LAW

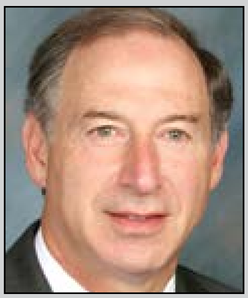
The Importance of the Special-needs Trust

By HYMAN G. DARLING, Esq.

A special-needs trust, or what is sometimes referred to as a supplemental-needs trust, is a document that is established to provide for a family member who has a disability. The primary purpose of the trust is to allow funds to supplement, but not supplant, the needs of an individual, who is known as the beneficiary. The person creating the trust does so either during their lifetime or by a document that becomes effective upon their death, and it continues for the lifetime of the disabled beneficiary.

Provided that the person creating the trust — normally a parent, grandparent, or other relative — uses their own funds to create it, the beneficiary receives the benefit during their lifetime, and upon that beneficiary's death, the funds may pass to other beneficiaries, such as family, friends, or charities. Contingent beneficiaries may also be named in the event that primary beneficiaries are deceased. Furthermore, if there are multiple disabled beneficiaries, the trust can also be maintained for the benefit of successor individuals who are disabled.

Most types of assets may be left to a trust, including stocks, bonds, cash, real estate, insurance policies, etc. To the extent that there are retirement-plan benefits that are payable to a trust, there may be additional taxes due upon the receipt of those funds, but those funds may be held by the trustee for the benefit of the beneficiary.



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The Trustee's Role

There is also a trustee who is appointed to manage the funds, file the tax returns, administer the property, and make discretionary distributions to or for the benefit of the beneficiary. This job carries a significant amount of responsibility. Each trustee is considered to be what is known as a fiduciary, which means that this person, or in some cases a bank or trust company, has the obligation to manage the funds with a higher standard of care than they would use with their own funds. They must act solely in the interest of the beneficiaries as to the assets that are held by the trust and administered to or for the beneficiaries.

In some cases, the trustee also has to account to governmental entities and all beneficiaries of the trust as to income, disbursements, taxes, and any increase or decrease in the value of the fund based on gains and losses. Tax returns, and often estimated payments, also have to be filed as required. Naturally, the trustee has the authority in most cases to engage the services of professionals such as accountants, lawyers, and investment advisors in order to attend to his or her required duties.

One of the primary benefits of the trust is to attend to the needs of a disabled beneficiary. Very often, these individuals are unable to be employed due to a disability, or possibly work only part-time or for a nominal salary so as to continue to receive their governmental benefits, be it Supplemental Security Income (SSI), Medicaid, housing assistance, food stamps, fuel assistance, etc.

A family member must be sure that the person they name as trustee has the ability to deal with their disabled family member and spend the funds prudently for the benefit and needs of the disabled beneficiary. In these cases, the primary benefit of the trust would be to provide for the beneficiary, but not allow the person who is receiving benefits to lose them based on excessive spending of assets for non-qualified expenditures.

In most cases, the SSI rules establish what a person is or is not allowed to have based on assets and income. The maximum assets that are countable, which a person may have to maintain their benefits for Supplemental Social Security, are $2,000 plus some other exempted assets.

It is important for the trustee to be sure that the funds are spent properly for the benefit of the beneficiary so as not to eliminate or reduce the governmental benefits. This allows the disabled individual to maintain all services available from the state or federal government, as well as have a pot of funds in the special-needs trust for their supplemental or what are sometimes known as 'luxury' expenditures. This may include trips, paid caregivers, or items such as furniture, computers, games, etc., which are not covered by governmental sources.

Again, it is worth repeating that, in most cases, a so-called third-party trust does not require any repayment to the government upon the death of the beneficiary. Naturally, there are exceptions to all rules and laws, but with special-needs trusts, the federal statutes, Social Security rules, and state law, as well as Medicaid regulations that dictate what a person may have or not have and what the trustee may do or not do, must be properly complied with.

In some cases, a grantor who creates the trust may consider establishing another person, an independent party called a trust protector, to be involved with and advocate for the benefit of the disabled beneficiary. This person would not be the trustee, but rather would have the authority to tell the trustee what the beneficiary might need from time to time.

In most cases, we do not wish to have a court oversee the trust, which requires additional time, expenditures, and publicity. A trustee need not account to anyone except the governmental sources and the beneficiary and/or that person's guardian or conservator. The trust protector may have the authority, if desired, to remove the trustee, but the trust protector could not appoint himself or herself as the backup trustee. Therefore, it is very important to consider who the trustee would be serving under this trust, as well as who the backup trustee would be in the event that the primary trustee is unable or unwilling to serve.

Issues to Consider

Finally, there are additional issues that need to be considered in establishing the trust:

• How much money should be deposited into the trust for the beneficiary, and how much should be left to other family members?

• Who should be the trustee or successor trustees?

• What assets should be put in the trust initially, if any, and how much should be deposited into the trust at a later date?

• Who are the ultimate beneficiaries of the trust if the primary beneficiary is deceased or no longer needs benefits?

• Is it possible that the trust could be terminated sooner if it is uneconomic to maintain or if the laws change, which might prevent a special-needs trust from having the same substantial benefits as when it was established?

Needless to say, this is one of the primary legal documents that one should not attempt to create on their own, because most of the trusts that are created will become irrevocable at one's death, and at that time, if they do not meet the test of all governmental authorities, then the person may lose their benefits until the trust is approved. This could take substantially more time and expense than if the person had contacted professionals to establish the trust properly at the time of its inception.

Keep in mind that the primary purpose is to maintain the benefits for a disabled person, while at the same time allowing the funds to be used for their benefit as needed, all in the best interest of the beneficiary. ■

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