IT IS THE RELATIONSHIP THAT CREATES FIDUCIARY DUTIES.

What it is a fiduciary relationship?

“… a situation where trust and confidence are reposed by one person in another who, as a result, gains a dominance, influence and superiority over the other as to the transaction in question." Brandt v. Uptown Nat. Bank of Moline, 212 Ill.App.3d 621, 571 N.E.2d 531 (3rd Dist 1991).

Attorney-Client Relationship


“Among the fiduciary duties imposed upon an attorney are those of fidelity, honesty and good faith in the discharge of contractual obligations to, and professional dealings with, a client. "When, in the course of his professional dealings with a client, an attorney places personal interests above the interests of the client, the attorney is in breach of his fiduciary duty by reason of the conduct." Doe v. Roe, 289 Ill.App.3d 116, 681 N.E.2d 640 (1997).

Trustee-Beneficiary Relationship

A fiduciary relationship exists between a trustee and beneficiary as a matter of law. Janowiak v. Tiesi, 402 Ill.App.3d 997, 1006, 932 N.E.2d 569, 579 (3rd Dist. 2010). "Trustees are but one example of a myriad of fiduciaries including guardians, executors, administrators, and agents. Each of these fiduciaries owes a duty of loyalty to the person or entity for whom the fiduciary is acting." Janowiak, at 1008. A trustee "owes a fiduciary duty to a trust's beneficiaries and is obligated to carry out the trust according to its terms and to act with the highest degrees of fidelity and utmost good faith." Fuller Family Holdings, LLC v. Northern Trust Co., 371 Ill.App.3d 605, 615, 863 N.E.2d 743, 754 (2007); Hawkins v. Voss, 2015 IL App (5th) 140001, ¶ 31 (Ill. App. Ct. 2015).

TRUSTEE’S FIDUCIARY DUTIES


2. Good faith—comes with the exercise of discretionary authority.
A trustee has a duty to act with the utmost good faith and the highest degree of fidelity toward the trust beneficiaries. *In re Estate of Hawley*, 183 Ill.App.3d 107, 538 N.E.2d 1220 (1989).

Because a trustee can be put in a position of great discretion, “acting with good faith in administering the trust means that the trustee must act honestly and with undivided loyalty to the trust, not merely with the standard of the workaday world but with the most sensitive degree of honor” *Laubner v. Jp Morgan Chase Bank, N.A.*, 898 N.E.2d 744, 386 Ill. App. 3d 457 (Ill. App., 2008)

3. Avoid Conflict of Interest.
The duty of a trustee is such that it will suffer not the remotest possibility of a conflict of interest, nor the faintest appearance of impropriety. *In re Estate of Hawley*, 183 Ill.App.3d 107, 538 N.E.2d 1220 (1989).

But: It is well established Illinois law that the personal interest of the executor as a beneficiary does not make her incapable or unsuitable to serve. *Estate of Kuhn*, 87 Ill.App.2d 411, 419, 231 N.E.2d 97 (2nd Dist. 1967).

And “where acts which would ordinarily be viewed as conflict of interest are contemplated, created or sanctioned within a trust instrument, as they are here, the trustee has no liability for following the trust's directives.” *McCormick v. McCormick*, 455 NE 2d 103 (1st Dist. 1983).


5. Follow the plain language. If the language of a trust is clear and unambiguous, the settlor's intent must be determined solely from the language of the trust and it should be enforced as written. *McCarthy Trust*, 408 Ill. App. 3d at 535. Generally, the powers and duties of a trustee must be determined by the instrument creating the trust, and, by accepting the trust, the trustee becomes bound to administer it, or execute it, in accordance with the provisions of the trust

**6. Duty to account.**

Every trustee at least annually shall furnish to the beneficiaries then entitled to receive or receiving the income from the trust estate, or if none, then those beneficiaries eligible to have the benefit of the income from the trust estate a current account showing the receipts, disbursements and inventory of the trust estate." 760 ILCS 5/11(a) (Trusts and Trustees Act).

The trustee has a duty of **transparency in the performance of her duties.** *Sanders v. Stasi*, 2011 IL App (4th) 100750, par.29 (2011)( in ruling that the beneficiary was entitled to an accounting the court stated that a beneficiary is always entitled to information reasonably necessary to enforce his rights and “to prevent or redress a breach of trust”).


**THE GAP**

Attorney ---→ Client // Third Parties (witnesses, adversaries)

There is no duty to Third parties.
Attorney ---→ Trustee/Client ----→ Third Party Trust Beneficiaries
There is a duty.

Attorney-Client-Beneficiaries

Fiduciary Relationship

Yes

Fiduciary Relationship

??

Beneficiary

Yes
BRIDGING THE GAP BETWEEN THE TRUST'S ATTORNEY AND THE TRUST BENEFICIARIES.

1. Law of Agency
2. ICPR
3. Illinois Probate Act
4. Trusts and Fiduciaries Act
5. Specific Case Law that draws on 1-4 above.

1. LAW OF AGENCY

"As a fiduciary relationship, there are a myriad of circumstances where attorneys act as agents for their clients." Horwitz v. Holabird & Root, 816 N.E.2d 272 (2004).

“In general, a client is bound by the acts or omissions of his attorney within the scope of the attorney’s authority. Marr v. Marr (1994), 264 Ill.App.3d 932, 638 N.E.2d 303.

Where the principal places an agent in a situation where he may be presumed to have authority to act for her, the principal is estopped as against a third person from denying the agent's apparent authority. Sakun v. Taffer, 268 Ill.App.3d 343, 353, 643 N.E.2d 1271 (1994).

The principal has the right to control the conduct of the agent and the agent has the power to affect the legal relations of the principal. Taylor v. Kohli, 162 Ill.2d 91, 95, 642 N.E.2d 467 (1994).

It is precisely because an attorney stands in a fiduciary relationship to the client that the attorney has the power to act for and to bind the client to matters within the scope of the attorney's agency. In re Marriage of Marr, 264 Ill.App.3d 932, 935, 638 N.E.2d 303 (1994) (“Generally, a client is bound by the acts or omissions of his attorney within the scope of the attorney’s authority”).

2. THE ILLINOIS CODE OF PROFESSIONAL CONDUCT

Rule 1.7 CONFLICTS OF INTEREST

(A) lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer
Comments to Rule 1.7

Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client. Concurrent conflicts of interest can arise from the lawyer’s responsibilities to another client, a former client or a third person or from the lawyer’s own interest. ILCS S Ct Rules of Prof.Conduct Rule 1.7, Comment 1 (emphasis added). Thus, under Rule 1.7, in addition to conflicts with other current clients, a lawyer’s duties of loyalty and independence may be materially limited by the lawyer’s responsibilities to other persons, such as fiduciary duties arising from a lawyer’s service as a trustee, executor or corporate director. ILCS S Ct Rules of Prof.Conduct Rule 1.7, Comment 9 (emphasis added).

3. Illinois Probate Act- various sections depending on the issues in the case.

4. Trusts and Fiduciaries Act- various sections depending on the issues in the case.

5. How does the Case Law apply 1-4 to arrive at the Trustee’s Attorney’s Duties to Beneficiaries?

There is a blending of estate/executor/administrator cases with obligations of Trustee and Trustee’s attorney.

(But There Are Differences)

-Survival Actions. Executor is the “personal representative” of the deceased. A successor trustee is not the personal representative of the deceased settlor. Survival actions can be brought by the appointed personal representative or special administrator.

740 ILCS 180/2.1 (Illinois Compiled Statutes (2017 Edition))


-HIPAA. A personal representative of an estate has authorization to obtain medical records during 50-years post-death restriction on release of medical records. (https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/health-information-of-deceased-individuals/index.html)

-Statutory Duty to Defend Will Contest. 755 ILCS 5/8-1(e)

- **Dead Man’s Act** 735 ILCS 5/8-201. *Rose v. St. Louis Union Trust Co.*, 241 NE 2d 16 (5th Dist. 1968)


   - **As to the Legal Duty of Attorney in Drafting.** Duty in contract or tort to beneficiaries depends upon intention of testator. Evidence suggested concern for tax consequences at the planning stage. Attorney undertook the affirmative duty. Question of fact existed. Reversed.
   - **As to the Legal Duty of Attorney in Representing the Estate and Reforming the Will.** Although executor owes fiduciary duty to estate and beneficiaries in the administration and even though beneficiaries of an estate are intended to benefit from the estate “an attorney for an estate cannot be held to a duty to a beneficiary of an estate, due to the potentially adversarial relationship between the estate’s interest in administering the estate and the interest of the beneficiaries of the estate. **Reforming the will would require the attorney to take on the duty of persuading a devisee and legatees to renounce their share to save taxes.** Affirmed.
   - **As to the Bank, Executor and Trustee.** Exculpatory provisions are generally held effective except as to reckless or intentional breaches or those committee in bad faith. Trustee not responsible for the tax returns. No evidence that Bank breached its duty to hire competent counsel. “We are not sure that courts should impose a duty upon an executor to questions the terms of the will”. Bank should not be required as a matter of law “to contact” and “pressure” beneficiary to forego a benefit in order to increase plaintiff’s share. **Burden lies with those who wish to change the terms. Reluctant to impose duty upon executor to give tax advice to some beneficiaries. Imposing that duty would increase cost of administration and could be a major undertaking** Affirmed.

2. **Estate of Halas**, 159 Ill.App. 3d 818, 512 N.E.2d 1276 (1st Dist. 1987)
The petitioner “breached its derivative fiduciary duty as a result of its conduct in reorganizing the Bears and also breached its own separate fiduciary duty to the beneficiaries. See, e.g. In re Clarke’s Estate (1962) 112 N.Y.2d 183, 188 N.E. 2d 128, 237 N.Y.S. 2d 694 (court held that attorney breached his duty notwithstanding the fact that the executor’s actions were proper).

The “petitioner acted in bad faith as to both its derivative and independent fiduciary duties.”

Respondents argued that a finding of bad faith and conflicting interests mandates a denial of fees. An attorney may not recover fees after representing adverse, conflicting and antagonistic interests in the same litigation. In re Estate of Lindberg, 98 Ill. App. 3d 212, (1981).

However, the determination of fees is discretionary with the probate court and will not be disturbed if there is any evidence in the record to support the findings. In re Estate of Freund, 63 Ill. App3d 1 (1978).

Much of the work benefitted the estate. Therefore, petitioner is entitled to the fair and reasonable value of the legal services.

No fees allowed for defending fee petition which is of no benefit to the estate.


- Executor had duty to defend the will
- No attorney-client relationship with beneficiaries
- In adversarial relationship, the attorney’s duty is to the estate.
- Executor had no duty to join in trust contest for beneficiaries
- Litigation was without merit and beneficiaries could challenge trust without estate involvement which would have been inappropriate under Estate of Minsky, 59 Ill. App. 3d 974 (1st Dist. 1978).

4. In re Estate of Kirk, 686 N.E.2d 1246, 1251 (2nd Dist. 1997). Waiver. Where petitioner (prior guardian of minors’ estate) waited 3 ½ years to raise conflict of attorney representing executor bank who was also guardian of minors estate and couldn’t show how conflict hurt the estate, disqualification was waived and fees were appropriate.
ADDRESSING BREACH OF FIDUCIARY DUTIES.

1. **Disqualification - ICPC Rule 1.7. CONFLICTS OF INTEREST**

   **Counter argument – Drastic measure.**
   - Disqualification of an attorney is a “drastic measure courts should hesitate to impose except when absolutely necessary.” Disqualification is a discredit to the profession and the particular attorney involved and should not be used for tactical advantage. *Guillen v. City of Chicago*, 956 F. Supp. 1416, 1421 (N.D. Ill. 1997); *In re: Possession and Controll of Commissioner of Banks and Real Estate of Independent Trust Corporation*, 327 Ill. App. 3d 441 (1st Dist. 2001).

   **DELAY**

2. **Fees.** “The law is well settled that trustees cannot reimburse themselves from the trust estate for their attorney fees, unless those fees were incurred in the management and preservation of the trust estate.” *Ellis v. King*, 336 Ill.App.2d 298, 307, 83 N.E.2d 367, 371 (2d Dist. 1949).
   - Trustee cannot reimburses himself/herself from the trust for attorney’s fees incurred in defending breaches of fiduciary duty if found to have breached his duties. *Grate v. Grzetich*, 867 NE 2d 577 - Ill: Appellate Court, 3rd Dist. 2007(reversed award of 50% of fees paid by trust in defending trustee for alleged breach-fees were not incurred in protecting trust assets).
   - A trustee has a duty of impartiality toward all beneficiaries and to protect their interests. When the trustee breaches his duty to administer the trust in accordance with its terms and acts in a manner that favors one beneficiary over another, even in good faith and the breach is technical in nature and caused no harm, the trustee is not entitled to attorney’s fees. *Northern Trust Co. v. Heuer*, 202 Ill. App. 3d 1066, 1070, 560 N.E.2d 961, 964 (1990).

3. **Malpractice Action.** advice of counsel is not a defense to breach of fiduciary duty. *NC Illinois Trust Co. v. First Illini Bancorp, Inc.* 23 Ill.App.3d 254, 752 N.E.2d (3rd Dist. 2013). Even if the assertion of reliance on counsel is true, the Defendant is bound by the advice of counsel and his remedy is a legal malpractice action. *Id* at 265.