



Estate Planning Council - Estate Planners Day

**Practical Considerations When Asked to
Serve as a Fiduciary**

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Why Are You Being Asked To Serve as a Fiduciary?



Why Are You Being Asked To Serve as a Fiduciary?

Are you the initial fiduciary or a successor?

- If you are the initial, why are you being asked to serve?
- If you are the successor, why the change?

Consider the family dynamics.

- Estranged or dysfunctional family members.
- How your history with the family members will impact your administration.
- Is there an SNT or any beneficiaries with special needs
- Are there certain elevated family members
 - Co-fiduciary
 - Operator of a family business

Why Are You Being Asked To Serve as a Fiduciary?

What does the instrument provide?

- You must review the will or trust instrument carefully.
- Are you being named as the fiduciary of a testamentary or *inter vivos* trust?
- If you are not named in the instrument, are you coming in as part of a regime change?

Sole Fiduciary vs. Co-Fiduciaries



Sole Fiduciary vs. Co-Fiduciaries

How many co-fiduciaries are there and who are they?

- Sole Fiduciary
- Corporate Fiduciary
- Both

Sole Fiduciary vs. Co-Fiduciaries

Pros and Cons of Corporate vs. Individual Trustee.

Corporate Trustee

Pros

Internal controls
Wide range of available services

Cons

Expensive
Inflexible

Individual Trustee

Pros

Knowledge of family history
Flexible

Cons

Patsy
Beyond your bandwidth

Sole Fiduciary vs. Co-Fiduciaries

Does the instrument require unanimous or less than unanimous action by the fiduciaries?

- EPTL §10-10.7: Exercise of powers by multiple fiduciaries.
Unless contrary to the express provisions of an instrument affecting the disposition of property, a **joint power** other than a power of appointment but including a power in a trustee to invade trust principal under section 10-6.6 of this article or under the terms of the dispositive instrument, **conferred upon three or more fiduciaries**, as that term is defined in 11-1.1, by the terms of such instrument, or by statute, or arising by operation of law, **may be exercised by a majority of such fiduciaries**, or by a majority of survivor fiduciaries, or by the survivor fiduciary. Such a power conferred upon or surviving to two such fiduciaries may be exercised jointly by both such fiduciaries or by the survivor fiduciary, unless contrary to the express terms of the instrument creating the power. A fiduciary who fails to act through absence or disability, or a **dissenting fiduciary who joins in carrying out the decision of a majority of the fiduciaries if his or her dissent is expressed promptly in writing to his or her co-fiduciaries, shall not be liable for the consequences of any majority decision, provided that liability for failure to join in administering the estate or trust or to prevent a breach of the trust may not thus be avoided.**
- What if you do not fit under the statute?

Sole Fiduciary vs. Co-Fiduciaries

Delegation

- Delegation may be provided for in the instrument.
- Even if there is no express delegation provision, a fiduciary may delegate certain actions to a co-fiduciary who has special skills or expertise.
 - *In re Estate of Farley*, 186 Misc. 2d 355 (Sur. Ct. Onondaga County 2000)
- The delegating trustee cannot be passive and may be held liable for its inaction if it is negligent.
 - *In re Goldstick*, 177 A.D.2d 225 (1st Dept. 1992)
 - *Matter of HSBC Bank USA, N.A.*, 96 A.D.3d 1655 (4th Dept. 2012)

Sole Fiduciary vs. Co-Fiduciaries

Delegation

Meinhard v. Salmon, 249 N.Y. 458 (1928)

“A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”

In Terrorem Clauses and Exoneration Provisions



In Terrorem Clauses and Exoneration Provisions

In terrorem clauses

- Intended to have a chilling effect on beneficiaries who are poised to challenge the testator's or settlor's intent and commence litigation.
- Safe Harbor Provision: EPTL § 3-3.5(b)

A condition, designed to prevent a disposition from taking effect in case the will is contested by the beneficiary, is operative despite the presence or absence of probable cause for such contest, subject to the following:

- (1) Such a condition is not breached by a contest to establish that the will is a forgery or that it was revoked by a later will, provided that such contest is based on probable cause.
- (2) An infant or incompetent may affirmatively oppose the probate of a will without forfeiting any benefit thereunder.
- (3) The following conduct, singly or in the aggregate, shall not result in the forfeiture of any benefit under the will:
 - (A) The assertion or objection to the jurisdiction of the court in which the will was offered for probate.
 - (B) The disclosure to any of the parties or to the court of any information relating to any document offered for probate as a last will, or relevant to the probate proceeding.
 - (C) A refusal or failure to join in a petition for the probate of a document as a last will, or to execute a consent to, or waiver of notice of a probate proceeding.
 - (D) The preliminary examination, under SCPA 1404.
 - (E) The institution of, or the joining or acquiescence in a proceeding for the construction of a will or any provision thereof.

In Terrorem Clauses and Exoneration Provisions

There are limits to *in terrorem* clauses.

1. They will be strictly construed.
 - *Matter of Marin*, 975 N.Y.S.2d 367 (Sur. Ct. Putnam County 2013)
 - *Matter of Merenstein*, 2018 N.Y. Misc. LEXIS 4400 (Sur. Ct. N.Y. County)
2. Cannot prevent a challenge to future conduct or to an accounting.
 - *In re Estate of Lang*, 60 Misc. 2d 232 (Sur. Ct. Erie County 1969).

In Terrorem Clauses and Exoneration Provisions

Exoneration provisions

- EPTL §11-1.7: Limitations on powers and immunities of executors or testamentary trustees:
 - (a) The attempted grant to an executor, testamentary trustee, or *inter vivos* trustee, or his or her successor, of any of the following enumerated powers or immunities is contrary to public policy.
 - (1) The exoneration of such fiduciary from liability for failure to exercise reasonable care, diligence and prudence.
 - (2) The power to make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise.
 - (b) The attempted grant in any will or trust of any power or immunity in contravention of the terms of this section shall be void but shall not be deemed to render such will or trust invalid as a whole, and the remaining terms of the instrument shall, so far as possible, remain effective.
 - (c) Any person interested in an estate or trust may contest the validity of any purported grant of any power of immunity within the purview of this section without diminishing or affecting adversely his or her interest in the estate or trust any provision in any or will trust to the contrary notwithstanding.

In Terrorem Clauses and Exoneration Provisions

Exoneration provisions are limited.

- Common law has found certain provisions invalid or void against public policy:
 - *In re Estate of Stralem*, 18 Misc. 2d 715 (Sur. Ct. Nassau County 1999)
 - *In re Estate of Allister*, 144 Misc. 2d 994 (Sur. Ct. Nassau County 1989)
 - *In re Estate of Maloy*, 75 Misc. 3d 390 (Sur. Ct. Monroe County 2022)
 - *In re Estate of Lubin*, 143 Misc. 2d 121 (Sur. Ct. Bronx County 1989)
 - *Matter of Shore*, 19 Misc. 3d 663 (Sur. Ct. N.Y. County 2008)

Trustee Insurance provisions

Asset Mix



Asset Mix

Cash and securities

- This is the easiest to administer.
- Be mindful of the Prudent Investor Act – EPTL §11-2.3(b)(1).

“The prudent investor rule requires a standard of conduct, not outcome or performance. Compliance with the prudent investor rule is determined in light of facts and circumstances prevailing at the time of the decision or action of a trustee. A trustee is not liable to a beneficiary to the extent that the trustee acted in substantial compliance with the prudent investor standard or in reasonable reliance on the express terms and provisions of the governing instrument.”

Asset Mix

Cash and securities

- What have the courts said about the Prudent Investor Act.
 - *Matter of Wellington Trusts, JP Morgan Chase Bank, N.A.*, 165 A.D. 3d 809 (2d Dept. 2018)
 - *Greenberg v. JPMorgan Chase Bank, N.A.*, 2014 N.Y. Misc. LEXIS 2011 (Sup. Ct. N.Y. County Apr. 25, 2014)

Asset Mix

A closely held business

- Consider whether the interest is a majority or minority interest.
- If it is a majority interest, who is the manager?
- Be familiar with the operating documents.
- A fiduciary in control of a trust or estate-owned business may have to account for the underlying business.
 - *Matter of Mastroianni*, 105 A.D.3d 1136 (1st Dept. 2013)
 - *In re Cole*, 2013 NYLJ LEXIS 4107 (Sur. Ct. N.Y. County July 12, 2103)

Asset Mix

A closely held business

- Owning a minority interest.
- A fiduciary may be compelled to account where there are allegations against the fiduciary for bad faith conduct, waste or diversion of entity assets that ultimately affects the value of the estate or trust.
- This often raises questions as to the Surrogate's Court's jurisdiction.
 - *In re Estate of Brandt*, 81 A.D.2d 268 (1st Dept. 1981)
 - *Estate of McKelvey*, 2023 NYLJ LEXIS 2000 (Sur. Ct. N.Y. County Aug. 7, 2023)

Asset Mix

A closely held business

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Other Jurisdictional Considerations



Other Jurisdictional Considerations

Advice and Direction under SCPA § 2107

- (1) Whenever the value of property of an estate is uncertain or dependent upon the time and manner of sale thereof a fiduciary may apply by petition to court for advice and direction as to the property, price, manner and timer of sale thereof.
- (2) The court may entertain applications by a fiduciary to advise and direct in other extraordinary circumstances such as complex valuation issues, or tax elections, or where there is conflict among interested parties, but need not entertain jurisdiction if to do so would be merely to substitute the courts judgment for that of the fiduciary.
- (3) A substantial compliance with the authorization so given shall relieve the fiduciary from any objection that the estate suffered a loss on account of the action taken under court advice and direction.

Other Jurisdictional Considerations

SCPA § 2107 is a statute of limited jurisdiction.

- When is the Court likely to give advice and direction?
 - Potential acts of self-dealing.
 - Disagreement among the fiduciaries.
 - *Matter of Marino*, 957 N.Y.S. 2d 265 (Sur. Ct. Bronx County 2021)
 - *Estate of Langfur*, 1994 N.Y. Misc. LEXIS 724 (Sur. Ct. Nassau County Feb. 23, 1994)
- When is the Court not likely to give advice and direction?
 - Fiduciary wants the court to pre-emptively authorize conduct expressly permitted under the instrument.
 - *In re Estate of McGuire*, 2021 NYLJ LEXIS 890 (Sur. Ct. Erie County Sep. 7, 2021)

Risk has its Rewards



Risk has its Rewards

Commissions – SCPA §2309

Managing interesting assets

- Closely-held businesses
- Art work

Cement professional relationships

- Attorneys
- Accountants
- Managers
- Appraisers

Questions?





Jay W. Freiberg *Partner*

Jay is laser-focused on efficiently obtaining wins for his clients, who hire him for his seasoned judgment in dispute resolution both in and out of the courtroom. A trusted counselor, he has deep expertise representing all types of stakeholders in sophisticated and complex trust and estate disputes. Jay has significant experience litigating all manner of breach of fiduciary duty actions in trusts and estates, as well as Will contests and other contested probate matters. As part of this practice, he counsels private clients in potentially contentious business and personal matters regarding, among other areas, closely-held businesses, real estate, tax and insurance. Jay's practice also includes guardianship actions and other contested elder law matters. A carefully aggressive advocate, Jay's clients look to him for their thorniest matters.

Jay is well-known in his field, and often speaks and writes on fiduciary litigation topics, including undue influence, no contest clauses, and accounting proceedings. Jay is a Fellow in the peer-elected American College of Trust and Estate Counsel (ACTEC). He is pro bono trust and estate litigation counsel to the New York Public Library. And he is also the chairperson of the Litigation Committee of Trusts & Estates magazine. Through his network, Jay provides seamless counsel to his multi-jurisdictional clientele.

Prior to forming Elman Freiberg, Jay was the chairperson of Katten Muchin Rosenman's New York fiduciary litigation practice. He was also previously an adjunct professor at Fordham University School of Law, where he taught legal writing for over 10 years. And Jay served as a law clerk for the Honorable Diane Weiss Sigmund, judge for the US Bankruptcy Court in the Eastern District of Pennsylvania.

Jay resides in Manhattan with his wife and two children. When not with his family or in the office, he can be found training for his next race. Jay is a veteran of numerous road races and triathlons and, on happy occasion, makes the podium.

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Hillary A. Frommer *Counsel*

Hillary is a seasoned litigator who concentrates her practice on trusts and estate matters. She represents fiduciaries and non-fiduciaries in all matters before the New York Surrogate's Court, with an emphasis on contested probate, accounting, discovery, turnover, and fiduciary removal proceedings. She has also successfully litigated her clients' interests in the Federal District Courts and New York State Supreme Court, including guardianship proceedings under the Mental Hygiene Law. As an acknowledgment of her experience, Hillary is certified to serve on the New York State Court Part 36 Fiduciary list, and has been appointed by the New York Surrogate's Courts to serve as a court-appointed Guardian ad Litem to represent individuals who are unable to appear in court to protect their own rights. Hillary has served as the Chair of the Estates, Trusts and Surrogate's Court Practice Section of the New York County Lawyers Association Since 2018.

Additionally, Hillary has practiced in the areas of commercial litigation, and complex business and partnership disputes. She has conducted numerous continuing legal education courses for bar associations and is a faculty member of Lawline.com. Hillary is a frequent contributor to local bar association publications and has written on strategies for selecting and using expert witnesses. Elected as a Fellow of the New York Bar Foundation, Hillary has been recognized by members of the bench and bar for her outstanding professional achievement and dedication to the legal profession.

Prior to joining Elman Freiberg PLLC, Hillary was counsel at Farrell Fritz, P.C. For more than a decade, Hillary served as a member of the board of directors of ParentChild+, an international nonprofit organization dedicated to breaking the cycle of poverty for low-income families.

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