

Special Needs Trusts Part 2 of 2

by Cynthia Sharp
cmyers@sharpbratton.com

CHOOSING A TRUSTEE

Family members may be the best qualified to determine the special needs of a child but may lack expertise regarding administration. The Trustee is responsible for proper investment of the Trust assets and for accurate record keeping and ensuring that distributions will not disqualify the beneficiary from governmental benefits. In choosing the Trustee, note that the person must be familiar with the Prudent Investor Act, Principal and Income Act, the rules of SSI, Medicaid and other governmental programs. An unsophisticated Trustee runs the risk of exposure to liability. In addition, the goals of the trust may not be satisfied. Consideration should be

given to choosing a professional such as a bank, disability organization, private fiduciary or attorney. A Trust Advisory Committee (TAC) could be established to advise the Trustee as to the beneficiary's needs. The TAC could consist of a family member, social worker, CPA or attorney. Consideration could also be given to appointing Co-Trustees such as a family member and a professional Trustee.

TRUSTEE RESPONSIBILITIES

It is critical to be extremely careful in choosing the trustee of any type of special needs trust. The trustee must be not only schooled in prudent financial management but must also be

intimately familiar with eligibility rules or the beneficiary may inadvertently lose eligibility.

A trustee will first of all be required to establish a bank or brokerage account. Financial institutions typically require a copy of the trust instrument, tax identification number and the trustee's personal identification (such as driver's license). An example of the title of the bank account is: "Jack Spratt, Trustee of The Betty Boop Special Needs Trust".

It is critical for the Trustee to determine the benefits program under which the Beneficiary is collecting benefits. Presumably it will be a "needs based" program since a Special Needs Trust was established.

The rule is that any item that could be converted into cash should not be distributed to the Beneficiary as disqualification would be the consequence. Therefore, the Trustee should personally distribute goods or services directly to the Beneficiary and will make direct payment to providers and vendors. The Trustee may be given a non-transferable and non-refundable right to obtain goods and services. For example, a voucher can be given to the Trustee. The Beneficiary should not have a credit card but the Trustee may charge items for the Beneficiary on a credit card issued in the name of the Trust. Cash distributions must not be made as they will be treated as income. In-kind maintenance and support (food and shelter) may be provided if the Trust permits it. Such a distribution will result in a reduction in benefits and it is critical that SSI benefits not be reduced to zero. Otherwise, the beneficiary will no longer be eligible for Medicaid.

The trustee is required to keep a detailed activity of the trust such as bank statements, check registers, canceled checks, financial statements, invoices and receipts. Maintenance of an accurate paper trail is mandatory since the records will be subject to scrutiny by the Medicaid Office.

Making loans is a problematic issue that may arise. The trustee must first look at the terms of the trust instrument and consider the purpose of the loan, identity of the borrower and size of the trust fund. The following issues also need to be addressed: Are there going to be potential collection problems? Should a promissory note or collateral be required?

SPECIAL SITUATIONS

The Trustee will be faced with the following special situations:

- Housing
- Transportation
- Paying members of a beneficiary's family for care provided.

HOUSING

A home owned by a (d)(4)(A) Trust must be paid over to the government after the Beneficiary's death at least to the extent that governmental benefits have been paid. Nevertheless, the Trustee is permitted to pay for all of the related expenses to the home from the Trust. The Trustee must decide how to treat other family members living in the home since the proceeds of a (d)(4)(A) Trust must be for the sole benefit of the Beneficiary. Therefore, it may be appropriate for the Trustee to enter into a rental agreement with the other family members. The Trustee has the option of purchasing the home and titling it in the Beneficiary's name; however, the Beneficiary will be deemed

to have received an equitable interest in the month of purchase which will result in a reduction or elimination of SSI in that month. If the Trust pays other shelter or household expenses there will be a reduction in SSI benefits. Examples of such expenses are: (1) Mortgage; (2) Real Estate Taxes; (3) Electricity, Water, Sewer; (4) Homeowner's Insurance; (5) Condominium Charges; (6) Rent on a property not owned by the beneficiary

The trust fund may be expended for the purpose of renovating a home purchased by the Beneficiary, however, the distribution shall be countable income in the month distributed. The disadvantage of titling the home in the name of the Beneficiary is that the Trustee loses control since the Beneficiary can sell, gift or mortgage the home.

Another scenario is where trust funds are expended to renovate a home owned by another. This usually involves renovation for handicap accessibility. This author has even seen installation of a swimming pool as well as an elevator approved. A doctor's prescription would be advisable to help justify the expense.

PROVIDING TRANSPORTATION

Provision of transportation obviously does not constitute food or shelter and will therefore not result in a decrease in benefits. The most serious issue is how to title the vehicle. It should not be owned by the trust because trust assets will then be exposed to a liability claim. The vehicle could be purchased and titled in the name of the Beneficiary or a reliable care provider. The Trust may pay operating expenses such as gas, maintenance, repairs, and insurance. One automobile is not a countable asset and there is no longer a limit as to the value.

PAYMENTS TO FAMILY MEMBERS

Often, a family member will quit his or her job or reduce work hours to provide care for the Beneficiary. The family member may be compensated for services since it would be necessary to expend funds for an outside party or for institutional placement. One manner in which to determine the appropriate compensation is to survey home health agencies for the appropriate rate. All payments are taxable income. The Trust may provide health insurance, a retirement plan and other employee benefits.

TAX CONSIDERATIONS

The IRS has its own definition of terms, which may be different from the Social Security Administration's definition. For example, "income" for federal tax

Continued on page 21

Some benefits are reserved for members.



Camden County Bar Association welcomes Magellan Hill Technologies as its preferred partner for telecommunications. Bar members receive exclusive deeply discounted rates.

Magellan Hill provides telecommunications auditing services, high-speed internet, local, long distance and conference calling.

Magellan Hill
TECHNOLOGIES



856.235.2177
www.magellanhill.com

Special Needs Trusts

Continued from page 14

purposes is broader than "income" for SSI purposes.

The trust must have an Employer ID Number. The steps to obtaining a tax identification number are:

- File an SS-4 form (Application for Employer Identification Number)
- The Trustee can call 1-800-829-4933 or apply online at www.irs.gov

An issue to be addressed is who is the "Grantor" for purposes of the SS-4 form? Under a testamentary trust, the Testator is the grantor. With respect to a self-settled (d)(4)(A) trust, the disabled beneficiary is grantor (even though it is established by a parent, grandparent or legal guardian – who is called the "grantor" in the trust instrument).

The trustee must use the EIN on all bank accounts and tax returns and not the beneficiary's social security number.

The funding of the trust is not normally subject to income tax. The funds from the settlement of a personal injury action are taxable to the extent of pre-judgment or post-judgment interest. Proceeds from an inheritance may be subject to estate or inheritance tax. Tax is payable on income earned by the trust unless the income is tax exempt. Any capital gains are taxed.

The income earned by a grantor trust is passed through to the beneficiary and taxed at his or

her personal rate. The income earned by a non-grantor trust is taxed at a higher tax rate unless income is distributed to the beneficiary. The trust will then benefit from a deduction and the beneficiary will declare income. The distributions are listed on Schedule K-1 of the tax return. The tax rate in 2007 for trust earnings in excess of \$10,450 per year is 35%. The fiduciary files tax return Form 1041. To reduce the trust income tax liability the trustee can purchase tax-free investments or make distributions from the trust to the beneficiary.

TERMINATION OF THE TRUST

The death of the lifetime beneficiary terminates the trust; however, the trust could continue for the benefit of remainder beneficiaries. The Trustee may remain in office for a reasonable period of time. In terminating the trust the Trustee must pay the final expenses, render a final accounting to remainder beneficiaries and ultimately distribute the remaining assets. The payment of expenses is tricky, if there are insufficient funds the following order must be followed: Pay debts; Administrative costs; Income taxes; Estate taxes; Beneficiary's personal debts; Funeral expenses; Medicaid reimbursement; Remainder Beneficiaries.

Mastery of the complex rules governing eligibility for public assistance programs is critical for those drafting or administering Special Needs Trusts.

From the Barrister Archives

Continued from page 20

make certain that Wilentz was not re-appointed. By his independence and his very far-reaching and controversial decisions, he had managed to alienate everybody. Though he was a Democrat and the New Jersey Senate was Democrat controlled, his appointment was seriously in jeopardy. This is another example of the great New Jersey tradition that partisan politics does not mean a whole lot regarding the administration of our Courts.

Tom Kean was a Republican and you can imagine the pressures brought to bear. Tom felt so strongly about the independence of the judiciary, he made the difficult decision and the rest is history. I'm sure that most of you have read the newspaper stories reminding everyone (ad nauseam) that the vote was equally divided in the Senate and I broke the tie which enabled Bob Wilentz to be the Chief Justice. During the debate, I remarked that our close proximity to the corrupt system in Philadelphia made my

decision, a lot easier. My only concern was to preserve the independence of the Court system, at all costs. New Jersey owes a huge debt of gratitude to Bob Wilentz, a magnificent personality who continued and enhanced the sterling reputation of the New Jersey Judiciary.

The second major event in the past month, was the passing of Bill Cahill. To most of you, he was the former Governor and/or the former Congressman from Camden. To me, it was a lot more personal. There are few people who remember Bill Cahill as just a lawyer. Their memory is Bill Cahill as a governor and congressman. He was a tremendous trial lawyer. In the presence of a jury, Bill Cahill was superb. I'm sure that Ray Uliase, who was a young attorney in the Cahill firm has great memories of that experience. Back in the "old days" young attorneys-to-be were required to serve a clerkship in a law office. You made no money, but, you worked for nine months in order to learn the practical part of your chosen profession. When

the clerkship had been completed, you were allowed to represent clients. I had heard about Bill Cahill, the outstanding trial lawyer. I sought and secured a clerkship in his office. This was before he had run for his very first political office. Mr. and Mrs. Cahill were remarkable people. They had old fashioned standards and believed in strong family values. Their very large brood of children can attest to that fact. Way back in 1960, the Cahills were guests at my wedding which was held at the old Walt Whitman Hotel in Camden. By the way, my wife and I have made it through the "no fault" era, and are still very happily married to each other.

Bill Cahill was a great believer in the independence of the judiciary. As Governor, he made some magnificent judicial appointments, including most of the New Jersey Supreme Court, at that time. Though this is not the usual and normal "View From the Bench" column, I didn't think you'd mind a bit of "the way it was."

GERROW COURT REPORTING CERTIFIED COURT REPORTING

- NO ADDITIONAL COSTS FOR EXPERTS OR TRAVELING
 - REALLEGAL E-TRANSCRIPTS AVAILABLE
- CONFERENCE ROOM, OFF STREET PARKING AND VIDEO CONFERENCING AVAILABLE
- FREE LUNCH FOR ALL DAY DEPS. IN OUR OFFICE

VISIT OUR OFFICE LOCATED AT:
1103 LAUREL OAK RD. - SUITE111,
VOORHEES, NJ 08043
PHONE: 856-784-7909 FAX:856-309-1405
WE ACCEPT: DISCOVER, VISA & MASTERCARD
FLORIDA OFFICE: 305-731-9775

STEVEN R. NEUNER Business Bankruptcy Specialist

THE EXPERIENCE YOU NEED & YOUR CLIENTS DESERVE

- 20 Years Experience
- ABBC Certified Business Bankruptcy Specialist
- Chapter 7 Trustee Since 1987

Available to help with all bankruptcy or debt relief problems: Business or individual, debtor or creditor. Litigation, divorce-related and complex matters invited.

ALL CLIENT RELATIONSHIPS PROTECTED
856-596-2828
sneuner@nv-njlaw.com

Adrienne Jarvis, JD, PhD

Welcomes Referrals In Social Security:

- SSD, SSI, Children's Cases
- Federal Appeals
- We Prepare All Documentation For Your Clients
- Our Paralegal Maxine Winston Was A Social Security Agency Administrator
- Our Office is Bilingual

Call: 856-482-2212
email: afjesq@aol.com

David C. Epler, Esq.

HIGH RIDGE MEDIATION CENTER
25 Years of Family Law Experience
Member of The New Jersey Association of Professional Mediators

Welcomes Referrals in the Area of:

FAMILY LAW MEDIATION

Including the Preparation of Mediated

- Prenuptial Agreements
- Parenting Time Agreements
- Property Settlement Agreements
- Or Memorandums of Understanding
- Allowing You to Further Negotiate And Finalize the Language in the Agreement

Let Mediation Assist in Finalizing That One Last Issue That Is Keeping Your Client From A Comprehensive Settlement

MEDIATE DON'T LITIGATE
CALL: 856-627-3200

Rogue Metal & Restoration



ANTIQUE AND CONTEMPORARY

BRASS, COPPER AND SILVER
POLISHING AND REPAIR

DOOR, WINDOW AND FURNITURE HARDWARE
SILVER FLATWARE

LAMPS AND LIGHT FIXTURES A SPECIALTY

OVER 20 YEARS EXPERIENCE

609-760-3688
ROGUEMETAL@COMCAST.NET

CHARLIE SILVESTRI
SILVERSMITH



10% OFF WITH AD
REFERENCES AVAILABLE