

CHAPTER 9

The “Future Person Principle”¹

Matthew D. Hutcheson – Fiduciary Prudence

As fiduciaries, to whom do we owe a duty of loyalty and honor? Is it the participants and beneficiaries within a retirement plan at this moment? No, this cannot be. It is not consistent with principles of Fiduciary Prudence to act on behalf of the individuals who are, today, accumulating resources sufficient to provide income during retirement. Albeit counterintuitive, our duty of loyalty is to the participants and beneficiaries in the future, or the “future person.” That, in reality, is what acting in their “sole interest” means. The future person is the current participants and beneficiaries ten, fifteen, or twenty years from now. It is “that” person we must look in the eye and unequivocally prove that it was their interests we were protecting. By the time a sixty five year old is ready to retire, they are unimpressed with the undisciplined desires of their twenty five year old self. No intelligent sixty five year old would permit a twenty five year old to dictate the type, quality, and security of their retirement ...or would they?

It is true that the current person and the future person cannot be viewed independent of each other, as they are the same entity at different ends of a continuum. Yet, the interests and the needs of the “future person” are wholly relevant to proper fiduciary thinking and decision making, and the interests and wants of the current person are not, or should not be. The purpose of the vehicle, (in this instance the “Trust”), is to provide benefits at a date or event in the future, and thus the fiduciary is responsible for the security and adequacy of those future benefits.

Conceptually, to prevent the current self from defeating the financial security of the future self, a fiduciary is placed betwixt, and charged with making decisions on behalf of the future person who does not yet have a voice. The voice of the current person, or those speaking for or influencing the current person, often becomes too loud for the weak minded fiduciary to withstand, ultimately yielding to the noise. Because the voice of the future person is silent, their interests slowly become secondary, and thus imprudent fiduciaries breach the trust vested in them and enter into prohibited transactions or fail to challenge questionable methods or economics.

Opportunity will exploit the current person way of thinking. It cannot resist the temptation to do so, and if left unchecked by principle, will add unnecessary service upon unnecessary service with impunity. Eventually, both the current person and the future will have been cheated.

There are two critical words in the realm of fiduciary governance. The first is “necessary.” The second is “reasonable.” Fiduciary Prudence dictates that securing the retirement income of the future person is necessary, including expending current resources within the trust to do so. The method and costs undertaken to secure the retirement income of the future person must be reasonable. Conversely, it is quite possible to consider services affecting the future person that are reasonable, but quite unnecessary. In a pure sense, any service that is paid for from assets of the plan, that are not truly necessary to fulfill the terms of a plan are by definition a prohibited transaction.

How then can the terms “necessary” and “reasonable” be fluid, to a certain degree, without violating the future person principle? For example, generally speaking, the plan document largely defines the actions of the fiduciary. Yet, the existence of a plan and its fundamental documentation does not denote the mutual existence of Fiduciary Prudence or fiduciary decision making, nor does it imply that the plan document is free of unnecessary design elements. Thus, a plan document could permit the pre-mature withdrawal of plan assets (non-elective employer contributions every two or three years for example) without a per se fiduciary breach. Most would never consider holding a fiduciary accountable for complying with such provisions, nor could they reasonably do so. However, not challenging such a provision, or at least questioning it, is clearly not in harmony with the future person principle. Is complying with such a provision as in-service withdrawals necessary if the plan document so dictates? Supposedly, yes. Is the cost associated with permitting such leaks as these reasonable? Probably, yes. Are such transactions within the realm of Fiduciary Prudence, and further, are they in harmony with the future person principle? No. Then the next logical question is, how can a fiduciary act prudently when a governing document (in this case a retirement plan and trust) was 1) drafted from a non-fiduciary settlor point of view and 2) contains permissible provisions that violate the future person principle?

This is where things get tricky for a fiduciary who fully understands the principles of Prudence. Invoking an infrequently used key phrase, “unless it is imprudent to do so” gives a fiduciary the ability to summarily silence the naïve requests of the current person, resulting in an increase of benefit for the future person. However, this phrase is widely

misunderstood. It is often abused by those who have selfish reasons to divert plan assets for unnecessary purposes, such as hyper allocation to a particular investment, claiming that such investment is prudent to the exclusion of fundamental and generally accepted diversification. Further, the twenty five year old “current person” may demand that no such intervention take place on behalf of their future self, and thus the duty of a fiduciary becomes increasingly difficult.

To conclude this chapter, it is necessary to understand the future person principle in context of the Hierarchy of Prudent Decisions^{TM2} discussed earlier in this text. The future person principle, coupled with the Hierarchy of Prudent DecisionsTM clearly reveals the correct attitudes, duties, and behaviors of a fiduciary operating within the realm of Prudence.

End Chapter 9

¹ The Future Person Principle is a term attributed to Matthew D. Hutcheson

² The Hierarchy of Prudent DecisionsTM is attributed to Matthew D. Hutcheson