



Selecting a Trustee – Some Things to Consider

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Parents and grandparents often have a pretty good sense of when they may want to create a special needs trust (“SNT”) for their child or grandchild with atypical needs. They also understand, perhaps after discussion, when their family’s circumstances warrant a need for money management, or if an inheritance will jeopardize essential means-tested government benefits, like SSI or Medicaid. In meeting with a special needs attorney, Clark and Cathy explained that Sara, their daughter with developmental delays, would be unable to manage her own inheritance. The question they had not fully considered was, “Who should hold that job after they are gone?”

A first and common reaction is to think of naming the beneficiary’s brother or sister (or another family member) to act as trustee of the SNT. Often the goal in choosing a family member as trustee is to “keep things simple” and less costly. Clark and Cathy were considering naming their son and Sara’s brother, Bob. After all, they trust Bob completely and know that he and Sara have a great relationship. In their minds, Bob would always try to act in Sara’s best interest. Why not name Bob as the trustee?

In some circumstances, there is no insurmountable problem if the proposed family member trustee understands his or her duties and responsibilities and has the necessary skills and time to devote to trust administration. However, [in many cases naming a family member as trustee is neither appropriate nor the best plan](#). There are considerations that Clark and Cathy need to weigh before selecting a trustee of Sara’s SNT, including the following:

The Relationship: *To date, Bob and Sara enjoy a wonderful relationship as brother and sister. Bob takes Sara to the movies, to ballgames, and they enjoy each other’s company. As trustee, Bob occasionally may need to say “no” to Sara when she asks for money from the SNT. He’s not used to refusing his sister’s requests. If Bob solely is in charge of the purse strings for Sara, this new role may strain their relationship.*

The Complexity of Government Benefit Regulations: *The rules for the government benefits that Sara is receiving are complex. Bob will need to spend significant time learning*

about and complying with the rules governing how trust distributions could affect Sara's government assistance. This never has been Bob's job. He must learn if, when and by how much a SNT distribution will reduce Sara's SSI or affect her Medicaid. He also must send certain notices to government agencies and speak or even occasionally argue with the agency representatives to ensure that Sara's benefits are preserved.

Getting the Taxes Done Correctly: Bob is not well-versed in the tax rules and does not know what a Schedule K-1 is used for, [or what a 1041 tax return looks like](#). He won't know which tax deductions a trust might take. As trustee, he clearly will need the advice of a tax professional.

The Inherent Conflict of Interest: It is common that upon the death of a special needs beneficiary, her siblings may inherit any monies left in the SNT. Clark and Cathy's estate is large enough that Bob likely would inherit some remaining trust money if Sara passed away before him. Although Bob is trustworthy and loves Sara, the more he spends on Sara during her lifetime, the less money will remain for him upon Sara's death. Wearing the two hats of a current trustee and a future beneficiary could create a conflict of interest. Clark and Cathy need to consider this potential conflict, however subconscious it might be for Bob, when selecting a trustee.

Potential Liability: Clients should consider that even a trustee with the best intentions may create liability for himself due to a breach of duties when managing the SNT. For example, the trustee inadvertently might make an improper distribution or fail to file a required accounting. Unlike professional trustees, [family member trustees typically do not carry insurance](#) to cover any liability created during the term of the trust.

Costs: Naming a family trustee seems like a cost saver; However, clients should consider all the other costs involved in order for a family member to properly fulfill the role of trustee. For instance, the trustee's duties involve proper investment management, navigating the complex rules of various government benefits, ensuring that tax returns are filed properly, and assuring that proper records are kept for distributions, expenses and taxes. Bob is not an expert in government benefits, trust taxation or money management. He definitely will need help. Bob certainly may hire professionals to assist him: a financial advisor for asset management, a CPA for tax advice and return preparation, and an attorney to navigate the benefit rules. Using each of these professionals will cost the trust money. It may be comparatively as or even less expensive to hire [a professional trustee who can perform all of these functions](#). In the end, the selection of Bob as a family trustee of Sara's SNT may not be as inexpensive or simple as Clark and Cathy originally thought.

A Compromise: There also are advantages to naming a trustee who knows, loves and hopefully lives near the beneficiary. In this case, Bob loves Sara and will check on her regularly. He has a pretty clear understanding of Sara's likes, dislikes, and needs on a weekly and monthly basis. Bob would exercise good judgment in approving distributions to meet Sara's needs, with the advice of someone well-versed in the distribution rules. In this case, Clark and Cathy ultimately may choose to have Bob act as a co-trustee with a local professional trustee. It will be important for the document creating Sara's SNT to clearly define the different roles of the co-trustees. The [professional trustee](#) would handle administrative tasks like tax matters, investments and record keeping. [A professional trustee](#) with experience managing many special needs trusts also would advise Bob on the effect any particular distribution might have on Sara's benefits. Some special needs attorneys may handle all or most of these functions. Naming co-trustees in this case would give Clark and Cathy peace of mind that Sara will be well cared for and the SNT administered properly.

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