

Representing and Acting as Trustee of a Special Needs Trust

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I. The Drafting is Only the Beginning

Representing Trustees of Special Needs Trusts is a challenging and exciting area of practice. After spending hours of labor crafting a complex legal document, it is hard to admit that the document is really only as good as the person responsible for administering the funds in compliance with your carefully crafted provisions.

Trustees may dislike attorneys and only want them when *they* think they need them. They do not want them when the *attorney* advises them that legal services are needed. However, the right combination of legal advocacy and a Trustee that performs their duties as Trustee in accordance with the intent of the Grantor(s) and the trust provisions can result in creative partnerships that greatly improve the quality of life for the beneficiary of the Trust.

A. Administering Special Needs Trusts

Administration of a Special Needs Trust includes the same issues and duties as any trust administration. A Trustee is a fiduciary and is subject to the commonly recognized fiduciary duties of diligence, loyalty, obedience and prudence. Loyalty requires that the interests of the beneficiary always come first. The Trustee is in a position of intimacy with the beneficiary. As a result, a Trustee is held to a higher standard than required in an ordinary business transaction.

All Trustees are required to: 1) maintain accurate records; 2) invest the funds as a reasonably prudent investor (a discussion, the details of which are far beyond the scope of this presentation); file all appropriate tax returns and/or accountings; 3) comply with the terms of the trust document itself.

The Trustees do not always understand the need to comply with the above requirements. One of the most important things to do in representing the Trustee is to make sure that it is clearly documented that their responsibilities were clearly explained to them. Although Special Needs Trusts are discretionary in nature, there is no discretion on the duties outlined above.

If a Trustee cannot handle their duties, even with repeated assistance from their attorney, the attorney has an obligation to assure that the Trustee understands the seriousness of their failure to perform. If necessary, this may include a Petition to Withdraw that will hopefully trigger an appropriate response by the Probate Court.

B Trustee Duties and Responsibilities Unique to Special Needs Trusts

1. Securing Public Benefits-

Usually securing public benefits and or maintaining them is an essential duty of a Trustee of a special needs trust. However, sometimes the beneficiary may be ineligible for benefits; for example, they may be working full-time (engaging in substantial gainful activity), or their medical condition may have improved. In these cases, the Trustee should keep track of what is happening to determine when and if benefits should be pursued again. In the meantime, the trust continues as a spendthrift discretionary trust, and can be administered as such without concern for the eligibility requirements for the various public benefit programs.

Securing and maintaining benefits can be tricky for Trustees. They must become familiar with rather complicated rules to assure that the beneficiary does not lose all of some of their benefits. Further, if the Trustee is also the beneficiary's Representative Payee, for benefits from the social security administration, they have additional and diverse legal obligations for those funds. It is essential that the social security benefits and the trust funds be maintained separately. Further, if the Trustee is also member, it is essential that they understand that both the social security benefits and trust funds must not be commingled with personal assets.

The special needs trust should have language in it giving the Trustee the power to hire professionals to assist them in performing their duties. Often, the Trustee will need the services of an attorney to assist in securing benefits for the beneficiary. It is essential that attorneys assisting in these matters are knowledgeable about the requirements for collecting fees at the administrative level from the social security administration.

2. Collecting Fees on Social Security Cases

Title II (SSDI) allows withholding of claimant's past due benefits for attorney fees, but not Title XVI (SSI benefits). However, one must obtain approval to charge or collect any fee for services under titles II and XVI of Act. It does not matter whether claimant or third party pays the fee, or whether funds have been withheld to pay the fee. There are two ways to get fees at the administrative level, a fee agreement approval or the fee petition process. If a fee agreement has been filed at the Agency, then judge just may approve fee agreement with final ruling.

The conditions to obtain SSA's approval to charge and collect fee are: the representative or claimant files the agreement with SSA before the date they make a favorable decision on the claim; the representative and claimant both signed fee agreement; the fee specified in the agreement does not exceed 25% of claimant's past-due benefits or \$5000, whichever is less; the decision is favorable; the claim results in past due benefits. If there are additional fees beyond \$5300, then Administrative Law Judge can approve it if there is an agreement.

The fee agreement may remain in effect throughout the administrative appeals process of a claim and during the administrative proceedings following court remand, or it may contain provision that limits its application to services through a specific level of administrative appeals process (e.g., 25%/\$5300 limit at initial hearing level, then fee petition process beyond that level).

If there is no fee agreement, then file Petition to Obtain Approval of Fee for Representing Claimant. Form SSA-1560-U4; **NOTE** fee authorizer does not need past-due benefit information to process fee petition, and fee petitions can be submitted and reviewed before past due benefit information is available. The Administrative Law Judge can approve up to \$5000 or 25% past due benefits, whichever less, then if fees are still above \$5000, then judge may recommend amount of fee to regional Chief Administrative Law Judge for additional approval. There is no time limit for filing fee petition unless direct payment of fee from past due Title II benefits.

Criteria for evaluating fee petitions and determining reasonable fees for representatives: Authorizer must consider purpose of the Social Security program (to provide a measure of economic security for program beneficiaries) and; the extent and type of services performed; the complexity of the case; the level of skill and competence required in providing the services; the amount of time spent on case; the results achieved by representative; the level of review to which the claim was taken and the level of review at which the representation began, and: the amount of the fee requested. ***Practice Tip:*** in cover letter requesting approval of fee, cite facts in case that shows the skill and ability of attorney involved in being able to obtain a favorable result.

There are excluded activities in itemization of time: preparing fee petition or other activities related to charging/collecting fee, and any services performed before state/fed court. For expenses not considered part of the fee for services; can be paid from the trust. Further, the trustee can pay the legal fees during the process as a loan made on behalf of the beneficiary and be reimbursed at the end of the matter.

3. Trust Administration with Public Benefits

The Trustee, beneficiary, representative payee, and advocates need to work together. The representative payee, and beneficiary must realize, that even though they may not be the Trustee, they must provide information about the trust to the agencies providing benefits to the beneficiary. Furthermore, they need to keep the Trustee informed when the agency requests information. Once the trust is funded, the Trustee, should provide a copy of the trust, and in the cover letter should explain why the trust is exempt. (See Attachment #1) If the trust was created by Court Order, notice should have been provided of the hearing to any agency providing *cash* benefits to the beneficiary. However, if the beneficiary is receiving services from a community mental health agency (or their contract agencies) and has not been billed for the services, you may need to give them notice as a creditor if the person has had the money in their own name.

It is important for the Trustee to be familiar with the income rules for the public benefit programs that the beneficiary is receiving. These are rather complex and confusing rules, so it may makes things easier for the Trustee, beneficiary, advocates and family members of the beneficiary to have some guidance about these rules. (See Attachment #2) This document outlines examples of permissible distributions, distributions that will reduce SSI benefits, and examples of distributions that are impermissible. This list makes the rules *real* and easier to understand. ***Practice Tip:*** When meeting with clients who are unsure about using a special needs trust, providing this type of information may make the decision easier.

For both SSI and Medicaid one of the most important provisions to be familiar with is the rule that distributions to third parties on the behalf of the beneficiaries are exempt

from being counted as income. (For SSA, 2 CFR 416.113(g), SSI 00815.400; For FIA PEM, 55, page 30 of 30). It appears the both FIA and SSA have become more familiar with special needs trusts, and are requesting annual (sometimes more frequent than annual) reports about distributions to the trust. When providing this information, it is important to outline why they should not be counted as income to the beneficiary.

Practice Tip: (See Attachment #3, letter from the Social Security Administration) the doctrine of merger seems to be their favorite legal theory. Here they have found that my client, who is the parent, guardian and Trustee of his son's special needs trust is not a third party, as, "You are an 'agent' acting on ___'s behalf as a legal guardian/representative payee. So the reference your attorney cited regarding '3rd' party payments does not apply here." Note the letter continues and counts shelter during a vacation as a basic need, shelter expense. Often the legal expense of fighting these battles outweighs the penalty. This trust will terminate next month so we will not fight as hard as we would have it just been established and we were going to have to address these issues yearly.

Recently, more folks with disabilities have secured assistance with housing from HUD, via the Section 8 program. Housing assistance from a charitable or governmental agency does not count as in-kind support for SSI or Medicaid, so this is a wonderful benefit for those who can get it. Recently on the NAELA list serve there was even a track on parents purchasing homes for their adult children with disabilities, and Section 8 paying them as the owner for a part of the rent.

However, a new issue has started to show up, as to how disbursements from a Special Needs Trust impact the person's rental amount (it is determined based on income, See Attachment #4 letter from the apartment complex). I have drafted a letter to respond to this issue. (See Attachment #5) I have relatively little experience with this issue, so those of you who may have already addressed it for one of your clients, let me know!

Practice Tip: It is particularly difficult to find the HUD regulations. The best web site I found was <http://www.hudclips.org/cgi/index.cgi>

4. Trust Provisions to be Aware Of

As Trustee, or an attorney representing a Trustee, (or an Agent of a Trustee) particular attention needs to be paid to provisions of the trust that require the Trustee to do something. This is not meant to be an all inclusive list, just some items to pay attention to:

- a) **Annual Evaluation-** This is a common provision in Special Needs Trusts, that requests the Trustee or its agent to arrange for an annual evaluation of the beneficiary, addressing specific topics. This Evaluation can be rather informal, and could be accomplished by participating in a person-centered planning meeting with a community mental health agency, or via a private meeting.
- b) **Defending the Trust-** When the author started working in this field, exploding provisions were common in special needs trusts. However, what started happening is that Trustees were too eager to use this provision when the Family Independence Agency, SSA, or the Department of Community Health, or the local Community Mental Health program determined the trust to be available. Therefore, now it is

common to see a provision requiring the Trustee to defend the trust from attack from the “evil empires”. This way it clarified that prior to exploding the trust, the Trustee had exhausted all legal options to defend the trust

- c) **Letter of Intent.** As you are aware, if there is a dispute about a Trust, a Judge will look to give effect to the “intent of the Grantor/Settlor”. When this author began working in this field, many of the folks drafting these trusts said something like, “I want you to make sure that if anything happens to me, my child does not end up in an institution, or group home.” Many times these individuals with disabilities lived with their families their entire life. However, what started happening is that the public mental health system was not able to respond to the requests of the Trustee. Often the Trustee was a grieving sibling, and they did not have the ability to advocate effectively for the beneficiary. So, a method was needed to encourage them to fight the system to give effect to the intent of the Grantors. Therefore, a provision referencing a letter of intent is included in the author’s Special Needs Trusts. (See Attachments, 6,7,8). The Trustee must make its best efforts to give effect to the specifics in the letter of intent. The ARC’s will assist the families in preparing these documents.

B. Review Discussion on Unusual Distributions Requests.

Author will present in person.