
**Horry County Probate Court
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**DUTIES AND POWERS OF
PERSONAL REPRESENTATIVES AND TRUSTEES**

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I. Introduction.

Personal representatives and trustees are persons or entities appointed in either a last will and testament or trust agreement to administer assets for the benefit of beneficiaries. As such, they are considered fiduciaries¹ for others and have special duties and powers that must be followed in the administration of their office. When a person or entity accepts the position of personal representative or trustee, they are agreeing to administer the estate or trust under the terms of a deceased person's last will and testament or under the terms of a trust agreement. They are also agreeing to be subject to the requirements of the state in which the estate or trust is being administered. In South Carolina,

¹ Along with personal representatives and trustees, fiduciaries also include guardians and conservators. S.C. Code Ann. § 62-1-201 (13) S.C. Code Ann. (1976, as amended). Personal representatives, guardians and conservators require an appointment by a probate court before they become empowered to serve, while trustees become empowered through the terms of the trust agreement.

fiduciaries of estates and trusts are governed by the terms of the South Carolina Probate Code (“SCPC”)² and the case law interpreting it. The SCPC imposes a number of duties and grants a number of powers to fiduciaries, along with covering certain instances when a fiduciary could be subject to personal liability for not discharging its duties properly. The intent of this outline is explain the basic duties and powers of personal representatives and trustees in South Carolina.

II. Duties and Powers of Personal Representative (§62-3-701 through §62-3-721).

A. Definition and Appointment of Personal Representative. A personal representative includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. The term “general personal representative” excludes special administrator.³ Executor and administrator are terms sometimes used in other jurisdictions for persons or entities charged with administering a decedent’s estate. A special administrator is appointed in limited cases where protection of an estate is needed either before a general personal representative can be appointed or after the general personal representative has been terminated, and in cases where a creditor of an estate institutes a proceeding.⁴

B. General Duties of Personal Representative. A personal representative has a duty to settle and distribute the decedent’s estate in accordance with the terms of the probated and effective will and the SCPC, and as expeditiously and efficiently as is consistent with the best interests of the

² South Carolina adopted its version of the Uniform Probate Code effective July 1, 1987. S.C. Code Ann. §62-1-100.

³ S.C. Code Ann. §62-1-201 (30).

⁴ S.C. Code Ann. §62-3-614.

estate.⁵ Personal representatives must also observe the same standards of care of a trustee as set forth under S.C. Code Ann. §62-7-804, including the same reasonable care, skill, and caution that a prudent person would observe, considering the purposes, terms, and distributional requirements of the trust.⁶ The duties of the personal representative commence when the probate court appoints the personal representative.⁷

C. Specific Duties of Personal Representative. In addition to the personal representative's general duties, the SCPC sets forth several specific requirements of the personal representative.

1. Notice to Creditors. Immediately after appointment the personal representative shall publish notice to creditors in a newspaper of general circulation in the county where the estate is being administered and such notice shall run once a week for three successive weeks.⁸ A personal representative may, but is not required to, give written notice by mail or other delivery to any creditor.⁹ A few years ago the Horry County Probate Court changed its procedures in regard to notice to creditors. Now, the Court prepares and files the notice to creditors for the personal representative and charges the estate for the newspaper fees for running the notice.

2. Possession and Protection of Estate. Upon appointment the personal representative has the right to and is charged with the responsibility of taking possession or control

⁵ S.C. Code Ann. §62-3-703(a).

⁶ Id.

⁷ S.C. Code Ann. §62-3-701.

⁸ See S.C. Code Ann. §62-3-704(a) and §62-3-801.

⁹ Id.

of the decedent's real and personal property. However, the decedent's property not needed in the administration may be surrendered to the presumptive beneficiary. The personal representative shall also take reasonable steps necessary to protect and preserve the estate assets, including paying any taxes related to estate property.¹⁰

3. Information to Heirs and Devises. Within thirty days after appointment the personal representative shall give information of his appointment to the heirs (which are the people that would inherit the estate if the decedent had died without a will) and the devisees (or beneficiaries) under the decedent's will. The information must include the name and address of the personal representative, indicate that it is being sent to persons who have or may have some interest in the estate being administered, whether bond has been filed, and name the court where papers relating to the estate are filed.¹¹ Probate court form number 305PC is used to provide information to heirs and devisees.

4. Inventory and Appraisement. Within ninety days after appointment the personal representative shall file an inventory and appraisement that sets forth the decedent's assets as of the date of death, describing the assets and their fair market value with reasonable detail.¹² Since it is often difficult to determine all of the decedent's assets within ninety days after appointment, the personal representative may request an extension from the court. If additional assets or relevant information about the value of the assets are discovered after the inventory and appraisement is filed, the personal representative is required to file a supplemental inventory and

¹⁰ See S.C. Code Ann. §62-3-709.

¹¹ S.C. Code Ann. §62-3-705.

¹² S.C. Code Ann. §62-3-704(b) and §62-3-706.

appraisement, with the updated information, and to serve the supplemental inventory in the same manner that the original inventory was filed and served.¹³ Probate court form number 350PC is used for the initial Inventory and Appraisement.

5. Settlement of Estate Claims. After the expiration of the eight month creditor period, the personal representative shall proceed to pay the claims of the estate that have not been disallowed. A personal representative has the option during probate administration to disallow any claim that the personal representative believes is not valid.¹⁴ While it could be helpful in some cases, the personal representative is not required to state a specific reason for disallowing a claim. Unless otherwise provided for in a judgment or contract, allowed claims bear interest at the legal rate (as determined under §34-31-20(A)) commencing thirty days after the expiration of the claims period and continuing until paid in full.¹⁵ It is very important for the personal representative to understand that he could subject himself to personal liability if the estate's assets are not sufficient to pay all of the allowed claims and the personal representative arbitrarily chooses to pay one claim over another claim of equal priority.¹⁶ For this reason, it is imperative that the personal representative wait until the claims period has ended and all estate claims and their respective priority have been evaluated before paying any claims against the estate.

6. Final Accounting, Proposal for Distribution and Petition for Settlement. Within one year after the first running of notice to creditors (or within ninety days after receipt of

¹³ S.C. Code Ann. §62-3-708.

¹⁴ Probate court form number 372PC is used to disallow a claim.

¹⁵ S.C. Code Ann. §62-3-806(d).

¹⁶ S.C. Code Ann. §62-3-807(b).

any applicable tax closing letter), a personal representative must file a full and complete accounting of all the decedent's assets as of the date of death, along with all receipts of the estate after the date of death, and all disbursements from the estate from the date of the personal representative's appointment. If the estate administration cannot be completed within one year, or within a reasonable amount of time after one year, the personal representative may file an interim accounting to stay in compliance with the statutory requirements. Along with the final accounting, the personal representative must file a proposal for distribution of any remaining estate assets and a petition for settlement of the estate, and must serve these documents on the interested parties of the estate (including claimants whose claims have not been barred or disallowed), together with a notice of right to demand a hearing.

D. Summary Administration - Accounting Not Required. Estates that qualify for summary administration are not required to file a final accounting. An estate qualifies for summary administration when the net estate does not exceed ten thousand dollars or the personal representative(s) is/are either the sole heir(s) (when the decedent did not have a will) or sole devisee(s) (when the decedent had a will).¹⁷ In summary administration cases, the personal representative starts the probate administration the same way as a regular administration, except that after the inventory and appraisal is filed the personal representative can distribute the assets to the heirs or devisees and then file a verified closing statement that sets forth that to the best of the personal representative's knowledge: (i) the estate qualifies (and how it qualifies) for summary administration, (ii) that the personal representative has disbursed the estate assets to the heirs or devisees entitled thereto, and (iii) that the personal representative has sent a copy of the statement to

¹⁷ S.C. Code Ann. §62-3-1203.

the interested persons of the estate.¹⁸ If no actions or proceedings involving the personal representative are commenced in the probate court within one year after the closing statement is filed, the personal representative's appointment is terminated.¹⁹

E. Differences Between Duties of Personal Representative and Duties of Trustee. The roles of personal representatives and trustees can be similar in some instances, but fundamentally they are quite different. A personal representative's role is generally a relatively short term role of wrapping up the decedent's financial affairs and distributing the decedent's assets to the beneficiaries. On the other hand, trustees often have longer term duties of investing and administering trust assets, along with making ultimate distributions when triggered under the terms of the trust. As mentioned above, S.C. Code Ann. §62-3-703(a) requires that personal representatives observe the same general standard of care that trustees must observe. However, the provisions of the SCPC do not impose upon personal representatives all the requirements that trustees are required to observe. For example, as set forth below, trustees are charged with the duty of keeping beneficiaries reasonably informed about the trust's activities. Since personal representatives already have specific reporting requirements during the estate's administration, and assuming they are fulfilling those requirements, they are not required to provide additional ongoing information to beneficiaries. While it is often prudent for personal representatives to remain open about the process, they are not required to comply with each and every demand from the beneficiaries. This issue often comes up in estate administration because once beneficiaries know

¹⁸ S.C. Code Ann. §62-3-1204.

¹⁹ Id.

that they have money or other assets coming to them they start making plans for the assets and then start questioning the personal representative about when distributions will be made.

F. Remedies if Personal Representative Breaches Duty. A personal representative is liable to interested persons for damage or loss resulting from a breach of fiduciary duty to the same extent as a trustee of an express trust.²⁰ There are essentially two remedies available to interested parties of an estate if the personal representative breaches his fiduciary duty.

1. Petition for Removal of Personal Representative. An interested person in the estate may petition the court for removal of the personal representative for cause. Once the personal representative is served with the summons and petition for removal, he shall not act except to account, to correct maladministration, or preserve the estate.²¹ Cause for removal generally exists when a personal representative has intentionally mismanaged the estate, or is, or becomes incapable of administering the estate.²² The courts have made it clear that it is difficult to remove a personal representative for cause.

(i) *Church v. McGee*²³ deals with a case where a beneficiary sought to remove a personal representative because the personal representative allegedly misrepresented the value of the Estate's assets. The Court of Appeals held that strong deference is to be shown to the personal representative chosen by the testator, and *Church* stands for the rule of law that "[t]he

²⁰ S.C. Code Ann. §62-3-712.

²¹ S.C. Code Ann. 62-3-611(a).

²² See S.C. Code Ann. §62-3-611(b).

²³ 391 S.C. 334, 344, 705 S.E.2d 481, 486 (S.C. App. 2011) (quoting *Smith v. Heyward* 115 S.C. 145, 164, 105 S.E. 275, 282 (1920)).

power to remove a personal representative should be [exercised] with great caution, and not at all, unless it is made to appear to be necessary for the protection of the estate, to prevent loss or injury to it from misappropriation, maladministration or fraud.”

(ii) *Blackmon v. Weaver*²⁴ involves facts where a personal representative was removed because she asked the court to construe a will and she advocated a position that favored her interests. Additionally, upon granting the removal of the personal representative, the lower court specifically discussed Blackmon’s hostility between her and other Estate beneficiaries. On appeal, the South Carolina Court of Appeals reversed, and held that “the mere existence of conflict between a personal representative and a beneficiary is an inadequate reason for removal of the personal representative. Without a showing of fault, the court will not remove a personal representative simply because the parties do not get along.”

2. Petition to Compel Personal Representative. If a personal representative does not timely file an accounting, proposal for distribution, and petition for settlement of the estate within one year after first notice to creditors, and if the personal representative fails to obtain an extension, any interested person may petition the probate court for an order compelling the personal representative to perform his duties.²⁵

G. General Powers of Personal Representative. Subject to the fiduciary duties imposed on personal representatives, a personal representative has all the powers over the decedent’s estate granted by the decedent in his last will and testament. A personal representative has the same power

²⁴ 366 S.C. 245, 621 S.E.2d 42, 45 (S.C. App. 2005) (citing *Reed v. South Carolina Nat’l Bank*, 293 S.C. 357, 360 S.E.2d 527 (S.C. App. 1987)).

²⁵ S.C. Code Ann. §62-3-1001.

over title to property of an estate that an absolute owner would have, in trust, however, for the benefit of the creditors and others interested in the estate. However, a personal representative may not sell the estate's real property (or personal property over \$5,000 that does not have a readily ascertainable value) without express authority to do so granted either in the will or court order.²⁶

H. Specific Powers of Personal Representative. Except as otherwise set forth in the decedent's will, the personal representative, acting reasonably for the benefit of the interested persons of the estate, may also exercise the following powers:²⁷

1. Retain, receive and maintain assets of the estate pending distribution, which could include insuring the assets or paying taxes on them, or compromising a debt owed to the estate.
2. Perform, compromise, or refuse performance of the decedent's contracts.
3. Satisfy claims and written charitable pledges of the decedent.
4. Invest assets of the estate pending distribution, which could include investing in or selling (subject to limitations in S.C. Code Ann. §62-3-715(b)), mortgaging, or leasing property of the estate.
5. Vote stocks or other securities or pay calls and assessments for securities of the decedent's estate pending distribution.
6. Allocate income or expense of the estate between income and principal.
7. Employ professionals to represent the personal representative in their fiduciary capacity.

²⁶ See S.C. Code Ann. §62-3-711.

²⁷ See S.C. Code Ann. §62-3-715.

8. Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of their duties.

9. Continue any unincorporated business or venture of the decedent for up to four months or longer if court approved or none of the competent adult probable beneficiaries object.

10. Determine which assets to use to satisfy devisees, without regard to its tax basis, and to have assets appraised and to use the appraised value for distribution purposes.

11. With court approval, compromise and settle wrongful death claims.

12. Donate a qualified conservation easement for tax purposes if heirs, beneficiaries, and devisees whose interests are affected consent.

III. Duties and Powers of Trustee (§62-7-801 through §62-7-817).

A. Definition of Trustee. The SCPC provides that a trustee includes an original, additional, or successor trustee, whether or not appointed or confirmed by the court.²⁸ The South Carolina Trust Code (SCTC) includes essentially the same definition.²⁹ Black's Law Dictionary defines a trustee as one in whom an estate, interest, or power is vested, under an express or implied agreement to administer or exercise it for the benefit or to the use of another, and one who holds legal title to property "in trust" for the benefit of another person (beneficiary) and who must carry out specific duties with regard to the property.³⁰

²⁸ S.C. Code Ann. §62-1-201(45).

²⁹ S.C. Code Ann. §62-7-103(19). The SCTC, which is Article 7 of the SCPC, was enacted on May 23, 2005, and became effective January 1, 2006. James C. Hardin, III, Esquire and S. Alan Medlin, Esquire, *The South Carolina Trust Code* 1-1 (2006).

³⁰ Black's Law Dictionary 1514 (6th ed. 1990).

B. Duties of Trustee.

1. Duty to Administer the Trust. Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith for the benefit of the beneficiaries and in accordance with the terms of the trust and the SCTC.³¹ This section of the SCTC clearly states that upon acceptance of the trusteeship, the trustee is “on-the-clock” and expected to perform trustee duties for the benefit of the trust’s beneficiaries.³²

2. Duty of Loyalty. A trustee shall administer the trust *solely* in the interests of the beneficiaries.³³ This duty makes it clear that the trustee shall perform its duties for the benefit of the beneficiaries and not use its position as trustee for personal gain, and that the trustee shall be loyal and faithful to the interests of the beneficiaries. Any act by the trustee that could be construed as self-dealing (or performed for the personal benefit of the trustee) must be specifically authorized under the terms of the trust, the SCTC, or approved by the court.

3. Duty of Impartiality. If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries’ respective interests.³⁴ This provision makes it clear to trustees and beneficiaries that one beneficiary shall not be favored over another beneficiary identically situated. However, this section does not mean that a trustee must treat all beneficiaries exactly the same. Oftentimes, the

³¹ See S.C. Code Ann. §62-7-801.

³² It is important to point out that the SCTC only applies to express trusts, whether in writing or oral. It does not apply to constructive trusts, resulting trusts, conservatorships, probate administrations, or other arrangements set forth in S.C. Code Ann. §62-7-102.

³³ S.C. Code Ann. §62-7-802(a).

³⁴ S.C. Code Ann. §62-7-803.

trust instrument will direct the trustee to treat beneficiaries differently. This is particularly true when a trust has current beneficiaries and future or contingent beneficiaries. An inherent conflict of interest exists between the interests of a current beneficiary and those of a future or contingent beneficiary. For example, if a trust's terms direct that a certain beneficiary will receive trust assets after a current beneficiary dies, it is easy to deduce that any assets given to the current beneficiary would reduce the amount of assets that would be available to give to a future or contingent beneficiary once their interest vests. In questionable cases, the prudent trustee should employ sound judgment when making distributions to one beneficiary that could end up reducing future distributions to a contingent or future beneficiary, or seek court approval prior to making the distribution.

4. Duty of Prudent Administration. A trustee must administer the trust as a prudent person would, considering the terms of the trust and circumstances surrounding its administration.³⁵ This is a safe harbor provision for trustees if they exercise reasonable care, skill, and caution when they discharge their responsibilities as trustee. This section begs the question of what exactly does “reasonable care, skill and caution” mean? Generally speaking, when a trustee must rely on his discretion to make a decision related to the trust, he should use good old fashion common sense and exercise his discretion in the same or similar manner as would other trustees similarly situated. In the context of investing trust assets, the trustee is charged to observe the long-standing “Prudent Man Rule” to preserve trust property and make it productive,³⁶ which is more

³⁵S.C. Code Ann. §62-7-804.

³⁶ See *Harvard College v. Armory*, 26 Mass. (9 Pick.) 446 (1830).

specifically covered in the South Carolina Prudent Investor Act.³⁷ With regard to accounting principles and the allocation of trust receipts and disbursements between trust income and principal, fiduciaries must comply with the terms of the South Carolina Uniform Principal and Income Act.³⁸

5. Duty to Avoid Excessive Costs. In administering the trust, the trustee may incur only costs that are reasonable in relation to the trust property, the trust's purposes, and the trustee's skills. Trustees should always be mindful of not spending too much trust money because the trustee could be held personally liable for any excessive costs.³⁹

6. Trustee with Special Skills. A trustee that has special skills or expertise, or is named trustee in reliance upon the trustee's representation that he has special skills or expertise, shall use those special skills or expertise in administering the trust.⁴⁰ This provision of the SCTC raises the bar for trustees with special skills, and trustees need to understand that they cannot rely on the general rules of prudence when they possess special skills that were relied upon when they were chosen as trustee.

7. Duty to Control and Protect Trust Property. A trustee shall take reasonable steps to take control of and protect the trust property, which would include obtaining insurance on trust property that should be insured.⁴¹

³⁷ See S.C. Code Ann. §62-7-933.

³⁸ See S.C. Code Ann. §62-7-901 through §62-7-932.

³⁹ See S.C. Code Ann. §62-7-1002.

⁴⁰ S.C. Code Ann. §62-7-806.

⁴¹ S.C. Code Ann. §62-7-809.

8. Duty of Recordkeeping and Identification of Trust Property. A trustee must keep adequate records of the trust's administration and must keep trust assets separate from his own personal assets.⁴²

9. Duty to Inform and Report. A trustee shall keep the qualified beneficiaries⁴³ of the trust reasonably informed about the trust's administration and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.⁴⁴ A trustee shall also:

- (i) upon request of a beneficiary, furnish a copy of the trust instrument;
- (ii) within sixty days after accepting a trusteeship, notify the qualified beneficiaries of the trustee's contact information;
- (iii) within sixty days after acquiring knowledge of an irrevocable trust, notify the qualified beneficiaries of the trust, the identity of the settlors, and their right to information related to the trust;
- (iv) notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation; and
- (v) at least annually, provide a report to beneficiaries of trust property, liabilities, receipts, and disbursements, including the trustee's compensation.

⁴² See S.C. Code Ann. §62-7-810.

⁴³ A "qualified beneficiary" is essentially a living beneficiary who is a distributee or permissible distributee of trust income or trust principal, or would be if the trust terminated on the date of the beneficiary's qualification. See S.C. Code Ann. §62-7-103(12).

⁴⁴ S.C. Code Ann. §62-7-813(a).

C. Remedies if Trustee Breaches Duty.

1. Petition for Removal of Trustee. The settlor, a co-trustee, or a beneficiary may request the court to remove a trustee, or the court may remove a trustee on its own initiative, if any of the following exist:

- (i) the trustee has committed a serious breach of trust;
- (ii) lack of cooperation of co-trustees substantially impairs the administration of the trust;
- (iii) the court determines the trustee should be removed because of his unfitness, unwillingness, or persistent failure to administer the trust in a way that best serves the interests of the beneficiaries; or
- (iv) a change in circumstances or all of the qualified beneficiaries request removal, and the removal and appointment of a successor trustee are not inconsistent with the material purposes of the trust.⁴⁵

2. Additional Remedies for Breach of Trust by Trustee. When a breach of trust occurs, the court, in lieu of, or in addition to, may order the following relief:

- (i) compel the trustee to perform his duties;
- (ii) enjoin the trustee from committing a breach of trust;
- (iii) compel the trustee to redress a breach of trust by paying back money or returning trust property;
- (iv) order the trustee to account;

⁴⁵ S.C. Code Ann. §62-7-706.

(v) appoint a special fiduciary to take possession of trust property and administer the trust;

(vi) suspend the trustee;

(vii) reduce or deny compensation to the trustee;

(viii) impose a lien or constructive trust on trust property or take steps to recover property wrongfully disposed of by the trustee; or

(ix) order any appropriate relief.⁴⁶

D. General Powers of Trustee. A trustee, without authorization by the court, but subject to the fiduciary duties imposed on a trustee, may exercise the powers conferred by the terms of the trust.⁴⁷

E. Specific Powers of Trustee. In addition to the powers conferred in the trust instrument, and subject to the trustee's fiduciary duties, a trustee has the following specific powers:⁴⁸

1. Collect trust property and accept or reject additions to the trust from the settlor or any other person.

2. Acquire or sell trust property at public or private sale.

3. Exchange, partition, or otherwise change the character of trust property.

4. Deposit money in accounts, invest trust assets, borrow money, with or without security, and within or beyond the duration of the trust.

⁴⁶ S.C. Code Ann. §62-7-1001.

⁴⁷ S.C. Code Ann. §62-7-815.

⁴⁸ See S.C. Code Ann. §62-7-816.

5. Create or continue a business enterprise and take all actions that may be taken as an owner.
6. Vote or exercise other stock rights of a shareholder of a corporation.
7. Own, lease, and manage real estate investments, including making repairs or alterations to such property.
8. Grant options on trust property or acquire options (and exercise such options) for the acquisition of property, including an option exercisable after the duration of the trust.
9. Protect trust property from damage and liability, including insuring such property, investigating any potential environmental issues, and paying any taxes or assessments on such property.
10. Abandon or decline to administer property of no or insufficient value to justify its collection or administration.
11. Pay, contest, settle, or release any claim by or against the trust.
12. Exercise elections with respect to federal, state, and local taxes.
13. Make reasonable loans of trust property or pledge trust property for loans made to the trust.
14. Appoint a trustee in another jurisdiction if necessary.
15. Pay amounts due to minor or incompetent beneficiaries to such beneficiaries conservator, guardian, or agent under a power of attorney.
16. Attain values for trust property and allocate trust property for distribution accordingly.
17. Mediate or arbitrate any dispute concerning the trust.

18. Prosecute or defend claims by or against the trust.
19. Sign and deliver contracts on behalf of the trust.
20. Upon distribution of trust assets, wind up the administration of the trust.
21. Allocate items of income or expense to either trust income or trust principal.
22. Divide the trust into separate shares or trusts, if it would be appropriate,

consistent with the settlor's intent, and would facilitate the administration of the trust.

IV. Conclusion.

The roles of personal representative and trustee are significant roles that must be taken seriously. Wills and trusts, along with the SCPC and SCTC, impose duties and grant powers that must be understood by personal representatives and trustees. Assets of an estate and trust are held and administered by fiduciaries for the benefit of beneficiaries, and those beneficiaries have the ability to ensure that the fiduciaries are doing what they are required to do, including having a court impose personal liability against the fiduciary for a breach of duty. At the end of the day, successful administration of an estate or trust by a fiduciary can be a very rewarding experience for both the fiduciary and the beneficiaries. Fiduciaries are encouraged to seek the counsel of an experienced estate and trust attorney to guide them through the process of administration.