

How to Keep the Fiduciary From Using the Estate (War Chest) To Wage a Battle Really On Behalf of a Beneficiary

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There are few circumstances in which a fiduciary (be it the executor or trustee) isn't allowed to hire and pay his or her attorneys from estate or trust funds. It is also a rare instance where a fiduciary doesn't have a duty of loyalty and neutrality towards all of the beneficiaries. Add to those factors that many statutes and even documents impose upon a fiduciary the duty to defend the trust or will. Add them all up and the beneficiary on the outside is at the sort of economic disadvantage that can often determine who will prevail.

In some circumstances the beneficiary on the outside can ask the court to take a closer look at the real battle and determine that the fiduciary doesn't have a dog in the fight so to speak.

Examples:

1. A personal representative in an intestate estate who quite properly presented to the court an issue of who was entitled to inherit the decedent's property which went to different children and stepchildren depending upon the character of the property. The reason there was an issue is that the decedent's four children had different mothers and property of the decedent's estate traceable to one set of the children's mothers (under that state's intestate succession laws) would only go to that woman's children and not to the children from the other mother. Without further belaboring the facts, once the personal representative had presented the issue to the court, if he took any further action, it could only be on behalf of one set or the other of the beneficiaries. The task of tracing the decedent's property and where it had come from was properly left to the two sets of children.

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2. A similar issue often arises in intestate estates in community property states where a surviving spouse inherits all of the decedent's community property but only a share of the decedent's separate property. It could be unfair if the personal representative is the surviving spouse, to have the estate assets fund his or her lawyer's discovery into whether or not certain assets were community property or separate property. Similarly unfair, in the same scenario, is where it is one of the children who is the personal representative.

This is not to say that someone who is not a beneficiary under the presumptive documents (those being attacked) should be allowed to prevent the fiduciary from defending the documents under some claim arising from the duty of loyalty. There is no such loyalty until (and if) that person is shown to be a beneficiary.