feature

Separating the Trees from the Forest

Why Details Matter When Drafting Documents for Individuals with Disabilities

by Amanda M. Buzo

I am frequently asked to review existing estate plans to ensure the plans are consistent with Medicaid and Social Security rules. Unfortunately, countless people slide thick, gold-embossed binders across our conference table, only to learn that the "special needs" documents inside do not match the beautiful exterior. The purpose of this article is to review common estate planning practices from the perspective of a special needs estate planner.

Conduct a thorough consultation

These days, parents of minor and adult children with disabilities are more likely to have acknowledged their child's disabilities, if not sought treatment for them. But we do encounter reluctance in labeling family members as having a disability, which requires us to be creative in discovering this information. I recommend asking if any of the beneficiaries have lineal descendants or spouses with disabilities or conditions affecting their ability to support themselves, and if it is possible that the lineal descendants could be contingent beneficiaries. It is also important to know what government benefits the beneficiary receives or may require in the future. Medicaid, Home and Community-Based Services Waivers, and Supplemental Security Income ("SSI") are means-tested government benefits. These programs categorize an inheritance as unearned income in the month received. An inheritance will also be treated as a resource if not properly spent down or transferred to an exempt trust in the month received. The increase in income and/or resources is likely to jeopardize the beneficiary's ongoing eligibility for Medicaid, Waiver, or SSI. Conversely, Medicare and Social Security Disability Insurance are not means-tested.

Realize disinheritance isn't the only option

The expectation is for other family members to financially provide for the individual receiving Medicaid and/or SSI in exchange for receiving a larger inheritance, but if the recipient reconsiders looking after his or her relative, or is sued, marries an uncooperative spouse, divorces, has creditor issues, or has an addiction, it is likely the assets will never be used for the intended beneficiary. There are also concerns that this arrangement establishes a constructive trust. There are many other planning techniques available, including first-party or third-party special needs trusts.

Recognize the ramifications of disclaimer

The Medicaid and SSI agencies will treat disclaimer as an improper transfer of resources, and the value of the disclaimed property will still be imputed to the individual. R.C. 5101:1-39-07(B)(14); POMS SI CHI 00830.330. Therefore, disclaimer is not an effective tool if the beneficiary wishes to retain his or her Medicaid and SSI eligibility.

There are circumstances, however, when it may be in the beneficiary's best interest for the trust to pay for food or shelter despite the penalty, and it is important that the trustee have the power to do so.

Remove ascertainable standard language

It is not unusual to leave assets in trust, nor is it unusual to include "health, education, maintenance, and support" as a loose distribution guide for the trustee. This same language will cause the trust to be a countable resource when determining Medicaid eligibility, even if the term "special needs trust" is used. R.C. 5111.151(G)(2). If the trust beneficiary will need Medicaid or SSI, it is best to make the

trust purely discretionary and not include an ascertainable standard. If the trustee needs guidance, the parents or caregivers may wish to draft a non-binding letter of intent to share their future wishes for the beneficiary.

Review the trust agreement in its entirety
Even if the scrivener does not include an ascertainable standard in the trust administration portion of the trust, it is still possible for the trust to be counted as a resource if the spendthrift clause includes ascertainable standard language. In addition to the terms noted above, other terms that should be avoided when preparing special needs trusts are medical care, care, comfort, welfare, and general well-being. R.C. 5111.151(G)(2).

Provide broad discretion
Some estate planners include language preventing the trustee from making any distribution for a beneficiary's food and shelter when the beneficiary is a Medicaid or SSI recipient. The reasoning behind this is understandable; those who receive Medicaid or SSI are subject to rules regarding the amount of income and assets/resources he or she has access to in order to meet their basic needs and still be financially eligible for the programs. A payment by a third party for a Medicaid or SSI recipient's food or shelter affects the beneficiary nearly as harshly as giving him or her cash, which is countable unearned income and could jeopardize Medicaid or SSI eligibility. There are circumstances, however, when it may be in the beneficiary's best interest for the trust to pay for food or shelter despite the penalty, and it is important that the trustee have the power to do so. For example, if the trustee pays the beneficiary's $1,000 per month rent (shelter), the beneficiary's monthly SSI of $674 will be reduced, but not dollar-for-dollar. The Social Security Administration employs formulas to determine the "value" of the rent payment. In this case, the beneficiary would lose one-third of the maximum SSI amount plus $20, or $244 per month, in exchange for a $1,000 per month apartment that he could never afford on his own.

Remove mandatory distributions
If you are still not convinced that a special needs trust should be discretionary, here is more support: a mandatory distribution to the beneficiary is unearned income according to DJFS and the Social Security Administration, and can jeopardize benefit eligibility, thus undermining the grantor's intent. And, as discussed above, the beneficiary cannot disclaim the distribution as the effect on Medicaid and SSI benefits is the same.

Reconsider gifting limitations in the power of attorney
Some powers of attorney for finances limit the agent's ability to gift to parallel the annual gift tax exclusion amount. If the principal requires Medicaid at some point in the future, then it may not be appropriate to limit the amount the agent can gift. For example, I have worked with middle-class families who have unexpectedly needed Medicaid due to a traumatic illness or injury. Several have had minor children with disabilities, and if the durable power of attorney ties gifting to the annual gift tax exclusion amount, the parent's agent's ability to transfer the disabled parent's assets to a special needs trust for the benefit of the child will be unintentionally and severely limited.

Coordinate durable power of attorney and trust agreement
If the disclaimer trust references the agent's authority to disclaim, the power of attorney should do so as well. Similarly, if your client wishes to permit his or her agent to revoke or amend a trust agreement or distribute trust property, the power must be granted in both the power of attorney and the trust agreement. R.C. 1337.18(A)(1)(a); R.C. 5806.02(E).

Consider the need for adult guardianship
Most estate planners will include a guardian nomination for minor children in the parents' wills pursuant to R.C. 2111.12, but some children require a guardian as adults. According to R.C. 2111.121, a parent may nominate a guardian for an incompetent adult child, but to be effective, the nomination must be in writing, signed by two witnesses, and notarized. Most wills are not notarized, and therefore it may be appropriate to make the nomination in a separate document that is witnessed and notarized.

Evaluate real property options
If the individual with a disability is also incompetent, it is poor planning to leave him or her real property if they cannot manage it. Even though real property is an exempt asset if the Medicaid or SSI recipient owns and resides in it, if the individual is now or one day is found to be incompetent, the real property will be a guardianship asset and subject to probate court supervision if it needs to be sold or mortgaged. It may be more appropriate to transfer title of the home to a discretionary trust for the benefit of the individual, allowing the trustee to maintain the real property.

Review beneficiary designations
As we all know, the beneficiary designation supersedes will or trust provisions. Some assets have de facto beneficiaries that can include a spouse or child. Your clients must review their beneficiary designations regularly to confirm the beneficiary designations are consistent with their written estate plans. It is necessary to use the company's forms and not rely on a letter or a note in the margin of the old form which, surprisingly, was the method a bank advised a client to use recently. This method, predictably, failed.

Consider estate planning for the adult child
If the child with a disability is 18 or older and competent, he or she may wish to execute a durable power of attorney for finances, a health care power of attorney, and/or a living will. For those with capacity to sign them, these documents are less restrictive alternatives to guardianship. It may also be advantageous to include educational provisions, or to draft a separate educational power of attorney, for adult children with disabilities who are continuing their education beyond age 18. Additionally, a declaration for mental health treatment may be appropriate for individuals with mental health issues.

To many, an inheritance can be an unexpected windfall after the death of a loved one. For people with special needs, an inheritance could instead unintentionally backfire and cause them to lose residential providers, health insurance, or cash benefits. Great care is required when preparing estate plans that may affect individuals with disabilities; if a special needs tree falls in a client's estate planning forest, there is no doubt you will hear it, and the ramifications for the beneficiary can be significant.

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