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Supplemental Needs Trust

by Attorney Michael Hooker of Northampton, Massachusetts

I have written columns in the past discussing irrevocable trusts and living trusts. Irrevocable trusts are good devices for protecting assets in the event of nursing home placement because the asset is not titled in the name of the individual and cannot be accessed by the elder. Of course, you have to wait out the five year Medicaid ineligibility period triggered by the transfer. The irrevocable trust is also good for avoiding probate upon the death of the elder and for having a trusted family member etc. as Trustee with formal authority over your assets.

Revocable trusts will also help you avoid probate court but they do not protect your assets in the event of nursing home placement. Why not? Because you can revoke it, and if you can revoke it, the state will mandate that you do so and spend what is in it on your care. This is why I generally do not recommend revocable trusts.

I have found, however, that irrevocable trusts can be quite useful, provided the client is willing to invest the time and money into creating a well-crafted trust. I have found irrevocable trusts to be especially helpful where the elder has a disabled child. The kind of trust I refer to is a Supplemental needs trust. This trust will allow you to provide for your disabled child without that child being in charge of the money. A key component of the supplemental needs trust is that it allows the child to retain his/her governmental benefits such as SSI and Medicaid. The trust can pay for things that Medicaid won't; for example, vacations, special medical equipment, extra staffing, companions.

If you create the trust during your life by putting funds in it, then the trust needs to have a provision that the state gets reimbursed for any Medicaid costs your child incurs during his or her life. In other words, the state won't let you give money to your child's trust unless the state is reimbursed from any funds remaining in the trust at your child's death. When I say the state won't let you, I mean that if you end up in a nursing home seeking Medicaid and have previously transferred funds to such a trust, it must have a payback provision or you won't get Medicaid. You can transfer to such a trust without a payback provision but you will be ineligible for Medicaid for up to five years.

Another way to create the trust is upon your death. If you leave the funds to a supplemental trust upon your death you don't have to worry about a payback provision because you wouldn't be seeking nursing home/Medicaid coverage.

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