



## COMMITTEE REPORT: ESTATE LITIGATION

By **Jay W. Freiberg** & **Yelena Rapoport**

# To Seek a Court's Advice and Direction, or Not to Seek, That is the Question

A review of the varying approaches taken in directing fiduciaries

**F**iduciaries generally have broad powers to administer and manage a trust or estate and are typically compensated for their service. But what happens when a fiduciary is uncertain about how to proceed and is reluctant to make a decision out of fear that any wrong move might spur litigation? The fiduciary's, or its attorney's, first instinct might be to seek advice and direction from a court. After all, there's no better assurance that the fiduciary has complied with its duties than a court's imprimatur.

But while the desire to obtain authorization from a court is certainly understandable—and if granted, it will give the fiduciary the sought-after peace of mind—it might not be attainable in states, like New York, that want fiduciaries to make decisions that they're specifically empowered to make. In those states, with limited exceptions, courts won't substitute their judgment for that of the fiduciary, even in admittedly difficult matters of administration. Worse, the fiduciary risks being personally liable for its, and potentially its adversary's, attorneys' fees and costs for improvidently commencing an advice-and-direction proceeding.<sup>1</sup>

On the other side of the spectrum are states like California and South Dakota that allow fiduciaries to seek court instruction on virtually any matter of trust administration. In these states, the decision to seek advice and direction regarding a potentially thorny issue is a proverbial no-brainer.

### "Hands-Off" Approach

New York has one of the most restrictive rules regarding the court's advice and direction, so fiduciaries who reside or administer assets in the state should think twice before bringing an advice-and-direction proceeding there.

Section 2107 of New York's Surrogate's Court Procedure Act (SCPA) permits fiduciaries to seek advice and direction "as to the propriety, price, manner and time of sale" of property whenever "the value of property . . . is uncertain or dependent upon the time and manner of sale."<sup>2</sup> This provision insulates a fiduciary from liability on account of the action taken pursuant to court advice and direction if the fiduciary substantially complies with the authorization so given.<sup>3</sup>

Other than as set forth above, however, a New York Surrogate's Court may entertain applications by a fiduciary to advise and direct only in "extraordinary circumstances" such as complex valuation issues, or tax elections, or where there is conflict among interested parties.<sup>4</sup> SCPA Section 2107 expressly directs that courts "need not entertain jurisdiction if to do so would be *merely to substitute the court's judgment for that of the fiduciary*."<sup>5</sup>

New York courts have narrowly construed the "extraordinary circumstances" requirement. Generally, the fiduciary must demonstrate that "conditions of an estate are so unusual that it would not be safe or proper for the fiduciary to proceed in the ordinary business way."<sup>6</sup> For example, one Surrogate's Court found that "truly extraordinary circumstances" were present when the fiduciary was faced with trust documents that contained conflicting payment provisions.<sup>7</sup> Other courts have limited "extraordinary circumstances" to situations in which a fiduciary risks being accused of self-dealing.<sup>8</sup>



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That's a very high bar, however, and in the absence of such "extraordinary circumstances," New York courts won't "stamp its imprimatur on a course of action" that's the fiduciary's to choose.<sup>9</sup> It's well settled that fiduciaries aren't "mere ministerial agents, and the courts have neither the duty nor the authority to exercise the business judgment that's imposed on fiduciaries."<sup>10</sup> New York Surrogate's Courts therefore frequently decline requests for advice and direction, particularly when the fiduciary is specifically empowered to make the decision at issue and will instead instruct the fiduciary to do its job.<sup>11</sup> New York appellate courts, too, have been reluctant to allow lower courts to substitute their judgment for that of the fiduciary.<sup>12</sup>

For example, one New York court recently denied an SCPA Section 2107 petition when the executors, who were concerned that a sale of estate assets might leave an insufficient amount in the estate to fully satisfy all the bequests under a will, asked the court to approve the sale at the executor-proposed prices.<sup>13</sup> The court held that the question was one of business judgment and not law, so it would be improper for the court to provide advice and direction.<sup>14</sup> A different New York Surrogate's Court even went so far as to tell a corporate fiduciary that "it is not the function of advice and direction to spare the fiduciary from the need to do legal research."<sup>15</sup>

Although New York has one of the most restrictive rules concerning advice and direction, the notion that courts shouldn't instruct fiduciaries as to matters that rest within their discretion isn't limited to New York. Indeed, it's also endorsed by the *Restatement (Third) of Trusts* (the *Restatement Third*).

Section 71 of the *Restatement Third* permits a trustee or beneficiary to ask for "instructions regarding the administration or distribution of the trust if there is reasonable doubt about the powers or duties of the trusteeship or about the proper interpretation of the trust provisions."<sup>16</sup> But a comment to Section 71 specifically advises that "if a matter rests within the sound discretion of the trustee, or is a matter of business judgment, the court ordinarily will not instruct the trustee how to exercise that discretion or judgment."<sup>17</sup> The comment

further provides that it wouldn't be proper for the court to instruct the trustee "on matters of judgment concerning the amounts of income or the portions of the trust estate the trustee should expend for the particular purposes in question."<sup>18</sup>

Relying on the comment to the predecessor provision of Section 71, the courts of Missouri, for example, have held that they won't act as "legal adviser of the trustees."<sup>19</sup> And the Missouri Supreme Court has explained that the purpose of judicial guidance "is not to provide a substitute for legal advisers, but to protect trustees in the class of cases where the advice of competent lawyers is not sufficient protection."<sup>20</sup>

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New Hampshire's highest court has likewise refused to give advice concerning a trustee's discretion.<sup>21</sup> When a testamentary trustee sought instruction concerning the apportionment of income and principal between beneficiaries of two trusts, the court held that "this task is properly one for the 'sole, reasonable discretion' of the trustee."<sup>22</sup> The court further held that because the testator vested the trustee with this discretion, the court "will not give advice establishing maximum and minimum limits within which the trustee's discretion shall be exercised in the future."<sup>23</sup> Nor was the court willing to substitute its judgment or discretion for that of the trustee.<sup>24</sup>



### “Paternalistic” Approach

Other states, by contrast, have enacted advice-and-direction statutes or rules that don’t limit the matters as to which a fiduciary can seek instruction or even expressly allow fiduciaries to seek instruction as to their discretionary powers.

For example, New Jersey’s Court Rule 4:95-2 allows fiduciaries to bring a summary action “for instructions as to the exercise of any of their statutory powers as well as for advice and directions in making distributions from the estate.”<sup>25</sup> Cases that have discussed Rule 4:95-2 suggest that New Jersey courts are willing to instruct their fiduciaries even as to matters in which the fiduciary is specifically empowered to act.

Pursuant to Rule 4:95-2, one New Jersey court granted a co-executor’s request for “confirmation” that any majority of the co-executors “may authorize and direct the use of funds or other assets of the Estate to pay any administration expenses of the Estate deemed appropriate by a majority” of the co-executors.<sup>26</sup> In a different proceeding for instructions, a New Jersey court similarly approved a settlement of actions against the estate because it determined that the fiduciary was acting within his powers.<sup>27</sup>

More often than not, courts will instruct the fiduciary to exercise its own business judgment.

States like South Dakota and California go even further than New Jersey and expressly allow trustees to petition the court for instruction as to any matter involving trust administration, including the exercise of the fiduciary’s discretionary powers. South Dakota Codified Laws Section 21-22-13 provides that “[t]he trustor, a fiduciary, or a beneficiary of any trust under court supervision may at any time petition the court for its action as to any matter relevant to the administration of the

trust, including . . . the exercise of any discretion vested in a fiduciary.”<sup>28</sup>

Similarly, California Probate Code Section 17200 permits a trustee or beneficiary to “petition the court . . . concerning the internal affairs of the trust,” which include, but aren’t limited to, “[d]etermining the existence or nonexistence of any immunity, power, privilege, duty, or right,” and “[s]ettling the accounts and passing upon the acts of the trustee, including the exercise of discretionary powers.”<sup>29</sup> So when a trustee of a California trust petitioned the court for an order approving the trustee’s distribution of trust assets and instructing the trustee to make the proposed distribution, the court granted it and held both that the trustee had the authority to make distributions in its discretion and that the trustee’s exercise of its discretion was reasonable.<sup>30</sup> And in a different matter, a California court granted a trustee’s petition for an order authorizing her refusal to make discretionary distributions that she didn’t believe were appropriate.<sup>31</sup>

A court in a “hands-off” state like New York certainly would have denied all of the foregoing



SPOT LIGHT

#### Different Strokes

*Nocturne* by Byron Browne sold for \$3,750 at Swann Auction Galleries American Art auction on Sept. 22, 2022 in New York City. A Modernist painter who predominantly worked in the neo-Cubist style, Browne was one of the founding members of the American Abstract Artists. His work appears in the collections of many museums throughout the country.



petitions seeking approval for ordinary and almost exclusively discretionary fiduciary acts.

### Good Business Judgment

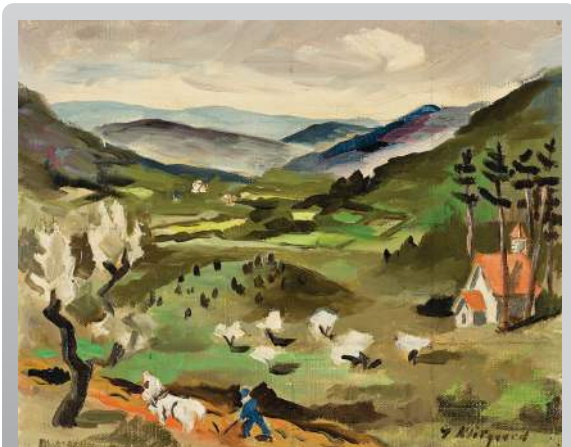
It's very tempting for fiduciaries to want to seek advice and direction from a court, and some commentators have even advised doing so as a "precaution."<sup>32</sup> The reality is, however, that in states that have taken a "hands-off" approach to trust or estate administration, those petitions are rarely granted. More often than not, courts will instruct the fiduciary to exercise its own business judgment. And, worse, you might be left fighting over who's responsible for the attorneys' fees incurred in connection with your petition.

The risk of filing such a petition might outweigh any reward, unless the petition fits squarely within the advice-and-direction rule or statute or the estate or trust is governed by the law of a state that's more willing to instruct its fiduciaries. If you find yourself in a situation in which your petition is unlikely to be granted, rather than file it and incur unnecessary fees, the best course of action might

well be to exercise "good business judgment" and contemporaneously document the support for such exercise, thereby potentially protecting yourself from a subsequent challenge.<sup>33</sup>

### Endnotes

1. See, e.g., *Restatement (Third) of Trusts (Restatement Third)* Section 71 cmt. e (2007) ("Expenses incurred by a trustee in applying to the court for instructions are payable from the trust estate unless the application for instructions was plainly unwarranted, there being no reasonable uncertainty about the powers or duties of the trustee or about the relevant law or proper interpretation of the trust. In such a case it is normally improper for a trustee to incur the expenses of making the application.")
2. New York Surrogate's Court Procedure Act (SCPA) Section 2107(1); *but see Trust under Article Second of Will of Boyer*, 35 Misc. 3d 1233(A), at \*4 (Sur. Ct. Dutchess Cnty. 2012) (holding that when there are "no novel or complex valuation issues[,] the discrepancies between the estimated valuations do not rise to the level of an uncertain value as contemplated by the statute"). The definition of "property" in SCPA Section 2107(1) isn't limited to real property and has been extended to stocks, bonds and business interests. See *Matter of Griffin*, 75 Misc. 3d 1230(A), at \*4 (Sur. Ct. Monroe Cnty. Aug. 2, 2022) (collecting cases).
3. SCPA Section 2107(3).
4. See SCPA Section 2107(2) (emphasis added).
5. *Ibid.* (emphasis added).
6. See C. Raymond Radigan and Adam J. Gottlieb, "Trusts and Estates Law; Extraordinary Circumstances Required for Surrogate's Advice and Direction," *NYLJ* (online) (July 31, 2009).
7. *In re Kline Revocable Trust U/A Dated Sept. 9, 1971*, 196 Misc. 2d 66, 74, 76 (Sur. Ct. Fulton Cnty. 2003).
8. See, e.g., *Estate of Dahly*, QDS:24209721, 1998 NYLJ LEXIS 4366, at \*9 (Sur. Ct. N.Y. Cnty. Oct. 15, 1998) ("Given the allegations of conflict of interest, self-dealing, the allocation question, and the cessation of any meaningful administration of this estate, the Court determines this is an appropriate proceeding in which to issue advice and direction."); *In re Feil*, 2001 NYLJ LEXIS 4509, at \*3-4 (Sur. Ct. Nassau Cnty. Oct. 9, 2001) (holding that the court has jurisdiction to give advice and direction in a "case of the sale of estate assets where the possible accusation of self-dealing places a fiduciary in jeopardy"); *Griffin*, *supra* note 2 (granting SCPA Section 2107 petition when an executor sought to sell estate property to himself for less than fair market value).
9. *Kline*, *supra* note 7, at p. 76.
10. *Griffin*, *supra* note 2, at \*3.



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#### Open Fields

*Woodstock* by Georgina Klitgaard sold for \$3,750 at Swann Auction Galleries American Art auction on Sept. 22, 2022 in New York City. Klitgaard worked as a mural painter for the Federal Arts Project. She's best known for her ability to capture seasonal changes in the landscapes, as well as natural occurring phenomena such as mountain mists and sunrises.



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11. *See, e.g., supra* note 9 (the question of whether a successor trustee should commence an accounting proceeding against his predecessors calls for an exercise of judgment that the successor trustee is empowered to make and, thus, doesn't present "extraordinary circumstances" warranting advice and direction); *Boyer, supra* note 2, at \*4 (denying SCPA Section 2107 petition and holding that "trustees must use their business judgment in determining the best course of action involving the [estate] property, including whether to commence an eviction proceeding against trust beneficiary"); *In re Lavacca*, 39 Misc. 3d 1238(A) (Sur. Ct. Dutchess Cnty. June 11, 2013) ("Petitioner must exercise the prudence and judgment required of his office . . . The court is loath to substitute its judgment for those of petitioner"); *In re Duke*, No. 1962-1459/C, 2013 WL 6684347, at \*2-3 (Sur. Ct. N.Y. Cnty. Dec. 19, 2013) (holding, among other things, that fiduciary's uncertainty "about how to carry out its specified authority because of . . . ongoing disagreements with the beneficiaries and their mother is not a basis for the court to substitute its judgment for [fiduciary's] in routine, albeit difficult, matters of administration" and declining to issue "advance word . . . as to whether an application for particular relief would be granted or denied").
12. *See, e.g., In re Lovell*, 23 A.D.3d 386, 387-88 (2d Dep't 2005) (reversing lower court's decision that granted executor's petition for advice and direction as to the sale of real property and that effectively canceled a sales contract it deemed inadvisable and holding that the executor "was required to use good business judgment" in deciding whether to enter into the contract).
13. *In re Estate of McGuire*, 72 Misc. 3d 1221(A) (Sur. Ct. Erie Cnty. Aug. 25, 2021).
14. *Ibid.*
15. *Duke, supra* note 11, at \*5.
16. *Restatement Third* Section 71; *see also ibid.* cmt. c ("In circumstances of reasonable uncertainty, whether of law or of terms of the trust, the trustee or a beneficiary is entitled to instructions of the court to clarify the trustee's powers or duties or other matters involving the meaning and effect of the trust provisions"). This section of the *Restatement Third* is generally

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- similar to its predecessor, *Restatement (Second) of Trusts* Section 259 (1959).
17. *Restatement Third* Section 71 cmt. d; *see also* Uniform Trust Code Section 201 cmt. (“The court will not ordinarily instruct trustees on how to exercise discretion” (citing *Restatement (Second) of Trusts* Section 259)).
  18. *Restatement Third* Section 71 cmt. d.
  19. *McEntee v. Halloran*, 391 S.W.2d 266, 268 (Mo. 1965) (affirming lower court’s refusal to advise the board of trustees of a city pension fund on how to collect sums alleged to be due from the city); *accord Marvin F. Hall Trust v. Hall*, 810 S.W.2d 710, at pps. 715-16 (Mo. Ct. App. 1991).
  20. *McEntee, ibid.*, at p. 268.
  21. *See In re Lykes’ Estate*, 113 N.H. 282, 286 (1973).
  22. *Ibid.* (citation omitted).
  23. *Ibid.*
  24. *Ibid.*
  25. N.J. Ct. R. R. 4:95-2.
  26. *Matter of Estate of Krivulka*, Docket Nos. A-0863-20, A-0803-21, 2022 WL 3693103, at \*6-7 (N.J. Super. Ct. App. Div. Aug. 26, 2022) (discussing lower court’s decision).
  27. *See Ehrlich v. McInerney*, No. 1:17-cv-879 (NLH/KMW), 2019 WL 4745269, at \*2 (D.N.J. Sept. 30, 2019) (discussing the motion brought pursuant to Rule 4:95-2 in a separate proceeding).
  28. S.D. Codified Laws Section 21-22-13. The South Dakota statute is on its face limited to trusts under court supervision, which a fiduciary, among others, can request at any time. *See* S.D. Codified Laws Section 21-22-9. The California statute isn’t so limited, and at least one court has taken the position that court supervision wasn’t required when an instruction was sought. *See* Cal. Prob. Code Section 17200; *Quintero v. Quintero*, No. A134108, 2012 WL 5935335, at \*1 (Cal. Ct. App. Nov. 27, 2012) (noting the lower court’s statement that the request for instruction as to whether a trustee was prohibited from making requested distributions, “has not subjected this trust to continuing court supervision”).
  29. Cal. Prob. Code Section 17200.
  30. *See In re Estate of Whitehurst*, No. F053122, 2008 WL 5104106, at \*3-4 (Cal. Ct. App. Dec. 5, 2008).
  31. *Quintero, supra* note 28, at \*1.
  32. *See* Radigan and Gottlieb, *supra* note 6.
  33. *See McGuire, supra* note 13, at \*2 (“Provided estate fiduciaries exercise ‘good business judgment’, their decisions are effectively immune to subsequent challenge. Only if the fiduciaries can be shown to have ‘acted negligently, and with an absence of diligence and prudence which an ordinary [person] would exercise in [his or her] own affairs’ . . . is a surcharge possible.”) (brackets in original; internal citation omitted).

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