

Wills, Trusts & Estates**Fiduciary crash course: 5 estate law dos and don'ts**By **Margaret O'Sullivan**

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(April 22, 2021, 1:58 PM EDT) -- You will be acting as a fiduciary if you take on the role of executor, trustee or attorney for property. These roles are defined by the distinct set of legal principles and rules which constitute fiduciary law. Accepting to become an executor, trustee or attorney for property requires that you adopt a "fiduciary mindset," and understand when your actions could cause a problem.

What is a fiduciary? The essence of being a fiduciary is acting for the benefit of another person and putting their interests first. Fiduciary law supports this role by creating a body of rules and legal norms to ensure the fiduciary will carry out this role. There are tomes of legal writing on this subject, and the law is constantly evolving, including adding new categories of who is a fiduciary.

In a nutshell, the focus of the role of a fiduciary is about the other person and their best interests, not about the fiduciary, who must come second. Here are five things that a fiduciary must do, or must not do.

1. A fiduciary must exercise care and prudence

In looking after someone else's property, you must be more careful than you would be with your own property, where you are entitled to take all the risks you want to.

An important part of being an executor, trustee or attorney for property is to review the investments the estate or trust holds to ensure they meet an appropriate standard of care. In Ontario, the *Trustee Act* follows the "prudent investor rule." A trustee is permitted to invest property in any form of property which a prudent investor might invest in and must ensure the care, skill, diligence and judgment any prudent investor would exercise in making investments.

See our earlier advisory: *Trustee Investments Under the Ontario Trustee Act*.

Care and prudence cover many activities, whether it be ensuring that there is adequate insurance on a home owned by an estate, making sure tax returns are completed and filed on a timely basis, to properly securing estate property so it is not lost or stolen.

2. Impartiality

A fiduciary must treat all beneficiaries impartially and with an "even hand" unless otherwise directed by the will or trust agreement. This can be a challenge, particularly when a family member is an executor or trustee. Each beneficiary must be treated equitably and you cannot "play favourites." There must be a certain professional detachment and neutrality in carrying out the role. Ensuring all communications to beneficiaries are equivalent and sent at the same time so everyone is on an equal footing, or making distributions to beneficiaries of an equal financial interest at the same time are a couple of examples.

If a beneficiary or other person tries to take the upper hand, it is important for the executor or trustee to ensure everyone receives fair treatment; for example, distributing a parent's personal and household effects among their children in an equitable way when one sibling tries to "over reach."

3. Duty not to delegate

A fiduciary may not delegate his or her authority to make decisions concerning the estate or trust property to someone else unless permitted by the will or trust agreement, legislation or court order. While simple administrative tasks can be delegated, the fiduciary still has a duty of oversight. But key decisions cannot be delegated.

You cannot appoint someone else to make decisions on your behalf, but instead must do so personally, because the office of executor and trustee is one of trust and confidence in a particular person.

4. Duty of loyalty and to act in best interests of beneficiaries

To ensure that the beneficiaries' best interests come first, a fiduciary has a duty of loyalty to them and there is a general prohibition on "self-dealing" and profiting or gaining a financial advantage from the estate or trust. Unless permitted by the will or trust agreement, an executor or trustee cannot purchase or borrow from, or loan to the estate or trust. The office of executor or trustee cannot be used to gain personal reward.

Remember — it's all about the beneficiaries, and fiduciaries who cross the line are heavily censored by the courts.

5. Duty to account

A fiduciary has an obligation to account to the beneficiaries. Only if they have full information can they be in a position to protect their interests. To ensure they are able to do so, the law requires that executors and trustees maintain records and produce accounts upon reasonable notice. If you take on the role, it is key to keep good records right from the beginning.

Being a fiduciary is the opposite of "mushroom management" and keeping everyone in the dark. Many estate and trust disputes arise because of a lack of open communication and failure to provide timely information, which in turn breeds distrust and suspicion, and then it's downhill all the way as the relationship crumbles and ultimately culminates in a dispute.

Having a fiduciary "mindset" and understanding the underlying principles should keep you on course, should you take on the role, which at the best of times is an often demanding and challenging one.

Margaret O'Sullivan is the managing partner of O'Sullivan Estate Lawyers LLP, a Toronto trust and estate boutique law firm she founded more than 20 years ago. The firm practises exclusively estate planning, trust and estate administration, Canada-U.S. cross-border and international trust and estate matters and estate dispute resolution.

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