

FREQUENTLY ASKED QUESTIONS

By Stephen A. Brown



Do I have any recourse against an agent appointed pursuant to a power of attorney who I believe is taking advantage of my loved one?

An agent acting under a power of attorney, also known as an “attorney-in-fact,” is a fiduciary. A fiduciary owes the highest standard of care and loyalty to the principal. As a fiduciary, the agent usually has the burden of initially demonstrating that his or her actions were in the best interests of the principal. If the agent has exceeded his or her authority or has engaged in self-dealing or misappropriation of the principal’s assets, the agent may be liable to the principal for breach of the agent’s fiduciary duties.

North Carolina law provides that any interested person can file a petition to adjudicate an individual incompetent, even if only to a limited extent, and have a guardian appointed. The process generally must be completed within approximately thirty (30) days from the filing of the petition. A guardian is endowed with certain statutory powers and is generally responsible for managing the ward’s finances under the supervision of the Clerk of Superior Court. A guardian may, and usually does, revoke any power of attorneys upon his or her appointment. Accordingly, a guardianship is often an effective means to protect both the person and estate of an incompetent adult.

Can I challenge a will or trust if I believe the document was changed at a time my loved one did not have the capacity and/or the ability to resist the influence of others to change the will or trust?

A beneficiary named under a decedent’s will or a beneficiary under the laws of intestate succession may have the ability to challenge a subsequent will or codicil (i.e., will amendment) executed by the decedent if the beneficiary’s interests have been materially affected by the will or codicil. The beneficiary may file a “caveat” to the will or codicil and allege that it was improperly executed, executed

About the Author

A Partner at Young Moore, Stephen Brown has extensive experience advising clients regarding estate, trust and guardianship matters, including will disputes, breach of fiduciary duty claims, marital rights in estate and trusts, irrevocable trust modification, asset protection, and incompetency proceedings. He regularly advises individuals on a range of estate planning strategies, including the use of simple and complex trust arrangements to achieve their personal and charitable objectives in a tax advantaged manner.

Stephen also advises closely held businesses on a range of issues, including governance, mergers and acquisitions, buy-sell agreements, employment agreements and federal and state tax disputes.



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Estate, Trust, Fiduciary & Guardianship Litigation –Frequently Asked Questions *(continued)*

at the time the loved one did not have capacity, or was the product of the undue influence of others. Such claims are generally difficult and require close scrutiny of the facts and circumstances existing at the time the will or codicil was executed by the decedent. The caveat action stays the administration of the decedent's estate until the caveat is resolved. While a caveat action may be filed anytime within three (3) years of the filing of the will or codicil in question, it is generally recommended to pursue a caveat action quickly after the probate of the purported will or codicil to avoid a dissipation of estate assets.

A trust instrument or trust amendment may also be challenged by a beneficiary whose interest was materially affected by the creation of the trust or trust amendment. Common reasons for challenging the creation or amendment of a trust instrument include improper execution, fraud or constructive fraud, the settlor's lack of capacity, or the undue influence of others. Any challenge is generally brought as a civil proceeding in the Superior Court and often consolidated together with any related caveat proceeding.

A decedent may transfer assets using a number of different legal methods, including a will, trust agreement, and beneficiary designation forms. For this reason, it is necessary to carefully review all relevant instruments to generate a holistic view of the decedent's intent and the effect of any additions or deletions from the plan.

Can I challenge a beneficiary designation that was changed by my loved one at a time I believe he or she lacked the capacity to do so or as the result of the influence of others?

A beneficiary previously named in a beneficiary designation, payable-on-death, transfer-on-death or other similar contractual designation may challenge a change to the designation on a variety of basis. Most commonly, the basis for such a challenge is the same or similar to that brought for a caveat action (see above). It is generally important to notify the institution preparing to disburse proceeds to the named beneficiary as soon as possible after the decedent's death. This may prevent the proceeds from being disbursed to the beneficiary by the institution. Care, however, must be given to carefully evaluate the timing and circumstances of each change of beneficiary designation.

Do I have any rights against my spouse's estate when my spouse devises all or a portion of their assets, whether by will or otherwise, to someone other than me at their death?

North Carolina law provides certain statutory protections to the surviving spouse of a decedent. Unless waived in a written agreement as provided by statute, a surviving spouse has the right to a Year's Allowance (currently \$30,000.00) from the decedent's estate as well as the right to claim an elective share against the decedent's estate. A Year's Allowance is paid from the property in the decedent's probate estate and takes precedence over creditor claims. The Year's Allowance must be filed within the one (1) year period following the decedent's death.

A claim for an elective share entitles the surviving spouse to receive a percentage of the decedent's total assets after adjustments for the decedent's debts. Importantly, the decedent's total assets include assets passing through probate as well as assets passing by beneficiary designation form, other non-probate transfers, and even by gift for a period prior to the date of death. The surviving spouse's percentage of total net assets is dependent on the number of years the couple was married, with the highest percentage being fifty percent (50%) of the total net assets for a marriage lasting fifteen (15) years or more. A claim for elective share must be brought within the six (6) month period beginning on the date a personal representative is appointed for the decedent's estate.

A surviving spouse may have other rights against the decedent's estate, including contribution for a mortgage encumbering property formerly held jointly with the deceased spouse, rights to certain retirement benefits, and rights under a premarital or other similar agreement. If any of these situations may apply to you, be aware that your ability to pursue such claims may require that you do so within a statutorily prescribed period of time.



Do I have the right to information regarding a trust in which I am a designed beneficiary?

A trust beneficiary generally has the right to certain information regarding the trust. The extent of his or her rights depends on the nature of the beneficiary's interest in the trust and the terms of the trust. As a general rule, the law provides that a beneficiary must be given at least sufficient information regarding the trust to protect his or her interest. A trustee that fails to provide sufficient information to the beneficiary may be subject to certain claims, including a breach of fiduciary duty.

Can I remove a trustee or executor that I believe has a conflict of interest, neglected his or her duties, or whose service is not in the best interests of the beneficiaries?

A trustee, executor, guardian and attorney-in-fact are fiduciaries and therefore must generally place the interests of the principal above their own interests and must exercise reasonable care and diligence in the performance of their duties. A fiduciary that engages in a conflict of interest, neglects her or her duties or commits other wrongful acts is subject to removal and potential damages for breaching their fiduciary duties. In the case of executor, administrator or trustee, the action is generally brought as a proceeding before the Clerk of Superior Court by an interested party under the applicable estate or trust.

Can the terms of a trust be modified or otherwise changed even though the trust is irrevocable?

The notion that an irrevocable trust cannot be modified is incorrect. An "irrevocable" trust is simply a trust that cannot be revoked or modified by the person creating the trust. The trust, however, may be changed by one of several methods depending upon the facts and circumstances. The terms of the trust may provide a method for the trustee or another individual to change the administrative or dispositive provisions of the trust. If the trust has no such provisions or the named individuals will not exercise their power to modify the trust, a trust beneficiary can file a civil proceeding to have the trust modified based on a number of circumstances making the change necessary or advisable. Common reasons that a trust may be modified include a beneficiary with financial or substance abuse issues, tax planning, and administrative savings. A trust modification action is filed as a civil proceeding in the Superior Court and generally requires the approval of the court except in very limited circumstances.



About Young Moore's Trusts, Estates & Wealth Preservation Services

Young Moore has extensive experience representing clients in estate, trust, fiduciary and guardianship disputes. Our wealth of estate planning and administration experience provides substantial insight into the legal and practical duties of fiduciaries, including executors, administrators, trustees, guardians and agents appointed pursuant to power of attorneys. Our attorneys regularly assist with the implementation of guardianship proceedings to ensure appropriate care and asset preservation for incompetent individuals. We also pursue claims against fiduciaries for self-dealing, misappropriation of assets, and other breaches of fiduciary duty. We also assist with challenges to the legitimacy of wills, trusts, beneficiary designations and other documents procured by the undue influence, fraud or tortious interference of others. In appropriate cases, we pursue the modification or termination of irrevocable trusts, the removal of executors or trustees, or the recovery of assets from trusts transferred in fraud of creditors, including a divorcing spouse. We understand the sensitive dynamics that are inherently present in these disputes and work diligently with our clients to identify appropriate strategies and resolutions in light of all relevant circumstances.