



Can the Beneficiary of a Special Needs Trust Change the Trustee?

The beneficiary of a special needs trust can never control or access trust funds - that is the job of the trustee. A common fear among beneficiaries or their families is that the trustee may not do what's in the beneficiary's best interests and that, if this happens, the beneficiary may not be able to do anything about it.

Choosing the right person to serve as trustee is one of the most important and difficult issues in creating a special needs trust. If you haven't chosen wisely, problems can emerge. The trustee might be incompetent in administering the trust and thus jeopardize the beneficiary's public benefits, be unresponsive to the beneficiary's needs, or even take improper fees from the trust. Or, the beneficiary and the trustee simply might not get along. Can the beneficiary of a special needs trust do anything about the actions, or inactions, of the trustee?

The short answer is "yes." First, the law generally charges a trustee of a special needs trust with the usual duties of any trustee, plus other specific obligations.

Usually, the trustee has an affirmative duty to inquire into the needs and welfare of the beneficiary, to communicate with the beneficiary and other involved individuals, and to make certain that the beneficiary maintains eligibility for public benefit programs.

If the beneficiary has grounds to believe that the trustee is not acting according to the law, the beneficiary generally has the right to petition a court to remove the trustee and bring related actions to address the trustee's conduct. Some states allow out-of-court ways to initiate a change of trustee. For example, in Pennsylvania, the beneficiary, or his or her representative, can draft a settlement agreement with the trustee to replace that trustee. As long as the change in trustee does not violate the essential purpose of the trust, the document is binding without going to court. However, these procedures, whether in or out of court, can be time-consuming and costly, and in some cases, merely "not getting along" with the trustee may not be enough to justify removal. Moreover, the beneficiary may not have the wherewithal to initiate the action or the legal capacity to do so. Generally, in court proceedings, the beneficiary must be able to understand what's going on and assist in the legal representation.

To avoid these types of obstacles, a special needs planner may draft the trust document to include mechanisms for removing a trustee (including defining reasons for trustee removal). The trust can also include provisions for trustee resignation, the appointment of successor trustees, and the appointment of a “trust protector.” The trust protector is a person or entity chosen by the person setting up the trust to keep an eye on the trustee’s performance, usually with the right to remove the trustee and appoint a new one. Even though there is no need to anticipate trustee misconduct, appointing a trust protector is a recommended way to provide an extra level of protection to the beneficiary. However, the rights and procedures for changing trustees vary from state to state. Therefore, the best way to build in protections that allow for the replacement of a trustee gone bad is to consult with a qualified special needs planner.

As a member of the Academy of Special Needs Planning, I am constantly reviewing new laws and amendments in this area of law as well as attending seminars and continuing education classes relevant to special needs planning and trusts.

Call today to schedule a free initial consultation. Call today, get peace of mind today.

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