

## The Voice, *The Official Newsletter of SNA*

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- [how we help families](#)
- [how we help professionals](#)
- [related topics](#)
- [more about us](#)
- [unsubscribe here](#)

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### Welcome!

You are reading *The Voice*, the e-mail newsletter of The Special Needs Alliance. Our purpose is to provide information about special needs planning for family members and professionals. We hope this newsletter helps you. We invite your questions, suggestions and comments (please understand that we cannot give individualized legal advice on the basis of an e-mail inquiry). We also encourage you to forward our newsletter to others who might benefit from the information here, or who might have similar questions.

### What Can a Special Needs Trust Pay For?



**Introduction:** Sometimes it is difficult to figure out what expenditures are appropriate from a Special Needs Trust. Confusion may arise because of differences in state law, trust size, age or condition of the beneficiary, terms of the trust itself, or any number of other variables. To compound the problem, there has been little direct guidance from the courts, and the legal literature is far from extensive.

**The Range of Choices.** A Special Needs Trust might have been created to handle proceeds from a personal injury settlement or an inheritance left directly to an individual with a disability. It might be designed to protect eligibility for Supplemental Security Income (SSI), Medicaid or other public benefits programs -- or for a number of programs (usually including those two) at the same time. Common questions about use of trust money revolve often revolve around travel and entertainment, transportation and housing -- but all manner of other expenditures crop up as an issue from time to time.

In one case, a mother acting as trustee might wonder about her ability to pay another family member for personal care not covered by Medicaid. In the next, a corporate trustee might be willing to pay for a trip to Disney World, but not know how to cover the costs or whether to pay for other family members who travel with the trust beneficiary. In yet another, the father who established the trust might chafe at the suggestion that he should not use money he contributed to the trust to pay for improvements on the family home.

**Where to Look for Answers.** The first advice to a trustee is usually to look at the trust document itself. It may be fine that state and federal law permit a particular expenditure, but if the trust does not then the trustee cannot take advantage of the government's flexibility. Sometimes there is nothing to prohibit a proposed expenditure in public benefits law or the trust document, but that still might not mean that the purchase is appropriate -- it might be imprudent considering the circumstances, or a

violation of general trust administration principles.

All that said, the very purpose of Special Needs Trusts is usually to provide extra, or supplemental, items to the beneficiary -- the things that the system, family and other sources cannot or will not provide. One of the very few court cases addressing this concept is a 2004 Minnesota Court of Appeals case, *In re: The Irrevocable Supplemental Needs Trust of Collins*.

Mr. Collins had been appointed trustee of a Special Needs Trust for the benefit of his teenage daughter. Over the course of five years, he used trust income and assets to pay for a number of items that later were challenged in court. A local judge ordered Mr. Collins to repay a little more than \$2,000 of allegedly improper expenditures.

What had Mr. Collins paid for with trust funds that got him in trouble? Among other things, he had purchased a snowmobile for her when she was 13, and Britney Spears concert tickets for her a year later. The Judge reviewing his accounting decided that some of those expenditures were inappropriate for a young beneficiary, and that was why Mr. Collins was ordered to return the funds from his own money.

**The Court of Appeals Reviews the Accounting.** Mr. Collins appealed the order directing him to return funds, and the state Court of Appeals (one step below the state Supreme Court in Minnesota) agreed with him. The proper approach, ruled the appellate court, was not to second-guess the trustee as to each expenditure, but to determine whether the trustee was properly exercising his discretion. Since the whole point of a Special Needs Trust (or, as the trust was called in this case, a "Supplemental Needs" Trust) is to provide for extra benefits that are not otherwise available, the trial judge here should have presumed that a trustee/father knows best whether his daughter is mature enough to ride a snowmobile or attend a Britney Spears concert.

The Minnesota case gives some insight into how judges -- at least appellate judges -- view Special Needs Trust expenditures, but it does not provide much assistance. That is partly because the decision was "unreported." That means that the judges decided that it should not be made available to cite as precedent. Even if it had been reported, it might not be very useful outside of Minnesota.

Nonetheless, the *Collins* case can give us some assistance in determining whether a given expenditure should be approved from a Special Needs Trust. Among the items to consider in a given case:

1. Is the expenditure permitted by the trust terms? Is it prohibited by Medicaid or Social Security regulations?

2. Does the expenditure clearly benefit the trust's beneficiary? Does it also benefit others, such as family members? If it benefits the trustee (as, for instance, a home improvement that clearly aids the beneficiary but also increases the value of the home owned by a parent/trustee), it should be scrutinized much more closely, and may not be permissible in all circumstances.

3. Is there enough money in the trust to make the proposed payment without seriously affecting the ability to provide other benefits in coming years? Not every expenditure that reduces future benefits is forbidden, but the larger the expenditure (in relation to the trust's size), the harder it is to justify.

4. Is the proposed expenditure related to the purpose for which the trust was established? In other words, if the trust came from a personal injury settlement it will ordinarily be easier to approve expenditures for therapy or adaptive equipment related to the injury for which the settlement was obtained.

5. Are there other sources of funds? If public benefits are available to provide the same items, the money ordinarily should not come from the trust. But if the public benefits are so limited that the quality of the items will suffer, or if it takes an extremely long time for equipment or services to get to the beneficiary, the trust might still be available to make the purchase more quickly or to purchase better supplies or equipment. Where family resources are available, it might be better to save trust funds -- especially if the beneficiary is a minor, and parents have a general obligation of support.

There will, of course, be other considerations in each case. We do not mean to give an encyclopedic list here, so much as to suggest that decisions about expenditures can be very difficult. It is not enough for the trustee to really, really want to make the expenditure, or to be completely convinced it is appropriate -- it is important to consider the proposal from all sides, admitting that there may be good reasons not to proceed, as well. The key is that the trustee must act reasonably, remain free from self-interest or bias, and above all, be prudent.

**How Does a Trustee Act Prudently?** The best way to assure that proper decisions are made, and to minimize the possibility of later difficulties, is to seek independent advice from a qualified legal expert. While many lawyers may insist that they know how to draft Special Needs Trusts, not all of them have experience dealing with state and federal agency treatment of expenditures.

Sometimes it may be appropriate to consider the options and risks, to make an expenditure and report it to the appropriate government agency and wait for a response. Sometimes it may be better to seek the blessing of the court system, giving notice to government agencies as appropriate and asking for a determination of the validity of the proposed expenditure in advance. The [Special Needs Alliance](#) advisor you consult will be able to give you guidance with expenditures, accounting requirements and government benefits.

**About the Author:** Robert B. Fleming practices law in Tucson, Arizona. He is the author of [The Elder Law Answer Book](#) (with his co-author and fellow Special Needs Alliance member [Lisa Davis](#) from Connecticut) and [Alive and Kicking: Legal Advice for Boomers](#). His law firm, [Fleming & Curti, PLC](#), provides one of the leading internet resources on elder law and special needs.

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