

CONSIDERATIONS IN SELECTING A FIDUCIARY TRUSTEE, AGENT UNDER POWER OF ATTORNEY, PERSONAL REPRESENTATIVE

1. WHAT IS A FIDUCIARY? A fiduciary is a person who has the authority to act for another. Common examples are a trustee, an agent under a power of attorney, and a personal representative for the estate of a decedent. In Colorado, a court-appointed Conservator of a person unable to handle their own financial affairs is akin to a personal representative of the estate during the life of the principal; and a Court-appointed Guardian is a special form of an agent under power of attorney to make decisions regarding health care matters. Other examples of persons with fiduciary responsibilities, although not commonly referred to as fiduciaries, are directors and officers of a corporation, general partners of a partnership, and managers of a limited liability company. This document focus on the more common concepts of a fiduciary, but the discussion relates to all with fiduciary responsibilities.

- a.** Common to all fiduciary relationships are;
 - i.** the principal who names the fiduciary,
 - ii.** the fiduciary,
 - iii.** the person to whom the fiduciary owes the duties assumed, and
 - iv.** the estate or corpus or body of assets under the control of the fiduciary.
- b.** For a trust,
 - i.** the principal is the grantor, settlor, or trustor,
 - ii.** the fiduciary is the trustee, and
 - iii.** the person to whom the fiduciary owed the duties is beneficiary, within the terms established by the principal.
- c.** For a power of attorney,
 - i.** the principal is the person establishing the agency,
 - ii.** the fiduciary is the agent, and
 - iii.** the beneficiary is the principal.
- d.** For an estate of a decedent,
 - i.** the principal is the decedent (whether the personal representative is appointed by Will or, for an estate without a Will, by statute,
 - ii.** the fiduciary is the personal representative, and
 - iii.** the beneficiaries are those identified in the Will or the heirs at law for a decedent dying without a Will.

2. AUTHORITY TO ACT. The fiduciary has all authority to act as may be necessary to carry out the specific responsibilities related to the position.

a. An agent under power of attorney may be granted general authority to do anything that the principal could do or a specific power, such as to attend a real estate closing for the

CONSIDERATIONS IN SELECTING A FIDUCIARY

principal. The agent can do only that which the principal specifically authorized and must act within the specific instructions included with the grant of authority.

b. A trustee, likewise, must act within the specific terms of the trust, as such may be modified by statute. For example, the COLORADO UNIFORM TRUST CODE, C.R. S. 15-5-101, *et seq.* (CUTC), mandates certain things that the trustee must do and others that the trustee may not do regardless of the instructions within the trust instrument. Furthermore, CUTC adds duties and responsibilities as default provisions unless the trust provides otherwise.

c. A personal representative of an estate is akin to a trustee of a trust, required to act within the terms of a Will, if one exists, or pursuant to the statutory provisions for intestate estates.

3. DUTIES & RESPONSIBILITIES OF A FIDUCIARY. Along with the fiduciary's authority to act are associated duties and responsibilities. A fiduciary should exercise good judgment, prudence, common sense, diligence, fairness, honesty, have reasonable skill, and have experience in the management of the types of assets under control – or the good sense to obtain assistance in the management of those assets.

- a.** In all cases, the duties include the duty:
- i.** to act within the principal's reasonable expectations to the extent known,
 - ii.** to manage, to preserve, and to protect the estate,
 - iii.** to be loyal to the beneficiary within the specific wishes of the principal (treating all beneficiaries fairly),
 - iv.** to avoid a conflict of interest,
 - v.** to maintain adequate records, and
 - vi.** to act with care, competence, and diligence.

b. The specific duties of an agent under power of attorney are set out in C.R.S. 15-14-714, a portion of the UNIFORM POWER OF ATTORNEY ACT. A specific duty of the agent under power of attorney is to preserve the estate plan of the principal to the extent known.

c. The specific duties of a trustee are set out in C.R.S. 15-5-801, a portion of CUTC. Specific duties of a trustee include regularly providing information regarding the status of the trust to the beneficiaries and preparing and filing annual income tax returns. In addition, the fiduciary must comply with the specific requirements of the UNIFORM PRINCIPAL & INCOME ACT C.R.S. 15-1-401 - 467 (prior to 1 January 2021) or UNIFORM FIDUCIARY INCOME & PRINCIPAL ACT C.R.S. 15-1.2-101 *et seq.* (effective as of 1 January 2021).

d. The specific duties of a personal representative are set out in Part 7 of the COLORADO PROBATE CODE, C.R.S. 15-12-701 to 718. Specific duties of a personal representative include regularly providing information regarding the status of the estate to the beneficiaries and preparing and filing annual income tax returns. A personal representative may be appointed as unsupervised or as supervised (requiring Court approval of material decisions). In addition, the fiduciary must comply with the specific requirements of the UNIFORM PRINCIPAL & INCOME ACT C.R.S. 15-1-401 - 467 (prior to 1 January 2021) or UNIFORM FIDUCIARY INCOME & PRINCIPAL ACT C.R.S. 15-1.2-101 *et seq.* (effective as of 1 January 2021).

CONSIDERATIONS IN SELECTING A FIDUCIARY

4. CHOOSING A FIDUCIARY.

a. There are always choices in appointing a fiduciary, including a spouse, one or more family members, one or more friends, a business associate, a bank or trust company, an investment advisor, an attorney, or an accountant.

b. In considering whom to appoint, the principal should carefully consider the nature of the responsibilities to be assumed, in particular:

i. the nature of the assets to be managed and the expertise required for such management,

ii. the length of time that the assets will have to be managed,

iii. the nature and extent of the decisions that will have to be made in making distributions to the beneficiaries, and

iv. the nature and extent of the record-keeping, accounting, and financial reporting that will be required.

c. It is possible to divide the responsibilities of the fiduciary. For example, one person might be responsible for the administration of the trust (accounting, record-keeping, and tax returns), one responsible for the investment management, and one for determining appropriate amount and timing of distributions to the beneficiaries.

i. All such persons will be held to fiduciary standards of conduct.

ii. In particular, it is important to note that the investment manager must be willing to accept the responsibilities as a *fiduciary*. A broker-dealer, as opposed to an registered investment advisor, is generally NOT willing to accept this responsibility.

iii. An investment manager for publicly-traded investments might not be qualified or willing to accept responsibility for non-publicly-traded securities.

d. In addition, for a trust, it may be appropriate to name a Trust Protector with authority, either on its own or with the consent of the trustee and/or beneficiaries, to modify the trust to address unforeseen circumstances. Unless specifically exempted by the terms of the trust, the Trust Protector will also be held to fiduciary standards of conduct.

5. POTENTIAL CONFLICTS OF INTEREST. In naming a fiduciary, the principal should also consider the possibility of conflicts of interest.

a. Examples of circumstances that could result in conflicts are:

i. a trustee who is also one of the beneficiaries,

ii. a distribution advisor who is also one of the beneficiaries,

iii. an investment advisor who is also either one of the beneficiaries or an owner of a business that is part of the estate,

iv. a Trust Protector who is related to the trustee or a beneficiary, and

v. a trustee who is related to the attorney for the trust.

b. While none of the above is prohibited and the principal is free to make such arrangement in its discretion, consideration should be given to the possibility that the potential conflict might result in an abuse of discretion; and thought should be given to a system to address actual conflicts that may arise.

CONSIDERATIONS IN SELECTING A FIDUCIARY

6. APPOINTMENT OF THIS FIRM AS FIDUCIARY. This firm or members of this firm can serve as a fiduciary; however, there are specific areas of potential conflicts that should be considered.

a. If this firm is appointed a fiduciary, this firm will also likely serve as legal counsel for the estate. The normal checks and balances which exist when two unrelated parties serve separately as fiduciary and legal counsel would be absent.

b. Each and every fiduciary is entitled to compensation for services performed, as are other service providers, including law firms. A law firm can receive compensation for services as fiduciary and for services as legal counsel as long as the total compensation is reasonable. This firm earns fees on an hourly basis and is reimbursed for costs. A copy of our firm's current hourly billing rates is published on our website, and is subject to change from time to time. In the absence of a specific provision, this firm's published rates will be deemed accepted by the appointment.

c. It is common for documents appointing a fiduciary to include language relieving fiduciaries from the obligation to post bonds with the courts for the faithful performance of obligations as well as language absolving fiduciaries from liability for losses resulting from decisions made in the exercise of reasonable care, diligence, and prudence; and we normally include such language. When this firm is nominated as fiduciary under documents our firm prepares, the inclusion of that language might be seen as a conflict. It is your choice whether or not to waive the requirements of bonds and whether to include exculpatory language.

d. Although the principal almost invariably reserves the right to remove a fiduciary in its sole discretion (without cause), and it is common to allow others (the beneficiaries or Trust Protector) to remove and replace a fiduciary. Often the right of the beneficiaries to remove and replace a fiduciary is limited in order to impose more control by your appointee; and there are circumstances when the principal might limit its own right to remove a fiduciary.

i. In the interest of preserving the principals' wishes, we normally permit beneficiaries to remove and replace a fiduciary only with cause and require unanimous consent by co-principals to remove a fiduciary.

ii. When this firm is nominated as fiduciary under documents our firm prepares, limiting the right to remove a fiduciary might be seen as a conflict. It is your choice whether or not any such limitations are appropriate.

e. The above are only some of the potential conflicts of interest; and there may arise others that are unforeseen.

f. Because we have a conflict of interest in advising you with regard to the decision to nominate our firm as your fiduciary and the inclusion or exclusion of language that might be viewed as a conflict, you should consider discussing these matters with independent counsel.

g. If, after consideration of these issues, you want to nominate our firm as your Trustee, we should like for you to acknowledge and to waive the potential conflicts of interest we have explained to you. After you have considered this decision carefully, we ask that you sign the consent which will be provided. Please return a signed copy of the consent to us.

Should you have any questions about anything discussed herein, please let us know.

WIEGAND – ATTORNEYS & COUNSELORS, LLC

CONSIDERATIONS IN SELECTING A FIDUCIARY

STATEMENT OF INTENT AND WAIVER OF POTENTIAL CONFLICTS

The undersigned has reviewed the foregoing **CONSIDERATIONS IN SELECTING A FIDUCIARY**, and I have discussed all questions that I may have had and had my questions answered. Having considered all,

I wish to appoint the firm of WIEGAND – ATTORNEYS & COUNSELORS, LLC or a member thereof as my fiduciary, and

I waive the potential conflicts of interest, understanding that, should actual conflicts develop, the document will provide for means to resolve such conflicts.

Client:

Date: _____

(Print Name)

Date: _____

(Print Name)