

When selecting a family member as Trustee:

Parents typically face two choices when selecting a trustee to manage a special needs trust for their child when the parents have died. One choice is a professional trustee—a bank or trust company or an individual who is in the business of serving as a trustee. Of course, professional trustees charge fees, and many banks and trust companies have a minimum trust balance requirement in order to serve as trustee. The other choice is to name a family member to serve as trustee, such as a sibling of the trust beneficiary or some other trusted family member. However, in most cases, this family member will never have served as a trustee and may have no idea what will be required to take on the responsibilities of a trustee.

As lawyers, we regularly (some might say incessantly) remind our clients that agreeing to serve as trustee brings with it some very important responsibilities and that the failure to carry out those responsibilities can have very unfortunate results. Because a trustee is managing money for the benefit of someone else, the law holds the trustee to a much higher standard of conduct than if the trustee were managing his or her own assets. In other words, a person can be sloppy about his or her personal financial records, but if he or she agrees to manage someone else's money, the rules are different. The law imposes a "fiduciary duty" on trustees—the duty to act in the best interests of the beneficiary (the person for whose benefit the trust was established).

This fiduciary duty is magnified when the beneficiary, due to a cognitive disability, does not have the capacity to oversee the trustee's performance. Understanding the requirements of fiduciary duty is especially important for trustees of special needs trusts. First, there are the usual fiduciary duties, among which are the obligations to keep accurate and detailed records, to ensure that funds are invested in a responsible manner, not to engage in "self-dealing" or to commingle the trust assets with the trustee's own, and to ensure that fiduciary income tax returns are filed on a timely basis.

In addition, the trustee of a special needs trust must administer the trust in a manner that is consistent with the rules of the Medicaid and/or Supplemental Security Income (SSI) programs. The trustee's failure to carry out these responsibilities could lead to a termination of income benefits and medical coverage for the beneficiary. And if the trustee's mistakes are egregious, the trustee may end up being personally liable for the financial consequences, meaning that the trustee would have to dig into his or her own pocket to compensate the beneficiary for these mistakes.

We often notice mistakes when we prepare accountings for our trustee clients. And while professional trustees, such as bank trust departments, also make mistakes, we see more problems when family members serve as trustees. But when we point out these mistakes to the trustee, we will often get these responses:

- "I don't keep detailed records of how I spent the money. If necessary, I can tell you what you need to know just from memory."
- "Of course I used trust funds for (the beneficiary's) benefit, and I resent the implication that I might have misspent trust funds or used some of this money for my own expenses."

- "Yes, I signed the trust agreement, but I never really read the document. I've been too busy caring for (the beneficiary). I've always been fair and honest in how I've used funds in the trust for (the beneficiary's) benefit, and I don't care what anyone thinks about the job I've done."

Unfortunately, in the world of trusteeship, fair and honest is not enough. A parent may have chosen Uncle Joe to serve as trustee, and he may be the most honest, well-intentioned and dedicated advocate one could ever find for the child. Uncle Joe may spend hours as a friend and companion each week, he may talk to doctors, social workers and residential counselors, and he may have used trust funds to make the child's life as comfortable and enjoyable as possible. Nonetheless, if Uncle Joe cannot accurately account for every dollar he spent from the trust, he remains potentially liable. And if he spent trust funds in a manner that violated an SSI or Medicaid program rule, then he put the child's government benefits at risk, regardless of how genuine his intentions might have been.

All in the family

We know that choosing the trustee of a special needs trust can be one of the most difficult decisions our clients must make. Our clients who are parents of children with disabilities naturally gravitate toward other family members—siblings, cousins, aunts and uncles. In most instances, clients select family member trustees for both emotional and financial reasons.

Clients may believe that a family member will have an emotional attachment to the beneficiary of the trust and as trustee will stick with the job, come what may. Clients also assume that a family member trustee—unlike a bank—will not charge a fee, thereby saving the trust considerable money over the course of the beneficiary's lifetime.

Hindsight is always 20/20

After many years of practice, and after working with many, many trustees over the years, we have changed our way of thinking. While in some situations it is appropriate for a sibling or other family member to serve as trustee, in many cases, particularly with a larger trust, naming a family member is not the best decision, for several reasons.

First, clients fail to appreciate the amount of work involved in being a good trustee. Even in those instances where the family member retains outside assistance for such services as tax return preparation, annual accountings, and investment review, the family member remains legally responsible to ensure that all of those steps are taken and is potentially liable if any step is not taken. A good trustee needs to actively supervise all trust activity, and it can be a time consuming job.

Second, clients often assume that a family member trustee will not charge for services. In fact, every trustee—family member, bank or some other professional—is entitled to a fee as a matter of law, and no trustee can be compelled to serve without the right to be paid for time spent.

Experience has taught us that these two assumptions—that a family member can handle the job without a problem and that the job will be done for free—are inaccurate. In recent years we have seen more and more family member trustees resign from the job. The time and effort required to do the job right was simply more than they expected, and they wanted out. They may want to remain involved in the life of the child with the disability in some capacity, but not as a fiduciary charged with managing money and property.

For those family members who continue to serve as trustees, many have begun taking compensation. And so they should—serving as a trustee is often time consuming and complex. Trustees who take the job without any compensation often end up resentful and frustrated. But once the family member starts taking commissions, there may be no significant cost savings over what a corporate trustee would charge. In that case, it may turn out that our client was operating under a false assumption when selecting the trustee. The point is that the client should realize that a family member may not be good at handling these pesky fiduciary tasks and may still charge a commission.

Are we saying that a family member should have no role? Absolutely not. We are saying that family members are often better suited for other roles: guardians, agents under powers of attorney or health care proxies, or just as plain old advocates or companions. In those cases where a bank or other professional trustee is used, the family member can still be given certain rights to make sure things are going well, such as the right to request copies of all trust financial statements, the right to receive annual accountings of trust activity, and if the bank or professional trustee is not responsive or proactive, the right to change trustees. Many family members would choose this level of responsibility over outright trusteeship if they understood the demands of serving as trustee. Our job as special needs planning attorneys is to help our clients understand the options.