



“Special Needs Trusts—Choice of Trustee”

By Dennis C. McAndrews, Esquire

Congressional approval of Special Needs Trusts occurred in 1993, and it makes sense to examine the state of the practice in developing such trusts. As Special Needs Trusts become better known to personal injury attorneys and their disabled clients, many more settlements and judgments are using the Special Needs Trusts as a vehicle to allow disabled plaintiffs to continue to receive Medical Assistance and Supplemental Security Income. However, a few common – and often critical – mistakes are emerging in some Special Needs Trusts. Indeed, over the last few years, an unfortunate, but growing, part of my own practice has involved "renovation projects" where a disabled beneficiary has been disqualified for public benefits due to an improperly drafted trust or errors by trustees who are not schooled in the maintenance and operation of Special Needs Trusts.

It is critical that the personal injury attorney and the draftsman of the Special Needs Trust consult early in the process concerning the selection of a trustee for the Trust. The portions of the Social Security Act which recognize Special Needs Trusts are silent on the type of trustee which may be selected, but the Rules of Civil Procedure in Pennsylvania require that where the injured party is a minor or an incompetent, a corporate fiduciary must be used. Compare 42 USC §§1396p(d)(4) with Pa.R.C.P., Rules 2039 and 2264. Historically, locating a corporate fiduciary to handle a Special Needs Trust with the value of less than \$250,000.00 has been extremely difficult, and most courts have been willing to appoint a responsible individual to serve as trustee-fiduciary in recognition of this difficulty, despite the apparent mandate of Rules 2039 and 2264. However, two new corporate fiduciaries have arrived on the scene in Pennsylvania which are specifically designed to meet the needs of individuals with disabilities, and which will accept much smaller trusts. Both of these corporate fiduciaries were created by local Associations for Retarded Citizens, an organization with a long history of advocacy on behalf of persons with disabilities. The ARC Community Trust of Pennsylvania operates out of King of Prussia, and was formed by a consortium of local ARCs in Southeastern Pennsylvania. The ARC Family Trust operates out of Allegheny County and was developed through the Allegheny County ARC. Although these organizations are relatively new, they are developing a solid track record of providing services as trustees for both Special Needs Trusts and "pooled trusts" (commonly used for very small settlements) whereby a Master Trust Agreement is used with an individual account for each disabled beneficiary in a commonly invested portfolio. However, in contrast to individual Special Needs Trusts, in a pooled trust, no contingent beneficiary may generally be named to take trust proceeds after the death of the disabled beneficiary.

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Neither the personal injury attorney nor the trust practitioner should presume that the selection of a corporate fiduciary will insure the proper management of the Special Needs Trusts. Some corporate fiduciaries are very capable in this area; others have little or no experience and training. We have been hired to address a series of substantial mistakes made by a corporate fiduciary and its investment advisor. Improper distributions from the trust caused the profoundly disabled minor beneficiary and his mother to lose their Medical Assistance and Social Security benefits, and caused the parent to become liable for a substantial Social Security overpayment—money which the parent no longer possessed and could not repay. Neither the corporate trustee nor the financial manager even possessed a copy of the trust or a copy of the court order creating the trust, and substantial intervention by our office was necessary to requalify the disabled beneficiary and to find appropriate funding sources to allow the parent to pay the past Social Security overpayment. Substantial in-service training was necessary by our office to bring the corporate fiduciary and the financial advisor up to speed in the appropriate management and distribution of proceeds from a Special Needs Trusts.

In circumstances where an individual, non-corporate trustee is utilized (typically in smaller trusts where the disabled beneficiary is neither a minor nor an incapacitated person) it is essential that a person be selected who will (1) manage the trust corpus prudently, (2) make only lawful and appropriate distributions to the disabled beneficiary, and (3) maintain accurate records to allow for periodic reporting to government agencies as necessary (especially at the termination of the trust). Therefore, an individual with a basic and fundamental understanding of financial transactions should be selected; the individual should be well-organized and able to recognize the importance of adhering to the requirements of the trust document. At the same time, an individual trustee need not be an expert financial planner, as the trustee can appropriately hire professional advisors (financial, legal, tax) as a proper expenditure from the trust to insure effective management of the trust.

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