BALDWIN HASPEL BURKE & MAYER LLC LAW OFFICES

Special Needs Trusts

Practice Areas
- Trusts

Trusts are an important planning tool for persons who cannot handle their own financial affairs for whatever reason, including mental or physical disability. A special needs trust ("SNT") is a trust designed to supplement benefits available to disabled persons under governmental assistance programs to improve upon their quality of life without jeopardizing their eligibility for governmental benefits.

Social Security Disability Income (SSDI), Medicare, Supplemental Security Income (SSI) and Medicaid are the primary sources of governmental benefits for the disabled. Eligibility for SSDI and Medicare is not dependent upon the amount of assets a disabled person owns. However, SSI and Medicaid are financial need-based programs. SSI provides direct cash benefits to a disabled person or his/her representative payee for food, shelter and clothing. Medicaid provides medical assistance to disabled persons for doctor and hospital bills. To qualify for SSI and Medicaid, the applicant must have limited countable monthly income and no more than $2,000 of countable assets.

Countable assets include cash or other liquid assets, as well as any real estate or other property (such as stocks, bonds or CDs) which can be converted to cash and thus be used to pay for the person's food, shelter, clothing or medical expenses. Certain assets, such as a family home and household goods and personal effects, are not counted in determining SSI and Medicaid eligibility.

The receipt of a personal injury award or an inheritance can jeopardize initial eligibility or continuing eligibility for SSI and Medicaid. Alternatively, disabled persons on the waiting list for community-based services under Louisiana's Medicaid Waiver Program may find themselves over the $2,000 asset limit when a slot becomes available. However, a properly drafted SNT can be used to preserve these benefits despite assets in excess of $2,000.

Generally, there are two types of SNTs for disabled persons. The first type is established for a disabled person with funds of someone other than the disabled person or his/her spouse. This is known as a "third party" SNT. A typical example is a SNT created under a parent's or grandparent's Will for the benefit of a child or grandchild to hold an inheritance. The second type of SNT is established with funds already owned by the disabled person or his/her spouse. This is known as a "self-settled" SNT. A typical example is a SNT funded with an inheritance already received, a personal injury award or cash or other assets already in the disabled person's name.

Both types of SNTs have common characteristics. They usually state that the purpose of the trust is to supplement rather than supplant those benefits available under governmental assistance programs to improve upon the beneficiary's quality of life by providing more sophisticated medical, rehabilitative, recreational, cultural or educational aid not provided by Medicaid or SSI. The Trustee may be parents, family members, the legal guardian or a bank or other institution qualified to exercise trust powers in Louisiana. The Trustee is given wide discretion as to timing and amounts of distributions after considering all other funds available to meet the disabled person's needs, including governmental benefits such as Medicaid and SSI. The Trustee is authorized to make expenditures on the disabled person's behalf rather than distributing monies directly to the disabled person. The Trustee is specifically prohibited from making any distributions which would jeopardize the disabled person's eligibility for governmental benefits.

A self-settled trust created with the disabled person's own funds generally is counted for Medicaid and SSI eligibility purposes, unless the trust meets one of the exceptions under federal law. One exception is the "Under Age 65 SNT." To qualify, the SNT must meet the following requirements:

- The disabled person must be under age 65.
- The trust must be created by a parent, grandparent, legal guardian or court even though the funds in the trust may belong solely to the disabled person. The disabled person, no matter how competent, cannot be the "creator" of the trust.
- The trust must provide that upon the Medicaid recipient's death or earlier termination of the trust, Medicaid will be reimbursed out of the funds remaining in the trust up to the cost of care provided by Medicaid ("pay-back" provision). However, there is no legal requirement that the trust must contain or maintain enough funds to repay Medicaid.The "pay-back" provision is not required in a "third party SNT, only a "self-settled" SNT.

Although both types of SNTs will protect the disabled person's eligibility for SSI and Medicaid, the SNT must be operated in a proper manner to avoid reduction in SSI benefits. Any monies distributed directly to the SSI

recipient will reduce the SSI benefit dollar for dollar for the month in which the distribution is made. In addition, if the beneficiary receives food, shelter or clothing as a result of payments by the SNT to other persons, then the SSI recipient will be deemed to have received "in-kind support or maintenance" which can reduce the SSI benefit. Of course, if the SSI recipient accumulates more than $2,000 in his or her name as a result of trust distributions, unexpended SSI benefits or other funds, the SSI recipient will become ineligible for both SSI and Medicaid under the countable asset test. It is important for the Trustee of the SNT to become familiar with the SSI rules if the goal is to preserve SSI and Medicaid benefits.

Medicaid and SSI usually do not notify a disabled person when denying eligibility or terminating benefits because of excess countable resources that such benefits may be preserved through the use of a trust. Likewise, many parents are unaware that they can leave assets to a disabled child when they die in a trust without jeopardizing the child's governmental benefits. However, not just any trust will do. The trust must be drafted by a lawyer who is familiar with SNTs, the special problems of the disabled beneficiary, and the often complex and changing rules under governmental assistance programs.