



TRUSTEE REMOVAL:

Practical Guidance for Planners and Litigators

MICHAEL T. CLEAR, JD, AND
ERIN D. NICHOLLS, JD

INTRODUCTION

Trustees occupy a pivotal role at the intersection of tax planning, wealth management, and family governance. Entrusted with the power to make distributions, oversee investments, and shape decisions that influence generations, trustees wield considerable influence. With such authority, however, comes the potential for problems: When a trustee becomes ineffective, conflicted, or unresponsive, the orderly administration of the trust suffers, and the potential for a dispute rises—sometimes resulting in protracted, costly litigation.

In these instances, replacing the trustee often becomes the ultimate objective. But the replacement process can vary significantly based on the language of the trust agreement, the statutory remedies available in the state of administration, and the relative cooperation of the parties involved. It is essential to understand the available options, as well as best practices for approaching the removal of a trustee.

RESIGNATION

Before pursuing removal under the instrument or through a court process, beneficiaries should be counseled to speak with the trustee directly and request that they resign, which can offer the following benefits:

- **Path of least resistance:** A simple resignation is almost always the easiest and least contentious path forward, and many trustees, especially professionals, may prefer to voluntarily step down once it becomes clear that the beneficiaries no longer support their service. Note, though, that some trustees may prefer to be removed under the terms of the trust document or by court order, particularly if they want

the protection of a judicial accounting and discharge of liability. Alternatively, in such an instance, the beneficiaries (and additional or successor trustees) may wish to directly release the resigning trustee from liability to avoid the expense and delay of a judicial accounting.

- **Negotiation opportunities:** Asking for a resignation first can open a dialogue, help avoid an escalation in disagreements, and allow the parties to structure a transition that minimizes disruption.

Practice pointer: Document the request for resignation. If litigation becomes necessary, showing that the beneficiaries attempted a less-adversarial solution can enhance their credibility in court.

REMOVAL PURSUANT TO TRUST TERMS

If the trustee declines a resignation request, the first step before initiating any removal effort through the court should always be a thorough review of the trust instrument itself. Many modern trust documents confer upon someone a trustee removal power, often in a nonfiduciary capacity, unless the trust or state law provides otherwise. If the instrument includes clear removal provisions, following them is usually the most efficient and effective path to resolution. When reviewing this type of power, consider the following:

- **Identity of power holder:** It is important to identify who holds the power of removal. Some common options include the beneficiaries themselves or a third party who may hold a unique title such as trust protector. If multiple people are eligible to exercise the power of removal, determine whether the power holders may act independently (sometimes expressed as acting severally) and, if not, whether the power holders must act unanimously or by majority.
- **Limitations on power of removal:** Many trust documents limit the power to remove a trustee, so it is important to fully understand the scope of the power. Examples of limitations include the following:
 - **Temporal limitations:** sometimes the removal power limits the frequency with which it can be exercised (e.g., a trustee can be removed only once every five years).
 - **Cause required:** though less common, the removal power may sometimes require some demonstration of cause to exercise the power.
- **Requirements for successor trustees:** Before removing a trustee, the trust document should also be reviewed to determine who is designated to serve next. Many trusts name one or more successor trustees who will be eligible to

serve upon removal of the current trustee. In other cases, the person or entity holding the removal power is also granted the authority to appoint a successor. Sometimes trust agreements impose qualifications on the successors, such as requiring that they be independent or, in more restrictive cases, that they be a professional trustee (such as a bank, trust company, accountant, or attorney).

Practice pointer: A trust that lacks a clear removal provision can leave beneficiaries mired in costly litigation; overly broad removal powers may undermine the stability of trust administration. The most effective removal clauses strike a thoughtful balance, providing flexibility for beneficiaries while preserving the critical independence of the trustee's role.

REMOVAL UNDER STATE LAW

If the trust instrument provides no mechanism for removal, the applicable state law will determine whether and how a trustee can be removed by the courts. State statutes vary, but most share several guiding principles regarding trustee removal through judicial intervention. The following are some common grounds for removal:

- Serious breach of trust (e.g., asset mismanagement, self-dealing)
- Lack of cooperation among co-trustees that substantially impairs administration
- Unfitness, unwillingness, or persistent failure to administer the trust effectively
- Removal in the beneficiaries' best interests

In certain jurisdictions, statutes allow “no-fault” removal of trustees. Generally, these states permit removal even in the absence of misconduct, provided beneficiaries consent and the action aligns with the trust's material purposes. This approach can be particularly beneficial when a trustee is not mismanaging assets but may not suitably match the role, for example, because of diverging philosophies on investment strategy or communication challenges. Courts exercise caution in applying these statutes, carefully considering whether removal will genuinely enhance trust administration.

Practice pointer: Always confirm the controlling law. Typically, for-cause removal proceedings involve substantive legal issues, meaning that the trust's governing law will control. But statutes that permit no-cause removal (e.g., with the unanimous agreement of the beneficiaries) may be deemed administrative in nature, meaning that the controlling law would be tied to the trust's situs, which may be different from its governing law.

ADVISING BENEFICIARIES: INITIAL CONSULTATION AND HARM REDUCTION

Advising a client about trustee removal requires more than analyzing the trust agreement and applicable state law. Effective counsel will also evaluate strategy, costs, and consequences. For trusts and estates counsel, considerations and best practices include the following:

- **Starting with communication:** Beneficiaries should ask the trustee for explanations and information related to the source of their concerns before escalating the situation with an immediate request for resignation. Many disputes arise from misunderstanding rather than misconduct.
- **Planning for releases:** As mentioned above, trustees often request a release upon departure. Whenever possible, the parties should work collaboratively to resolve the terms of the release without court involvement. Open communication, transparency in accounting, and clearly documenting how trust assets were handled can go a long way toward easing beneficiary concerns and avoiding disputes. If the parties cannot agree on a release agreement, a trustee may petition the court for approval of an accounting and judicial discharge before resigning, which could lead to a protracted and more expensive process.
- **Factoring in timing and costs:** Removal actions in court are rarely quick. Depending on the jurisdiction, the process can take months to a year or more. These proceedings can also be expensive when court costs and attorney and accountant fees are included. Since these expenses are typically paid from trust assets, the very funds that beneficiaries are trying to protect may be diminished in the process.
- **Considering tangential impacts:** Granting beneficiaries the power to remove trustees can have unintended consequences. In certain circumstances, it may expose the trust to claims by creditors or divorcing spouses who may argue that the beneficiaries exercise so much control that their entitlements under the trust are reachable. While merely having the power to remove is not usually a problem, frequent use (or perceived misuse) of this power may become evidence in future litigation that the beneficiary exerted excessive control over the trust, which can undermine the trust's objective of providing asset protection and preventing other legal challenges.

Practice pointer: It is important to set expectations early. Advise clients that litigation is often costly, time consuming, and uncertain, but that thoughtful negotiation might achieve the same objective with far less collateral damage.

ADVISING BENEFICIARIES: IN CONTEMPLATION OF LITIGATION

If disharmony cannot be resolved through negotiation and the situation progresses to the point of judicial intervention, expect the process to be adversarial. For litigators, consider:

- **Procedure:** In some states, a petition for the removal of a trustee can be filed with the probate court that has jurisdiction over the trust. In other states, the petition may need to be filed in a court of general jurisdiction, such as the trial-level state court or superior court. A proceeding in probate court is often less formal and may lack some of the procedural elements of a trial-level proceeding, such as a formal discovery period. For that reason, probate court actions may be shorter and less expensive than the alternative.
- **Burden of proof:** When trustee removal requires a finding of fault, the burden of proof is typically on the party seeking removal. Beneficiaries should be prepared to collect evidence of the trustee's alleged wrongdoings, as well as any other relevant information, such as the beneficiaries' attempts to resolve the dispute prior to litigation, as previously mentioned.
- **Considerations of alternatives:** In trustee removal actions, courts generally have a range of remedies available to them that fall short of full removal. Courts may consider intermediate remedies such as restricting a trustee's powers, ordering fiduciary accountings, requiring the trustee to serve with a bond, or appointing a co-trustee. Beneficiaries should be advised of such potential outcomes when considering the pros and cons of judicial intervention.

Practice pointer: Remember that trustee removal is not just a litigation issue; it is also a planning issue. Well-drafted trust documents reduce disputes; poorly drafted trust documents all but ensure them.

CONCLUSION

Trustee removal is one of the most consequential remedies in trust administration. It protects beneficiaries when fiduciaries fail in their duties but also reveals the inherent tension between flexibility, stability, tax efficiency, and asset protection.

The practitioner's roadmap in these instances should be simple: first, ask for the trustee's resignation and negotiate a release if one is requested; next, review the trust instrument to determine whether it authorizes trustee removal; and finally, pursue removal through judicial intervention only if the trustee refuses to resign and removal is not possible pursuant to the terms of the trust itself. By advising with foresight and drafting with precision, attorneys can help ensure that removal remains a last resort to be used only when necessary to protect both the trust and the family it was designed to serve. 