

SPECIAL NEEDS TRUSTS: THE BASICS EVERY LAWYER SHOULD KNOW

By Michele P. Fuller

Just when you think your work is done, the case resolved, they drag you back in. Something in the back of your mind tells you your client may have to do a trust or something to protect their benefits. Attorneys do not need to become special needs planner in addition to what they already do, but they do need to know some simple basics regarding the effect their client's settlement may have on their eligibility for governmental benefits. Lawyers have been held liable for failing to recognize and advise their clients of the effect the settlement may have on their eligibility.

Whether a client is receiving funds directly as a result of their own cause of action, as a claimant under a wrongful death cause of action, an inheritance, or any other reason, the first question to be answered is whether the person receiving the funds receives **means-tested** benefits? Unfortunately, when a client is asked what type of benefits they receive, frequently the answer is "disability." The client, or their representative, may not know the type of benefits the client receives or be able to find a determination letter. As a practice tip, the client or their legal representative can call 800-772-1213 and request a benefits statement. Not all disability benefits are means-tested, so determination as to whether the client has benefits that need protection is the first step in the process. Early involvement with a special needs planning attorney will help the client become comfortable with the planning that will need to take place to preserve benefits, a process which may seem complex and overwhelming to them. Further, a consultation with the client regarding their benefits and the effect of receiving settlement

proceeds or an inheritance limits the liability of the lawyer after the case is resolved, and sets client expectations regarding the handling of funds.

What is a means-tested benefit? The most common are Supplemental Security Income (SSI), Section 8 housing, Medicaid, Veteran benefits, and Waiver services. Most of these are federal programs which are administered differently in each state. In addition, the client may also receive state and local benefits that are also means-tested. Means-tested benefits typically have an income and asset limit to be met in order to become and remain eligible, and the Medicaid Assistance limit of \$2,000 in countable assets is probably familiar to you. Best practice is to affiliate with a local special needs planning attorney as they will be familiar with various types of benefits, quirks of the local DHS office and probate court where the client resides, and determine if a settlement or structured settlement payments will compromise the client's continued eligibility.

After you have determined that your client in fact does receive a variety of governmental benefits and an outright distribution of proceeds or payments will effect their eligibility, when is a (d)(4)(A) special needs trust is appropriate? When the following criteria have been met:

1. The client receives means-tested benefits,
2. is under age 65, and
3. The amount received justifies the costs involved.

A (d)(4)(A) special needs trust refers to 42 USC 1396(p)(d)(4)(A), which codified one of the exceptions to the general premise that all trusts are countable assets with regard to means-tested governmental programs. By placing funds and/or structured settlement payments into a special needs trust, the assets are held for the sole benefit of

the beneficiary while preserving their continued eligibility for assistance. Only a parent, grandparent, guardian or court can create this type of trust. Notice that the beneficiary cannot create the trust themselves, and often court authority approving the creation of the trust is necessary. Some courts actively maintain supervision of the trust and require the filing of bonds and annual accounts which can be very costly. Trusts with modest assets or those that are over-structured can be exhausted from these fees, and nothing angers a client more than having all of their funds go to pay lawyers and they receive little or no benefit. Counsel should consider the continued costs of administration when deciding whether this type of special needs trust is the most appropriate. Local counsel should also be consulted as to the common court practice where the trust will be administered. However, if a parent or other lay person is to act as trustee, supervision may be advisable. With the current economy and job market, a loss of financial security within the family may make dipping into trust assets too great a temptation to resist.

A (d)(4)(A) special needs trust must be irrevocable, executed by a proper party as indicated above, provide for the sole benefit of the beneficiary, and it must contain a pay-back provision upon the death of the beneficiary. Upon the death of the beneficiary every state in which the beneficiary received benefits must be paid back their proportional share of the assets remaining in the trust. The Trustee is responsible for obtaining the lien information which should be reviewed carefully for accuracy. Having the person in charge of the beneficiary's health care review the lien statement is also advisable. If a structured settlement broker is working with the client, the immediate and future structure payments should be made payable to the trustee of the trust. The beneficiary of the structure must be the trust and a commutation rider should be considered in order to pay

the future lien and any estate taxes upon death. The amount to be structured, if any, should be taken carefully into consideration.

One of the most difficult decisions can be the nomination of a Trustee. Often a family member, especially the parent of a minor, will want to serve in that capacity. However, most often family members or lay people, in general, are not the best option. The policies regarding allowable distributions change frequently and vary state to state. You can pay a family member for care services in some states, as you can in Michigan, but not others without penalty. In addition, there are tax considerations and investment issues to consider. Special needs trusts are complex to administer, and professional administration, even in light of the costs involved, is usually for the best. Potential family members as Trustees usually fall into two categories: the busy professional or the unsophisticated but willing. Neither are good choices. The busy professional is just that. Too busy. The willing but unsophisticated person is not a good choice as the potential for mistakes without professional guidance is too great a risk. In addition, if a bond is required the client may have trouble qualifying. Bond companies are looking at credit scores and if there are blemishes they will decline the application. Corporate or professional fiduciaries often do not have to file bonds so long as proof of liability coverage is offered to the court. If there is no court involvement and no bond, there is no recourse for the disabled beneficiary if a family member makes mistakes or improperly distributes funds.

The most common question a client has is, "What can the trust pay for?" Policies regarding distributions change frequently and differ state to state. The Trust itself is designed to supplement governmental benefits, so needs that can be met through outside

entities should be exhausted first before seeking payment from the Trust. Generally, distributions from the trust must meet several criteria: (1) for the sole benefit of the beneficiary, (2) in the best interests of the beneficiary, (3) otherwise unavailable from other resources and/or no other responsible party, and (4) fiscally prudent. Often clients will inquire about the purchase of a home and transportation. Can they be purchased by the Trust? Yes. However, it must be done in light of the considerations outlined above and the purchase of any home should not be done without professional guidance, and prior court approval, if applicable. If the beneficiary is a minor, the trust does not relieve a parent of their obligation to provide for the basic needs of their minor child. Most importantly, do not overpromise the client. Setting reasonable expectations from the start is important for the client's future relations with the Trustee and/or special needs trust attorney and ultimately benefits the disabled beneficiary.

Knowing when a special needs trust may need to be implemented, what it is and how it works in the best interests of your client are essential special needs trust basics all attorneys should know in order to avoid a client's benefit disqualification and a potential claim for failing to provide this information. Working with an experienced special needs planning attorney early in the litigation, settlement or probate process can assist counsel in meeting their due diligence obligation to their client, relieve a client's anxiety about the process and their benefits, and set reasonable expectations after the matter is resolved.

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