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CLIENT GUIDE – FUTURE FIDUCIARIES UNDER YOUR LIVING TRUST ESTATE PLAN

COURTESY OF
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ABOUT ZIMMER LAW FIRM

Zimmer Law Firm has served Greater Cincinnati families with comprehensive estate planning, estate settlement and elder law issues including Medicaid benefit pre-planning and crisis claims since 1993. Barry Zimmer, firm founder, is the only area member of the American Academy of Estate Planning Attorney, an exclusive membership organization dedicated to promoting excellence in estate planning and elder law. Zimmer has held the designation of Academy Fellow since 2008 in recognition of his commitment and accomplishments in estate planning. He was also selected "Best of Cincinnati – Estate Planning Law" by Best Business Company in 2015 and 2016.

We consider it a great privilege to help families plan their estate and leave a meaningful legacy. We realize that clients entrust us with all their worldly wealth and ask us to make sure it's preserved, not only for their use but for generations to come.

We work to make a difference in our community – one family at a time, and we are passionate about helping families assure their peace of mind.

Since 1993, I have helped thousands of people protect their families and their wealth. I have personally helped loved ones plan and provide care as they age, suffer through grave illnesses, and die. I am a husband, father, and provider, and know the angst that clients experience when they think about the future of their family without them. I am legal guardian for my special needs brother.

I know firsthand both personally and professionally the importance of good planning, and the disruption created by poor planning or no planning at all. I get deep personal fulfillment from helping people plan for these issues. That is why I do what I do.

Barry Zimmer
Founder
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THE NEED TO NAME FUTURE FIDUCIARIES

A critical step in making an estate plan is to identify who will be your fiduciaries. These are the people you will rely on to manage your legal and financial affairs, take care of your minor children (if any), and make medical decisions for you if you are incapacitated and cannot handle such matters yourself. They will also settle and distribute your estate upon your death or keep your trust open for future distributions if that is your intent.

The legal definition of a fiduciary is a person who holds a legal or ethical relationship of trust with another person. The naming of your future fiduciaries is done through the legal documents we prepare for you. Specifically, they are the Trustees named under your Living Trust; the Executors (aka Personal Representatives) named in your Pour-Over Will; the agents named under your Property Power of Attorney; the agents named under your Health Care Power of Attorney; the Personal Representatives named under your HIPAA Release; and Personal Representatives named under your Right of Disposition.

It is important in all instances to name a list of alternates to serve as fiduciary if your primary choice is unable or unwilling to serve. Except for Trustee appointments, it is the best practice to name one person to serve at a time, and the alternates to serve in succession, instead of multiple persons serving at the same time. Successor Co-Trustees can serve, although we frown on more than two serving at one time. Co-Trustees should only be appointed for good reason, as multiple trustees serving at the same time can slow down the process of settling a trust estate.

We call these fiduciaries your “future fiduciaries” because they will not have any authority or responsibility while you are acting on your own behalf to manage your legal and financial affairs, unless you specifically want them to. Your initial choices may need updating or change from time to time for various reasons.

Reason for this report. To help our clients in making the decisions on future fiduciaries or considering changes to your existing choices, we have prepared this explanation of the fiduciaries who you must name under your legal documents, and each fiduciary’s role.

TRUSTEES

The definition of a Trustee is an individual or institution holding and managing assets for the benefit of another. When setting up a revocable Living Trust, there are 3 main categories of Trustees.

The **Initial Trustee** is the person(s) who serve(s) as Trustee(s) when you first set up your trust. That is generally the Trustor/Trustors (the person or persons who make the trust and who puts assets in the trust).

Successor Trustees are those persons or trust companies named to serve as Trustee in the event the Initial Trustee(s) were to be unable or unwilling to serve, e.g. due to death, illness, or resignation. The Successor Trustee(s) step into the office of the Trustee in such events and are responsible to carry out the purpose of the trust and the specific instructions left by the Trustor(s), as part of the Trust Agreement, for use and distribution of the assets held under the trust.

The **Beneficiary Trustees** are those Trustees appointed for each of the trust shares after settlement of the estate and division for your heirs. For example, if you have 3 children and are leaving your estate to your children under your trust, there are Trustees named for each trust share. They can be the same or different for each child, or you can choose the same persons you selected to settle the estate.

The **Special Co-Trustee** is a position that we create under your Living Trust who is activated for limited purposes only after your death or incapacitation, as specified in the trust agreement, for circumstances where the Successor Trustee is not capable of acting. Examples might be where there are conflicts of interest, or changes in law or circumstances that make the trust provisions obsolete and need to be adjusted by a person who acts to carry out your intent and who is impartial. By default, this person is either the next Successor Trustee in line to serve unless that person is closely related to you. If there are no eligible persons to serve, then the Successor Trustees will appoint a disinterested person by majority vote, to act only for the specified purpose. The Special Co-Trustee is not involved in the administration of the trust for any other purpose. If you have chosen to name someone as Special Co-Trustee, then that person(s) will serve when the need arises upon action by the Successor Trustee, in lieu of the default option described above.

A Special Co-Trustee is generally considered as a Trust Protector, which is an advanced planning technique to enable trust estate administration issues resolved outside of court involvement and to add flexibility to planning.

EXECUTORS

The Executor/Executrix is an individual or institution named in a Will to administer the estate of the person making the Will. The executor is the fiduciary of the probate estate. The executor legally steps into the shoes of the decedent and represents the estate in the probate court. In Ohio the term used to refer to an executor is the Personal Representative.

When you base your estate plan on a funded Living Trust, it is neither expected nor intended that assets are to pass under your Will. That is because your assets should all be titled to you as Trustee or set up to pay to named beneficiaries or your trust (as primary, secondary, or contingent beneficiary) when you die, e.g. IRAs, life insurance. There will be no probate proceeding for such assets, hence there will be no need to activate your Will by admitting it to probate.

If there were assets left in your name at your death that did not have a beneficiary attached, they would pass under your Will in a probate process. The Executor named in your Will would handle that. The Will points at your trust as the beneficiary, rather than your children or heirs. The Trust terms would then apply to the assets the Trustee receives from the probate estate. That gives the children/heirs all the protections of your trust, and carries out your intent and instructions, even though there was a probate. Hence the name "Pour Over Will" for the type of will that is used with a Living Trust. It "pours over" to the trust.

The Will is a safety net only, for those assets not held by or payable to the trust. The Executors should be the same people named as Successor Trustees, which is what you chose already.

Practices and processes for funding Living Trusts vary from lawyer to lawyer. At Zimmer Law Firm, our standard practice (unless otherwise specified for you) is to carry out the titling of assets to our clients' Living Trust, and to set up beneficiary designations to coordinate with the trust for those assets not titled to the trust during your lifetime.

PROPERTY POWER OF ATTORNEY AGENTS

A Property Power of Attorney is a legal document giving another person, known as Agent or Attorney in Fact, the legal authority to act on your behalf in your absence, or if you were incapacitated, with respect to your personally owned assets and legal or financial affairs not related to your Living Trust if you have one. The maker of the Power of Attorney is called the Principal. A power of attorney loses its validity in the event the principal dies. A durable power of attorney is one that remains valid even after the principal becomes incapacitated, which is the default rule in Ohio.

A Property Power of Attorney supports a Living Trust by allowing the agent to transfer any property that wasn't transferred prior to the disability of the settlor to the trust, and by appointing an Agent to manage assets not held in trust such as an IRA or 401k, which must stay in the owner's name. The agent also has authority to conduct the Principal's legal affairs, unless the instrument is limited in scope.

It is usually best to have the Successor Trustees also serve as the POA Agents. Some people name different persons to serve as Agents than who they name as Trustees, for a check and balance.

HEALTH CARE POWER OF ATTORNEY AGENTS

A health care POA appoints agents to make medical decisions for you if you are incapable of speaking for yourself, in your doctor's opinion. The agent's authority is spelled out in the instrument. The Health Care Agents should be those persons who you feel most comfortable making medical decisions for you, including decisions about artificial life support, and artificially supplied nutrition and hydration as spelled out in your Living Will.

LIVING WILL

This document is a declaration of your wishes about artificial life support or other treatment that would extend your life by prolonging the process of dying, rather than help you return to good health or recover from illness or injury. There is no fiduciary named under this document, as the purpose of the document is to pronounce your wishes in a legally enforceable way.

HIPAA RELEASE

The term HIPAA stands for the Health Insurance Portability and Accountability Act, a federal law which among other purposes protects the privacy of your medical and health information (Protected Health Information). A HIPAA Release names those persons who you allow access to that information, known as your Personal Representative. These people may need access to confidential medical information to make medical decisions, request medical billing information, and to activate certain fiduciary roles. Naming a person to receive Protected Health Information as a Personal Representative under the HIPAA rules does not confer any authority to make medical decisions for the person signing the Release.

GUARDIAN FOR MINOR CHILDREN OR ADULT INCOMPETENTS

The definition of this term is someone who is legally responsible for the care and wellbeing of another person. A guardian is generally nominated in the case of a minor child in need of care or financial support, or when an adult is disabled or incompetent to care for himself or herself.

If you have a minor child, then you will need to nominate who will serve as guardian of the child(ren) in the process of making your Will. You also nominate who will serve as a guardian for yourself if you become incapacitated. There is more on this below.

Guardians act under the supervision of a probate court and are responsible for all their actions to the court. The person for whom the Guardian serves is called the Ward.

A parent is the natural guardian for a minor child. A parent's authority as guardian for a minor child terminates by law in Ohio when the child reaches the age of majority, which is 18 years old. The child is legally an adult at that age provided he/she has graduated high school To be guardian for a child over age 18 requires appointment by a probate court based on the legal incompetence of the child.

In Ohio, a Guardian for an incompetent adult must take a 6-hour course to be appointed and a 3-hour refresher each year. The courts prefer that a guardian for the person be an Ohio resident, but they require an Ohio resident for guardian of the estate.

There are 2 types of guardianship. One is a guardianship for the person of the ward, which creates parental-like responsibilities and rights. The other is a guardianship of the estate of

the ward, meaning the ward's money and assets. If a minor or incompetent has no assets, there is no need for a guardian of the estate. The same person is typically guardian of the person and the estate, although they can be different. Both are appointed by a probate court.

A minor or adult incompetent who inherits assets under a Living Trust will ordinarily not require a guardian of his/her estate. That is because the inherited assets will be held under the trust for benefit of the minor or incompetent. The then-serving Trustee will manage the inherited assets and distribute them to or for the benefit of the ward, to the guardian of the ward for the ward's benefit if there is a guardian of the person of the ward, or to a parent of a minor ward if there is not guardian of the person.

There are strict rules that apply to guardians, including reporting requirements.

The guardianship of a minor ends when the child reaches age 18. Funds and assets held in a guardianship of the estate are released outright at that time.

Adults in good health could require a guardian of their estate if they were to become incapacitated in the future due to injury, aging, or illness. Modern living-trust based estate plans include a durable Property Power of Attorney, which appoints an agent to act for you if you become incapacitated. (See explanation above.) If you have a Living Trust estate plan, it is unlikely you will personally ever need a guardian because your Trustee and Power of Attorney Agents have the legal authority to manage your assets, legal affairs, and medical decision making if you are incapacitated. If for some reason you were to need a guardian then you have nominated the persons named as Property Power of Attorney Agents (see above) as your Guardian at the conclusion of your Property Power of Attorney, and under your Health Care Power of Attorney.

RIGHT OF DISPOSITION

This is a legal document that is unique to Ohio. It allows you to name a fiduciary known as your Personal Representative, and give that person the authority to make decisions about disposition of bodily remains (e.g. burial vs. cremation), autopsy, funeral arrangements, purchase of casket, etc. This person's decisions are final, and no one can overrule his or her choices. It is your job to communicate to the Personal Representative what your wishes are with respect to such matters.

CONCLUSION

Naming your future fiduciaries requires careful thought. There are many factors to consider. This report is not intended to be an authoritative and comprehensive exposition of what fiduciaries must do and how and when they are to act. Your best resource is the estate planning attorneys at The Zimmer Law Firm.

If you would like to learn more about how to select a Trustee, contact us for our report, *A Client Guide to Selecting a Trustee.* We also recommend that you and the persons you name

as future fiduciaries attend our exclusive *Trustee and Power of Attorney School*, to learn about the tools of Zimmer Law Firm's Living Trust based estate plans, what are the responsibilities of all the fiduciaries under an estate plan, how and when they should take action, and what to do to organize your affairs for an efficient estate management or settlement by your future fiduciaries.

The workshop is presently offered four times a year at different venues in the community and is free of charge. Check our website for dates and times and watch your email inbox for invitations.

ABOUT THE ACADEMY

The Academy is a national organization dedicated to promoting excellence in estate planning by providing its exclusive membership of attorneys with up-to-date research on estate and tax planning, educational materials, and other important resources to empower them to provide superior estate planning services.

The Academy expects Members to have at least 36 hours of legal education each year specifically in estate, tax, probate and/or elder law subjects. To ensure this goal is met, the Academy provides over 40 hours of continuing legal education each year. The Academy has also been recognized as a consumer legal source by Money Magazine, Consumer Reports Money Adviser and Suze Orman in her book, 9 Steps to Financial Freedom.