

Establishing, Onboarding, and Administering a Special Needs Trust – A Corporate Trustee’s Perspective

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Special Needs Trusts are established for many reasons, such as protecting the interests of a disabled child or grandchild or ensuring the safety of settlement money received in response to a catastrophic event. Provided, however, whenever a special needs trust is being established in connection with a personal injury or medical malpractice matter, there are often unique factors that stress the onboarding process such that it is important for the Trustee to have an efficient process for opening the trust account, onboarding the client, and ensuring the initial needs of the client are satisfied. Therefore, to position a new trust relationship for success, it is helpful for a new trustee to separate the account opening process into three different stages: (1) account acceptance and Bank Secrecy Act (“BSA”) and Anti-Money Laundering (“AML”) compliance; (2) satisfying the trust beneficiary’s immediate needs; and (3) long-term financial planning and budgeting.

I. Account Acceptance and BSA/AML Compliance

There is no doubt that corporate trustees require a lot of information whenever establishing, onboarding, and funding a special needs trust. However, these data requests are necessary to ensure the ability of the trust company or bank to comply with BSA/AML laws and regulations. For example, at a minimum, the trustee must obtain the following identifying information from each customer before opening an account:

- Legal Name (Individual or Business)
- Date of Birth (individuals)
- Physical Address
- Identification Number (SSN, TIN, Passport Number, Foreign Alien ID Number)
- Documentation (Trust document, Articles of Incorporation, Doing Business As (DBA) Paperwork, etc.)

The BSA laws were established to require U.S. financial institutions to maintain appropriate records and file certain reports involving transactions and customer relationships. Furthermore, the BSA laws were also originally enacted to assist in investigating an array of criminal activities including income tax evasion and money laundering. Now, BSA reporting also helps investigate individuals suspected of drug trafficking and terrorist financing activities.

Separately, AML laws were enacted to prevent banks from knowingly or unknowingly participate in the process of making illegally-gained proceeds appear legal. For example, the Uniting and Strengthening America by Providing Appropriate Tools to Restrict, Intercept and Obstruct Terrorism Act of 2001 or the USA PATRIOT Act was enacted by Congress in response to the September 11, 2001 terrorist attacks on the United States. The act, in addition to addressing other criminal activity, criminalized the financing of terrorism and enhanced the existing BSA framework by strengthening customer identification procedures.

Given these laws, banks and trust companies enact policies and procedures to avoid unintentionally participating in criminal activity. These policies and procedures are often designed around the following five pillars of compliance:

- Board approved written program including policies, procedures, and internal controls
- Annual independent testing
- Board approved Bank Secrecy Act Officer
- Annual training for all Bank personnel and the Board
- A Written Customer Identification Program (“CIP”)

The CIP program must include account opening procedures specifying the required identification for opening an account. This often involves running the customer’s social security number through RISK ID, a private software program designed to help verify the true identify of each customer. Therefore, in the context of a trust account, understanding the identities of the grantor and current beneficiaries is not only good practice when establishing the initial client relationship, but also is likely a part of the bank or trust company’s CIP program. Which, in turn, allows the bank or trust company to move forward with administering the trust account with confidence that its client is not involved in nefarious activity.

II. Satisfying the Trust Beneficiary’s Immediate Needs

After the trust is executed and the bank or trust company accepts the account, opens it on the system, such as Addvantage, SEI or any of their competitors, and takes custody of the assets, the next hurdle to overcome for the trustee is to communicate with the trust beneficiary (or the beneficiary’s legal representative, if applicable) about his or her immediate needs. As is often the case with cases involving litigation, a trust beneficiary’s needs and wants often blur together. It is the trustee’s responsibility to distinguish between those things that are necessary to provide for the security and well-being of the disabled individual and those that may be for the benefit of other individuals or are a desired want rather than a necessity. When making these decisions, success is most often achieved when the trustee embraces its role as educator as much as trustee.

For example, many who receive large personal injury settlements may have little to no experience with significant wealth, purchasing a home, using an ABLE Account, or understanding how their Medicare and Medicaid benefits complement one another. Therefore, regardless of the request, educating the beneficiary about how his or her trust is going to be administered and about how decisions are made within the trust will establish the foundation upon which the entire relationship will be built. As way of illustrating this point, consider three of the common immediate needs of a special needs trust: (1) houses; (2) vehicles; and (3) Medicare Set Asides.

a. Home Purchases

Purchasing a home is, generally, the item of greatest importance to a disabled beneficiary and his or her family. And, quite often, the disabled party and his or her family have been thinking about purchasing a home since the day they first met with their litigating attorney. As a result, it is not uncommon for the beneficiary or the family to have already begun looking at homes, and in some cases, putting an offer on one, before a trust is funded. Therefore, from the very onset of administration a trustee can be left in the challenging position of helping a family purchase their dream home without jeopardizing the long-term financial stability of the trust.

Navigating these situations is often more art than science but establishing a framework for repeatable and scalable success is helpful. For example, since many beneficiaries of special needs trusts have little to no experience with purchasing and maintaining real estate, it is often best for the property to be purchased by the trust and held as an asset so the trustee can assist the disabled beneficiary navigate the home buying experience and ensure that the asset is maintained over time. To accomplish this goal, it is helpful when a trustee openly communicates about the home buying process long before the trust is even established. This includes educating the plaintiff attorney about the purchasing process as well.

What does a qualified home purchasing process entail? The process will involve, among other things, limiting the purchase price to no more than 25%¹ of the value of the trust, title being in the name of the trust, an inspection and appraisal being completed, and when purchasing property in remote areas, completing a survey of the property so all parties understand its boundary lines.² These steps not only help the trustee and the beneficiary make informed decisions about whether to purchase the property in question, but also help the trustee understand how its purchase, and future maintenance, will impact the long-term financial stability of the trust account.^{3 4}

As way of example, recently a trust beneficiary's legal representative requested that he be authorized to serve as the general contractor and be compensated for coordinating the build out of his sister's new home. When presented with this request, the trust officer required proof of license and insurance to validate that he was, in fact, a licensed general contractor. In response, however, the legal representative raced back to the litigating attorney and demanded that he force the trustee to authorize him to serve as the general contractor as he needed to be paid for his involvement in the litigation. Fortunately, the trust officer began communicating with the representative and litigating attorney about the requirements for building the desired home long-before the trust was funded and the trustee was selected. Therefore, the litigating attorney was able to reinforce the trustee's position, which resulted in the brother relenting and allowing for properly licensed people to build out the residence.

b. Vehicle Purchases

While home purchases are often a top priority for trust beneficiaries, vehicle purchases are not far behind. And, similar to home purchases, trust beneficiaries often have selected their new vehicle prior to

¹ Considering known future medical and support costs not covered by private and public benefits might reduce the percentage the trustee is willing to allocate to the purchase of a home.

² When purchasing a home in a remote area, it is also important to speak with the family about access to care and medical providers should an emergency arise.

³ A trustee should always consider how an ABLE Account can help cover various home related expenses without negatively impacting a beneficiary's eligibility for Supplemental Security Income ("SSI") and Medicaid, if applicable.

⁴ Other factors to consider when purchasing a home are evaluating the home for ADA and handicap accessible modification purposes, recommending a single level home for beneficiaries with limited mobility, confirming with an SSI beneficiary's family about how power, water, etc. will be paid, confirming a furniture budget, addressing insurance coverage, whether the property is in the desired school district, and will the home be able to satisfy the beneficiary's long-term needs.

the funding of the trust. Fortunately, however, by leveraging experience and a systematic protocol for purchasing vehicles, such as comparing three similarly priced vehicles before moving forward with a purchase, poor outcomes can be avoided. For example, recently a trust beneficiary's representative drove a Jeep off the lot the very day the trust was funded. When the request to purchase the vehicle was presented to the trustee, the trustee denied the request for multiple reasons. The primary reason was that it was impossible to find any Jeep in the country within \$10,000 of the price of that vehicle. Therefore, after communicating with the client that the trustee was not opposed to purchasing a Jeep, but rather was opposed to purchasing that Jeep, the trustee helped negotiate a return of the vehicle to the lot, which was easy after explaining the representative did not have the authority to obligate the trust to make the purchase. The trustee found an identical Jeep online for \$25,000 less than the original requested amount.

A second example of a "vehicle" purchase involves a young woman who is blind, deaf, and mute. This woman needed a RTV/UTV to get around her family's farm so she can participate in the daily farming activities. Unfortunately, however, after purchasing the RTV/UTV, the Social Security Administration ("SSA"), inappropriately categorized this purchase as a second automobile, which negatively impacted her eligibility for Supplemental Security Income ("SSI"), which then negatively impacted her eligibility for traditional and waiver Medicaid benefits. That said, because of the trust attorneys and trustee's depth of knowledge regarding the administration of special needs trusts and government benefit programs, the trustee and trust attorney were able to secure the confidence of the beneficiary's parents to fight back against the SSA's position. This confidence paid off as the beneficiary eventually secured a ruling from an Administrative Law Judge that the SSA's position that the RTV/UTV was a second automobile owned by the beneficiary, was wrong. This ruling resulted in the reinstatement of the beneficiary's government benefit programs and the backpay of SSI benefits that were previously, and improperly, withheld from her.

The primary takeaway from these examples is that special needs trust beneficiaries and their representatives are in need of guidance and support, and trustees must not shy away from taking hard positions even if they place the trust beneficiary or his or her legal representative in an uncomfortable position.⁵

c. Medicare Set Asides

It is not atypical for a trust company to often have trust accounts that are impacted by 42 USC §1395y(B)(2), the Medicare Secondary Payer Act. Therefore, when serving the disabled community, a trustee must understand how the Medicare Secondary Payer Act impacts, in increasing fashion, both workers compensation and liability settlements. Failure to understand these laws could jeopardize the well-being of the client. Therefore, trustees who position themselves as experts in the field must understand how Medicare's interest in personal injury litigation requires the Medicare beneficiary to adequately consider and protect Medicare's interest in his or her future injury related medical care. This is best accomplished by engaging third-party experts such as Medivest or Cattie and Gonzalez to evaluate the settlement, determine the amount to be allocated to a Medicare Set Aside, and then administer the

⁵ Qualified Trustees should also help coordinate modifications necessary for the vehicle so the disabled person can enter and travel in the vehicle. And, in instances where the beneficiary can drive, making sure the proper adjustments are made to permit the beneficiary to operate the vehicle in a safe and responsible manner.

same for the benefit of the trust beneficiary. Provided, however, in addition to knowing who to partner with to satisfy Medicare's interest in the disabled beneficiary's settlement, it's also important that the trustee understand that the Medicare Set Aside itself must be a sub-account of the trust or risk jeopardizing the trust beneficiary's eligibility for means-tested government benefits, such as Medicaid and Supplemental Security Income ("SSI"). In the end, knowledge of and experience in addressing issues like Medicare Set asides is what separates qualified trustees from the rest of the wealth management and fiduciary services industry.

III. Long-Term Financial Planning and Budgeting

Finally, once the trust account is onboarded and the initial needs of the trust beneficiary are satisfied, the next step toward ensuring the long-term stability of the account's administration is to establish a budget. Then, once this budget is established, the trustee must determine how it will impact the financial stability of the trust account through a cash flow analysis. This cash flow analysis, which should be updated once a year at a minimum, will become the single greatest tool in educating the trust beneficiary and his or her family about the impact of their disbursement requests. Furthermore, it will help guide the trustee in determining whether certain disbursement requests are permissible and sustainable.

While it is the trustee's fiduciary duty to make the trust's assets productive, that productivity must tie back to a plan. A cash flow analysis is exactly that – a plan. Thus, the earlier a cash flow analysis can be prepared, the better chance the trust has of enjoying long-term success both from an administrative and financial perspective.⁶

This final point reinforces the underlying theme of this article, which is that successful trustees embrace their role as educator as much as, if not more than, their role as fiduciary. Sure, everything outlined above is necessary to ensure a trust account is properly administered, but each item also presents the trustee with the unique opportunity to educate the trust beneficiary about why the trust was established, how it can be used, and most importantly, ensure that the beneficiary's long-term needs are satisfied. Like with almost everything in life, education is key.

⁶ Often times, beneficiaries of special needs trusts have not had a lot of wealth in the past so it is incumbent upon the trustee to teach the beneficiary (and their legal representative, if necessary) how the trust's assets can be used to provide for the beneficiary's long-term medical and support needs. For example, \$1,000,000 sounds like a lot of money to most people, but it can be dissipated quickly when annual expenses are multiplied over several years. Therefore, understanding the impact of medical and support expenses on the trust's assets will help make the budgeting process more tangible for the beneficiary, which in turn will help create a more realistic budget.