

# Selecting a Fiduciary

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## Overview of Fiduciary

- **Fiduciary Relationship**

MCL 700.1212 (1) states:

“A fiduciary stands in a position of confidence and trust with respect to each heir, devisee, beneficiary, protected individual, or ward from whom the person is a fiduciary. A fiduciary shall observe the standard of care described in 7803 and shall discharge all of the duties and obligations of a confidential and fiduciary relationship, including the duties of undivided loyalty; impartiality between heirs, devisees, and beneficiaries; care and prudence in actions, and segregation of assets held in the fiduciary capacity....”

## Fiduciary Defined

MCL 700.1104 (e)

- Conservator
- Guardian (Plenary and Partial)
- Trustee
- Personal Representative
- Successor Fiduciaries
- Agent Under Durable Power of Attorney – not defined as a Fiduciary under Estates and Protected Individuals Code (EPIC), but is recognized as one in caselaw.
  - Agent owes the Principal fiduciary duty (*see* MCL 700.5501 (3)(a) and caselaw).
- Trust Protector

## Quick Fiduciary Details

- **Conservator** -- Authority defined by EPIC
  - Voluntary – can have capacity and consent
  - Involuntary – if found to be without capacity
    - Inability to manage affairs
    - Assets will be wasted
  - Must report to the Court and Interested Parties
- **Guardian**
  - Must have a court finding by clear and convincing evidence both that:
    - 1) the person is incapacitated, and
    - 2) the appointment is necessary as a means of providing continuing care and supervision of the individual
  - Must report to the Court and Interested parties

## Quick Fiduciary Details

- **Personal Representative** - - Authority defined by EPIC & document (Will)
  - Named in document, or appointed by the Court following a Petition.
  - Must report to the Court and Interested parties
- **Trustee** - - Authority defined by the Agreement (Trust) and Michigan Trust Code.
  - Named in document or appointed by the Court by Petition.
  - Must report to Qualified Trust Beneficiaries and any other persons as defined in the Agreement.
- **Agent** - - Authority defined by the Document, or EPIC & caselaw.
  - Named in document
  - Reporting requirements defined in document.

## Fiduciary Options

- **Individual**
  - Family member
  - Friend
  - Trusted Advisor (attorney, CPA, insurance or financial advisor)
    - DOL rules for financial advisors.
- **Corporate**
  - Bank or institution with trust powers

## Individual Fiduciary

(Pros vs. Cons)

- Pros
  - Familiarity with family and relationship dynamics
  - No fee or less of a fee (maybe?)
  - Stake in the outcome – desire for administration of trust to be successful

## Individual Fiduciary

(Pros vs. Cons)

- Cons
  - Relationship dynamics / strain on relationships / stress
    - Individual's often underestimate the complexity and time involved
    - Often client's name individuals for short-sighted reasons
  - Conflict of interest could cloud judgment (valuation, discretionary distributions, personal property)
  - Lack of expertise, knowledge, or skill to handle the work
  - Could be more expensive – hire tax advisor, investment advisor, etc.
  - Mortality

## Individual Fiduciary

- When to use an Individual
  - Guardianship / Powers of Attorney / smaller trusts, estates, conservatorships
  - Simple family dynamics (single child, no creditors)
  - Estates with high-risk assets (eg. gas stations)
  - Individual should be trustworthy, competent to handle financial matters, and stable

## Corporate Fiduciary

(Pros vs. Cons)

- Pros
  - Knowledge, education, skill, experience
  - Process and procedures to minimize risk and protect client
  - Regulated by state and federal rules and laws
  - Combined services
  - Can work with client's other advisors (legal, tax, etc.)
  - Permanent

## Corporate Fiduciary

(Pros vs. Cons)

- Cons
  - Financial expense – may be too expensive for small estates/trusts
  - Willingness – depending on nature and size of assets

## Corporate Fiduciary

- When to use a Corporate Fiduciary
  - Medium to Large Trusts, Estates, Conservatorships
  - More complex family dynamics (multiple beneficiaries, blended families, etc.)
  - Complex business or financial situations
  - Special Needs
  - Domestic Asset Protection Trusts (\*new in MI)
  - Life Insurance Trusts
  - Charitable

## Multiple Fiduciaries

- In some situations, a good solution is to name both an individual and corporate fiduciary
  - Division of responsibilities; delegation of risk;
  - Individual's knowledge of family, and corporate fiduciary's expertise
- Be careful about naming too many co-trustees

## Hypothetical #1

- Estate planning fact pattern
  - See handout . . . .

## Hypothetical #1

- What is the relationship between the boys?
- Will 3<sup>rd</sup> son feel a conflict because of his role in the business and the fact that he will have to “buy” his brothers out of a business that they had no hand in building or growing after dad dies?
- How much time does 3<sup>rd</sup> son have – big family of his own, running a business, etc.
- What fee will 3<sup>rd</sup> son expect for expending his valuable time on the administration

## Hypothetical #2

- Conservatorship fact pattern
  - See handout . . . .



## Hypothetical #2

- Limited conservatorship? POA? General or limited?
- Who do you name?
- Change phone number perhaps?
- Corporate fiduciary (outside of box solution)

## SELECTING A FIDUCIARY

### HYPOTHETICAL FACT PATTERN #1

1. Client is ready to complete his estate planning. He is single (divorced) with 4 adult children – all boys.
2. His estate is worth approx. \$4,000,000 and consists of the following assets:
  - \$2,000,000 value of stock of closely held manufacturing business
  - \$500,000 value of house in Florida
  - \$300,000 value of house in Michigan
  - \$100,000 cash at various banks in Florida and Michigan
  - \$550,000 investments
  - \$125,000 RV, boat, misc. vehicles
  - \$75,000 collectibles and personal property
3. Oldest son lives on what he makes – is not wealthy. He is in his 50s and is single.
4. 2<sup>nd</sup> son is in military – is not wealthy. He is in his early 50s and is single with one child (18 yrs old).
5. 3<sup>rd</sup> son works with client in the manufacturing business and owns a small amount of stock in the business – buy/sell agreement in place for son to buy stock on death of client; 3<sup>rd</sup> son is doing well financially. He is married and has 5 children, and may have more.
6. 4<sup>th</sup> son owns his own business and is financially secure. He is married, has no children, and has no plans to have children.
7. Client wants 4 boys to share equally which will likely require 3<sup>rd</sup> son to pay some money to his brothers.
8. Client sees his 3<sup>rd</sup> son more than the other sons, by virtue of the fact that he works with him. He has confidence in his 3<sup>rd</sup> son's ability, and would like to name him as trustee. He would like to name his 4<sup>th</sup> son successor trustee.
9. What do you advise?

## SELECTING A FIDUCIARY

### HYPOTHETICAL FACT PATTERN #2

1. Client is in his late 80s, and has been victim of a phone scam, in which he has been convinced that he can make easy money by cashing a check and wiring money back to his new "friends."
2. This is puzzling to family, friends, and acquaintances, as client is a very well respected and highly regarded professional in the community, and has served the community for 50+ years.
3. Although Client is very embarrassed and remorseful that he acted on this silly request, this isn't the first time it has happened. In fact this has happened on several occasions and client has given away nearly \$30,000 to these scammers, who call Client multiple times every day.
4. In all other respects Client is very sharp and handles all of his affairs.
5. He lives independently. He still drives, still goes to the YMCA to swim/workout every day, still goes to his office most everyday (although not to work but to socialize), and still handles his other affairs of daily living.
6. Client's wife recently entered a nursing home, and so Client lives on his own.
7. He has 2 grown children, but they live out of state.
8. Children are concerned for their father. They want to help somehow without him feeling like they are trying to take his freedom. They do not want to go into court for a conservatorship because they feel that it would be too intrusive and embarrassing for their father, who is well-known in the community.
9. What do you advise?

**ESTATES AND PROTECTED INDIVIDUALS CODE (EXCERPT)**  
**Act 386 of 1998**

**700.7103 Definitions.**

Sec. 7103. As used in this article:

- (a) "Action", with respect to a trustee or a trust protector, includes an act or a failure to act.
- (b) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the internal revenue code, 26 USC 2041 and 2514.
- (c) "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in section 7405(1).
- (d) "Discretionary trust provision" means a provision in a trust, regardless of whether the terms of the trust provide a standard for the exercise of the trustee's discretion and regardless of whether the trust contains a spendthrift provision, that provides that the trustee has discretion, or words of similar import, to determine 1 or more of the following:
  - (i) Whether to distribute to or for the benefit of an individual or a class of beneficiaries the income or principal or both of the trust.
  - (ii) The amount, if any, of the income or principal or both of the trust to distribute to or for the benefit of an individual or a class of beneficiaries.
  - (iii) Who, if any, among a class of beneficiaries will receive income or principal or both of the trust.
  - (iv) Whether the distribution of trust property is from income or principal or both of the trust.
  - (v) When to pay income or principal, except that a power to determine when to distribute income or principal within or with respect to a calendar or taxable year of the trust is not a discretionary trust provision if the distribution must be made.
- (e) "Interests of the trust beneficiaries" means the beneficial interests provided in the terms of the trust.
- (f) "Power of withdrawal" means a presently exercisable general power of appointment other than a power that is either of the following:
  - (i) Exercisable by a trustee and limited by an ascertainable standard.
  - (ii) Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.
- (g) "Qualified trust beneficiary" means a trust beneficiary to whom 1 or more of the following apply on the date the trust beneficiary's qualification is determined:
  - (i) The trust beneficiary is a distributee or permissible distributee of trust income or principal.
  - (ii) The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the interests of the distributees under the trust described in subparagraph (i) terminated on that date without causing the trust to terminate.
  - (iii) The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.
- (h) "Revocable", as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest. A trust's characterization as revocable is not affected by the settlor's lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a durable power of attorney, a conservator of the settlor, or a plenary guardian of the settlor is serving.
- (i) "Settlor" means a person, including a testator or a trustee, who creates a trust. If more than 1 person creates a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution. The lapse, release, or waiver of a power of appointment shall not cause the holder of a power of appointment to be treated as a settlor of the trust.
- (j) "Spendthrift provision" means a term of a trust that restrains either the voluntary or involuntary transfer of a trust beneficiary's interest.
- (k) "Support provision" means a provision in a trust that provides the trustee shall distribute income or principal or both for the health, education, support, or maintenance of a trust beneficiary, or language of similar import. A provision in a trust that provides a trustee has discretion whether to distribute income or principal or both for these purposes or to select from among a class of beneficiaries to receive distributions pursuant to the trust provision is not a support provision, but rather is a discretionary trust provision.
  - (i) "Trust beneficiary" means a person to whom 1 or both of the following apply:
    - (i) The person has a present or future beneficial interest in a trust, vested or contingent.
    - (ii) The person holds a power of appointment over trust property in a capacity other than that of trustee.
- (m) "Trust instrument" means a governing instrument that contains the terms of the trust, including any amendment to a term of the trust.
- (n) "Trust protector" means a person or committee of persons appointed pursuant to the terms of the trust



\* who has the power to direct certain actions with respect to the trust. Trust protector does not include either of the following:

- (i) The settlor of a trust.
- (ii) The holder of a power of appointment.

History: 1998, Act 386, Eff. Apr. 1, 2000;—Am. 2009, Act 46, Eff. Apr. 1, 2010;—Am. 2012, Act 483, Imd. Eff. Dec. 28, 2012.

Popular name: EPIC

*Pretty broad depending on lang. in trust.*

## Examples of Powers of Trust Protector

- (a) the power to appoint one or more successor trustees and successor trust protectors and determine the order in which successor trustee(s) and trust protector(s) will serve;
- (b) the power to remove any trustee with [or without] cause and appoint a successor if necessary;
- (c) the power to appoint a special fiduciary or trustee to handle certain aspects of administration and/or limit some/all other trustee's involvement with same;
- (d) the power to unilaterally veto any action taken by trustee(s);
- (e) the power to direct investments or to appoint and/or remove advisors or investment managers without cause;
- (f) the power to amend the trust agreement;
- (g) the power to change the trusts situs, principal place of administration, and/or governing law;
- (h) the power to terminate a trust or a beneficiary's interest (by treating the beneficiary as though he/she had predeceased or died and distributing remainder beneficiaries subject to continue administration of the trust or outright to remainder beneficiaries);
- (i) the power to review and approve accountings;
- (j) the power to establish or define an ascertainable standard, determine whether an ascertainable standard has been satisfied in order to permit a distribution of principal income;
- (k) the power to sprinkle income among eligible beneficiaries;
- (l) the power to veto, reduce, or increase a distribution of principal;
- (m) the power to veto any exercise of appointment;
- (n) the power to approve the sale of closely held business or other unique asset in the trust;
- (o) the power to approve or disapprove of margin transactions;
- (p) the power to approve asset allocation decisions;
- (q) the power to approve trustee compensation;

- (r) the power to terminate or modify a trust if tax law changes have rendered the tax planning in the trust obsolete;
- (s) the power to terminate or modify GST trusts which because of changes in the tax law are no longer desirable;
- (t) the power to decant an existing trust to new trust;
- (u) the power to modify trusts including making accommodations for a beneficiary's unexpected catastrophic accident or illness;
- (v) the power to modify or terminate a trust due to unexpected and major change in economic conditions or fundamental changes in tax laws, such as the elimination of the estate tax or the institution of carryover basis at death;
- (w) the power to arbitrate disputes between the Trustee and a beneficiary, and between beneficiaries; and
- (x) the power to interpret the trust by defining ambiguous terms.