

**Top Ten (Maybe even 15!)
Mistakes Made in Drafting &
Administering Special Needs
Trusts**

1

Our Hypothetical

- It's 4p.m. on a Friday afternoon. You are heading out for the weekend when your phone rings. It's Marvin the Med-Mal Maven, an attorney whose advertisements you've seen and heard but have never met. He informs you that he has just settled the biggest case of his career. It's a multimillion dollar settlement of a personal injury case involving a 19 year old young woman, Giselle, a ballet prodigy who was hit by a car rendering her a paraplegic. She has decision-making capacity and is firmly convinced she will dance again and wants the settlement funds directed towards making that happen.

2

- Marvin, the defendants, the structured settlement brokers, life care planners and the young girl's mother, had all agreed on the terms when the mother informed Marvin that her best friend had asked why the monies weren't going into a Special Needs Trust? Marvin consults with the structured settlement brokers and the life care planner who all agree that's not a bad idea (especially given the kind of long-term therapy and surgeries Giselle may need if it appears she can dance again), and why didn't they think of it first. Giselle's Uncle Freddie has agreed to serve as Trustee because he used to be a bookkeeper and worked for an investment firm. Giselle's mother suggests that Marvin contact you to send him one of those "special needs trust thingies" so he can take it to the Judge on Monday (when they've all been ordered to appear to put the settlement on the record.)

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■ You explain to Marvin that it's not quite that simple and suggest that he get the matter continued so that you can meet with Giselle, her mother, Uncle Freddie and the other players involved so that you can do your job as well as Marvin has done his. With some grumbling Marvin agrees and a meeting is set for the following week.

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■ Everyone is present at the meeting. Marvin tells you the story and what, in his opinion, the terms of the trust need to be, while Giselle and her mother sit there and nod. Whenever you try to talk to Giselle, her mother, or Uncle Freddie, Marvin interrupts, giving you what he believes is the correct answer. Everyone urges you to please prepare the Trust since they have to be back in Court in two days. You, feeling pressured but are sure your "standard" SNT will work just fine, promise to have it to them tomorrow. Having observed Giselle, you believe you have enough information to move forward without reviewing the life care plans, her medical records or having any further conversations with her mother or her. You ask your paralegal to printout "our form SNT", glance at it to make sure everyone's names are spelled correctly and send it off with Marvin.

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■ What could possibly go wrong....?

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#1

- Failing to identify who the Client is

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#2

- Failing to communicate who the Client is to the family and what that means

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#3

- Drafting a Third Party Trust with a "Payback" provision

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#4

- Drafting a First Party Trust without a "Payback" provision

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#5

- Adding Third Party funds to a First Party Trust or *vice versa*

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#6

- Failing to clearly understand the nature of the Beneficiary's disability

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#7

- Making distributions from a Third Party Trust prior to making distributions from a companion First Party Trust

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#8

- Not advising a non-professional (or even a professional) Fiduciary on the “do’s and don’ts” of appropriate distributions, and why administering a SNT is SOOOOOO different than other Trusts.

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#9

- Drafting SNTs without regard to various POMS provisions directly in point or using improper language that contradicts a POMS provision directly on point

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#10

- Not adequately discussing the appropriate use of a Bond

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#11

- Funding a Third Party SNT with funds held in the Beneficiary's UTMA Account

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#12

- Failing to properly advise clients regarding the use of Structured Settlements

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#13

- Failing to properly analyze the advantages/disadvantages of using Trust Advisors or Trust Advisory Committees

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#14

- Poorly or inconsistently drafted definitions of “disability” or “special needs”, especially in the context of qualifying the SNT under SECURE 2.0

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#15

- Your pick for “worst mistake” (not by you, of course...) that you’ve ever seen

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