

Elder Law: Special needs trusts enhance lives of those with disabilities

Sunday, October 23, 2011
By Julian Gray and Frank Petrich

In a prior column, we talked about Bill and Susan and their son, Sam, who has disabilities (special needs) and requires assistance with various activities of daily living. We discussed the option of Bill and Susan establishing a special needs trust during their lifetimes so that Sam's inheritance could remain intact within the trust someday to provide for his needs. This is called a "third party special needs trust" (established with funds other than those of the beneficiary of the trust).

The key function of that trust is to allow Sam to enjoy the benefits of the funds without disrupting his eligibility for important needs-based benefits such as Supplemental Security Income (SSI) and Medicaid (called Medical Assistance in Pennsylvania).

While establishing a special needs trust is proactive, what happens if a disabled person does not have a trust established in advance of receiving assets, especially where those assets are that person's?

Let's say Sam was injured as a result of medical malpractice or an auto accident. What if his uncle, Paul, who had no children, left his entire estate payable to Sam? This needs special attention to help identify the options available to preserve Sam's benefits while avoiding wasting the assets he receives and the possible loss of benefits.

Fortunately, under both federal and state law, there are protections afforded to disabled people to protect their assets while maintaining their benefits. The "third party special needs trust" could do this.

While the term "special needs trust" is loosely used to describe a trust which provides a disabled beneficiary additional and supplemental funding to pay for her/his care, another special type of trust actually allows the individual to use his own funds rather than funds funneled through a trust created (frequently) by parents.

This trust is called a "(d)(4)(a) trust," called that because of a section of the federal law authorizing it. In a subsequent column, we will also discuss the use of a so-called (d)(4)(c) "pooled trust," which is established and maintained by a nonprofit organization.

Pennsylvania recognizes the disabled person's right to establish his own trust and transfer assets into it, at which time the assets are no longer considered "available" for "means-tested" programs such as SSI and Medicaid. However, the establishment of this type of trust is more restrictive than the type established by the parents with the parents' funds or the uncle with his funds.

Here's a brief summary: Under the current Pennsylvania statute, the disabled person (as determined by the Social Security rules on disability) may establish a trust if he/she is under the age of 65 years and the trust is to be used for the sole benefit of the disabled person during her/his lifetime. There is, however, a significant catch.

Upon the death of the disabled beneficiary, any funds remaining in the trust must first be used to repay the state Medicaid agency that provided funding for her/his care during his lifetime. Once the state is repaid, the balance of the trust funds can be distributed to the trust beneficiary's estate. Thus, this type of special needs trust, in addition to being known as a (d)(4)(a) trust, is commonly referred to as a "payback trust."

For those of you math wizards contemplating this arrangement, you may be thinking, "What good is this if the state has to be repaid at the end of the day?"

A closer look reveals a few important benefits not apparent on the surface. Let's say Sam received a \$250,000 net settlement from an auto accident. If Sam accepted those funds (regardless of his age), he would lose all of his important SSI and Medicaid benefits.

With ongoing significant care costs, this settlement would be exhausted in just a few years and Sam would be right back on government benefits without the enhancements to his care the settlement, intended for his injuries, can provide.

If Sam chose to place the settlement funds into a special needs trust, he would have the benefit of continued government assistance coupled with funds from the trust to enhance his standard of living for many years. Let's further assume that upon Sam's death the trust funds were just about exhausted. Well, since there are no funds left in the trust, there is nothing to pay

back to the state. Thus, by using the trust, Sam has stretched the funds much longer than simply trying to live on them alone without the government assistance.

When planning for either a lump sum payment such as an inheritance or personal injury settlement, it is important for the disabled beneficiary to look at all the options and decide whether a special needs trust is appropriate. Many people choose to receive what is known as a structured settlement or a series of payments to the beneficiary over a term of years or even for life. But once again, the decision should be weighed against various other factors, including the potential loss of important government benefits.

For more information on special needs trusts and planning, take a look at information provided by the Special Needs Alliance (www.specialneedsalliance.com), a national nonprofit organization committed to helping disabled individuals and their families with life planning.

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First published on October 23, 2011 at 12:00 am

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