Special Needs Trust Management

This handout will concentrate on the unique trust management issues involved with the management of first party and third party special needs trusts.

In addition to basic trust management principles, trustees of special needs trusts need to be informed of their unique distribution rules, tax rules and funding rules. It is critical that the trustee of a special needs trust understand how important it is to properly manage a special needs trust so that the assets held in the trust and/or the manner in which distributions are made do not cause the trust to be a countable asset or the distribution to be deemed as countable income. If distributions are not made correctly, the trustee could naively sabotage an otherwise well written special needs trust.

Making this topic even more difficult is the fact that distributions from a special needs trust are treated differently depending on the type of government benefit received. Distributions may also be treated differently by various public programs if the trust is a self funded (first party) special needs trust rather than a third party funded special needs trust. The following information will assist the trustee in managing the special needs trust in a manner which avoids naively sabotaging the intent of an otherwise well written special needs trust to preserve needs based benefits.

The trustee of a first party or self settled special needs trust containing a requirement to reimburse Medicaid for the cost of any Medicaid funded services received by the beneficiary following the death of the beneficiary must be keenly aware of the 'sole benefit' rule in making distributions. There is more room for error in making distributions from a self settled, first party trust than in a third party trust which does not require a Medicaid payback. If a trustee of a self settled trust does not abide by the 'sole benefit' rule, he or she could be personally liable to the state for funds improperly distributed.

When the beneficiary dies and Medicaid seeks to be paid back, the trustee may have personal liability to reimburse Medicaid if he or she cannot account for how the funds were distributed. In addition, the trustee must be able to provide documentation that all distributions were for the "sole" benefit of the beneficiary. As this is a much stricter requirement than needed for third party special needs trust or a typical discretionary support trust, the trustee needs to be aware of the need for detailed record keeping.

With a special needs trust, the trustee must also make him/herself aware of all the government benefits the beneficiary is receiving and how distributions from a special needs trust may result in a reduction or loss in benefits. The trustee must make him/herself aware of the impact distributions may have on critically needed benefits such as Section 8, Medicaid or SSI.

This duty to become and to stay informed of what benefits the beneficiary is receiving and how distributions will affect these benefits is unique to trustees of special needs trusts.

If the trustee of a special needs trust is also a remainderman of the trust, he or she needs to understand the potential estate tax ramifications of serving as trustee when named as a remainderman. The typical special needs trust states that 'all distributions are in the sole discretion of the trustee." It is this sole discretionary power that creates the possibility that the IRS could include the remainder interest in the taxable estate of the trustee if he or she is serving as trustee at the time of his or her death. The trustee needs to be aware of this potential tax liability and potential 'cost' to his or her estate.

The trustee also needs to be aware of the potential for conflict or appearance of a conflict of interest when he or she is both the trustee and a remainderman. All distributions from a special needs trust need to be discretionary and not linked to an ascertainable standard. The trustee with a remainder interest may be tempted to limit or minimize distributions thus retaining more of the trust for him or herself upon the death of the beneficiary. Even if the trustee doesn't limit distributions due to issues of self interest, he or she needs to be aware that his/her refusal to make a distribution may be interpreted by others as being based on self interest.

APPLYING FOR A TAX IDENTIFICATION NUMBER

Individual trustees are often well meaning family members and/or friends of the family. They often have little or no experience with trusts. Prior to funding the special needs trust, the trustee must obtain a tax identification number from the Internal Revenue Service. This number should be used in opening all trust accounts. A tax identification number must even be used for self funded special needs trusts which are considered "grantor" trusts. If the social security number of the beneficiary of a self settled special needs trust is used, the beneficiary may lose government benefits. The individual trustee should not use his or her own social security number when opening account to avoid income tax consequences.

IDENTIFYING ASSETS TO BE TRANSFERRED TO THE TRUST

Deciding which assets should be titled in the name of the trust and which should continue to be held in the name of the beneficiary can be complicated. The primary purpose of the trust is to preserve assets for the benefit of a beneficiary who is now, or who may in the future be eligible for needs based or means tested governmental benefits. A secondary purpose of the trust, however, may be to prevent the beneficiary from being exploited by others or from wasting his or her own assets. Deciding which assets should be transferred to the trust will also depend on whether one is dealing with a self settled/first party or third party trust.

TITLING ASSETS IN A SELF FUNDED OR FIRST PARTY FUNDED SPECIAL NEEDS TRUST

Generally, a self funded trust should be funded with all countable assets belonging to a beneficiary who is receiving needs based governmental benefits or who anticipates an inheritance, proceeds from a law suit settlement, gift, lottery winning, back payment from SSA or some other windfall. The receipt of a windfall, if not transferred to a special needs trust, will result in a loss of governmental benefits such as SSI, Medicaid, community based waiver services, etc. The first party trust should be funded not only with funds in the possession of the beneficiary, but also with any and all funds that the beneficiary has a legal right to (such as a future interest in a trust, future payments from an annuity, life insurance beneficiary, etc). It is important to always look at the source of the funds before deciding if they should be transferred to a first party or third party special needs trust. An important caveat is if the source of funds can be traced to the beneficiary, these funds should be added to a first party special needs trust and should not be added to a third party special needs trust.

The first thing the trustee should do is attempt to identify any and all assets that the beneficiary owns or to which he or she has a legal right and determine which of these assets, if continued to be owned by the beneficiary, will result in a loss or diminution of needs based benefits. Those non exempt assets which will jeopardize eligibility for needs based benefits should be transferred into the first party trust. However, there are some assets which have significant value which may not need to be placed in a self settled trust. These are called exempt assets. For example, if one of the assets inherited is a home in which the beneficiary plans to live, the trustee may want to keep the home in the beneficiary's own name. A home is an exempt asset, as long as the beneficiary lives in the home. However if the beneficiary is not capable of managing a home and would need a guardian of the estate to protect the home, the trustee may determine the home would be better managed as an asset of the trust to avoid the need for a guardian of the estate. Other exempt assets include up to $2,000 in cash assets, one car and household furnishings and personal belongings with a total value less than $2,000. The value of personal property is its current resale value and not the purchase price value.

When determining which assets need to be transferred to the trust, the trustee may want to consider spending down some of the assets by converting non exempt assets (such as cash) to exempt assets by purchasing a home, car, prepaid funeral, etc. The trust should be funded with only those assets which need the protection of the trust to be exempt or in the case of a home, because the beneficiary cannot manage the asset him or herself. For some clients, spend down of exempt assets may be more cost efficient than creating a special needs trust.

It is important to remember that the first party special needs trust is primarily used to protect assets and not income. Income from government benefit programs such as SSI, SSDI, Veterans Pensions and Railroad Retirement Pensions cannot be assigned to a self settled special needs trust. (POMS Section S.I. 01120.200.F.1.c.). However if income received from SSI, SSDI, or other pensions is not spent down at the end of the month, it will be considered a resource on the first day of the following month. These excess resources can be transferred to a first party special needs trust in the month following their receipt.

Income may be assigned to a self settled trust from a structured settlement, alimony and child support. Annuity payments, alimony and child support are generally considered income. However, if there is an irrevocable assignment of structured settlement payments, alimony and child support, these are treated as an asset and can be transferred to a first party special needs trust allowing the beneficiary to remain eligible for means tested benefits.

All non exempt assets and income which is assignable to a first party special needs trust should be titled in the name of the trust. Once transferred to the trust, these assets will be subject to the terms of the trust and will not disqualify the beneficiary from receiving needs based benefits. Assets may be titled, *John Citizen, Trustee of the Jennifer Jones Irrevocable OBRA '93 Trust dated 7/7/07* or *The Jennifer Jones OBRA'93 trust dated 7/7/07, John Citizen as trustee.*

As stated above, the tax identification number, and not the beneficiary's social security number should be used when opening accounts in the name of the trust.

TITLING ASSETS IN A THIRD PARTY SPECIAL NEEDS TRUSTS

The third party special needs trust is a common estate planning vehicle used in Massachusetts to receive assets of third parties for the benefit of a beneficiary. This type of trust is generally used by parents, grandparents and other friends and family members who want to leave their assets for the benefit of a person with a disability. But in so doing, they do not want to jeopardize the trust beneficiary's eligibility for government benefits. The assets in a third party special needs trust must have belonged to someone other than the beneficiary when placed in the trust.

The trust, and not the beneficiary, must have been specifically named in the will or trust, or as beneficiary of a life insurance, IRA or other annuity/pension funds. If the individual who is the beneficiary of the trust is named as the beneficiary on a life insurance policy or payable on death account, and not the trust, then these funds cannot be transferred to a third party trust. This is true even if you know that the intent of the policy holder or holder of any asset was to leave these assets to the trust.

If the parent or holder of the policy did not designate the trust specifically as the beneficiary, you cannot later put the funds into a third party special needs trust. This is unfortunately a common mistake that families make. They meet with an attorney to draft a the necessary written special needs trust then fail to make changes in beneficiary designations on assets that pass outside of their will or living trust. It is recommended that clients bring change of beneficiary forms with them to their meeting with the attorney to execute the third party special needs trust. Following the execution of the trust, the attorney can then assist the client to make the necessary changes to the beneficiary designation form(s).

It is critical that the trustee of a third party special needs trust, be advised to never commingle assets that belong to the beneficiary or to which the beneficiary has a legal right with the assets of an otherwise properly funded and drafted special needs trust. Such commingling of the beneficiary's assets with trust assets will sabotage an otherwise well written trust and is a fatal management error. Unfortunately, it is one that occurs far too often despite written warnings to trustees.

Clients will often relate that they have been saving the son or daughter's gifts, earnings, etc. for several years and now want to put this money into the special needs trust they have executed. These funds may be in an account solely in the parent's name, so, technically, they do not belong to the child. If the funds are traceable back to the beneficiary this will create a 'commingling problem'. If SSI or Medicaid trace the funds back to the child, transferring the funds into the special needs trust may be considered a 'step transfer' and will require the trust include a payback clause to be exempt. A step transfer occurs when the child gives the money to his parent to hold for him or her. The parent then uses the same money to fund a third party special needs trust for the benefit of the child. The parent may also need to file a gift tax return for the transfer to the trust. If the funds can be traced back to the special needs child, the only option is for the parent to create a first party trust.

As stated earlier, it is important to recognize that the majority of the trustees named in third party special needs trusts are not professional trustees. They are frequently family members who have a very full load on their plate already. The chance for making a commingling mistake are great when a trustee is trying to work, raise a family, deal with providing the extraordinary care of a special needs sibling or advocating for the sibling. The purpose of the trust is to provide for the child when the parent or caregiver family member is no longer there to do so. To decrease the workload on the parent or family member, it is generally good practice to avoid funding a third party trust during the lifetime of the family or caregiver family member with two exceptions.

The first exception is if a parent was aged and concerned about the cost of long term nursing home care for him or herself. Because of the five year look back period, an older parent may want to make the special needs trust irrevocable and transfer funds he or she wishes to protect for the child into the trust. This works well when the parent has 2–3 year long-term care insurance coverage and/or additional assets to get beyond the five year transfer of assets look back period. The parent or grandparent needs to be careful not to jeopardize his or her eligibility for nursing home care by improper gifting.

The second exception is if a family has significant wealth and anticipates an estate tax liability. The parent may want to take an appreciating asset and gift it to the trust, using up a portion of his or her lifetime credit. Other than these two situations, the best practice is to wait to fund the special needs trust at death. If the child needs extra things that the trust is meant to provide, the parent is still alive and can use his or her own funds to meet the child's special needs.

A common error which causes commingling of assets occurs when a parent is receiving their own retirement or spousal benefits as well as disabled adult child benefits as a direct deposit in the parent's checking account which is titled in the name of the parent or his or her living trust. When the parent dies, if the living trust contains a sub-trust for the adult son or daughter with a disability indicating that the funds are to continue to be held for his or her benefit, the checking account is often continued with a new tax identification number. This is a third party trust. However, if the SSA Childhood Disability Benefits (CDB) are deposited into the same checking account that the parent used when the parent was alive, the trustee will have committed a naive commingling of the beneficiary's income with the third party special needs trust assets. This error is more likely to occur when the trustee of the trust is also the representative payee for the adult child's SSA benefits.

Another common error which results in commingling of the beneficiary's assets with the assets within a third party special needs trust, is if the beneficiary is given the right to sign a *Crummey Power* in a third party special needs trust. A Crummey Power enables a donor to qualify gifts to a trust as present interest gifts eligible for the $14,000 per year annual gift tax exclusion. In order to qualify for the annual gift tax exclusion, the beneficiary must have the right to withdraw the gift for a limited period of time. The primary beneficiary of a third party special needs trust cannot be given the right to withdraw. If the primary beneficiary is given the right to withdraw, the funds in the trust will be considered to belong to the beneficiary. This withdrawal right triggers the need for a payback to the state for funds that were initially third party. However, the persons given the right to withdraw is limited to the persons who are named to receive a portion of the trust upon the death of the primary beneficiary, then the gifts will not be deemed as belonging to the primary beneficiary. This is the result indicated in the Estate of *Cristofani v. Comm'r* (97 TC 74 (1991) which held that contingent beneficiaries may receive gifts and have those gifts qualify as "present" interest annual exclusion gifts if they have the requisite right to withdraw the contribution/gift. The IRS was not pleased with the Cristofani case and in fact has attempted to restrict its application.

When the Commonwealth learns of the commingling, it may determine the assets in the trust are no longer exempt and the trust will have to be converted to a first party trust with a payback clause in order to protect these assets from disqualifying the beneficiary from needs based benefits. Commingling assets can be a fatal error to the third party trust and advising against it cannot be emphasized enough when advising all trustees, including corporate trustees.

BASIC TRUSTEE ISSUES

It is not unusual for a client to designate a trusted family member to wear several hats. He or she could be named as trustee, guardian, representative payee for SSA benefits, a remainderman, etc. All of these roles carry duties that may conflict with each other. It is critical to forewarn the trustee who is also the representative payee to keep the trust funds and SSA income separate. The same is true if the trustee is guardian and has possession of income earned or savings of the beneficiary. The trustee wearing the hat of trustee, representative payee and guardian may naively commingle assets unless warned in advance of the importance of keeping assets that belong to the beneficiary separate. This is especially critical if the trustee is managing a third party special needs trust.

First and foremost of all the trustee's duties is the duty to be loyal. This can best be described as the "Golden Retriever Rule x 2". This duty of loyalty is especially important to keep in mind when the trustee is a family member with potential loyalties toward other family members. The trustee may need to be reminded that he or she must administer the trust with the best interest of the beneficiary in mind at all times. If the trustee fails to keep the best interest of the beneficiary in mind when making distributions (or not making distributions) he or she could be held personally responsible for any loss or harm that comes to the beneficiary of a special needs trust as a result of the trustee's actions or inaction.

One of the reasons an independent trustee is preferred over a family member is due to the duty of the trustee to be loyal to all beneficiaries and not just the named beneficiary. Unless the trust has specific language indicating that the interests of the remainder beneficiaries are secondary to that of the primary beneficiary, the trustee may be placed in a difficult position trying to balance the interest of the primary beneficiary with the interests of the remainder beneficiaries. Even with the best of intentions, a trustee who is a family member can be drawn into a series of conflicts which can lead to hard feelings and disharmony even in functional families.

The trustee should also be aware of avoiding even the appearance of self dealing. This means that the trustee should never invest in his or her own business, commingle trust assets with his or her own assets, never borrow from the trust for personal use, and should not sell assets held in the trust to him or herself. This applies not only to the trustee but to his or her immediate family.

The trustee should read the trust and become familiar with the terms of the trust. The trustee must be knowledgeable about the intent of the grantor. If the grantor left a letter of direction or letter of intent, the trustee should read this additional document very carefully.

While it is sometimes hard to second guess what it is that the grantor wanted from the language in the trust, a letter of direction can give clear guidance and direction to the trustee enabling him or her to better follow the wishes of the grantor.

It is recommended that all trustees become familiar with the Massachusetts Prudent Investor Rule. Individual trustees are often extremely conservative with investments. They invest in certificates of deposit, money market accounts and other 'safe' investments.

Unfortunately there are also those who take greater risks than they should. If the trustee is not familiar with investing large sums of money, he or she should consult an investment professional to assist with investments. It is important to note that while a trustee can hire a professional money manager, he or she will remain liable for investment failures that fall below the principles outlined in the Massachusetts Prudent Investor Rule.

The Prudent Investment Rule states in part "a trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, term, distribution requirements and other circumstances of the trust." The trustee must balance investments with the size of the trust and the needs (both long and short term needs) of the beneficiary.

The trustee has a duty to maximize the trust resources and to make investments that will produce an adequate stream of income to meet the trusts needs. This must be balanced however with the intent and purpose of the trust to provide a higher quality life for the beneficiary. If a beneficiary has a need for housing or transportation, it may be appropriate to spend a large portion of the special needs trust on the purchase of a home or a vehicle. Although this may remove a large portion of the trust from income producing investments, it may serve the purpose of the trust in that it provides a higher quality of life. The duty to make trust property productive needs to be balanced with the needs of the beneficiary and the intent of the grantor.

As stated above, the trustee can delegate certain responsibilities but he or she cannot avoid liability by doing so. The trustee is responsible for any and all failures. The trustee should always seek assistance when needed such as in tax preparation, investments, making distributions, etc. However, the trustee has a duty to be sure that the person or agency he or she hires is knowledgeable and qualified.

The trustee must prepare and send to the beneficiary (or his legal representative) annual accounts of the trust's activities. An accounting should include a list of assets held by the trust, the market value of these assets at the end of the year, income produced by the investments and distributions made from the trust.

In order to avoid problems, it is recommended that the trustee communicate more often than once a year with the beneficiary or the legal representative. The trustee may want to hold regular or frequent meetings to discuss investments, distributions, etc. The purpose of these meetings is to avoid any surprises at the end of the year and to avoid misunderstandings about the trust activities.

The trustee also has a responsibility to provide monthly reports to the beneficiary and/or the representative payee of all distributions made from the trust. SSI reporting requirements requires any change in circumstances be reported to SSI within 10 days of the month in which the funds are distributed. The recipient of SSI therefore has a legal duty to inform SSI of any and all benefits he or she has received from the trust. The trustee may want to confirm with the beneficiary who is to be responsible for reporting trust distributions to SSI so there is no misunderstanding. Timely reporting to SSI is critical. Failure to report to SSI on a timely basis may result in a penalty and will require any overpayments be paid back to SSI.

One advantage of the monthly reporting is if the trustee is unknowingly making a distribution in a manner which reduces SSI, it is better to correct this early on rather than having an entire year go by before the error is discovered. A more detailed discussion of how SSI treats earned income, unearned income, inkind income, and non countable income is provided herein.

The following is a brief example of why monthly accounting of distribution is required for SSI purposes. For example if the trustee is providing the beneficiary with $50 per month to buy cigarettes, this will result in a $30 loss of SSI. SSI does not count the first $20 per month received by the beneficiary. This $20 is referred to as the "disregard amount". For every unearned dollar given to the beneficiary in excess of the $20 disregard, he or she will have a dollar deducted from his or her SSI check.

With a monthly accounting, the trustee will learn of the error of giving cash to the beneficiaries before a large amount of SSI funds are lost. The trustee can then change the manner of distribution by arranging for a carton of cigarettes to be purchased for the beneficiary rather than giving him or her money to buy his or her own cigarettes. Breach of duty can occur intentionally or as a result of negligence. If the breach is intentional such as in the case of stealing trust assets or self dealing, the trustee may face criminal penalties for breach of his/her fiduciary duty. The trustee will also be personally liable for losses to the trust as a result of his/her intentional action.

A trustee may also be personally liable for a breach of duty that was not intentional but was the result of negligence. The only exception to this is if the trust includes an exculpatory clause which protects the trustee as long as he or she was acting in good faith. If the trustee was acting in good faith, he or she may not be personally liable for any resulting loss that occurs.

This type of clause is usually inserted to protect an individual trustee who is serving without compensation. There is a higher standard of care for trustees who are being paid a fee and/or who hold themselves out as a professional trustee. However, some trusts include a broader exculpatory clause that may protect the professional trustee from liability for negligent acts.

The tendency of parents naming their non-disabled sons or daughters as trustees of the special needs trust present special concern. While the trustee may have a close bond with the beneficiary/sibling, know the child best and be familiar with the circumstances of the beneficiary, the trustee may lack the objectivity that a disinterested trustee can bring in making distributions. When a sibling is named as trustee and is also a remainderman, there is also an inherent and obvious conflict of interest.

In addition to the conflict of interest, many siblings or family members do not have the financial expertise to manage a large sum of money. Family members may be better suited for the role of trust advisor or trust protector. An alternative to a family member as trustee of a small trust may be one of the non profit organizations in Massachusetts which manage pooled special needs trusts. If the estate is large enough a professional trustee, a bank or other corporate fiduciary is appropriate. At the very least if the parents still want a sibling to serve as a trustee, it is prudent to consider an objective professional co-trustee to serve along with the family member. This co-trustee should have the financial expertise as well as knowledge of government benefits that the sibling may lack.

MANAGING THE FIRST PARTY OR SELF-FUNDED SPECIAL NEEDS TRUST

First party funded trusts - (d)(4)(A) and (d)(4)(C) trusts.

As stated prior, the trustee has a duty to read the trust and become familiar with its trust's terms. It is critical that the trustee identify if the trust is a first party or third party special needs trust.

The reporting, accounting, distribution and termination requirements will differ for first party trusts. If the trust is a first party trust, the trustee has the same loyalties and obligations cited above to the beneficiary and named remaindermen. In a first party special needs trust, the trustee also has a responsibility to the trust's primary creditor (the state or states that provided Medicaid funded services to the beneficiary) and to not waste the assets held in the trust. If the trustee of a first party trust cannot properly account for all the distributions made from the trust, he or she may be held personally liable to refund the state for the cost of Medicaid funded care. It is important to remember that the 'sole benefit' rule only applies to a first party funded trust.

The following is a discussion of how the sole benefit rule limits the trustee in making distributions from the first party trust in relatively common situations.

A first party or self settled trust can be either a (d) (4)(A) (individual) or a (d) (4)(C) (pooled) trust. These require the trustee make distributions for the "sole benefit" of the beneficiary. This can create a problem for the trustee when the beneficiary is living at home with his or her family. If the trustee makes a distribution for the trust for home renovation, repairs, or household furnishings, the trustee should seek a pro rata payment from the other family members who are living in the home. This may not always be possible. The sole benefit rule also creates a problem for the trustee when purchasing a car, paying credit card bills, and paying for the beneficiary's legal obligations such as child support.

The trustee of a special needs trust should be mindful of the beneficiary's need to live in adequate housing. If paying for housing from the trust is the only way to afford this, it may be appropriate to purchase a home for the benefit of the beneficiary. If the trustee pays 100% of the cost of housing and/or renovations and other family members are enjoying the benefit of the housing is the payment in violation of the sole benefit rule? There is no one answer to this question. Based on the circumstances, paying 100% of housing costs may be appropriate and justifiable. It may also be appropriate to pay 100% of the cost of renovations and or improvements to an existing home owned by the beneficiary's parent or sibling. This becomes complicated in cases where the family members who are providing support, care and supervision for the beneficiary, are unable to obtain a home equity loan or cannot afford to sell the present home and move to a more adequate home.

How much is spent on housing repairs/renovations will depend on how much is in the trust and what the other needs of the beneficiary are. In order to protect the trustee from violating the sole benefit rule or risking spending down the trust prematurely, it is good practice that the trustee obtain court approval or approval from Mass Health before spending a large amount of money on renovations/ repairs of a home that the beneficiary shares with others. This is especially true if the renovations or repairs are not specifically related to accommodating the beneficiary's handicap.

When the home is owned by other family members, the trustee has the option of paying for the repairs and placing a lien on the property for the amount of the actual value of improvement to the home. Another option is to obtain a right to occupy the home so that the family members who own the home cannot later sell the home after the repairs have been made and pocket the additional sales price he or she receives as a result of the improvements.

As an example, a sister may approach the trustee to build an addition to her home so that her brother could live with her. The home is owned by the sister and her husband. The trustee needs to protect the beneficiary's investment in his sister's home. If the value of the home is increased due to the addition and if the home is later sold, the trustee needs to have a lien on the home or a pro rata ownership interest based on the value of the addition so that the trust can recoup a portion or all of the funds invested in the sister's home if or when the sister later sells her home.

The trustee can also opt to use trust funds to purchase a home for the beneficiary and allow family members to live in the home for a pro rata share of expenses (utilities, taxes, etc). Where a family cannot afford to pay pro rata share of expenses, the trustee should obtain approval from the court and/or Mass Health to avoid violating the sole benefit rule of a first party trust. The trustee will need to justify to the court and to Mass Health why paying 100% of the housing expenses is in the beneficiary's best interest when other family members are sharing the home.

Transportation may include providing the beneficiary with a wheel chair accessible vehicle or a safe and reliable automobile. Purchasing a car or van with first party special needs trust assets create a problem when other family members will share the beneficial enjoyment of owning the vehicle. Ideally, if the family can afford it they should be asked to assist with the purchase price of the van and its operating expenses. In many cases, contributing towards the cost of purchasing or maintaining a vehicle is simply not affordable.

In order to protect the trust from a lawsuit, the trustee may prefer that the beneficiary own the car and if he or she is not a licensed driver, have a family member own the vehicle. While allowing a family member to own the car may give the appearance of using first party trust assets for the benefit of another, the trustee may be able to justify using trust monies to purchase a vehicle which is to be titled in the name of another family member by the limitation of liability of the trust's "deep pocket". Another option is to have the trust own the vehicle and obtain umbrella insurance for the added risk of a legal claim against the trust in the event of an accident should occur.

There is no one solution to providing adequate transportation for the beneficiary of a first party special needs trust, but the trustee needs to be aware of the conflict of buying a car using trust assets and allowing other family members to use the car for their personal use. The trustee also has an obligation to investigate the driving records of the family member who is to be entrusted with the car. If the family member has a poor driving history, is unreliable and untrustworthy, the trustee may want to purchase subscription taxi service or other contracted transportation services rather than using trust funds to purchase a vehicle for daily use. The cost for contracted transportation services may be higher than owning a vehicle and the convenience less but in some cases, it may be the only prudent option.

Paying credit card bills is always complicated and creates risk for the trustee. This is true if from a third party trust as well as a first party trust. With a first party trust, the trustee must ensure and retain documentation that the billing entries are for the sole benefit of the beneficiary and not for other family members. This is especially critical when the credit card is not in the trust's name but is in the parent's or other family member's name. The trustee needs to ask for receipts and document that the charges were for the beneficiary.

A frequent question asked is if the trust can pay for birthday, Christmas or wedding presents for other family members when the beneficiary has been invited to a celebration. While purchasing gifts for others in these circumstances from a third party trust is allowed, it is NOT allowable under the sole benefit rule of a first party special needs trust.

The trustee of a first party trust is faced with a challenge when the beneficiary has a legal obligation to pay child support or alimony. Unfortunately, paying child support or alimony with funds in a first part special needs trust may violate the sole benefit rule. The trustee can pay for legal fees to petition the court to stop or reduce the payments due to change in circumstances. In some cases the amount may be reduced so the alimony or child support payments can be made from the beneficiary's own resources and or income. In other cases, the child support may be reduced to the amount the child is receiving from SSA benefits under the disabled parent's work.

Another option where an individual receives a fairly large law suit settlement or other windfall, prior to funding the special needs trust, the beneficiary may consider purchasing an annuity which will pay child support until the child reaches the age of 18. Because the beneficiary has a court order to pay the child support and purchasing of the annuity fulfilled his legal obligation, the purchase of the annuity for the benefit of his child is not deemed a gift by Medicaid. The remaining funds can then be placed in a (d)(4)(A) trust for the beneficiary's sole benefit.

It is important to remember that while a first party trust is an exempt asset for Medicaid purposes, it is not an exempt asset when it comes to creditors other than the State. Generally a first party funded special needs trust does not provide any protection from the beneficiary's general creditors. It is considered against public policy to take one's own money and defeat the interest of one's bona fide creditors as reflected in the Restatement (Second) of Trusts.

It is not unusual for the beneficiary to not realize the limitations of the trust and make credit purchases on his/her own which are not for his/her sole benefit. The trustee must use his or her discretion when paying these bills and if the trustee feels the purchases made on credit were inappropriate and violate the sole benefit purpose of the trust may refuse to pay the bill. In order to avoid potential legal action against the beneficiary for non payment of the debt, the trustee may want to try to negotiate a payment plan on the debt which the beneficiary can pay from his or her own earnings. If negotiation fails and a judgment is obtained against the trust, this author recommends that the trustee petition the court prior to paying for a debt incurred on purchases made on behalf or for the benefit of others.

If the beneficiary is likely to be exploited by others to buy expensive items he cannot afford to pay for from his own income and assets, then the trustee may want to discuss the possibility of a limited or plenary guardianship of the estate to avoid future creditor debt. This is also true if, due to a mental disability, the trustee is unable to control his or her spending or understand his or her own spending limits. A guardianship of the estate should always be a last resort. In rare cases, it may be necessary to prevent the loss of the entire trust and possible disqualification or loss of critically needed government benefits.

MANAGING THE THIRD PARTY SPECIAL NEEDS TRUST

The third party trust provides the trustee with far greater discretion than does the first party special needs trust. While the first party trust gives the estate planner a safe harbor to protect funds that would normally disqualify a person from receiving government benefits, it is a more complicated and more restrictive trust instrument than is the third party special needs trust. It is important to understand the distinction between these two types of trusts. Another important distinction of the third party special needs trust is that it does not require a payback to the state.

The third party trust is the preferred estate planning instrument for families with special needs children. It offers far greater flexibility to the trustee in determining distributions which enhance the quality of the beneficiary's life. With proper planning, there should be limited need for the first party trust. First party trusts should only be used for unexpected windfalls such as a lawsuit settlement, a winning lottery ticket, etc.

If there are sufficient funds available in the trust, the trustee may want to use trust assets to provide housing or improve the current residence of the beneficiary. Unlike a first party trust, the trustee of a third party trust does not have to be as concerned about others benefiting from the special housing costs provided by the trust. The trustee needs to balance the amount of money in the trust, the amount of other services needed by the beneficiary and the amount of income available each year to provide special goods and services with the beneficiary's own ability to provide his or her own safe and adequate housing. If investing a large portion of a special needs trust into a home or into repairs in someone else's home leaves the beneficiary with insufficient assets to meet his other needs, the investment may not be considered prudent. On the other hand, if living in a safe and comfortable home significantly improves the quality of the beneficiary's life, one could argue the trustee is following the intent of the Grantor and using the funds in a manner which greatly enhances the quality of the beneficiary's life.

It is solely up to the trustee to request other family members make a pro rata contribution towards housing costs, maintenance and/or repairs made to the house. In a third party trust, the trustee's decision to provide special housing cost will depend on the effect this will have on the beneficiary's benefits and the ability of the trust to afford the ongoing expense.

The fact that other family members will benefit from the purchase of a car or van for the beneficiary with trust assets is not an issue with a third party trust. The trustee must be prudent in the amount spent on the car or van and whether there are sufficient funds available from the trust to insure and maintain the car. However, the car or van can be used by or owned by others.

The trustee has a duty to investigate the driving records of any driver who will be driving the car, ensure that the car is properly insured and determine if it is best to have the vehicle owned by another member of the family or by the trust for the liability purposes. In the end, however, it is up to the trustee to make a decision regarding ownership and/or use of the vehicle purchased with third party special needs trust funds.

As discussed above, if the trustee feels the beneficiary or family is irresponsible and cannot be entrusted with a car, the trustee may want to arrange for alternate means of transportation even if more costly and less convenient to the beneficiary. If the primary driver of the car has a history of moving violations, accidents, health problems that could cause an accident, etc., it may not be prudent to purchase a car even if the trust can afford to do so.

A trustee will want to use his or her discretion as to which, if any, credit card payments he or she makes on behalf of the beneficiary. The trustee will want to evaluate the beneficiary's use of credit, if it is in his or her best interest to do so, if the charges are reasonable in light of the beneficiary's needs and ability to pay (or for the trust to pay), etc. The trustee can pay for billing charges for purchases made on behalf of another but the trustee will want to determine if such charges are appropriate based on the circumstances. In the example above, the trust could not pay for gifts for others from a first party trust. No such limitation exists with a third party trusts.

While the trustee can pay for gifts for others, he or she should use caution to avoid the appearance of misusing the trust funds for the benefit of others. In situations such as gift giving, it is helpful if the Grantor left a letter of direction or intent advising the trustee of the intent to make gifts to others.

If the beneficiary is receiving SSI or Medicaid, the trustee may not want to pay for any charges for basic support and be discriminating in what other charges he pays. If a trustee routinely pays the entire credit card bill each month without reviewing the charges and determining their appropriateness, SSI could claim the use of the card and automatic payment by the trustee is equivalent to unearned income.

As with all other distributions, payment for a beneficiary's legal obligations is in the sole discretion of the trustee of a third party special needs trust. While the trustee need not worry about the sole benefit rule of the first party trust, the trustee must always be concerned about spending down the trust prematurely or wasting trust assets. The trustee also needs to be careful to avoid establishing a pattern of practice of paying for alimony, child support, etc. Such distributions are not recommended. Distributions for these expenses may create an obligation on the part of the trustee to pay for future payments and should be made with great caution.

The properly written third party special needs trust will have a spendthrift clause which makes the trust assets unavailable to the beneficiary's creditors. The decision to pay a creditor on behalf of the beneficiary should be made very carefully and only when it is clearly in the best interest of the beneficiary to do so.

When making any and all distributions from the trust, the trust must remember the most significant duty which is to be loyal to the beneficiary. If the trustee fails to use due diligence in making distributions that benefit others, he or she can be held personally liable to both the beneficiary and, in some cases to the remaindermen, if it is later proved the trustee was not prudent in his/her distributions from the trust.

MAINTAINING CONTACT WITH THE BENEFICIARY, THE REPRESENTATIVE PAYEE FOR SSA BENEFITS, THE GUARDIAN AND/OR LEGAL REPRESENTATIVE OF THE BENEFICIARY

Staying in close contact with the beneficiary, if he or she is competent, or in the case of a minor or beneficiary who has a guardian, designated agent, or who has an interdependent relationship with his or her family with family members, is recommended. The trustee may want to have regular meetings, either in person or by telephone, with the beneficiary and/or with his/her representative and close family contacts. Many serious problems can be avoided with frequent communication with the beneficiary, his or her agent and/or family members where appropriate.

It is important that potential or actual conflicts be dealt with in a timely manner. It is not unusual for the beneficiary, parent or guardian to have unrealistic expectations of how the money in the trust should be spent. When the funds in the trust are from a law suit settlement, (requiring a first party trust) and the disabled beneficiary is a minor or an adult who is still living at home and dependent on the family for care, family members may see the trust as being available for the entire family's needs. The sole benefit rule limits the types of distributions the trustee can make from which the other family member may reap a benefit. Even with a third party funded trust, it is essential that the trustee make the restrictions and limitations on distributions clear to the other family members to avoid misunderstandings and to squash unrealistic expectations early on.

The most difficult part of being a trustee of a trust with no ascertainable standards and broad discretion on the part of the trustee is that it is so much harder to say "no" when asked for a distribution. In trying to stay on good terms with the beneficiary or a custodial parent, the trustee may feel coerced into making distributions the trust cannot afford or which are not prudent given the size of the estate. The trustee must understand that trying to placate other family members could lead to personal liability if the distributions are later determined inappropriate or imprudent given the size of the estate.

The trustee who bends over backwards in making distributions that the beneficiary or family member requests, may find him or herself accused of 'wasting the estate'. It is not unusual for the beneficiary to appear shocked and angry when told the trust is nearly spent down and to react by criticizing the trustee for mishandling the trust. The beneficiary, who was so demanding, may later say "well, you should have said "no" more often" or something to that effect and shift the blame for the spend down of the trust on the trustee. The purely discretionary standard for a special needs trust places a tremendous fiduciary duty on the trustee to document the legitimacy of all distributions.

The trustee's guiding rule in managing the trust is to preserve the assets for the beneficiary throughout his or her lifetime. When meeting with the beneficiary, his legal representative and/or family, the trustee should attempt to ascertain what the client's anticipated ongoing needs are. Unless the trust is funded with substantial dollars, choices will have to be made as to what are reasonable expenses and what is simply not affordable. Before making any distributions, the trustee should consider a number of factors which should then be shared with the beneficiary and his or her legal representative or close family member(s). This information should be shared verbally in as simple language as possible, as well as in written form. The information which needs to be discussed prior to developing a budget and making any distributions includes:

- the size of the trust and anticipated income it will generate
- the beneficiary's current and anticipated on going needs
- the age and health of the beneficiary
- anticipated extraordinary expenses listed in priority of need
- how to meet unexpected, infrequent needs
- how much of the income should be reinvested to plan for future expenses

It is much easier for the trustee to say "no" when he or she has a firm idea of how much money is available each year for ongoing expenses and what may be needed in the future for sporadic but necessary extraordinary expenses. A trustee must be more cautious about overspending the trust than he or she is with his or her own funds. If the trustee spends more than the trust can afford in order to stay on good terms with the beneficiary or his family, the trustee will fail in his or her duty to be prudent.

One useful strategy to build a more realistic understanding of the limits of the trust is to meet with the involved parties (beneficiary, his or her guardian or representative, other significant family members) to discuss and to develop an annual budget which reflects the anticipated distributions. Everyone should have an understanding of how much money is available to be spent each year. If the beneficiary's critical needs are such that the trustee needs to withdraw from the principal, the trustee needs to advise all parties of the consequences of doing so. The trustee needs to be vigilant about not spending down the trust fund on non essential purchases, as doing so may expose him or her to personal liability. Distribution such as purchasing a car or van or for paying family members for care giving services are loaded with potential risks and hidden costs. The trustee must understand the actual costs and risks to the trust before saying yes to a distribution for a car or private care giving payments to a family member.

It is not unusual for a parent who is not able to work outside of the home to ask the trustee if he or she can be compensated for staying at home to care for his or her child. Even if the child is a minor child, the courts may allow compensation for extraordinary care. In some cases, it may be appropriate to pay other family members for the extraordinary care they are providing the beneficiary. Paying family members for services provided may present a conflict for the trustee and may cause resentment among other family members. The trustee must determine the legitimacy of such a request as well as if this is an ongoing expense that the trust can afford. Assuming the trust is a first party trust, the trustee should also seek permission from a court before agreeing to pay a family member for care.

If a family member is being paid, the trustee will want to have a contract with the family member which clearly delineates the scope of employment (types of duties, number of hours, pay rate, etc.). The trustee also has to treat the family member as an employee of the trust and pay all taxes, workman's compensation and social security expenses. (Note: The receipt of payment by the family member is taxable earned income) If the beneficiary or the trust owns the home the trustee may also want to purchase an insurance rider for domestic help in the home to protect against the family suing the beneficiary or the trust if there is an accident in the home. When all of the expenses involved with compensating a family member for care are added up, the cost may be such that it eventually depletes the trust balance. If a trustee allows a trust to be spent down due to payments for care to another family member, the trustee risks the charge that he breached his duty of loyalty to the beneficiary and used trust funds primarily for the benefit of another. It isn't enough to pay only for legitimate expenses. The trustee must balance legitimate requests with the needs of the beneficiary and the ability of the trust to provide those needs for as long a time possible. The trustee may also want to investigate other sources of payment for a family care giver.

With a budget, the trustee can plan for how to provide for the expense of big ticket items that are necessary to meet the beneficiary's needs. For example, if the beneficiary or his or her family requests the trustee purchase a new wheel chair accessible van for their child, the family may feel the purchase of a new van is a very reasonable request. However, if the trust is funded with only $300,000, withdrawing $50,000 from the principal to purchase the van will significantly reduce the amount of money left for other services the beneficiary may need. In addition, purchasing a new van may incur increased expenses such as higher insurance costs. By developing a budget with the family, the family members will better understand why what they thought was a reasonable request is not affordable or affordable only by eliminating other services.

In the previous example, perhaps the trust could pay for repairs for the old van and begin setting aside funds from the income to replace the van in a few years. What is important in these type of situations is communication. The trustee cannot expect the beneficiary or the family to understand why something isn't affordable for the trust. From the beneficiary's perspective, he or she may see themselves as wealthy with $300,000 in trust to provide special needs. The beneficiary and/or his family may not have any experience with managing funds of this size and not realize of the need to budget and plan if the funds in the trust are going to last the beneficiary's lifetime or as long as possible.

It may also be appropriate in some cases, to discuss investment strategies with the beneficiary, his or her legal representative or family member(s). If the beneficiary and/or family members have an interest in investment planning or experience in this area, the trustee may want to consult with them for input. Regardless of the risk level the beneficiary or family feels is tolerable, if the trust loses money due to an investment scheme that is later determined to be risky, it is the trustee who is responsible for the loss and not the beneficiary and/or his family.

The trustee needs to be aware of and cautious about family dynamics and stresses within the beneficiary's family. The trustee's relationship with other family members may become quite contentious if the trustee does not keep the family members informed and involved with trust administration. The beneficiary and his or her family may feel the trustee is treating them with disrespect by keeping them in the dark about investments and administrative costs. Meeting with the beneficiary or family to review the investment plan, administration of the trust (including taxes, trustee fees and other administrative costs), and to develop a budget that stays within the income generated by the investments may avoid offending the beneficiary or family member.

The needs of the beneficiaries may change from one year to the next. The trustee may not know of these changes if the trustee is not in frequent contact with the beneficiary and the family. The flow of communication should be kept open so that misunderstandings do not occur and resentment does not develop. Ongoing communication may aid the trustee in avoiding getting into a tug of war with the beneficiary and/or his or her family. It will also ensure that the trust assets are best meeting the current needs of the beneficiary.

NAVIGATING THE MAZE OF GOVERNMENT BENEFITS AND THEIR TREATMENT OF TRUSTS

The need to determine what benefits the trust beneficiary is receiving is just as important as developing a budget and determining the lifetime needs of the beneficiary. The type of benefits received may limit the manner in which distributions are made. Knowing and staying on top of any changes in benefits is critical. Certain needs based benefits such as SSI, Medicaid and Section 8 can be adversely affected by the manner in which distributions are made.

A distribution from a special needs trust may be appropriate under general trust or tax rules but may violate eligibility requirements for critically needed benefits. A trustee must become familiar with the various rules regarding how distributions from a trust are treated or the trustee may disqualify the beneficiary from being eligible for certain benefits or naïvely cause an unanticipated reduction in benefits. The trustee needs to make informed decisions regarding distributions. To do so the trustee must know the scope of benefits received and their respective deeming rules.

IDENTIFYING ENTITLEMENT BENEFITS, NEEDS BASED BENEFITS AND SLIDING SCALE FEE BENEFITS FOR WHICH THE BENEFICIARY MAY BE ELIGIBLE.

The beneficiary and his or her family members may advise the trustee that the beneficiary is not receiving any government benefits. This does not mean the trustee can then just pay for any and all services the beneficiary needs from the special needs trust. The trustee has a duty to make a reasonable effort to determine if the beneficiary may be eligible for government benefits.

If the trustee believes there are benefits available for the beneficiary, he or she should encourage the beneficiary or the family member to apply for said benefits. The primary purpose of a special needs trust is to supplement and not to supplant government benefits. If the beneficiary is eligible for benefits which would allow the trustee to use the funds in the trust for other goods or services, the trustee would be negligent if he or she didn't make a reasonable effort to pursue application for said benefits. If a first party trust is involved, the trustee may have to seek a court order before making distribution for something that could be covered by a local, state or federal government benefit.

This is an example of how serving as a trustee of a special needs trust has greater responsibility and risk for the trustee than serving as trustee of a typical discretionary support trust. It is important for the trustee to investigate and apply for any and all benefits that the beneficiary may qualify for as a result of his or disability and income level. The trustee should not be shy about engaging the services of a social worker or other professional to help the trustee identify what programs, if any, are available to the beneficiary.

In order to stay current with the beneficiary's needs, the trustee may also want to hire a social worker or professional to complete an annual evaluation of the beneficiary's status. This evaluation will assist the trustee in determining what services may be needed in the coming year and be helpful in prioritizing needs. This annual evaluation should consider the following needs of the beneficiary:

- health, physical and rehabilitative needs
- personal interests, hobbies, recreation preferences
- legal status, power of attorney, guardianship, etc.
- changes in benefits
- any changes in circumstances (marriage, change of living arrangements, etc.)
- receipt of assets (inheritance, etc.)

In making distributions from the trust, the trustee will also want to keep in mind future eligibility for benefit programs so that the trustee does not naively jeopardize future eligibility.

While a beneficiary may not be eligible for a certain program or benefits presently, he or she may require that benefit in the future. Trustees must use caution when buying a non exempt item or establishes a pattern of distributions which later may be deemed as available to the beneficiary.

MAKING DISTRIBUTIONS TO MAXIMIZE GOVERNMENTAL BENEFITS

As stated above, the trustee must become familiar with the types of government benefits and how distributions from the trust may be deemed and adversely affect continued eligibility.

There are three basic types of government benefits with which the trustee must be familiar, these are:

- entitlement benefits (such as SSDI and Medicare)
- needs based or means tested benefits (such as SSI and Medicaid)
- sliding scale fee benefits (such as Section 8 and Food Stamps)

It is recommended, that regardless of the type of benefits a beneficiary is receiving at the time, the trustee follow these basic instructions when managing trust assets:

- Refrain from making cash distributions directly to the beneficiary
- Make all distributions to third parties or directly to a vendor
- Title all assets held by the trust in the name of the trust

- Avoid commingling of assets that belong to the beneficiary with the special needs trust
- Avoid commingling assets that belong to the trust with the trustee's assets
- Use a tax payer identification number when opening accounts
- Maintain accurate records
- File all state and federal tax returns when due
- File reports to agencies providing services to the beneficiary on a timely and as needed basis or give required reports to the beneficiary or his or her representative payee to file
- File annual accountings with the beneficiary or his legal representative

ACCOUNTING, RECORD KEEPING & TERMINATION OF TRUST

Accounting for trust assets and distributions: A trustee must keep accurate records detailing all of the trust's activities. The trustee is required to provide accounting information to the beneficiaries of the trust as well as to any public agency that is providing care, supports and/or services to the beneficiary. In the case of SSI and Section 8, the trustee or the beneficiary is required to report all distributions from the trust in a timely manner. This may be within 10-30 days of receipt. In other words, an annual accounting to the beneficiary may not be sufficient depending on the benefits received.

If an agency such as Section 8 or SSI requests information from the trustee regarding distributions the trustee must respond in a timely manner. If an agency is providing means tested benefits, the agency has a right to this information. Failure to provide it may result in the beneficiary's loss of the benefit or service. The trustee's records must be more complete than just a simple check register from a checking account.

The trustee must keep all information concerning the trust in an organized and accessible manner. The type of records that must be kept include: check registers, bank statements, cancelled checks, brokerage account statements, receipts for all purchases and itemization of all purchases. Itemization of purchases is critical in a first party trust as the trustee has a duty to spend trust assets for the sole benefit of the beneficiary.

When making purchases, it may be wise to preserve contemporaneous notes that were made demonstrating the need for the item. This may be important where an advocate, agency representative or a disgruntled remainder beneficiary later accuses the trustee of wasting trust assets or of making inappropriate distributions. If records become voluminous, the trustee can have them scanned or rent storage space. The cost for scanning or for a rental space is an administrative cost that can be charged to the trust. These records should be kept indefinitely.

In most cases, the special needs trust will end when the beneficiary dies or when the trust is spent down. Upon termination of a special needs trust, the trustee will have the following responsibilities:

- pay allowable final expenses of the trust,
- prepare a final accounting for beneficiaries
- file final federal and Massachusetts tax returns
- payback to state (first party special needs trust)
- distribute the assets to the remaindermen

It is important to note that the state is not a remainderman but a creditor of the trust whose interest has superiority to other creditors. While certain administrative expenses are allowed, if the trustee delayed taking his or her fees until after the beneficiary dies, he or she may not be able to pay themselves for their services as a trustee following the death of the beneficiary unless there are funds left after paying back the state.

Administrative expenses which the state will allow include all taxes owed and reasonable administrative fees to conclude the trust business. Reasonable administrative fees include the expense of an attorney or accountant to wrap up the trust business. If a trustee is going to charge for his or her services, he or she should keep a contemporaneous record of the time he or she spends managing the trust and submit the bills to the beneficiary or his legal representative on a monthly basis. It is wise for the trustee to pay himself or herself no less than on a quarterly basis and perhaps on a monthly basis to ensure payment for his or her work in the event of an unexpected or premature death of the beneficiary.

At the death of the beneficiary, Massachusetts Estate Recovery Unit of Mass Health will seek reimbursement for all payments it has made on behalf of the beneficiary over the course of his or her lifetime. At the time of death of the beneficiary, the trustee should request a payback statement from the Massachusetts Estate Recovery Unit. It is important to review the payback records with the guardian or member of the family who was knowledgeable of medical care the beneficiary received. There may be some discrepancies or duplications of charges which will be difficult for the attorney to identify on his or her own. If you want an itemized printout of all charges, you will have to make a specific request for this.

If a trustee feels there is an error in the medical charges made on behalf of the beneficiary, he or she can dispute the charges. The cost and time involved with challenging specific charges may be daunting. Unless the size of the dispute is significant, it may not be practical or worth the effort of a challenge.

As stated above, Massachusetts Mass Health is not a remainderman of the trust. It is a creditor with a superior lien on the funds remaining in the trust at the time of the death of the beneficiary. The trustee of a special needs trust will be personally liable if he or she distributes the funds to the named remaindermen in the trust without seeking information from Massachusetts Estate Recover Unit regarding the amount paid for Medicaid funded services throughout the lifetime of the beneficiary. As a reminder, the third party trust, if managed correctly so that the beneficiary's resources were not commingled with third party trust assets, does NOT require a payback to the state.

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To learn how we can assist, contact our Special Needs Practice Group Leader Frederick M. Misilo, Jr. at 508.459.8059 or fmisilo@fletchertilton.com.

Ask us about providing a seminar for groups of parents, professionals and advocates on special education issues.

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