deceased husband had generated



Because each decision, big or small, was ripe for disagreement, the executors missed some crucial deadlines, including one that would have allowed them to deduct hundreds of thousands of dollars of advisory fees and another that created an unnecessary penalty from the Internal Revenue Service.”

significant wealth for the family in real estate, which still comprised the bulk of his estate, along with several pieces of artwork from a small number of renowned artists. After a few months of stalling on her responsibilities of managing and settling her deceased spouse’s estate, the woman realized she was overwhelmed by grief and could not properly perform the necessary duties, so she resigned, leaving her three children to act in her place. This, she explained, is when “it” started.

While the three children were relatively close prior to their father’s death, his passing, according to their mother, heightened their emotions and engendered some theretofore unforeseen acrimony, so much so that there was a lawsuit instituted by each child against the others alleging mismanagement of estate assets. Indeed, the estate appeared to be in disarray. Because the children wanted liquid cash, they began selling the real estate and artwork to raise cash to fund the various trusts that their father had set up for their benefit. Putting the artwork on the market had the deleterious effect of flooding the art market with several rare works by one particular artist, consequently decreasing the value of each piece alone. Similarly, a bulk of the real estate was put up for sale in a relatively small geographical area, acting like a fire sale to decrease the price of the assets. Because each decision, big or small, was ripe for disagreement, the executors missed some crucial deadlines, including one that would have allowed them to deduct hundreds of thousands of dollars of advisory fees and another that created an unnecessary penalty from the Internal Revenue Service.

The mother I met felt what many mothers, fathers, children and others feel when faced with the sometimes extremely burdensome task of managing and settling an estate as executor: overwhelmed – by grief, by family dynamics and competing demands and by responsibility. And an executor’s responsibilities

are not minimal; they include (but are certainly not limited to) locating all of the deceased’s assets, opening an estate account, petitioning the probate court, notifying creditors and paying debts, valuing business, investment, art and other hard-to-value assets, filing a final income tax return, filing an estate tax return, hiring a team of lawyers, accountants and other advisors and properly distributing the estate to named beneficiaries. Executing on these duties can prove difficult for anyone, let alone someone without any estate administration experience who is going through what is often the most trying and emotionally difficult time of their lives while they grieve the loss of a loved one.

Unfortunately, stories like this are not uncommon. Often, family members who are named as executors become overwhelmed with their associated responsibilities. Many throw money at the problem by hiring a team of expensive (and sometimes unnecessary) advisors; others create liability for themselves by neglecting their responsibilities altogether, which can cause businesses to slump and executors to miss important deadlines that create penalties, hire unequipped advisors, fail to pay debts that accrue additional fees or fail to make timely distributions to now disgruntled and potentially litigious beneficiaries. This is why the answer to the question “Who will be your executor?” should be more carefully considered before choosing a default spouse or family member.

For many estates, particularly small ones or those with straightforward, liquid assets, naming a spouse or child as executor may indeed be the most prudent and efficient answer. For example, when the assets consist mainly of cash and marketable securities, and the will provides that everything is left to the surviving spouse or to the children in equal shares, naming a spouse or child as executor may make sense. However, if there are closely held business interests, real property in multiple jurisdictions (having a vacation home in Aspen, for example, may mean having to do a second, ancillary court proceeding in Colorado), highly valued artwork, high concentrations in hedge fund or private equity interests, debt interests or other complex assets, or if the estate plan uses formulas to create multiple tax advantages and creditor-protected trusts, then hiring an experienced corporate executor can almost certainly yield better, more cost-efficient results – and may potentially save a family member acting as executor from being the scapegoat for souring family dynamics.

Corporate executors are professionals at acting as the scapegoat. They act fairly and impartially when confronted by family members who demand access to estate funds or disagree over sales of artwork, business interests or other complex assets. Naming a corporate executor relieves the family or particular family members from making difficult decisions that could potentially

create family disunity. The corporate executor has a fiduciary, legal *obligation* to manage the estate in the best interests of the beneficiaries, which means avoiding fire sales and maximizing investment returns on estate assets while it is being settled and administered, a process that can sometimes take two or more years. Moreover, corporate executors do not become sick or incapacitated, nor do they become overwhelmed by the demands of grief. They can also work with your family in advance of a death to assess any preferred service providers, such as valuation experts, art auction houses, real estate agents and so forth. Finally, corporate executors come with a wealth of experience and knowledge in settling complex estates, which can provide additional cost and efficiency advantages to the estate.

At BBH, we go further than providing the standard benefits of a corporate executor by working to understand the family's dynamics, its goals and the values members wish to pass on. We have taken to heart the studies that show that the extreme majority of generational wealth transitions fail, not because of poor tax or investment decisions, but because of poor intrafamily communication about the wealth. In fact, according to the Williams Group, 70% of wealthy families lose control of their wealth by the second generation because of breakdowns in communication and trust, inadequately prepared heirs and a lack of family mission and values. As executors, we take seriously our role as steward of the family's wealth from the deceased to the next generation. What differentiates us is not our ability to know all the probate, tax and administrative laws, but rather our understanding that the only way to combat the old adage "shirtsleeves to shirtsleeves in three generations" is by maintaining a relentless focus on family dynamics and values, communication and preparing heirs for wealth. Our executor services include a suite of services to minimize intrafamily acrimony by leveraging our best-in-class values-based planning tools to help families more effectively communicate about their wealth, as well as pass on their values with that wealth through generations, both proven tools that minimize conflict and maximize value.

Consider again briefly the woman mentioned earlier that I met, whose family fell apart after her husband died. I like to think that if BBH had been named as executor of her husband's estate, we could have saved her family by doing what we do with all of our clients. When a client names us as executor, we do not wait until death to begin the work; we begin immediately. If we do not already, we get to know the family members' advisors, or introduce them to any necessary advisors they may need, so that we can work seamlessly with them at a death. We could have introduced the family to our Center for Family Business to implement a clear succession plan for the real estate business, so that the family could avoid a fire sale at death. We could also

have taken an inventory of the artwork and reached out to auction houses about a plan of action that would avoid devaluing the artwork by placing it on the market all at once. In addition, to avoid potential intrafamily conflicts, we could have leveraged the power of storytelling during a family meeting, where the parents speak to the children not only about the estate plan, but also about the art, the heirlooms, the memorabilia and the meaning and intent behind the gifts.

If you have read this far, you have probably asked yourself the following question at least once: What about fees? After all, why pay a corporate executor when you can have your spouse or child do it for free (assuming they actually waive commissions)? Since family members who are named as executor almost always come into the role without any prior experience managing and settling estates, most individuals hire a team of lawyers, accountants, investment advisors, property managers for real property, consultants for business interests, auction houses for art and potentially many other advisors to help guide them through estate administration. While a family's estate planning attorney will often fulfill a few of these roles, he or she may also need to hire several outside advisors to settle the estate. A corporate fiduciary, however, will have many of the necessary resources to manage, invest, account for, settle and distribute the estate all under one roof. And whenever we do use outside advisors, we are often able to obtain substantial discounts as a corporate client. In addition, most people do not realize that a portion of executor fees are deductible against the estate taxes, so the out-of-pocket cost for the estate is generally much smaller than the commission included in a published fee schedule. Finally, there may not be a price tag on allowing the family to just grieve and to effectively avoid family disharmony, unnecessary penalties, fees, litigation and the like from the errors or delays caused by an inexperienced, well-meaning family member.

If you have questions about the benefits of naming BBH as your executor, please reach out to your local wealth planner. ■



NEW YORK BEIJING BOSTON CHARLOTTE CHICAGO DENVER DUBLIN GRAND CAYMAN HONG KONG
JERSEY CITY KRAKÓW LONDON LUXEMBOURG NASHVILLE PHILADELPHIA TOKYO WILMINGTON ZÜRICH

WWW.BBH.COM

Brown Brothers Harriman & Co. ("BBH") may be used as a generic term to reference the company as a whole and/or its various subsidiaries generally. This material and any products or services may be issued or provided in multiple jurisdictions by duly authorized and regulated subsidiaries. This material is for general information and reference purposes only and does not constitute legal, tax or investment advice and is not intended as an offer to sell, or a solicitation to buy securities, services or investment products. Any reference to tax matters is not intended to be used, and may not be used, for purposes of avoiding penalties under the U.S. Internal Revenue Code, or other applicable tax regimes, or for promotion, marketing or recommendation to third parties. All information has been obtained from sources believed to be reliable, but accuracy is not guaranteed, and reliance should not be placed on the information presented. This material may not be reproduced, copied or transmitted, or any of the content disclosed to third parties, without the permission of BBH. All trademarks and service marks included are the property of BBH or their respective owners. © Brown Brothers Harriman & Co. 2019. All rights reserved.