



COMMON PROBLEMS IN SPECIAL NEEDS TRUST ADMINISTRATION

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The Trustee of a special needs trust faces a number of challenges in administering a trust.

I. Housing.

One of the most immediate issues Trustees often face is the purchase or other provision for housing for the beneficiary. First, the decision must interface with public benefits received by the beneficiary. If the beneficiary receives SSI, then the Trustee must decide if the trust's provision of housing will or should reduce the benefit. In some cases, this is justified - provision of housing that meets the beneficiary's needs may be an appropriate trade-off for the reduction in SSI benefits. In some states (not Virginia) payment of housing costs may be treated as income for Medicaid qualification purposes, and the Trustee must consider the impact of making housing payments. Alternatively, the Trustee may consider having the trust purchase a residence but have the beneficiary pay rent from his SSI benefit.

If the trust purchases a residence, the Trustee must consider source of payment for utility and maintenance expenses. Will the trust pay these or will the beneficiary? If other persons will live in the house, what will their contribution be? Is it appropriate for them to pay rent or other expenses? This can be particularly challenging when family lives with a beneficiary and, often, cares for him. If the trust is a first party trust, it must be for the **sole** benefit of the beneficiary but the issue is what is truly for his benefit?

If the trust makes renovations to an existing home a frequent question is how to title the home. A common situation is minor child receives birth injury settlement into a SNT. Child lives with parents and parents own the home. If the trust pays for the renovation of the home to make it accessible for child, should the trust have a lien or ownership interest in the home? Is it appropriate for parent to benefit from the increase in value in the home? A trustee must look at whether the home really increased in value due to the improvements - accessibility modifications often are of benefit only the person with special needs.

II. Vehicles

When an SNT is funded, one of the first requests is often for a vehicle. The issue is both appropriateness for the beneficiary as well as percent of use by the beneficiary. If the beneficiary lives with a spouse or parents and the trust purchases a customized van, is it used exclusively for the beneficiary or by the family as a whole? Is the van really one that accommodates the beneficiary or is it the conversion van that beneficiary's dad had always dreamed of?

A second issue with vehicles is expenses beyond the purchase. Who will pay for gas, insurance and repairs?

The most cumbersome issue is that of titling. Ideally the trust should be owned and insured by the trust but this can be almost impossible to navigate with DMV and insurance companies. Alternatively, one can title the car in the beneficiary or a family member and then have the trust record a lien against the title. This prevents the "owner" from selling and retaining the proceeds. The trust is actually making a loan to the family member, then posting a lien to secure the debt. In reality, the trust never expects this loan to be repaid and that can be considered a violation of fiduciary duty, but trustees often take the position that this method is in the best interests of the beneficiary.

III. Vacations

A common intended purpose for SNT's is recreation and vacations for a beneficiary. A trust can usually pay for the costs of transportation, food and lodging for the beneficiary and a caregiver or companion. The trustee should take care to document the need for the caregiver/companion with a doctor's letter or similar.

The biggest challenge with vacations is paying the costs without handing cash to the beneficiary. Care must be taken to pre-pay or directly pay all costs. This can sometimes limit the types of vacations or accommodations used and can definitely take some creativity.

While Trustees are often warned about paying for food or lodging for SSI recipients, there is actually a specific SSI rule recipients may receive food or shelter costs during a temporary

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absence from home.

IV. Caregivers

Trustees should carefully consult IRS Publication 926 as to tax rules for employees vs. independent contractors. If the caregiver is an employee of the trust, then the Trustee may be required to withhold for FICA and income taxes, as well as worry about workers comp and unemployment taxes etc. The Trustee must also worry about liability issues if a caregiver is injured. All of these issues should be discussed with a tax advisor or payroll service and the home insurance agent should be consulted regarding liability issues.

V. Family as Caregivers

The writer has been involved in more than one lawsuit regarding compensation of family members as caregivers. This should be specifically anticipated and drafted into the trust agreement. Consideration should be given to the qualifications and licensing of the family member, as well as an analysis of market rate for comparable services. Local Commissioners of Accounts can be particularly sensitive to the delineation between parental or spousal time and attention versus care covered by the SNT. An employment agreement may head off many discussions on these points.

Often the primary difficulty is one of the family member's expectations. If a parent has been out of work for 7 years, caring for a disabled child, and the settlement finally comes in, the parent often feels entitled to "share" in the assets received and it can be difficult to differentiate between the child's needs and the parents' needs. If a married man receives a settlement and his wife is not able to be employed due to his care needs, she often has difficulty in separating her need to be supported from the Trustee's need to administer the trust for the sole benefit of her husband.

VI. Cash Needs

The writer recently established a pooled trust account for a woman in her 50's who is mentally competent but, due to a progressive neurological disease, has been in a nursing home for several years and will continue to reside there. Her needs are small but she really wants to use the trust for stamps, fancy colored pens, scented soap and lotion, and other small purchases. She has no friends or family members who are able to do this type of shopping for her and then be reimbursed by the trustee. The Trustee must then struggle with several possibilities:

- (1) use of gift cards, which could be considered available for food and a problem under SSI, and some Medicaid programs consider them to be income;
- (2) trying to establish accounts to facilitate such purchases at individual stores - much harder in this day of chain stores;
- (3) issuing a debit card to the beneficiary - caution must be used, as use of a debit card by the beneficiary can be considered to be income to the beneficiary. Visa or similar gift cards

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are also considered to be cash and, therefore, income.

(4) issuing a limited credit card to the beneficiary, that is then paid directly by the beneficiary. There are now a number of limited credit line/prepaid cards available for a nominal monthly fee, where the trustee can get statements of where the card is used and replenish the card as warranted. A credit card works, as it is really a “loan” to the beneficiary and not considered to be income.

Again, this can take some creativity on the part of the trustee and, often, the trustee will elect to use credit cards in the name of the trust or, at least, the trustee for that purpose. Most recently, Social Security has been attacking reimbursement to parents for expenses paid on behalf of their children - minor or adult-if the child is an SSI recipient. They state that such reimbursement to the parent is income to the child. . . .

Conclusion: Serving as Trustee of an SNT is even more challenging than the usual Trustee role!

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