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DUTIES AND RESPONSIBILITIES OF THE TRUSTEE OF A SPECIAL NEEDS TRUST

As an individual not actively engaged in the business of trust administration, many questions often arise as to one’s role as Trustee. Oftentimes, our clients serve as a sole Trustee or Co-Trustee of a family member’s Irrevocable Special Needs Trust. Usually, the Trustee position is a ‘side-job’, performed in addition to other, primary, full-time responsibilities.

This Memorandum outlines the various *duties* and *responsibilities* of a Trustee under current Michigan law. Additionally, it provides guidelines regarding Trustee compensation and other commonly discussed areas of concern with our clients who, as individuals, are not generally professional Trustees. You should set aside a quiet time to read this memorandum, as it is lengthy and complicated. It may not answer all of your questions, but it will answer many. Please put it with your Trust records, as it will be helpful to have it available to read again and again.

This memorandum assumes that the beneficiary of the Special Needs Trust now receives Supplemental Security Income (SSI) and\or Medicaid. This memorandum is designed to explain the SSI rules so you can understand how and when to make distributions from the Trust without jeopardizing benefits. It also makes some practical suggestions in Section I on how to obtain help in recognizing and dealing with some of the special needs of the beneficiary. The Memorandum is divided into four major categories for purposes of discussion:

I. The first section addresses the meaning of a *Trustee*, the overall framework from which a Trustee’s role is governed, the general duties and liabilities of a Trustee, overview of the SSI and SSDI benefit program and how to prepare your agenda for deciding on distributions;

II. The second section describes the rules about how and when to make payments from the Trust;

III. The third section outlines the reporting rules for SSI and\or Medicaid benefits, suggests ways to prevent a reduction in benefits and the importance of staying current with new developments; and

IV. The fourth section includes a section on record-keeping, annual accounting requirements and trustee compensation.

SECTION I

TRUSTEESHIP

A Trustee is considered a *fiduciary*. Thus, one's duties as a Trustee are bound by the laws governing fiduciary relationships. Michigan's definition of a "*fiduciary relationship*" under *The Estates and Protected Individuals Code* is as follows:

> "*A fiduciary stands in a position of confidence and trust with respect to each heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary. A fiduciary shall observe the standards of care described in section 7302 and shall discharge all of the duties and obligations of a confidential and fiduciary relationship, including the duties of undivided loyalty; impartiality between heirs, devisees and beneficiaries; care and prudence in actions; and segregation of assets held in the fiduciary capacity. With respect to investments, a fiduciary shall conform to the Michigan Prudent Investor Rule*." M.C.L.A. §700.1212.

YOUR DUTIES AS THE TRUSTEE

The terms of the Special Needs Trust govern your duties and responsibilities as the Trustee. The primary duty of a Trustee is to administer the Trust expeditiously for the beneficiary's benefit to supplement any benefits the beneficiary receives from the SSI, Medicaid programs or elsewhere. The funds are not available to the beneficiary and do not count as the beneficiary's property in determining eligibility for SSI, and/or Medicaid. Being appointed and serving as a Trustee is a very serious undertaking. Every Trustee is held to a high standard of performance, considerably higher than the performance acceptable for your own affairs. A person who holds property for another is a fiduciary. Every Trustee is a fiduciary and has certain duties which must be strictly carried out. These duties include:

- Duty to carry out the terms of the Trust agreement.
- Duty of loyalty to the beneficiary.
- Duty to act and invest prudently.
- Duty to not delegate Trustee responsibilities.
- Duty to maintain the books and records and keep the beneficiaries reasonably informed of the Trust administration.

Of these duties, perhaps the most significant duty is that of undivided loyalty to the beneficiary. The Trustee must administer the Trust solely in the best interests of the beneficiary and exclude from consideration his or her own advantage as well as exclude the welfare of any other person or entity. Because the Trustee is in a position of such intimacy with the beneficiary and has such control over the Trust's property, a Trustee is held to a higher standard than would govern in an ordinary business transaction. In your position as Trustee, you can be held personally responsible to the beneficiary. That means that you may be required to pay back any damages that may result from improper administration of the Trust.

Under Michigan law, the Trustee is required to invest in accordance with either the express terms of the trust or the *prudent investor rule*. If the Trustee possesses any special skill or expertise, then Trustee has the duty to use those skills.

Under Michigan's *Prudent Investor Rule*, a Trustee *"shall invest and manage assets held in a fiduciary capacity as a prudent investor would, taking into account the purposes, terms, distribution requirements expressed in the governing instrument, and other circumstances of the fiduciary estate. To satisfy this standard, the fiduciary must exercise reasonable care, skill, and caution."*

Some of the requirements of a prudent investor are to diversify investments of the trust, and act solely in the interest of the beneficiary(ies), with authority to delegate the investment and management functions to an agent, *so long as the Trustee exercises care in selection, scope and review of investment duties delegated.*

Achieving the goal of supplementing the public benefits can be tricky because this means not violating complicated eligibility rules. If you don't strictly follow these rules, you may cause the beneficiary to lose some or all of his or her public benefits, and you also fail to carry out the requirements of the Trust, which is duty #1 set out above. This memorandum is intended to explain the basic rules to you so that you can better carry out the purpose of the Trust and your duties as Trustee. Then you can avoid the loss of needed public benefits and any reason to remove you as Trustee.

Please note that if you are also the beneficiary's Conservator, Guardian, Agent under a Power of Attorney, Patient Advocate Designation or Representative Payee, you have different legal obligations in those roles. You must keep these roles and the funds SEPARATE. For example, if you are the Representative Payee for the beneficiary, and receive his or her SSI or SSDI check, you must not mix or commingle the SSI or SSDI money with the assets that are part of the Trust. Instead, each fund must be kept totally separate from any other (you should have one checking account for the Trust and another for the SSI or SSDI benefits) and all funds must be kept separate from your own assets. Of course, you should have a separate bank or investment account or accounts for the Trust, in the name of the Trust, or you as Trustee of the Trust.

This memorandum does not discuss your duties as Trustee for distribution of the Trust when the beneficiary dies. Please let us know if you would like that information.

OVERVIEW OF PUBLIC BENEFITS

The federal Social Security Administration (Social Security or SSA) operates the SSI program. The Michigan Department of Human Services (DHS) has agreed to administer the Medicaid program under contract with the federal government. The Department of Human Services (DHS) in each county administers the Medicaid program locally.

An SSI beneficiary receives a monthly cash payment for support because the beneficiary is aged, blind or disabled and his or her assets and income are low enough to meet a means test.

SSI is intended to pay for the beneficiary's food, clothing and shelter. An SSI recipient is entitled to receive Medicaid benefits because he or she is considered categorically needy under the law. If the beneficiary receives too much income or has assets that are too great, he or she is likely to lose his or her SSI eligibility (or have it reduced) and the automatic Medicaid coverage along with it. The loss of Medicaid coverage can be a more serious problem than the loss of SSI benefits, especially if alternative medical insurance is not readily available, or the person needs long term care or mental health services paid for by Medicaid.

SETTING THE AGENDA FOR DISTRIBUTIONS

To help you make decisions about purchasing goods and\or services for the beneficiary, you should ask the beneficiary what he/she wants that he/she cannot get now. Then, working with the beneficiary their circle of support, while keeping in mind the rules described below, you should decide which items, if any, you want to pay for out of the income and principal in the Trust. You may also want to obtain information from the beneficiary's care givers; advocates or family.

The Trustee requires that you or your agent obtain evaluations of the beneficiary at least once a year. These evaluations should include the following items:

1. An evaluation of the beneficiary's physical condition, and any rehabilitation, educational and training programs in which he/she participates.

2. Recreational leisure time and social needs and appropriateness of existing program services.

3. Educational needs and programs.

4. Laws and administrative practices relating to various governmental financial assistance and private contractual benefit programs, as it is essential to secure these benefits unless the beneficiary has a reasonable chance of earning sufficient income to support him/herself.

5. Legal rights, treatment in accord with his/her needs, payment of a fair wage for work performed, the right to vote and the right to marry.

The evaluation should be based on individual contacts with the beneficiary, his/her social worker (if any), and other individuals who are in regular contact, including service providers.

Since the Trust encourages you to employ professionals to help in the administration of the Trust, consider hiring a care manager or other qualified person to prepare an annual assessment of the beneficiary's needs for your review. This report should include both (a) assessment of the beneficiary's current needs and (b) recommendations for maximizing his or her quality of life. We can furnish a list of persons for you to contact regarding these reports. In return, we ask you only to let us know if you were satisfied with their services. This can take place as part of the person-centered planning process and the development of an individual plan for Medicaid services, or it can be done separately.

SECTION II

HOW AND WHEN TO MAKE DISTRIBUTIONS FROM THE TRUST

This section describes the rules about distributions: how and when to make payments from the Trust. To do this properly, you need to have some familiarity with the SSI/Medicaid rules on assets and income. Then, using these rules, it suggests how and when to make payments from the Trust to maintain eligibility. These rules will help you determine the kinds of distributions that you will want to make.

1. SSI Rules

Social Security or the Department of Human Services will categorize any distribution you make to the beneficiary as some form of income, subject to its income rules. Then, if the income buys some kind of asset (or becomes an asset itself such as money in a bank account), the asset will be subject to separate resource rules.

We will discuss the asset rules first, and then the income rules. Classifying the expenses from the Trust as income or as a resource will usually make a big difference to the beneficiary's eligibility and benefit levels, so it is important to have some understanding of them. In order to be sure that distributions fall into the desired category, you must maintain very accurate records of how the Trust funds are spent. These records will be needed if Social Security or the Department of Human Services wants verification of the expenditures or disbursements you have made. It is not unusual for the agencies to make a demand for verification, and you should expect it. See Section 3 for more information on record-keeping.

2. SSI Rules - Assets

A. Countable Resources

Generally, a countable resource is any asset considered by SSI rules to determine eligibility (therefore a resource is sometimes called a countable asset). It could be tangible, like a second car, or it could be intangible, like a savings account. A SSI recipient and Medicaid beneficiary is allowed to have only $2,000, or less in resources. If resources exceed $2,000 during any whole calendar month (even by a few cents), the beneficiary's public benefits may be terminated.

Income that is received during the month is considered income throughout the calendar month of receipt, even if it is deposited in a bank account. If, at the end of the month, it is still in the account, it becomes a resource in the next month and is then subject to resource rules.

B. <u>Excluded Resources</u>

The beneficiary is allowed to have certain exempt assets, which are excluded from the $2,000 limit. These exempt assets are not counted in determining eligibility, and the beneficiary's ownership of them will not jeopardize his or her SSI benefits or their Medicaid. Therefore, you may freely purchase exempt assets for the beneficiary and give them to him or her (except for food and shelter). You should not give the beneficiary the money to purchase exempt assets for himself or herself as direct payments of cash money are considered countable income as explained below.

The following assets are exempt:

1. A home, including adjacent land, if the beneficiary lives in it or intends to return to it; (equity value of up to $500,000)

2. Household goods (furniture, furnishings, household equipment, household supplies), and personal effects (toiletries, items of personal care and education, clothing and jewelry--however, giving the beneficiary food is in-kind support, as explained below)--all limited to a total value of $2,000;

3. One automobile (or other vehicle) limited in value to $4,500 unless needed for specific or regular medical treatments, modified to handicapped use, or especially needed for essential daily activities (then value is unlimited);

4. Life insurance with a cash surrender value, if its face value is less than $1,500, and all term life insurance;

5. A burial plot, or other burial space, worth any amount; and

6. An irrevocable burial fund.

All the assets above are specifically exempted by law. You might note that a number of common and useful items are not specifically mentioned as exempt in the SSI regulations, but are not counted because they are included among personal effects or are services. These include:

- Recreational equipment, games and crafts;
- Books and magazines;
- Telephone, answering machine;
- Television, radio and cable service; I-Pod
- Musical instruments and stereo;
- Travel and education;
- Recreation and entertainment; and
- Some home maintenance, such as gardening
- Homeowner's/Renters Insurance

3. **Income**

Even though the Trust principal is not considered a resource of the SSI/Medicaid beneficiary, disbursements from the Trust may be considered income to the beneficiary, depending on the nature of the disbursement. SSI rules will treat distributions you decide to make from the Trust in one of four ways:

A. Direct income to the beneficiary;
B. Not income;
C. In-kind income; or
D. In-kind support and maintenance.

We will discuss these in order. Remember, if your distribution becomes an asset (which happens after 30 days), SSI rules will treat it as either a countable resource or an excluded resource, which we discussed above. The distribution or resource cannot be income and an asset in the same month.

A. Direct Income

Any money you give to the beneficiary directly will be considered income to the beneficiary, and, after a set-aside of the first $20.00 each month, will reduce his or her SSI benefits on a $2-for-$1 basis. As a result, you should avoid making direct payments to the beneficiary, since there will be no net advantage from doing so. If your actions reduce the beneficiary's SSI benefits to zero, then both the beneficiary's SSI and Medicaid benefits will be jeopardized, because the Medicaid benefits depend on SSI eligibility, and a separate application will then need to be made to the Department of Human Services.

You may not reimburse the beneficiary for purchases he or she has made, even if the purchases are for exempt assets. The payment will simply be counted as direct income. In addition, SSI rules say that if you give the beneficiary anything that is equivalent to cash (such as postage stamps), it will be counted as direct income.

B. Not Income

Other kinds of distributions from the Trust are not income because they are not cash, nor are they food or shelter. Examples of benefits that are not income include payments you make to someone other than the beneficiary, such as for certain kinds of medical care and social services. Also, bills you pay for the beneficiary to receive services are not income from the Trust. However, if the beneficiary receives any asset as a result of your paying the bill, the value he or she receives may be counted under the in-kind income rules discussed below.

C. In-Kind Income

Generally speaking, in-kind income exists when you give the beneficiary something other than money. In most cases, it is safe to provide such income to the beneficiary. This is because the value of any non-cash item (other than food or shelter) is not counted as income if the item will become an exempt asset when it is retained into the following month. You can also give the beneficiary something that will be used in the month it is received, such as a vacation or a tank of gas.

As a result, you may give the beneficiary most of the exempt assets mentioned above (such as books, an I-Pod, furniture or recreational equipment). For example, if you give the beneficiary a television, it will not be counted as income. This is because it would be an exempt household asset if retained into the following month.

1. Distribution of Allowable In-Kind Income

- The safest (but least convenient) way is to distribute these services or goods directly to the beneficiary personally. In other words, you can buy a television and deliver it to the beneficiary personally. You do **NOT** give the beneficiary the money to buy the television.

- You can make a direct payment to a provider, such as an appliance store, which then provides the goods or services to the beneficiary, such as delivering the television; or

Thus, when you give the beneficiary the right to receive goods or services, it should always be non-transferable and non-refundable (such as an airline ticket to take a trip).

One safe way to administer the Trust is to use a credit card in your name as Trustee. Then, any refunds are credited to the Trust instead of to the beneficiary. Then the beneficiary can show that he/she cannot obtain a cash refund.

D. In-Kind Support and Maintenance (ISM)

If the beneficiary receives food or shelter as a result of payments by the Trustee to other persons, then the beneficiary will have income in the form of in-kind support and maintenance (ISM). ISM causes a reduction in the beneficiary's SSI payments. This is why the Trustee is directed to exercise his or her discretion in the Trust agreement to make distributions, which will supplement and not provide for the beneficiary's basic needs.

However, the Trustee has authority to make decisions which are in the best interest of the beneficiary. That may require examining carefully how the rules regarding in-kind support and maintenance will be applied. Problems can arise when in-kind income consists of food or shelter. The beneficiary's SSI benefits may be reduced or eliminated if he/she receives ISM.

The theory behind the reduction or elimination is that SSI benefits are specifically intended to pay for a person's food or shelter, so if that person receives those things from another source, then less SSI benefits are needed. *As a result, if you pay the beneficiary's grocery bill, rent or meals (for example, in a restaurant) for the beneficiary, you are providing ISM to the beneficiary. In theory, you are then also reducing his/her need for SSI benefits.*

There are sometimes very fine distinctions between allowable in-kind income and countable ISM. For example, you can pay for some entertainment expenses, but not others (for example, a movie ticket but not a restaurant meal, as that is food).

Note also that you can pay for certain medications and alternative health treatments if they are not covered by Medicaid or other benefit programs. If the beneficiary purchases a home, ISM can arise in each month when the Trust pays the beneficiary's mortgage payment, property taxes, insurance or utilities (gas, water, electricity, garbage collection). However, the Trust can generally purchase a home in which the beneficiary resides. If you are thinking about buying a home where the beneficiary will reside, please call us. We need to discuss that decision in detail to determine if the SSI benefit will be reduced and if so, by how much.

If you do give ISM to the beneficiary, his/her SSI benefits will be reduced, but not on a two-for-one dollar basis, like with cash. There are two different formulas that Social Security uses to reduce the SSI benefits for a person who receives ISM. Which formula is used depends on the household and living arrangements of the SSI recipient. Determining which rule and how it applies can be complicated and quite detailed, like income or estate tax planning. If you have questions or concerns about the impact on your beneficiary of ISM distributions from the Trust, please ask us for assistance before you make any such distributions. We are here to help you with issues like this.

4. Conservatorships

You should note that the SSA rules regarding conservatorships or guardians of the estate take a completely different approach. The rules consider that funds in a conservatorship estate are available for the conservatee's support and maintenance. Thus, assets in a conservatorship estate that exceed $2,000 will cause the beneficiary to lose his or her SSI and Medicaid benefits. Therefore, it is important to administer the Trust properly and consider the consequences of placing assets in a conservatorship for the beneficiary.

I find that it is helpful to summarize for you expenditures that you should not make and expenditures that would be proper. That list is below.

1. **The Trust should never distribute cash to the beneficiary**. As indicated above, you distribute any cash to the beneficiary, his/her SSI benefits will be reduced by an equivalent amount and he/she will be no better off than if he had not received any funds. This is true regardless of whether he/she uses the cash for food or shelter or for supplemental, non-support needs.

2. **Generally, do not use funds from the Trust to purchase food or shelter for the Trust beneficiary**. These items will constitute in-kind income and would most likely result in a 1/3 reduction of the beneficiary's grant level. Normally, you won't want to do this. Let the beneficiary use his/her SSI benefits for such items, and use distributions from the Trust for

non-necessities. However, keep in mind that if it is an emergency, you may use Trust distributions for food and shelter.

3. **Any distributions from the Trust should be made directly to the third party supplier of the goods and services to be received by the Trust beneficiary**. This is necessary because, as indicated under rule #1 above, you cannot give the beneficiary cash for goods and services, regardless of whether it will ultimately be used for non-support items.

4. **Distributions related to medical needs which are not already provided by Medicaid or other public benefit programs will always be exempt from consideration as income under the SSI program and most other public programs**. As a result, the purchase of any goods or medical service for the Trust beneficiary not already available through Medicaid or another public benefit program that can be justified by a medical authority's order will not cause a reduction in SSI benefit levels. The term medical authority is broadly interpreted and includes in addition to medical doctors, many other health care providers, such as podiatrists, chiropractors, physical therapists, and psychologists.

The following expenditures could be proper from the Special Needs Trust:

1. Because the home is an exempt resource, improvements and repairs to the home should not constitute income to the beneficiary. You could therefore hire a plumber, painter or other contractor to make any necessary repairs to the house. If the beneficiary enjoys completing home improvement projects on his/her own, you could purchase tools for him/her. You could also use Trust funds to hire someone to take care of the lawn, shovel the snow, etc.

2. Consistent with the above, you could also use funds from the Trust to install a burglar alarm and monitoring/response system in the beneficiary's home.

3. If the beneficiary is interested in attending school, you could pay his/her tuition, purchase his/her books and supplies and arrange for transportation with funds from the Trust.

4. If the beneficiary enjoys reading, you could purchase the latest best sellers, enroll him/her in a book-of-the-month club or obtain subscriptions to favorite magazines.

5. Funds from the Trust could be used for entertainment purposes, including: trips to the movies, plays, museum and sporting events; the purchase of a new television, VCR, CD or sound system; and the installation of cable or

satellite TV. If the beneficiary has a hobby, supplies related to the hobby may be purchased.

6. If the beneficiary enjoys traveling, Trust funds could be used for a vacation trip in the United States or to visit friends or relatives (provided that the tickets cannot be converted to cash). Trust funds can be used to send a chaperone along on the trip.

7. Trust funds could be used to purchase and maintain a car for the beneficiary if he/she wishes to drive, or for bus passes, if he/she doesn't wish to drive. Payments for car repairs, gas, oil changes, license fees, insurance and upkeep may be paid by the Trust.

8. Household goods and other items of personal property of reasonable value could also be purchased with a portion of the Trust funds. Trust funds should not be providing the sole method of transportation for the household.

9. Bills for items such as cleaning, supplies and paper products (and other sundries not constituting food, clothing or shelter), telephone expenses, etc., could also be paid with funds from the Trust

10. Support services, dental care, physical therapy, massages and other medical costs, to the extent not covered by some other public benefit program, could also be paid for with Trust funds.

11. Funds could also be used to pay for home care services including hygiene and home cleaning assistance, to the extent they are not covered by another program.

12. Almost any other purpose, provided that funds are not used directly or indirectly for food or shelter, and any money paid is given directly to the provider and not to the beneficiary.

13. Clothing.

SECTION III

REPORTING GUIDELINES - SSA RULES

The SSI program and the Medicaid program require periodic reports for all SSI/Medicaid recipients. These reports MUST be completed for eligibility to continue. The Representative Payee must report the existence of the Special Needs Trust to SSA, and provide a copy of it, if requested. In addition, the beneficiary must report all of the following:

A change in: (1) the beneficiary's address, (2) employment status, (3) his or her living arrangements (such as adding or losing a roommate), (4) his or her income (including the receipt of any direct income or ISM from you as Trustee), (5) any countable resources, (6) health insurance coverage, (7) the beneficiary's marital status, as well as (8) changes or improvements in the beneficiary's physical or medical condition (for example, the beneficiary improves so much that he/she is no longer considered disabled), (9) admission to or discharge from any health facility or public facility (such as a hospital or nursing home), (10) any trip outside the U.S. and (11) new eligibility for other public benefits.

The report may be brief, but it should be in writing to the Social Security Administration and it should include the beneficiary's name and Social Security number, a description of the event that triggered the report and the date of the event. The report is due within 10 days after the end of the month in which the event took place, be sure to keep a copy, and send it with proof of receipt.

If a required report is not made on time, the SSI program is entitled to reimbursement for all SSI benefits incorrectly paid to the beneficiary, and SSI can assess a penalty of up to $100, depending on how late the report is. Thus, you will want to remind the Trust beneficiary of this requirement and you may also need to inform the Representative Payee of this requirement. Remember that the SSA will have access to any K-1's the Trust files itemizing the income from the Trust uses for the Trust beneficiary. This may raise questions about the distributions and you may receive an inquiry from SSA about them. If you receive any correspondence from SSA or DHS, please inform us of it immediately. We are here to help you respond to these inquiries. Failure to respond, or an incomplete explanation, may result in a loss of benefits.

NOTE: The Trust is required to file tax returns, and the IRS and the Michigan Department of Treasury will know about all income distributed from the Trust, as they regularly exchange reporting information with SSI and the Medicaid program. This is why all reports should be filed on time as required by the governmental agencies and in the proper fashion. You need a separate taxpayer identification number for the Trust, which we will obtain for you. **DO NOT** use the beneficiary's social security number on the Trust bank account as this will cause the income to be reported as his/her income and cause disqualification.

PREVENTING A REDUCTION IN BENEFITS - APPEALS FROM ADVERSE ACTIONS

In administering the Trust, you must pay attention to any notice regarding a change in benefits and keep reasonably well informed of new developments. If SSI or Medicaid notifies you or the beneficiary that it intends to reduce or eliminate the beneficiary's benefits, you should appeal in writing, within 10 days. If you act quickly, the SSI and Medicaid benefits will continue and not be suspended during the appeal. Although you are allowed up to 60 days to appeal an SSI decision, and 90 days to appeal a Medicaid notice of action or decision, asking for an appeal after 10 days have passed will result in the loss of the SSI and Medicaid benefits while you await the results of the appeal.

You must also stay informed about changes in the beneficiary's benefits in order to make intelligent decisions as Trustee of the Trust. Failure to learn about a change in benefits can have catastrophic results. Although SSI is a federal program run by the Social Security Administration, the federal contribution is only a portion. Make sure that the SSI and Medicaid programs have your address, in addition to the beneficiary's address, and request that you receive copies of all communications affecting the beneficiary's benefits. Instruct the beneficiary to be sure to let you know promptly of receipt of any such notice, and remind the beneficiary of that often. You might find it helpful to be named the Authorized Representative for Medicaid for the beneficiary. If you are the Authorized Representative, you have the responsibility to report changes in income or assets, so you will need to report all Trust distributions. Be sure to keep copies of all correspondence from each benefit agency. This will help in determining the applicable rules on eligibility, reporting and appeals.

SECTION IV

RECORD KEEPING

It is very important to determine whether distributions from the Trust are income, not income, in-kind income or in-kind support and maintenance for the beneficiary. To be certain that your distributions fall into the desired category, you must maintain very accurate records. You should keep a record of each disbursement as it is made, keep the receipt for the disbursement and review the records monthly, when you balance the Trust account. You should review the records again each year, in preparation for the accounting and filing the income tax returns. These records will be needed if Social Security and/or DHS wants verification of the expenditures that you have made.

The director of the federal Health Care Finance Administration, who is responsible for implementing the Medicaid program, had advised the Michigan Medicaid director on how to treat disability/payback Trusts. If your Special Needs Trust requires repayment at the death of the beneficiary to the Department of Human Services (for the Medicaid program) of all benefits received by the beneficiary, then it is a payback Trust. That memo indicated that states have the right to monitor distributions from the Trusts to be sure that the funds are used for the benefit of the disabled person. Thus, such a demand for verification of Trust disbursements is likely, and you should expect it.

If you need help with this, we can help you to get set up to keep good records and accountings.

ANNUAL ACCOUNTS

In Michigan, a Trustee has a duty to account to the beneficiaries of a trust annually and keep them informed of the trust and its administration. Annually, and upon a change of Trustees or upon Trust termination, the Trustee must provide an accounting to each *current trust beneficiary*. The Trustee need only send an accounting to an *interested trust beneficiary* upon request by such individual. It is important to be cognizant of what must be contained in a trust accounting. There are two categories of accountings: 'compliant' and 'acceptable'.

The following are the six requirements of a ‘compliant’ trust accounting pursuant to Michigan law:

1. Accounting must be reasonably understandable.

2. Accounting must begin with a summary of purpose and content.

3. Accounting must contain sufficient information to notify recipients of all significant transactions affecting administration during the accounting period.

4. Accounting must include both *tax cost* and *current asset values* at the beginning and end of the accounting period.

5. Accounting must show gains and losses *separately*.

6. Accounting must show transactions that do not affect the amount for which the Trustee is accountable (i.e., stock splits). M.C.L.A. 700.7307(3).

The following are the criteria for an ‘acceptable’ accounting:

1. The accounting must contain a concise description of the trust purposes and the manner in which the trustee applied the trust estate and income toward such purposes.

2. The accounting must contain an itemized statement of receipts and disbursements during the accounting period.

3. The accounting must contain a statement of the property on hand at the end of the accounting period. M.C.R. 5.722(B).

<u>TRUSTEE COMPENSATION</u>

It is proper to pay a trustee compensation from the trust. However, there is not a fixed ‘rate’ of pay. The reasonableness of each individual Trustee’s compensation depends upon a variety of factors and must be looked at in light of individual circumstances. Case law in Michigan reports a number of factors for reviewing the appropriateness of trustee compensation. They include:

1. size of trust,
2. responsibility involved,
3. character of work involved,
4. results achieved,
5. knowledge, skill and judgment required and used,
6. time and services required,
7. manner and promptness in performing its duties and responsibilities,

8. any unusual skill or experience of the trustee,
9. fidelity of the trustee,
10. amount of risk,
11. custom in the community for allowances, and
12. estimate of the trustee value of its services.

The weight to be given any factor and the determination of reasonable compensation is within the probate court's discretion. *Comerica Bank v Adrian*, 179 Mich App 712, 724, 446 NW2d 553 (1989). So we look to the Probate Court for guidelines. §7205 of EPIC preserves the court's power to review the trustee's employment of any agent, including attorneys, auditors and investment advisors as well as the trustee's own compensation. The Court may be asked to determine the reasonableness of compensation paid.

CONCLUSION

We have reviewed many complicated rules in this memorandum. Being Trustee of a Special Needs Trust may be very different from anything you have done. The rules to administer it properly are varied and many. As you work with the Trust administration and the beneficiary, please let us know how we can help you.