

	Schenck Price <small>SCHENCK PRICE SMITH & KING, LLP</small>
<h1>WHEN FIDUCIARIES GO WRONG</h1> <p><i>2021 Stetson University National Conference on Special Needs Planning and Special Needs Trusts</i></p>	
<small>Presented By: Shirley B. Whitenack, Esq. Schenck, Price, Smith & King, LLP Paramus, NJ --- Florham Park, NJ --- Sparta, NJ --- New York, NY sbw@spsk.com All Rights Reserved © 2021</small>	

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	Schenck Price <small>SCHENCK PRICE SMITH & KING, LLP</small>
<h2>WHAT IS A FIDUCIARY?</h2> <ul style="list-style-type: none"> • A fiduciary is a person or entity in whom another reposes reliance and confidence. • A fiduciary must act on behalf of the best interests of the person or entity that is relying on the fiduciary. • A fiduciary has affirmative duties to those relying on the good faith of the fiduciary. 	
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<h2>EXAMPLES OF FIDUCIARY RELATIONSHIPS</h2> <ul style="list-style-type: none"> • attorney to client • doctor to patient • accountant to client • trustee to beneficiary • Guardian to ward • Conservator to conservatee • attorney-in-fact to principal 	
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PERSONAL REPRESENTATIVES	Schenck Price <small>SCHENCK PRICE SMITH & KING, LLP</small>
<ul style="list-style-type: none"> • The rights and duties of an executor are derived from the decedent's will, applicable state statutes and court orders in proceedings involving the estate. • The rights and duties of an estate administrator are set forth in the governing statutes and court orders, if any. • Personal representatives are required to perform their duties in the same manner that a prudent person would manage his or her own affairs and are held to a strict standard of care. • They must act in good faith and deal impartially with beneficiaries. 	
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PERSONAL REPRESENTATIVES	Schenck Price <small>SCHENCK PRICE SMITH & KING, LLP</small>
<p>Duty to settle and distribute the estate assets and income expeditiously</p> <p>Must locate the original will, identify and determine the value of the probate assets, secure real property and take possession of personal property, prepare and file tax returns, pay claims and taxes, identify the beneficiaries, manage the assets and distribute the assets pursuant to the terms of the will or the laws of intestacy.</p>	
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PERSONAL REPRESENTATIVE	Schenck Price <small>SCHENCK PRICE SMITH & KING, LLP</small>
<p>Personal representative can engage attorneys, accountants, realtors, financial advisors and others to advise and assist them in administering the estate.</p> <p>May be held liable if those hired by the personal representative cause harm to the estate.</p>	
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TRUSTEES	Schenck Price <small>SCHENCK PRICE SMITH & KING, LLP</small>
<p>Duty to avoid self-dealing, to avoid improper delegation of the trustee's duties, to deal impartially with all beneficiaries and to prudently invest the trust asset.</p> <p>Keep accurate records, file tax returns and/or accountings and comply with the terms of the trust document. Depending on the state, the actions of the trustee may be governed by the state's Principal and Income Act, Prudent Investor Act and Uniform Trust Code.</p>	
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PRUDENT INVESTOR ACT	Schenck Price <small>SCHENCK PRICE SMITH & KING, LLP</small>
<ul style="list-style-type: none"> • The standard of prudence is applied to investments as part of the total portfolio, rather than to individual investments. • Primary consideration is balancing in all investing between risk and return. • Trustee is permitted to prudently invest in anything that contributes to achieving the risk/return objectives of the trust • The requirement that fiduciaries diversify investments has been incorporated into the definition of prudent investing. • Trustees are permitted to delegate with proper safeguards. 	
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UNIFORM TRUST CODE (UTC)	Schenck Price <small>SCHENCK PRICE SMITH & KING, LLP</small>
<p>UTC consists of a set of default provisions that a trust instrument may override.</p>	
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EXCEPTIONS	Schenck Price <small>SCHENCK PRICE SMITH & KING, LLP</small>
<p>Exceptions over which the terms of the trust do <u>not</u> prevail:</p> <ul style="list-style-type: none"> • the requirements for creating a trust; • the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries; • the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a lawful purpose, not contrary to public policy; • The power of the court to modify or terminate a trust; • The effect of a spendthrift provision and the rights of creditors and assignees to reach a trust; and • The power of the court to require, dispense with, modify or terminate a bond. 	
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UTC - SPECIFIC DUTIES OF TRUSTEE	Schenck Price <small>SCHENCK PRICE SMITH & KING, LLP</small>
<ul style="list-style-type: none"> • the duty to administer the trust in good faith • the duty of loyalty • the duty of impartiality • the duty of prudent administration • the duty to use special skills or expertise 	
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SPECIAL NEEDS TRUST	Schenck Price <small>SCHENCK PRICE SMITH & KING, LLP</small>
<p>Similar to that of other trusts insofar as accounting and tax law are concerned.</p> <p>Must also understand:</p> <ul style="list-style-type: none"> • public benefits programs that may be available to the beneficiary. • distributions from income or principal may affect the beneficiary's eligibility for those programs. 	
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AGENT UNDER A DURABLE FINANCIAL POWER OF ATTORNEY	Schenck Price <small>— SCHENCK PRICE SMITH & KING, LLP —</small>
<p>A Power of Attorney is a written instrument by which a principal authorizes another individual, known as the agent, to perform specified acts on behalf of the principal.</p> <p>A principal executing a power of attorney intends the agent to act for the principal's benefit.</p> <p>The agent must act in good faith and only within the scope of authority granted in the power of attorney.</p>	
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GUARDIANS AND CONSERVATORS	Schenck Price <small>— SCHENCK PRICE SMITH & KING, LLP —</small>
<p>Governed by state statutes. Duty of care owed by guardians/conservators to the wards/conservatees varies from jurisdiction to jurisdiction.</p>	
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POWER OR ATTORNEY FOR HEALTH CARE	Schenck Price <small>— SCHENCK PRICE SMITH & KING, LLP —</small>
<p>Every state has statutes authorizing the use of advance health care directives.</p> <p>Authorizes an agent to make medical decisions for the principal when he or she is no longer able to give informed consent to medical treatment.</p> <p>If the principal's wishes are not known, the agent must employ substituted judgment.</p> <p>If the agent is unable to determine what the person would choose to do under the circumstances, then he or she must make decisions that are in the best interest of the principal.</p>	
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ELEMENTS OF ESTABLISHING BREACH OF FIDUCIARY DUTY	Schenck Price <small>SCHENCK PRICE SMITH & KING, LLP</small>
<ol style="list-style-type: none"> 1. Existence of fiduciary duty 2. Breach of duty 3. Causation 4. Damages 	
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REMEDIES FOR BREACHES OF FIDUCIARY DUTIES	Schenck Price <small>SCHENCK PRICE SMITH & KING, LLP</small>
<ul style="list-style-type: none"> • actual damages; • lost profits; • disgorgement of fees or profits; • out of pocket losses; • punitive damages; • rescission; • injunctive relief; • accountings; • surcharge; • reformation; • constructive trust; • removal of fiduciary; • attorney's fees; and • criminal penalties. 	
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BREACH OF DUTY OF IMPARTIALITY (SELF-DEALING)	Schenck Price <small>SCHENCK PRICE SMITH & KING, LLP</small>
<p style="text-align: center;"><i>Black v. Black</i>, 422 P.3d 593 (2018)</p>	
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FAILURE TO APPLY FOR PUBLIC BENEFITS ON BEHALF OF THE BENEFICIARY	Schenck Price <small>SCHENCK PRICE SMITH & KING, LLP</small>
<p><i>Sargent v. Sargent</i>, No. PC-08-1429, 2009 R.I. Super. LEXUS 109, 2009 WL 3328560(R.I. Super, July 31, 2009)</p>	
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FAILURE TO INVESTIGATE WHETHER MEDICARE WOULD PAY FOR HOME HEALTH CARE SERVICES	Schenck Price <small>SCHENCK PRICE SMITH & KING, LLP</small>
<p><i>Liranzo v. LI Jewish Education/Research</i> (N.Y. Sup. Ct., Kings Cty., No. 28863/1996 June 24, 2013)</p>	
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FAILURE TO PROACTIVELY IDENTIFY THE NEEDS OF THE TRUST BENEFICIARY	Schenck Price <small>SCHENCK PRICE SMITH & KING, LLP</small>
<p><i>Matter of J.P. Morgan Chase Bank N.A. (Marie H.)</i>, 956 N.Y.S.2d 856 (N.Y.Surr.Ct., 2012)</p>	
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CONCLUSION	Schenck Price <small>SCHENCK PRICE SMITH & KING, LLP</small>
<p>A fiduciary has a legal obligation that is considered the highest standard of care under the law.</p> <p>Myriad remedies for breaches of fiduciary duties</p> <p>Fiduciaries who engage attorneys can proactively sidestep breaching their fiduciary duties and potential exposure to personal liability.</p>	
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QUESTIONS?	Schenck Price <small>SCHENCK PRICE SMITH & KING, LLP</small>
ANY QUESTIONS?	
	
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Thank you	Schenck Price <small>SCHENCK PRICE SMITH & KING, LLP</small>
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