

THE SNT TRUSTEE AS A “SUPERFIDUCIARY?”

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Generally, all trustees have certain duties they must perform. These include: the duty of loyalty, the duty to adequately invest trust assets, the duty to follow the terms of the trust document, keep careful records, prepare accountings, communicate with trust beneficiaries, file tax returns and pay taxes, and distribute trust income and assets to or for the benefit of the trust beneficiaries in accordance with the terms of the trust.

The SNT trustee, however, may have additional duties. If the trust beneficiary is receiving means-tested public benefits such as SSI and Medicaid, the trustee has to make sure that the distributions that are made to or for the benefit of the trust beneficiary do not render the beneficiary ineligible for those benefits. This requires the trustee to know the eligibility rules for the means-tested benefits received by the beneficiary. As these rules and regulations are subject to change, the SNT trustee must keep up with changes that may affect the beneficiary's benefits.

Distributions of trust income and/or assets for food and shelter are considered "in-kind income" and may result in a decrease of the beneficiary's monthly SSI benefit by one-third. If the trustee makes distributions to the beneficiary above the monthly limit allowed by the program, they will be considered unearned income and the beneficiary's SSI monthly benefit may be reduced dollar for dollar. Accordingly, the trustee must be aware that distributions generally should be made directly to the vendors of goods and services rather than to the beneficiary.

In addition, the trust document may have provisions which direct trustees to perform certain tasks that are not related to the management, investment and distribution of assets and income. For example, the trust document might direct the trustee to apply for public benefits on

behalf of the beneficiary. The trustee may also be directed to work with family members and allied professionals to provide support to the beneficiary.

In many cases, the beneficiary has no involved family members or friends and is unable to set express his or her needs and preferences. Under such circumstances, it may incumbent on the trustee to act affirmatively to ascertain and meet those needs and preferences of the trust beneficiary. Indeed, trustees of special needs trusts may be liable to the beneficiary for failing to be proactive.

Failure to apply for public benefits on behalf of the beneficiary

All trustees have a duty to act in accordance with the terms of the trust. Many special needs trusts contain provisions requiring the trustee to seek and maintain public benefits for the beneficiary. In *Sargent v. Sargent*, No. PC-08-1429, 2009 R.I. Super. LEXIS 109, 2009 WL 3328560 (R.I. Super. July 31, 2009), the court held that the trustee breached her fiduciary duty by failing to affirmatively do so.

In April 1998, Diane Sargent established the Diane M. Sargent Revocable Trust –1998. The grantor was named as trustee. Her daughter, Pamela Sargent, was designated successor trustee. The grantor died in November 1999 and was survived by four adult children. Assets that were not owned by the trust at the time of the grantor’s death were passed directly to the trust pursuant to a pourover will. Among other things, the trust provided that after the grantor’s death, the assets were to be divided into equal shares for her children. Her son, Kennett’s, one-quarter share was to be administered in a special needs trust for his benefit.

The special needs trust provided, in pertinent part:

My primary intention in establishing the Special Needs Trust is to provide for KENNETT’S special needs in order that he can be maintained at a level of human dignity. As used herein, the term “special needs” means the requisites for maintaining KENNETT’S

good health, safety, and welfare when, in the discretion of the Trustee, such requisites are not being provided by any Governmental Authority (as hereinafter defined). “Special needs’ includes, by way of illustration and not by way of limitation, dental care, special equipment, program training, education, travel needs and recreation.”

Another provision in the special needs trust directed the trustee to exercise her best judgment and fiduciary duty” to seek and maintain all available public benefits for Kennett.

In the four and one half years that Pamela administered the special needs trust, she did not make any distributions on his behalf or to him despite requesting information about the trust assets and a request for money to purchase a condominium because the building he lived in was being sold.

In 2004, Kennett and his brother, Jeffrey, whose share also was held in a continuing trust, filed suit against Pamela seeking an accounting and removal of Pamela as trustee.

Although she was directed by the court to prepare an accounting in 2004, she completed a “preliminary accounting” in 2006.

In May 2007, plaintiffs renewed their request to remove Pamela as trustee. The court appointed a guardian *ad litem* for Kennett to recommend whether Pamela acted in Kennett’s best interests pursuant to the terms of the trust. The guardian *ad litem* concluded that the trustee had acted “arbitrarily in denying distributions to Kennett for his health, maintenance and support.”

In September 2007, Pamela resigned as trustee. The beneficiaries’ father and Coastline Trust Company were appointed successor co-trustees. In 2008, the successor co-trustees filed suit against Pamela contending that she had breached her fiduciary duties. The case was tried without a jury.

Kennett engaged several attorneys who explained to Pamela that Kennett was receiving Social Security Disability benefits (“SSDI”) and therefore, the distribution of trust benefits for the purchase of a condominium would not adversely impact those benefits. Nevertheless, Pamela

stated that she would not distribute the funds unless Kennett produced a letter from the Social Security Administration stating that he was receiving SSDI and that the distribution of assets would not disqualify him from receiving those benefits. Kennett testified that he enjoyed living in Boston and doing volunteer work there but had to move to Rhode Island because he didn't receive enough money from his Social Security benefits to place a deposit on a new apartment there. He testified that he became so depressed that he started drinking again after years of sobriety, attempted suicide, was hospitalized and spent the next few years in rehabilitation centers.

The court found that Pamela had a duty under the terms of the trust to make her own inquiries regarding Kennett's public benefits but failed to do so. Instead, she shifted the burden to Kennett. In so doing, she created "unnecessary administrative barriers against his receiving some of the roughly \$400,000" trust share at a time when he urgently need it.

The court further found that "Pamela did not perform even the most basic duties of a special needs trustee, educating herself as to the type of benefits Kennett was receiving." Therefore, the court held that Pamela breached her duty to administer the SNT in accordance with its terms by "acting arbitrarily and without knowledge of, or inquiry into, Kennett's basic life circumstances. The court required Pamela to disgorge her trustee's fees and pay reasonable attorneys' fees directly related to efforts to compel Pamela to comply with a consent order.

In *Liranzo v. LI Jewish Education/Research* (N.Y.Sup. Ct., Kings Cty., No 28863/1996, June 25, 2013), a corporate fiduciary was surcharged for paying for home health care services without investigating whether Medicaid would pay for those services and for making payments on behalf of family members that disqualified the beneficiary from receiving SSI and Medicaid benefits. In this case, a special needs trust was funded with over \$400,000 from a personal

injury settlement for the benefit of a child. The trust directed the trustee to endeavor to ascertain whether Medicaid would cover home health care services before using trust funds for that purpose. Six years later, the trust was valued at \$3,253.03. The corporate trustee filed an accounting action to be released.

The court found that the trustee paid \$118,064 for home health care services without inquiring whether Medicaid could pay for those services in violation of the trust terms. The trustee also paid \$56,320 for cab fares for the beneficiary's family and made payments to the family that rendered the beneficiary ineligible for SSI and Medicaid benefits.

The court held that the trustee breached its fiduciary duty to properly administer the trust and to preserve the trust assets for the lifetime needs of the beneficiary. The trustee was ordered to repay the trust \$176,905.99.

Failure to proactively identify the needs of the trust beneficiary

All special needs trusts confer discretion upon the trustees. However, the words "absolute discretion", "unfettered discretion" and "sole discretion" do not insulate the trustees from liability for failure to act affirmatively on behalf of the trustee. *Matter of J.P.Morgan Chase Bank N.A. (Marie H.)*, 956 N.Y.S.2d 856 (N.Y.Surr.Ct., 2012), illustrates this point.

In *Matter of J.P.Morgan*, a mother established a special needs trust for her son, Mark, who was on the autism spectrum and was developmentally disabled. Mark was non-verbal and required constant supervision and assistance with all of his activities of daily living. He was 16 years old when his mother died. Prior to her death, Mark's mother placed him in a residential school in New York.

Mark's mother's attorney and J.P. Morgan Chase Bank became co-trustees of Mark's trust, which was funded with almost \$3,000,000. The trust provided for distributions of income

and principal for Mark's "care, comfort, support and maintenance in the trustees' "sole and absolute discretion." It further provided:

Before expending any amounts from the net income and/or principal of this trust, the Trustees may wish to consider the availability of any benefits from government or private assistance programs for which the Grantor [sic] may be eligible and that where appropriate and to the extent possible, the Trustees may endeavor to maximize the collection of such benefits and to facilitate the distribution of such benefits for the benefit of the beneficiary."

The trust document further provided that payments could be made to any facility where Mark resided and to any organization where Mark was a client or participant in a program it sponsored for the general uses of such facility or organization.

After Mark's mother died, the attorney/trustee filed a proceeding to be appointed guardian of Mark's person. The attorney disclosed at the hearing that he hadn't seen Mark since Mark was six years old and was applying for guardianship to fulfill a promise he made to Mark's mother on her deathbed. The lawyer had never visited the residential school to ascertain Mark's condition or his needs, nor had the lawyer spoken to the staff at the school to find out Mark's unmet needs. The attorney also revealed that not "a single dollar" from the trust had been expended on Mark in almost three years.

The corporate trustee indicated at the guardianship hearing that it had not expended any funds from the trust on Mark's behalf because of "its lack of institutional capacity" to ascertain or meet Mark's needs. The court noted that if it lacked such expertise it should obtain the services of someone who had such expertise. Accordingly, the co-trustees engaged the services of a care management company.

The care manager assessed Mark's needs and recommended certain services and items that should be purchased by the trust. Mark's gross motor skills, communication skills and social skills improved as a result of those expenditures. The court opined that this case "should provide

a clarion call for all fiduciaries of trusts whose beneficiaries are known to have disabilities to fulfill their ‘unwavering duty of complete loyalty to the beneficiary’ or be subject to the remedies available for breach of their fiduciary obligation.”

The court found that the trustees failed to “exhibit a reasonable degree of diligence” toward Mark by failing to do anything for Mark. It noted that even where a trustee has discretion, a court will intervene if the trustee, acting arbitrarily or without knowledge of or inquiry into relevant circumstances, fails to act. The court held that the trustees had a duty to the beneficiary to ascertain Mark’s needs and to apply the trust funds to serving those needs and breached their duties to Mark.

The duty of a trustee of a special needs trust to act was similarly addressed in *Matter of Cronin*, 2017 NYLJ LEXIS 3753 (N.Y. Surr. Ct. 2018). During a proceeding to have a guardian appointed for Andrew, a 51 year old man with intellectual disabilities, the existence of a trust for Andrew’s benefit valued at almost \$100,000 was disclosed. The trustee, a nonprofit organization, had not expended any funds for Andrew’s benefit for almost seven years. Andrew testified at the hearing that he didn’t have money to go to the movies, attend sporting events or buy his favorite sports jerseys.

The court found it “deeply troubling” that the trustee had taken no steps to ascertain or meet the beneficiary’s needs. The court held that the “duty of trustees to act in the best interest of the trust beneficiary carries with it the concomitant obligation that trustees make themselves knowledgeable about a beneficiary’s condition and needs.

Conclusion

A nominated trustee must review the trust document before accepting the position to ascertain the duties imposed by the trust terms. The trust may impose special duties on the

trustee such as applying for public benefits for the beneficiary, and the putative trustee must consider whether it is a duty it wants to undertake.

Upon accepting the trusteeship the trustee should conduct an evaluation of the beneficiary. Specifically, there should be an assessment of the beneficiary's physical, mental and living conditions, the public benefits that the beneficiary receives or may be eligible to receive, and the beneficiary's medical, educational, financial, social, vocational and recreational needs. If the trustee believes it does not have the requisite skill or expertise to conduct such an evaluation it should retain the services of a social worker or care manager who has such expertise.

The trustee should consult with an attorney who devotes a substantial portion of their practice to special needs trust planning and administration. The law pertaining to public benefits can be difficult to navigate and changes periodically. Such an attorney can guide the trustee in managing trust funds for a beneficiary with special needs.