

## **Multiple Co-Trustees? Proceed with Caution!**

by Desiree F. Rivera, Esq.



# **KEEP CALM AND PROCEED WITH CAUTION**

For many clients, the estate planning process can be a very emotional one as they are tasked with making a number of important decisions that will affect their family long after they are gone. One of those important decisions is who they would like to appoint as trustee of their trust. For a variety of reasons, some people consider appointing multiple successor co-trustees to serve jointly (as opposed to a single successor trustee). A common scenario might be a family of four where the husband and wife are creating their estate plan and would like to appoint both of their adult children as successor co-trustees after the husband and wife's passing.

The same sentiment is true for co-trustees who are appointed to administer a trust with other co-trustees. As a co-trustee, after your loved one passes, the trust administration process can be a very arduous one, filled with many important decisions. As a co-trustee, the process can become even more challenging by the need to coordinate, communicate, and work with another trustee (essentially, an additional decision maker).

Whether counseling estate planning clients who are considering appointing multiple successor co-trustees, or working with trust administration clients who are actively administering a trust with a co-trustee, below are some general guidelines and considerations we discuss with our clients to help guide them in their decision-making process.

### **Pleading Ignorance Is NOT Bliss**

When a trust has more than one trustee serving,



each co-trustee is under a duty to actively participate in the trust's administration (California Probate Code Section 16013). In addition, a co-trustee must also take reasonable steps to prevent the other co-trustee from breaching the trust, or to compel a co-trustee to redress a breach of trust.

Further, a trustee can be liable for a breach committed by a co-trustee where the trustee does the following:

- Participated in the breach
- Improperly delegated administration
- Approved, knowingly acquiesced in, or concealed the co-trustee's breach
- Negligently enabled the co-trustee's breach
- Neglects to take reasonable steps to compel a co-trustee to redress their breach

Simply put, a co-trustee cannot hide their head in the sand while the other co-trustee administers the trust. A co-trustee must be proactive in running the trust (and ensuring the trust is run properly) or that trustee could be held liable, not only for their own actions, but for the actions of their co-trustee as well.

## The Challenges of Co-Management

Co-trustees must act unanimously in administering the trust, unless the trust document provides otherwise (California Probate Code Section 15620). However, if a vacancy occurs in the office of a co-trustee, the remaining co-trustee can continue to act to avoid injury to the trust. Therefore, unless the trust document provides otherwise or the co-trustee cannot act for an acceptable reason, the co-trustees must act unanimously when making decisions regarding the trust's administration.

This required unanimity may prove burdensome when performing minuscule tasks such as:

- Obtaining all trustees' signatures on documents
- Working with outside institutions such as banks that are not familiar with working with multiple decision makers
- When a co-trustee becomes a "hold out" or otherwise becomes uncooperative, as they prevent the advancement of the beneficiaries' interests and the trust's administration as a whole

For those involved in creating their estate plan, a major consideration in whether to appoint co-trustees (for instance multiple children) is whether those children get along or work well together. If parents know the children do not get along now, it is a good indicator that they will likely not work well together as co-trustees in the future, especially after the emotional rollercoaster of losing their parents.



## Remove Some Stress and Delegate!

Help is on the way! Tasks to be performed by the co-trustees can be reasonably delegated to others. For example, a co-trustee might delegate the task of tracking expenses and payments to a qualified bookkeeper. On the same note, one trustee might get delegated the task of dealing with a business owned by the trust because that co-trustee assisted in running the business during the trustor's lifetime and therefore has the expertise or knowledge needed to adequately deal with that trust asset. A trust document might even build in different roles for co-trustees such as an investment trustee who handles all trust investments.

Nevertheless, a trustee does have a duty not to delegate acts that they can be reasonably expected to perform themselves. In addition, they may not delegate the entire trust administration to a co-trustee or other person. If the trustee does delegate a matter to an agent, co-trustee, or other person, that trustee still has a duty to exercise general supervision over the person performing the delegated task.

### **Wait, I Can Get Paid?**

The good news is that a trustee is entitled to compensation as set forth in the trust, and if the trust does not specify otherwise, the trustee is entitled to reasonable compensation. Further, unless the trust provides otherwise, if the trust has two or more trustees, the compensation is apportioned among the co-trustees according to the services rendered by them.

Additionally, corporate trustees generally charge a percentage of the trust's assets as their fee for serving as trustee (for instance, 1%-2% annually). However, depending on the corporate institution, if a trust appoints a corporate trustee to serve as co-trustee with a private individual (perhaps a family member), the corporate trustee may charge a higher annual fee. Professional fiduciaries and private individuals tend to charge an hourly rate for their services as trustee, which tends to be lower than the corporate trustee. However, some professional trustees do charge a percentage of trust assets, like a corporate fiduciary.

Potential liabilities, proactive decision-making, delegation, and compensation are all important items to consider when determining a successor trustee for your estate plan or administering the trust after someone passes. Our firm has decades of experience in these matters and our estate planning attorneys are happy to answer your questions.



### **We look forward to serving you & wish you the best**

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T (949) 501-4800

Or send us a private email at the link below and we will respond promptly:

[info@lawandsteinllp.com](mailto:info@lawandsteinllp.com)

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LAW & STEIN LLP  
2601 Main Street, Suite 1200  
Irvine, CA 92614  
[info@lawandsteinllp.com](mailto:info@lawandsteinllp.com)

