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## BREACH OF FIDUCIARY DUTY: A GROWING SOURCE OF PROBATE LITIGATION

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With great power comes great responsibility. No one appoints a power of attorney, nominates a guardian, or designates an executor or trustee with the expectation that they will misuse property or exceed their given authority. But sometimes, unfortunately, that is exactly what happens. What recourse, then, do principals or beneficiaries have against fiduciaries who misuse their power? This is a frequent and ever-growing source of probate litigation.

### ESTATES

Sometimes, executors or administrators violate their fiduciary duties by simply failing to administer an estate at all. For instance, an executor or administrator may fail to take possession and control of estate property, which can lead to loss or waste. In such cases, beneficiaries may seek the fiduciary's removal, based on the fiduciary's neglect of duty and/or incompetency, and because the interest of the property at issue demands it.

An executor or administrator may also breach their fiduciary duties by failing to file the necessary inventory and account(s) within the times required by law. When

such deadlines are missed, probate courts will often issue reminders and eventually citations, aimed to bring unresponsive fiduciaries into compliance. When that fails, however, the probate court may remove the fiduciary even without any request from a beneficiary. And in such cases, the removed executor or administrator may also lose out on some or all of their fiduciary fee for the time they served.

Most often, though, executors and administrators face removal not for their inattentiveness, but for their affirmative actions that exceed the scope of their authority. For example, under R.C. 2109.44, executors and administrators are precluded from having any dealings with the estate in their individual capacities. This includes a prohibition against selling estate property to the fiduciary personally, unless all heirs and/or devisees who would be affected by the transaction provide their consent, the probate court approves, and the transaction is shown to be in the overall best interest of the estate. If a fiduciary sells or transfers estate property to themselves, without obtaining the necessary approvals, they will certainly be subject to removal.

Additionally, executors or administrators may face removal if there are unsettled claims between the estate and the fiduciary which may become the subject of controversy or litigation. For example, assume a brother and sister enter into a contract. The brother then dies, and the sister becomes executor of his estate. After she is appointed as executor, the sister asserts a creditor's claim against the brother's estate, arising from their contract. In reality, however, the sister's claim lacks merit, and the brother's estate should not

be liable for anything. Paying this claim would not be in the best interest of the estate and its other beneficiaries, and the sister's conflict of interest would justify her removal. Or, alternatively, assume that the brother had a valid claim against the sister during his lifetime. Once the sister is appointed as executor, she almost certainly will not investigate or sue herself, even if such a claim would be in the best interest of the brother's estate. Again, such a conflict of interest would justify the sister's removal.

Furthermore, if an executor or administrator misappropriates or improperly administers estate assets, they could be forced to return all such assets and/or pay the necessary damages to restore the estate.

## TRUSTS

Many individuals create trusts specifically because of the privacy they afford. Indeed, with the exception of testamentary trusts, probate courts do not have any ongoing oversight over a trust's administration unless a trustee or beneficiary specifically requests or invokes such jurisdiction. If a trustee does what they are supposed to do, this lack of court involvement does not present an issue. Sometimes, however, trustees can take advantage of this apparent lack of accountability, leading to protracted litigation with the trust's beneficiaries.

Under the Ohio Trust Code, a trustee is required to administer a trust in good faith, in accordance with its terms and purposes, and solely in the best interest of the beneficiaries. The trustee is also required to act as a prudent person and

exercise reasonable care, skill, and caution to protect (and/or grow) the trust assets. In short, trustees must act dutifully on behalf of the beneficiaries, not to further their own personal interests. (For instance, much like R.C. 2109.44, which deals with self-interested transactions in estates, R.C. 5808.02(B) prohibits self-interested transactions in trusts, unless certain requirements are met.)

Under the Trust Code, the court may impose a myriad of remedial measures if a trustee commits a breach of trust, or if there is sufficient evidence that a future breach of trust may occur. For instance, the court may order certain injunctive relief, order the trustee to account, appoint a special fiduciary to take control of the trust property and administration, suspend the trustee, reduce or deny the trustee's compensation, or remove the trustee altogether. The court may also void certain acts of the trustee, impose a lien or constructive trust on trust property, and/or compel a noncompliant trustee to pay money damages or restore property. If a trustee makes a profit as a result of their breach of trust, they can be required to pay back any such profit as well. These remedies are not exhaustive, and they are not mutually exclusive.

Some trusts contain exculpatory provisions, designed to relieve trustees of liability for certain (in)actions. However, such provisions are unenforceable to the extent they purport to relieve a trustee of liability for actions taken in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. Such exculpatory provisions are also unenforceable to the extent they were included in the trust as a result of an

abuse of the trustee's confidential or fiduciary relationship with the settlor. The paramount goal of trust construction and enforcement is to abide by the settlor's intentions, which means enforcing only those terms that the settlor themselves actually intended to include.

## GUARDIANSHIPS

The probate court is considered the superior guardian of any adult or minor ward. However, the practical reality is that the probate court cannot oversee the day-to-day needs of every ward in their county. Therefore, a guardian of the person and/or estate is appointed, to serve as the "boots on the ground" protector of a ward's best interests.

Much like estate and trust fiduciaries, guardians are required to put the ward's best interests above all else. Specifically, guardians of the person must protect the ward, ensure their safety, and provide suitable care and maintenance. Similarly, guardians of the estate must manage the ward's assets, debts, and potential claims in the ward's best interest. Any departure from these duties—such as neglecting a ward's care or misappropriating a ward's funds for personal use—will subject the guardian to removal and potential liability.

## POWERS OF ATTORNEY

Agents under a power of attorney are required to act loyally, in good faith, and in the best interest of the principal. Additionally, POAs are required to act in accordance with the principal's reasonable expectations (to the extent the POA knows them), and to attempt to preserve the principal's estate plan. POAs are also

required to avoid conflicts of interest and keep clear records of all receipts, disbursements, and transactions made on the principal’s behalf.

Under R.C. 1337.36, numerous categories of individuals may petition the court to review an agent’s conduct and grant appropriate relief. This includes the principal themselves, the executor or administrator of a deceased principal’s estate, the principal’s spouse, parent, or descendant, or any beneficiary who has a financial interest in the principal’s probate or non-probate assets when the principal dies. An agent who is found to have violated their duties must restore the value of the principal’s property to what it otherwise would have been had the violation not occurred.

Notably, if one of the individuals listed in R.C. 1337.36 files a petition to review an agent’s conduct, the principal can file a motion to have the petition dismissed. Courts generally will not interfere with or investigate matters that the principal themselves does not want investigated. However, if the court concludes that the principal lacks the capacity to rectify the potential issue themselves—*i.e.*, to revoke the power of attorney instrument at issue—then the court will proceed to investigate nonetheless.

Much like trusts, power of attorney instruments sometimes include exculpatory provisions. Again, however, such provisions are unenforceable to the extent they purport to relieve an agent of liability for breaches of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the principal’s best interests. These exculpatory clauses are also unen-

forceable to the extent they were inserted as a result of an abuse of the agent’s confidential and fiduciary relationship, as such a provision would not truly reflect the principal’s own intentions.

### CONCLUSION

No matter the context, those in fiduciary positions must be sure to act loyally, in good faith, and in the best interest of the principal and/or beneficiary(ies) whom they are appointed to serve. Attorneys who serve in these fiduciary roles themselves—or who serve as their counsel—must be familiar not only with these statutory obligations, but also with the potential ramifications if such duties are not upheld. Otherwise, expensive and time-consuming litigation will almost certainly ensue.

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