



Can a Parent Be a Trustee?

Can a parent be the trustee for their minor special needs child? I was speaking at a seminar recently when one parent mentioned that his attorney had told him that neither he nor his wife should be the trustee for their child's Supplemental Needs Trust (SNT). Their child was under 18 years of age, making him a minor. Since this was not the first time I have come across this question, there appears to be some confusion surrounding this issue. Attorneys whom I work with and are familiar with the area of Special Needs have created numerous Supplemental Needs Trusts for minor children with disabilities designating the parents as trustees. Hopefully, this article will help clarify this issue.

First, let us be clear about the type of Supplemental Needs Trust (SNT) that we are discussing, which is an inter vivos third-party SNT. In plain English, this means that we are dealing with a trust that actually exists while the creator of the trust is still alive. (The parents are usually the creators of the trust, although it could be the grandparents, other relatives, friends, etc.) This is distinctly different from a testamentary Supplemental Needs Trust, which does not come into existence until the creator dies. Obviously, if the parents are both deceased, they cannot be trustees, so we can eliminate testamentary trusts from our consideration. (For purposes of simplicity, I am going to ignore those situations where a testamentary trust becomes funded upon the death of one of the parents, at which time the remaining spouse may become the trustee. Even if this were to occur, the trust—for purposes of our discussion—would behave in a similar manner to an inter vivos third-party trust.)

The fact that the trust is a third-party Supplemental Needs Trust means that the trust has been funded, or will be funded, with assets from anyone other than the beneficiary. In this situation, we are referring to that situation where the parents have funded the SNT. The beneficiary is the special needs child. The person(s) or organization receiving the assets remaining in the SNT after the death of the special needs child is often referred to as the “ultimate beneficiary.”

Why would there be any question as to whether the parents could be the trustee of the Supplemental Needs Trust for their minor child? Let's remember that one of the main purposes of the Supplemental Needs Trust is to supplement, but not supplant, government benefits. In other words, the SNT allows parents to leave money to their special needs child while still maintaining their child's eligibility for government benefits such as SSI and Medicaid. One of the reasons that this is permitted is that there is an implied requirement that the trustee be independent.

With an independent trustee, government programs usually do not count the trust assets as a resource since the beneficiary (special needs child) does not have control over the trust assets. However, if the trustee is the child's parent and the child is a minor, it may be difficult to argue that the child does not have any control over the assets of the trust.

This sounds as if it makes a powerful case to avoid a parental trustee situation, right? Well, not exactly. Unless you plan to apply for Medicaid for your child prior to his or her 18th birthday, what is the impact on governmental benefits? None! Prior to age 18, your child is considered a minor and therefore, your assets are considered when applying for SSI. (Note: For Medicaid purposes parents are financially responsible until age 21, unless the child is not living in the home for a specified period of time for medical purposes. However, age 18 is the age of majority for SSI purposes, and you can get Medicaid through SSI.) If you are so impoverished as to be able to qualify for SSI, it is likely that you are not concerned about setting up a Supplemental Needs Trust for your child. And, if you wait until your child turns 18 years of age, the issue disappears. For SSI purposes, the issue of whether the parents are the trustees becomes a moot point.

There may be other practical reasons such as income and estate tax that need to be considered when deciding whether the parent(s) should be the trustee(s), but the need to protect government benefits is not one of them.

The selection of the trustee is an important one. You must look at your entire situation, taking into account all factors before determining who will act as trustee. Should it be a corporate trustee, a family member, a trusted advisor or some form of co-trustees? Parents often ask who will be looking over the trustee's shoulder to make certain that they are doing things right. The answer is *no one*. It is possible to have a trustee removed, but it is not usually an easy task. So select the trustee(s) carefully.

Note: Special Needs Planning is extremely complex and it is therefore important that you consult both a qualified attorney and financial advisor who are knowledgeable in this specialty.