State Court Case Puts Trustees of Special Needs Trusts on Alert

Trustees should not take their duties lightly and should recognize that sanctions can be imposed for spending too much or too little of trust funds.

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Many banks and trust companies have expanded their fiduciary offerings to include serving as trustees of supplemental (special) needs trusts.[1] These institutions recognize the growing demand for this service, often from aging clients who are parents and caregivers for adult children with disabilities. A recent decision from the New York County Surrogate's Court[2] highlights some of the risks and challenges in this rapidly growing segment of the fiduciary services market.

Background

Supplemental needs trusts are established for the benefit of individuals with disabilities who are supported by various means-tested government benefit programs like Medicaid and Supplemental Security Income (SSI).[3] While several different types of supplemental needs trusts exist—"first-party" trusts funded with the assets of the person with the disability, "third-party" trusts created as part of the parents' estate plans, and "pooled" trusts managed by not-for-profit organizations[4]—all supplemental needs trusts share certain common characteristics. If properly drafted, they will not adversely affect the beneficiary's participation in the Medicaid and SSI programs,[5] and the beneficiary of the trust will have some form of disability—physical, cognitive, or a combination thereof.

Much has been written about these trusts over the years, and readers looking for an in-depth treatise on the topic have many options from which to choose.[6] Yet in the authors' experience, most substantive articles and treatises focus on the more technical aspects of these trusts—drafting techniques, benefit program eligibility, tax treatment, etc. Often lost in the discussion is the fact that these trusts are still discretionary trusts (with some limitations that vary from state to state), and by design these trusts require fiduciaries to exercise that discretion for a beneficiary who is often incapable of self-expression and self-representation. In those cases where the beneficiary cannot communicate and has no responsible relative, guardian, or other advocate, trustees are left to find other methods of obtaining information in order to determine how best to use trust assets for the beneficiary's benefit.

Trustee discretion. As this New York case highlights, guidance in this area—the extent to which a fiduciary has an *affirmative duty*

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to be proactive in identifying the needs of a beneficiary with a disability, and how that fiduciary actually carries out this duty—is sparse. What many trustees believe to be the protection offered by the grant of "full discretion" (and the notion that a court will not substitute its judgment for that of a discretionary trustee absent a showing of abuse of discretion[7]) may not serve as adequate protection in the case of supplemental needs trusts being administered for beneficiaries who lack cognitive capacity and have no legal representative or advocate.

Facts of the case

The decision, *Matter of J.P. Morgan Chase*,[8] generated significant national attention among trustees and attorneys alike, and was the subject of an extensive article in *The Village Voice*.[9] The case involved a proceeding to settle an interim accounting prepared and filed by the co-trustees of a supplemental needs trust established for a developmentally disabled, autistic man—"Mark"—who was served by a residential program in upstate New York. The trust was established by Mark's mother and held well in excess of $2 million. The two co-trustees were an experienced estate planning attorney and a well-known banking institution.

From the decision we learn that 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 who could identify his needs and preferences, and then work with the trustees so that the funds in the trust could be used to satisfy them.

Mark was in a Medicaid-funded residential program for individuals with autism, but the program focused on providing a safe and appropriate residential environment for its residents. The program administrators were not charged with determining how private dollars should be spent to supplement the care and attention that Mark was receiving.[10] That was the responsibility of the trustees, and one can reasonably assume that the creator of the trust—Mark's mother—expected this to be part of the trustees' responsibility when they accepted the appointment.[11]

Lack of expenditures. As the court reviewed the accounts of the co-trustees, it discovered that while they regularly took their commissions and fees, they spent practically nothing on Mark until the court intervened, and made no effort to determine if they should be doing so.[12]

In the authors' experience, this is not an uncommon occurrence. We regularly encounter trusts that have sat "dormant" for years. The trustees—sometimes professional trustees, sometimes family members—do not mishandle or misappropriate trust money. They keep the money segregated and prudently invested. They make sure tax returns are filed. And they take commissions. But in those cases where the beneficiary is unable to communicate and has no one—no guardian, no advocate, no close family member making requests on the beneficiary's behalf—there is typically little activity.

Indeed, there is a line of thinking which suggests that so long as the

1 Many readers are more familiar with the term "special needs trust." In New York (where the authors practice) the governing statute uses the term "supplemental needs trust," which is the term used in this article.

2 New York's probate court is referred to as the Surrogates Court. The case referenced and discussed in this article is In the Matter of the Accounting of J.P. Morgan Chase Bank, N.A, and H.J.P. as co-Trustees of the Mark C.H. Discretionary Trust of 1995 v. Marie H., 956 N.Y.S.2d 856 (N.Y. Surr. Ct., 2012) (hereinafter referred to as "Matter of J.P. Morgan Chase").

3 See 42 U.S.C. section 1396p(d)(4)(A) for the federal provision allowing for "first-party" trusts (which are funded with the assets of the person with the disability), and in New York, Social Services Law 366(2)(b)(2)(iii) and Estates Powers and Trusts Law 7-1.12, which cover both "first-party" and "third-party" trusts (the latter being funded with the assets of persons other than the individual with the disability).

4 See 42 U.S.C. section 1396p(d)(4(C).

5 Supplemental needs trusts receive varying treatment under the rules of other means-tested programs, such as the federal section 8 program. The federal Medicaid and Supplemental Security Income statutes specifically recognize supplemental needs trusts and provide preferential treatment. A detailed discussion of the treatment of these trusts for benefit eligibility purposes is beyond the scope of this article.

6 See, e.g., Begley and Cannelos, *The Special Needs Trust Handbook* (Aspen Publishers, 2013). For a discussion of the treatment of supplemental needs trusts in the context of retirement account benefits, see Wilcenski and Pleat, "Dealing with Special Needs Trusts and Retirement Benefits," 36 ETPL 15 (February 2009).

7 See Restatement [Third] of Trusts § 50(1)(b); see also In re: Estate of Glick, 2005 N.Y. Misc. LEXIS 7336 (N.Y. Sur. Ct. Kings Co., 2005), citing Matter of Gilbert, 156 Misc. 2d 379 (N.Y. Sur. Ct. NY Co., 1992), and Leigh v. Estate of Leigh, 55 Misc.2d 294 (N.Y. Sup Ct. NY Co., 1967).

8 Note 2, *supra*.

9 Savchuk, "The Decision That Could Change Everything for Disabled People with Million Dollar Trusts," Village Voice, 6/10/2013; available at http://www.villagevoice.com/2013-07-10/news/disabled-inheritance/ (last visited 10/23/2013).

10 Evidently, the residential program staff were unaware that Mark was the beneficiary of a trust, as the co-trustees never contacted the institution subsequent to the establishment and funding of the trust.

11 While excerpts from the trust document included in the decision reflect that this document was not drafted using New York's statutory language (N.Y. Estates Powers & Trusts Law 7-1.12), the court found that the language of the trust document—combined with the fact that it was drafted by the attorney/co-trustee who had met both Mark and his mother—was sufficient to establish testamentary intent.

12 The predecessor case which led to the decision In the Matter of J.P. Morgan Chase, was In the Matter of the Guardianship of Mark C.H., 28 Misc. 3d 765 (N.Y. Sur. Ct. New York Co., 2010) (hereinafter referred to as "the Matter of Mark C.H."). In the Matter of Mark C.H., the individual co-trustee of the discretionary trust for the benefit of Mark C.H. petitioned for guardianship of Mark pursuant to Article 17-A of New York's Surrogate Court Procedure Act (this is a guardianship proceeding limited to those with a diagnosis of mental retardation or a developmental disability). It was through that guardianship proceeding that the court became aware of the funds available for Mark C.H. and the fact that no action had been taken by either of the co-trustees to determine Mark's specific personal needs.

trustee is preserving trust principal and otherwise complies with the standard rules of fiduciary conduct, the trustee will not be held liable for the failure to make distributions so long as there was some reasonable basis for the inaction and the governing instrument cannot be interpreted to compel a distribution.[13] As reflected in the written decision of this court, this line of thinking may not serve as sufficient defense in those cases where a disabled beneficiary suffers as a result of the trustee's lack of proactivity.

Lack of familiarity with the disability. Interestingly, in *Matter of J.P. Morgan Chase*, the corporate co-trustee seemed to admit its lack of familiarity with the system of supports for individuals with disabilities in testimony presented during the accounting proceeding. As recounted by the judge in her decision, when she asked the representative of the institution serving as corporate co-trustee why Mark's trust sat dormant for all those years,

> [the Trustee's] "excuse" for inaction was its lack of institutional capacity to ascertain or meet the needs of this severely disabled, institutionalized young man." [Parenthetical in original.]

The institutional co-trustee's statements reflect a common sentiment among those trustees who have no experience with the world of disability. Most trustees are comfortable making investment and distribution decisions when the beneficiary has no disability, as they are reasonably guided by common life experiences. For example, the trustee of a discretionary trust established for a minor child with no disability can reasonably expect that there will likely be some significant future event requiring money: the purchase of a home, college tuition, a first automobile, financing a wedding, starting a business, or an uninsured medical expense.

These trusts require fiduciaries to exercise that discretion for a beneficiary who is often incapable of self-expression and self-representation.

Moreover, as the beneficiary gets older, she will be able to communicate directly with the trustee to express her preferences and intentions on the use of funds in the trust. For this young beneficiary, preservation of principal is an important objective, and the trustee—familiar with these life events—can and should put reasonable limits on 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 many individuals with disabilities, and this is unfamiliar territory for many trustees. An individual with a developmental disability will typically be eligible for Medicaid funded programs that are designed to provide housing, transportation, daytime activities, subsidized employment, and comprehensive medical care. On paper, everything looks fine. But service delivery systems—like other medical, educational, and social services systems—require attention and advocacy to function at their best. Readers are likely familiar with this concept in other settings. Consider two elderly individuals in a nursing home, one with a dedicated family member who visits every day and actively participates in treatment decisions, and the other without. As a matter of law, both should be receiving the same level of care and attention from the institution. But in practice, the first resident—the one with an *advocate*—will get more and better attention from the facility.

This same concept applies in cases involving individuals with disabilities who reside in both community and institutional settings, but in the authors' experience, many trustees fail to recognize the similarity. Without the proactive advocacy of a family member, guardian, or advocate to help guide the trustee in making distribution decisions, funds that could be used to pay for goods and services which make the beneficiary's life better—additional therapy, private case management and advocacy, adaptive equipment, recreational opportunities—often go unused. Well invested perhaps, but unused.

As noted above, there is certainly ample precedent to suggest that so long as the discretionary trustee is fulfilling the traditional obligations of trusteeship, the trustee's exposure is limited.[14] While there is also authority for the proposition that the trustee can be held liable for failure to carry out the terms of a trust (such as when a trustee fails to provide adequate support to a beneficiary or refuses to make a distribution[15]), the authors are unaware of any other cases that address this

[13] See, e.g., In re: Estate of John A. Messer, 34 Misc. 2d 416 (N.Y. Sur. Ct. Cattaraugus Co., 1962). One could argue that a disabled beneficiary in a residential institution is indeed sufficiently cared for and does not have any needs that are going unmet. While in the authors' experience this is rarely the case, it is certainly possible, depending on the institutional setting, staffing, programming, etc.. The problem in this case is that the trustees could not make any credible argument to this effect, as there was no evidence that they ever made any inquiry into the beneficiary's condition.

[14] See *supra* note 13 and accompanying text.

[15] As explained by the judge in Matter of J.P. Morgan Chase: "It is not sufficient for the trustees to simply safeguard the Mark Trust's assets; instead, the trustees have a duty to Mark to inquire into his condition and to apply trust income to improving it. *The trustees abused their discretion by failing to exercise it.*" (Emphasis added.) See also Matter of Osborn, 252 A.D. 438 (2d Dept, 1937); Matter of Kaminester, 16 Misc. 2d 1071 (N.Y. Sur. Ct. Kings Co., 1959).

obligation specifically in the context of a supplemental needs trust.

This may be changing. In *Matter of J.P. Morgan Chase*, the judge opined 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 court:

> 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, the trustees retained a private social worker to help ascertain how Mark's life could be enhanced through the proactive use of trust funds, and Mark responded wonderfully.

Those of us who work in this area are well aware of what parents and other family members have known for a long time: money alone does not improve quality of life; rather, *money plus advocacy* improves quality of life. Millions of dollars sitting dormant in a trust account did not 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.

Other side of the coin

Before a trustee reading this article opens the coffers and begins making distributions with reckless abandon for a disabled beneficiary, attention should be paid to a less publicized New York Supreme Court[16] decision, *Liranzo v. LI Jewish Education/Research*[17] that actually *surcharged* a corporate fiduciary for paying privately for services that would otherwise have been covered by the Medicaid program.

In *Liranzo*, a corporate trustee paid privately for caregivers and other services for the beneficiary of a supplemental needs trust who may otherwise have been eligible to have Medicaid pay for the cost of (much of) that care. In *Liranzo*, there *was* an involved parent—the beneficiary's mother—and the trustee complied with the requests of the mother to pay privately for the beneficiary's care (and to make other distributions from the trust at the mother's request, apparently without any credible inquiry). Over time the funds in the trust were nearly depleted, and the trustee sought to have its accounts settled when the trust became economically impractical to manage.

The court refused to approve the accounting and release the trustee, and instead directed the trustee to return $176,905.99 to the trust, to pay the $6,500 fee of the Court Examiner appointed by the court to review the accounting, and refused to authorize payment of attorney fees. According to the court, the trustee should have conducted an independent investigation to determine whether some or all of the goods and services purchased by the trustee could have been provided by Medicaid or some other benefit program.

This was clearly a drastic result. As a general rule the authors disagree with the notion that a trustee has an independent obligation to interface directly with a government benefit agency to secure benefits for a beneficiary. However, in this case the language of the trust document specifically required the trustee to investigate the availability of government benefits prior to paying privately for services. In the authors' experience, a trustee is limited in its ability to advocate directly with a public benefit agency when a parent or guardian is not inclined (or equipped) to do so. Yet we do agree with the court's suggestion that a professional should have been retained to render an independent decision on whether such benefits were available to the beneficiary, regardless of representations made by the beneficiary's mother.

On the one hand, this decision appears to run counter to the holding in *Matter of J.P.Morgan Chase*, which excoriated the fiduciary for failing to use funds in its control for the beneficiary's benefit. And as the trustee argued in *Liranzo*, supplemental needs trusts in New York give a trustee the discretion to pay privately for goods and services even if they would otherwise be available through the Medicaid program, so long as the trustee believes that the beneficiary would be in a better position for doing so.[18]

Consistent decisions. We believe that the two decisions are entirely consistent. In both decisions, the trustees were criticized for failing to take affirmative steps to become informed about the needs of their beneficiaries.[19] In *Matter of*

16 In New York, the Supreme Court is the trial level court.

17 N.Y. Sup. Ct., Kings Co. No. 28863/1996, 6/25/2013.

18 New York's statute specifically contemplates a trustee's choice to pay privately for benefits that might otherwise be available through a government benefit program. See N.Y. Est. Powers & Trusts § 7-1.12(e)(2)(i).

19 In *Liranzo*, the trustee did apparently raise the issue of Medicaid coverage with the mother and a social worker. For reasons that are not entirely clear from the decision, efforts at securing a Medicaid-funded home health aide were not successful. It was the opinion of the court that the trustee had an obligation to do more than simply raise the issue. If the beneficiary was eligible for Medicaid-funded care, and if there was reason to believe that paying privately for aides would dissipate the trust well before the end of the beneficiary's life, the trustee could (and we think should) have retained an independent professional to investigate.

J.P.Morgan Chase, the result was a trust which sat dormant for years. In *Liranzo*, the result was a trust whose assets were unnecessarily spent for services that could have been paid for through one or more government benefit programs.

The judge opined that the trustees were not entitled to compensation because they *failed to be proactive* in trying to identify the beneficiary's needs.

In both cases, the trustees' actions could have been entirely legitimate:

- In *Matter of J.P.Morgan Chase*, the trustees could have concluded that all of Mark's needs were being fulfilled by his residential program. As mention above, this would be unlikely in a Medicaid-funded environment, but it is certainly possible.
- In *Liranzo*, the trustee could have concluded that the beneficiary's needs were so unique that only specialized, privately paid care was appropriate. Yet without any independent investigation or inquiry, the trustees were left without any corroboration for their conduct.

In defense of the trustee

Both in the court decision and especially in her comments to *The Village Voice* (the judge retired from the bench shortly after the decision), the judge in *Matter of J.P.Morgan Chase* did not have kind words for corporate trustees of supplemental needs trusts.[20] Those of us who practice in New York know this judge to be a particularly vocal and progressive advocate for individuals with disabilities, and it seems to us that she used this trust and these trustees to make a point.

The authors work closely with many excellent and proactive corporate and professional trustees, and we know how difficult these trusts can be to administer. Indeed, the rules governing trust distributions often conflict from one government benefit program to another,[21] distribution standards are often ambiguous and difficult to apply in practice,[22] and (in the authors' experience) many of those who review the actions of the trustee in the context of settlement proceedings have very little practical appreciation of how tough it can be to make the right decision about the use of trust money for a beneficiary with a cognitive disability who has no credible advocate. Moreover, in most cases, trustees are using their standard fee schedules, meaning that they often spend a tremendous amount of time dealing with the "social services" component of these fiduciary appointments without any additional compensation.

That said, a lack of legal authority was not the issue in *Matter of J.P. Morgan Chase*. Quite to the contrary, the trustees were not criticized for making the wrong decisions. Rather, they were criticized for making no effort to understand the needs of their beneficiary and for making no (distribution) decisions whatsoever, yet still collecting compensation for their efforts (or the lack thereof).

This latter point is an important one. In the authors' experience, a trustee of a supplemental needs trust is not going to be held to an unreasonable standard, *so long as the trustee is being proactive* in trying to ascertain how funds in its control can be used to enhance the quality of life of a beneficiary with a disability. This is consistent with the notion that a court will not second guess the discretionary judgment of a trustee which is exercised reasonably and in good faith. But in those cases where the beneficiary lacks the cognitive capacity to communicate, and if there is no credible and reliable family member, guardian, or other advocate who can communicate on the beneficiary's behalf, then—at least in the eyes of the judge in *Matter of J.P. Morgan Chase*—it becomes an *affirmative obligation* of the trustee to locate a professional who can provide this advocacy and assistance. For those trustees who fail to do so and who continue to take compensation, they may find a very unpleasant surprise at the time they seek to have their accounts settled.

Some practical suggestions and recommendations

In *Matter of J.P. Morgan Chase*, the representative from the institution serving as co-trustee testified that it lacked the "institutional capacity" to deal with the out-of-the-ordinary responsibilities that

20 As quoted in The Village Voice article, note 9 *supra*: "They're lazy pieces of shit," says [the judge]. "It's a business. They collect their commissions, and they think their only responsibility is to invest the money and keep the money safe with no regard for the beneficiary."

21 Much has been written about the terribly inconsistent and often arbitrary treatment of supplemental needs trusts by the Social Security Administration for those individuals participating in the SSI program. See, e.g., Swartz, O'Brien, and Cannelos, "The Wrongful Disregard of SSI Comparability by Some State Medicaid Agencies as it Relates to SNTs," 5 NAELA J. 139 (2009).

22 For example, there is considerable confusion and disagreement whether the trustee of a supplemental needs trust in New York must make distribution decisions "solely for the benefit of" the beneficiary (following the terminology used in the federal Medicaid transfer of asset rule in 42 U.S.C. section 1396p(c)(2)(B)(iv)), for the "primary benefit" of the beneficiary, as the federal rule has been interpreted by New York's Medicaid agency ("OBRA Provisions on Transfers and Trusts, New York State Department of Social Services (n/k/a Department of Health) Administrative Directive 96 ADM 8 (3/29/1996), or whether there is any substantive difference between the two.

accompany the administration of supplemental needs trusts. We think the representative missed the point. A trustee is not expected to have a degree in special education or social work, or to have a detailed knowledge of the disability service delivery system. Rather, the trustee is expected to use its discretionary authority (as may be circumscribed by the terms of the trust document) to locate professionals who do. Following are some suggestions for the proactive trustee.

Retain a case manager or private advocate. Most trustees would not hesitate to retain a geriatric care manager for an elderly, homebound beneficiary who does not have family or friends to monitor a plan of care. An experienced geriatric care manager will have professional familiarity with the system of services that supports elderly individuals in community-based and institutional settings, and can serve as the trustee's "boots on the ground." In fact, many (and perhaps most) trust documents will specifically provide the trustee with authority to retain professionals to assist the trustee in meeting a beneficiary's needs. This is a very common provision in supplemental needs trusts.

The service delivery system for younger individuals with disabilities is different from the service delivery system for the elderly, but it does have many similar characteristics. Medicaid funding continues to shrink, which has the effect of increasing the case loads of Medicaid funded "service coordinators" and other direct care staff. Because the not-for-profit agencies are limited in what they can pay their direct care staff, turnover is high. Unless the person with the disability has a tireless advocate, the level of care in a Medicaid-funded environment can suffer significantly.

They were criticized for making no effort to understand the needs of their beneficiary and for making no (distribution) decisions whatsoever, yet still collecting compensation.

Many individuals with disabilities have had parents provide that advocacy from birth to the age of majority and beyond. But as these parents themselves age, become disabled, and pass on, rarely are other family members equipped to fill the parents' shoes as advocates.[23] While siblings and other family members are often willing to help, they simply cannot dedicate the same time and attention that was provided by a parent. As a result, the beneficiary of a supplemental needs trust may be eligible for Medicaid funded services, but there are no "boots on the ground" to make sure that the system is working the way it should (or that the level of care is *optimal* rather than *adequate*).

Trustees of supplemental needs trusts can retain a case manager or private advocate for a younger beneficiary with a disability, just as they can hire a geriatric care manager for an elderly beneficiary who is no longer able to live independently. A good case manager will have professional experience working with younger individuals with cognitive disabilities, and will be familiar with the different Medicaid-funded "waiver" programs that serve these individuals in the community. The case manager can work to maximize Medicaid-funded services, and identify supplemental services and supports that can be purchased using funds in the supplemental needs trust.

Retain counsel with relevant experience. The law and rules governing the administration of supplemental needs trusts remain difficult to navigate. On the one hand, a trustee may be penalized for failing to use funds in a supplemental needs trust in a proactive manner as in *Matter of J.P. Morgan Chase.* On the other hand, a trustee can be surcharged for paying privately for services that would otherwise have been paid for by the Medicaid programs in *Liranzo.* There is really no single "playbook" to help trustees identify the dividing line between the two.

Much of this uncertainty is derived from the fact that these trusts can be subject to oversight by multiple entities at any one time. A supplemental needs trust established by court order in the settlement of a personal injury lawsuit may be subject to the continuing jurisdiction of the court that approved the settlement. At the same time, there may be a court-appointed guardian for the disabled beneficiary that is reviewing the trustee's accounts annually. And the state Medicaid agency—having an interest as a statutory creditor at the end of the beneficiary's life[24]—will be reviewing trust distributions on a regular basis for its own purposes. To make matters worse, supplemental needs trust practice can vary significantly from state to state and, here in New York

[23] The issue of the aging caregiver has received increasing attention in recent years. See, e.g., Ansberry, "Uneven Care: As Parents Age, Agencies Struggle to Help the Disabled," Wall St. J., 10/19/2004, page A1.

[24] Supplemental needs trusts established with the assets of the person with the disability are referred to as "first-party supplemental needs trusts," and must provide the state Medicaid program with a right of recovery at the beneficiary's death for medical assistance paid during the course of the beneficiary's life. See 42 U.S.C. section 1396p(d)(4)(A).

where the day-to-day administration of the Medicaid program is delegated to each county's social services office, from county to county. Furthermore, as explained above, a trustee managing funds for a beneficiary who receives both SSI and Medicaid may be faced with conflicting instructions from the government benefit agencies on how trust funds can be used.[25]

Attorneys who practice in the area of supplemental needs trusts and government benefits can provide a trustee with guidance on how best to navigate this complicated system of oversight, and can be particularly useful in communicating with representatives from government benefit agencies who are making demands and issuing decisions based on unfamiliar rules and regulations. Again, the terms of most supplemental needs trusts contemplate that this level of advocacy is outside of a trustee's expertise, and specifically allow the trustee to retain professionals to assist.

Periodically settle the accounts. Most trustees—and certainly all professional trustees—understand that their accounts will ultimately need to be settled, formally or informally, in order to be fully released from liability. For discretionary trusts that will last for an extended period or for a beneficiary's lifetime, many trustees voluntarily choose to settle their accounts periodically.

There are many different reasons for doing so. Periodically settling the accounts relieves the trustee from having to permanently maintain financial records. It also frees the trustee from reproducing a running commentary on the bases for various distribution decisions that would have to be recounted at the time of settlement, an event that may occur years—and sometimes decades—down the road.

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Periodic settlement takes on even more importance for supplemental needs trusts, as these trusts offer fertile ground for objections, among which are the following:

- Failure to use government benefit programs fully.
- Distributions made in contravention of confusing and often conflicting government benefit program rules.
- Incorrect tax treatment of trust income.[26]

In those cases where the supplemental needs trust was funded with the beneficiary's own assets,[27] the state Medicaid program is an interested party in the proceeding. As a priority creditor, the Medicaid program has a very tangible interest in maximizing recovery by challenging distribution decisions. Getting these issues to the table and addressing them periodically helps a trustee stay on course (or limit the damage as a result of its failure to do so).

A glimpse of the future

Current demographics—primarily the aging of the population of informal caregivers—suggest that the demand for qualified trustees of supplemental needs trusts will continue to grow. Among those reading this article are surely attorneys who have drafted complex estate planning documents for clients of some means who have children with disabilities, and those planning documents likely include supplemental needs trusts to be funded on the passing of the parents. Other readers are professional fiduciaries who have longstanding relationships with these same clients, and who will be faced with the prospect of administering these trusts for vulnerable beneficiaries who will be unable to advocate for themselves. The decision in *Matter of J.P. Morgan Chase* will help ensure that professional trustees and their attorneys appreciate the unique responsibilities associated with these appointments. ■

[25] See *supra* notes 21-22 and accompanying text.

[26] See Landsman and Fleming, "What is a "qualified disability trust" for federal income tax purposes?," available at http://www.specialneedsalliance.org/taxes.pdf (last visited 10/23/2013).

[27] See *supra* note 3 explaining a "first-party" supplemental needs trust.