Teaching An Old Dog New Tricks: Traditional Special Needs Trusts Are Not The Only Tool To Protect a Person with Disabilities

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Traditional wisdom in Special Needs planning dictates that, if you have a disabled person under the age of 65 who has received or is set to receive assets, you need to set up a Special Needs Trust ("SNT") to be the ultimate destination of those assets. SNT's are tremendously useful in finding a fast solution to achieve asset eligibility for a disabled person. With that said, SNT's have their issues and there are other solutions that work well but may be overlooked.

The Problems With Special Needs Trusts:

While classic SNT's effectively achieve asset eligibility for clients who fall within their usage criteria, they are authorized by statute and strict guidelines apply which are outlined below:

1. Age: If a disabled individual is over the age of 64, he or she simply cannot set up a SNT;
2. Oversight: A disabled individual cannot set up his or her own SNT, even if the individual has legal capacity. Under current laws, only the disabled individual's parents, grandparents, legal guardian or a court can set up the Trust. This can create inefficiency in getting a Trust up and running; and probably the most undesirable aspect,
3. Payback: Any assets left in a disabled individual's SNT are exposed to payback to the Commonwealth upon his or her death for all Medicaid benefits provided to the disabled beneficiary.

With these issues in mind, a client needs to consider other options when presented with utilizing a SNT.

3rd Party Supplemental Needs Trusts:

Frequently, families find themselves forced into the position of using a SNT by leaving an inheritance directly to a disabled individual. This entire issue can be avoided by being proactive and utilizing a 3rd Party Supplemental Needs Trust ("3PSNT") to receive a disabled individual's inheritance.

A 3rd Party Supplemental Needs Trust is set up by parents or relatives to stand in as beneficiary for the disabled individual. This way, the inheritance/gifts are never owned by the disabled individual, thereby circumventing the need for a SNT. This Trust is also not a payback Trust, therefore avoiding the need to pay back anything left over in the Trust upon the disabled individual's passing or early termination of the trust. An individual can be any age to be the beneficiary of a 3rd Party Supplemental Needs Trust and it can be set up by anybody without any court oversight.

Transfer to a Trust for the Sole Benefit of a Disabled Person or Minor Child:

If a disabled individual does not have the benefit of the above-referenced 3PSNT, transferring any assets to a Sole Benefit Trust for a Disabled Person or Minor Child ("SBT") can also be an effective supplement or alternative to a SNT.

A Sole Benefit Trust created by the disabled individual for the benefit of another disabled individual (family member or otherwise) or minor child, much like a SNT, is not subject to any gifting penalties. This avoids any delay or interruption of benefits. A Sole Benefit Trust is also not subject to payback, much like the above-referenced SNT. This allows the disabled individual to set up an estate plan for loved ones that will not be supplanted or interrupted by payback provisions. While a Sole Benefit Trust is not generally a primary tool in a disability plan, utilizing one alongside a SNT allows a disabled individual to provide for family members or loved ones in a manner that is not subject to gifting penalties or payback provisions.

Five Year Lookback Trusts:

If a disabled individual is not receiving SSI, Medical Assistance Long Term Care Benefits or Waiver Services, there is a good chance that he or she is not on any means-based benefits programs. This opens the door to planning options that don't necessarily involve immediate benefits eligibility. While many practitioners and clients may default to transferring assets into a SNT, if a disabled individual does not immediately need access to benefits programs, a Five Year Lookback Trust should be considered.

A Five Year Lookback Trust, also known as an Asset Protection Trust ("APT"), cleanses assets from any exposure to Medical Assistance or related programs five years after assets are transferred into it. It is not subject to any payback provisions, has no age requirement, can be settled by the disabled individual if he or she has the capacity to do so and can vest some modicum of maintained control in the disabled individual settling the Trust. These Trusts are optimum for an individual who: wants to eventually obtain government benefits when needed, wants to maintain some control over the assets held in Trust and wants the ability to leave assets to his or her heirs.

ABLE Accounts

A relatively new option, ABLE accounts are a convenient way for people with disabilities to utilize funds in an account for qualified disability expenses without the oversight of a trustee or third party. These arrangements are still evolving, but for now an ABLE account can accept up to $14,000/year and can maintain up to $100,000 without such funds being countable resources for programs such as SSI. Interestingly, in Pennsylvania at this time, ABLE accounts do not have a payback provisions like the SNT described above. However, none of the trusts described above have an asset limit like the ABLE account.

In Summary, there are a variety of options that accomplish the same goals as a traditional SNT without some of its drawbacks. These options are contingent upon certain circumstances being met, but a client needs to consider these options before entering into a traditional SNT, especially if they are going to purchase a home with funds held in the SNT.