

SPECIAL NEEDS TRUST “WRAP UP”: TIPS, TRICKS AND PRACTICE POINTS TO CONSIDER WHEN DIRECTING FOR THE END OF THE ADMINISTRATION OF A SPECIAL NEEDS TRUST

**Presenter: ETHAN J. ORDOG, ESQUIRE
BEGLEY LAW GROUP, P.C.
Moorestown, New Jersey**

I. BACKGROUND AND IMPORTANCE

It is recognized for many professionals, individuals and families that the assessment of the pros and cons of the establishment and funding of a Special Needs Trust can be daunting, particularly if there has not been prior experience and/or an understanding of the framework and administrative logistics of a Special Needs Trust by a potential beneficiary and/or their family/friends. There is no crystal ball to reflect upon or review the outcomes that will occur during the life of a beneficiary of a Trust to know answers to critical questions, i.e. How much will care costs be for the beneficiary? What will be the

length of the Trust administration? How will the assets grow or be utilized during the life of the beneficiary?

Perhaps even more pressing in initial conversations or communications related to a Special Needs Trust and funding, is the scope of the expectation of how distributions will be effectuated, but also the scope of the interplay between the assets of the Special Needs Trust and the allowable distributions therefrom, especially in the event that the Special Needs Trust shall be called upon or sought to contribute household expenses, carrying costs, or be the owner of real property, particularly if other members of the family are to reside in the home.

The understanding of a budget and corresponding demands on the Special Needs Trust allow, at the very least, the reasonableness of expectations for the utilization of the Special Needs Trust, especially when many individuals have been awaiting a resolution of certain claims that they may be pursuing, i.e. personal injury or workman's compensation, or based upon the need to take action to resolve pending termination of public benefits based upon assets being received and/or held by an individual which may make them ineligible for benefits.

Transparency and detailed discussions, while sometimes difficult, particularly in light of these considerations, especially when public benefit eligibility is sought to be maintained and/or a critical conversation point, are necessary so as to attempt to avoid displeasure by and between a beneficiary of a Special Needs Trust and/or their family and friends, and the professionals who may be involved, including Counsel, the Trustee,

Financial Advisors, Care Coordinators, etc. Moreover, and consistent with the scope of this presentation, it is recognized that there is also considerable uncertainty and/or misunderstanding upon the passing of a Special Needs Trust beneficiary and the steps which must or should be taken to allow for the transition of the administration to the corresponding termination of the Trust. Of course, there are different factors to consider if there is a 1st Party or 3rd Party Special Needs Trust as issue, in addition to the recognizable inherit conflict that can exist between the positions taken by individuals who had formerly been working together on the administration of the Special Needs Trust and how to ensure protection and finalization, as opposed to missteps which can lead to problems or delays in the finalization of the administration.

A Trustee must be mindful of communicating a process, and perhaps not an outcome, outside of ultimate goals of the finalization of the administration of a Trust, particularly when family or interested parties engage with and/or in communications with the Trustee may simply be confused as to the next steps and corresponding belief that now that the individual beneficiary has passed away that the assets of the Trust will be distributed immediately to members of the family or individuals named by the deceased Trust beneficiary, in addition to the simple “misunderstanding” that things were explained or believed to be understood that payback or other potential costs and expenses would not be required for payment until ALL of the beneficiaries, i.e. remainderman named or with a potential interest, had passed away.

The passing of a Special Needs Trust beneficiary, begins a distinct and sometimes complicated phase of the Trust administration, and it is imperative that the Trustee and other involved individuals and professionals work together to determine an appropriate and comprehensive action list. Specifically, the list of immediate action or consideration that must be undertaken, as well as a more global checklist for the termination of the Trust should take into consideration the following:

- The assets remaining and manner in which such assets are held, i.e. brokerage account, structure, real estate, vehicle, etc.;
- Are there any funds held by a Sub-Trust for Medicare Set-Aside purposes;
- Pending litigation remaining or claims which might exist against the Trust;
- Ongoing carrying costs for property/vehicle expenses-communications with those residing at property of anticipated transition of next steps required, etc.;
- Outstanding governmental benefits being received or which will end as the result of the passing of the beneficiary;
- Medicaid or other recovery which will exist against the Trust and initial communications for confirmation and review of the scope of any asserted lien;
- Status of funeral arrangements;
- Consideration of appointment of personal representative of Estate;
- Consideration of need for discharge of any Guardian/Appointed fiduciary;
- Communications with and potential disputes amongst or asserted by family members;
- Multiple states involved (critical to know and understand all jurisdictions where benefits may have been received;
- Demands for distributions;
- Unresolved creditor claims;
- Tax reporting obligations (Income, Estate, Inheritance, etc.);
- Determine outstanding Trustee compensation to be sought or termination commission;
- Status of Existing Pre-paid Funeral services;
- Accountings;
- Releases;
- Any Court related filings that would need to be directed related to distribution, termination, effective change of structure payments, etc.

It is fully recognized that certain consideration herein would be dependent upon the scope of the factors being considered, as well as the type of Trust instrument involved, as

well as the scope of action which may have been taken or effectuated during the life of the Trust administration. But it is important and must be a priority for those involved to identify the issues that will need to be resolved so as to avoid additional complications or problems arising. Similar to the underlying discussions or communications related to the establishment and funding of a Trust, it is prudent to have directed correspondence or updates provided so as to address the potential obstacles that could or might arise with the finalization of the Trust administration. Accordingly, the responsibility at death is not simply to "close the account." The Trustee must create a deliberate and thought-out wind-down plan.

PRACTICE POINT: Be sure at the time of the acceptance of an administration that every effort is made to secure information on all benefits being received by an individual so same can be documented and there is an expectation of the potential benefits that would be subject to reimbursement or repayment from the Trust at the time of the passing of the beneficiary. All too often there is uncertainty about the benefits being received and/or the source of coverage for certain services being provided. It is also wise to secure any Life Care Plan, and perhaps direct for the securing of an updated or amended Care Plan accordingly.

PRACTICE POINT: Be sure at the time of the acceptance of an administration that communications are effectuated to confirm the different jurisdictions that a beneficiary of the Trust may have resided in to ensure that anticipated lien confirmation that would need to be requested is present to ensure that any multi-state jurisdiction issues are known at

the front-end of the administration. This is also critical in any Court proceedings or related requests for distribution or accounting filings to ensure that any agency or potential remainderman lienholder is properly noticed on proceedings that might or could impact claims to be asserted or which exist at the time of termination and/or the passing of a beneficiary.

PRACTICE POINT: It is important that the Trustee and other professionals involved have a packet of important documents relevant to a matter in their possession. For example, any Court Orders, Structure Contracts, IRS documentation (TIN), Settlement Documents, Guardianship/Conservatorship paperwork, Powers of Attorney, Last Will and Testament, Information on members of the family, i.e. addresses and relationships of closest and secondary relatives, make up, at the very least, information and documentation which should be held or accessible. If the Trustee is a Successor Trustee, in addition to above referenced paperwork and documentation/information, are any prior tax filings and accountings, as well as summary of any budgeting or correspondence from state agencies approving or denying requests for distribution, etc.

II. Preliminary Checklist or Action List (Subject to Change)

Immediate — First 1–7 Days

- Obtain death certificate.
- Secure Trust assets/request date of death valuation.
- Stop unnecessary recurring payments.
- Identify outstanding obligations.
- Notify appropriate professionals.
- Identify governmental benefit programs.

- Review Trust termination provisions.
- Determine whether a probate estate exists.
- Review status of tax filings.
- Review status of accountings/filings.

Early Administration — First 30 Days

- Prepare complete asset inventory.
- Obtain current financial statements.
- Identify real estate.
- Identify vehicles.
- Obtain annuity/structured settlement contracts.
- Contact Medicaid agency (multi-state if services in other jurisdictions).
- Identify creditors/lienholders.
- Determine accounting requirements.
- Consult tax professional.

Intermediate Administration

- Obtain Medicaid payment history.
- Review governmental claims.
- Resolve disputed claims.
- Sell or transfer Trust assets.
- Address real estate.
- Address vehicle/title issues.
- Resolve structured settlement issues.
- Pay permissible expenses.
- Prepare interim/final accounting.
- Determine Trustee compensation.
- Prepare tax filings.

Final Administration

- Confirm Medicaid reimbursement paid.
- Confirm taxes.
- Confirm professional fees.
- Confirm administrative expenses.
- Complete final accounting.
- Obtain approval/release where appropriate.
- Calculate final distribution.
- Distribute remaining assets.
- Obtain receipts.
- Close financial accounts.
- Complete court proceedings, if applicable.

- Prepare final Trustee report.
- Preserve Trust records.

III. Checklist/Action Item Specifics

Upon the passing of the beneficiary, consistent with the scope of the immediate and general administration wind-down steps, it is important to secure a death certificate for the individual and it is anticipated that the Trustee should be prepared to address questions related to distribution for funeral expenses or payments (scope of same based upon the type of Trust and corresponding liens/anticipated distribution), in addition to being able to provide a general understanding of the time-line for resolution, disposition of assets, etc.

Without fail, as families or loved ones are dealing with the grief or general logistics of the passing of the Trust beneficiary, the focus shifts to how the Trust will be resolved and to what extent, if any, disposition might include disbursement to named individuals in a Will and/or intestate beneficiaries. Moreover, if there is a vehicle, home, reliance on the Trust for contribution of payments, etc., of course the individuals impacted want to have assurance or an understanding of what is to come or anticipated. Unfortunately, and often despite best efforts to inform or otherwise condition certain expectation that exist or which have arisen during the administration related to how the ultimate passing of the Trust beneficiary may result in outcomes that will require action, interested family members or other closely connected individuals do not recall the pay-back provisions, limitations on the use of funds for funeral expenses, the potential loss of the privileges associated with the former vehicle secured by the Trust, or possible sale of real property.

Depending on the circumstances of the individual beneficiary and benefits received by them formerly and/or at the time of the passing, it is also imperative to determine whether an Estate is being opened for the individual and if there are any other assets or items that would be subject to the scope of any lien, so as to understand and perhaps not duplicate efforts related to resolution thereof.

Securing Trust Assets and Information Gathering

While the Trustee may or should have a list of assets, i.e. Trust holdings, it remains imperative, upon the passing of the Trust beneficiary to create a formal inventory of assets and any continuing or ongoing anticipated costs and expenses. Bank accounts, existing credit cards, brokerage accounts, real estate, vehicle(s), personal property, structures, life insurance, digital assets, business interests, accounts receivable and/or pending settlements or ongoing litigation should be identified. Similarly, a determination of any debts or obligations, as well as amounts that are typically paid by the Trust monthly, quarterly, annually, etc., should be identified and either stopped, depending on the type of distribution and/or identified as an ongoing expense, subject to the preservation of an asset, but also in light of potential issues that might exist depending on the claim for reimbursement from Medicaid or other state agencies who provided services/benefits for the Trust beneficiary.

It is also important, in the completion of the task, to engage in communications, outside of anticipated correspondence regarding same with members of the beneficiary's family, with any accountant, financial advisor or Counsel involved to ensure that matters

are identified that could be at issue and that all steps are taken in preparation for final logistical steps that are anticipated, etc.

Real Estate Trust Ownership

How is the property titled, i.e. 100% Trust owned/other percentage?

Is there are mortgage or other liens against the property?

Is there insurance on the property and what are the present property taxes?

Who is presently residing at the property and what is the contribution requirement, if any?

How are utilities on the property held/titled?

Are there personal items in the property and how are they being disposed?

Is the property being sold, transferred, in kind, or to be determined?

Should an appraisal by secured and is there any Court requirement related to the transition of the property?

Proposed Real Estate Steps:

Secure the Property

Ensure Insurance Coverage- notification as may be required to company

Budget carrying costs until disposition- who is paying?

Obtain Appraisal

Determine claims or liens

Communications with any residents as to options and intentions

Obtain approval from Court as may be required or desired related to transfer, sale, etc.

Vehicle and Personal Property

Vehicle- ownership v. lien of title held by Trust and/or purchased to be confirmed, along with fair market value and any existing loan on the vehicle. Moreover, the status of insurance, registration and intended outcome with respect to the vehicle should be determined and communicated, especially if the vehicle is being driven or used by a relative, etc.

Personal Property- Jewelry, Furniture, Electronics, Collectibles, Household Goods and personal effects need to be discussed as to the interplay with any Trust interest therein, as well as the anticipated outcomes with respect thereto. Be careful of the disposition to or by relatives of the Trust beneficiary without consideration of value or otherwise, particularly if the Trust secured the items, etc.

Identification of Governmental Benefits and Communications

In assessing potential payback requirements, particularly from a First Party Trust, a Trustee, hopefully with an organized and/or comprehensive list of benefits received or formerly received by a beneficiary of a Trust, is able to have information on and be able to direct correspondence to ensure the notification of the passing of the beneficiary, but also to start the process of ensuring that all lien information is gathered or secured. It is recognized that many Trustees maintain a data base of contacts, addresses and important information on the payback requirements of certain programs that exist. While not exhaustive because of the requirements and position of different state programs as it

pertains to payback requirements, a Trustee looking to finalize the transition of the Trust and assets therein should be mindful of the following programs/agencies:

Medicaid	State Medicaid Agency
Social Security	Social Security Administration
Medicare	
State Medical Assistance Programs	
Housing Assistance	
Food Assistance Programs (SNAP)	
Veterans Benefits	
State Specific Benefits Programs	
County/Local Benefits Programs	
Any other benefits programs	

In addition to the identification of the programs and potential payback, it is also important to consider the following logistical/procedural questions:

1. Which State or States provided Medicaid or other benefits to the Trust beneficiary?
2. What benefits constitute recoverable medical assistance?
3. Are there any known or stated exemptions that would apply to any recovery?
4. What are the allowable administration expenses that can be paid by the Trust before payback is effectuated, particularly if the assets of the Trust are insufficient to cover the lien amount, etc.?
5. Has a full statement of the payment history been provided? If so, has same been reviewed and is the amount correct?

6. Is there any differentiation from the Trust payback requirements and the Estate recovery rules in that jurisdiction?
7. Are there any concerns about Medicaid questioning the administration of amounts remaining which would prompt the need for Court filing to approve and secure a release related to the administration?

Establishment of Priorities/considerations for Balance of Assets and Claims

Tier 1

- A. Determination of governmental reimbursement obligations (Medicaid-potentially more than on jurisdiction, State Agencies, Other Governmental Claims)

Tier 2

- A. Determine Permissible Administrative Expenses
 1. Trustee Compensation;
 2. Legal Fees;
 3. Accounting Fees;
 4. Tax Preparation and Fees;
 5. Court filings;
 6. Other allowable expenses under the Trust or allowed by Medicaid.

Tier 3

- A. Resolution and Tax Reporting
 1. Income Tax Liability
 2. Filings
 3. State Obligations for Taxes
 4. Estate and Inheritance Filings/Amounts Due

Tier 4

- A. Identification, Confirmation and Resolution of Liabilities of the Trust, if any
 - 1. Only if assets are sufficient and required for payment
 - 2. Take into consideration other assets or access to funds by beneficiary and/or their Estate
 - 3. Priority of Credit Claims important
 - 4. Any insolvency filings

Tier 5

- A. Determine Remaining Distribution, if any
 - 1. After all obligations resolved, any distribution based upon terms of the Trust and considerations included- Will, intestacy, probate related issues to be addressed- releases signed by any beneficiary, as well as confirmation of information, i.e. addresses, phone numbers, social security numbers for potential beneficiaries. In some instances, it is not until this time, albeit not advisable, for issues related to intestate succession to arise in so far as disputes over parentage, obligations of a potential parent, etc.

PRACTICE POINT: Often, the specifics of a structured settlement annuity are understood, i.e. term of payments or guarantees, as well as the payee, i.e. the Trust, although the actual contract and residual pages which detail commutation, remainder provisions, remainder payee designations, etc., are often not in the possession of the Trustee or Parties, often remaining with civil counsel, etc. It is important to have these documents, and hopefully, have participation by Trust/Estate Counsel and/or the Trustee, in these types of communications when a settlement is being effectuated, particularly depending on the amount being directed for structure or the terms thereof, to allow discussion on the

scope of the potential options or considerations that should be discussed. In the absence thereof, some of these matters can be corrected or resolved during the lifetime of the beneficiary, so it should still be a point of review/discussion. Some Questions and Ideas to Consider for Structured Settlement Annuities:

1. Who owned the annuity and who is the Payee?
2. Does the annuity benefit terminate upon the death of a beneficiary or is there a guaranteed payment term?
3. Is there a death benefit?
4. Who or what, i.e. Trust, is named as the Successor Beneficiary or Payee?
5. Is there a commutation rider or provisions to allow access to funds?
6. Can the annuity be assigned or sold, and is Court approval required?

IV. Accounting and Court Proceedings

For most Trustees, the end of the administration is directly connected to the desire to ensure the finalization of their role as Trustee, with limited to no expectation that a creditor, lienholder, beneficiary, etc., would assert claims against them accordingly. It is of course the hope that a Trustee has prepared annual accountings and has back up connected to all expenses paid or amounts distributed, as well as calculations reflecting fees and costs associated with the administration of the Trust, in addition to back-up for other costs incurred during the administration. Moreover, it is anticipated the tracking has been effectuated on all assets received and the increase of holdings attributable to the Trust.

In consideration thereof, the Trustee has to make a determination depending on the scope of and manner of prior production of the Trust, often depending on the requirements of the jurisdiction with authority over the Trust, as to how to effectuate a final accounting, so as to secure a release or Order which covers the scope of the time served and does not open the door to potential claims or questions, particularly in the event that the end of the Trust administration would include the final disposition of assets.

Most Trustees consider and weigh options carefully, but it is important to make sure that each set of circumstances from the administration is contemplated in the documentation prepared so as to allow the final reporting of the global activity of the Trust administration, particularly at the time of final disposition. More and more, Trustees are going beyond formal release documents being directed to individuals or representatives, in favor of the presentation of the full accounting for review, audit and approval by the Court. It is collectively an opportunity for the presentation of the accounting to all interested or conceivably interested parties to direct response/exceptions to the administration, etc. It also often allows the Trustee to address any other prayers for relief including fees and costs which might be allowable but desired to be approved. In many instances, there is also request for approval of the final distribution of Trust assets, etc.

In addition to accounting actions/filings with the Court, many Trustees have also sought direction from the Court and/or authorization to take action that may be contemplated but perhaps not agreed upon and/or believed to be in conflict, including distributions to creditors, approval for the sale of certain assets for a proposed price or

range of prices, dealings with the scope of the class of beneficiaries of a Trust, in the event that funds exist for allowable distribution after the payment of lienholders and creditors, etc. There have also been considerable filings seeking to eject or otherwise remove holdover parties or seeking to compel the return of assets, i.e. vehicle/personalty.

It is recognized that the Trustee, as well as most parties involved, would want to find ways to avoid any court proceeding, but it is an avenue by which resolution and finality can be brought to matters that have issues arising that are in question and/or which have not been resolved in normal course. It is also an avenue to address anticipated concerns or issues that would otherwise arise in the finalization of the administration of a Trust.

V. Taxes

For most Trustees or Trust companies, especially given the fiduciary context of their appointment and involvement in the Trust administration, great emphasis is placed on the requirement of tax filings for the Trust, as well as the certainty that the Trust beneficiary is also filing appropriate individual tax returns. Notwithstanding the basic concept that the Trust beneficiary is filing 1040s, often with the assistance from the Trust and/or Trustee in the coordination of such filing, is the corresponding 1041 filings for the Trust. Depending on the size of the Trust, as well as the holdings and activity regarding the assets, the complexity of the 1041 is relative thereto. The development of an internal tax plan for filings by the Trustee and/or the efforts to establish a relationship with a CPA or other tax professional is essential to the successful administration of the Trust and the role of the

Trustee to satisfy their obligations. Of course, at the end of the administration of the Trust, final 1041 filings, in addition to any K-1s issued, are crucial to ensure that there is no remaining liability or reporting issues related to the income of the Trust. In certain administrations, there are pending issues which might still need to be resolved related to income taxes, etc.

That said, at the time of the termination or end of the Trust, there should be consideration given to any fees, costs and potential tax liability that will be incurred related to the administration to ensure that sufficient funds are available for the resolution of same. Additionally, confirmation of the status of any beneficiary 1040s should be dealt with annually to ensure that no issues arise that might otherwise impact on the finalization of the Trust and/or its distribution that could have otherwise been addressed during the life of the beneficiary, i.e. failure to file personal returns. Most Trustees make a point of emphasis to confirm that the beneficiary has tax assistance, if necessary, to ensure that filings are being effectuated.

Another factor to consider, depending on the jurisdiction in which the Trust beneficiary resides, is the posthumous filings required for potential State Estate or Inheritance Tax, depending on the assessment or imposition of same, as well as consideration related to any Federal 706 filing requirements. The interplay between the disposition of same by the Trust and/or the Estate of the beneficiary needs to be addressed to ensure that proper consideration is given to these issues, as well as any required filings or tax payments depending on the logistics of state or federal provisions

that exist in furtherance thereof. It is important to be mindful of the identification of the potential need to address same in the file of the Trustee to ensure that these issues are not overlooked and/or considered during the life of the administration.

VI. Closing Out the Trust and Trustee Compensation

Notwithstanding numerous considerations or direct points of emphasis listed herein regarding the Trustee and the transition of the Trust upon the passing of the beneficiary, most Trustees have policies and fee schedules which dictate compensation during the administration, as well as reference to final fees and costs upon the proposed termination of the Trust. Some compensation is based upon Court Order and/or the terms of the Trust document approved, with other Trustees subject to state statutory provisions as it pertains to compensation.

While compensation is an important factor and drives the involvement of Trustees and the role they play in accepting the administration of a Trust, final letter, releases, confirmation of distribution, etc., are often the last action steps that are required to be taken to ensure that the Trust administration is properly ended. It is recognized that, assuming all of the items set forth herein have been resolved or considered, that every distribution or close of the Estate should have documented releases effectuated that serve as confirmation of the acceptance of the administration, approval of any accounting presented, or acknowledgement of the steps taken by the Trustee related to resolution of any payback requirement which might exhaust the assets of the Trust. The interplay

between Trust administration and final releases and acknowledgements, especially if there is a considerable payback requirement and perhaps limited to no distribution to remainderman will or intestate beneficiaries, has prompted more and more Trustees to seek judicial direction or Order so as to allow for the close out of the Trust and waiver of liability/indemnification, especially if there are anticipated issues which might be presented or if there had been the imposition of a surety bond or other requirements of the Court in the establishment and funding of the Trust.

While most corporate Trustees are authorized to serve as Trustee without the requirement of the posting of a surety bond, some Courts have directed for same to be imposed as a condition of the appointment. In that instance, additional steps must be taken to secure the release of the bond, either by Court Order or other avenue as confirmed with the company in which the bond has been processed.

Most Trustees have trusted professionals, i.e. attorneys, tax professionals, etc. on whom they rely on to address and discuss these types of issues. The rise of Trustee representation has grown considerably in seeking to address issues that arise during the administration of the Trust, but perhaps, more consistently, in the wind-down of the Trust and corresponding final steps to close out the Trust and make any final distributions, etc.

Additional Practice Points, Tips and Tricks

1. At the time of the termination and wind-up of the Special Needs Trust, be sure to READ, once again, the terms of the Trust and any inclusions therein, as well as any amendments, accountings, court Orders, structure documents, settlement documents or important notes on the file to be certain that the process or considerations related thereto are being resolved globally without any missteps.

2. Do not make distributions to individuals or requesting parties too early and make sure there is certainty in final claims or liens, as well as secured releases, if any, related to the Trust termination before releasing funds. It always seems prudent to maintain an escrow as well for anticipated action set forth herein that might arise that will require payment or retention of a professional.

3. Document all communications related to the wind-down of the Trust and make sure that clear correspondence is directed that details decisions or action taken by the Trustee in working to get ultimate finality of the administration of the Trust. Early discussions in the process with family, professionals and any creditors will direct and guide certain considerations of the Trustee in fulfilling obligations and resolutions sought accordingly.

4. CONSIDER/ANALYZE Court Protection and the types of issues that have arisen in a matter with requests for distribution, interactions with relatives or interested parties, and the scope of assets and potential liens that exist, as well as the nature of the anticipated final accounting and complexity thereof.