Attachment "D"

AUTHOR'S NOTE

The following are two chapters from *Achieving Independence*, a guide for Californians on how to plan for a loved one with a disability. While these chapters refer to programs unique to California, the concepts remain that the programs and systems that serve persons with disabilities will change, often in ways that are difficult to predict.

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Chapter Eight

Creating and Maintaining Distribution Plans

The Magic Document Syndrome

Being involved in the day-to-day administration of the special needs trust assists the law office to identify issues that are common with special needs trusts, to be able to create a plan that is more likely to succeed. Many parents of children with disabilities go through a lifelong learning process about how to provide for the unique needs of their children. It's become very commonplace for parents to realize it is important to create a special needs trust to provide for their child's quality of life, but all too often the creation of the document is seen as the objective rather than a tool to meet a goal. A special needs trust should really be a document that creates a system not only to provide the distributions that the beneficiary needs, but also to create a checks and balance system of accountability to make sure that the goal of maintaining the quality of life is kept.

Distribution Plans

What is common with the administration of all too many special needs trusts are that the funds are often expended until the trust runs out of money. This of course is not acceptable, especially in today's environment where it is very unclear what the future is of many of the programs that provide core services for persons with disabilities. The uncertain world that persons with disabilities, their families and service providers face make the need for a plan that is revised with regularity essential.

It takes a team composed of financial, social, legal, tax, and fiduciary professionals to administer all the aspects of administration of a special needs trust to fulfill the needs of the beneficiary. Unfortunately, all too often there is a lack of coordination among the players. The danger is that the trustee without a plan may not coordinate with the financial advisor about what the present and future needs are for the beneficiary. The financial advisor might create a plan that does not coordinate with the tax advisor about what tax credits or deductible expenses might exist to ensure that the portfolio is tax advantaged. The tax advisor does not proactively consider the likely deductible expenses for the future or give guidance about how expenditures might affect the beneficiary's taxes. And the social service professional may be making recommendations that may be beneficial but are not actuarially sound. This lack of coordination leads to wasting of assets and may subject the trustee to liability.

Special needs trust administration without a plan that is revised periodically to reflect inevitable changes in the beneficiaries needs and resources as well as its actuarial soundness is prone to being either being expended too quickly or not used prudently for items the beneficiary could benefit from. A well thought out distribution plan can be a tool to coordinate the activities of all the players, and help make some very important social and fiscal decisions. It also allows all parties to have some idea of what is expected of them, and to use the precious resources set aside for a person with a disability to its fullest.

Lastly, there has been a marked increase with trustees being held liable for misadministration of special needs trusts. Often this is because of either overspending or underspending of resources on the beneficiary. For instance, in the case of Matter vs. J.P. Morgan Chase Bank in 2012 in a testamentary special needs trust that should have been funded with $4,000,000 after five years of administration after the grantors death showed that while the trustee and advisors regularly took their fees which were substantial, spent no funds on the beneficiaries direct needs The court ordered that a care manager be hired, and based on the care managers assessments the beneficiary was moved to a more suitable facility, arranged for him to take a vacation, to attend classes, and to obtain equipment such as computers and iPads to enhance his quality of life.

On the other end of the spectrum, a case involving BNYii started with over $400,000 in a special needs trust and expended the funds in less than a decade spending about $60,000 a year. The court held that the trustee breached its fiduciary duties by failing to focus on the beneficiary's long-term needs by authorizing each and every discretionary disbursement requested by the infant plaintiff's mother without investigating whether many of these expenditures could have been paid by Medicaid. The court pointed out that BNY made no effort to consult a professional on government benefits or assistance programs as required by the trust. For instance, a significant portion of the trust assets were expended on caregivers that would likely have been paid by Medicaid.

Breaking Down the Distribution Plan into Phases

In most cases, there should be three phases to developing the distribution plan. First, should come an assessment of the beneficiary's needs. Step two involves incorporating that information within the distribution plan. Based on the distributions that will be necessary to meet beneficiary needs, along with an evaluation of the trust's investment portfolio and other available resources, the distribution plan should project the trust's long-term performance. Third, comes periodic re-evaluation to measure the trust's actual performance against expectations and to make necessary adjustments. Let's review the process, step by step.

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First appeared as part of the conference materials for the
18th Annual Changes and Trends Affecting Special Needs Trusts session
"Financial Projections for Quality of Life Possible When Factoring in Public and Private Resources"