

September 26, 2005

TRUSTS AND ESTATES A Practice Focus

To Help the Disabled

Special Needs Trusts can preserve crucial eligibility for government benefits.



People with disabilities have special legal needs. Qualifying for certain government benefits can be critical to maintaining their quality of life.

In the past, injured individuals could lose government benefits because they received significant sums of money, either through settling a lawsuit or by receiving an inheritance. Ironically, the financial settlement or inheritance intended to help them actually ended up depriving them of federal Supplemental Security Income for the disabled and Medicaid benefits.

Fortunately, the federal government has provided a means to avoid this conflict, by creating the Special Needs Trust. Lawyers with clients or family members who have disabilities should understand how to use this federal benefit.

PRESERVING ELIGIBILITY

Special Needs Trusts were authorized by Congress in the Omnibus Budget Reconciliation Act of 1993, which amended the Social Security Act.

This amendment allowed people to place proceeds from a personal-injury or a malpractice court settlement into a special trust. While the assets of the trust are used to help the disabled person, the money in the trust is disregarded by federal and state governments in determining eligibility for public-assistance benefits.

This exclusion of assets is particularly important to preserve eligibility for Supplemental Security Income. In contrast to Social Security's retirement benefits—which go to all people above certain ages who have contributed to the Social Security system—Supplemental Security Income is awarded to disabled people, regardless of age. It is means-tested, meaning that if you have significant money, you are ineligible for Supplemental Security Income.

For a disabled person, qualifying for Supplemental Security Income is an important step toward claiming additional government benefits. If you are eligible for this type of income, you are automatically eligible for Medicaid, also called Medical Assistance. And conversely, if you don't qualify for Supplemental Security Income, you can't obtain Medicaid.

For a disabled person with expensive medical bills, access to Medicaid is very important. Medicaid is critical for the disabled

person because it covers nursing-home care, which can be extremely expensive.

Determining eligibility for Supplemental Security Income and Medicaid for disabled children can be tricky. If the disabled person is under 18, his parents' income is counted in determining eligibility for Supplemental Security Income, but the child may still qualify. After age 18, the parents' income is not counted. Absent inheritance or winning the lottery, most people do not begin to accumulate any wealth until they enter the work force. A young person over 18 who becomes disabled and is unable to work may have few assets, and thus on a means-tested basis, he is almost always eligible for Supplemental Security Income and Medicaid.

But a legal settlement or inheritance can eliminate eligibility for these benefits programs. So using the Special Needs Trust also helps children retain their public assistance benefits while supplementing their income through disbursements from the trust.

The Special Needs Trust must be carefully crafted to ensure that the trust is used in accordance with applicable federal and state laws. In Maryland, for example, the trust instrument itself must be submitted to the attorney general's office for approval. If the trust fails to meet the Maryland requirements, the attorney general's office will withhold approval. If the trust is approved, it can then be funded and implemented.

GONE BY 20

Let's look at a typical scenario where a Special Needs Trust could help.

A 10-year-old Maryland boy is severely injured and receives a \$3 million settlement. After fees and legal expenses, he is left with \$1.5 million. This boy requires custodial care. He must live in a group home or other alternative residential setting; needs physical, occupational, and speech therapy; is wheelchair-bound; and requires special equipment and special schooling.

The total cost of the foregoing might be in the range of \$125,000 per year, rounded to roughly \$10,000 a month.

Without a Special Needs Trust, his court settlement is counted for purposes of qualifying for public assistance. The boy's income is also counted unless it falls below the Supplemental Security Income maximum monthly allowance. (Currently, this

monthly allowance is \$579, but it usually goes up every year.)

On these facts, the boy would not pass the means test because, with his court settlement, he supposedly has the means to support himself. On a means-tested basis, the law says he has plenty of money. The boy would first have to spend down whatever assets he has to a few thousand dollars, and then and only then would he be eligible to receive Supplemental Security Income, Medicaid, or any other form of public assistance.

Given the possibility of unforeseen medical and other expenses, and at today's current low interest rates, that disabled boy will burn through his settlement amount in less than 10 years. The boy's money will be gone by the time he is 20, leaving a lifetime of special needs to be covered by public assistance. And this would occur in a lifetime when both Medicaid and Supplemental Security Income could face budget cuts, leaving the boy with even less assistance.

Remember, even if the child has the standard health-insurance coverage through his mom's or dad's employer, such coverage is only temporary. And it will not cover long-term or permanent illnesses or disability.

Some suggest that the disabled person give away his assets to his parents or his siblings, thereby impoverishing himself so he can qualify for public assistance. But that won't work. Transfers to third parties run afoul of the "look back" rules, which allow the state to look back at any transfers and assess a penalty, measured by the amount transferred.

WITH A TRUST

Now let's change our hypothetical situation by creating a Special Needs Trust. In this case the net settlement of \$1.5 million goes into the trust. The law says the individual now has "no assets" because his Special Needs Trust is disregarded in counting his assets.

With the Special Needs Trust, the state will still fund the individual's nursing expenses, group home or alternative living arrangements, medical and hospital charges, ambulance fees, wheelchair (one can easily cost upward of \$7,000 with a custom-seating system), eyeglasses, and other such expenses.

The \$1.5 million trust can be used to take care of medical expenses that the state does not cover. For example, if Medicaid won't pay the extra \$750 for a more comfortable seating system on a wheelchair, the trust can cover the cost. If the state will not pay for an upgrade on a walker, the trust will pick up the extra expense. If the state won't fund an extra pair of eyeglasses, the trust will pay the bill.

The catch is that if the trust pays for those items that are technically covered by Medicaid, the Medicaid program will not reimburse the trust. This is why careful monitoring of the trust expenditures is critical.

In addition, by law, funds for the trust also cannot be used for "basic support items" such as food, clothing, or shelter. (The monthly check from Supplemental Security Income can cover those items.)

But the trust funds can be used to improve the disabled person's quality of life above and beyond better medical care. Examples of such quality-of-life expenditures include tutoring

and other forms of education, recreation, computers, electronic entertainment devices (iPods, for example), and pets.

PAYBACKS

Is there any downside to using a Special Needs Trust? In my view, no, but people should be mindful of one particular complication. Most of these trusts are created with the disabled person's own funds (i.e., from a court settlement for personal injury or malpractice). Such funds fall into the "payback" category, which means that the state has a lien on the trust for all money that the state expends. Over time, this lien could amount to millions of dollars.

Some suggest that the disabled person give away his assets to his parents or siblings so he can qualify for public assistance. But that won't work.

Yet since the payback does not occur until after the disabled person has died—and then only to the extent that any trust funds remain—the downside is practically zero. After all, the trust served the disabled person for his or her entire life, and upon death: the purpose for which the trust was created no longer exists. Why shouldn't the state get its money back? A parent or spouse has no personal obligation for the payback; only the trust does, and then only if there is any money left in the trust.

Moreover, while the Special Needs Trust addresses a conflict for disabled people between settlement awards and public assistance, the funding of such a trust is not restricted to settlements or indeed to the disabled person's own money. A Special Needs Trust can be funded by a parent or third party for the benefit of a disabled person. And in that case the issue of payback does not arise because the government has no lien or claim to the balance of the trust funds.

Thus, Mom and Dad can use their own assets to fund a Special Needs Trust for a child with Down syndrome, and there will be no payback on the death of the disabled person.

In every estate plan involving a disabled person, the lawyer should consider using a Special Needs Trust to ensure that the disabled person maximizes the state and federal benefits to which he is entitled. If executed properly, the trust will permit that individual to protect his assets and receive public assistance.

A Special Needs Trust is appropriately named—it makes sure that those in need are treated in a special way.

Arthur H. Blitz, a principal in the Bethesda, Md., law firm of Paley, Rothman, Goldstein, Rosenberg, Eig & Cooper, has a disabled child with a Special Needs Trust. Blitz can be reached at ablitz@paleyrothman.com.