

The Voice® Newsletter

April 2015 - Vol. 9, Issue 5

This installment of the Voice was written by Special Needs Alliance member Edward V. Wilcenski, a founding partner of the law firm of Wilcenski & Pleat PLLC in Clifton Park, New York. He practices in the areas of special needs planning, elder law, and trust and estate planning and administration. A past president of the Special Needs Alliance, Ed writes and lectures frequently on issues affecting individuals with disabilities and their families.

A Wake up Call for Professional Trustees and Parents

A fairly recent court decision, *In the Matter of Mark C.H.*, involved the obligations of the trustee of a special needs trust, and serves as the focus of this issue of The Voice. The case involved an accounting proceeding brought by the co-trustees of a supplemental needs trust established for Mark, an autistic man living in a residential program in upstate New York. The trust, established by his mother, held in excess of \$2 million. The two co-trustees were an attorney and a well-known trust company, and in this proceeding they sought to have the court “settle” (approve) their accounts.

Both of Mark’s parents were deceased, and there were no other involved friends or family members. As a result, Mark had plenty of money (through his trust). What he lacked was an advocate-someone whose primary obligation was to help identify his needs and preferences, and then to work with the trustees so that the funds in the trust could be used to satisfy them. Though he was in a Medicaid funded residential program for individuals with autism, the program’s focus was limited to providing a safe and appropriate residential environment for its residents. While the program administrators could (and did) make suggestions about possible expenditures for Mark, they were not charged with determining how private dollars should be spent to supplement the care and attention that Mark was receiving. That was the responsibility of the trustees. Or so thought Mark’s mother when she established the trust.

As the court reviewed the accounts of the trustees to see how funds in the trust were being spent, it discovered that the co-trustees regularly took their commissions (i.e. compensation), but spent practically nothing on Mark, and made no effort to determine if they should be doing so. And because Mark did not have a family member, guardian or advocate looking out for him, no one was the wiser for it.

Unfortunately, it is not uncommon for trusts like this to sit dormant for years. The trustees-sometimes professional trustees, sometimes family members-do not mishandle or misappropriate trust money. They

keep the money prudently invested. They make sure tax returns are filed. And they usually take trustee fees (known as commissions in some states). But if the beneficiary is not competent and no one is asking for distributions, the trustees often do little or nothing else. Indeed, there is a line of thinking which supports this approach to trust administration. As the thinking goes, the trustee has a responsibility to preserve trust assets for (some undetermined) future need. For certain types of trusts, this approach is appropriate. For special needs trusts, it usually is not.

To explain, if a trust is being administered for a young child with no disability, common life experiences suggest that there will likely be some significant future event which will require money: the purchase of a home, admission to a university, purchase of a car, financing a wedding, starting a business, or an uncovered medical expense. As the beneficiary gets older, the beneficiary will let the trustee know his or her preferences. For this young beneficiary, preservation of principal is an important objective, and the trustee – familiar with these life events – will limit distributions while the beneficiary is young so as to ensure that the funds will be there when the child gets older.

The future is different for a beneficiary with a significant disability, and this is unfamiliar territory for many trustees. An individual with a developmental disability will typically be entitled to services through a Medicaid funded “waiver” program. These programs provide housing, transportation, daytime activity, sheltered employment, and comprehensive medical care. Though these services can be a godsend, they do not necessarily meet all of a beneficiary’s needs, nor do they insure as rich a quality of life as the beneficiary could enjoy.

Unfortunately, many beneficiaries of special needs trusts lack the ability to advocate on their own behalf and to educate the trustee about these other possibilities. As a result, many trustees, unsure of the beneficiary’s needs, and lacking a family member, guardian or advocate to provide this information, will simply do nothing without receiving a request. Funds that could be used to make the beneficiary’s life better – additional therapy and services, private case management and advocacy, better durable medical equipment, recreational opportunities – instead go unused. Well invested perhaps, but unused.

In the past, so long as a trustee did no harm and tended to the traditional obligations of trusteeship – invested prudently, filed tax returns, kept good records – there would be no liability. This may be changing. In *Matter of Mark C.H.*, the judge believed that the trustees were not entitled to compensation because they failed to be proactive in trying to identify the beneficiary’s needs. In the words of the judge:

“It was not sufficient for the trustees merely to prudently invest the trust corpus and to safeguard its assets. The trustees here were *affirmatively charged* with applying trust assets to Mark’s benefit and [were] given the discretionary power to apply additional income to Mark’s service providers. Both case law and basic principles of trust administration and fiduciary obligation require the trustees to take appropriate steps to keep abreast of Mark’s condition, needs, and quality of life, and to utilize

trust assets for his actual benefit. While the accounting in this trust is not yet complete, their failure to fulfill their fiduciary obligations should result in denial or reduction of their commissions for the period of their inaction.” (Emphasis added.)

Ultimately, Mark’s trustees retained a private care manager to help ascertain how Mark’s life could be enhanced through the proactive use of trust funds, and Mark responded wonderfully.

Mark’s case demonstrates a very important point. Money does not improve quality of life; money plus advocacy improves quality of life. Millions of dollars sitting dormant in a trust account didn’t help Mark one bit. But a small fraction of those dollars, spent under the guidance of a dedicated advocate, made all the difference in the world.

So what can be learned from Mark’s story?

- For trustees of special needs trusts the lesson is clear. A trustee’s duty extends beyond simply investing trust assets. The trustee has an obligation to keep apprised of the beneficiary’s situation and to consider his needs. Where the beneficiary lacks the cognitive capacity to communicate, or if there is no credible and reliable family member, guardian or other advocate who can communicate on the beneficiary’s behalf, it becomes an affirmative obligation of the trustee to locate a professional who can provide this advocacy and assistance.
- For families, Mark’s story reinforces the need to choose their trustees carefully and, if possible, to consider the appointment of “trust protectors” or committees who can review the actions of the trustee and intervene if the trustee is not being proactive in assessing the beneficiary’s needs.

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