

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 every 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 specialized 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 without 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 (<http://policy.ssa.gov>) 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.

With all due apologies to Mr. Shakespeare, his executors or successor trustee, as the case may be, the purpose of this not-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.

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.



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TRUSTEE DUTIES AND RESPONSIBILITIES

Now that we have sent the settlors 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’ trust or a credit shelter trust. It is the trustee’s duty to accomplish this and to correctly fund and separately account for each of these sub-trusts. The issues involved in funding a credit shelter trust, for example, are so numerous and complex that they warrant entire seminars for lawyers and accountants.

(4) **Investment decisions.** The trustee must look to the trust document and to the nature and station in life of the beneficiaries for guidance in making investment decisions. Income and remainder beneficiaries may warrant different and conflicting investment strategies. Also, the trust document may provide that the trustee is to take the beneficiary’s non-trust assets into account in making distributions. The trustee will also have to take performance/risk factors into account for each beneficiary. The potential conflicting interests of the beneficiaries may cause the trustee to walk a difficult investment tightrope. Finally, investment decisions should always be based upon the best interests of the beneficiaries and not upon financial remuneration, disclosed or undisclosed, to the trustee.

(5) **Conflict of interest.** The trustee must avoid any self-dealing and conflicts of interest. A situation was anecdotally related to me recently where a brother and sister were the beneficiaries of a trust, the brother was the sole trustee and also the tenant farmer of a farm owned by the trust. This is a situation fraught with potential conflict of interest. Even a scenario where one sibling has discretionary distribution authority, as trustee, over other siblings can be very uncomfortable for all involved.

(6) **Accounting.** All trustees have a duty to render periodic accountings to the beneficiaries, taking into account the Illinois Principal and Income Act. This may be a daunting task for an individual, since trust principal and income rules do not coincide with generally accepted accounting principles.

(7) **Tax matters.** The trustee will have the responsibility for filing a Notice of Fiduciary Relationship, Notice of Termination, Application for FEIN, Form 1041, Form 706, determining the FEINs of beneficiaries, adoption of accounting method and payment of estimated taxes.

The foregoing is certainly no exhaustive listing of trustee duties, nor is it a comprehensive discussion of any of them. What is set out are some of the issues that brother-in-law Lloyd may have to confront while serving as trustee. If Lloyd is very, very smart, he will seek professional advice on all of these issues. If circumstances are right, he will consult with you because you are the one who drafted the trust, the one who knew your clients’ intentions.

However, there not only is no guarantee that Lloyd is very, very smart or that he will consult with you. You probably have no relationship with Lloyd. Therefore, the actual administration of the trust you so carefully crafted to follow your clients’ wishes will be totally left to chance. No estate planning attorneys should be satisfied with that result.

THE CASE FOR THE CORPORATE TRUSTEE

There may be situations where most practitioners feel there is no necessity for a corporate trustee, for example, where the trust document calls for an outright liquidation and distribution immediately after the demise of the settlors. However, there are several circumstances that seem to dictate naming a corporate trustee.

(1) **Any long-term trust.** Any trust that does not call for an outright and immediate distribution and termination may indicate the necessity of a corporate trustee. The corporate trustee will have the investment experience and expertise to manage the trust assets over a period of time. Institutional investment opportunities will exist for the corporate trustee that may give it a substantial edge over an individual.

(2) **Behavior incentives, disincentives; asset protection.** A popular and growing concept in trust drafting is to provide certain behavior incentives or disincentives for beneficiaries. For instance, the trust may provide for certain additional distributions to a beneficiary who gains a bachelor’s degree within a certain time frame, or prohibits distributions because of substance abuse behavior. Many trusts today contain provisions to protect the beneficiaries from their own self-destructive behavior, such as insulation of trust assets from creditors. It may be unwise to place the decision-making power in such situations with a family member or friend who may be motivated to “keep peace” within the family. A corporate trustee will be able to make these decisions in an impartial fashion, thereby avoiding putting the “heat” on the family member or friend.

(3) **Diversity among beneficiaries.** Beneficiaries may be diverse in geography, interest (remainder vs. income) or may just not get along with each other. The experience, expertise and impartiality of a corporate trustee may provide the solution to balance these competing interests.

(4) **Charitable trusts.** Because of the inherent tension between income and remainder beneficiaries, most charities are far more comfortable with a corporate trustee than with an individual. Some charities have become fairly adept at “looking over the shoulder” of a trustee for the period of income distribution prior to the final payout.

(5) **Trusts with marketable securities.** Again, the experience and expertise of the corporate trustee in dealing with marketable securities issues will work further for the best interests of the beneficiaries.

CONCLUSION

Estate planning lawyers can no longer keep their ostrich-like approach when it comes to administering their clients’ trusts. We can no longer assume that the named corporate trustee will be around, nor can we leave it to chance with Lloyd. We have the obligation to see to it that the clients’ intentions are carried out faithfully.

Corporate trustees are regulated and periodically audited by state and/or federal agencies and have the assets necessary to provide financial responsibility. There are no such protections for individuals who serve as trustees.

For the high net worth client, the forces of competition are still at work, whether the corporate trustee is part of a large bank or local institution. There are several stand-alone trust operations that have commenced in recent years who are not only available, but quite willing to provide high-quality service for the not-so-wealthy client. There are still very fine local banks with full-service trust operations. There are, indeed, alternatives. The task for the practitioner is to identify those alternatives for the client and to make diligent inquiry as to how the trust will be administered in a fashion to serve the needs and wishes of that client.

“The fault, dear Brutus ...

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) 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.

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