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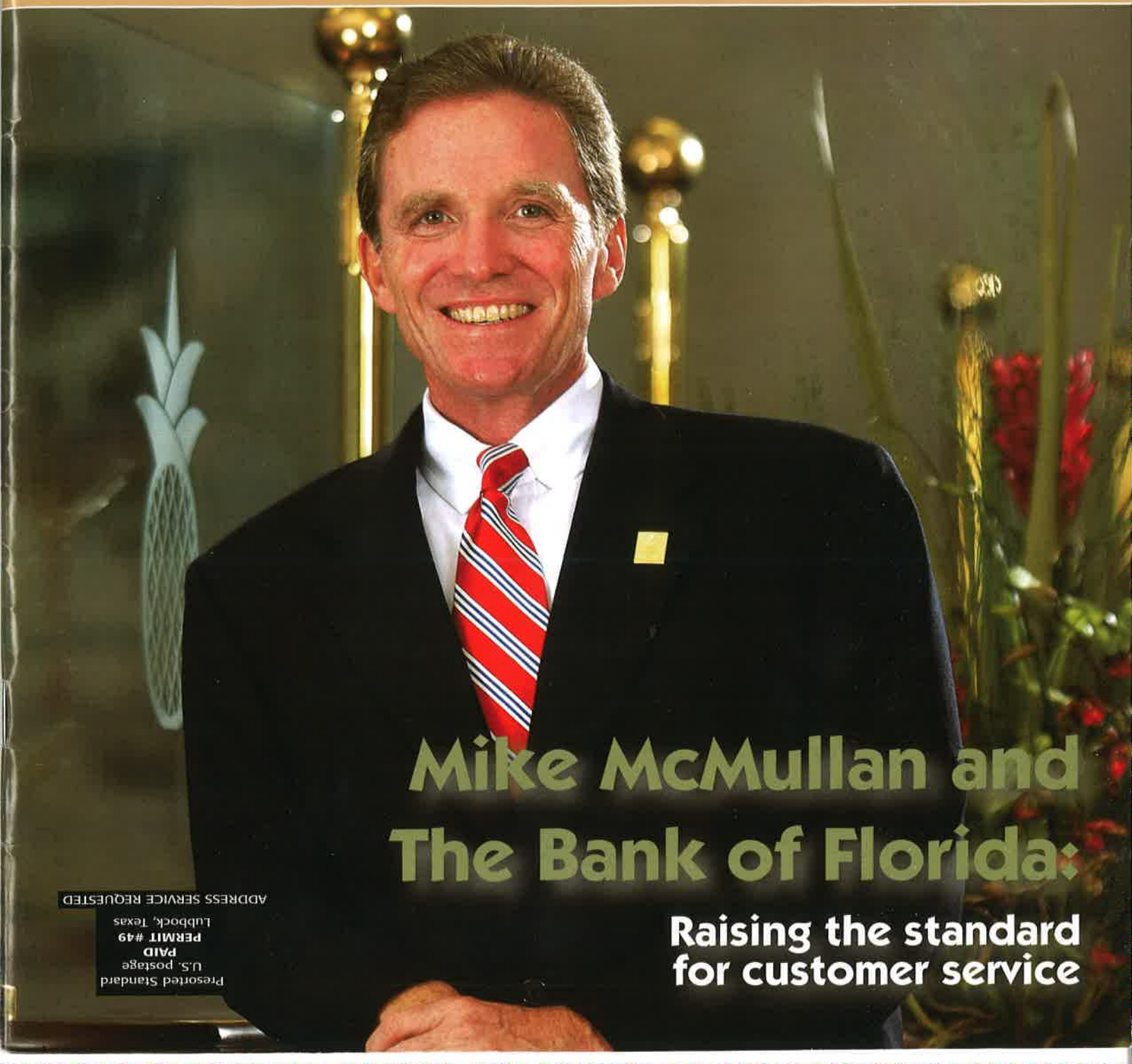

Mike McMullan and The Bank of Florida:

Raising the standard for customer service

Special needs trusts: The wave of the future Part II

By **Stephanie L. Schneider, Esquire, Board Certified Elder Law Attorney**

Earlier this year, my article explained the legal basis for creating special needs trusts and addressed the differences between a self-settled and a third-party created special needs trust. The second article focuses on two ways in which financial institutions can successfully compete in today's marketplace by providing value-added services to their customers when serving as trustee of a revocable or irrevocable trust. First, how corporate trustees can provide value-added service to their existing customers and their families by serving as trustee of a third-party created special needs trust. Second, how corporate trustees can identify those situations where an existing irrevocable trust of a living grantor may require reformation to become a special needs trust for a disabled beneficiary.

Serving as a trustee of a special needs trust: Value added service to the customer

Many financial institutions have long-standing relationships with their customers, which extends to the customer's children. It is an opportunity to provide banking and trust services to future generations. Today's consumer is looking for value-added service when selecting a professional to manage their financial affairs and provide investment and tax planning advice. Taking the time to get to know your customer on a personal level can provide you with important information that will allow you to offer additional services.

A customer may have a child or grandchild that has a disability yet not disclose that in the initial meeting with you. When discussing the importance of proper estate and tax planning with the customer, this issue should be raised. If the customer has had their legal documents prepared by a traditional estate planning attorney, there is a possibility that the attorney did not ask whether there is a disabled beneficiary and/or may not have known how to do proper planning for a disabled beneficiary's inheritance. In addition, there is a likelihood that the customer may not have disclosed the existence of a disabled family member due to social stigma, embarrassment or other reasons.

Corporate fiduciaries have the ability and resources to provide a management system that can enrich the life of a disabled family member who is unable to handle their financial affairs. The only way to insure that an inheritance the customer leaves will be spent on the

disabled child is to leave it in a special needs trust with a reliable and trustworthy trustee. Before we can get to the point of implementing the appropriate estate plan the corporate fiduciary must first identify if a disabled family member exists. This is one of many reasons why it is so important to develop a strong foundation in your relationship with the customer.

Years ago many families with a disabled child would disinherit the child in their estate plan because the parents knew that an outright inheritance would result in loss of the child's government assistance. Unfortunately, the "plan" that many families implemented provided no measure of protection to the disabled child. Some families requested (not in the legal document) that the beneficiaries of the estate, such as the siblings of the disabled child, utilize some of their inheritance for their disabled family member. Even if the healthy beneficiary agreed, this was a moral promise and was not a legally enforceable obligation. If the healthy beneficiary became divorced, had a drug or alcohol addiction, filed bankruptcy, was personally sued on a judgment, had creditors, or became irresponsible for any reason, that inheritance could be lost. As a result, the resources would no longer be available to provide the disabled family member with a better quality of life.

Today, anyone (not just parents and grandparents) can create a special needs trust in their last will and testament or, revocable trust to benefit a disabled person to whom they have no legal obligation of support.**1** Even if the disabled person is not currently receiving government assistance**2** a special needs trust will be appropriate if the disabled person cannot responsibly manage their inheritance or, is prone to being financially exploited due to limited mental capacity, education or intelligence. Parents and grandparents can be assured that the inheritance placed in the special needs trust which is intended for the sole use of the disabled beneficiary will in fact fulfill that purpose.

Moreover, whereas the parents or family members will eventually face mortality, the corporate trustee, the financial institution, will continue to exist and so presents many attractive benefits to administering the special needs trust.

Reformation of an irrevocable trust to a special needs trust

You may have a client with a taxable estate who has implemented an estate plan to negate or minimize estate taxes through an irrevocable life insurance trust ("ILIT"). Each year the grantor gifts the annual gift tax exclusion amount to the trust which is used by the trustee to pay the annual premium on the life insurance policy insuring the life of the grantor. What happens when a disabled beneficiary who is receiving government assistance has a Crummy power? If you are serving as the trustee of an ILIT the answer to this question may shock you.

State and federal governments are likely to view the Crummy power, regardless of whether it is exercised, as an available resource of the disabled beneficiary. "Available" resources are counted when determining if a disabled person qualifies for government assistance. If the "Crummy power" is not exercised, the government can argue that the beneficiary failed to accept a resource to which he/she was entitled and treat that inaction as a transfer of assets; this can disqualify the beneficiary for government assistance. A similar problem arises if the client's estate plan leaves an outright inheritance for the disabled beneficiary or, places the inheritance for the disabled beneficiary in an irrevocable trust that does not contain "special needs" language.

Irrevocable trusts cannot be unilaterally amended by the grantor. Florida Statutes 737.4031 gives a court authority to modify an irrevocable trust when compliance with the terms of the trust would defeat or substantially impair the accomplishment of a material purpose of the trust.**3** A petition is filed by the grantor explaining the reasons why the trust jeopardizes the disabled beneficiary's entitlement to government assistance or, does not provide protection for the disabled beneficiary to inherit and maintain entitlement to government assistance. In the case of an ILIT, the court must completely remove the disabled beneficiary from the trust. In all other situations, the court must create a special needs trust to hold the inheritance of the disabled person.

Conclusion

Corporate fiduciaries should inquire whether a customer has a disabled family member to whom they wish to leave an inheritance, and request copies of the customer's existing estate planning documents. Corporate fiduciaries can then recommend that the customer consult with an elder law attorney to ensure that any necessary changes be made and problems timely corrected while the grantor is alive.

1 There is then no "pay-back" requirement to the government agency since the assets that fund the special needs trust are those of a third party and not the disabled person receiving the government assistance. The testator or grantor can designate the residuary beneficiary of the special needs trust should assets remain at the death of the disabled individual.

2 Examples include: Medicaid; Supplemental Security Income; food stamps; Section 8 HUD housing.

3 F.S. 737.4032 provides for modification of an irrevocable trust only after the death of the settlor. In cases where the settlor is alive at the time it is discovered that proper planning has not occurred for a disabled beneficiary the appropriate procedure is to use F.S. 737.4031.

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