

Academy of Special Needs Planners:

The Worst Mistakes Made in Planning and Drafting SNTs

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At the recent National Academy of Elder Law Attorneys Symposium in Maui, Hawaii, ASNP member [Kevin Urbatsch](#) gave a presentation that focused on "The Top Worst Mistakes Attorneys and Trustees Make When Planning, Drafting or Administering Special Needs Trusts."

According to Urbatsch, most planners make a huge mistake right from the get-go by focusing on simply acquiring Supplemental Security Income (SSI) and Medicaid benefits for their client without taking into account all of the other goals of special needs planning. By focusing only on these needs-based programs, the planner ignores other important issues like housing, caregiving, and the person with a disability's current and future family situation.

Urbatsch emphasized that in order to avoid mistakes, the special needs planner can never have too much information about the tremendously broad areas of law she comes in contact with. By way of illustration, he highlighted several recent developments in special needs law, including reports of local housing agencies counting distributions from supplemental needs trusts as income for Section 8 purposes as well as the push by some states to force structured settlement annuity beneficiaries to name the state as a remainder beneficiary.

The next big mistake on Urbatsch's list revolves around who the attorney actually represents. In cases where a client has a physical disability but no cognitive impairment, this decision is relatively easy, although Urbatsch explained that these clients will often try to avoid giving up full control of their assets in order to qualify for benefits.

The more difficult situation arises when a person with marginal capacity comes into the attorney's office. In this case, Urbatsch explained, "if they don't have capacity to enter into what we call a first-party special needs trust . . . you are pretty much stuck with going to court." Urbatsch emphasized that the client's family and friends are typically going to try to avoid the cost and inconvenience of going through a guardianship proceeding. Because of this, the attorney will often not have to discuss who he represents until a problem arises. "As long as everybody is one happy family, it's usually not a big deal, but once there is a conflict, then what happens? They all start looking at me. 'Hey aren't you my attorney?' 'Aren't you *my* attorney?' And it's very easy to do because of the cost of having to go through court to set this up and do it right. And by do it right, I mean do it without a conflict potential."

Another common mistake, according to Urbatsch, is confusing benefit programs as well as different types of special needs trusts. The client may say that he receives "disability" (which can be SSI or Social Security Disability Income (SSDI), or that he already has "a trust" (which can be either a first- or third-party SNT). Getting pigeonholed into only thinking about SSI or Medicaid, especially if a client is already receiving Medicare from SSDI or can afford private insurance, can lead to overplanning.

Urbatsch briefly spoke about reviewing other attorneys' trusts. He explained that an inexperienced planner will often add first-party SNT legal requirements to third-party SNTs,

such as payback language in a third-party SNT. He also stressed the importance of using a stand-alone SNT instead of creating sub-trusts within other estate planning documents. He confirmed that practitioners can use a stand-alone *third-party* SNT for multiple beneficiaries. "You just want to make sure that the distribution standard for the child with the disability is under the special needs distribution standard -- fully discretionary," he cautioned.

This discussion of distribution standards gave rise to yet another frequent mistake -- making the distribution standard either too broad or too narrow. A broad standard, which should *never be included in an SNT*, "includes a requirement for distributions for the beneficiary's support, maintenance, or a mandatory distribution to the beneficiary." A narrow standard prevents a trustee from making certain distributions that may be allowed under the rules (such as older SNTs that may prohibit distributions for clothing, an item that was previously considered in-kind support by SSI but has since been taken off the list). Making the standard too narrow can limit the flexibility, and overall benefit, of the trust.

Because distribution mistakes contribute to many beneficiaries losing SSI, Urbatsch recommended always using a professional trustee to manage the trust. Urbatsch also recommends the use of an advisory committee to help the trustee make distribution decisions. This committee should be made up of the beneficiary's "family members, the friends, the people who have the beneficiary's best interests at heart." However, for liability purposes, when it comes to actually having the power to make distributions, Urbatsch would still "make it all discretionary with the trustee -- they'll look at the recommendations of the advisory committee and make that decision." For families who are concerned about giving a professional trustee this much power, there can also be a designated trust protector or protectors with the right to replace the trustee for any reason.

Urbatsch then addressed ways to help a beneficiary avoid conflicts with the SSI "sole benefit rule" that often comes into play when utilizing a first-party SNT (third-party SNTs don't have the same restrictions). Although the trust expenditures must be for the "sole benefit" of the person with the disability, "it does not necessarily mean that only the beneficiary can enjoy the beneficial enjoyment." Urbatsch gave the example of the family of a child who requires swim therapy for cerebral palsy. If there is a documented medical need for a private pool (since children with cerebral palsy are often prohibited from swimming in public pools), trust funds can be used to build a pool for the beneficiary, even though other family members may use it as well.

Urbatsch concluded with a brief discussion of the use of gift and credit cards to avoid having to give an SSI beneficiary cash. According to Urbatsch, gift cards are allowed so long as they are non-transferable and can't be used for food or shelter. An SNT trustee can also pay a beneficiary's credit card bill if the trustee goes to great lengths to ensure that he doesn't make any payments for food or shelter when paying the bill. By combining good trust draftsmanship with informed, thoughtful trust management, and avoiding the mistakes he highlighted, Urbatsch said a planner can make a world of difference for an individual with disabilities.

The Symposium's manual includes Urbatsch's 44-page paper, which goes into far more detail than is possible here. The manual is available in hard copy or on CD for \$146.25 (members) or \$195 (non-members). Contact Terri Anthony at NAELA, 1604 North Country Club Road, Tucson, AZ 85716; (520) 881-4005, ext. 107; info@naela.com

*Audio tapes or CDs of the sessions are available in a variety of formats from ADC Services,
69013 River Bend Drive, Covington, LA 70433; ADCTape@aol.com*