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The Importance of Selecting the Best Fiduciary

Appointing and removing executors and trustees

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Clients often give little thought to fiduciary selections when finalizing their estate plans, yet these decisions are frequently critical to ensure the client's intent is carried out. To make an informed decision, a client must understand the differing roles of executors and trustees, as well as their powers and duties.

An executor collects an estate's assets, pays applicable taxes and other lawful debts, and then distributes any remaining assets to the will's beneficiaries. Once these tasks are accomplished, the executor closes the estate and is discharged of further responsibility. In contrast, a trustee usually manages assets for beneficiaries—who may be charities, minors or persons with physical, mental or emotional impairments—on a long-term basis. A trustee may distribute trust income or principal to beneficiaries using discretionary standards established by a will or trust. Such standards ensure that distributions are consistent with the testator or grantor's wishes, and also may serve to prevent beneficiaries from squandering funds.

Fiduciary Powers

Executors and trustees are vested with broad discretionary powers granted by statute (under Title 3B in New Jersey). See [N.J.S.A. 3B:14-23](#). The governing document, that is, the will or trust document, can modify the statutory powers. A fiduciary's authority generally includes the power to sell, invest and manage the assets of the estate or trust; pay taxes, debts and expenses; hire professionals; prosecute, defend and settle litigation; and, of course, make distributions to beneficiaries. The standards for distributions to trust beneficiaries can be limited (e.g., distributions for a beneficiary's health only), broad (e.g., for any purpose whatsoever in the trustee's sole, absolute and nonreviewable discretion), or rely upon customary standards (e.g., for a beneficiary's health, education, maintenance and support) depending on the client's inclinations. These standards are usually driven by tax considerations, as well as concern for the beneficiaries.

Fiduciary Duties

In addition to having broad, discretionary powers, executors and trustees also owe fiduciary duties to the estate or trust beneficiaries. Fiduciaries must act with loyalty and at all times further the legitimate interests of the beneficiaries they serve on a good-faith basis. [In re Koretzky's](#)

[Estate, 8 N.J. 506 \(1951\)](#). Although executors and trustees may receive statutorily prescribed commissions, they are not permitted to use any trust or estate assets in a manner that would violate the terms of the governing document or constitute self-dealing or embezzlement. Moreover, fiduciaries are required to make administration decisions with the same degree of care that an prudent person would use under similar circumstances. See [N.J.S.A. 3B:10-26](#). Fiduciaries are essentially required to maximize value whenever possible and refrain from wasting assets. If the fiduciary is an attorney or other professional with specialized knowledge, he or she is expected to employ a greater level of care commensurate with that knowledge. While a fiduciary may employ professionals for assistance, it is ultimately the fiduciary's responsibility to ensure the proper administration of a trust or estate.

Absent some countervailing will or trust provision or persuasive reason to the contrary, a fiduciary must invest funds in accordance with the Prudent Investor Act. See [N.J.S.A. 3B:20-11.1](#). This act identifies a series of factors that fiduciaries must consider when making investments, such as: (1) general economic conditions; (2) inflation and tax consequences; (3) the role of any particular investment in the entire investment portfolio; (4) expected capital gains and income; (5) the requirements of the beneficiaries; and (6) any "special relationship" of the asset to the trust. The act identifies closely-held businesses, personal property and real estate as examples of potential "special relationship" assets. [N.J.S.A. 3B:20-11.3\(d\)\(8\)](#). Accordingly, if a trustee knows that a trust was intended to ensure the continued operation of a family business, he or she would have to consider that fact before making investment decisions that could threaten such an objective.

Fiduciaries are also required to keep beneficiaries reasonably informed and to provide an accounting of their financial activities related to the trust or estate. [N.J.S.A. 3B:14-18](#). An accounting is usually accomplished on an informal basis without court involvement unless a dispute arises. If either the fiduciary or the beneficiary desires a formal accounting, an application may be made to the Superior Court to approve the fiduciary's accounting, and the beneficiary, in turn, may take exception to any amounts in controversy. R.4:87.

Selecting Executors and Trustees

In general, a client should select fiduciaries who are trustworthy, intelligent, stable, organized and motivated to carry out the client's wishes. Because fiduciaries can hire professional advisors, such as attorneys, accountants and financial advisors, they do not necessarily need specialized skills. A client should consider whether a candidate has the ability to effectively administer the estate or trust and also maintain a good relationship with the beneficiaries to keep disputes to a minimum. In some situations, it is better to name two or three fiduciaries so they may share the burden of administration and work collaboratively in exercising discretion. If two co-fiduciaries are named, lawyers should consider naming a tie-breaker or including tie-breaking provisions in the governing document. When there are three or more fiduciaries, the governing document should state that majority vote rules.

As an example, a spouse or other family member may be equipped to handle a simple and relatively small estate, but may or may not be able to meet the task of administering a multimillion dollar estate with several testamentary trusts and business interests. Family

members generally have a personal stake in the proper administration of the trust and are often familiar with the special needs and personalities of the beneficiaries. If a testator chooses a family member to serve, he or she should confirm that the individual is willing and possesses the necessary characteristics to act in that capacity.

When family members are unavailable or undesirable, professionals, such as accountants and lawyers, and corporate fiduciaries, such as banks and trust companies, can act as executors and trustees. They often possess extensive knowledge, experience and resources that can be relied upon to administer trusts and estates carefully and appropriately. A client also may appoint a family member to act jointly with the professional or corporate fiduciary to ensure that the family has a "voice" in the process.

A will or trust should include provisions for appointing successor fiduciaries in the event the originally named fiduciaries are no longer able or willing to serve. In the absence of a named successor, a court will be forced to select and appoint a fiduciary as it deems appropriate.

Removing a Fiduciary

If a fiduciary fails in his or her duties, a co-fiduciary or beneficiary may commence an action in the Superior Court for the removal of the fiduciary on notice to all interested parties. [N.J.S.A. 3B:14-18](#) to -22; R.4:84-4. Although courts have the power to remove fiduciaries, they do so sparingly and defer to a client's fiduciary selection when possible. Nevertheless, removal is warranted when a fiduciary abuses his or her authority. Grounds for removal include conflicts of interest, hostility toward beneficiaries, theft, self-dealing, gross mismanagement and a refusal to administer the estate or trust. [N.J.S.A. 3B:14-21](#). A fiduciary cannot continue to serve when his or her loyalty is divided because of competing interests that are adverse to those of the beneficiaries. Moreover, while not every squabble between a fiduciary and a beneficiary warrants removal, it is required when their relationship descends into outright animosity that threatens proper administration. [Wolosoff v. CSI Liquidating Trust, 205 N.J. Super. 349, 360-61 \(App. Div. 1985\)](#) ("Generally, in order for friction or hostility between the beneficiary and trustee to form the basis for removal, there must be a demonstration that the relationship will interfere materially with the administration of the trust or is likely to do so.") In addition, a relatively new trend involves appointing a "trust protector" with the power to remove and replace a trustee. The scope of a trust protector's powers can be broad or limited depending on the client's circumstances.

A fiduciary who steals, mismanages or refuses to administer estate or trust assets can be denied commissions and held personally liable for any losses sustained. In limited circumstances, a fiduciary's actions could open the door to punitive damages and the payment of any attorney fees incurred by the party seeking removal. [In re Estate of Stockdale, 196 N.J. 275 \(2008\)](#) (holding that punitive damages might be appropriate against nonbeneficiary fiduciaries where surcharge and accounting would not restore estate); [In re Niles, 176 N.J. 282 \(2003\)](#) (awarding attorney fees where litigation arose, in part, from trustee's tortious conduct). If the will required the fiduciary to obtain a surety bond, the beneficiaries will have a guaranteed source of recovery. Testators, however, often waive the bond requirement so that the estate will not have to bear the cost of obtaining and maintaining the bond.

Without the appropriate executors or trustees in place, even well-crafted wills and trusts can be rendered ineffectual. As a result, it is essential to consider the client's unique set of circumstances when selecting the best fiduciary and to avoid, as much as possible, the burden of subsequent removal and replacement proceedings.

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