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Special Needs Trusts: The Current Law and Pending Legislation

Introduction

Individuals with special needs often face "quality of life" challenges compared to those without special needs. Many times individuals with special needs require added expenses to meet those needs. The added financial burden often leads individuals with special needs to depend on public benefits to help them meet those costs. Unfortunately, public benefits often fail to meet all of the needs of a disabled individual. However, the supplemental needs of those individuals (meaning needs not covered by public benefits) can be met by using funds held in a Special Needs Trust (SNT).

Understanding Special Needs Trusts

A Special Needs Trust is a trust that is established for an individual with special needs who is or may become dependent on public benefits, such as Medicaid and SSI. The trust is specifically identified to meet certain supplemental needs and to enhance the quality of life for the beneficiary, the special needs person. Most importantly, the SNT is created so as to not disqualify the beneficiary for the public benefits being received. The trust, then, is a pool of money available for the benefit of the beneficiary in order to provide him or her with goods or services that public benefits do not provide. For example, SNT funds may be used for in-home care services that would otherwise not be affordable to the beneficiary. Should a person with special needs receive these funds outright and outside a properly created SNT, the individual may become ineligible for the public benefits and reinstatement of the benefits can be a difficult process.

There are two types of SNTs: A third-party SNT and a first-party (self-settled) SNT. A third-party SNT is one in which a loved one has assets that he or she would like to use to benefit the individual with special needs. Whereas, a self-settled SNT is one in which the assets belongs to the individual with special needs.

A self-settled SNT is often used in the case of a litigation settlement. One example involves an individual who was in a car accident and sued the "at fault" driver successfully. By the time the lawsuit settlement was reached, the individual had been declared disabled. Instead of the settlement funds being given outright to the person who is now disabled, the funds could be placed into a self-settled SNT for the benefit of that

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individual. This allows the person with the disability to continue to receive benefits *and* have the settlement money available to him or her for supplemental purposes, increasing his or her quality of life.

Self-settled SNTs have been recognized by federal law since 1993 under 42 USC §1396p(d)(4)(A). A self-settled SNT contains a mandatory payback provision, meaning that upon the death of the beneficiary, the State will be paid back from the remaining trust assets up to the amount of public benefits expended on behalf of the beneficiary during his or her lifetime.

Within a self-settled trust an individual trustee or corporate trustee is appointed to manage the funds in the trust. Choosing the correct trustee is an important decision as the trustee will be responsible for managing and investing trust assets, and is responsible for following the guidelines regarding proper distributions from the trust. Failing to do so could result in a loss of benefits for the trust beneficiary.

Problem with the Current Law

The law, as currently written, states that a first-party trust may only be *established* by the individual's parent, grandparent or a court of competent jurisdiction. It appears that the option for a competent individual to establish his or her own trust under 42 USC § 1396p (d)(4)(A) was a simple mistake by the writers of the law. However, this minor mistake causes major financial losses to disabled individuals. It requires those disabled individuals who have no parent or grandparent alive to establish the trust, to expend money on an attorney and court costs in order to ask for a court order establishing the trust. The money to accomplish this is often such an impediment for these individuals, that they do not pursue it and end up either kicked off the public benefits or forgoing the supplemental monies they would otherwise have access to.

Pending Legislation

Currently there are two identical bills sitting in the House of Representatives and in the Senate which would create the option for competent individual who is disabled to establish his or her own trust under 42 USC § 1396p(d)(4)(A). In May 2013, H.R. 2123 was introduced in the House and the next day it was referred to the House subcommittee on Health, where it is currently sits. A few months later in November 2013, S. 1672 was introduced in the Senate, was read twice and referred to the Committee on Finance. The title of the identical bills is the "Special Needs Trust Fairness Act of 2013" and is described as "a bill to amend title XIX of the Social Security Act to empower individuals with disabilities to establish their own supplemental needs trusts."

As advocates for individuals with special needs, it is important that we support this bill so that our clients have more choices for themselves with regards to establishing special needs trusts. If you feel so inclined, please contact your Congressional representative and ask for the passage of these bills. Encouragement from us of the importance of this bill to our clients is imperative to get the bill recognized and enacted. Otherwise, it may get lost in the shuffle and our clients' needs may not be adequately addressed.

Conclusion

A Special Needs Planning attorney is an essential advocate when preparing SNTs for individuals with special needs. The attorney will be able to identify the type of SNT that would be helpful in the particular situation and will know how to properly construct it so as to prevent the person with special needs from being kicked off his or her benefits. There are many roadblocks that can arise in the planning process and it is imperative that you have an attorney familiar with the many federal and state laws and regulations concerning public benefits and SNTs.

If you have a client with special needs who would benefit from the establishment of an SNT, please contact us. We are committed to and passionate about assisting those with special needs and look forward to helping in any way we can.

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