

## What's with the Trustee using my money to fight me?

Legal Alert  
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Usually, a fiduciary (either an executor or a trustee) may hire and pay his or her attorneys from estate or trust funds. Moreover, the law (statutes or code sections), and some trusts and wills, impose upon a fiduciary the duty to defend the trust or will. Fiduciaries almost always have the duty of loyalty and of neutrality towards all the beneficiaries, but that doesn't always prevent the fiduciary from taking sides. Where a fiduciary uses trust or estate funds to defend a will or trust, the opposing beneficiaries end up at an economic disadvantage – and that advantage can determine who will prevail.

The economic advantages in defending what appears to be the controlling will or trust may cause the beneficiaries to ask the court to take a closer look at the real battle and determine that either the fiduciary-as-fiduciary doesn't have a dog in the fight, or the fiduciary is really choosing a side, particularly if the fiduciary is also a beneficiary. The fiduciary could even welcome court direction. In some states, a fiduciary can avoid the duty to defend a will or trust if he or she has a good faith belief the document being defended does not reflect the testator's or trustor's intent. That has to be weighed against the possible claim if a fiduciary fails to defend a document, he or she may be accused of breaching fiduciary duties, resulting in removal, surcharge and, in some states, even an award of fees and costs from the fiduciary's personal assets.

A request to the court to limit fiduciary involvement is likely to be successful when the core issue is not the validity of the underlying document, but rather a dispute about the characterization of property or the interpretation of an ambiguous provision.

One personal representative in an intestate estate (the decedent didn't leave a will) appropriately asked the court who was entitled to inherit the decedent's property (which went to

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different children and stepchildren depending upon the character of the property). The decedent's four children had different mothers, and under that state's intestate succession laws, any property of the decedent's estate traceable to one mother's ancestors would only go to that woman's children, not to the children from the other mother. It seems, once the personal representative presented the question to the court, any further action he took would necessarily be on behalf of one set or the other of the beneficiaries. The task of tracing the decedent's property was then properly left to the two sets of children. Yet, it took a court order to keep the personal representative from spending estate money to try to determine the source of the estate's assets.

In community property states there can be a similar situation, where a surviving spouse inherits all of the decedent's community property but only a portion of the decedent's separate property. If the personal representative is the surviving spouse, it may be unfair to allow the estate assets to fund the investigation into whether certain assets were community property or separate property – the fiduciary could directly benefit from that determination (and would have an incentive to find that all property was community property). The flip side of the coin is where one of the children is the personal representative – he or she will be inclined to find that property is separate property and again be happy to spend the estate's money on the determination.

A different situation occurs when someone who is not a beneficiary under the presumptive documents (those being attacked) tries to prevent the fiduciary from defending the documents, claiming such actions would somehow be a breach of the duty of loyalty to that person. There is no such loyalty owed until (and unless) that person is shown to be a beneficiary. For example the Washington Court of Appeals confirmed that even fiduciaries who have no personal interests in the estate have a duty to defend the will or trust in probate. But in many cases the undisputed beneficiaries can and should be able to prevent a fiduciary from using estate or trust funds to favor one beneficiary or another, especially to favor him or herself.