

What are the duties and responsibilities of the trustee of a special needs trust?

By James L. Melchers

Before accepting the trusteeship of a special needs trust, you should have some understanding of what will be required of you. State law and the trust document itself define the exact duties of the trustee for a specific special needs trust. The general duties will be discussed individually below, but in summary include a duty of loyalty, a duty to administer the trust, a duty of prudent administration, a duty to control costs, a duty to control and protect trust property, a duty to enforce and defend any claims against the trust, a duty to keep records and identify trust property, a duty to inform and report, and a duty to distribute assets upon the termination of the trust. There are other duties outlined in specific trust documents and most trusts give trustees certain discretionary powers in the administration of the trust.

What is loyalty in the context of a special needs trust? The trustee has a duty of loyalty to administer the trust solely in the interest of the beneficiary and never in the interest of the trustee individually. This is also known as the fiduciary duty. In most states, this duty means the trustee cannot buy assets from the trust or sell assets to the trust, in other words no self dealing. This borrowing and lending should not occur even if considered fair, reasonable and beneficial to the trust. Trust assets must be kept separate from those of the trustee. There can be no commingling of trust funds with the trustee's personal funds.

The duty to administer the trust means the trustee shall administer the trust in good faith in accordance with the provisions found in the trust itself, as well as in good faith for the interests of the beneficiary only. The responsibility of prudent administration means that a non-professional trustee (an individual and not an institution such as a bank) must exercise the same care and skill as a prudent person would exercise in handling his own property. A trust shall invest and manage trust property as a prudent investor. The trustee will administer the trust as a prudent person would by considering the purposes, terms, distribution requirements and any other circumstances of the trust.

A trustee may delegate the performance of acts that he could not reasonably be required to perform personally, such as the physical care of the beneficiary. The trustee is obliged to take reasonable steps to take control of and protect the trust property.

A trustee must defend against actions that may result in a loss to the trust estate, unless under the particular circumstances of an action, it is reasonable not to make a defense.

Even though there are always costs involved with the administration of a trust, the trustee has an obligation to incur only costs that are reasonable considering the value of the trust property and the purposes of the trust. Additionally, most trusts provide for some compensation to the trustee.

The importance of the duty of record keeping and identification of trust property cannot be stressed enough. Trustees can get into major trouble if they do not keep trust property identified as trust property and do not keep good clear accounting records of the assets of the trust. Trust property should be titled as trust property. Trust property must be kept separate from the trustee's own personal property and the trustee must have records to show that funds and assets have been kept separate. A trustee must give to a beneficiary upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and permit him, or a person duly authorized by him, to inspect the subject matter of the trust, and the accounts, vouchers, and other documents relating to the trust.

The duty to inform and report obligates the trustee to keep the beneficiary or his legal

representative reasonably informed about the administration of the trust and of material facts necessary for them to protect their interests. A trustee should promptly respond to a beneficiary's request for information related to the administration of the trust. Every year, a trustee must render to a beneficiary or his legal representative a clear and accurate accounting covering his administration for the preceding year.

Upon the death of a special needs person, the trust will terminate and after all debts are paid, the trust assets, if any, will be distributed to the designated successor beneficiary of the trust. This termination can be delayed if the trust is subject to a life estate or usufruct to another person.

In conclusion, the duties of the trustee of a special needs trust require an individual or corporate trustee who is sensitive and responsive to the needs of the special needs person.

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