When Serving As Trustee: Five Rules;

We acknowledge that some individuals have the time, inclination and aptitude to provide valuable and credible fiduciary services, in many and perhaps most instances, individuals fail to appreciate the time and effort that is required to do the job correctly, and they do not understand the risk of liability in the increasingly contentious world of Medicaid eligibility and reimbursement.

Indeed, our experience has been that many individuals-typically family members with nothing but the best intentions when they accept the job-either resign from the position, or they begin to take compensation in an amount which is about same amount that a professional trustee (a bank or trust company) would charge. For those individuals who stay on as a paid trustee, they often have to rely much more heavily on paid professional support from attorneys, accountants and others. As a result, the arrangement is usually more expensive, and the family member trustee has less time to spend being a friend and companion to the beneficiary with the disability, the one role that is nearly impossible to replace. We thus believe that clients should strongly consider using banks and trust companies to fill the role of trustee, and allow family members to be just that.

Nonetheless, many of our readers will find themselves serving as trustees, whether by choice or necessity. In this article we provide a list of suggestions that may help make their jobs easier, and highlight a few common mistakes that we hope they will avoid once they take the helm.

1.Keep Receipts; The rule is simple: no receipts, no reimbursement.

You may think that it goes without saying that a trustee will keep receipts, but we are continually surprised at how frequently a trustee is unable to produce any documentation which corroborates purchases made with trust funds. Often the issue arises in the context of reimbursement of expenditures the trustee has made.

Here's the situation. Say the sister of a trust beneficiary is shopping at a local mall and sees a great deal on a nice winter coat that she knows the beneficiary needs. She buys the coat for $53.19 using her own funds and delivers the coat to her brother. The sister then sends an e-mail to the trustee (perhaps another sibling) asking the trustee to send her a check for $53.19 to reimburse her for the coat. The trustee writes a check from the trust checking account for $53.19 payable to the sister, and writes in the check ledger "reimbursement - winter coat." Is the expenditure permissible? Absolutely. Trust funds may be used to purchase clothing for the beneficiary, the beneficiary needs the coat, and the price is reasonable. So far so good.

The problem is that without a receipt there is no way for the trustee to prove that a coat was actually purchased with the money. The trustee may say, "But it's my sister - I know she wouldn't lie to me." That may very well be the case, but in the world of trust administration, the trustee cannot rely on getting the benefit of the doubt. If the trustee cannot corroborate a purchase with a receipt or other documentation from the merchant, the trustee runs the risk of having to reimburse the trust out of the trustee's own funds.

2.Don't Use an ATM Card

Some people prefer to pay for everything with cash. They may not like credit cards because of the risk of paying interest on a purchase, or they may dislike the idea that the credit card company maintains a running record of their financial activity. Or they may just like the feel of a roll of bills in the pocket. They may feel that if they need something and there isn't enough money in the bank, they simply will wait to make the purchase until they save enough money to do so. We respect this school of thought.

Unfortunately, this practice can be a very cumbersome practice for a trustee. When we prepare accountings for our trustee clients, we often see ATM withdrawals followed by a description of the item purchased with the withdrawn funds. For example, a trustee may provide us with a copy of her check ledger which shows a $60 ATM withdrawal, followed by the explanation, "winter coat for (beneficiary)."

Is the expenditure permissible? Absolutely (see explanation in item 1 above). But exactly $60.00 for a winter coat? How often do you pay an even dollar amount for an item? Almost never. If a trustee insists on using cash to make purchases, then she should follow the rule outlined in item 1 above (keep receipts), and make sure that any change that is left over from a purchase is returned to the trust. So in our example, the check ledger would show a $60.00 withdrawal for purchase of the coat, and then a $6.81 deposit reflecting the unused balance. The trustee would have the receipt for $53.19 to support the expenditure.

Doable? Yes. But on a recurring and regular basis, it can become overly cumbersome and lead to mistakes. And what if the balance is not returned to the trust account? The trustee remains *personally liable* for the difference. Our advice? If a trustee wants to manage her personal financial affairs using only cash, that's fine. But when serving as trustee, write checks or use a credit card (and pay the credit card bill promptly and in full).

3.You CANNOT Use Trust Money to Make Gifts

Recently our law firm prepared a final accounting for the trustee of a first-party supplemental needs trust. That type of trust must comply with certain rules required by the Supplemental Security Income (SSI) and Medicaid programs. Among them are that the trust must be for the sole benefit of a person with disabilities. A final accounting is required when the beneficiary dies and the trust terminates. In this case, the beneficiary was a relatively young woman who suffered a catastrophic injury and required nursing home care. She was unable to communicate and unable to travel outside of the facility; thus there were few opportunities to utilize trust funds for her direct benefit.

A review of the accounting prepared by the trustee revealed that many distributions from the trust account were for birthday gifts, graduation gifts, and holiday gifts for the beneficiary's children and other family members. When we inquired about these distributions, we were told by the trustee that this is how the beneficiary "would have wanted her money to be spent" in light of the fact that it could not be used for her direct benefit, that at least her children and other family members would derive some benefit.

We understand the trustee's thinking, as well as her frustration over the fact that this money was otherwise going unused. Why shouldn't this money be used to help this young woman's family, especially since this would certainly have been her intention if she were able to make her wishes known?

The simple reason is that the law requires a first-party supplemental needs trust to limit expenditures to the purchase of goods and services for the person with a disability. Not for her spouse, not for her children, not for her church or synagogue, and not for her favorite charity. And if the terms of the trust are not followed, then the preferential treatment that is given to these trusts by the SSI and Medicaid programs may be lost, meaning that the individual may lose Medicaid coverage, may lose regular monthly income from the SSI program, and may be forced to begin paying privately (using trust funds) for goods and services that would otherwise be provided by these government benefit programs.

The bottom line? These government benefit programs are voluntary. If an individual with a disability has money, and she (or her guardian or advocate) wants the freedom to spend the money in any manner she wants or give it away whenever she wants, then she is free to do so. But once she decides to take advantage of the benefits provided by the SSI and Medicaid programs, she must comply with their rules. And those rules say that funds in a first-party supplemental needs trust can only be used to purchase goods and services for the beneficiary-they cannot be used to make gifts. Period.

4.Don't Throw Anything Out Until Your Job is Done

When an individual accepts the role of trustee, she should understand that that every trust transaction will someday be subject to review and scrutiny. Indeed, a fundamental responsibility of every trustee is the responsibility to account, i.e., to provide detail, to the penny, of what the trust took in, what the trust earned (in the form of interest and dividends), what was spent, and what is left. This obligation applies to every trustee, be she the trustee of a special needs trust, a life insurance trust, or one of the many other types of trusts that are prepared for estate planning purposes.

Unfortunately, this is one of those areas where it is easy for trustees to get lazy because in many instances the trustee does not have to "pay the piper" until the job is done. In other words, unless the trust document or some other court order requires it, a trustee is not typically obligated to prepare accountings of trust activity on an annual basis. Rather, the accounting is often not required until the trustee wants out of the job (i.e., the trustee wants to resign), or until the trust terminates (usually at the beneficiary's death). At that point, the trustee must prepare a comprehensive accounting beginning with the date the trustee was appointed and continuing through the date of termination.

A good trustee will retain all financial records relating to the trust until such time as her final accounting has been prepared, reviewed, and she has been released from any further responsibility and liability. In some cases these comprehensive accountings can cover a span of years that stretches into decades. Without good financial records, it can be nearly impossible to produce a detailed historical summary of trust financial activity.

Unfortunately, many financial institutions do not maintain financial records for more than a few years. Understanding this, it is the trustee's responsibility to retain hard copies of all bank and other financial statements, the check ledger and other documentation of trust activity until her final accounting is prepared and approved.

It is a good practice for all trustees to periodically have their accounts settled on a voluntary basis by preparing interim accountings. These interim accountings will wipe the slate clean for the period of time covered, and once the trustee's accounts have been settled, the trustee is able to get rid of the underlying financial records. Just remember, there is no statute of limitations in the world of trust accountings. Until such time as the trustee's job is done or the interim accounting has been approved, she is on the hook. Don't throw anything out.

5.Don't Take it Personally

When you accept the role of trustee, you accept all of the important responsibilities that accompany the position. You may be a favorite sibling, a dedicated advocate, or a loyal family friend; nevertheless, in the world of trusteeship, none of those relationships matter. What matters is your ability to follow the rules, as outlined in the trust document and as provided for in the government benefit programs which support your beneficiary. Thus, if you cannot provide a receipt for the purchase of the winter coat, you should expect that the person reviewing your accounting-whether it be a judge, an attorney for your beneficiary, or a representative of the Medicaid program-will not give you the benefit of the doubt, and you may have to dig into your own pocket to reimburse the trust account.

As they say in the movies, "It's not personal. It's business." Treat it as such.