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Special Needs Planning

In the course of our practice, we work with many families where there is a special needs beneficiary. The term "Special Needs Beneficiary" applies in several cases, including those beneficiaries who are either eligible, or potentially eligible, for SSI (Supplemental Security Income) or other governmental benefits where eligibility is resource based, as well as family members who, because of lack of capacity, will need assistance in the future. There are some unique estate planning components to consider when working with special needs families.

Initially, when there is a beneficiary who can potentially qualify for SSI, it is important to review the qualification criteria and to build the estate plan around those criteria. For example, SSI eligibility brings with it two components:

The first eligibility criteria is a medical diagnosis in the form of a developmental disability, as set out specifically in the codes. This would include, for example, cerebral palsy, Down's syndrome, autism etc. The second component for eligibility is a resource level in that the potential beneficiary cannot have assets valued in excess of $2,000. This is an asset value test, not an income value test. Once the eligibility criteria are met, then a monthly benefit is paid by the Social Security Administration for the benefit of the special needs person.

A primary concern of many parents is that should they pass away and leave any part of an estate to a special needs beneficiary, theoretically that beneficiary's asset level will then exceed the $2,000 maximum, and thus render the beneficiary ineligible for continued SSI benefits. At that point, SSI benefits would cease, unless or until, the beneficiary depletes the inheritance they received, at which time the beneficiary could reapply for SSI benefits. One of the primary problems is that the application process is difficult and time consuming, and a secondary application requires the same amount of work as the original application.

A standard strategy for dealing with this concern is to incorporate a special needs trust (SNT) into the estate plan. A special needs trust would hold assets devoted to the special needs beneficiary in such a way that the SSI qualifications are still met. Essentially the assets are available for any of the beneficiaries needs other than what SSI provides for. Typically SSI's funds are to be used to pay for food, clothing and shelter, so a well drafted SNT would prohibit the use of the monies for these needs. Of course, the monthly SSI benefit is usually insufficient to meet all of the needs of a special needs beneficiary, so the trustee of a SNT must be creative. The benefit of the SNT of course is that the beneficiary himself is not deemed to own the assets and therefore the asset value test is not breached.

It is important to remember that in California, an SSI recipient has automatic Medi-Cal eligibility and there is no need to also complete the Medi-Cal application process. Accordingly, retaining the SSI eligibility can be critical, so as to not risk losing Medi-Cal eligibility.

A SNT can be either “stand alone” or testamentary. A testamentary SNT comes into existence at the death some (i.e., a parent) leaving assets to the beneficiary. There is no need for the SNT until the parent is deceased, hence the “testamentary” creation of the SNT. A “stand alone” SNT comes into existence immediately and is often utilized if there are inheritances coming from other family members, or perhaps there are other funds (including a settlement) of a beneficiary. One should consider the components and need for the SNT before determining which type is to be used.

If a stand alone special needs trust is utilized for any of the purposes outlined above, it can also be the recipient of assets from the parents’ estate at their death.

Generally, when the assets used to fund an SNT belong to someone other than the special needs beneficiary, the trust is drafted so that at the death of the special needs beneficiary there is a direction as to the disposition of any remaining balance. On the other hand, if the special needs beneficiary has his own assets (i.e. perhaps from a settlement), the trust will probably need to be drafted to include provisions designed to reimburse the state for any Medi-Cal benefits it has given to the beneficiary. Much of this is determined based on the actual source of the funds.

Another significant component of special needs planning is whether or not a conservatorship will be needed for a special needs person. A conservatorship is the appointment by the court of a legal representative to manage the financial affairs of a special needs beneficiary, and/or their personal affairs, including medical care, placement etc. Depending on the input from the local regional center, and the severity of the special needs beneficiary’s medical issues, the conservatorship can be established as early as the age of 18 or anytime thereafter that a parent or interested party feels is appropriate. The establishment of the conservatorship is done through a petition to the court. A court will maintain complete jurisdiction over the matter and will assure there are sufficient safeguards in place so that a conservatorship is not improperly established.

Families with special needs beneficiaries should consider the use of a SNT and the extent to which assets should be placed in trust at the parents’ death for the benefit of the beneficiary. Even though the SSI eligibility rules are under federal law, the law of the state where the person creating the SNT resides will control the validity of the trust.