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Special Needs Trust Overview

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Special Needs Trusts Overview

by

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I. INTRODUCTION

According to a study funded by the National Institute on Disability and Rehabilitative Research, it is estimated that over 56.7 million Americans are disabled. This number represents approximately 18.7% of the entire population of the United States (303.9 million per the 2010 U.S. Census).¹ Of these individuals, approximately 38.3 million suffer from a severe disability (about 12.6% of the population), and about 12.3 million people aged 6 and older need assistance with one or more activities of daily living.² The number of Americans with disabilities is expected to increase as the U.S. population ages. In light of the growing number of Americans with a disability, the need for special needs planning, as well as the establishment and administration of special needs trusts, is growing.

Attorneys not familiar with special needs planning or attorneys just beginning to practice in this area, are often confused and overwhelmed with the vast amount of knowledge necessary to adequately advise and plan for their clients. While only one tool in the attorney's bag, special needs trusts present an excellent opportunity to preserve both assets and the beneficiary's eligibility for government benefits. However, improper drafting or inadequate counseling in the preparation of a special needs trust can create disastrous consequences for the beneficiary, including the reduction or total loss of means-tested government benefits. Additionally, failure to keep abreast with the ever-changing Social Security policy regarding special needs trusts and revisions to Social Security's Program Operation Manual System ("POMS") can cause extreme adverse effects on a beneficiary's eligibility for public benefits.

The purpose of this paper is to provide an overview of special needs trusts, including the different types of special needs trusts, drafting techniques and administrative concerns. Additionally, this paper will provide an overview of the types of public benefits preserved by special needs trusts, as well as how these trusts affect the beneficiary's receipt of public benefits. Finally, this paper will explore the use of special needs trusts in a litigation context.

¹ <http://www.census.gov/prod/2012pubs/p70-131.pdf>

² <http://www.census.gov/prod/2012pubs/p70-131.pdf>

II. SPECIAL NEEDS TRUST OVERVIEW

One of the most common tools used by attorneys in planning for public benefits is a special needs trust (“SNT”). Governmental benefits are designed to provide basic health care, food and shelter. As such, governmental benefits provide for only a meager existence to recipients. A SNT is designed to provide additional needs and extras, such as vacations, that normal governmental benefits do not provide. A SNT can either be self-settled or third-party settled depending on the source of the funding. Each of these types of trusts are discussed below.

CAUTION: When establishing or administering a SNT, it is important to correctly determine the source of the funding (i.e. self-settled or third-party funds). As discussed below, these two types of trusts have different requirements. Additionally, a catch-all trust that includes both self-settled and third-party funds is prohibited. Third-party funds should never be comingled with a self-settled trust, and vice versa.

A. Self-Settled Special Needs Trusts

To provide for the payment of supplemental needs, federal law permits an individual with disabilities to retain his or her resources in one of two types of SNTs. Without the creation of such trust, the resources would count as an asset of the individual, disqualifying him or her from SSI³ or Medicaid benefits.⁴ The two types of trusts are commonly referred to as (d)(4)(A) and (d)(4)(C) SNTs.⁵ These two types of SNTs are self-settled or first-party SNT trusts, meaning that these trusts are funded with the beneficiary’s own funds.

1. (d)(4)(A) Special Needs Trust

A (d)(4)(A) SNT is a trust created (and funded) for the sole benefit of an individual with a disability under the age of 65 by the individual, by the individual’s parent, grandparent or legal guardian, or by a court.⁶ The trust is funded with the disabled person’s assets. The trust must provide that the state Medicaid agency will receive amounts remaining in the trust upon the individual’s death up to the amount paid by each state under the Medicaid program for services to the disabled individual.

In Texas, a court may create a court managed trust under Chapter 1301 of the Texas Estates Code or a §142 trust under the Texas Property Code. Both of these trusts may be drafted to conform with the requirements of 42 U.S.C. §1396p(d)(4)(A) to qualify as a special needs trust. Since the passage of the Special Needs Trust Fairness Act in December 2016, an individual with only a physical disability has been able to act as grantor of his or her own (d)(4)(A) SNT. An individual who has only a physical disability can also petition a Court to create a Chapter 1301 management trust.⁷

³ 42 U.S.C. §1382b.

⁴ 42 U.S.C. §1396p(d)(4).

⁵ 42 U.S.C. §1396p(d)(4)(A), (C).

⁶ 42 U.S.C. §1396p(d)(4)(A).

⁷ Tex. Estates Code §1301.101(a)(1).

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