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SNT Trustee Obligations & Trust Administration Best Practices

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fi·du·cia·ry | \fə-ˈdū-shē-er-ē: n. *“One, such as an agent of a principal or a company director, that stands in a special relation of trust, confidence, or responsibility in certain obligations to others.”*

Latin: fiduciarius, from fiducia - “trust”

I. Introduction

A trustee or fiduciary is charged with many responsibilities and tasks; but above all else, a fiduciary has the duty of loyalty to its beneficiaries. This duty of loyalty to and advocacy for beneficiaries is especially relevant in the administration and drafting of Special Needs Trusts (“SNTs”), also known as Disability Trusts or Supplemental Needs Trusts. As an SNT trustee, we are blessed to serve one of the most underserved but most deserving populations in our country. However, the complexity of public benefits structures and regulations, diversity of clientele and liability risk of serving as trustee can be daunting. Coupling these issues with recent litigation against SNT trustees, the ever-changing public benefits landscape, new tax regulation, ever-evolving audit requirements from state and federal agencies and a client base that requires and deserves a more “hands-on” approach, and the difficulty of SNT administration comes into full focus. Thankfully, SNT administration is filled with “those” stories wherein the SNT trustee is able to make a truly significant and tangible difference in their beneficiaries’ lives. This presentation will delve into case law affecting the SNT trustee while providing best practice tips applicable to all fiduciaries in order to avoid litigation and reputation risk. Additionally, the ever changing world of federal and state oversight as it relates to SNTs and SNT beneficiaries will be addressed. All of the information provided herein will assist the SNT trustee, drafting attorneys and attorneys representing the SNT trustee in setting and maintaining beneficiary expectations, thus promoting a meaningful and productive relationship between trustee, attorney and client.

II. Trustee Duties

There are a myriad of duties assigned to any fiduciary or SNT trustee including, but certainly not limited to:

- Secure and protect trust assets
- Loyalty and impartiality

- Compliance with trust document terms
- Settlor intent
- Accountings to all interested parties
- Statement production
- Discretionary distribution determination
- Investments (making trust property productive)
- Compliance with federal and state regulatory agencies
- Compliance with federal, state and county public benefits regulations
- Tax preparation
- Remainderperson considerations
- Court filings as applicable
- Staying abreast of new legal and tax changes

In addition, the trustee is charged with the duty to balance the beneficiary's current needs against the projected longevity of the trust. A "jack-of-all-trades", the SNT trustee is sometimes required to simultaneously assume the roles of trustee, legal advisor, financial analyst, budgeter, public benefits coordinator, case or care manager, family mediator, and psychologist. Oftentimes, the SNT trustee must delegate some of these roles to other professionals more well-versed in these areas so as not to become "jack-of-all-trades, but master of none." Great care and due diligence must be exercised in such delegations as ultimately the liability for the delegated services can certainly fall back on the trustee.

One of the most difficult challenges facing the SNT trustee is its affirmative obligation to be proactive in finding support services and public benefits specific to their beneficiaries' disabilities (or in delegating such obligation). In *In re JP Morgan Chase Bank, N.A.*, 38 Misc.3d 363, 956 N.Y.S.2d 856 (Sur. 2012) (the "JP Morgan Chase Matter"), the New York County Surrogate's Court found that the "trustees...were affirmatively charged with applying trust assets to [the beneficiary's] benefit." The trust in question was a third party discretionary trust for the benefit of Mark, a young man on the Autism Spectrum living in a group home that provided the assistance and constant supervision he needed for his Activities of Daily Living ("ADLs"). Through the court proceedings, it was discovered that neither co-trustee or their duly acting agents had visited Mark in five years. While Mark did receive Medicaid-funded residential program benefits, the residential provider was never tasked with determining how Mark's private funds would best be spent to improve his quality of life, potentially through day programs, educational expenses, additional caregiver or companionship services, vacation expenses and the like. As such, it was determined that Mark lacked any kind of advocacy for his ongoing needs except for \$3,525 expended from a multi-million dollar trust for a care manager. The overwhelming majority of distributions from Mark's trust were fees for the trustee and the trustees' counsel. Tellingly, the decision in this case includes a remark from the judge stating that when she asked the corporate co-trustee about the lack of activity in the trust and advocacy for the beneficiary, the trustee's "excuse for inaction was its lack of institutional capacity to

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