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Special needs trusts:

The wave of the future

By **Stephanie L. Schneider, Esq., CELA**

Special needs trusts are gaining popularity among families of a disabled person when creating their estate plan, and disabled persons on public assistance who receive lawsuit proceeds or a direct inheritance. Special needs trusts that are funded with considerable assets may necessitate the knowledge and expertise offered by a corporate trustee to administer these trusts. Is your financial institution prepared to market to these consumers and successfully handle this new source of business? Have your employees received specific training on special needs trusts and how they differ from revocable trusts? This article will provide an overview of special needs trusts, advise of pitfalls to be aware of and share practice tips for effective and efficient administration. Issues concerning tax treatment of these trusts are beyond the scope of this article.

Overview

Special needs trusts have been authorized by federal law¹ since 1993 and Florida law² the last few years. They are planning tools that enable a disabled person to receive the benefits of services and products purchased for them by the trust without losing the government assistance that pays for their long-term care medical needs. The special needs trust is invaluable for persons with chronic, long-term disabilities where the cost of medical care can be exorbitant and they cannot pass medical underwriting requirements to obtain private health insurance. Consequently, many people apply for government assistance to help finance the cost of their care.

Government assistance is provided through the state Medicaid agency and the Social Security Administration³. The Medicaid program pays for medical assistance for children and adults living in either a private residence or, in a skilled nursing facility. Medicaid applicants must satisfy strict income and asset criteria and be aged, blind or disabled. The Supplemental Security Income program (SSI) provides a monthly cash benefit to individuals who have low income and assets no greater than \$2,000.00. "Income"

is anything received in cash or "in kind" that the person can use to meet his/her needs for food, clothing or shelter. "In-kind" income is not cash but is actually food, clothing or shelter or something that the person can use to obtain those items. In Florida, once a person is approved for SSI they are presumptively eligible for Medicaid benefits⁴. While the amount of the SSI benefit is inconsequential for most individuals, it is the attendant medical benefit that is valued.

Since government assistance programs have strict financial eligibility requirements⁵, a disabled person who receives a direct inheritance or lawsuit proceeds can lose their public assistance due to excess assets and be forced to spend-down the inheritance or settlement until they reach the appropriate financial levels and then re-apply. Unfortunately for many people the inheritance or settlement proceeds won't last long. Special needs trusts are a creative and legal solution to this problem.

The goals of a special needs trust

The goals of most special needs trusts are to utilize the trust assets to improve the disabled person's quality of life and quality of care while maintaining government assistance as the primary tool to finance basic medical services. The trustee of a special needs trust is generally given broad discretion to utilize trust assets to purchase such items as: a handicap equipped van; modifications to a home such as wheelchair ramp access and safety equipment; private duty care; purchase of a home; additional therapy; experimental therapy; entertainment; services of a social worker or care manager, just to name a few.

Types of special needs trusts

There are two basic types of special needs trusts: an inter-vivos trust (effective during life) that contains the assets of the disabled person; and a testamentary trust (effective at the settlor's death), which contains assets of the deceased grantor.

The inter-vivos special needs trust is primarily used where the disabled person has either come into a direct

inheritance or settlement proceeds. The criteria for an inter-vivos special needs trust are:

1) the disabled person must be age 65 or younger,

2) the beneficiary of the trust must be "disabled" as defined by the Social Security Act, and

3) the trust must provide that at the disabled beneficiary's death the State will be reimbursed for Medicaid benefits it has paid.⁶

This trust can only be created by the disabled person's parent, grandparent, legal guardian or a Court. The disabled person may not serve as trustee or co-trustee otherwise the government will view that person as having direct access to the assets and count the assets. Assets cannot be added to this trust after age 65.

The testamentary trust is primarily used where family members wish to include the disabled person in their estate plan and realize that a direct inheritance will render that person ineligible for government assistance. It is not governed by federal or state statute and therefore, has none of the requirements discussed above including no payback requirement. For the reason explained above, the disabled person cannot serve as trustee or co-trustee. Testamentary special needs trust for a spouse must be created within a Last Will & Testament⁷; for all other individuals they may be created within a revocable trust.

The common thread of both special needs trusts is that the trustee must carefully administer the trust so as not to jeopardize the disabled beneficiary's public assistance.

Beware the pitfalls

By now you have realized that a trustee of a special needs trust has additional responsibilities to being a prudent trustee, honoring the directions of the trust agreement, and following Florida Statutes on trust administration. A special needs trust trustee must be aware of the programs under which the beneficiary receives assistance and understands the basic rules in order to know what types of dis-

bursements will cause a reduction or, loss of public assistance. So long as an SSI recipient continues to receive at least \$1 each month he maintains his Medicaid benefits; if an improper disbursement results in complete loss of SSI the Medicaid benefits will be terminated.

Consider the following suggestions when evaluating whether to accept a new client that involves a special needs trust, as well as to effectively and efficiently administer these types of trusts:

1. Engage knowledgeable counsel: Administering a special needs trust involves not only trust law but also laws concerning government assistance programs. It is important to engage counsel that possesses this specialized knowledge and not just knowledge of drafting trusts. If the trust agreement authorizes the trustee to engage professionals to assist the trustee in carrying out its responsibilities, counsel fees should be payable from the trust assets.

2. Identify the public benefit programs: In the beginning obtain written documentation from the disabled person (or their legal representative) identifying the government agencies and the programs under which the trust bene-

fiary is a recipient. This information is crucial to the trustee and their counsel determining what are appropriate and inappropriate disbursements under the public assistance rules.

3. Engage a case manager: A case manager with a strong social work and nursing background can serve as a liaison between the disabled person and the trustee. The case manager by performing an initial assessment and on-going monitoring services can aid the trustee in identifying necessary services and products that would benefit the disabled person.

4. Disbursements: Money paid directly to the trust beneficiary reduces the SSI benefit dollar for dollar the following month. Money paid directly to someone to provide the beneficiary with food, clothing or shelter reduces the SSI benefit - but only up to a limit. No matter how much money is paid to a vendor for these items, no more than \$204 (in 2003) is subtracted from the beneficiary's SSI check for that month.⁸ Prior to making the disbursement the trustee should confirm that when this sum (based upon the federal benefit rate) is subtracted from the SSI benefit it

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will not eliminate SSI entirely. Money paid directly to someone to provide the beneficiary with items other than food, clothing and shelter does not reduce the beneficiary's SSI benefits. Items that are not "food, clothing, or shelter" include: medical care, dishes, lawnmower, home repairs, replacement of water heater, insulation, payment of telephone bills, condominium fees, homeowner's association fees, cable television, pool service, lawn service, appliance maintenance contracts, pest control services or contracts, alarm service contracts, education and entertainment, among other things.

5. Record keeping: It is important to maintain accurate records of disbursements made in the event the government agency requests they be produced. While the disabled person (or authorized representative) is responsible to report a change in financial circumstances to the agencies, be prepared for the agency to

review trust disbursements to confirm whether assets or income were directly disbursed to the beneficiary and whether they were used to provide food, clothing or shelter for the beneficiary.

With proper training and knowledgeable counsel financial institutions can effectively market to these consumers and properly administer special needs trusts. ¶



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