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Understanding Your Fiduciary Responsibilities

The Role of the Executor

An executor is also known as a “fiduciary”—loosely defined as a person who accepts responsibility to act for the benefit of someone else. The powers and authority of the executor come from the Last Will and Testament of the decedent and from New York State in the Estates, Powers and Trusts Law (EPTL).

Responsibilities of the Executor

Along with this power comes the burden of responsibility. The fiduciary is responsible to understand the nuances of the language, and to follow the requirements of the Will. In addition, a fiduciary must consider the tax consequences of their actions, prudently manage and invest the estate assets, and remain cognizant of the many fiduciary responsibilities set forth in statute and case law in the State of New York.

State law generally determines the scope and extent of the duties of an executor, and these will vary greatly depending on the language in the decedent’s Will, the nature of the estate properties and circumstances of the estate beneficiaries. Please keep in mind that state law is designed both to protect the individual acting as executor from unnecessary liability, and also to protect the people who benefit from the estate from the actions of a negligent or unscrupulous executor.

Speaking generally, a fiduciary has the responsibility to act with good faith and undivided loyalty in the administration of an estate. As executor you are expected to:

- exercise reasonable and prudent levels of care in the fulfillment of your responsibilities
- act in good faith, and be loyal to the persons for whose benefit you act
- comply with terms of the Will
- comply with orders of the court
- refrain from personal traffic in, or private use, application or appropriation of estate property, at least without specific authority in the document or the order of the court
- to refrain from self-dealing (not to deal with himself as an individual)
- to be fair in any dealings with the beneficiary
- take possession of, and keep in his custody, the estate property (without commingling with his own property), and manage it in accordance with the terms of the Will or applicable state law



- keep safely, safeguard, preserve and protect the estate property against loss, dissipation or diminution; and in order to accomplish this, to enter into proper contracts, incur debts and make expenditures where necessary and proper, and to prosecute and defend suits and proceedings in proper cases
- carry on a business where required to do so by the estate
- insure the estate property (when applicable)
- make improvements authorized by the Will or applicable state law
- invest (within specific restrictions, if any) and in doing so to exercise the care, diligence and skill of an ordinary prudent man in the making, retaining, disposing or changing of estate investments, in accordance with the Will instrument and the applicable local law
- distribute the estate property, after the settlement of claims against the estate, administrative expenses and estate taxes, to the beneficiaries entitled to it
- keep and render a full and accurate record and accounting of the estate
- timely file all necessary federal and state tax returns for the estate.

Standard of Conduct

The expectations of a fiduciary are high. “A trustee [executor] 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. As to this, there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the ‘disintegrating erosion’ of particular exceptions.”ⁱ

Investments

A fiduciary must understand his or her responsibilities managing the estate assets while under their control. New York State has enacted a statute providing guidelines for the fiduciary to follow entitled the *Prudent Investor Act*.ⁱⁱ This statute is to be used as a guideline and must be read in the context of the specific grants and limitations contained in the decedent’s Will. The statute states that when making investment decisions the executor is bound to employ such diligence and such prudence in its care and management as in general “*prudent men of discretion and intelligence in such matters employ in their own like affairs.*”ⁱⁱⁱ Briefly, the requirements of the EPTL provide that an executor is required to consider:

- the size of the portfolio
- the nature and estimated duration of the fiduciary relationship
- the liquidity and distribution requirements under the governing instrument
- general economic conditions
- effects of anticipated inflation or deflation



- expected tax consequences
- the role of each investment in the portfolio as a whole
- the expected total return of the portfolio
- related estates
- the income and resources of the beneficiaries (to the extent the executor knows of them)
- an assets special value to some or all of the beneficiaries, if consistent with the executor's duty of impartiality.
- the intent of the decedent, as expressed in the Will
- the assets held in estate
- the extent to which the assets consist of financial assets, interests in closely held businesses, tangible and intangible property, or real property
- the extent to which an asset is used by a beneficiary
- whether an asset was purchased by the executor or owned by the decedent
- the net amount allocated to income under the New York Principal and Income Act
- the increase or decrease in the value of the principal assets (the executor may estimate if not readily available)
- whether the executor has an invasion power or the power to accumulate income and the extent to which the executor has exercised such a power from time to time.

Liability of the Executor

Executors can be subject to surcharge for damages if they are negligent in the performance of their duties. This liability is personal to the individuals acting as executor, and they must always remain vigilant to avoid the possibility of such judgments against their own property. Executors may be liable for the following:

- Breach of trust or duty (for positive acts and for omission or negligence constituting such a breach)
- Failure to carry out the terms of the decedent's Will
- Violating orders of the court that has control over the estate
- Any loss arising from unauthorized delegation of the executor's powers
- Loss on commingling estate property and funds with his own, or using the estate property or funds in his own or some other person's trade, business or private affairs. Any gain resulting from such activity inures to the estate property



- Negligent or willful failure to meet the required measure or standard of care, diligence and skill
- Losses due to failure to get the estate assets into his possession without unnecessary and unreasonable delay
- Loss or damage to the estate property resulting from failure to act with reasonable care, diligence and skill in handling the estate property
- On obligations incurred and contracts made by him in administering the estate, he is liable for goods and services, where the contract or transaction doesn't indicate to the provider that the executor didn't intend to be held personally liable; there is authority to contrary that the executor can in a proper case charge the estate directly without binding himself personally
- Losses on prolonged deposits of estate funds, unless authorized by the estate or by statute, and for allowing estate funds to lie dormant
- All losses arising from an investment, including decline in value and loss of interest, where the executor made investments in unauthorized and non-legal investments, failed to exercise good faith, improperly dealt with himself, took an investment in his own name without indicating its estate character, failed to take adequate security for the investment or to exercise requisite care, diligence and skill
- Estate property that he fails to surrender to beneficiaries entitled to it, unless he accounts for, and justifies such failure
- Loss resulting from unreasonable delay in making distribution of the estate property as required by a court order or decree
- Damages or injuries resulting from a tort committed in the administration of the estate
- The cost of an accounting and the expenses of an accountant where the executor failed to keep clear and accurate accounts.
- Any of the following items for which he fails to account: estate income; property or funds originally received by him; all rents, profits and gains arising from the estate property; profits from a business operated as part of the estate administration; proceeds of sale of estate property, etc., and
- Legal costs and counsel fees in a proceeding where he is found guilty of misfeasance in administering the estate property and is indebted to it.

ⁱ Meinhard v. Salmon, 249 N.Y.464, 164 N.E.2d 546

ⁱⁱ EPTL Article 11-2.3

ⁱⁱⁱ Id.

