



## **Fiduciary Bonds**

### *Managing Your Affairs*

Most people know the importance of having someone look after your financial interests, both in life and after. For our life finances we hire accountants. To ensure that our wishes are upheld when we're no longer here to do so ourselves, someone else must do it for us. The question is who?



## **1. What/Who is a “fiduciary”?**

In simple terms, a fiduciary is a trustee; someone whose job is to safeguard the interests - estate, property or business - of the person they represent. A fiduciary could be a person, bank or trust company, appointed by a court order or assigned in someone’s Will. A fiduciary has clear-cut legal duties, which vary from province-to-province.

## **2. What is the Role of the Fiduciary?**

*Fiduciary* comes from the Latin word *fiducarius*, meaning "(holding) in trust," from *fides*, meaning "faith," and *fiducia*, meaning "trust"<sup>1</sup>). From this definition it’s easy to conclude that a fiduciary must act in good faith, with complete honesty, integrity and loyalty. It is a significant legal responsibility that should be taken seriously.

Fiduciaries must comply with the legal requirements of their appointment with the estate legislation for their province and, where applicable, a court order and/or deceased’s Will for this role.

## **3. What to Consider When Choosing a Fiduciary?**

When choosing a fiduciary to act on your behalf, you want to be sure that the person or entity you choose has your interests in mind, is willing and capable of managing the responsibilities of their role and will act in good faith on your behalf. It’s important to note that, when you name an executor in your Will to manage the affairs of your estate, you are, in fact, identifying a fiduciary. Depending on the circumstances, a court of law has the authority and discretion to appoint a fiduciary on your behalf, if they feel one should be appointed, but no one was assigned this role.

## **4. Common Situations Requiring a Fiduciary**

Here are some common situations where fiduciaries are required *and* where fiduciary bonds (see 5. below) can be advantageous to protect the interests, assets and rights of the individual estate creditors and beneficiaries:

Handling the affairs of a:

- Person who has died without a Will (intestate).
- Person who has died with a Will (testate); where the executor resides outside of the province.
- Person who has died in testate, but the named executor does not wish to serve in their role.
- Person who is incapacitated and who has no Living Power of Attorney.
- Trust established under a Will or deed,

And

- For the estate of a minor.
- Taking control of a business that files for bankruptcy.

### **Responsibilities a fiduciary might be obligated to carry out:**

- Advising pertinent parties of their appointment.
- Preparing and filing an account of inventory and valuation of assets.
- Ensuring the assets become the possession of the entitled parties, defined by the provincial estate act and/or deceased's Will.
- Taking the necessary steps to manage, protect and preserve the assets.
- Paying creditor(s) of the estate.
- Filing a final accounting with the court when all assets have been disbursed to have the bond discharged.
- Other obligations mandated by a Court of Law.

**NOTE:** This list is just an example of some of the responsibilities a fiduciary might be obligated to carry out. Depending on legal requirements, the obligation can be broad (e.g. acting in good faith), or specific (e.g. maintaining detailed financial records). If there are questions, it's advisable to seek the services of legal counsel for advice and assistance to ensure the fiduciary is acting within the law or decree.

## **5. What is a Fiduciary Bond?**

Fiduciary Bonds provide insurance protection against the possibility of fraud or embezzlement by a fiduciary. They are a contractual guarantee to *protect the interests placed into the trust or care of the fiduciary*. This includes the interests of assets held in trust for beneficiaries, estate creditors, minor(s), or for the individual(s) who are incapacitated. If the fiduciary does not carry out the obligations in accordance with the jurisdiction's legal requirements, the bond is a contractual guarantee that can be used to remedy the situation.

Fiduciary Bonds are divided into two groups: **probate matters** (e.g. estate bonds), and **other matters** (e.g. receiver and/or trustees in matters of insolvency, that are being dealt with in Provincial and Federal Bankruptcy courts).

**NOTE:** Fiduciary bonds are not "Will insurance" products\*. Coverage under insurance products protects the executor of the estate; whereas the fiduciary bond is designed to *protect the estate heirs, the estate creditors, the estate minor(s) or the individual(s) who have become incapacitated*. The fiduciary bond is a legally-binding agreement and remains in place for the entire time it takes the fiduciary to carry out their legal obligations.

*\* Will insurance is not a replacement or an alternative for fiduciary bonds. Make sure you are obtaining appropriate coverage. Check with your insurance broker for more information.*

## **6. Common Fiduciary Bonds:**

**a) ADMINISTRATION BONDS (also referred to as EXECUTOR BONDS and ESTATE BONDS)** are required when someone dies intestate. By law, Administration Bonds ensure the administrator/executor of the estate complies with the provinces' Estate Act, satisfies the creditors of the estate and distributes the estate assets in accordance with the Estate Act legislation.

**b) FOREIGN EXECUTOR BONDS** may be required by the court for executor(s) who may, or may not, be named in a Will, and who reside outside the province or country.

**c) TRUSTEE & BANKRUPTCY BONDS (also referred to as BANKRUPTCY TRUSTEE BONDS)** guarantees faithful performance of duty by a person appointed as a trustee for the bankrupt estate. The trustee must comply with the Bankruptcy Act to ensure that estate creditors are dealt with in a fair manner and in accordance with the legislation.

**d) GUARDIANSHIP BONDS (also referred to as STATUTORY GUARDIANSHIP BONDS under the Substitute and Decisions Act)** are required by the Office of the Public Guardian and Trustee or the courts. These bonds are required when the incapacitated person does not have a Living Power of Attorney, requiring the Public Guardian to take control of the assets. This bond protects the assets of the incapacitated person. Application can be made to the Public Guardian and Trustee, or the court, to assume control of the assets for the incapacitated person.

Guardianship Bonds are also required by the court when a minor survives parent(s) and the parent(s) have not named a guardian to look after the minor. The bond protects the estate assets for the minor.

## **7. Other Common Bonds**

While carrying out his/her duties, a fiduciary might require additional bonds in order to replace or transfer original financial instruments, i.e. stock, share or bond certificates. The Lost Instrument Bond and the Waiver of Probate Bond are both common bonds an executor may need to administer the estate. These bonds are typically categorized and referred to as "Commercial Surety Miscellaneous Bonds."

### **a) LOST INSTRUMENT BONDS (also referred to as LOST SECURITIES BONDS)**

If the fiduciary cannot locate the original "instruments" - stock, share or bond certificates - they may obtain a Lost Instrument Bond to arrange for the replacement or transfer of these documents. This Bond guarantees that if the original lost financial instrument is found, it will be returned to the surety company for proper disposal, and that the issuer of the replacement financial instrument will not suffer an economic loss. The benefit of the Lost Instrument Bond is that it enables the fiduciary to administer the estate, overcoming barriers posed by lost securities.

**b) WAIVER OF PROBATE BONDS** are required to transfer assets (e.g. stock certificates, investment or mutual fund accounts) to the names of beneficial heir(s) of the estate without the need to produce Letters of Probate or Letters of Administration. Opting for the Waiver of Probate Bond enables the fiduciary to administer the estate without applying for probate, which can be costly and time consuming.

## 8. Applying for a Fiduciary Bond

If you have assumed the role of fiduciary and need a bond, your first step is to find a Surety Broker to guide you through the process of finding the type of bond you will require and to help you apply for the bond. Because every fiduciary obligation is unique, your Surety Broker will require information from you based on your specific obligations attached to your fiduciary role and the applicable laws or court agreements pertaining to your fiduciary responsibility. Be sure to choose a Surety Broker that you feel comfortable with. A list of Surety Brokers can be found at [website link].

## 9. When is a Fiduciary Bond Required by Law?

Each province has its own governing legislation specific to what type and when a fiduciary bond is required. Estate Acts and regulations outline the bond's purpose and specified obligations required by the fiduciary. Often, it will also advise the value of the bond which must be obtained.

**NOTE:** *Each province sets out their legislated requirements and should be consulted for the most recent version.*

## One Example of Fiduciary Bond Particulars in Province of Ontario

Legislation	Estates Act and the Rules of Civil Procedure
Obligee	Regional General Court (i.e. link: <a href="http://www.attorneygeneral.jus.gov.on.ca">www.attorneygeneral.jus.gov.on.ca</a> )
Principal	The individual or party, such as bank and trust company seeking executorship of the estate
Risk	Protects the assets of the Estate in case of theft, fraud or negligence. The Surety's obligation is to ensure the appointed Fiduciary carries out its responsibilities to act in the Estate's best financial interest and to manage its finances responsibly and in good faith. The Trustee must not use the Estate's assets to improperly benefit their self or anyone not named as beneficiary in the Will.
Parties Protected	Estate creditors and Estate beneficiaries
How Protected	The Fiduciary becomes obligated and is held accountable to the Surety Company to carry out his/her fiduciary responsibilities for the Estate through an Indemnity Agreement with the Surety.
When Bond is Needed	<ol style="list-style-type: none"> <li>1. When there is no Will;</li> <li>2. When the named Trustee renounces their appointment;</li> <li>3. When the Estate Trustee named in the will resides outside Ontario the province where the assets are; or,</li> <li>4. When the Will is being contested</li> <li>5. When the named Executor in the Will does not wish to serve as Executor</li> </ol>

**For more information contact any of the member Surety companies and/or their websites or more helpful articles and tips regarding the role of bonds in a fiduciary arrangement. A List of Surety Companies and Surety Brokers may be found at [www.suretycanada.com](http://www.suretycanada.com).**