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# The Unexpected Complexities of Tragedy (Fundraising, Special Needs Trusts, Medicaid & Tax Deductions)

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## I. INTRODUCTION

When disaster or tragedy befalls a member of our community the first response of many people is, "How can I help?" "Help" generally involves donating money to assist the individual, family, or community in need. The reasons behind fundraising vary greatly. Fundraising can occur to assist the family of a fallen police officer. It can occur to help pay medical bills for an individual suffering from cancer. It can also occur to assist with funeral expenses or college education for minor children when a parent passes away. Every individual who benefits from any type of fundraising is unique, and each situation must be analyzed to ensure that the needs of the beneficiary are met. This analysis must include whether or not the beneficiary receives any type of means-tested government benefit.

Well-meaning friends and family members can inadvertently cause the reduction or complete loss of means-tested government benefits by fundraising activities. Often this loss of benefits results in the loss of health insurance, as many individuals with disabilities rely on the Medicaid program to provide for their health care needs. In most situations, the funds raised do not sufficiently support the health care needs of the beneficiary on a long-term basis. The focus of this paper explores the relationship between fundraising and the retention of means-tested public benefits.

Section II of this paper provides an example to illustrate the various pitfalls and issues associated with fundraising activities. Section III of this paper discusses the coordination of collection efforts in fundraising. Section IV of this paper provides an outline of the relationship between fundraising and government benefits. Section IV includes a brief description of the different government benefits programs, as well as issues regarding fundraising for beneficiaries who receive benefits from any of these programs. Section V of this paper outlines the tax consequences associated with fundraising, including the availability of a charitable deduction for the donor. Section VI discusses the solicitation of funds. Section VII concludes the paper.

I would like to thank the following attorneys for allowing me to use their papers as the basis for this paper: "After the Fundraiser: Special Needs Planning After the Fact," by Mary Alice Jackson and James M. McCarten; and "Gifts to Charities: Easy As 'π'" by Shannon G. Guthrie and C. Stephen Saunders.

## II. THE TRAGEDY

As a method of illustrating the various pitfalls and issues surrounding fundraising, please refer to the following illustration. As the paper outlines various issues an attorney should consider when counseling regarding fundraising and public benefits, this example will provide an illustration of resolving potential conflicts.

> **ILLUSTRATION:** Rose Flowers, 8 years old, and her family are involved in a major automobile accident, which results in the death of her father. Her mother survives the accident with minor injuries. Her sister, Daisy, 5 years old, also suffers minor injuries. However, Rose, is paralyzed and suffers physical injuries that will require medical assistance for the remainder of her life.
>
> Rose and her family are members of a small community, which includes a church, as well as a significant number of individuals who want to help the family.

While each tragedy contains different issues, each example of fundraising begins with an occurrence of misfortune. As the attorney representing either the family, fundraiser or other party in the activity, it is important to remember that all of the parties are united based on a common incident.

## III. COORDINATION OF COLLECTION

### A. Pre-Planning

There are two common timeframes for the collection of donations for an individual. The first timeframe deals with a pre-planner who contacts an attorney prior to the collection of donations on behalf of the beneficiary.

> **ILLUSTRATION:** A group of civic leaders in Rose's community wanted to establish a series of fundraisers for the benefit of the family. Prior to the collection of assets, they consulted an attorney who established the "Flower Family Trust." During the course of the collection of assets, funds were raised to benefit the Trust and not the individual family members directly. Since the funds were collected in the name of the Trust, the Trust was considered a third-party settled trust. The benefits of a third-party trust are discussed in Section IV.B.3.b.

In addition to being able to establish a third-party trust for the benefit of the beneficiary or the beneficiary's family, pre-planning also helps organize and coordinate the collection effects. Our firm was involved with the coordination of donations collected for the benefit of a child of the client's co-worker, who had been diagnosed with a terminal illness. The client wanted to establish a trust for the benefit of the child to provide for educational expenses of the child. Our client was sophisticated enough to realize that the individuals who would donate to this trust would contribute large amounts upon the creation of the trust, but there would not likely be future, ongoing contributions. The pool of individuals anticipated to donate to this trust was small and mainly consisted of the client's co-workers. Therefore, the client was able to estimate, with accuracy, the potential contributions and expectations of the individuals making the contributions to the trust. Additionally, instead of one individual being responsible for the collection of the donations, the co-workers could make the contributions directly to the trust.

## B. Post-Fundraising Planning

Conversely, some fundraising activities are done spontaneously and without the ability to accurately anticipate the amount of the potential contributions or the number of individuals who would contribute to the fund. In this scenario, planning for the receipt of funds was not contemplated prior to the fundraising activities and the organizers may consult with an attorney after the funds have been received. In some cases, individuals may anticipate a large amount of donations, when in reality only a small amount is raised. Conversely, the individual organizing the fundraiser may raise funds in excess of what was originally contemplated. Sometimes, the funds are collected and held in a "trust" account at a financial institution for the benefit of the individual. In these situations, the bank could appoint a custodian (sometimes an employee of the bank or a family member) until a trust is established. Once a trust is created, the funds would be payable to the trust. Our office has dealt with a "trust" established in this manner for a client and his wife, in which the client was injured (and later passed away) due to an accident on vacation. In this situation, the bank held the funds collected for the injured individual in a segregated custodial account. An employee of the bank (who was also a family friend) served as the custodian of the account. The bank obtained an Employer Identification Number ("EIN") for the account in the name of the yet to be written trust. The only item missing was a written trust document stating the terms of the trust. Once the trust was completed, the bank transferred the funds to the trust. Our office also considered these funds a third-party trust, even though there was not a trust document created prior to the collection of assets. The rationale was that the funds were solicited and held in "trust" for the beneficiary, even though the trust was not yet established.

> **ILLUSTRATION:** Rose's school also wanted to collect funds on behalf of the family, especially since Rose was a second grader. The school raised $5,000 by holding a bake sale, car wash, and other fundraisers. However, these funds were solicited and collected on behalf of Rose, individually, and not the Flower Family Trust. Therefore, these funds could not be placed in the Trust.
>
> Additionally, Rose's church established the Rose Flower's Fund directed at collecting donations to assist with Rose's medical needs. Response to the fund was overwhelming and the church collected $150,000 to assist with Rose's medical needs. These funds are held at the church's bank, segregated from the church's general fund. Again, these funds are owned by Rose, individually, free from trust.

As discussed below in more detail, the owner of the funds collected in a fundraising effort is important in relation to any public benefits received by the beneficiary. When analyzing an account that has already been established or funds that have already been raised, several questions must be resolved. Whose Social Security number was used to establish the account? If the beneficiary's Social Security number was used, then the funds more likely belong directly to the individual. How were the funds collected? Were the funds collected in the name of a trust or the for the benefit of the individual directly? What role does the bank play in this matter? What internal rules does the bank have regarding such funds collected for the benefit of an individual? These questions will be discussed in relation to obtaining and maintaining public benefits in the next section.

## C. Conflicts of Interest

One of the main concerns with the coordination of fundraising efforts is the determination of who is your client. Is your client the beneficiary of the fundraising? Or a charitable organization raising funds? Or the family of the beneficiary, who may also be the main fundraiser or trustee of a trust established for the beneficiary?

Even though on the surface all of the different entities and individuals want to assist the beneficiary, inevitable conflicts will arise, especially as the funds collected become more substantial. As an attorney, you should clearly define the scope of your representation to include who is your client.

## Title search: The Unexpected Complexities of Tragedy (Fundraising, Special Needs Trusts, Medicaid & Tax Deductions)

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