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## **Selecting a Trustee of a Special Needs Trust**

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## **I. Introduction**

In my current employment, I work for a large bank that administers over a thousand special needs trusts, in over 40 states nationwide, with an average account size of close to \$1 million. In the past, I have worked as an attorney, drafting a wide variety of special needs trusts – everything from court-created, first party SNTs with several million dollars in assets, to third party SNTs, intended to handle small gifts from family members and friends, in amounts as small as a few thousand dollars. I have seen special needs trusts that hold complex assets, like oil, gas, and mineral interests, real estate, and interests in closely-held family businesses, and I have seen special needs trusts that were designed to hold nothing but a small amount of cash, invested in CDs or money-market funds. There are special needs trusts that require dozens of disbursements each month, with complex payroll for caregivers and significant medical care disbursements, with discretionary distribution budgets over \$500K per year; and there are special needs trusts for highly-functioning, disabled individuals, who need nothing more than a few distributions each year. Some SNTs will require the trustee to be intimately involved with the Social Security Administration, state Medicaid agencies, and other public benefit programs; in other situations, the trustee will have little or no involvement with public benefit officials, courts, or the appeals process.

When considering the most appropriate trustee for a special needs trust, it is important to consider the likely character or nature of the SNT at issue, and the work at hand in administering that trust. Good-fitting trustees are like good-fitting shoes: one size does not fit all. The choice of the most appropriate trustee often depends on a variety of factors and circumstances, ranging from the disability of the beneficiary, to the mix and variety of assets in the trust, to the court and legal requirements of the trust, to the beneficiary's need for advocacy regarding public benefits, and many more factors. Why is the choice of trustee important? Could any bank or financial institution with trust powers in the state properly administer a special needs trust? Couldn't a well-intentioned family member serve as trustee of an SNT and do the job for less cost and expense than a corporate fiduciary?

The adverse consequences of making the wrong choice are also wide ranging and could include any of the following:

- A trustee with insufficient technical expertise on SNTs could make distributions that temporarily (or permanently) disqualify the beneficiary from important benefits such as SSI/Medicaid
- An inexperienced trustee could be overly protective and risk intolerant and refuse to make distributions at all, such that the beneficiary does not receive adequate support and assistance from the trust
- A trustee with a limited understanding of statutory requirements and SSI regulations could improperly accept additional assets into a trust, in some cases unnecessarily

subjecting those assets to Medicaid payback or jeopardizing the beneficiary's means-tested benefits

- Poor communication between the trustee and the beneficiary (or the beneficiary's representative) could lead to an adversarial relationship and, once again, inadequate or improper distributions from the trust
- A trustee could fail to properly manage, protect, and enhance specialty assets such as real estate, oil and gas interests, or other unusual assets
- A trustee could run afoul of tax laws or employment laws
- Poor investment decisions could lead to poor investment performance
- A beneficiary with complex care needs could be left with insufficient or inappropriate care and attention

Anyone who has administered both a fair number of Special Needs Trusts (SNTs) and a variety of other types of trusts would quickly agree that SNTs are simply not like any other trust. A trust officer on an SNT feels, at different times, like a banker, a lawyer, a social worker, an investment advisor, a bill pay service, a mental health counselor, a benefits advocate, or an insurance agent. And there are some days when the trustee can have to play many of those roles all at once.

SNTs involve bill pay and distribution activity levels that are 3-4 times more than a typical irrevocable trust or revocable management trust. This is because the SNT beneficiary often has exceedingly high care needs, and yet all bill payment and distributions must be coordinated with, and made directly to, the vendor or service provider. SNTs may involve beneficiaries whose disabilities make them difficult to reason with, or difficult to comprehend. The trustee may be asked to provide advice, guidance, or assistance in applying for Social Security benefits, Medicaid, Medicare, or other benefits. The trustee needs to have at least a basic working knowledge of complex rules and regulations (the POMS), which are subject to frequent amendment, and which directly affect the decision-making process for making distributions from the trust. There may be considerable court requirements or accountings involved. The trustee may need to know how to engage appropriate professionals, such as care managers, attorneys, and social workers, to ensure that the beneficiary gets sufficient and appropriate care in his or her home. If the trustee is not fully aware of what to expect, and fully prepared for meeting the needs of the beneficiary and the trust, administration of the trust can quickly become a vicious roller coaster ride.

In this paper, I hope to provide some guidance regarding the factors and circumstances that should be taken into consideration when selecting a trustee for a special needs trust. As discussed more completely in the paper, there are some circumstances where only a corporate fiduciary is an option to serve as trustee, and there are other situations where either an individual trustee or a corporate fiduciary could be an option. This paper provides a discussion of the factors that should be considered when selecting a corporate fiduciary, factors that should be

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