Authors

Mark L. Anderson

Mark Anderson is an attorney and partner with Schmitz, Schmidt, & Anderson, P.A. He has practiced elder law for over 25 years, helping his clients cope with the legal challenges associated with aging, incapacity, and long-term care. Mark's familiarity with a broad spectrum of legal disciplines allows him to craft innovative plans for the personal and financial security of each client. Mark's work encompasses traditional estate planning (wills, trusts, Powers of Attorney, and Health Care Directives), probate, guardianships and conservatorships, and Medical Assistance. Mark is licensed in Minnesota.

Patty Dunlop

Patty Dunlop is a Licensed Social Worker, and has been with Schmitz, Schmidt, & Anderson, P.A. in St. Paul for more than 27 years. Her main focus is on Medical Assistance applications, whether taking on the extensive paperwork herself or helping clients maneuver through the process on their own. With her background as a social worker, she brings knowledge of long-term care services and housing options to the firm and its clients and is able to help clients deal with the major life changes they face when a family member needs long-term care.

Trusts

There are several different types of trusts used in Long-Term Care estate planning. This session will discuss these trusts, how they are funded, and how to determine the impact of each one on Medical Assistance/Long-Term Care eligibility.

There are three parties to every trust…The Grantor/Settlor, the Trustee, and the Beneficiary.

Revocable Trusts

Revocable Trusts are just that…revocable. The Grantor retains the right to make changes to every aspect of the trust, such as changing the Trustee, Beneficiary, or how/when the trust funds are paid out. The Grantor also retains the right to revoke the trust at any time and for any reason. Because the Grantor has full access to the assets in the trust, it is considered fully available to the Grantor and his/her spouse for Medical Assistance purposes.

Revocable Trusts are not used for the purpose of protecting assets. They are commonly used to avoid probate and for the Grantor to control his/her assets after death more so than with a Will.

Irrevocable Trusts

An Irrevocable trust cannot be revoked by the Grantor. It is therefore an entirely separate taxable entity. It must obtain its own tax identification number and file its own tax return. For a simple, Irrevocable Trust to have any Medical Assistance applicability, the Grantor must not retain any interest whatsoever. The Trustee cannot pay out any of the principal or income to the Grantor. The Grantor also has no ability to change any portion of the trust or to revoke it, although a Trustee may make certain expressly allowable changes, such as the ability to nominate a successor or co-trustee. Since the Grantor does not retain any interest in the trust, it is not considered available to the Grantor and his/her spouse when applying for Medical Assistance benefits.

On occasion, Irrevocable Trusts are set up where there are circumstances where the Trustee can distribute a portion of the trust funds to the Grantor. Any portion that can be paid out is considered available.

If an Irrevocable Trust is funded within 5 years prior to the Grantor filing for Medical Assistance, the funding is generally treated as an uncompensated transfer of asset (note this does not apply to special needs trusts). Note that the potential uncompensated transfer occurs when the trust is funded, and not when it is established.

If an Irrevocable Trust was funded within the previous 5 years of an individual's need for Medical Assistance, we must first determine whether or not the client has other resources sufficient to pay through the remainder of the lookback period.

It is our practice, with both Revocable and Irrevocable Trusts, to have the Trustee provide a written statement of the current value of the trust to the county financial worker at the time of the Medical Assistance application.

Medicaid Trusts:
Special and Supplemental Needs Trusts.

Both Special and Supplemental Needs Trusts are established and allowed under Federal and State law. These trusts provide a "safe harbor" for certain qualified needs-based public benefits recipients to place assets which would otherwise render them ineligible for benefits.

Supplemental Needs Trusts

A Supplemental Needs Trust is funded by someone other than the Medical Assistance applicant. Often it is an estate planning tool used to provide a gift or inheritance to a person who is receiving needs-based public benefits such as Medical Assistance. Funds contained in a Supplemental Needs Trust are not considered available to the person for purposes of financial eligibility. Assets in the trust must be used solely to pay for goods and services for the beneficiary and cannot be used to pay for anything paid for by public benefit programs.

A Supplemental Needs Trust may be established and funded by anyone other than the Beneficiary, his/her spouse, or "anyone obligated to pay any sum for damages or any other purpose to or for the benefit of the Trust beneficiary under the terms of a settlement agreement or judgment." Minn.Stat. § 501B.89, subd. 2(b). An individual with a disability cannot establish a Supplemental Needs Trust for himself or herself. A spouse is similarly prohibited from establishing a Supplemental Needs Trust for a spouse with a disability. A Supplemental Needs Trust is a third-party Trust so the person with the disability and his or her spouse, who is legally obligated to pay for the medical expenses of the spouse with a disability (see, Minn.Stat. § 519.05(a)), are not allowed to establish such a Trust.

In section 2.3.3.2.7.9.7 of the Eligibility Policy Manual (EPM), the requirements to consider a Supplemental Needs Trust as excluded are laid out. In summary, those requirements are:

- The purpose of a Supplemental Needs Trust is to provide for the reasonable living expenses and other basic needs of a person with a disability when benefits from publicly funded benefit programs are not sufficient to provide adequately for those needs. A Supplemental Needs Trust may allow or require distributions only in ways and for purposes that supplement or complement the benefits available under Medical Assistance.

  A Supplemental Needs Trust must contain provisions that prohibit disbursements that would have the effect of replacing, reducing, or substituting for publicly funded benefits otherwise available to the beneficiary or rendering the beneficiary ineligible for publicly funded benefits.

- A Supplemental Needs Trust must be established by someone other than the beneficiary or the beneficiary's spouse.

- The trust must be funded with the income or assets of someone other than the beneficiary, the beneficiary's spouse, or anyone obligated to pay any sum for damages or any other purpose to or for the benefit of the trust beneficiary under the terms of a settlement agreement or judgment.

  An exception to this requirement is when a Supplemental Needs Trust is established with lump sum proceeds of payments made by the Social Security Administration (SSA) pursuant to the United States Supreme Court decision in Sullivan v. Zebley, 493 U.S. 521 (1990).

- The beneficiary must meet the disability criteria of the Supplemental Security Income (SSI) program before the trust is established. A person with a disability established by SSA or the State Medical Review Team (SMRT) meets this qualification.

  A disability may also be established by the written opinion of a licensed professional who is qualified to diagnose the illness or condition, confirmed by the written opinion of a second licensed professional who is qualified to diagnose the illness or condition. The licensed professional must determine the beneficiary has a mental illness or condition, which to a reasonable degree of medical certainty is expected to:
    - Last for a continuous period of 12 months or more; and
    - Substantially impair the person's ability to provide for their care or custody.

- A Supplemental Needs Trust may provide for other beneficiaries upon the death of the beneficiary.

- A Supplemental Needs Trust is not required to include a provision to reimburse the Minnesota Department of Human Services (DHS) for Medical Assistance benefits paid on behalf of the Beneficiary at the time of his/her death.

- A Supplemental Needs Trust may provide for other beneficiaries upon the death of the beneficiary.

- A Supplemental Needs Trust is not required to include a provision to reimburse the Minnesota Department of Human Services (DHS) for all MA benefits paid on behalf of the beneficiary at the beneficiary's death.

- Trust assets, including any income generated by the trust assets that is retained by the trust, are unavailable assets.

- Disbursements from the trust made directly to the beneficiary or to someone acting on the beneficiary's behalf, such as a guardian or legal representative, are counted as unearned income in the month received.

- Payments made by the Trustee for the benefit of the beneficiary, but not made directly to the beneficiary, are not counted.

- The corpus of a Supplemental Needs Trust established on or after July 1, 1993, is considered an available asset when all of the following conditions are met:
    - The Beneficiary is age 65 or older
    - The Beneficiary resides in a state institution or nursing facility for six months or longer; and
    - There is no reasonable expectation that the Beneficiary will be discharged from the institution or facility.

A Supplemental Needs Trust can be either revocable or irrevocable. If revocable, the funds in the Supplemental Needs Trust could be considered available to the Grantor should he or she need to apply for Medical Assistance because they can revoke the trust and get the funds back. If irrevocable, the funds in the trust will not be considered available to the Grantor because he or she can get them back. Regardless, the funds in a Supplemental Needs Trust are not considered available to the disabled Beneficiary when he/she applies for Medical Assistance benefits. Because the funds in the trust were from someone other than the Medical Assistance recipient/Beneficiary, the funds are also exempt from estate recovery.

Special Needs Trusts

A Special Needs Trust is an asset preservation tool used by an individual with a disability to preserve the use and enjoyment of assets during the individual's own lifetime without jeopardizing eligibility for public assistance programs.

In section 2.3.3.2.7.9.4 of the Eligibility Policy Manual (EPM), the requirements to consider a Special Needs Trust as excluded are laid out. In summary, those requirements are:

- A Supplemental Needs Trust must be established on or after August 11, 1993.

- It must be established before the Beneficiary reaches the age of 65. A Special Needs Trust established before the Beneficiary reaches the age of 65 remains excluded after the beneficiary reaches age 65.

- A Special Needs Trust established prior to December 13, 2016 must be established through the actions of the beneficiary’s parents, grandparents, legal guardian, or a court. It cannot be established by the Beneficiary.

  A Special Needs Trust established on or after December 13, 2016 may also be established by the actions of the Beneficiary on their own behalf.

- It must be funded with the income or assets of the Beneficiary. It may also contain assets of other people.

- The Beneficiary must meet the disability criteria of the Supplemental Security Income (SSI) program at the time the trust is established. A person with a disability established by the Social Security Administration (SSA) or State Medical Review Team (SMRT) meets this qualification

The trust does not meet the criteria for the exclusion if the Beneficiary's disability began after the trust was established.

If the Social Security Administration or the State Medical Review Team (SMRT) did not determine the Beneficiary's disability at the time the trust was established, SMRT must determine whether the Beneficiary was disabled according to SSI criteria at the time the trust was established.

- The trust must be established for and used for the sole benefit of the disabled Beneficiary and must provide that all disbursements are for the sole benefit of the Beneficiary, with the following exceptions:
  - The trust may allow reasonable compensation for a Trustee(s) to manage the trust.
  - The trust may also allow reasonable costs associated with investment, legal, or other services rendered on behalf of the beneficiary with regard to the trust.

  A trust is NOT excluded as a Special Needs Trust if it includes a provision that allows for either of the following:

  - Benefits to other people or entities during the beneficiary's lifetime, or
  - Termination of the trust prior to the Beneficiary's death with payment of the corpus to another person or entity, other than repaying the State.

- The trust must provide that, upon the death of the Beneficiary or earlier termination of the trust, the Minnesota Department of Human Services receives all amounts remaining in the trust, up to an amount equal to the total amount of Medical Assistance benefits paid on behalf of the Beneficiary.

- Interest and income generated by the trust is also excluded, providing that the establishment of the trust occurred prior to the Beneficiary reaching age 65.

This EPM section also goes into detail about allowable and prohibited expenses and payments, as well as evaluating any additions to the trust.

A Special Needs Trust, if administered properly, is not counted as an asset for Medical Assistance eligibility. However, any funds remaining at the time of the recipient's death is available for estate recovery.

Pooled Special Needs Trusts

A Pooled Special Needs Trust is similar to a Special Needs Trust in that it allows a person with a disability to protect his/her own assets and remain eligible for Medical Assistance benefits. The difference is that it is established and maintained by a non-profit organization. EPM 2.3.3.2.7.9.5 describes the requirements that must be met in order for a Pooled Trust to be considered excluded. These requirements are:

- It must be established on or after August 11, 1993.
- It must be managed by a non-profit organization and held in a separate sub-account.

- It must be funded by the Beneficiary or the Beneficiary's parents, grandparents, legal guardian, or a court.
- It must be funded with the income or assets of the Beneficiary.
- The Beneficiary must have been certified disabled at the time of the creation of the trust, either by Social Security or the State Medical Review Team.
- The funds in the Beneficiary's sub account must be used for his/her sole benefit.
    - The funds in the sub account may also be used to compensate the Trustee (the non-profit organization) for reasonable compensation for management of the funds.
- The Department of Human Services must be named as the Remainder Beneficiary.

The beneficiary of a Pooled Special Needs Trust can be any age at the time of its creation. However, there are extra requirements for a Pooled Special Needs Trust that is created by a person age 65 or older, or for additions to a Pooled Special Needs Trust at age 65 or older. These requirements are laid out in EPM 2.4.1.3.4. In a nutshell, the Trust Beneficiary must show intent to receive valuable consideration for the assets/income transferred into the trust. This is done by having the Beneficiary provide documentation showing how the funds will be expended during his/her life expectancy per the Social Security Actuarial Life Table. The documentation must show that the funds will be totally expended by the end of his/her life expectancy and that they will be used solely for the benefit of the Beneficiary. If sufficient documentation is not provided, the amount not considered sufficient is considered an uncompensated transfer. For example, if the Beneficiary funds the Pooled Special Needs Trust with $75,000 but only shows how $50,000 will be expended, the $25,000 difference would be an uncompensated transfer because he/she will not receive valuable consideration.

A Pooled Special Needs Trust is not counted as an asset for Medical Assistance eligibility if set up correctly. However, any funds remaining at the time of the Beneficiary's death is available for estate recovery.