

## **Absolute Discretion: Understanding the Trustee Provisions in Your Child's Special Needs Trust**

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You've researched the importance of setting up a Special Needs Trust to help your child after both you and your spouse have passed away. You've carefully chosen a knowledgeable, experienced special needs attorney to draft the trust, one who is familiar with your child's government benefits and physical or psychological needs. You've weighed the choice of trustee, whether an individual or an institution or both. (See *Exceptional Parent*, April 2008 issue, "Selecting a Trustee.") Now you've received the draft of your child's trust – anywhere from 10 to 50 pages of legalese – and your eyes are glazing over. You'd like to just sign and get it over with.

**STOP.** A Special Needs Trust gives the Trustee enormous power to help – or not help – your child. The Trustee has absolute discretion. Even if you have chosen a knowledgeable, thoughtful, disinterested, caring individual as Trustee, your Trustee may resign, or fall ill, or run into family problems. If you have chosen a corporate trustee, the trust company may "cut back" and fire your trust officer, or move its trust office to a different state. In addition to choosing a good Trustee, you should have a document that includes the tools necessary to protect your child if there are problems with the Trustee or if a different Trustee is serving. This article will review some of the nuts-and-bolts issues your trust document should address, as well as trust language you may want to include – or avoid.

### **Why is the Trustee's Discretion Absolute?**

As explained in the April 2008 issue of *Exceptional Parent*, the Trustee of a Special Needs Trust is usually given the "absolute" discretion to make or withhold payments on your child's behalf. In other words, the trust document will say that the Trustee can "just say no" when asked to pay for your child's medical care or support – or pretty much anything else. This kind of discretion is broader than is typically found in other trust documents. While the language used is needed to preserve the beneficiary's Medicaid and SSI eligibility, the language may also protect the Trustee from the beneficiary's complaints. Courts will generally refuse to interfere with the Trustee's exercise of "absolute" discretion.

Of course, even "absolute" discretion doesn't quite mean "absolute." Trustees are always obligated to act in "good faith." For example, declining to make payments for a beneficiary simply because the Trustee doesn't like the beneficiary is not acting in "good faith." It's not easy to prove that a Trustee has the wrong motives, however. In practice, "absolute discretion" can mean that if there is any plausible reason for the Trustee's conduct, the Trustee wins.

What can a beneficiary do about a stingy or neglectful Trustee? It depends on the state! Some states allow all the beneficiaries (not only your child, but also those who

receive what's left on your child's death, the "remainder" beneficiaries) to get together and agree that a Trustee should be removed. By contrast, other states only permit a Trustee to be removed for "cause," which may be difficult to prove. This writer surveyed the Connecticut cases involving Trustee discretion over the past century and was hard pressed to find any case in which a Trustee vested with "absolute" discretion had been found to violate fiduciary duties.

### **Remedies for Abuse of Trustee Discretion**

**1. Court Action.** States have different laws about which court should have jurisdiction to hear complaints about the Trustee or requests that the Trustee "account" for his, her or its actions. When the terms of the trust are incorporated within a person's will, the courts of the state where that person lived at the time of his or her death will generally have jurisdiction. If, however, the terms of the trust are set forth not in a will but in a separate trust document (also known as an "inter vivos" trust), jurisdiction may depend upon where the Trustee – not the beneficiary – resides. Bottom line: ask your attorney what state's courts have "jurisdiction" over the trust. If the answer is a court thousands of miles across the country, because that's where the Trustee lives, you may want to think about choosing a more local Trustee. Alternatively, ask if the document can include a provision stating that the trust can be enforced in the courts where your child resides.

**2. Include Useful Trust Provisions.** The question of jurisdiction might not matter as much if provisions in the trust document contain an out-of-court mechanism for changing the Trustee. The trust document can specify that someone will have the power to: (1) remove the Trustee; (2) appoint a successor; (3) require the Trustee to file accountings (with the beneficiary, a court, or someone else); and/or (4) on the beneficiary's behalf, petition the court to take action against a Trustee short of removal.

Who should have these powers? Most attorneys will counsel against letting the beneficiary have the power to remove a Trustee of a Special Needs Trust, out of concern that the state might decide that the beneficiary can control the Trustee, and thus control the distributions. Instead, the document can designate a "Trust Protector" who won't have the day-to-day obligations of a Trustee, but who will be authorized to speak for the beneficiary and call the Trustee's actions into question. This may be a good way to involve a sibling who is uncomfortable serving as Trustee. Some documents might include a family-run "Trust committee" to hold this kind of power. Even if no Trustee is ever removed, the threat of removal works wonders when persuading an undesirable Trustee to resign!

**3. Include Trustee Succession Planning.** Many trust agreements fall short when dealing with the issue of succession -- who will replace the Trustee who resigns or otherwise "ceases to serve." Ideally, a trust document will set out a series of successors. Another method is to authorize someone to select the replacement, such as the resigning Trustee or a Trust Protector. If, however, the person who picks the replacement is the same person who removed the predecessor, it may be prudent to require that a replacement be a professional or otherwise unrelated person. [See

Sidebar] This is particularly important if the person with removal power is a remainder beneficiary.

[SIDEBAR] **Trust Clauses and Conflicts to Watch Out For.** Requiring a professional Trustee need not mean requiring that your present attorney serve as Trustee. Unfortunately, some attorneys and corporate fiduciaries are interested less in your beneficiary as a person than in the fees they expect to receive as Trustee. In fairness, your attorney may be justifiably concerned that a non-professional Trustee's mistakes could cause your beneficiary to lose government benefits, or that an unscrupulous non-professional Trustee without insurance coverage might waste or steal trust assets. While these concerns are legitimate, that doesn't mean the trust document should require that a particular attorney or law firm or financial institution must serve in perpetuity. A red flag should go up if the document you are going to sign tomorrow morning contains certain provisions without any suggestion on your part or prior discussion. Provisions you may not want in the trust agreement:

- Attorney/Firm Lifetime Employment Clauses: Designation of attorneys, or law firms, or those who are members of particular groups, as mandatory successor trustees with no language permitting removal or replacement.
- Total Forgiveness Clauses: Broad exoneration of all Trustees in all circumstances (even if these clauses are not always enforceable).
- You're Worth It No Matter What Clauses: Conclusive determination that standard rates or commissions are appropriate

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**4. Include Supportive Provisions.** A trust document can also include provisions that will help the Trustee to do a better job. Even with the best of intentions, individual Trustees are only human, and their other obligations may sometimes get in the way of their fiduciary duties. Removal should be a last resort. For example, the trust can expressly authorize Trustees to appoint co-Trustees, and to delegate authority from one Trustee to another (except where there may be tax or other reasons preventing such delegation). The trust document can and probably should authorize Trustees to hire investment advisors. The document can also make it clear that the Trustee is a Trustee, not a guardian, and is not responsible for applying for benefits (although the Trustee should have the power and authority to apply for benefits if no one else is doing so, or at any rate, doing so effectively).

Some attorneys use the term "Trust Protector" to refer to a benefits expert who must be consulted periodically regarding the appropriateness of expenditures. And, if permitted in your state, the trust document can authorize the Trustee or the Trust Protector to amend the document itself to the extent necessary in order for the beneficiary to continue to qualify for benefits.

**5. Review Trustee Protective Clauses Carefully.** When a trust document “exonerates and indemnifies” the Trustee or states that the Trustee “shall not be liable “ -- except under the most extreme circumstances like willful misconduct or gross negligence – review the language carefully with drafting counsel. You want to be sure you understand in what situations the Trustee will get off the hook when things go wrong and where such clauses may be necessary to protect a Trustee.

Sometimes it is important to protect the "good" Trustee against the "problem" beneficiary. Certain beneficiaries are so difficult to deal with that you may have trouble persuading anyone, even a financial institution, to serve as Trustee. You may want a Trustee to exercise "tough love," which is likely to put the Trustee in conflict with the beneficiary. This may be the case where there are problems of drug addiction or psychotic behavior. An "exoneration" clause can protect the Trustee from liability to the beneficiary (and to any remainder beneficiaries who think the Trustee should have been even tougher). Even in more ordinary circumstances, many people want to protect the Trustee who is a family member, not only because they care about the individual family member, but to preserve family harmony.

There is a fine line, however. On the one hand, if the document includes a broadly worded exoneration clause, the responsible but inexperienced family Trustee won't get sued if honest mistakes happen. That's fair. On the other hand, the trust document should preserve the possibility of redress if Cousin Ned decides to play "day-trader" with the Trust assets and wipes out the trust, leaving your beneficiary in the lurch. A better way to protect Ned or any other family trustee when it comes to investment issues may be to say that the Trustee is protected only if (s)he hires a qualified investment advisor. If the trust fund is not terribly large, you may want to go so far as to require the purchase of a fidelity bond, a kind of "Trustee malpractice" insurance.

Similarly, you may want to protect your local bank from unfair lawsuits by a difficult beneficiary, but not for making bad investment decisions. In that case, the trust document could excuse the non-family Trustee *only* from liability that might arise if the Trustee is overly generous in making expenditures for the beneficiary, and then only if the Trustee has followed the advice of appropriately defined professionals, or a committee of family members, or some other group charged with the duty to advise the bank about the beneficiary's particular needs.

**Conclusion.** While all the provisions in your child's Special Needs Trust deserve your careful attention, practically speaking, the provisions relating to the Trustee's successors, replacement, and liability, may have the greatest impact on your child's life as a trust beneficiary. Your attorney may use the phrase "standard language" and sound frustrated when you ask too many questions, but it is your trust. Be sure you understand exactly what you are signing when you give someone the "absolute" discretion over funds you want to benefit your child.

**About the Author:** Lisa Nachmias Davis is an attorney practicing law in New Haven, Connecticut, most of whose work involves helping people with estate planning (wills and trusts), elder law problems (Medicaid and Medicare, living wills, conservatorships),

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