



The Wealth Counselor

A monthly newsletter for wealth planning professionals

Special Needs Planning for Affluent Clients

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In a recent issue of *The Wealth Counselor* we explored clients' potential planning needs that are unrelated to the economy or to the estate tax. One of these was special needs planning. Whether you realize it or not, you probably already have these clients, or you have clients who know someone who needs this planning.

In this issue, we will look more closely at the increasing need for special needs planning, explain how you can work with a team in order to add a social service element to your practice, and look specifically at the needs and desires of your more affluent families with loved ones who require special care or assistance. We will also look at how special needs planning can be an entry to other planning opportunities across generations within the same family.

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At Price & Farrington, PLLC we work closely with our professional colleagues to help our clients plan, protect and pass their legacies to their loved ones through caring and confidential counseling.

The Increasing Need for Special Needs Planning

There is no doubt that the need for special needs planning is increasing. Just look at these statistics:

- In 1992, there were 15,580 children ages 6-22 who were diagnosed as having what is now called an Autism spectrum disorder. In 2006, the number was 224,594.
- In 2006, there were an estimated 24.9 million adults in the United States with serious psychological distress.¹
- Approximately 4.4 % of U.S. adults may have some form of bipolar disorder during some point in their lifetime.²
- In 2006, an estimated 22.6 million people in the U.S. (9.2% of the

population age 12 or older) were substance-dependent or substance-abusive in the previous year.³

Almost every family has at least one member (child, grandchild, nephew, niece, parent, grandparent) who will always need help managing personal care and/or finances. And since most of these conditions do not decrease life expectancy, many families are looking for answers on how to provide the best quality of life for their loved ones for the rest of their lives . . . which could, for a young child, be 70 years or longer.

Fewer Programs Are Available

At the same time that the need for support services is increasing, government and non-government programs are being reduced or eliminated because of the strain on state budgets, competition among entitlement programs, and pressures to reduce deficit spending. Once a program is cut, it may be difficult if not impossible to restore it in the future.

Families Are Motivated

Even families who are using them now do not believe that the programs that are benefitting their special loved one will be there to provide the needed benefits in the future. They are wisely (and fearfully) looking at alternatives to provide those services. Common concerns are:

- Who will care for my loved one when I am gone?
- Who will be my loved one's advocate?
- Where will my loved one live?
- How much independence can be maintained?
- Will the money last for my loved one's lifetime?

Preserving Government Benefit Entitlement

Are government benefits for a special needs person worth preserving? For families of lesser means, the answer is almost always, "Yes, absolutely!" For more affluent families, however, maybe not.

It may be better to privatize the special needs person's care instead of spending thousands of dollars to protect a few hundreds in benefits that may not be available in the future. In the past, many practitioners focused exclusively on preserving public benefits at all costs. Today, special needs planning is not necessarily "poverty planning." The proper focus today is, on a case-by-case basis, how to provide the best quality of life throughout the life of the loved one.

Planning Tip: Affluent families have disabled loved ones. Their focus is more likely to be on providing quality of life, not preserving entitlement to poverty programs.

How You Can Help

This critical area of planning can allow you to provide real value and peace of mind to your clients, and give you and your colleagues increased opportunities for business that can span generations. Careful planning is necessary to supplement government benefits that are worth preserving, is flexible enough to adjust to changes in future benefits, will preserve and expand assets, will make sure the special person receives proper care, and may even save taxes. For the affluent client, your goal is to put together a team of advisors that will create a private social services system that replaces government benefits and services.

Creating an Effective Team

Even the most perfectly drafted legal instrument cannot succeed without proper funding, implementation and review. For the special needs trust, the implementation and review is especially critical because it must accommodate an individual with unique needs for his or her lifetime.

Once the plan is in place, it will be need to be managed. Who should do that? The ideal trustee would need to:

- use discretion in the best interest of the disabled beneficiary;
- understand public benefits and keep up with changes in the law;
- invest wisely and conform to all statutory fiduciary requirements;
- understand taxes;
- keep perfect books;
- provide advocacy and prevent abuse; and
- be immortal.

Since no one person can meet all of these requirements, often the most effective solution is to divide the responsibilities into areas, with a team of professionals working together. For example:

A Corporate Fiduciary Trustee for Accountability:

- keeps perfect books;
- carries insurance, is bondable or has deep pockets; and
- is immortal.

A Care Manager for Beneficiary Advocacy:

- will use discretion in the best interest of the disabled beneficiary;
- must understand public benefits; and
- provides advocacy and prevents abuse.

A Financial Advisor for Risk and Investment Management:

- can invest wisely and conform to all statutory fiduciary requirements;

- understands taxes.

Team Model #1: Trust Advisory Committee

Often a professional trustee will manage the funds, make distributions, prepare tax returns and keep records, but will be directed by a Trust Advisory Committee that makes distributions, can amend the trust and can replace the trustee. A care manager can also be on or engaged by this committee.

Planning Tip: Many parents think a sibling would be the best trustee, but this is rarely a good idea. Most individuals are just not prepared to handle those responsibilities. A professional trustee will, in the long run, be less expensive than dealing with the mistakes that are often made by a well-meaning, but inexperienced, family member. Also, some siblings may find themselves torn between using the trust assets to provide for the disabled dependent and preserving them for the remainder beneficiaries - especially if the trustee is one of the remainder beneficiaries. It's usually better to have a professional as trustee and have the family member serve on the Trust Advisory Committee.

Model #2: The trustee can be directed by a care manager.

In this case, the trustee would manage the funds but would be directed by a care manager who interacts with the beneficiary. A trust protector or advisor would oversee the trustee and care manager from a distance and can replace either for any reason.

Planning Tip: The role of the care manager can be critical. In most families, one parent (most often the mother) has been a fierce advocate for the child, actively seeking benefits and supervising the child's care and progress. The care manager will assume this role and will become the beneficiary's advocate, seeking and evaluating benefits and programs, supervising care providers and preventing abuse. Selecting and installing a care manager while the parents are living will give families peace of mind that their loved one will continue to have the quality of life they so strongly desire.

Planning Tip: Using a stand alone third-party trust (instead of embedding the special needs trust in the parents' revocable trust) will allow other family members to make gifts to support the beneficiary. This trust can be activated while the parents are living or at the death of the first parent. It will also allow the donor to decide who will receive any funds that are not used to supplement the needs of the beneficiary.

Planning Tip: Special needs planning includes the opportunity to plan across generations within the same family. Grandparents often want to provide for a special needs grandchild; aunts and uncles may want to help, too. Plus, the special needs discussion can open doors to discussions about other estate planning needs.

Planning Tip: Consider calling the trust "discretionary" instead of "special needs." "Special needs" historically has meant needs not met by government entitlement programs. Not all disabled beneficiaries want or need government poverty program benefits.

Funding the Trust

Life insurance on the life of a parent or grandparent is often used to fund these trusts. However, tax planning combined with special needs planning can present some unique opportunities. For example using an IRA or 401(k) account to fund one of these trusts can offer tax advantages while at the same time creating drafting challenges (because the trust usually has to be structured as an accumulation trust to preserve government benefits).

Charitable lead trusts also have application in this context (income goes to the charity, remainder to the special needs trust). Special needs families are often grateful to organizations that have provided assistance and benefits to their child and to them, and are eager to help make sure they can continue to provide these services to not only their loved one but to other families in the future.

Planning Tip: Affluent clients will be able to provide more opportunities for their special needs beneficiary. For example, they might consider putting a residential property in the trust to guarantee their loved one will always have a familiar, safe home.

Managing the Trust

Careful investment of the trust assets is critical. Risk tolerance is especially low for these trusts since loss of these assets could be catastrophic for the beneficiary.

The trust's assets will need to earn or grow enough to meet the plan's objective to provide for or supplement the beneficiary's care. At the same time, care must be taken because of a trust's compressed tax brackets for ordinary income.

Trust income can be distributed to or for the benefit of the beneficiary in such a way that it is taxable to the beneficiary (because the beneficiary will typically be in a much lower tax bracket). However, care may need to be taken so that the distribution does not unintentionally jeopardize any public benefits the beneficiary may be receiving. Often this can be accomplished by the trustee paying care providers directly.

Planning Tip: Use of Crummey withdrawal powers in this type of trust may jeopardize the beneficiary's eligibility for government benefits.

Resources

Take advantage of the many free resources and publications available, including

those from:

- National Association of Professional Geriatric Care Managers (caremanager.org)
- National Alliance on Mental Health (NAMI) (nami.org)
- Stephen Dale (Dale Law Firm, PC) (achievingindependence.com)
- The Arc of the United States (previously Association of Retarded Citizens) (thearc.org)

Both The Arc and NAMI have helpful resources including links (Resources and Inform Yourself, respectively) to publications that you can place in your waiting room to open the door for special needs planning conversations.

Whether you realize it or not, you probably already have these clients, or you have clients who know someone who needs this planning. Bring it up at every planning meeting. Plant the seeds that you are aware and have the resources to help.

Conclusion

Special needs planning for the affluent creates unique planning opportunities and challenges for the entire planning team. By working together during the design, implementation and administration phases, the planning team can ensure that the special needs beneficiary receives the level of care needed and desired by the family.

¹ <http://www.oas.samhsa.gov/NSDUH/2k6NSDUH/2k6results.cfm>

² <http://www.pendulum.org/bpnews/archive/001884.html>

Based on criteria specified in the Diagnostic and Statistical Manual of Mental Disorders, 4th edition (DSM-IV).

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