

To understand this current quandary of trustee selection, we should examine some recent history, derived from sources somewhere between anecdotal and empirical in nature. Part of this history comes from the 28 years or so that I practiced law while constructing more than 500 estate plans and part of it comes from my recent experience of having talked, one-on-one, to nearly 800 estate planning lawyers in Illinois and Wisconsin.

When I first started practicing law, and for some time thereafter, there generally was no question of trustee selection. Most lawyers simply asked their clients, "Which bank do you want to be trustee?" It was as simple as that. We all knew how complex the role of the trustee was and that, generally speaking, the trust departments of the local banks were quite competent to perform the duties and responsibilities set out in the trust document. We also knew the people who ran those trust departments, we even knew the president of the bank and probably played golf or had lunch with those people. If by some chance a problem might arise, we knew who to call. If we had a good enough relationship with that bank, its trust department would refer probate business to us when the original attorney was no longer practicing. We would even get phone calls from the trust officer when a small amount of bank stock might become available for purchase. Life was good. Today, when I talk about these bygone days to younger attorneys, I am invariably met with blank stares.

Then, somewhere around 25 years or so ago, what happened in banking began to happen. The community where I practiced is fairly typical. There were two fairly substantial community banks in my town, each with a full range of services, including trust departments. It was simply a matter of customer allegiance of the client. Did they like First Bank or Second Bank? It was like Garrison Keillor's Lake Wobegone, Chevrolets for the Catholics and Fords for the Lutherans.

One day, however, a new bank holding company dangled enough money in front of the board of directors of First Bank that they decided to cash in. Second Bank laughed at this and continued to tout their bank as the only "local" bank, hoping to take business away from the old First Bank customers. But, Second Bank's smugness turned into \$\$\$ when another holding company came along and bought out Second Bank. -You know the rest of the story. Eventually, both banks were merged into a much larger organization with a combined trust department. Then, that much larger organization was bought out by an even larger organization. One day, this megabank announced that it was closing the local trust operation and we could call a toll-free number somewhere in North Carolina.

We shook our heads in lawyer-like cynical amusement at all this until we realized that we could no longer answer that issue of trustee selection so easily. So, what could we do? There might be some

local banks in another community. But these were being acquired and merged also. The megabanks that were resulting from this acquisition frenzy were no longer interested in trust services or, if they said they were, it was only for very wealthy clients, or we feared that they would be soon bought out by an even larger bank who would not be so interested. In recent years in Illinois, a record number of "de novo" banks have begun operations, most, unsurprisingly, with a good deal of success. However, the vast majority of these new banks have not elected to take the further risk of having trust departments because of the time frame historically necessary to achieve profitability.

What did we do in response? We began asking our estate planning clients if they had family members or close friends who were financially responsible and who would be willing to act as trustees. As we did this, we began to lose sight of the very important role of the trustee. It was enough just to be able to identify a trustee in this financial climate. Somehow, it would all work out in the end. In light of what follows herein, we became like ostriches with our heads in the sand over the trustee selection question.

Trustee duties and responsibilities

Now that we have sent the settlers out the door, having "solved" the problem of identifying the trustee by naming Lloyd, the brother-in-law, who used to be a CPA, but who now is a "financial adviser" that likes to sell certain lines of investment products, let us examine some of the duties and responsibilities that the trustee might be facing when the time comes.

- (1) Trust documents. One of the first things a trustee must do is to examine the trust documents. These instruments constitute the roadmap for the trustee in administration of the trust. Investment decisions, the timing and amount of distributions, creation of sub-trusts and a myriad of other issues are determined by the underlying trust documents.
- (2) Inventory and assets. Once the trustee has the picture of the pathway dictated by the trust documents, attention turns to taking inventory of and gathering the trust assets. Marketable and unmarketable securities may need to be re-titled, real estate interests determined, bank accounts re-registered, life insurance proceeds collected, appraisals made and retirement/employee benefits reconciled. In an all-too-common situation, there may be unfunded or underfunded assets that have to find their way to the trust, thereby triggering a decision as to whether or not a probate proceeding is necessary. Finally, the trustee has the responsibility of "booking" all of the trust assets at their fair market value.
- (3) Creation of sub-trusts. The trust document may provide for the creation of sub-trusts, such as with a family trust, a grandchildren's

Advising Clients on Trustee Selection

A couple of years ago we ran a seminar series for lawyers on trust administration and trustee selection. The handout materials contained enough thought provoking notions that one lawyer commented that he did not know why anyone would ever want to be a trustee. It is fraught with peril and liability and virtually impossible to get it all right every time. We agree, and yet many advisers are concerned about "steering" their clients too strongly in the direction of a corporate trustee.

Let's be clear. If the situation is that mom and dad have a relatively straightforward asset portfolio and their only intention is that when they are gone their assets get divided among their level headed adult children, it is probably fine to name the children as successor trustees. Probably.

A true story from our annals is one where grandma left a tidy sum to her two adult, educated, professional, sophisticated and beautiful sibling granddaughters, free of trust. We were grandma's successor trustee with the sole tasks appearing to be marshalling the assets, paying the final expenses, taxes and then distributing the assets to the two charming young women. Our member attorney and I met with the granddaughters a few days after grandma passed away. We both came away from that meeting believing these people were as grateful as can be and would be a cooperative set of beneficiaries, willing to help with disposing of personal property and even wanting to try selling the real estate granny owned with the trustee's and lawyer's guidance.

A few months later we were dealing with police reports of these two in a fist fight on granny's front lawn in the middle of the afternoon over who would get this gold leaf picture frame and not that one. A myriad of childhood hostility issues had surfaced. Every decision was challenged based solely on the fact that if one of them liked it the other did not. It did not stop until the last check was issued, almost two years into what should have been a six month decedent trust administration.

Throughout the course of this administration I spoke with the mother and father of these women. They had divorced bitterly and each sided with one of their daughters against the other. Now we had a four way melee. Mom had initially been a little miffed that she had not been appointed successor trustee. In the end she stated she would never be able to thank us enough for stepping in and stepping up. In her opinion, if she had to mediate that mess she might never be speaking with either of her daughters again.

Sometimes it is abundantly clear that a professional trustee is needed, such as in the case of many special needs trusts or other obvious situations. Other times it may not seem so clear, but consider some typical objections clients raise to the notion of hiring a professional.

Trustee fees are expensive? Typical fees are about 1% of assets under management annually or less. As professional trustees, our investment expertise comes along for the ride at no additional cost. If we cannot add 1% of value, just in our cash management capabilities alone in most cases, we should close the doors.

Trustees do not have good investment performance records? The fact is we cannot really advertise the numbers. We have no proprietary products to sell. Each portfolio is custom made. Investment performance is mostly a matter of asset allocation, and asset allocation is mostly a function of client needs and expectations. A portfolio of short term U S Treasury instruments that might be appropriate for one client will have performance characteristics that are vastly different from one fully invested in an array of equity and other growth oriented opportunities. The more correct statement, we would challenge, is that most investment advisers do not understand how trusts work. A trustee is often placed in the role of wealth preservation expert rather than wealth management expert. We know how to be both.

I will lose control of my assets? The key to dismissing that notion is remembering that it is indeed *your assets* and not ours we are talking about. In a well crafted plan and with our team approach, which keeps you as the attorney in the role of central trusted adviser, we can help your clients *take control* of their assets. Client input and discussion is critical to maintaining that relationship and our model assures that better than any we see elsewhere.

My estate is too small for a trust? No matter how much money it is, *when it is all your money, it is a lot of money*. Since we do not impose minimum account size restrictions or generally limit the type of asset we may hold as trustee, there is no reason a client with \$150,000 should be treated any less importantly than one with \$15,000,000 or more. That is our premise and our promise.

You as the drafting adviser have no doubt answered all the other questions, such as revocability, substitution of trustees if needed, standards of discretion over principal for beneficiaries, etc. Some of our members regularly coach their clients to name us as agent for them as their own trustee. That way we

THEN AND NOW

Recently, I came across our first newsletter, published in the fall of 2000. Looking at it gave me pause to think about where we were then (we were Guaranty Trust then) and where we are today.

Then, we proudly announced that:

- we had visited over 500 attorneys;
- we had \$70,000,000 in assets under management;
- we were trustee for just under 100 land trusts;
- GTC had conducted seminars and “town hall” meetings for lawyers;
- we offered complete trust services as well as unbundled services such as escrow and custody accounts;
- GTC served as investment agent for “Starker” exchanges where our parent company, Attorneys’ Title Guaranty Fund, Inc., served as qualified intermediary; and
- there were four employees of GTC.

In that issue, there were photos of Hank Blacharczyk, president of the company, and me. How were we to know then that Hank would suffer a fatal heart attack just six months later? Hardly a day goes by but that I recall Hank, his pleasant nature and his love of his family and playing golf.

By the fall of 2000, we had laid the solid foundation for what now can only be called the unparalleled success story of ATG Trust Company.

In July 2001, we were very fortunate in finding Hank’s successor, Bob Lopardo, who has served as president of ATG Trust Company these last six years. Through his prudent, yet visionary, leadership, ATG Trust has widened its horizons not only in the volume of business but also in the range of financial services offered to lawyers and their clients.

Here’s a brief report card on ATG Trust today:

- we now have nearly \$300,000,000 in trust assets under our management, an increase of 430 % in 6 ½ years;
- ATG Trust has taken its message to over 3000 lawyers in Illinois and Wisconsin (my 2002 Volvo now has 162,000 miles on it);
- nearly 400 lawyers have become members of ATG Trust;
- ATG Trust serves as trustee for over 1600 land trusts, having acquired the land trust business of Northern Trust in 2005;
- we serve as qualified intermediary for 300 to 400 “Starker” exchanges per year, thanks to Brian Michaels and Sara Smith, who are nationally recognized experts in “Starker” exchanges;
- structured settlements and structured payments have been added as significant new lines of business due to the efforts of Brian Michaels; and
- there are currently 11 employees of ATG Trust, including 6 trust officers.

When we started ATG Trust in 1998, we had an idea—an idea that in some respects looked to the past. That idea was the accessible furnishing of high quality traditional trust services to estate planning and transactional lawyers and their clients. Another part of that idea was to recognize and build on the notion of the lawyer serving as a trusted adviser to his or her client. Yet another aspect of that idea looked forward, to be aware of new services that could be added for the benefit of your clients.

By any measurement, that idea has proved to be successful, then and now.

Dennis A. Norden
Sr. Vice President and General Counsel
April 23, 2007

What’s So Special about Special Needs Trusts?

Unfortunately there is nothing special about the rise in disabilities among our children of today. Physical and mental disabilities are growing in number everyday. One (1) in one hundred fifty (150) children born today has some type of ASD (Autism Spectrum Disorder).

Tort actions involving injuries to children are also on the rise, some resulting in multi- million dollar settlements. Obviously children with unique medical needs will require the best possible medical care and services. This care will be costly. Will a million dollar settlement be enough to provide for the child’s specialize care? Maybe it will. But can a parent risk compromising their disabled child’s quality of life and medical care by the use of limited resources?

Wouldn’t a better plan of medical care include the use of available state benefit programs such as Medicaid and Supplemental Security Income (SSI)? However these government benefit programs have a means test based on income and resources (asset) limitations. If a disabled child or the child’s parent/guardian takes constructive

receipt of any settlement funds, such action could possibly disqualify the child from receiving government benefits. In years past, to become eligible for government benefit programs, some attorneys advocated that parents should disinherit their disabled child and let the state government agencies provide for their needs, obviously not the most prudent planning advice.

What’s a parent to do to protect their disabled child’s eligibility for social services benefits and still retain their child’s cash settlement. One of the paramount duties and responsibilities of parents of a disabled child is to ensure that they are and remain eligible for government benefit programs. Additionally, they must preserve their estates for the benefit of the entire family with out the worry that some government agency might file a claim against the family estate.

Since 1982 the Illinois Courts through their decisions provided for a special form of trust known as a Supplemental Discretionary Needs Trust. This type of trust was a new estate planning option for attorneys.

On September 6, 1991, Public Act 87-311 was passed that provided for the incorporation and ratification of all previous Court decisions regarding the use of Supplemental Discretionary Needs Trusts.

On August 10, 1993, President Clinton signed into law the Omnibus Budget Reconciliation Act (OBRA – 93) that provided for new opportunities in the use of the Supplemental Discretionary Needs Trusts. In particular, it detailed provisions for the creation of a number of trusts that are exempt from asset transfer rules. (42 USC 1396 p (d)(4)). Two of the most common trusts commonly known as Qualified Under 65 Disabled Trust and Pooled Trust are also identified as First Party Pay Back Trusts.

Qualified Under 65 Disabled Trust

Qualified Under 65 Disabled Trust, (42 USC 1396p(d)(4)(a), also known as Self Settling Special Needs Trust, are typically funded by personal injury settlement proceeds for the benefit of a disabled individual (as defined in 42 USC 1382 (a) 3), under the age of 65. A parent, grandparent, and legal guardian of the disabled person or a State Court must establish the trust, solely for the benefit of the disabled person. In addition, it must be irrevocable.

The disabled person’s special needs must be identified and included in the agreement. Such special needs may include, but not limited to: supplemental medical and dental expenses, specialized training and treatment programs, independent medical exams, transportation expenses (may include the purchase of a wheelchair accessible van), liability and casualty insurance. Additionally quality of life items such as electronic equipment (TV, radio, stereo and computer equipment, vacations, cultural events (camps, athletic events) and compensation for a companion or caregiver for the disabled person.

Pooled Trusts

Pooled Trusts (42 USC 1396 p (d) (4) c) are established and managed by a nonprofit association (IRC 501c) for the benefit of disabled individuals. These trusts may be established for any age beneficiary, even someone over the age of 65. Separate accounts are maintained for each beneficiary for purposes of investing and managing trust

funds. The Pooled Trust combines all the separate trust funds under a master pooled account. These separate trust accounts are established for the benefit of the disabled person by a parent, grandparent, and the disabled person’s legal guardian or by a Court. Upon the disabled person’s death, if the residual trust funds are to be paid out to the disabled person’s heirs, then the State social services agencies (Medicaid) must be reimbursed for any amounts of medical assistance paid on behalf of the disabled person.

Third Party Trust

Additionally, there is another trust known as a “Third Party Trust”. The Social Security’s Program Operations Manual System (POMS) Section SI 01120.200 () provides for such trusts. Someone other than the beneficiary as the grantor establishes this type of trust.

When drafting a Third Party Trust, language must be used to ensure that any and all income and principal will not be legally available to the trust beneficiary. If the beneficiary is granted rights to revoke the trust or direct the use of corpus for support or maintenance, the trust assets will be considered a source of income for SSI purposes resulting in the beneficiary’s ineligibility for SSI benefits. Third Party Trusts, like other Special Needs Trust must be carefully drafted by incorporating explicit language that ensures that any and all distributions will supplement but not supplant sources of income, including SSI or other government benefits.

Third Party Trusts provide that upon the death of the beneficiary, the trust corpus shall be distributed according to the terms of the trust. There are no restrictions other than the terms of the governing document. More importantly, there are no requirements to pay back any government agencies.

So it appears that there is something special about Special Needs Trusts. If your clients are faced with providing for family members that may have some type of disability, a Special Needs Trust may be the answer to preserving the family estate while in turn providing the disabled person with the social services benefits that they so rightfully deserve. Anything less is unacceptable.

Trustee, or not trustee? Aye, there’s the rub

By Dennis A. Norden Introduction

With all due apologies to Mr. Shakespeare, his executors or successor trustee, as the case may be, the purpose of this not-so-scholarly article is to address one of the most confounding dilemmas facing estate planning attorneys today--selection of a trustee.

Many of the estate planning bar find themselves today between a heavy rock and a very hard place when it comes to naming the trustee in their clients’ trust documents. Attorneys are aware of the often-times complex nature of the role of the trustee, yet their clients are insistent upon naming family members or friends for this role. For our purposes, let’s assume the term “trustee” means the successor trustee when the settlors have passed on or become disabled.



One South Wacker Drive, 24th Floor
Chicago, Illinois 60606-4654
Phone: 312.338.7878
Fax: 312.338.1594
1031 Dept.: 312.752.1031
www.atgtrust.com