

Appropriate Special Needs Trust Distributions

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The most common question a special needs trust client has is, "What can the trust pay for?" Policies regarding distributions change frequently and differ state to state. What is allowable in one jurisdiction may cause a disruption of benefits in another. In general, a special needs trust is extremely flexible as to what it can and will provide. A trustee of a special needs trust generally does not pay for any good or service otherwise available through governmental benefits. Governmental benefits arguably provide for the basic needs of an individual, such as an income, housing, medical benefits, and food. Professional trustees, in most circumstances, will not issue cash or a cash equivalent, such as a pre-paid card, due to the immediate impact on the individual's benefits. The Trust itself is designed to supplement governmental benefits, not replace them, so needs that can be met through outside entities should be exhausted first before seeking payment from the Trust.

Depending on the terms of the trust, a trustee can pay for the basic needs of the individual under certain circumstances, especially in an emergency where the health and safety of the beneficiary are in jeopardy. Payments from the trust for the basic needs or support of the beneficiary may cause a decrease in monthly income or loss of other benefits. This situation can arise even if no money changes hands. For instance, an adult child living in his parent's home rent free may see a one-third reduction of his SSI check as in-kind support and maintenance (ISM). A trust that owns a home can pay for all expenses related to the home, including utilities. In most states this will cause a one-third reduction of the SSI income, but the benefit to the beneficiary outweighs the loss of income. If there are others living in the home, the trustee may have a lease agreement and receive rent to help support the home. Overall, the duty of the trustee is to act in the best interests of the beneficiary and there are circumstances where the benefits to the beneficiary outweigh the penalties. These types of distributions should be done with the professional guidance of special needs attorneys so as to minimize any potential negative impact and maximize the benefit to the beneficiary.

Generally, distributions from the trust must meet several criteria: (1) the distribution must be for the sole benefit of the beneficiary, (2) in his or her best interests, (3) otherwise unavailable from other resources and/or no other responsible party, and (4) be fiscally prudent. Most often clients will inquire about the purchase of a home and transportation. Can they be purchased by the Trust? Yes. However, it must be done in light of the considerations outlined above and the purchase of any home should not be done without professional guidance and with court approval if the trust is supervised. If the beneficiary is a minor, the trust does not relieve a parent of their obligation to provide for the basic needs of their minor child. Even though parents are losing jobs and facing economic difficulties, the court is generally unsympathetic to requests for funds or purchases to meet basic needs of the children.

The most important practice tip is that a special needs trust is a very flexible document in which the trustee has full discretion to act in the best interests of the beneficiary. Every jurisdiction has its quirks. Even though the trusts are written pursuant to federal statutory authority, the administrative policies differ greatly between states. An experienced special needs planning attorney can help set reasonable client expectations, which are important for the clients future relations and satisfaction with the Trustee and/or special needs trust attorney.

- **Food and Shelter.** Any distributions for food and shelter will disrupt benefits or have a negative effect on them. Part I discussed situations where the advantages of such distributions outweighed the penalty imposed. It is strongly recommended that these types of distributions should be made with professional guidance from a special needs planning attorney.
- **Entertainment.** Requests for entertainment are generally without issue for the beneficiary and a caregiver. However, some states require that the caregiver be a non-family member or a penalty for entertainment costs will be imposed. Entertainment that includes food and/or shelter can be problematic, such as a restaurant or even popcorn at a movie, if paid for by the trustee. However, SSA disregards the first \$20. So, the trustee could pay for food, such as popcorn at a movie, or give the beneficiary \$20 in cash without affecting SSI benefits.
- **Vacations.** Vacations can potentially be problematic since they include elements of both food and shelter. Even though a hotel or other vacation housing payment is technically shelter, under the Social Security Administration's POMS an ISM penalty is not imposed during a temporary absence from the primary residence. Food while on vacation can become an issue, however. Cruises or all-inclusive resorts are great options. If the beneficiary requires assistance, a trustee can generally pay for one individual to accompany the beneficiary. More than one caregiver can be paid for as long as the need for such assistance can be properly documented by a physician.
- **Medical expenses not covered by Medicaid.** Most medical expenses are covered by Medicaid. However, there may be certain specialists, therapies or testing that are not. As state programs are cut in an attempt to balance budgets, services like podiatry, non-emergency dental care, glasses, hearing-aids, and chiropractic services are eliminated and can be paid for out of the special needs trust.
- **Incidentals or ongoing expenses.** Generally, the provider of a good or service should be paid directly from the special needs trust. However, this may not be possible or convenient when dealing with issues like personal hygiene needs, gas, or clothing. A friend or family member will pay for these items with the expectation of reimbursement from the special needs trust. In some regions this reimbursement is treated as unearned income to the recipient. This interpretation diverges from federal regulations, but is a reality nonetheless. Credit cards are an easier way to deal with these types of purchases. Gift cards are generally treated as cash and are not suggested.
- **Vehicles.** Vehicles are one of the most frequent significant purchases. There can be issues with insurance and ownership. If a trust is supervised by a probate court, I strongly recommend prior court approval. If the vehicle is owned by the trust, there can be liability issues, which expose the trust and puts it at risk in the event of an accident, damage or theft. If the vehicle is in a family members name alone, then there is no recourse if the vehicle is sold or transferred. When there is a responsible family member, friend or guardian of the beneficiary, the vehicle can be in that person's name, but the trust should place a lien on the vehicle to prevent unauthorized transfer. Creativity may be required depending on the policy in the beneficiary's region.

- **Older adults.** If the beneficiary is over age 65, some of the most typical disbursements are for bed-hold payments, non-covered medical expenses, guardianship expenses, translators, advocacy or additional care management services, and legal expenses.
- **Other expenses.** There is no limit on the value of personal items, including computer or adaptive equipment, televisions, gaming devices, furniture, or expenses to develop interests or skills, training or education

A special needs trust must be prudently administered in the best interests of the beneficiary, while avoiding adverse effects on the beneficiary's benefit eligibility. This type of trust is extremely helpful in promoting a higher quality of life for a beneficiary. Because of these trusts' complexity, professional guidance is generally recommended. However, where a need is demonstrated, with creativity the beneficiary's requirements can generally be met.