

## ***SPECIAL CONSIDERATIONS FOR TRUSTEES OF SPECIAL NEEDS TRUSTS***

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All trustees have basic fiduciary duties, such as the duty to prudently invest and to comply with the requirements of taxing authorities. Elder law attorneys are familiar with the fiduciary obligations that apply to all trustees. This article will address the unique responsibilities of a trustee of a special needs trust, also known as a supplemental needs trust. Special needs trusts are used to preserve needs-based public assistance and at the same time provide a fund for the beneficiary to pay for things over and above basic needs that will enhance the beneficiary's quality of life.

A trustee must follow the rules set out in the trust regarding the circumstances under which distributions can and cannot be made. Typically the primary purpose of a special needs trust is to provide for items and services beyond the beneficiary's basic needs for food, clothing and shelter. Not all special needs trusts have identical distribution provisions. Some special needs trusts specifically prohibit any distribution for food, clothing and shelter. Other special needs trusts may have as their primary purpose to pay for special needs, but still allow distributions for basic needs under some circumstances. Therefore, the trustee should become very familiar with the distribution provisions of the special needs trust. If the trustee pays for food, clothing or shelter, depending on the specific wording in the trust the trustee may be breaching his or her fiduciary duty, even if the beneficiary is not receiving public assistance. Similarly, if the trustee refuses to pay for shelter costs when it might be allowed by the trust and very helpful to the beneficiary, the beneficiary may not have the best quality of life available under the circumstances.

Assuming a distribution for a basic need such as shelter is allowed under the trust, the trustee must be familiar with the effect of the distribution on the beneficiary's public assistance. If the trust pays for shelter under the in-kind support and maintenance rules, the benefits will be reduced. However, there is a maximum amount that can be deducted. In some situations it is possible to receive a large monthly distribution for shelter and still maintain substantial benefits. The rules regarding in-kind support and maintenance are tricky, and the elder law attorney should suggest that the trustee seek advice before making distributions for basic needs to insure that a distribution does not cause unforeseen problems.

Another question arises regarding distributions made on behalf of the beneficiary when it will in some way tangentially benefit someone else. Most special needs trusts are written for the sole benefit of the lifetime beneficiary. Can a family member be paid to accompany the beneficiary to the beach? The answer is yes, if the distribution provisions allow it and it is necessary for the beneficiary to have companion care. The

answer is no if the beneficiary does not need a companion or attendant to take a trip to the beach. What about paying for cable television when there are other people in the home? The answer to this, and many similar questions, is unclear, and will depend on the circumstances. A wise trustee will look at the entire situation, including perhaps such factors as the importance and advisability of cable television in this particular person's life, the number of other people who are also benefiting from having cable television in the house and the amount of money in the trust.

If the beneficiary is currently receiving needs-based public assistance, in most cases the trustee should directly pay the third party providing goods and services to the beneficiary. This is because the beneficiary must report the receipt of any asset, including cash, to the agency that is providing assistance. The receipt of cash may cause an interruption in public benefits because the beneficiary had cash available to pay for food, clothing or shelter, even if the beneficiary did not use the cash for a basic need. Therefore, in most situations the trustee will directly pay for a public transit pass, computer, or other item the beneficiary can use. The trustee may arrange for regular bills, such as cable television, Internet subscription and phone bills, to be mailed directly to the trustee.

Most special needs trusts that were funded with the beneficiary's own assets name the State of Oregon as the first remainder beneficiary. This is called a "payback" provision. At the death of the lifetime beneficiary certain administrative costs may be paid. However, payment of burial expenses is not allowed. Therefore, it is increasingly important for the trustee to consider the purchase of a pre-paid burial plan. Whether this is an issue in a trust funded with third party assets will depend on the wording of the trust.

There is increasing pressure on attorneys to properly select and advise special needs trust trustees. Lawyers representing trustees of special needs trusts should be aware of the special duties of the trustees and advise their clients, in writing, of their obligations. This article is intended to provide a glimpse of the difficulty in administering a special needs trust. It is no wonder that many people choose to have a professional fiduciary serve in the role of trustee. If the family is not prepared to monitor the issues outlined above, the lawyer should consider recommending a professional.

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