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SPECIAL NEEDS TRUSTS: THE WAVE OF THE FUTURE

By: Stephanie L. Schneider, CELA

Special needs trusts are gaining popularity among families of a disabled person when creating their estate plan, as well as for disabled persons 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 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.

Overview.

Special needs trusts have been authorized under federal law¹ since 1993 and under state law² the last few years. They are a legal vehicle that enables a disabled person to receive government assistance for their long-term medical needs while simultaneously receiving the benefits of services and products purchased for them by the trust. Government assistance is provided through the state Medicaid agency and the Social Security Administration³. Government assistance programs have strict financial eligibility requirements (low income, low assets) and medical requirements. Most persons with chronic, long-term disabilities are ineligible for private health insurance and the cost of their medical care can be exorbitant. Consequently, many people apply for government assistance. A disabled person who receives a direct inheritance or, lawsuit proceeds can lose their public assistance due to excess assets. Special needs trusts are a solution to that problem.

The trustee of a special needs trust can utilize trust assets to purchase: 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, just to name a few.

In order for a special needs trust to be effective and not be attacked by the government agencies, the disabled person cannot serve as trustee (or even co-trustee).

¹ 42 U.S.C. 1396p(d)(4)(A), (C).

² Chapter 65A-1, Florida Administrative Code, § 1.701(23), (25); § 1.702(13)(a).

³ The two primary programs are Supplemental Security Income (SSI) administered by the Social Security Administration and Medicaid administered by the Department of Children & Families.

There are two basic types of special needs trusts: an inter-vivos trust (effective during life) contains the assets of the disabled person; a testamentary trust (effective at the creator's death) contains assets of the deceased creator. The goals of all special needs trusts are to utilize the trust assets to improve the disabled person's quality of life and quality of care while utilizing government assistance as the primary tool to finance the basic medical services.

... criteria for under 65 trust

The primary difference between the two trusts is that a special needs trust funded with the disabled person's assets must contain a provision providing that upon that person's death the remaining assets will first be paid to the government as reimbursement for Medicaid benefits paid; a testamentary special needs trust is not required to contain this language.

In order to obtain and maintain public assistance eligibility, a person must satisfy limiting asset and income requirements. As you can imagine, without proper advance planning a direct inheritance or a lawsuit settlement can render a person ineligible for government assistance. A disabled person would be forced to spend-down the inheritance or settlement until they reached the appropriate financial levels and could then re-apply.

By now you have realized that a trustee of a special needs trust has an additional responsibility to being a prudent trustee, honoring the instructions of the trust agreement, and following Florida Statutes on trust administration.

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 the ordinary rules regarding trusts but additional laws concerning government assistance programs. It is therefore important to engage counsel that has this specialized knowledge. In most cases, counsel fees should be payable from the trust assets.
2. 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 can aid the trustee in identifying necessary services and products that would benefit the disabled person.
3. Identify the public benefit programs: In the beginning obtain written documentation from the disabled person identifying the agencies and the programs under which the trust beneficiary receives benefits. This is crucial to the trustee and their counsel so that they can determine under the public assistance rules which are appropriate and inappropriate disbursements.

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