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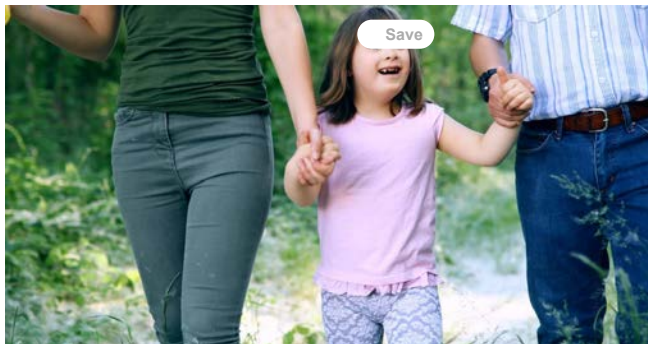
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## Administration of Special Needs Trusts: Development of an Improved Approach (Part II)

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This is the second installment of an article that appeared in the March 2019 Issue of the NYSBA Journal.

The authors wish to express thanks to NAELA Fellow Ron M. Landsman for his willingness to offer insight and comment on the ideas expressed in this article. His article in the Spring 2014 issue of the NAELA Journal, *When Worlds Collide: State Trust Law and Federal Welfare Programs*, NAELA Journal Vol. 10, No. 1 (Spring 2014), remains one of the most important writings in the area of special needs trust practice in many years.

In Part I we discussed the different standards of review courts use to assess the work of supplemental needs trust (SNT) trustees. One derives from guardianship practice (a “best interest” assessment), another from benefit program eligibility (a “government benefit” assessment). Both incorporate

important considerations when analyzing a distribution from a supplemental needs trust, but neither represents an appropriate standard for judicial review in determining whether a trustee properly exercised its discretion.

The appropriate standard of review for a distribution from a supplemental needs trust is the same one that applies to any discretionary trust: abuse of discretion. That standard provides the flexibility and protection afforded the trustees of other discretionary trusts so long as the trustee follows the commonly accepted rules of fiduciary conduct, as supplemented by additional steps that acknowledge the beneficiary's disability and eligibility for government benefits.

To obtain the protection afforded to trustees of other discretionary trusts, the SNT trustee should acknowledge and address three aspects of SNT administration that are not at issue in the administration of other discretionary trusts:

1. A beneficiary's cognitive disability may prevent reliable communication with the trustee;
2. Programs and services available to support the beneficiary in the community represent an additional resource to be considered before using trust funds to purchase a good or service; and
3. Traditional, informal means of settling accounts may be insufficiently protective.

Effective SNT administration requires the trustee to establish a means of communication with the beneficiary or a beneficiary's representative, a protocol for assessing programs and services, and a plan for regular accounting and periodic settlement. If followed, and presuming that the trustee has satisfied the other, traditional obligations of fiduciary conduct, the trustee's reasonable exercise of discretion should be supported upon judicial review under an abuse of discretion analysis, even if the court would have made a different decision on the same set of facts.

## **Basic rules of fiduciary conduct applicable to all trustees**

All trustees must follow the basic rules of fiduciary conduct, requiring them to apply income and principal in accordance with

the terms of the governing document,<sup>1</sup> account for the application of principal and income,<sup>2</sup> invest prudently and in accordance with the terms of the trust,<sup>3</sup> prepare and file tax returns,<sup>4</sup> and keep beneficiaries informed of how trust funds are being invested and/or utilized.<sup>5</sup>

## Exercising discretion

Trustees of discretionary trusts must exercise judgment when making distribution decisions. In New York, case law follows a few common lines of inquiry in determining whether a trustee properly exercised discretion:

1. Does the trustee have an established process for review and consideration of beneficiary requests?<sup>6</sup> In other words, is there evidence that the trustee is making informed decisions?
2. Did the trustee follow its own established policies in making distribution decisions, and did it document the basis for those decisions?<sup>7</sup>
3. Did the trustee exercise independent judgment rather than deferring to a beneficiary or a beneficiary's representative?<sup>8</sup>
4. Does the document require the trustee to consider whether the beneficiary had other assets and resources that could be used in lieu of using funds from the trust, and if so, did the trustee do so?<sup>9</sup>
5. For significant or long-term expenditures, did the trustee balance the immediate needs of the beneficiary with probable future needs?<sup>10</sup>

If the trustee can answer these questions in the affirmative, courts will typically support the trustee's discretionary decisions even if the judge or another party to the proceeding might have made a different decision on the same set of facts. In the realm of discretionary trusteeship, the process of proactive administration protects the fiduciary and beneficiary alike. When the trustee follows the process of communication, investigation, consideration and documentation, the beneficiary receives the benefits of the fiduciary arrangement. In exchange, the trustee is protected from later challenge to its distribution decisions simply because another might have reached a different conclusion.

This quid pro quo assumes that both the trustee and the beneficiary are capable of self-advocacy. But when a beneficiary

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