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## CHALLENGES IN SPECIAL NEEDS TRUST ADMINISTRATION, PART II

Last week's edition of the *Elder Law News* discussed several challenges facing trustees in the administration of special needs trusts (SNTs). This week's edition completes that discussion, as presented by William Main, Vice President and Senior Trust Officer with Wells Fargo, at the recent Stetson Special Needs Trust IX seminar.

**Challenge #6: Houses.** Trustees often immediately face the issue of whether the trust can and should purchase a house for the beneficiary. The trustee must consider the financial implications of the purchase, as well as the suitability of the proposed house for the beneficiary. The trustee must also consider whether household expenses will be paid by the trust. Some trusts include language limiting the amount of trust assets that can be used to purchase a house. The trustee may consider preparing a real estate management agreement specifying who can live in the house, whether the others need to pay rent, and what will happen if the beneficiary has to move out of the house. The agreement should also specify who will pay the maintenance and utility costs. The trustee needs to be aware that trust payments for food and shelter items may jeopardize the beneficiary's eligibility for needs-based benefits. For example, payments for mortgages, real property taxes, rent, heating, fuel, gas, electricity, water, sewer, and garbage removal can reduce Supplemental Security Income (SSI) benefits. In many situations, it may be in the beneficiary's best interest for the trust to pay for these items even if the SSI benefit is reduced. If permitted by the trust document, the SNT can pay for real estate maintenance and upkeep, and, provided the improvements are for the beneficiary's benefit, the SNT can also pay for structural renovations, swimming pools, whirlpool baths, and recreational spaces. Titling the house is another important consideration. It may be better for the house to be titled in the name of the beneficiary or the beneficiary's conservator, in order to limit liability for an accident on the property.

**Challenge #7: Caregivers.** The trustee must determine whether a caregiver is an employee or an independent contractor. An employer may be required to

withhold Social Security tax, Medicare tax, and income taxes from an employee's wages. Family members and conservators often argue that a caregiver is an independent contractor because the family members and conservators do not want to pay the taxes or file the required forms; caregivers may not want their earnings reported to the IRS. The IRS, however, is strict about these issues. IRS Publication 926 outlines the tax requirements in this area. There may also be state requirements for payment of withholding and worker's compensation taxes. Trustees should consult a tax advisor, and they may want to consider working with an employment/payroll service.

**Challenge #8: Family Members as Caregivers.** In many cases, family members are the primary caregivers. The trustee should consider whether the family members are qualified to provide the care needed. If the family members are not qualified to provide the level of care needed, then the trustee and family should discuss alternate care arrangements, such as having trained caregivers paid for by public benefits or the trust. If the family members want to be compensated for their services, then the trustee and caregiver should have a written agreement specifying how the rate of pay is calculated and how the wages are paid. An employment agreement can distinguish between the duties performed as parent, for example, versus the duties performed as a paid caregiver. The trustee should be aware of the beneficiary's ability to develop independent living skills, and caregiver burnout. The trustee should maintain open communication with the caregivers, and may recommend respite care when necessary. The same taxation issues apply to family members as caregivers as with non-family members. Family members may be even more reluctant to be classified as employees than non-family members. The trust, however, can be liable for interest and penalties for failing to pay withholding taxes, so it is critical that the trust follow the tax laws and regulations.

Oast & Hook can assist trustees of special needs trusts with these and other challenges, as well as provide assistance with accountings and fiduciary income tax returns.

### **Announcements**

Oast & Hook is pleased to announce that we will be participating in two upcoming community events.

Oast & Hook attorney Sandra Smith will represent Oast & Hook at the Chesapeake Special Olympics Open House on Friday, November 9th. The Open House is designed for the athletes, family members, volunteers, and supporters, and it will be held from 6:30 p.m. to 8:30 p.m. at Towne Bank on Mt. Pleasant Road in Chesapeake.

Oast & Hook attorney Sandra Smith will represent Oast & Hook at the VBCPS Special Education Resource Fair on Monday, November 12th. The resource fair will have information on children and adult services, recreational programs, vocational information, respite services, support and advocacy groups, and it will be held from 6:30 p.m. to 9:00 p.m. at Landstown High School in Virginia Beach. Admission is free. For more information please telephone JoAnna Bryant at 757-461-4474.

If you are interested in having an attorney from Oast & Hook attend or give a presentation at one of your community events, then please telephone Jennifer Lantz at 757-967-9724.

### **Oast & Hook**

Oast & Hook is an elder law firm. We represent older persons, disabled persons, their families, and their advocates. The practice of elder law includes estate planning, investment and insurance advice, estate and trust administration, powers of attorney, advance medical directives, titling of assets and designations of beneficiaries, guardianships, conservatorships, and public entitlements such as Medicaid, Medicare, Social Security, and SSI, disability planning, income tax planning and preparation, bill paying, account management and reporting, care management, and fiduciary services. We also handle litigation involving these issues, such as will contests and estate administration disputes. For more information about Oast & Hook, please visit our website at [www.oasthook.com](http://www.oasthook.com).

Oast & Hook is a Virginia member of the Special Needs Alliance, a nationwide network of disability attorneys. As members of this alliance, we assist personal injury attorneys in resolving their cases to enhance the judgments and awards of their disabled clients and to maintain the eligibility of these clients for SSI and Medicaid. We are experienced in protecting the public benefits of persons with special needs and in assisting with the management of their assets. For more information about the Special Needs Alliance, visit its website at [www.specialneedsalliance.com](http://www.specialneedsalliance.com).

### **Distribution of This Newsletter**

Oast & Hook encourages you to share this newsletter with anyone who is interested in issues pertaining to the elderly, the disabled and their advocates. The information in this newsletter may be copied and distributed, without charge and without permission, but with appropriate citation to Oast & Hook, P.C. If you are interested in a free subscription to the *Elder Law News*, then please e-mail us at [eln@oasthook.com](mailto:eln@oasthook.com), telephone us at 757-399-7506, or fax us at 757-397-1267.

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Our website contains information about Oast & Hook and an archive of our newsletters and other estate planning, estate administration, and elder law articles in searchable format.

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