Pathways

a trust and estate newsletter from Downey Brand LLP

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Special Needs Trusts Help Disabled Beneficiaries

Think Charitably This Holiday Season

ASK AN EXPERT

Why is it necessary to fund a living (revocable) trust?

What happens if there was a failure to fund?

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ASK AN EXPERT

Why is it necessary to fund a living (revocable) trust?

People often think of trusts as entities, but trusts are fiduciary relationships under which a trustee holds assets for a beneficiary according to the terms of a trust document and the trust provisions in the Probate Code.

A trust controls only the property the trustee holds. Therefore, the person who establishes the trust, known as the "settlor," must fund the trust by deed, asset assignment, securities account change of title form, bank account signature card, etc. Often in a family trust, the settlor and trustee initially are the same person, in which case the settlor signs documentation transferring the asset to himself or herself as trustee.

Settlors should consider funding on an ongoing basis as they receive new assets. For example, a settlor who inherits real property should consider deeding it to herself as trustee.

In most cases, however, the settlor does not transfer all of his or her assets to the trustee. For example, settlors generally do not transfer personal effects, vehicles, or checking accounts with relatively small balances. The Probate Code exempts certain levels of assets from probate and then provides for efficient ways to transfer those assets.

Settlors need not transfer all assets to the trustee. Some assets will pass free of probate by beneficiary designation or by virtue of how the owner holds title. For example, joint tenancy property or community property with right of survivorship passes outright to the survivor. Also, individual retirement accounts, 401(k) plans and pensions, and life insurance benefits pass by beneficiary designation (commonly outright to a surviving spouse in a married couple situation). The trustee maybe be a beneficiary.

Legal counsel can guide settlors through the trust funding process.
–Sil Reggiardo

In some situations, however, a failure to fund a trust may not be correctable.

What happens if there was a failure to fund?

When trusts are not properly funded, it may be necessary to open a probate proceeding in the Superior Court so that the assets of the decedent outside the trust can be distributed to the proper beneficiaries.

Of course, one advantage of trust creation is probate avoidance. The probate process is slow, moderately costly and public. Thus, it is unfortunate when a lapse in funding a trust requires the opening of a probate proceeding that would not otherwise be necessary.

Even the probate process may not achieve the desired result. For example, if Mary outlives her first husband John, then gets married to Tom but does not update her estate plan, Tom will be entitled to a share of her probate estate if she dies before he does. Hence, if Mary failed to transfer her cabin to her trust, and the cabin has to go through probate, Tom might end up as a co-owner of that cabin.

The good news is that sometimes errors in trust funding can be corrected without probate. If there is clear evidence that an owner of property intended to transfer it to his or her trust, but simply never got around to signing a formal deed or other form of conveyance, a trustee may file a relatively simple petition, commonly known as a "Heggstad petition," that asks a judge to declare that a particular asset is held in the trust. If the court grants the petition, probate can be avoided.

In some situations, however, a failure to fund a trust may not be correctable. For example, if a settlor has a pay-on-death designation on a brokerage or bank account, the named designee generally will be entitled to the account proceeds.

Hence, not all funding failures can be fixed and the fixable ones may be costly.

–Jeff Galvin

The general information in this newsletter may or may not be appropriate for your particular situation. Before taking any action based on this newsletter, you should consult with your estate planning attorney.

Special Needs Trusts Help Disabled Beneficiaries

While all parents should have an estate plan to provide for their minor children, the need for a plan is greater with respect to kids with disabilities. Children who have conditions such as Down syndrome, autism or muscular dystrophy may need substantial assistance throughout their adult lives.

Adults with special needs may be entitled to Supplemental Security Income (SSI) or Medi-Cal benefits that provide for a basic level of support. Special needs trusts, when properly created, allow assets to be used for a beneficiary's needs without disqualifying the beneficiary from receiving public benefits. An ordinary family trust, in which a child might be fully entitled to a distribution shortly after reaching adulthood, might fail to provide long term support because the assets will have to be used in lieu of the public benefits that otherwise would be available.

Under federal law, when a beneficiary cannot revoke a trust or direct the use of trust assets for his/her own support and maintenance, the trust principal is not a resource for SSI purposes. Hence, parents and other family members often create special needs trusts to provide for kids with disabilities as they grow older.

When planning for an individual with a disability there are several costly mistakes that many people make:

1. Procrastinating. Parents often put off estate planning, but when it comes to children with disabilities procrastination can have dire consequences. Beneficiaries without disabilities can usually rely on their own income and retirement while those with substantial disabilities normally cannot.

2. Disinheriting. Parents often rely on SSI and Medi-Cal to provide basics of food and shelter for the disabled child. Knowing the child is unable to have assets of more than $2,000, they decide, or are informed, to disinherit so as to protect the public benefits. However, those benefits rarely provide more than subsistence and sometimes not even that.

3. Ignoring the Special Needs. Instead of planning for the disabled child, parents will treat all the children the same regardless of the special needs. This type of planning may jeopardize the disabled child's public benefits and perhaps leave him or her without health insurance, while not providing enough assets to support his or her lifetime needs.

4. Relying on Family. Families often depend on other children or family members to use their own funds to care for the individual with special needs. However, that leaves the disabled individual vulnerable to the family member's financial situation. The family member could lose a job, go through a divorce, have a financial calamity, or just have competing financial objectives. The disabled individual has no protection in these situations.

To avoid the consequences of these mistakes, a special needs trust should be established for the disabled individual. Once the trust is in place, the assets will be available to supplement the individual's public benefits. While assets cannot be paid directly to the beneficiary, there are many permissible uses that can enhance the life of the disabled individual. Allowed expenditures include home improvements, clothing, furniture, medical expenses not covered by benefits, insurance premiums, education, transportation, entertainment and vacations.

In sum, there is no reason a disabled individual should lose benefits or be left out of a family's estate planning. A special needs trust is a relatively simple way to provide long term support to loved ones with disabilities.

–Sabrina Schneweis-Coe

WELCOME SABRINA!

We are pleased to announce that Sabrina Schneweis-Coe has joined our Stockton office. She received her J.D. from the University of the Pacific, McGeorge School of Law in 1999 and her B.A. from the California State University, Sacramento in 1996. Sabrina is Certified as an Estate Planning, Trust and Probate Law Specialist with the State Bar of California Board of Legal Specialization. Prior to joining Downey Brand, she was a sole practitioner at the Law Office of Sabrina Schneweis-Coe in Lodi, California.

Think Charitably This Holiday Season

During the holiday season, we often are reminded about charitable giving. If you've made charitable gifts in the recent past, you have probably already heard from those charities seeking additional gifts for this year. There are numerous worthwhile causes which rely upon charitable giving for a substantial share of their income.

These times are lean for many of us, but I believe that most of those who receive this newsletter are in a position to make contributions to causes that are important to them. It is also not irrelevant that such gifts qualify for charitable deductions when computing one's income tax.

Some people like to seek out information on the internet as to what the organizations are doing and how much of the money they collect is spent on administrative and fundraising costs. Some well-known national charities have fundraising overhead charges that may surprise you. Websites with useful information about charities include www.bbb.org/charity, www.charitynavigator.org and www.guidestar.org.

This space is too limited to summarize the assorted forms of charitable giving that can be a key part of an estate plan. For example, charitable trusts and annuities can provide a lifetime income stream to the donor with the remainder going to a designated charity. Charitable gifts, when properly planned, may reduce or avoid the payment of federal estate tax by decreasing the amount that will pass to non-charitable beneficiaries. As of this writing, of course, we are all living with uncertainty as to what Congress will do with the estate tax, including the question of whether the exemption amount will revert to $1 million in 2011. In any event, if you are interested in charitable planning opportunities, we have several qualified lawyers who can discuss the ins and outs with you.

Merry Christmas and best regards for the holiday season. –Jim Willett

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