

## E-Alert - Persons Behaving Badly As Fiduciaries: What Can A Charitable Beneficiary Do?

September 6, 2012

It is becoming more common for a charitable beneficiary of an estate to encounter bad behavior by the estate's fiduciary. In its recent decision *In Re Estate of Neuman and Estate of Wiggs*, the Minnesota Court of Appeals held that a co-personal representative was liable for various breaches of fiduciary duties that would have eaten up half of the charitable beneficiaries' gifts. In *Wiggs*, two women who died in close succession had each left their estate to the other, or to three charities if the other was deceased. A longtime acquaintance acted as personal representative of the first decedent's estate, as attorney-in-fact for the second to die, and then as personal representative for her estate.

The acquaintance, who owned a promotions company, arranged for his employee to be named as a co-attorney-in-fact and as co-personal representative for the second decedent. The two co-fiduciaries then retained the promotions company to provide estate administration and elder care services at rates up to seven times the market rate, even though the company had almost no experience providing either type of services. The two co-fiduciaries billed their time through the promotions agency on an hourly basis and also billed the estates for duplicative personal representative services. The longtime acquaintance also took out personal loans from the estates and made gifts from the estates to his co-fiduciary, all with the full knowledge of his employee/co-fiduciary.

Once the charitable beneficiaries learned of these acts, they demanded an accounting, filed objections and prevailed in a trial, after which the court ordered the return of \$289,039 to the estates. The employee was found liable for \$156,519 of that amount based on her co-fiduciary role and the wrongful gifts she accepted. The acquaintance did not appeal, but the employee did, claiming that her status as an employee shielded her from liability for breach of her fiduciary duties because she was subordinate to her co-fiduciary as his employee. She claimed she could therefore not be held liable for the exorbitant fees even though she knew about these payments and participated in making them.

The Court of Appeals wholly rejected this argument, holding that a personal representative owes the estate's beneficiaries an unqualified duty of loyalty and that a fiduciary who has a conflict of interest is nevertheless subject to liability for his actions. The co-fiduciary argued as a matter of public policy that upholding the District Court's decision would discourage people from becoming personal representatives if



they have conflicts of interest. Ironically, the Court of Appeals agreed and hoped its decision would discourage people from becoming fiduciaries when they were compromised by conflicts of interest.

The Court of Appeals also rejected the co-fiduciary's argument that the estate could not recover the wrongful gift made to her out of the first estate because she was not the fiduciary of that estate. The Court of Appeals refused to allow her to retain the wrongful gift, given that both estates were administered together, that the second estate (of which she was a fiduciary) was the beneficiary of the first estate and that she provided no value for this alleged gift. The Court of Appeals further held that as a matter of equity such inappropriate gifts will not be allowed.

While this case presents especially egregious facts, charities are finding that more lay persons who serve as fiduciaries are acting negligently, or willfully in their own personal interests, to the detriment of the charitable beneficiaries of estates. Charities are forced to weigh the costs and benefits of active intervention in the administration of an estate to prevent such abuse.

One of the most important actions a charitable beneficiary can take in preventing or minimizing damage from the wrongful actions of fiduciaries is to request information from the personal representative promptly and regularly regarding fees being charged, service providers being hired, and the scope of work to be performed. (The Court of Appeals decision confirms that basic elder care and administrative services performed by non-professionals should be billed at approximately \$25 per hour in the absence of some contractual arrangement with the decedent.) A personal representative's failure to respond to the charity's request for information is a good indicator that further inquiry is warranted. Taking a more active role in obtaining and reviewing estate records requires a charity to balance the size of the bequest, the time and effort to communicate with fiduciaries, and the potential cost of addressing any irregularities that are discovered. Early involvement, however, can be substantially less time-consuming, expensive, and more successful in preventing damage than attempting to correct misadministration after the fact.

At Gray Plant Mooty, we have successfully represented a number of charities confronting these situations. We tailor our services to fit the needs and issues of a particular charitable client when administration problems arise.

*This article is provided for general informational purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult a lawyer concerning any specific legal questions you may have.*