

Creating an Advisory Committee that Actually Functions

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Advisory committees have been incorporated into special needs trusts since their earliest inception. As we will discuss in this paper, while the concept of incorporating an advisory committee is sound, in practice it is rare that the advisory committee actually functions as expected.

A Little Background

Many potential clients from our office attend a workshop on special needs trusts prior to meeting with an attorney to enable the client to learn more about how best to design and execute a trust that will meet their loved one's specific needs. Early in the workshop we illustrate the challenge by utilizing an example with a fictional girl named Kathy who is age 17 and has a significant disability. Her condition will require some level of assistance for the rest of her life. A great part of the challenge is that if Kathy lives a normal life span she could very well live another 70 years or longer. Over that period of time it is very likely that Kathy will experience many changes in her needs as well as eligibility for those services that provide her support.

So Just Imagine

- Imagine that you have a 17 year old daughter named Kathy
- Kathy has a disability and is going to need assistance for the rest of her life
- Kathy is likely to have a normal life span and could live 70 years or longer



Much of the rest of the workshop focuses on how to meet the challenge of providing for Kathy for the next 70 years in a world where there are many unknowns. We emphasize the need to ensure that the document is flexible so that it can adjust to whatever changes may occur during her lifetime.

During our workshop we share the observation that the single greatest issue regarding whether a special needs trust functions or fails is the choice of a trustee. In our segment covering “choice of trustee and management systems” we educate the attendees regarding the attributes and duties of the “Ideal” Trustee. We also discuss different models that might be incorporated in the special needs trust.

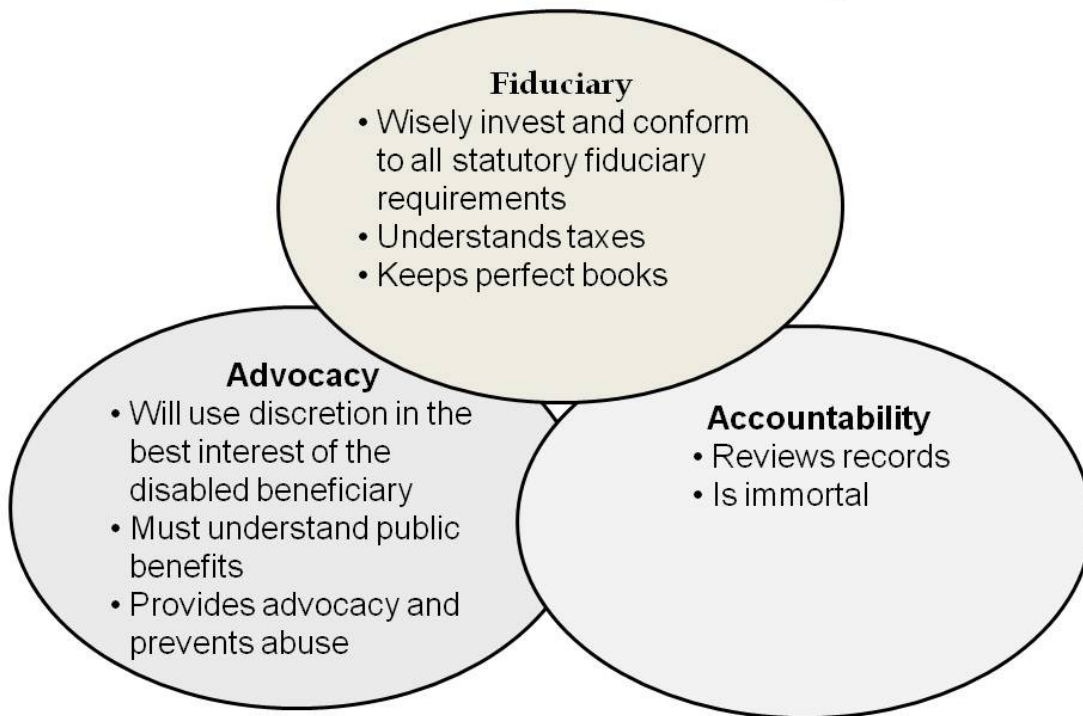
We have developed the following checklist for identifying the ideal trustee:

- Will use discretion in the best interest of the disabled beneficiary
- Must understand public benefits and keep up with changes in the law
- Can wisely invest and conform to all statutory fiduciary requirements

- Understands taxes
- Keeps perfect books
- Provides advocacy and prevents abuse
- Is immortal

Of course there is no such thing as an ideal trustee who can guarantee superior service for the beneficiary's lifetime. Instead we suggest a team approach in which the duties are divided into three spheres: Advocacy, Accountability and Financial. The basic concept is that there is no ideal trustee that can guarantee to serve all of Kathy's needs for the next 70 years with certainty. By dividing up these duties into three spheres we can begin to create a system of checks and balances that can adjust to almost any need that Kathy might have or changes in the systems that support her.

Divide the Duties Into Three Categories



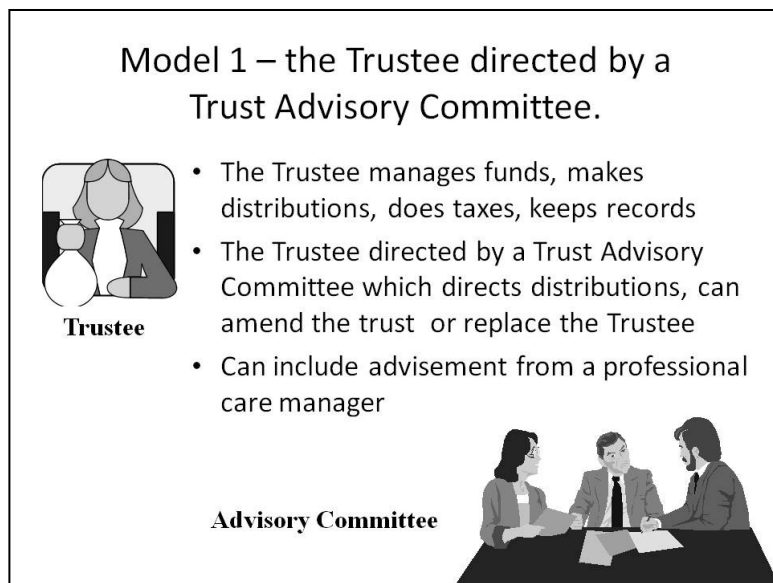
Quite honestly the specifics of how these duties are divided up are less important than ensuring that we have a functional checks and balance system. For purposes of this illustration the three spheres might include

- **FIDUCIARY** – Sphere One could be the oversight of investment of trust assets which conforms to all statutory fiduciary requirements, and management of those investments and distributions in order to minimize taxation to the trust or the beneficiary.

- **ADVOCACY** – Sphere Two could refer to a management system that creates a written distribution plan updated annually that ensures the resources and advocacy the beneficiary requires is provided by the beneficiary’s circle of support and backed up by professional care management to the extent required. Trust management will also maximize the utilization of public benefits when they are in the beneficiaries’ best interest.
- **ACCOUNTABILITY** – the third sphere would be performed primarily by the trust advisory committee and is meant to ensure that the trust stays on task in order to enhance the beneficiary’s quality of life while conforming with changes in the law, and in identifying and maintaining the most effective trustee available during the beneficiary’s lifetime.

We share our experience with workshop attendees that a professionally managed trust almost always performs better than the family managed trust. The concept of a professional trustee is counterintuitive to most clients. Some are concerned that their disabled loved one will be at the mercy of an impersonal institution or professional trustee. What the client usually desires is that their family remains in charge. This is probably the major reason that most special needs trusts designate family members as trustees. But without the advisement of an experienced professional trustee, our experience shows that family managed trusts are more likely to be mismanaged causing loss of benefits, inappropriate investments, the expenditure of trust assets which are either too quick or too conservative, and ultimately the loss of funds within the trust. These losses far exceed the fee of a professional trustee, and the damage will most likely be irreparable.

There are several management models that address these concerns. Each model allows the participation of family and loved ones that care about their disabled child.



One of most common models implemented uses a professional trustee and incorporates an advisory committee. In this model the trustee manages the funds, makes distributions, oversees the taxes, and keeps records. The trustee is directed by an advisory committee on appropriate distributions based upon the annual plan. A professional care manager does periodic assessments to ensure that the beneficiary is free from abuse and neglect, and presents the trustee and advisory committee with a

distribution plan that periodically directs which services the trust should provide. The advisory committee is given the power to amend the trust if laws or circumstances change, and the power to replace the trustee if the position becomes vacant or the advisory committee feels that the beneficiary would be better served with a change of trustee. The committee chair or co-chairs

will generally be responsible for the administrative process of the advisory committee including the scheduling of meetings and assuring that there are the proper number of advisory committee members.

Discretion of Trustee

Two common denominators with all special needs trusts are the extreme amount of discretion that's given to the trustee and the lack of control of the beneficiary. There is a reason for this condition. If an SSI or Medicaid recipient is also a beneficiary of a trust and therefore has access to the trust assets - then by law, SSI and Medicaid will count the trust as a “resource”, causing ineligibility. If the beneficiary has no power to compel the trustee to make a distribution then their eligibility for SSI and Medicaid is unaffected. Because of this stipulation, special needs trusts vest the trustee with “sole and absolute discretion”. This prevents the trust from being counted as a resource. A special needs trust is essentially a glorified spendthrift trust.

In some cases, denying the beneficiary access to the assets may be a primary objective while in other cases this loss of control by the beneficiary may be an undesirable byproduct. Even so, giving this level of unchecked control to a trustee is rarely a good idea. In our workshop we discuss how incorporating an advisory committee can empower family and friends (often referred to as a circle of support) by giving the advisory committee oversight of the trust and the power to hire and fire the trustee, thereby allowing the committee ultimate control.

Basic Concept of an Advisory Committee


Advisory committees are a very common tool utilized in many special needs trusts. The basic concept is to provide oversight to the trustee regarding the needs of the beneficiary in order to assure that the special needs trust is being administered in the beneficiary’s best interest. In the best of circumstances the advisory committee provides a system of checks and balances. A well run advisory committee empowers key family advocates who will ensure that the beneficiary’s needs are met and they are free from abuse and neglect.

Do Advisory Committee’s Actually Work?

Through a professional career that has focused on special needs trusts for over two decades I have rarely seen an advisory committee that is functional. In fact our office regularly sees special needs trusts that have been administered for decades without the slightest involvement of the advisory committee. One of the biggest reasons advisory committees fail is because members are given little or no direction and they feel that their input is not relevant to the beneficiary’s well being.

**Why Most Advisory
Committee’s Fail**

- Vague purpose
- Lack of structure and poorly defined duties
- Ambiguous timelines
- Lack of familiarity with the needs of the beneficiary
- Lack of relevant information to base advisement on.



A local disability organization recently organized a project in order to help families invite loved ones to participate in their child’s special needs trust advisory committee. Nearly 100% of the persons invited to serve on such a committee accepted, but the organizers found that continuation

on a committee depended upon how relevant the committee members felt their committee was to the beneficiary. The conclusion is clear. If the committee members lack relevant information and structure, the committee will flounder, the members will lose interest ultimately the committee will cease to function.

There are three basic reasons why most advisory committees rarely function properly:

1. Vague purpose.
2. Lack of structure and poorly defined duties.
3. Lack of familiarity with the needs of the beneficiary and lack of relevant information to base their advisement on.

Making the Purpose of the Advisory Committee Clear

All too often it is not clear to the advisory committee members and the trustee what the exact purpose of the trust is. This leaves the advisory committee to interpret that purpose for themselves.

Both the special needs trust and all supporting documents need to be clear regarding the overall objective of the trust. The trust should contain an outline of its primary objectives, and details of those objectives should be provided in a letter or memorandum of intent.

Let's return to our example. Suppose it was the grantor's intention that Kathy lived in the least restrictive environment available to her, and that wherever possible Kathy's choices be honored. Furthermore, the grantor desires that the trustee focus on supporting whatever vocational interest Kathy might have. Unfortunately, Kathy has a substance abuse issue. The grantor's direction might include a desire that Kathy remain clean and sober and participating in appropriate treatment before the trustee makes any distribution beyond her basic needs. The grantor could express that a primary purpose of the special needs trust is to focus on Kathy's safety and quality of life. By giving at least this level of direction, all parties clearly understand the grantor's intention.

Even if the grantor does not have strong opinions about how the trust should be administered on a daily basis, they tend to have certain values that they want spelled out and upheld within the trust. If the document only specifies that the loved one must be kept eligible for public benefits then both the trustee and the advisory committee are left to guess what the grantor's overall intent was and how they would fulfill their obligations.

Defining the Committee Structure and Duties

It is imperative to clarify how the trust committee should be structured, who is in charge, and when and how the committee members need to act. Without this guidance, some advisory committees will interpret their purpose to be co-trustees and become overly involved in day-to-day events. Others will interpret that their purpose is to be a sounding board for the trustee and that they are simply to be called on when needed. Under these circumstances, the advisory

committee will tend to wait for someone to tell them what to do which often means that they do nothing.

Dividing the Trust Advisory Committee Into Two Tiers

In many cases the grantor may have specific people that they definitely want involved in their child's life no matter what the situation, and others that may be a good choice presently, but their involvement may not be practical many years from now. For instance, it may be obvious that the beneficiary's sibling should take a leading role in overseeing their disabled sibling's needs. It is very common that there is a second tier of family and friends that are also caring and responsible, but because the future is impossible to predict, that second tier will likely change in the future. A strategy that we have found very useful is to name those people that the grantors feel should take a leading role as the chairperson or co-chairs of the advisory committee in the trust and then make reference to a schedule of successor committee members maintained separately by the grantor.

One advantage of this strategy is that it gives the grantors more control throughout their lifetime in keeping their advisory committee up to date without the formality and the cost of amending the trust. The most common changes to a special needs trust are the trustee, the advisory committee members and who will receive the remainder upon the death of the beneficiary. Beyond this, a well written and thought out special needs trust rarely needs changes to the core document.

Back to our example. Kathy's parents feel that her siblings, Bill and Mary, should serve as co-chairs. Bill and Mary have always been very committed to Kathy's needs and have stated that they want to remain involved in their sister's life. Kathy's parents would also like to have her uncle John involved with the trust committee, not only because he has been involved in Kathy's life, but also because he is a successful business man. They feel confident that his oversight will ensure that the trust is being managed prudently. However, the parents are concerned about John's advanced age and recognize that John would not likely outlive Kathy. They would also like to include Robin, one of Kathy's caregivers who have been very committed to Kathy's needs and Veronica, Kathy's 12 year old cousin who has always been close to Kathy.

The parents decide to identify Bill and Mary as the co-chairs within the trust document. They then make reference to a schedule of successor advisory committee members to fill the remaining positions. This approach allows for changes without modification of the trust document. For instance, Uncle John and Veronica may make good choices in the near future, but it is very possible that in a decade they would not be able to fulfill their roles. As far as Robin is concerned, it might be wise not to include her presently, but as she matures she can easily be added to the schedule.

The following is an example of language that could be included in the trust document concerning the structure of the trust advisory committee.

Sample Language

Composition of Trust Advisory Committee

The Trust Advisory Committee shall consist of a minimum of 3 members, but no more than 5 members to be determined by the chairperson(s) then serving. If any member of the Trust Advisory Committee is unwilling or unable, for any reason, to act or continue to act as a committee member, the chairperson(s) then serving may decide whether or not to fill the vacancy. However, there shall be at least three (3) members serving at all times. If there are fewer than 3 members serving and the chairperson(s) then serving are unable or unwilling to appoint a successor committee member, the Trustee may appoint the successors.

The initial Chairpersons for the Trust Advisory Committee shall be

Bill Jones

Mary Jones

In the event that either Bill Jones or Mary Jones cannot or will not serve, then the remaining chairperson shall <serve alone/select a successor chairperson/elect whether to select a co chair>.

In the event that neither Bill Jones nor Mary Jones is willing to serve, then the remaining advisory committee members shall select a chairperson by majority vote.

Duties of the Chairperson(s)

The Chairperson(s) primary duty is to ensure that the duties and the timelines of the Trust advisory committee are followed, and to make sure that there are at all relevant times the proper number of members on the committee.

Selection of the Remaining Trust Advisory Committee Members

The grantors shall maintain a schedule of successor Trust advisory committee members to be updated from time to time to provide guidance for the Trust Advisory Committee for selection of successor Trust Advisory Committee members to maintain the requisite number of committee members.

How an Advisory Committee Can Prevent Abuse

While it is desirable to have members that live in the same locality as the beneficiary, there are many special needs trusts that operate quite well with advisory committee members that live far away. In fact, we have many trust advisory committee members that do an outstanding job while living outside of the country.

The challenge for committee members that are not able to visit the beneficiary on a regular basis is that they may become out of touch with the beneficiary's needs. There is a danger in having a

vulnerable beneficiary who is isolated with no one monitoring his or her needs and any signs of abuse or neglect. The most effective method to prevent abuse is to make sure that someone visits the beneficiary regularly.

One function that parents of a seriously disabled child often perform is to identify when their child is being neglected or abused. Anyone who has been involved with behavioral treatment soon learns to detect changes in behaviors of their severely disabled loved ones. These are often indicators that something is wrong. Many parents and advocates I have worked with have the same experience I had as a psych nurse – sometimes it is hard to articulate exactly what those behavioral changes are – but it is palpable. I often sit with parents who tell me that their child would never suffer the fate of abuse or neglect. Yet it is the parent’s advocacy and vigilance that is the key in the wellbeing of their child. Many times, if the parents were unable to continue to provide their vigilance – there is no one who could come close to filling their shoes. The need for personal oversight and vigilance is especially timely while government agencies who traditionally served as watchdogs have their budgets cut and caseloads increased.

If it is not practical for an advisory committee member to personally visit the beneficiary on a regular basis, the solution may be to have a provision in the trust which pays for a trained professional such as a care manager to periodically come and visit, preferably unannounced. The greatest value as attorneys creating special needs trusts that we can bring to our clients with disabled loved ones who cannot effectively advocate for themselves is to provide them with a private social service system that can have someone independent of the various support programs with the vigilance necessary to detect abuse and neglect. To accomplish this – it truly takes a team of family, advocates, and care management.

A Three-Step Process of Developing a Distribution Plan

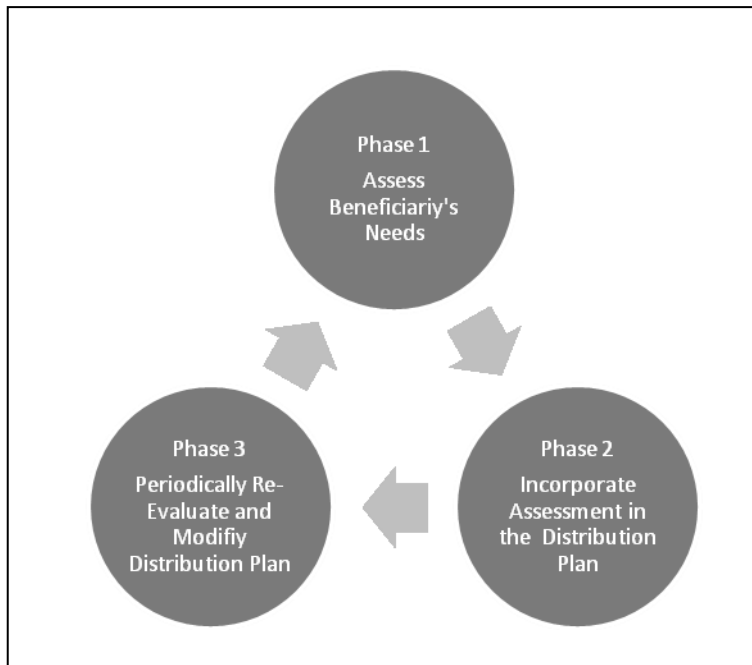
We have found that when an advisory committee lacks relevant information about the needs of the beneficiary, the committee will cease to function or to be an effective advocate. Providing all parties, including the trust advisory committee, with a written plan, commonly referred to as a distribution plan, will provide a tangible tool for all involved parties. They can use this

Sample Language

Periodic Visits by Trust Advisory Committee Members or Professional Care Manager

It is our desire that Kathy be visited at least monthly by a member of the Trust Advisory Committee and report back to the Trust Advisory Committee and trustee any concerns or needs that Kathy might have. In the event that no member of the Trust advisory committee that is able or willing to make these visits with regularity, we wish the trustee to have a professional care manager to make regular visits with Kathy and report their findings to the Trust Advisory Committee and trustee.

distribution plan to review, reflect upon, and to provide informed advice that the trustee can use to direct future trust activities. In most cases, this plan is created primarily by the care manager with input from the trustee and trust advisory committee members. A written distribution plan that is updated periodically and presented to the trustee and the trust advisory committee is an extremely effective tool. We have found that performing an annual review of a distribution plan by the advisory committee and trustee should be one of the advisory committee's primary functions.



In most cases there should be three distinct phases in developing a distribution plan. The first phase should be an assessment of the beneficiary's needs. The second phase should involve taking that assessment and incorporating it into a distribution plan. The distribution plan should include projections of the long-term performance of the trust based on anticipated distributions and investment performance. The third phase is periodic re-evaluation to measure the expectations against the actual performance of the special needs trust, and to make adjustments when necessary.

Let's review the three phase process, step by step:

Phase 1 – Assessment

In cases where the beneficiary requires a great amount of care, it is almost always preferable to utilize a professional care manager to perform the assessment unless the trustee possesses those skills. We routinely ask the care managers to assess the needs of the beneficiary and to provide a written report to help guide the distribution plan and other persons involved in the trust.

These reports include:

- Observations of the beneficiary and the circle of support in his or her environment;
- Recommendations of services that might assist the beneficiary and the family, and
- Recommendations for safety of the beneficiary and caregivers.*

- * It is very common for care giving family members to eventually suffer a back injury, especially as the child increases in weight. A care manager can monitor the safety needs of the caregiver and the beneficiary and recommend precautions.

Sample Language

Annual Distribution Plan

The trustee shall produce a written distribution plan to be reviewed by the Trust Advisory Committee annually. The primary purpose of the distribution plan is to provide specific recommendations of services likely to be provided to Kathy for the upcoming year, the cost of those services, and a good faith estimation of how those expenditures will affect the longevity of the trust.

The Trustee may/shall specifically employ a qualified Care Manager to assess Kathy's medical, social and direct care needs and incorporate those assessments in the distribution plan. The Care Manager shall be a qualified professional who is familiar with services in Kathy's community as well as the developmental needs of persons with disabilities similar to Kathy's.

The distribution plan shall provide guidance and advisement concerning Kathy's needs, rights, and entitlement to public benefits, and what discretionary distributions should be made for needs not covered by public benefits, as well as recommendations concerning distributions otherwise covered by public benefits, including, but not limited to, payment for supplemental medical and therapeutic care, education and habilitation services, attendant care services whenever the need arises, residential services, and daily support services. Whenever possible the distribution plan shall make a good faith estimate of the likely cost of each recommendation to be incorporated in an annual budget.

The distribution plan shall be made available to members of the Trust Advisory Committee for their review at least <15 days> prior to implementation. The distribution plan shall include a projection of longevity of the special needs trusts based on the assumed depletion of the trust as well as a reasonable rate of return on the investments of the trust.

The Care Manager shall be entitled to fair and reasonable compensation for services rendered. The amount of compensation shall be equal to the customary and prevailing charges for services of a similar nature during the same period of time and in the same geographic locale. The Care Manager shall be reimbursed for the reasonable costs and expenses incurred carrying out its fiduciary duties under this agreement.

Phase 2 -- Development of the Distribution Plan

The next phase is to take the assessment of the care manager and other advisors relevant to the needs of the beneficiary and incorporate the information into a distribution plan. This plan should include overall objectives - both short and long term - on how the trust will assist in the life of the beneficiary. It should also include information about the resources available to fulfill that objective, including trust assets and assets outside of the trust. The distribution plan should also include a projection of how the trust investments should perform and a projection of when the trust is likely to be exhausted based on the projected distributions.

Phase 3 – Periodic Reassessment

The Third Phase is to periodically evaluate the trust's performance and update the assessments and distribution plan as needed. Providing for the care of a disabled beneficiary has many variables. This process does not end until the beneficiary dies or the special needs trust is exhausted. The past few years have been extremely volatile for the stock market and for local and regional social service programs. In many cases trustees are being faced with the increasing needs of their beneficiaries as government programs for attendant and respite care are reduced or eliminated, and special needs trust investments have declined.

Keeping the Distribution Plan Up-To-Date

The process of assessing the needs of a disabled beneficiary and then incorporating those assessments into a budget is not a one-time process. Balancing the needs of the beneficiary with the resources available to the trustee is an ever-changing process. We are all experiencing the economic challenge of decreased investment values in Special Needs Trusts and the subsequent reduction in the income from those investments. At the same time, many states are reducing assistance to persons with disabilities. California, for instance recently eliminated dental care previously provided by Medi-Cal; reduced or eliminated home health attendant care for many persons with disabilities receiving benefits from the In Home Support Services program, which is partially funded by Medicaid; and has long ago eliminated almost all community programs for mental health.

Projecting the Longevity of the Special Needs Trust

The budget portion of the distribution plan should ideally utilize a projected rate of return and rate of distributions in order to determine how long the trust will last. In most cases, the objective of the trust would be to ensure that these funds last for the beneficiary's lifetime. We have found that having the distribution plan for review by the trust advisory committee and the trustee greatly assist all parties in making rational recommendation within the resources available.

The Power to Hire and Fire the Trustee

The function of the trust advisory committee needs to be advisory in nature and should not be seen as an entity that serves as co-trustee. Many good trustees and trustee services are happy to be accountable to someone or some entity, but requiring that every action of the trustee be confirmed by the advisory committee is cumbersome. On the other hand, the power to replace

the trustee is in most cases an essential tool to keep the trust advisory committee in ultimate control.

I have learned the hard way that there must always be some mechanism to fire and replace the trustee if circumstances change. Adjusts may be necessary for any number of reasons. It could be that the trustee selected when the trust was drafted was appropriate, but that trustee is no longer the appropriate choice. It could also be that the successor trustee does a good job, but a better option comes along that has better services at a lower cost. In fact, we can anticipate that as government services are reduced, private and nonprofit trustee services will fill the gap.

In addition, we have seen trust companies and services change wildly regarding minimum account size and services which they perform. A local trust company in Contra Costa County had a \$500,000 minimum account size 5 years ago. They raised that minimum to one million dollars a few years ago, and recently increased their minimum to 2 million dollars. At the same time, another trust company in the area has a mere \$250 minimum requirement. There is a proliferation of pooled trusts across the country with many of those trusts offering services ranging from bare boned fiduciary services to a complete array of services. In addition, states like California have private licensed fiduciaries that are becoming a more competitive option.

Sample Language 4 gives some suggested language to empower the trust advisory committee to initially confirm or replace the nominated trustee, and to retain that power as time goes on. So for example, Kathy's parents initially nominated REALLY BIG BANK AND TRUST as the initial trustee. Upon their death a few decades later, the trust advisory committee finds that the LEAKY LAGOON POOLED TRUST has more services at a better cost. The advisory committee has the option of hiring LEAKY LAGOON POOLED TRUST instead of retaining REALLY BIG BANK AND TRUST. This has a positive effect for Kathy's parents because it then becomes less imperative that they constantly review the "market" of trustee options, since can rely on the trust advisory committee to do their due diligence at the time.

Sample Language 4

Successor Trustee

Upon the death of the second grantor to die, or in the event that neither grantor is able to serve because of incapacity, REALLY BIG BANK AND TRUST, or a corporate trustee, private professional trustee, or pooled trust of the Trust Advisory Committee's choosing shall serve. In addition, the Trust Advisory Committee may replace REALLY BIG BANK AND TRUST with/without cause with a corporate trustee, private professional trustee, or pooled trust of the Trust Advisory Committee's choosing that is familiar with managing special needs trusts for beneficiaries with disabilities similar to Kathy.

It should be noted that the law practice that caters to families with disabled loved ones needs to make it their business to be aware of what trustee service options are available in their communities. The practice is then able to counsel their clients, and trust advisory committees that may be faced with accessing the optimal trustee services currently available when the reins are handed to them. We emphasize to our clients that hiring a law office should be able to do more than draft a document. The clients are hiring the office for their experience, and an essential part of the equation is keeping up to date with the best options available upon the client's death or incapacity. This is what distinguishes the document seller from the law office that truly serves their clients.

Conclusion

The concept of a trust advisory committee to provide a check and balance system in a special needs trust is important. But to expect the trust advisory committee to fulfill its function requires the trust management system to provide the committee with well designed tasks to perform and to provide that committee with relevant information to base their advisement upon.