



The Wealth Counselor

A monthly newsletter for wealth planning professionals

Solidifying the Adviser Relationship through Creative Trust Planning

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Clients have worked hard to amass their wealth. Many have developed close ties to their advisers in the process, including financial advisers, CPAs and attorneys. Will those ties be broken if they become incapacitated or die? Do they want their successor Trustee or their Personal Representative to make that decision? This issue of The Wealth Counselor examines some ways in which the planning team can help clients address this important issue.

Shaping the Level of Adviser Involvement

Your clients have carefully chosen their adviser to provide them advice. The strength of their desire that such advice continue if they become incapacitated or die is often related to the length of the relationship and, for example, the amount of assets under that adviser's management.

Once apprised of the possibilities, clients often choose to have continuity of that advice and the client/adviser relationship, so it is incumbent upon the planning team to discuss and address these issues. There are at least two distinct approaches that clients can use:

- Create a document stating their desires
- Provide direction in their estate planning documents

The advantages and disadvantages of each of the above approaches are discussed below.

Naming the Trusted Adviser in a Separate Document

The simplest and least formal approach is for the client to express, in a signed document that is separate from their estate planning documents, the desire for the continued use of a

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trusted adviser. Commonly, the document is a memorandum or letter that refers to the adviser by name or as, for example, a "financial adviser who is managing a significant portion of my estate, as determined by my Trustee (or Personal Representative)." Significantly, this approach is merely precatory - that is, it is a suggestion that reflects the client's desire, but the successor Trustee or the Personal Representative is not obligated to follow the client's suggestion.

Planning Tip: Using a memorandum or letter to express a desire for continued reliance on a particular adviser is the simplest and most flexible approach. On the other hand, it provides the least predictability because it is not binding and thus does not ensure realization of the client's objectives.

Planning Tip: To increase the likelihood that the client's desire will be realized, copies of the memorandum or letter should be put with their estate planning documents and provided to the attorney, adviser, CPA and, as the client ages, to the named Successor Trustee or Personal Representative. To avoid confusion, later changed expressions of the client's desires should expressly supersede earlier ones.

Incorporation in Client's Estate Plan Documents

A client can also direct, instead of merely suggesting, that if they become incapacitated or die the relationship with their trusted adviser will continue. To avoid unintended and unanticipated consequences, this should only be done with the advice of experienced counsel. It is done by making appropriate provisions in the client's estate planning documents. A client can accomplish this through any of three ways:

- Provide express direction to the client's successor Trustee or Personal Representative to continue the relationship with the trusted adviser;
- Appoint the trusted adviser to serve as "Investment Adviser" to the successor Trustee or Personal Representative; or
- In the case of the client's investment adviser, separate Trustee responsibilities, assigning some to an "Investment Adviser," and appointing the trusted investment adviser to serve as Investment Adviser if the client becomes incapacitated or dies.

Planning Tip: The first two options are the most commonly used. They typically take effect when the client becomes incapacitated or dies, and they appear in the trust or will article guiding administration (i.e., provisions that direct the Trustee in managing the trust or the Personal Representative in managing the estate).

Planning Tip: For consistency's sake, incorporate similar language in the client's Durable Power of Attorney to ensure continued input by the trusted investment adviser into all asset management decisions.

The third option - appointment of a separate "Investment Adviser," is a newer concept recently codified in Delaware's trust law. While Delaware law obviously does not govern

all trusts, it is instructive as to how to establish an Investment Adviser relationship.

Planning Tip: The trust instrument can separate trustee duties as the client desires, including separate Administrative Trustees, Distribution Trustees, Investment Advisers, and General Trustees (who manage the general operations of the trust).

The "Investment Adviser"

The purpose of creating the Investment Adviser role is to separate investment decisions from the other responsibilities of the Trustee. Under Delaware law, the Investment Adviser can have broad, even absolute discretion, and decisions made by the Investment Adviser are not generally subject to review. Unless state law provides otherwise, the authority of the Investment Adviser may be conferred in either a fiduciary or nonfiduciary capacity. For example, 12 Del. Code Sec. 3313(a) provides that an Investment Adviser is a fiduciary unless the trust instrument says he is not.

Planning Tip: Investment Adviser powers typically include the powers to direct the sale or exchange of property; hold, maintain, or cancel life insurance; and open, manage, and close accounts.

Title Holder vs. Power Holder

A Trustee is a title holder. The Trustee's name is actually on the title to the property subject to the trustee's authority; e.g., *John Doe, Trustee of the Jane Doe Trust*. By contrast, an adviser may have power over an asset, but does not hold title to it. This is intended to insulate the trust, the Trustee, and the Adviser from liability that might arise from the actions of the others.

Conclusion

Clients, particularly those with strong bonds to their adviser, often desire continuity of advice after their incapacity or death. By raising these issues with clients, the planning team can help their clients to achieve their planning objectives. Doing so often establishes a bridge to a new relationship with the client's surviving spouse, children, and other beneficiaries.

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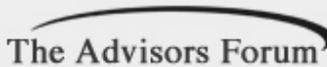
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