
ESTATES AND ELDER LAW REPORTER

Special Needs Trusts Provide for Loved Ones, Preserve Estates

If someone wishes to provide, after their death, for the needs of a spouse or a child who is under a disability, and also to protect assets from being depleted by nursing home or long-term care costs, a "Special Needs Trust" can be established to achieve both goals.

Under the Special Needs Trust, the trustee may be instructed to hold and administer the beneficiary's share of the trust estate for his or her benefit for so long as the disability continues, or until the beneficiary's death. This allows for the disabled beneficiary's needs to be provided for with trust assets for as long as such special needs are present.

If, however, the disability is so severe that the beneficiary is receiving, or may receive, governmental benefits to assist in payment of the expenses of his or her care, and the financial condition of the patient is a factor in determining eligibility, an outright inheritance will probably result in disqualification or ineligibility for the governmental benefits. Even a directive to hold the beneficiary's share in trust may result in disqualification or ineligibility for benefits unless the Trustee's discretion to make distributions to or for the beneficiary is carefully limited.

Careful draftsmanship should assure that the trust being established for the care of

the beneficiary does not include any assets that legally belong to the beneficiary, so the trust will not be deemed to have been "established" by the beneficiary within the meaning of statutes such as the Medicaid statute. If the beneficiary is receiving Medicaid assistance and the beneficiary is deemed to have established the trust, the existence of Trustee's discretion to make principal distributions may cause the entire trust estate to be considered an available asset of the beneficiary

The trust document must provide that distributions from the trust are intended to supplement, and not replace governmental assistance, and trust distributions are not intended as the primary source of funds for the beneficiary's care. Distributions from the trust must be wholly discretionary on the part of the trustee.

Therefore, the Trustee may be allowed to provide for care or needs not otherwise covered by governmental benefits and assets can be passed on to other beneficiaries upon the death of the disabled beneficiary.

Of course, the key to the success of the Trustee in meeting the goals of the trust are in the careful drafting and administration of the trust provisions. An experienced attorney can help determine if a Special Needs Trust can help you meet your estate planning goals.

Understanding the Authority Granted or Not Granted Under a Power of Attorney

Anyone executing a Power of Attorney (POA) for Property or Health Care is granting very broad authority to his or her named Agent. In almost all cases, the authority granted to the Agent is the same as that of the principal relative to control over their property or health care decisions.

Of course, the principal can limit the authority of the Agent when drafting the document as much, as little or not at all, as the principal wishes. The problem arises when the principal purchases a form off the shelf or obtains it from someone that doesn't explain the options available to the principal or the consequences of limiting or not limiting the Agent's authority.

The risks of unlimited authority are obvious. Such unlimited control over someone else's property or health care decisions in the wrong hands can be disastrous for the principal.

However, under some circumstances, the granting of additional authority may be appropriate. For instance, the Power of Attorney Act (the Act) expressly excludes some Agent powers.

Specifically, the Act states, "...the agent will not have power... to make gifts of the principal's property...or to change any beneficiary whom the principal has designated...under any will, trust, joint tenancy, beneficiary form or contractual arrangement." The Act also prohibits the Agent from amending or revoking any will or trust that the principal has in place unless these powers are specifically granted in the

POA document. Gifting and beneficiary change powers can also be specifically granted in the document.

There are times when, for estate or Medicaid planning purposes, it makes sense for the Agent to hold these powers. Under some circumstances, many thousands of dollars could be saved by:

- Establishing or continuing a gifting program to reduce the size of an estate for estate tax purposes;
- Changing a beneficiary designation on an IRA to extend the distribution period to maximize tax deferred accumulations;
- Change a beneficiary designation on an insurance policy to prevent the death benefit from going directly to a governmental benefit recipient; or
- Amending a trust to include "Special Needs" or estate tax "Bypass" provisions.

These are just a few of the situations in which expanded Agent powers can be beneficial for the principal or the principal's estate and subsequent beneficiaries.

Careful counseling for anyone executing a POAs is critical to maximizing their effectiveness and providing exceptional service to our clients.

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