



*Special needs require special lawyers.*

# Special Needs Trusts for Minors and the Parents' Obligation of Support (Part II)

BY KEMP SCALES

Part I of this article in last month's issue discussed a parent's child support obligation when a minor child has assets of his or her own and also the potential conflict present when a parent acts as custodian or trustee for a minor child. This discussion focused on a 1987 Pennsylvania Supreme Court case, *Sutliff v. Sutliff* (1) which held that if a parent has sufficient funds for support, the court should not consider the minor's funds in setting the support obligation. It also held that a parent-custodian who uses custodial funds to satisfy his or her own support obligation violates the duty of loyalty and is subject to surcharge and removal for such violation.

Part II will pursue this issue as it applies to the support obligation of parents who have a minor child who is the beneficiary of a special needs trust.

## Special Needs Trusts:

What about "exceptional parents"? Many will have a minor child with special needs who is the beneficiary of a special needs trust. The second Pennsylvania case deals with this issue.

But first, some background. As discussed in prior articles in this magazine, special needs trusts (SNTs) are used to hold assets for beneficiaries with special needs who are receiving public benefits, particularly needs-based benefits such as SSI or Medicaid, that require the beneficiary to be not only "disabled" but also impoverished.

SNTs fall into two basic types, depending upon whose money went into the trust:

- **Third-Party SNTs**—These are trusts funded by someone other than the exceptional beneficiary. For example, they are often used for estate planning by

parents or grandparents who want to provide for a child or grandchild with special needs. At the death of the exceptional beneficiary, any remaining funds in the trust will be distributed to the remainder beneficiaries selected by the parent or grandparent (the "trust settlor").

- **"Self-Settled SNTs"**—These are trusts funded with assets belonging to the beneficiary with special needs. When the trust beneficiary is a minor, the money typically comes from a personal

injury or medical malpractice action. (2)

The *Sutliff* case discussed above involved "third-party" money (although held in a custodial account rather than a trust). The following case involved "first-party" money in a self-settled SNT.

- **Second Pennsylvania Child Support Case**—Special Needs Trust. This second case was a recent one decided by the Pennsylvania Superior Court in 2005. (3) Like the *Sutliff* case, *Novitski* involved an initial order requiring a father to pay support for his non-custodial minor child and the father's objection to paying support for a child who had substantial assets of his own. Unlike the *Sutliff* case, however, both parents worked full-time and had relatively equivalent (and relatively modest) incomes—about \$3,000 a month for the mother, and about \$3,500 for the father—and neither parent had control of the child's assets. But the relevant distinction for this discussion is that the minor child, who had severe disabilities, had assets in a special needs trust.

The recitation of the facts by the court

**"The purpose of a special, or supplemental needs trust is to provide income for the special or supplemental needs of a disabled beneficiary, without disqualifying him from receiving public assistance for his basic needs."**

will sound disturbingly familiar to many “exceptional parents.”

“Child is profoundly mentally and physically disabled...The parties separated when Child was about three months old. Since that time, Mother has been solely responsible for Child’s care and upbringing. Father has had no actual involvement with Child for several years.”

The child received a settlement award from a medical malpractice litigation which was placed in a special needs trust (the opinion does not state how much was in the trust, but does note that the bank trustee paid for a specially-adapted house where the mother and child lived).

The father claimed that he should not have to pay any support because the SNT would supply all of his child’s needs. The mother, while acknowledging that the trust assets were presently “substantial,” argued that they were necessary to provide for the child’s needs throughout his life as an individual with profound special needs who would never be able to support himself. The mother also cited the Sutliff case discussed above for the principle that a parent’s support obligation to a minor child is independent of the minor’s assets, and if the parent has sufficient funds for support, the court should not consider the minor’s funds in setting the support obligation. (The father claimed that Sutliff did not apply because, unlike the father in that case, he did not have any control over the management of the child’s trust).

An indication of how the court was going to decide was its sympathetic discussion of special needs trusts.

“The purpose of a special, or supplemental needs trust is to provide income for the special or supplemental needs of a disabled beneficiary, without disqualifying him from receiving public assistance for his basic needs. ...As SSI and Medicaid provide disabled persons with only basic necessities needed to maintain

their health and support, special needs trusts provide services and goods, not covered by basic public or private insurance, which parents would need to provide during their lifetime to enhance a disabled child’s life.”

And, sure enough, the court sided with the mother:

“As a matter of law and public policy, we will not allow a support obligation to be underwritten by a special needs disability trust, and permit those assets to be depleted. Father cannot be excused from his support obligation by a fortuity of circumstances, unless Father is genuinely unable to contribute to Child’s reasonable needs. (Here the court cites the Sutliff case discussed above). Trust was established to provide for Child’s supplemental needs as a disabled person, who will never live or work independently, and preserves his right to receive public assistance for basic services for which he is eligible.”

Parent as Trustee of SNT for Minor Child. Parents who act as trustee of their minor child’s special needs trust are involved in a potential conflict of interest between their support obligation as parent and their fiduciary responsibility as trustee. As trustees, they are to provide income for the special or supplemental needs of their minor child without disqualifying their child from receiving public assistance for their basic support needs. As parents, they have an obligation to ensure not only that their child’s basic support needs are met, but also that their child is provided with goods and services to enhance his or her life, limited only by their own financial ability to do so.

As is clear from the two Pennsylvania cases discussed above, the parental support obligation takes priority. “Whether or not the (SNT) is third-party settled by a now deceased parent or grandparent of the beneficiary, or funded with the child’s own assets held in (a self-settled) trust, the rule clearly applies to both. Parents

cannot lawfully use their minor child’s entrusted funds to satisfy the family and child’s historic standard of living.” (4)

Conclusion: Readers of this magazine have no need to be reminded of the challenges faced by parents of children with special needs. The responsibility of supporting children is difficult enough when the children do not have special needs; the difficulties are multiplied when a child is exceptional.

And the responsibility is difficult enough when the marriage is strong. But, of course, many marriages are not strong. The divorce rate in the U.S. for marriages in general is nearly 50 percent, (5) and it is significantly higher for parents who have children with chronic illnesses. (6) And, of course, divorces involving minor children are often accompanied by contested support obligations.

However, regardless of the circumstances of the parents, whether financially comfortable or hard-pressed, married or divorced, custodial parent or not, the focus of the support obligation (whether or not the formalized by a court order) should be on the best interest of the child.

When that child has disabilities, a special needs trusts can be a major benefit. But in such cases parents need to avoid the risk of permitting the trust funds to be used as a substitute for their own support obligations, which risk is magnified when the parent is also acting as trustee of their child’s funds. (7) **EP**

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- 1 *Sutliff v. Sutliff*, 515 Pa. 393; 528 A.2d 1318 (1987).
- 2 Congress authorized the use of self-settled Special Needs Trusts through a 1993 amendment to the Social Security Act as a means to prevent such persons who come into money from being disqualified for Supplemental Security Income (“SSI”) and Medicaid benefits. 42 U.S.C. § 1396p(d)(4)(A). But in exchange, such trusts must provide that the state Medicaid agency will receive any funds remaining in the trust upon the death of the beneficiary, up to the amount of Medicaid payments made on behalf of the beneficiary during his or her lifetime (and for this reason they are sometimes referred to as “payback” trusts).
- 3 *Ricco v. Novitski*, 2005 PA Super 121; 874 A.2d 75 (2005).
- 4 Clifton B. Kruse, Jr., Esquire, Trust Planning for Incapacitated Persons, presented at the Special Needs Trust conference at Stetson University College of Law, October 13, 2000.
- 5 National Center for Health Statistics, <http://www.cdc.gov/nchs/fastats/divorce.htm>
- 6 “Healthy Baby, Healthy Marriage? The Effect of Children’s Health on Divorce.” Angela R. Fertig, Princeton University, June 17, 2004. <http://www.princeton.edu/chw/papers/fertighealthybaby.pdf>. (Interestingly, this study found no such effect on divorce in the U.K. Why this was so could not be established, but the author noted there was evidence that the availability of health insurance was an important factor and thus the difference could be related to the different health care systems in the two countries.)
- 7 To minimize this risk, parents should consider using an independent, professional trustee for their child’s special needs trust.