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**Summary of the Different Roles of  
Executors, Trustees and Guardians**

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When preparing an estate plan, you must consider the selection of Executors, Trustees and Guardians. These choices are particularly important if you have minor children or a disabled child, or want to do tax planning.

Nominating someone as Executor, Trustee or Guardian should not be viewed as conferring a privilege, but rather inviting your nominee to undertake some potentially substantial duties and responsibilities. This memorandum will provide an overview of the distinctions between these three separate roles and highlight how they differ from each other.

▪ **The Executor.** The Executor is appointed in New Hampshire by the Probate Court of the county in which the deceased lived. The person(s) (and/or bank or trust company) appointed are almost always those designated as Executors in the decedent's Will.

***The Executor "executes", or carries out, the provisions of the decedent's Will. The job of the Executor is to work with the estate's attorney, and sometimes other professionals (accountant, investment advisor, financial advisor, etc.) to:***

1. Have the Will submitted for and admitted to probate. This means having the Court declare the Will valid and appoint the Executor who will receive "letters testamentary" evidencing the Executor's legal authority to act on the estate's behalf;
2. Collect all of the decedent's assets;
3. Pay all of the decedent's obligations, including debts, funeral expenses, etc.;

4. Make sure that all applicable death and income tax returns are properly prepared and are filed on time, and that any taxes due are paid;
5. Administer and, where appropriate, invest the assets of the estate until they are distributed; and
6. File an “accounting” with the Probate Court, and, after the Court approves the accounting, distribute the remaining assets of the estate among the Will’s “beneficiaries” in accordance with the provisions of the Will. In cases involving a “pour over” Will, the Executor will distribute the remaining assets to the Trustee of the decedent’s revocable trust.

▪ **The Trustee.** A trust is administered by one or more Trustees, who may be individuals and/or a bank or trust company.

***The job of the Trustee is to:***

1. Make sure that the Trustee receives all of the assets that belong to the trust. The Trustee typically receives assets from the Executor and/or one or more life insurance companies;
2. Administer, invest and reinvest the assets of the trust during the term of the trust, which may be years, decades or even longer;
3. Keep detailed records of all trust transactions;
4. Make sure that all tax returns for the trust are filed on time, and that estimated and other tax payments are timely made;
5. Distribute trust’s income and/or principal during the trust’s term in accordance with the provisions of the document which created the trust (usually in New Hampshire a revocable trust agreement), exercising discretion if so authorized by the document;
6. When the trust ends and, perhaps, before, account (report, in detail) to all of the trust beneficiaries regarding trust assets, income, expenses, distributions, etc., during the trust term or accounting period (usually one year); and
7. When the trust ends, distribute the remaining assets of the trust to those individuals (and/or charities) entitled to whatever remains in the trust (called “remaindermen”).

The duties of a Trustee usually continue for a far longer period than do those of an Executor. The duties of a Trustee are less time consuming, but more investment-related, than those of an Executor. Therefore, although the person, persons and/or bank or trust company selected as Executor also may be selected as Trustee, it is not always best that those who are serving as Executors also serve as Trustees, due to the different functions of the different positions.

When considering the preparation of a Will or Trust Agreement, you should consider successor Executors and successor Trustees, since, except for banks and trust companies, those who are named may die, become unable to act or simply become unwilling to act (e.g., friends may move away and friendships lapse over time).

In many instances your spouse is the appropriate person to designate as Executor. If you create a trust for the benefit of your spouse (or for your spouse and others, such as your children), your spouse may serve as the Trustee of the trust. Care must be taken in naming your spouse as the sole Trustee, to avoid adverse tax consequences. You also may name your spouse as a co-Trustee, along with a bank and trust company, other family members, friends, attorneys, accountants, financial advisors, etc. You should avoid naming someone as Trustee who, over time, may cease to be impartial.

▪ **The Guardian.** The other fiduciary typically named in the Will of an individual with one or minor children is a Guardian.

There are, in fact, two types of Guardians: the Guardian of the Person and the Guardian of the Property.

The Guardian of the Person has the job of raising the child until the child attains majority. Because that individual has to act very quickly if something happens to both parents (or the surviving parent), the individual named as Guardian of the Person should know that he is so named and should be asked whether he would be willing to assume the considerable duties of being a surrogate parent.

The Guardian of the Property handles the minor's funds, to the extent that they are not held in a trust. It is far more convenient to use a trust to hold a minor's property, but, for various reasons, certain assets (e.g., insurance policies, retirement plan benefits and "in-trust-for" bank accounts) may be payable to a minor and not be governed by a trust agreement.

The Guardian of the Property operates under the strict supervision of the Probate Court, without the flexibility that a trust can provide. For this reason, one of the goals of proper estate planning is to assure that the Trustee, not the Guardian of the Property, manages all of the minor's assets.

The same individual may be Guardian of the Person and Guardian of the Property. That individual also may serve as the Executor and/or Trustee.

Some attorneys, as part of the estate planning process, tell their clients that they are required to name an attorney as the Executor and/or Trustee. That is simply untrue. Executors and Trustees are entitled to be compensated (some states, such as New York and New Jersey, set the compensation of Executors and Trustees by statute, whereas others, such as New Hampshire, do not, requiring only that the Executor's compensation be "reasonable"). The attorney may be the appropriate choice, but only if the client, not the attorney, so determines.

In summary, while the dispositive provisions of an estate plan are of great importance and should be carefully considered, the Executor, Trustee and Guardian should be selected with equal care, not as an after-thought.