

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. This installment was written by Special Needs Alliance member [Donna Bashaw](#) of Laguna Hills, California. Ms. Bashaw is a former President of the [National Academy of Elder Law Attorneys](#), and she is certified by the National Elder Law Foundation as a Certified Elder Law Attorney.

Insurance and Other Concerns for Parent/Caregiver



Introduction: A California reader asks: "What kind of insurance (for example, workers compensation) is required when a special needs trust pays a parent to care for a child?"

SNA Member Donna Bashaw responds: A parent is often the best person available to be the caregiver of a disabled child. Paying a parent from a special needs trust to give care, however, requires some analysis so that the parent is protected, the child does not lose public needs-based benefits, and the trustee follows all applicable laws.

Insurance Needs: When employing a home caregiver, adequate insurance in case of an injury to the caregiver and insurance for casualty losses from caregiver theft must be available. The latter will probably not be a concern if the parent is the caregiver, but insurance in case the parent is injured is important.

Workers' compensation benefits must always be included in California for comprehensive personal liability coverage. Workers' compensation may cover a parent who is also a household employee, but the policy must be reviewed carefully to be sure that it does so. The parent should also review his or her homeowners policy to see what coverage might be available for homeowner injuries. Some policies include an Additional Coverage Endorsement for workers' compensation benefits with respect to "residence employees," which includes family members when the coverage is for "any person employed."

The trustee of the trust and the parent should work with the insurance agent to be sure there is adequate and appropriate coverage. In addition to an insurance agent, you may want to consult with an attorney familiar with administration of special needs trusts.

Other Considerations: When a special needs trust employs a parent as a paid caregiver, the following questions should be considered.:

Is the child a minor or an adult?

Is the special needs trust a "third party" or "self-settled" trust?
Is the parent the trustee of the trust?

Is the Child/Beneficiary a Minor or an Adult?

There are many more concerns if the child is a minor than if the child is an adult when a parent will be paid for care. Parents generally have a duty of care and support obligations for their minor children (for California support for this proposition, look to California Family Code Sec 3900). When paying the parent of a minor trust beneficiary, the trustee will therefore need to distinguish between "normal" care of a child and extraordinary care necessitated by the child's disability.

Even the concept of "normal" care is complicated by individual facts. A parent, for example, is also responsible for providing at least the necessities of life and perhaps more for the minor child even when the child has "ample means". See the California Court of Appeals case *Chapin v Superior Court of Kern County* (1966) 239 Cal.App.2d 851 for an illustration of this principle. In that case, the father of a child objected to having to pay the full amount of support for his daughter after his ex-wife married a wealthy second husband.

For most public needs-based benefits (Supplemental Security Income, Medicaid and some other benefits programs), the income of the parent will generally be deemed as "available" to the child living in the same household. Therefore, paying the parent could mean a reduction or termination of those public benefits, even though the payments are not directly to the child.

If the child is an adult the above two considerations are usually not a problem. However, in some cases the obligation of parental support to a child with a disability may extend past majority. Providing payment to a parent for caregiving then becomes a much better option to pursue.

Is the Special Needs Trust a Self-Settled Trust or a Third Party Trust?

If the special needs trust is a self-settled trust which was established by court order then it may require court approval before payment can be made to a parent as a caregiver. This is especially true if the child is a minor because of the care and support obligations discussed above. Check with an attorney with experience in administration of special needs trusts to see whether court approval is required in the case of a particular trust.

If court review is required, the Judge will probably consider the parental obligation of support as one element of the review. Even if court approval is not required, the same analysis should be considered.

A third party trust -- that is, one established by a parent, grandparent or other person for the benefit of the child, but not using the child's funds - will usually not require as much separate review. For both type of trusts, the trust document itself should be reviewed to be sure there are no restrictions on who may receive payments or what types of services may be provided.

Is the Parent the Trustee of the Trust?

If a parent is the trustee of the special needs trust then conflict of interest issues become a concern. A trustee's decision to hire himself or herself is obviously fraught with many problems. Decisions about

hiring and salary may need to be approved by a court before proceeding with that course of action. The decision is still problematic, but the independent review by a judge should protect the parent/trustee from any later allegations of impropriety. A special needs lawyer can help advise about this.

Miscellaneous Considerations

Wage and overtime laws should be reviewed when setting salaries and should be complied with by the trustee. Withholding of FICA, FUTA and state taxes should be scrupulously followed. The decision to hire employees of any special needs trust raises a number of insurance and related questions, and is seldom as simple as it may seem at the outset.

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