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Using Community Special Needs Trusts

By Thomas D. Begley, Jr.

Brian was a 15-year old halfback on his high school junior varsity football team. One day in practice Brian was hit hard by a teammate, went down and suffered a severe brain injury. Fortunately, Brian survived and has regained the use of some portions of his brain but not others. He is able to think and to express himself, but he is unable to move his arms or legs and will be confined to a tube for the rest of his life.

Brian is covered under his father's medical insurance from work, but there is a \$1 million cap. His medical bills will approach \$10,000 per month for the rest of his life. It appears that Brian will be able to finish high school through the use of tutors, and may even be able to attend college.

Members of the community are concerned about Brian. They have decided to organize a series of fundraisers and expect to raise between \$1 and \$3 million. Brian's parents have heard that if Brian has money he will lose his public benefits, especially Medicaid, which is currently paying all of his medical bills.

The solution to this problem is for the organizers of the fundraising campaign to establish a special needs trust for Brian's benefit. Contributions will be made directly to a local bank that has agreed to serve as trustee. The trust will make no payments directly to Brian because this would affect his Medicaid, but would instead pay third parties who provide goods and services to Brian. The trust can pay for virtually anything so long as payment is not made directly to Brian. For example, the trust could pay for private tutoring, college tuition, vacations for Brian and a caregiver, recreation and anything else that would enrich Brian's life. Because Brian cannot compel a distribution from the trust, the assets are not considered "available" for public benefit purposes.

Irrevocable. Since funds are being contributed by many members of the community, it is appropriate that the trust be irrevocable from the outset so that the contributors have assurance that their funds will be used as intended.

Who should serve as trustee? If the funds in the trust are going to be significant, a professional trustee is advisable. A parent or other family member could serve as co-trustee, or a trust advisory committee could be established composed of a parent, a nurse, a financial advisor, a lawyer, and perhaps even a member of the state Brain Injury Association.

If the amount in the trust is small, it is often difficult to find a corporate trustee, but the funds could be managed by a lawyer, a CPA or a family member. If a family member serves as trustee, they should be encouraged to retain the services of a professional money manager and a lawyer experienced in disability law.

Another alternative for a smaller trust is a pooled trust, if one is available.

How are trust distributions made? Trust distributions are made by the trustee. A trust advisory committee can be given authority to advise the trustee on appropriate distributions. Distributions may not be made to the beneficiary receiving means-tested public benefits, such as SSI, Medicaid or Section 8 Housing. Distributions to the beneficiary would count as income to the beneficiary and may disqualify him from public benefits. Therefore, all distributions are made to the third party provider of goods and services.

Payments made to third parties for food and shelter for the beneficiary reduce the SSI payment by one-third or one-third plus \$20 depending on the beneficiary's living arrangements. Regular payments to third parties are counted as income for Section 8 Housing purposes. Sporadic payments are not counted.

How are monies invested? Monies are invested by the trustee. The trustee must be familiar with the Prudent Investor Act. The best solution for a non-professional trustee is to hire a professional money manager.

Taxation. Tax considerations:

- *Gift Tax.* Since the contribution is to an irrevocable trust, it is subject to the federal gift tax laws.
- *Estate Taxes.* Assets in the trust would be included in the estate of the beneficiary in most circumstances.
- *Income Tax.* Earnings on the principal of the trust are taxable to the trust unless distributed to or for the benefit of the beneficiary, which is normally the case. The trust is responsible for filing an income tax return (1041) for both federal and state governments and a K-1 if the income is distributed for the benefit of the beneficiary.



Begley & Bookbinder, P.C. is an Elder & Disability Law Firm with offices in Moorestown, Stone Harbor and Lawrenceville, New Jersey and can be contacted at 800-533-7227. The firm services southern and central New Jersey and eastern Pennsylvania.

The Firm provides services in connection with protecting assets from nursing home costs, Medicaid applications, Estate Planning and Estate Administration, Special Needs Planning and Guardianships. If you have a legal problem in one of these areas of law, contact Begley & Bookbinder at 800-533-7227.

Begley & Bookbinder has prepared **Special Reports** concerning *Special Needs Trusts*, *Vacation Area Homes – Tax and Management Issue* and *Utilizing Special Needs Trusts in Matrimonial Cases*. Please contact Begley & Bookbinder at 800-533-7227 or visit our website at www.begleylawer.com to obtain a **Special Report**.

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If you are interested in having an Elder & Disabilities Law Attorney from Begley & Bookbinder speak at an event, please contact Colleen Caruso at (856) 787-4237.

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