

SERVING AS SPECIAL FIDUCIARY/
REPRESENTING A SUSPENDED FIDUCIARY

By

**Hon. Freddie G. Burton, Jr.
Chief Judge
Wayne County Probate Court**

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I. INTRODUCTION

Presentation will cover the following topics:

- A. Serving as a special fiduciary – what is expected and how to proceed.**

- B. Representing a suspended fiduciary – how to help your client (and protect yourself).
- C. Checking the effective date of the special fiduciary’s appointment.

II. IN GENERAL

- A. A special fiduciary is appointed to a case to resolve a problem – i.e., the original fiduciary has failed to fulfill one or more of the obligations of their position (inventory, account, annual report not filed, etc.).
- B. You were appointed because the fiduciary was delinquent – if you are delinquent in your responsibilities, the problem is compounded.
- C. Your actions should be directed to correcting the deficiency or securing the money, getting the property to the persons entitled to it, or closing the case if warranted.
- D. The Probate Court has broad authority to appoint a special fiduciary.
 - 1. Upon reliable information received from an interested person, court or state official, or other informed source, including the court’s files, the court may appoint a special fiduciary. **MCL 700.1309(a).**
 - 2. Appointment can be made on the court’s own initiative, on the notice it directs, or without notice in its discretion. **MCR 5.204(A).**
 - 3. The probate court is specifically empowered to appoint a special fiduciary (and suspend a dilatory fiduciary) if the fiduciary fails to perform their required duties within the time allowed. **MCR 5.203(D).**
- E. Effect of Appointment of Special Fiduciary
 - 1. Unless the order of appointment provides otherwise, a special fiduciary’s appointment suspends the powers of the general fiduciary.
 - 2. The special fiduciary is an interested person in the case until their appointment is terminated.
MCR 5.204(B).
- F. Payment as Special Fiduciary
 - 1. A special fiduciary is not paid by the Court.
 - 2. The fees for a special fiduciary will come from the estate, the suspended fiduciary, or the bonding company.

III. SERVING AS SPECIAL FIDUCIARY

A. In General\What's Expected

1. Your purpose is to attempt to cure the delinquency or secure the assets as quickly as possible, and manage or close the case – i.e., if there is money, get these funds to the persons entitled to it (estate, conservatorship, heirs, etc.); if there are no funds, promptly inform the court so the file can be closed.
2. **Practice Pointer:** If you don't want a special fiduciary appointment, simply let the Judge's staff know. It is far better to decline an assignment than to accept one and not follow through.
3. Let everyone know that you have been appointed special fiduciary (i.e., interested persons, financial institution, bonding company, etc.).

B. How to Proceed

1. **First – Qualify as Special Fiduciary as Soon as Possible.**

Important Note: Check the effective date of the special fiduciary's appointment.

- In an effort to encourage delinquent fiduciaries to resolve situations without having to appoint a special fiduciary, the Court will sometimes make a 30 day delayed appointment.
- A warning letter is sent to the delinquent fiduciary.
- If you are given a delayed appointment as special fiduciary, do not qualify until the effective date of your appointment. At the end of this period, check and see if the delinquency has been resolved. If it has, take no further action; if it has not, qualify and proceed to act as special fiduciary in the case.

Practice Pointer: The Judge's staff typically prepares a Delinquent Fiduciary Worksheet. This contains information on the problem with the file, and will help guide you in the right direction in your efforts to resolve the situation. If they do not already have a copy of the worksheet for you, ask them for one when they inform you of your appointment.

2. **Second – Conduct an Immediate, Thorough Review of the File.**
 - a. Determine what hasn't been filed by the suspended fiduciary.

- b. Ascertain if there is a surety bond. (This is useful, since a surcharge action could be filed if the money cannot be located\collected from the fiduciary).
 - c. Copy relevant documents from the file.
 3. Occasionally your review of the file will enable you to immediately resolve the situation.
 - a. Example: The missing item (i.e., inventory, notice of continued administration, etc.) is in the file, but was not entered on the Court's computer system or entered in the wrong case.
 - b. If this is the scenario, take the file to the Judge's office and explain the results of your review. The Court will vacate your appointment as special fiduciary and enter the document in the computer, thereby resolving the situation.
 4. **Third – Secure the Assets as Quickly as Possible.**
 - a. FAX\email a copy of your Letters of Authority to the financial institution.
 - b. This will 1) put the bank on notice and allow them to check with their legal department if they have any questions concerning your letters; 2) require you to make only one trip to the institution to take control of the funds; and 3) place the bank on the hook if they allow the suspended fiduciary to withdraw the money after you have informed them of your appointment as special fiduciary.
 5. If the suspended fiduciary is represented by an attorney:
 - a. Call the lawyer to find out why the item(s) has\have not been filed and\or the action required by the Court has not been performed.
 - b. If something jumps out at you (i.e., account not filed, etc.), try to persuade the attorney to get the situation corrected and set the matter for hearing.
 - c. Diary the matter (30 days is reasonable) to give them time to take the necessary action.

Practice Pointer: Remind the attorney that if they commit to do something, they must follow through. If there is a bond in place and you as special fiduciary have to file a final account, petition to be appointed successor fiduciary, and\or request a surcharge, you will bill the bonding company for fees and costs and the bonding company will come after the lawyer and their client.

- d. If the case involving the suspended fiduciary is set for hearing and their reinstatement is approved by the Judge, have your appointment vacated and do not charge the attorney. You may still have to file a zero first and final account as special fiduciary, however.
- e. If the attorney does not follow through within the time you have given them, file a petition to remove and, if there is a surety bond, a petition to surcharge.

Note: Even if a lawyer has filed an appearance for the fiduciary, you must still take steps to secure the assets as quickly as possible to protect the heirs\devises\protected individuals\interested persons.

C. “Dead End” Situations

1. You will sometimes encounter situations where you are unable to recover the funds, there is no surety bond, and you cannot locate the fiduciary.
2. In these circumstances, file a petition to close the estate. Indicate what actions you performed so the Judge will have a basis to close the case.
3. Example #1: A house has been mortgaged with negative equity and no viable prospects for sale.
4. Example #2: Funds were given to a fiduciary that was not bonded. The fiduciary cannot be located, nor can it be determined where the money was deposited.

D. Problem Scenarios

1. If the money is gone but the fiduciary can be located, file a petition to remove the fiduciary. Hopefully the fiduciary will come forward and tell the Court where the funds are. In these situations, do not spend a tremendous amount of effort looking for the assets – make the suspended fiduciary declare to the Judge what they did with the money.
2. If the fiduciary does not attend the hearing or produce the information on the funds, go after the bond and\or bonding company.
3. If the suspended fiduciary wants to be reinstated and you believe that doing so would be detrimental to the estate, let the Judge know that in your opinion this should not be done and explain why.
4. Example: Fiduciary executed a promissory note with the estate and has not made payments\returned funds.

IV. REPRESENTING A SUSPENDED FIDUCIARY

A. In General

1. As the attorney of record for a dilatory fiduciary, you run the risk of being viewed as part of the problem, not part of the solution.

Practice Pointer: An attorney who files an appearance on behalf of the fiduciary represents the fiduciary – not the estate. **MCR 5.117(A).**

2. Be careful that you are not held jointly liable for the fiduciary's neglect and/or malfeasance.
3. **MCR 5.206** (Duty to Complete Administration) provides:

A fiduciary and an attorney for a fiduciary must take all actions reasonably necessary to regularly administer an estate and close administration of an estate. If the fiduciary or the attorney fails to take such actions, the court may act to regularly close the estate and assess costs against the fiduciary or attorney personally. (emphasis added)

4. Once you are in the case as the attorney of record, you are not out until the judge says so. An attorney's appearance on behalf of a fiduciary applies until the proceedings are completed, the client is discharged, or an order terminating the appearance is entered. **MCR 5.117(C)(2).**

Practice Pointer: Avoid being drawn into a situation where a fiduciary is suspended and you are still representing them in name only. File a petition to withdraw when your work in the case has ended. (Example: You provided assistance for the client in establishing a conservatorship, but they administered the file without further aid.)

B. Fiduciaries are Suspended Only as a Last Resort and After Multiple Notices

1. In an effort to prevent delinquencies, the Wayne County Probate Court sends out several notices to its fiduciaries regarding their specific responsibilities.
2. A Pre-Notice is mailed 28 days before the due date of a particular action. The notice includes the due date (Example: Inventory due October 4th) and the form which is required to be filed.
3. A Notice of Delinquency is sent out 28 days after the due date of the omitted action, which states that the action must be taken within another 28 days or the fiduciary will be suspended.

4. A Notice of Suspension is mailed out 28 days later if the item has still not been filed. In many cases, a special fiduciary is then also appointed.

Practice Pointer: Up to two extensions of the due date can be obtained from the Court. **MCR 5.203(C)**. If you believe your client will follow through and correct the deficiency, consider asking for additional time to file the item.

C. “Preemptive Strike”: If you discover that the fiduciary has moved and left no forwarding address, file a petition to withdraw and, if circumstances merit, request the appointment of a special fiduciary.

D. Reinstating a Suspended Fiduciary

1. Have the fiduciary complete the action they were supposed to do (i.e., file inventory, account, etc.) along with submitting a **Petition and Order for Reinstatement (Estate not Closed) (PC603)** and a \$20 filing fee. This will be set for hearing; if waivers and consents from all interested persons are obtained, the fiduciary may be reinstated without a hearing.
2. If no funds are missing, it is typically not difficult to have the fiduciary reinstated.
3. If a special fiduciary has been appointed:
 - a. Call the special fiduciary as soon as possible. Let them know what the situation is, and ask him or her not to file a petition to remove your client or take any action beyond securing the assets.
 - b. Having the special fiduciary forbear from filing a removal petition will save your client from incurring fees the special fiduciary would otherwise generate in attempting to resolve the situation.
4. Representing “Second Offenders”.
 - a. Occasionally, a fiduciary may be suspended a second time.
 - b. Try to convince\persuade the Court to allow your client to continue to serve as fiduciary, even if a bond would be imposed.
 - c. Examples: “My client will personally pay the bond.” and\or “My client will pay costs of a special fiduciary if one is appointed.”
 - d. This precludes the estate from incurring any expenses due to the fiduciary’s breach of their duty.

5. Fiduciaries Gone Bad.

- a. If your client is not attempting to rectify their situation, file a petition to withdraw. This is a signal to the Court that there is a problem.
- b. Examples: Client will not give you and/or interested persons the money in question. Information for preparing an account is not provided.
- c. Under these circumstances, the Court will in many instances immediately appoint a special fiduciary.