

Check the Language in Your Special Needs Trust

Posted by Harry Margolis on Sun, Oct 23, 2011 @ 11:26 AM

By Harry S. Margolis

I was recently consulted by the trustee of a special needs trust who was wondering how she could use the trust to distribute money to the beneficiary, who is her niece. Any regular distributions would cause an increase in the niece's rent in subsidized housing. The problem is the language of the trust which requires that

payments will not render Jane Doe ineligible for any benefits of cash, medical, housing, or other forms of assistance which Jane Doe receives or may receive as a result of any disability, handicap or needs from any state or federal government or governmental agency, from any charitable source, or from any private insurance company or other organization that may provide payments, housing, services or assistance to disabled, handicapped or needy persons **and, furthermore, that such payments will not, in the Trustees' judgment, cause a reduction in any such benefits that Jane Doe receives.**

While payments from the trust would not make the niece ineligible for subsidized housing, they would increase her rent which certainly appears like "a reduction in . . . benefits."

This is an example of the drafting attorney going overboard. The purpose of special needs trusts is to permit the beneficiary to qualify for available benefits while also permitting her to benefit from the trust funds for goods and services that public programs won't cover.

Given that most public programs don't want to use their limited budget for individuals who have ample resources elsewhere, it is important for a special needs trust to include language clarifying its goal to supplement the benefits available rather than to supplant them.

But to categorically forbid the trustee from making payments that displace even a dollar public benefit, can so tie the hand of the trustee that the trust provides no benefit at all. This is the case for my client. Here are a few of her options:

- Ignore the restriction. Since it serves to undermine the purpose of the trust by making it impossible to help her niece, she can, in effect, rewrite the trust to eliminate the restrictive language. The risk she takes in doing so is that the remaindermen -- those who will receive whatever is left in the trust upon the niece's death -- might sue her using funds they feel should come to them. The aunt may be protected from this

threat by first seeking a release from the remaindermen. (The problem with this is that sometimes remainderman change. For instance, if a remainder beneficiary dies, his children may take his place.)

- Go to court to have the trust reformed. If successful, this approach provides certainty about the terms of the trust and protection from any subsequent claim by remaindermen. It has the disadvantage of cost and uncertainty as to how the court will decide.
- Make only limited distributions that do not cause a decrease an increase in the niece's rent. This, of course means that the trusts benefit to the niece will be limited.

Unfortunately, there's no perfect solution. The aunt will have to decide on which approach to take based on factors including the niece's need for additional support, the amount of money in the trust, and her knowledge of and comfort level with the remaindermen.

(By the way, the trust was drafted by a national law firm that presumably does little special needs planning.)

Margolis & Bloom, LLP, practices estate, long-term care and special needs planning in Boston, Dedham, Framingham and Woburn with a strong commitment to client service. If you have questions about these or other legal matters, do not hesitate to contact us by e-mail by clicking [here](#) or by calling us at 617.267.9700.