

DESIGNING A SPECIAL NEEDS TRUST (SNT)

Published in the December 2000 Issue of *The NAELA News*

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When I got out of law school I was fortunate to go to work for a wise "old" lawyer who gave me good advice, such as: "A form is just a checklist and every form is an incomplete checklist." "A form should never be used until you know what every provision means and why the provisions are in the document."

Recently, on the NAELA Listserve, Ed Wilcenski from Albany, New York wrote: "I would be interested in hearing how other members might handle what I have found to be a fairly common request.

Parents of a disabled minor would like to design their wills to provide their selected guardians with an option to reside in their (the parents') residence should they agree to serve, as the parents' home is much larger and is already handicapped accessible (wheelchair ramp, wide doorways, etc.)

Some ideas: leave the home in a special needs trust for the minor, and include a provision allowing the children to live in any real property owned by the trust for as long as needed, in the trustee's discretion; Special Needs Trust without any mention of real property, but provide notice to the trustee of the parents' intentions in a memorandum separate from the will; Provide the guardians with a formal right of occupancy; Outright ownership to the guardians for a term of years; Facts of the case will certainly influence this decision, but I would be grateful for your thoughts."

He did not request a Special Needs Trust (SNT) form. He appropriately asked for thoughts and ideas to consider when designing the Special Trust.

My comments were:

"It takes a lot of thought to draft for the many options. Non-guardians should be trustees with authority to vote on the home issues so self dealing is not an issue. Becoming the substitute parent of a disabled child is a major responsibility. It may require many personal sacrifices. Therefore, provide financial assistance for the caregivers. A committee of trustees should be given authority to provide money distributions to the caregiver.

CAUTION: In some states minor's have 'probate homestead' rights to live in the home of the deceased parent until the child is 18. This encumbers the title. To avoid this potential problem (especially for every single parent with minor children) put the home in an intervivos trust. Several years ago I had a single parent with cancer. She had minor children. I could not figure out how a will could avoid the homestead right of the minors or how to terminate the minor's interests prior to maturity. It was a situation where the home would not be the best home for the potential trustees/guardians who would not be moving into the dying parent's home."

Ruth Phelps from Pasadena, California, commented:

"If the guardians are going to live in the beneficiary's home, I would certainly try to work out some of the details beforehand, such as whether they have an obligation to pay rent. If the trust owns the house, and the guardians are the trustees, I would have to think long and hard about whether the failure to pay rent was a breach of their fiduciary duties or self-dealing. It would be much better to have some language in the SNT that said that they could occupy rent-free so long as they were living there with the beneficiary. Then the self-dealing isn't an issue. I don't like the idea of transferring the house to the caregiver. If they turn out to be bad guardians, or greedy, they could institutionalize the beneficiary, sell the house and head for Rio. I heard about a trustee of a SNT who had the SNT buy him a BMW so he could take the trust beneficiary to doctor appointments (had to go in style, I suppose). Not what you like to see, and if the trustee is your client, there doesn't seem to be much you can do about that except resign."

Designing the Trust for disabled children is difficult. Every disabled child is special, with needs that are continually changing and demanding. Every guardian/custodian requires special considerations. Benefitting the beneficiary is the purpose of a trust. But when asking relatives or friends to assume the responsibility for a disabled child, the Trust must benefit the caregivers also. Counsel the parents objectively and design the Trust not just from the parent's objectives, but from the viewpoint of the child and the potential caregivers. The parents may be making presumptions about what the caretakers will want. So be sure your clients have serious and thorough discussions with the proposed guardians/custodians.

Before starting the design, get all the facts. Start your checklist. Go spend some time in the home with the child and his/her family. Find out the child's physical, emotional, healthcare, educational, housing, and companionship needs, as well as the child's awareness. What is the potential for physical and mental improvements? Will the disabled child's siblings be cared for also?

Does the disabled child require constant care and attention? Is the disabled child totally dependent? If so, the prospective caregivers must be fully aware of the responsibilities being accepted. In a year there are 8,760 hours. Most jobs are for 40 hours per week or 2,080 hours per year, less time off for vacations, holidays and sick days. The full time caregivers are accepting 4 ½ full time jobs.

Below are just a few of the many matters to consider:

- Will the proposed guardians/custodians and their children want to move into the parents' home, have the disabled child move into their home or purchase/build a new home?

- Where do the proposed guardians/custodians now live?

- Do the proposed guardians/custodians have disabled or minor children?

- When planning for death of parents without enough assets to care for their disabled child, can life insurance be purchased to increase available money?

- Who will be the guardians/custodians of the child?
- Who will be their successors?
- How long will child's Trusts last?
- What provisions should be made for distributions or withholding distributions. Obviously distributions, should not be made directly to a beneficiary who is on Medicaid or on illegal drugs. If a beneficiary is on Medicaid, then the Special Needs Trust provisions must give complete flexibility to the trustees to benefit the child and make distributions to the caregiver.
- Who will be the Trustees? How much will Trustees be paid?
- Will the caregivers be Trustees?
- Who will be the watch dogs over the caretaker Trustees?
- Are the assets enough to justify a corporate Trustee? Do the proposed individual Trustees have investment experience? Being a Trustee is a lot of work.
- Should individual Trustees serve with the corporate Trustee? Who will be the individual Trustees? Should there be a "committee" to advise the Trustees?
- Should the individual Trustees who have custody of the children have a vote relating to distributions?
- Should the guardians/custodians have authority to occupy the residence? Under what conditions?
- Who should decide whether the guardians/custodians benefit personally from the Trust?
- Who pays for new a refrigerator, TV, garage door, house maintenance, utilities, taxes, etc.?
- If the guardians/custodians have minor children, should the minor children of the guardians/custodians benefit from the Trust?
- Will the distributions from the Trust to caregivers be considered a distribution of income for income tax purposes? Will the caretakers be employees of the Trust, subject to workers compensation (nursing home employees have a very high workers compensation rate), withholding, unemployment tax?
- Will the caregivers/custodians be paid? How much? Who determines?
- Flexibility is a must. Try to imagine all the changes that will take place in 10 years, 20

years, 30 years. What if the husband/wife caregivers get a divorce?

- Does the Trust pay for all the vacation expenses?
- What happens to the home and contents when the disabled child dies or must live in an institution?

Conclusion:

As Elder Law attorneys we have learned how to help not only the elderly, but also the disabled. But our work is not just filling out a form. Advice we give our clients must be targeted to their individual needs. Each form, trust, will, and other documents must be designed to give optimum benefits to the disabled child, help avoid problems and by necessity give benefits to the caretakers and other family beneficiaries.

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