



The “Marquis Fiduciary”

Considerations and strategies for best-in-class executors and trustees.

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“We have a front row seat to the human drama!” a member of the authors’ firm bellows periodically when a client situation calls for it. Frequently, this one-liner references a situation where disagreements have boiled over between a fiduciary and an estate or trust beneficiary. The prospect of litigation has arisen. Such circumstances are unfortunately an increasing reality in today’s litigious society. Such circumstances must be considered when deciding whether to serve as an executor or trustee.

The “Best of the Best” always carefully and deliberately review the will, trust agreement, family circumstances, and who the beneficiaries are, before accepting service as a fiduciary. An individual should carefully consider the

role and its associated duties, obligations, and potential liabilities. Abiding by required duties and obligations can be seen as the minimum requirements for the role.

This article includes important considerations and tips for the unwary for every prospective fiduciary when deciding whether to serve in such a capacity. It also includes certain strategies that an ambitious fiduciary should consider to go above and beyond the minimum requirements of the role to become a “Marquis Fiduciary” – best in class.

The Decision to Serve

Traditionally, a request to serve in a fiduciary capacity was emblematic of a high level of trust and personal confi-

dence. Oftentimes such a request would be viewed as an honor indicative of the appointed individual’s prowess, skill, and exemplary judgment. Such appointments to serve were generally the product of trust and confidence built up over decades. Prospective fiduciaries may feel social pressure to accept for fear of tarnishing a friendship or business relationship without fully appreciating the role or grasping the totality of the duties involved.

Serving as a fiduciary could also prove financially rewarding. Consider, for example, being appointed as the trustee of a \$10,000,000 trust which allows the fiduciary to claim 1.4% of the market value of the trust annually as compensation. For high value estates

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and trusts compensation over years is usually significant.

Of course, serving as a fiduciary is not all sunshine and roses. Notwithstanding the positives there can be significant drawbacks. As mentioned previously, at a minimum, serving in a fiduciary capacity creates duties, obligations, and corresponding legal ramifications for not adhering to them. Breaching such duties or obligations can subject the fiduciary to liability and subject the fiduciary's personal assets to exposure from claims by estate or trust beneficiaries. Even a fiduciary who has done nothing wrong could face meritless attacks and be required to defend and ultimately settle such claims.

Additional Considerations

Declining a Fiduciary Appointment or Accepting With an "Exit Plan." The authors' firm routinely drafts dynastic trusts which may last for multiple generations. An initial inquiry for a prospective fiduciary should be what their desired term of service is. Estates can remain open for years. Trusts can last for 360 years in some jurisdictions and indefinitely in others (i.e., at a minimum, for the rest of a fiduciary's lifetime). Does the fiduciary desire to serve as a trustee far into the future for children or grandchildren they may have never met?

In most jurisdictions a nominated executor may decline to serve in writing.¹ However, whether an individual has formally accepted service as a trustee can sometimes be unclear. For this reason, it is important that a

trustee's decision to decline be made explicitly clear. In Georgia, a trustee may accept by "acts" as well as "words."² After acceptance, a trustee is prohibited from later changing the trustee's mind and declining.³ Trustees may also be deemed to have accepted trusteeship by "substantially complying" with a method of acceptance provided in the trust agreement, or in certain circumstances by accepting delivery of the trust property, exercising powers or performing duties as a trustee, or otherwise indicating acceptance of trusteeship.⁴

Once a fiduciary accepts service a future exit can prove more difficult than anticipated. Fiduciaries should therefore consider their ultimate "exit plan" at the outset. In Georgia, an executor may resign: (i) in the manner and under the circumstances described in the will; (ii) upon petition to the probate court showing that the resignation was requested in writing by all heirs or all beneficiaries; or (iii) upon petition to the probate court, showing certain circumstances to the satisfaction of the court.⁵ This means that an executor could find themselves stuck absent significant flexibility provided in the will or a compelling reason. Similar concepts apply to trustees in Georgia. Under Georgia state statutes, a trustee may resign: (i) in the manner described in the trust agreement; (ii) upon 30 days' written notice to the qualified beneficiaries, the settlor (if living), and all co-trustees; or (iii) upon petition to the court.⁶ Resignation alone does not necessarily relieve the trustee from liability for any actions prior to the resignation, except to the extent relieved by the court, or to the extent relieved by the trust agreement.⁷ If a resignation creates a vacancy, the trustee's resignation shall *not* be effective *until a successor trustee accepts*.⁸

The latter point is of paramount importance. Consider the circumstance where a trust agreement includes provisions which are difficult

to administer, or where litigation has arisen. The trustee may essentially be required to continue to administer the trust until a successor trustee accepts service. But what if no successor wants to get involved? The legal terminology for this scenario is that the trustee could be "stuck holding the bag." Court proceedings may be required to find a willing fiduciary if one is not readily available.

The authors recommend that a fiduciary consider the following questions from the outset:

- Does the will or the trust agreement provide flexibility for resignation?
- Does the will or trust agreement grant the beneficiaries a right of removal?
- Would the listed successor trustees be viable candidates to serve in the future considering their ages, experience, and judgment?
- Would the fiduciary be able to turn over assets for administration to the listed successors in good conscience?

Duties, Obligations, and Liabilities

Duties of the Executor. The role of the executor generally consists of locating, identifying, and taking possession of so-called "probate" assets. Such "probate" assets generally consist of any property owned by the decedent in the decedent's individual name at the time of death. "Probate" assets generally exclude assets which pass to another by right of survivorship, retirement accounts and life insurance policies which have a designated beneficiary other than the decedent's estate, or other assets which are payable on death to another. A prospective executor should also consider whether "ancillary" probate might be needed – i.e., whether the decedent owned property in other states which would require supplemental probate proceedings in those states.

Administering the Estate, Notice to Creditors, Satisfaction of Debts. Once the ex-

¹ O.C.G.A. 53-6-12.

² See generally O.C.G.A. 53-12-202.

³ O.C.G.A. 53-12-202.

⁴ O.C.G.A. 53-12-202. Note: A person designated as trustee, without accepting the trusteeship, may act to preserve the trust property if, as soon as practicable, the person rejects or declines the trusteeship.

⁵ O.C.G.A. 53-7-56.

⁶ O.C.G.A. 53-12-220.

⁷ O.C.G.A. 53-12-220.

⁸ O.C.G.A. 53-12-220.

ecutor identifies estate assets, the executor generally must manage, preserve, and safeguard those assets. The executor may be required to post a bond or account periodically to the probate court and beneficiaries. The executor should consider whether the estate is comprised of complex assets which would require significant involvement. For example, an estate comprised of marketable securities would require less involvement than stepping into the decedent's shoes in order to run an operating business.

The executor must publish a notice to creditors in the official newspaper of the county of the decedent's domicile at the time of death. Certain ascertainable creditors may be entitled to additional and more specific notice. The executor ultimately satisfies bona fide debts and liabilities or may be required to dispute them and defend against them.

The executor must be mindful of the requirement that they coordinate and file a decedent's final income tax return for income earned prior to death, a federal gift tax return for gifts made in the year of the decedent's death, and a federal estate tax return by certain crucial deadlines to the extent such filings are required.

Ultimately, the executor distributes the estate property pursuant to the terms of the decedent's will. Once the executor has fully performed their duties and the estate's administration is complete, the executor may petition the probate court for discharge from office and from liability.

Liability Considerations. In Georgia, if an executor commits a breach of fiduciary duty or *threatens* to commit such a breach, a beneficiary or heir, as the case may be, has a cause of action to: (i) recover damages; (ii) compel performance of duties; (iii) enjoin the commission of a breach of fiduciary duty; (iv) compel redress by payment of money or otherwise; or reduce or

deny compensation to the executor, among other things.⁹

The authors recommend considering the following from the outset:

- Are the anticipated assets of the estate unique or unusually complex?

Applicable state law almost always contains non-modifiable requirements which cannot be waived by a trust agreement. A prospective trustee should therefore be familiar with provisions of applicable law that the trustee must abide by regardless of what the trust agreement says.

- How difficult will it be to ascertain the nature and extent of the estate assets?
- Has the family done estate planning to minimize or avoid probate (i.e., through the use of a properly funded revocable living trust?)
- Do all of the family members get along?
- Does the executor foresee the risk of multiple creditor claims that could create headaches?

Duties of the Trustee. The main functions of the trustee with respect to trust property are similar to the role of the executor with respect to property of an estate. A trustee may also be required

to post a bond or account to the beneficiaries. Generally the trust agreement will waive court accountings to the extent applicable law permits.

It is of the utmost importance that the prospective trustee review the trust document and fully understand its terms before accepting service. Significant flexibility is available for drafting provisions of a trust, but a fiduciary must understand that applicable state law almost always contains non-modifiable requirements which cannot be waived by a trust agreement. A prospective trustee should therefore be familiar with provisions of applicable law that the trustee must abide by *regardless of what the trust agreement says*.

For example, in Georgia, a trust may not vary the effect of or rules relating to spendthrift trusts (i.e., creditor protection related issues), the requirement that the trustee administer and exercise discretion in "good faith," prohibit or limit a court from taking action with respect to a trust, or completely eliminate the trustee from all liability.¹⁰

Management of Trust Property. The trustee is of course required to follow the provisions of the trust with respect to investing or managing trust assets, distributing income and/or principal in accordance with the trust agreement, or refraining from doing so when the trust agreement so dictates. The prospective trustee should remember that they may have been selected for their fortitude to stand up to needy and greedy beneficiaries and stay firm: "No, you cannot have a Ferrari. You get a used Toyota Corolla."

It is also the authors' recommendation that the prospective trustee not enter into any "handshake" deals or "wink wink nudge nudge" arrangements with the settlor. The trustee should be very wary of any discrepancy between what the settlor of the trust says the settlor "intends" and what is explicitly written in the trust agree-

ment. In the authors' experience a trustee opens themselves up to significant risk by acting in accordance with "unwritten" rules. Such behavior is ripe for challenge.

Trustees are generally subject to common law duties of loyalty (i.e., the trustee is required to administer the trust solely in the interests of the beneficiaries); impartiality (i.e., the trustee should not favor certain beneficiaries over others); and "good faith," among other things.¹¹ The trustee must be mindful of annual income tax filings at the state and federal level, if so required, and make tax payments when required.

Liability Considerations. To the extent the trustee violates any duty owed to a beneficiary, the violation may constitute a "breach of trust."¹² In Georgia, if the trustee commits (or even *threatens* to commit) a breach of trust, the beneficiaries may have a cause of action for recovery of damages; compelling the trustee to perform its duties; requiring accountings; enjoining the trustee; compelling redress of the breach by payment of money or otherwise; suspending or removing the trustee; reducing or denying compensation; and "any other appropriate remedy provided by statute or common law."¹³

Trustees who commit a breach of trust may be personally chargeable with any damages resulting from the breach, including, but not limited to, loss or depreciation in value, with interest; any profit made, with interest; any amount that would have reasonably accrued to the trust or a beneficiary but for the breach, with interest;

and in the discretion of the court, expenses of litigation, including reasonable attorneys' fees incurred in bringing an action related thereto. Under Georgia law, no provision in the trust is effective to relieve the trustee of liability which is committed in bad faith or with reckless indifference to the beneficiaries.¹⁴

The authors recommend a prospective trustee consider the following when deciding whether to serve as a trustee of a trust:

- Are the anticipated assets of the trust unique or unusually complex?
- Is the trustee prepared to say "no" and ultimately defend their record?
- Can the trustee in good confidence balance the interests of present-interest beneficiaries and future remainder beneficiaries, which frequently conflict?
- Does the trustee know the family members well enough to identify potential red flags or situations that could lead to a future dispute?

How to be a "Marquis Trustee"

Once a prospective executor or trustee fully understands their respective roles, they may also consider how to go "above and beyond." In any estate or trust context several opportunities exist to provide significant value to the beneficiaries:

Estate Tax Savings vs. Income Tax Basis Planning. When taking an inventory of the estate an executor should quickly determine whether the estate could be subject to federal estate tax. Should a federal estate tax return be required, the executor will be required to ascertain a value for the estate's assets. For more complex estates appraisals for hard to value assets are usually needed.

The executor should determine whether it is advantageous to seek the

lowest defensible value for an asset to minimize the impact of federal estate tax, or whether a higher value is desirable to obtain an increased step up in basis.¹⁵ Step up in basis is an income tax concept that can significantly benefit the beneficiaries of an estate or trust. To the extent an asset is includible in a decedent's gross estate for federal estate tax purposes, the asset's income tax basis may be stepped up to fair market value as of the decedent's date of death.¹⁶ The step up in tax basis allows the gain inherent in the asset to be minimized or completely eliminated upon a subsequent sale. For significantly appreciated assets, the benefits can be tremendous. Fiduciaries should familiarize themselves with this concept and seek opportunities to maximize this planning opportunity.

Planning for the Substitution of Assets in Irrevocable trusts.

When the settlor of an irrevocable trust taxed as a "grantor trust" for federal income tax purposes appears to be nearing end of life, the trustee should review whether the settlor possesses a power of substitution in the trust's assets.¹⁷ Powers of substitution are frequently granted to settlors of irrevocable trusts to take advantage of "grantor trust" income tax treatment. The substitution power generally authorizes the settlor to substitute assets into the trust in exchange for assets of the trust which are of equivalent fair market value.

Should a substitution power exist, the trustee may consider discussing advantageous exercises of the power with the settlor. The settlor could, for example, substitute cash into the trust in exchange for appreciated marketable securities. This would allow for the appreciated securities to receive a favorable step up in basis when included in the settlor's gross estate for federal estate tax purposes. Obviously, cash is not eligible for a step up in basis.

Modification of Trusts for Basis Harvesting. Trustees of irrevocable trusts might also look for opportunities to modify

⁹ O.C.G.A. 53-7-54.

¹⁰ O.C.G.A. 53-12-7.

¹¹ Such duties and their ability to be waived are highly dependent on applicable state statutes.

¹² O.C.G.A. 53-12-300 through 53-12-308.

¹³ O.C.G.A. 53-12-300 through 53-12-308.

¹⁴ O.C.G.A. 53-12-303.

¹⁵ See I.R.C. Section 1014.

¹⁶ To the extent an asset has depreciated in value below the asset's income tax basis, the income tax basis may also be "stepped down."

¹⁷ See I.R.C. 675(4)(c).

the trust to take advantage of changing circumstances and changing tax laws. For example, an older irrevocable trust may have been established decades ago for the benefit of a beneficiary who has minimal outside assets. Under current law, each individual possesses a \$12,060,000 estate, gift, and generation-skipping transfer tax exemption amount. These historically high exemption amounts are set to revert to prior lower levels in 2026. If the increased exemption amounts are not taken advantage of, they are lost.

The trustee may consider modifying the trust to include a formulaic general power of appointment in the trust. The formulaic general power of appointment could force the inclusion of trust assets in a beneficiary's gross estate for federal estate tax purposes; but only to the extent that: (i) the assets have a fair market value in excess of income tax basis; and (ii) such inclusion would not generate a federal estate

tax liability. This concept, commonly known as "basis harvesting" can provide tremendous income tax benefits to the trust with each generation. "Basis harvesting" can make full use of unused exemption amounts of the beneficiaries and provide enormous benefits over time.

State Level Income Tax Planning. State level income taxation is another important area whereby a "Marquis Trustee" may be able to provide significant value. Whether a trust would be subject to a particular state's state level income tax is often a highly fact intensive analysis. In Georgia, for example, a tax is imposed upon resident fiduciaries and upon nonresident fiduciaries: (i) receiving income from business done in the state; (ii) managing funds or property located in the state; or (iii) managing funds or property for the benefit of a resident of the state.¹⁸

Perhaps a Marquis Trustee would consider methods of modifying a trust, changing situs, adding out of state trustees, or changing governing law in order to minimize state level income

tax liabilities of the trust by a particular state. A recent landmark case provides significant federal protection against subjecting a trust to a state level income tax solely on the basis of the residency of a beneficiary in certain circumstances.¹⁹ A Marquis Trustee should be well aware of changing laws with respect to state level income taxation and be prepared to take action accordingly.

Conclusion

Any prospective executor or trustee should carefully consider whether to accept or decline to serve as a fiduciary. Should an individual desire to accept service, it is important that they fully understand the provisions of the relevant will or trust and the associated duties and obligations associated with those roles. Of course, abiding by fiduciary duties should be considered the bare minimum...and fiduciaries should always search for opportunities to go above and beyond. Fiduciaries should always strive to be the best they can be – a "Marquis Fiduciary." ■

¹⁸ O.C.G.A. 48-7-22.

¹⁹ See *North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213 (2019).