

Practical Probate: Fiduciaries Part 1

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Fiduciary is a term used to describe someone who serves in a role where they must put the interests of another person or persons above their own. Examples of fiduciaries include executors, administrators, conservators, guardians, trustees, health care representatives, and agents under a power of attorney. Certain financial advisors may also be fiduciaries.

An executor is someone who is appointed by a court as a result of being named in a will. An executor is responsible for protecting the assets of the estate of the person who passed away. Executors are also responsible for administering the estate of the deceased person through the probate process.

Some people say that they are the executor of a living person's estate. Such statements are incorrect. No one may be an executor until three things occur: first, they must be named in a valid will to be an executor; second, the person whose will names the executor must have died; and third, the will must be admitted to the probate court and the person named executor must be appointed by the court. Unless and until all those occur, there is no executor. Someone named as executor may decline to serve. In that case, another person must be appointed by the probate court to serve as executor (if the will names an

alternate executor), or administrator (if not named in the will).

An administrator is someone who is appointed by a probate court when the person who died had no will, or when the person who died had a will, but the named executors in the will decline or are unable to serve. An administrator only has authority that the probate court gives them. In contrast, an executor has the authority that the will gives him or her.

How do fiduciary duties apply to administrators and executors?

A fiduciary must perform their job. A fiduciary's job always includes protecting the assets that are entrusted to their care. If the fiduciary wastes or mismanages the assets entrusted to them, they are subject to removal as well as surcharge (a court order to personally reimburse the estate for the loss).

The authority of a fiduciary is limited by a number of factors.

An executor's authority is limited by the terms of the will under which they are appointed. If the executor needs to conduct an activity for which the will does not provide, then the executor must get permission from the court before they may carry out that activity. An example of this is where the decedent was the sole member of a limited liability company, and the

business of the company needs to be wound up. While a will may provide authority for the executor to continue to conduct a business that the decedent owned, not all wills do so. An operating agreement of the company may also provide this authority, but, unfortunately, many limited liability companies don't have operating agreements.

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About the author



Dom Calabrese has been a Connecticut Probate Judge since 2002. He's currently the judge in the Region 22 Probate District in Southbury, Connecticut and is a judge in the Waterbury Regional Children's Court.

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