

Selecting a Trustee for Your Child's Special Needs Trust

One of the key factors in predicting whether a special needs trust will succeed in accomplishing your objectives is the selection of the trustee; when the beneficiary of the special needs trust suffers from mental illness, finding an ideal trustee may be *the* single most important consideration.

A brief review of the role of trusts, in general, and special needs trusts in particular, will help illustrate the importance of the trustee's role. In essence, a trust is a contract. The most common type of trust is the revocable "living trust," which generally is used to avoid the probate court process at death. The living trust avoids the cost and delay of the probate court process if assets are re-titled into the name of the trust; at death, the trustee distributes the trust assets to named successor beneficiaries in accordance with the terms of the trust/contract. With respect to an irrevocable special needs trust, however, the central purpose is to set aside assets for a disabled person, including a child, without affecting the child's financial eligibility for public benefits programs, such as Medicaid and Supplemental Security Income (SSI). If the special needs trust is drafted properly, the assets contained in the trust will not count as the child's asset/resource; and, if administered appropriately, the distributions will not count as income to the child. Simply put, a special needs trust works because the child has no right to demand distributions from the trust; rather, full discretion over the use of trust assets rests solely with the trustee. Having full discretion means that the trustee can deny any request the child/beneficiary might make, even if reasonable.

The trustee of a special needs trust has a number of responsibilities. First, the trustee is responsible for investing trust funds and managing other trust property, such as real estate. Given the volatility of financial and real estate markets, this duty alone can be overwhelming for many individuals. Second, the trustee must respond to requests for distributions. Since a special needs trust is designed principally to supplement public benefits which may come in the form of cash or medical assistance, the trustee must understand of the different public benefit programs in order to evaluate whether the assistance requested should or could be covered by a public source. Third, when making distributions, the trustee must be mindful that certain distributions might be counted as "income" to the trust beneficiary; if a mistake is made, a trustee unwittingly may cause a disruption in the beneficiary's Food Stamps, Medicaid, SSI or other benefits.

Many parents initially are inclined to appoint family members or close friends as trustees of a special needs trust, perhaps hoping to save money in the form of trustee fees, or to recognize the important role that individual has played in their child's life. Unfortunately, many trusts fail because trustees, even though well intentioned, often are ill equipped for the complexity of the job. For instance, when it comes to investing money and managing real estate, professional trustees – such as trust companies, banks or certain non-profits – generally are more skilled and knowledgeable than lay persons. In addition, professionals either are better informed about the ins and outs of public benefits eligibility, or they know when to seek out expert assistance.

More importantly, by not having a personal history with the trust beneficiary, professionals are more likely to respond to calls from a beneficiary without fatigue or irritation. In contrast, family members or friends often find that relationships with the trust beneficiary become strained by having to field multiple requests for assistance. Thus, rather than being a brother, sister, uncle or friend to whom the beneficiary might turn for social interaction or emotional support, that individual now becomes the gatekeeper of funds – or, the person who denies requests.

Although it may be imprudent to name family members or friends to serve as trustee, there are other important roles they can play. For instance, a special needs trust can be designed to have a "trust advisory committee, which would be entitled to accountings from the trustee, and would be empowered to guide and oversee the trustee. Other trusts have a "trust protector," whereby a family member is given the authority to replace the trustee at any time. Under either of these structures, family members and friends are involved, but in a strictly supervisory capacity which also provides a check and balance on the trustee.



Butenhof & Bomster, PC

132 Middle Street – Manchester, NH 03101
Phone (603) 296-0428 Fax (603) 296-0430
office@butenhofbomster.com

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