

WILLMS, S.C.

LAW FIRM

MEMORANDUM

TO: Clients and Friends of Willms, S.C.

FROM: Atty. Jessica A. Liebau

DATE: October 7, 2014

RE: Wisconsin Trust Code Provides New Tools for Special Needs Trusts

Introduction

Special needs trusts have long been an essential tool in estate planning for individuals with disabilities. They allow us to provide for our family members (or ourselves) with disabilities without interfering with public benefit eligibility. With the recent passage of the Wisconsin Trust Code, attorneys who specialize in special needs planning now have additional ways to make sure these trusts work the way they are intended without involving the court system. This should increase our ability to make sure these trusts carry out the grantor's wishes when it matters most.

Defining Special Needs Trusts

Special needs trusts (or SNTs, for short) can take on many forms. One of the forms we commonly use is called a "third-party special needs trust," which means that someone other than the person with a disability (i.e. a "third party") is contributing assets to a trust. Whomever is appointed as trustee of the trust is then given wide discretion to make distributions of the trust income and/or principal for the benefit of the person with the disability. When written and administered correctly, these trusts provide funds for a variety of needs and desires of the beneficiary without interfering with that person's eligibility for public benefits such as Medicaid or Supplemental Security Income (SSI). This then avoids the need to disinherit a beneficiary with a disability, and also avoids the risks associated with giving that beneficiary's inheritance to someone else for "safekeeping" (both of which have serious drawbacks).

An effective SNT requires careful drafting by an attorney who has expertise in federal and state laws related to SNTs and public benefits. Therefore, the failure to include (or omit) the required language can cause a SNT to fail, which means the funds will interfere with the beneficiary's public benefit eligibility. This can happen for a variety of reasons, including: the trust was drafted in a different state with different rules than where the beneficiary lives, the trust was not drafted to be a special needs trust in the first place, or the law simply changed from the time the trust was drafted to when the trust is distributed. The laws related

to special needs trusts are very complicated and ever-changing. In the past, we had tools to fix a trust agreement if necessary, but oftentimes the courts were involved, requiring additional time and money.

The Impact of the Wisconsin Trust Code

The Wisconsin Trust Code, which went into effect on July 1, 2014, provides us with additional tools to fix a special needs trust, the first of which is the ability to “decant.” What this means is that the trustee of an existing trust has the power to transfer assets from a trust with problematic provisions to a new trust that has the required provisions, provided that the beneficiaries of both trusts are the same and all other legal requirements are satisfied such as proper notice to the proper parties. While decanting is something that is also allowed for non-SNT trusts, this may prove to be a very beneficial strategy for protecting assets that are intended to have SNT protections.

The second major tool that the Wisconsin Trust Code gives us is the ability to appoint a “trust protector” in a trust agreement. A trust protector is someone who is given the power under the terms of a trust agreement to do certain things that the trustee or the grantor may not be permitted to do, such as modify the terms of the trust. This is particularly important for SNTs, which are often irrevocable by the time an issue is discovered. This trust protector can step in and revise the problematic portion of the SNT so that it works properly. If a trust protector is provided for in a trust agreement, the grantor of the trust has some assurance that the SNT will work even if the laws change in the future, and even though the trust agreement may otherwise be irrevocable. Attorneys who specialize in this area have actually been incorporating trust protectors into SNTs prior to the passage of the Wisconsin Trust Code because the previous law did not prohibit us from doing so. However, now that we have a new law specifically authorizing the use of trust protectors, we have greater guidance in terms of what a trust protector can do, and what their legal responsibilities are to the trust and its beneficiaries.

Conclusion

Overall, the new options given to us under the Wisconsin Trust Code should allow us to make sure that a SNT created for a beneficiary with a disability works exactly as intended without the need for court intervention. Therefore, this is a great time for people who plan on leaving an inheritance to someone with a disability to review their current plan and determine whether it needs to be modified or can be improved upon. We welcome the opportunity to assist you with this endeavor.

Atty. Jessica Liebau focuses a large portion of her practice on planning for individuals who have disabilities. She is a member of the National Academy of Elder Law Attorneys, serves on the Board of Directors of the Interfaith Caregivers Ozaukee County, and volunteers with organizations serving individuals with disabilities.