

A guide to choosing the right fiduciaries

PROFESSIONAL OPINION



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What is a fiduciary?

A fiduciary is an entity or a person who acts on behalf of, and in the best interest of, another and who agrees to the legal and ethical duties of good faith, loyalty and care, while avoiding conflicts of interest. An executor, administrator, guardian, trustee and agent under a Power of Attorney (POA) or Health Care Proxy (HCP) are all examples of fiduciaries.

Types of fiduciaries

With respect to a decedent's estate, an executor is nominated under a Last Will and Testament

(Will), whereas an administrator is appointed under New York State statute when a decedent does not have a Will. An executor or administrator of an estate is tasked with collecting and managing a decedent's assets, paying the debts or expenses of the decedent and estate, and making final distributions of estate assets to beneficiaries. Executors and administrators must often interact with attorneys, financial and tax professionals, and sometimes, the courts.

A trustee derives authority from an inter vivos trust or a

testamentary trust created by a Will. Trustees are responsible for administering trusts in accordance with the terms of the trust instrument, which includes managing and investing trust assets and making distributions to trust beneficiaries.

Documents such as POAs and HCPs create a principal-agent relationship that is effective during the principal's lifetime, unless revoked. The principal nominates agent(s) and grants those agent(s) specific powers and authority to act on behalf of the principal. An agent under a POA is authorized to execute financial transactions for the principal during the principal's lifetime. An agent under a HCP will make medical decisions on behalf of the principal when the principal cannot (i.e., if the principal is incapacitated).

A legal guardian is a fiduciary appointed by either a Supreme Court or Surrogate's Court. Guardians may handle the personal affairs, property, or both of an individual who is unable to manage property on his or her own or care for himself or herself —referred to as a Ward. A guardian of the person has the duty to provide for the Ward's individual needs, including his or her safety, health, social and living conditions. Guardians of the property are tasked with marshaling the Ward's assets and making financial decisions for the Ward. A guardian might be appointed for a child under the age of 18, for a person of any age who has a disability, or for any other reason sufficient to consent to a guardianship.

Choosing your fiduciary

Choosing fiduciaries is a process that warrants meaningful thought. In selecting a fiduciary, considerations include the person's geographic location, financial literacy, medical background, familial status or relationship, and age. It may make sense to appoint an agent un-

der your HCP who lives nearby or who has medical knowledge. Geographic proximity might be less important for an agent under a POA or an executor, but financial literacy should be an overriding consideration.

Selecting a family member or someone with whom you share a close relationship as a fiduciary can be advantageous, as they are likely to be familiar with your individual circumstances and wishes. Depending on the situation, however, you may opt to choose a fiduciary who is independent from the family dynamic, instead seeking an objective third party or professional. The person's age should also be considered (i.e., the desire that your executor, trustee or guardian outlive you).

A fiduciary should know your values and possess intangible qualities like trustworthiness, responsibility and attention to detail.

Trustworthiness should be a threshold question when choosing a fiduciary. Without trust, you cannot be sure that your fiduciary will uphold his or her duty of loyalty to you or your beneficiaries.

Responsibility, reliability and accountability are equally important qualities in fiduciaries.

Financial acumen is a plus in these roles, but more important is having a fiduciary who will hire the right professionals, address matters quickly, and communicate with third parties and beneficiaries in making decisions. The ideal fiduciary is someone who will handle your affairs effectively and know when and where to seek help.

Once you have found your ideal fiduciary, you must ensure they are up for the task. The most effective fiduciaries are those willing to fully commit themselves to your affairs.

The need for a fiduciary can arise both during life and after death. Care must be taken to ensure that your fiduciary will act in your best interest at all times and in accordance with legal and ethical parameters. In addition to specific attributes, like financial or medical knowledge, a proposed fiduciary's trustworthiness, integrity, reliability and responsibility should be considered.

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