

## Why Can't Beneficiaries and Trustees Just Get Along?

Legal Alert  
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The need to decide what a trustee should or shouldn't do, at least under English law, goes back as far as the 12th century and the Lord Chancellor's establishment of the Courts of Chancery. It may not have gotten much better as trust litigation is certainly an expanding field with the kinds of disputes between trustees and beneficiaries expanding, at least in part as a result of tax-driven trust strategies and special needs trusts.

**Who are these people?** In many instances the affinity between a trustee and the beneficiaries of a trust depends on how each came to the party. Selecting fiduciaries by the settlors of trusts run to themes repeated and familiar to estate planning attorneys. Among those choices, although not an exhaustive list, often is the surviving spouse (whether or not the parent or step-parent of beneficiaries), the eldest or the perceived most competent child (or grandchild, or niece, or nephew), the aunt or uncle of the beneficiaries, private fiduciaries, corporate fiduciaries and trusted consultants including accountants, investment managers and attorneys. A quizzical decision seen is the choice of co-trustees from opposite branches of a blended family. A variation on that theme is a step-child remainderman beneficiary selected to serve together with the surviving spouse. Obviously there are as many if not more varieties of beneficiaries, including the very common surviving spouse as a lifetime income beneficiary with children or grandchildren as remainder beneficiaries. Those beneficiaries may be the second (or third or more) spouse, natural and/or step-children and continuing sub-trusts for the benefit of any of those. Adding charitable beneficiaries and their development directors brings a certain flavor to the relationship between trustee and the beneficiaries. The significance of trustees coming from such a diversity of persons, entities and combinations of the same as well as the variety among those named as beneficiaries is that the continuum in the relationships between trustees and beneficiaries is almost infinite.

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**Why conflict?** It's a given that there will be tension between income beneficiaries and remaindermen visited upon the trustee and which can range from questioning investment decisions or the interpretation of principal and income rules, to objecting to invasion of principal and even claims of breach of the duty of impartiality. Since a common tax-driven estate stratagem for a couple involves the creation of separate trusts at the first death, some irrevocable, some with required distribution of income and the right to trust assets be made productive, some with provisions for invasion of principal based on any number of criteria and most with remaindermen beneficiaries whose beneficial interests are impacted by any invasion (and who may or may not be entitled to be told what is happening in the administration of the trust).

**What's to argue?** Sometimes trustees just don't do what they are supposed to do or beneficiaries demand they do what they shouldn't. But conflict among them can also be a bewildering assortment, including interpretation or what does the trust say, investing or what is the trustee doing with the assets, distribution or when and what should be given to the beneficiaries, reporting or what is being told to the beneficiaries by the trustee, accountings or are all the assets there or at least traceable, delegation or is the trustee hiring the right people, compensation or is the trustee overpaid and the broader issue of breach or is the trustee doing something wrong. Trusts that give the trustee discretion present their own problem as a trustee might reasonably believe that absolute or sole discretion means the trustee can do whatever they want. Yet most states (ORS § 130.715) temper that discretion with a requirement of good faith and consideration of the purposes of the trust and the interests of the beneficiaries.

**What about elder beneficiaries?** Beneficiaries who are under a disability, including just the ravages of age often have no one to look out for their beneficial interests. This can mean that even with a trustee investing properly, taking appropriate compensation, asking the court to approve accountings and providing all the appropriate information relevant to the beneficiary's interest something is missing. An older beneficiary, even a surviving spouse who never handled the finances, and who just so happens to lack the ability to understand the information provided by the trustee, may not be willing or able to ask for what he or she needs. Should there be a new obligation or duty for a trustee whose beneficiary is elderly or the beneficiary of a special needs trust? Such a trustee ought to be active in seeking information on the beneficiary's condition and abilities and, when that ability is lacking, consider an advocate who will communicate on behalf of the beneficiary with the trustee.