RHODE ISLAND LAWYERS WEEKLY

Amended statute empowers disabled who have capacity

By: Pat Murphy | January 12, 2017

Estate planning attorneys see a two-word change in the federal law governing special needs trusts as making a dramatic difference in meeting the needs of clients who suffer from disabilities.

Last month, President Obama signed into law the Special Needs Trust Fairness Act, an amendment to existing law that will now allow people with disabilities, who have mental capacity, to create their own special needs trusts.

Before the change in the law, disabled clients who were otherwise competent to manage their own affairs needed a parent, grandparent or guardian to create a trust for them, or had to resort to a cumbersome and expensive process to have a state court create the trust.

The amended law makes it much easier for clients to set up special needs trusts when they receive new funds as a result of medical-malpractice or other personal injury settlements, said Kristin N. Matsko, an attorney in Providence.

“They are able to engage in the planning without having to involve parents or grandparents or other individuals on their behalf,” Matsko said. “They’re able to have more autonomy.”

Edward H. Adamsky not only recognizes the tangible benefits of the amendment, the Tyngsboro, Massachusetts, lawyer also sees the new law as correcting stereotypes under which federal lawmakers operated when they enacted the statute in 1993.

“It takes away this concept that a person with a disability is not a regular, ordinary human being who can make their own decisions,” Adamsky said. “Now we’ve included them in the law and said, ‘Yes, you are a person. You can set up your own trust if necessary.’ That’s a big change.”

Special needs planning tool

A special needs trust preserves the beneficiary’s eligibility for means-tested government benefits such as Medicaid and Supplemental Security Income.

“Assets like an award from a lawsuit or a small inheritance can trigger a loss of benefits,” Adamsky said. “Special needs trusts are a way to keep getting those benefits.”

Don J.J. Cordell of Boston said it is often critical for disabled people to have access to funds in a trust because of various expenses not covered by programs such as Medicaid and SSI.

“In order to qualify for Medicaid or SSI, a disabled person can only have $2,000 in assets and will have a minimal income,” Cordell said. “The availability of these assets in the trusts help fund their other expenses, whether it be uninsured health care costs or basic subsistence needs.”

The Special Needs Trust Fairness Act specifically addresses “self-settled” or “(d)(4)(A)” trusts, which are funded with assets — often in the form of an inheritance or personal injury settlement — that belong to a disabled individual who is the beneficiary of the trust.

In order for the assets of the trust not to count for Medicaid or SSI purposes, federal law requires that the trust be irrevocable and administered for the sole benefit of the beneficiary for expenses not covered by the government program at issue.

The beneficiary must be under 65 when the trust is created. In addition, the trust must provide that Medicaid and other government programs be reimbursed for benefits paid to the beneficiary from any assets that remain in the trust at the time of the beneficiary’s death.

“It allowed a disabled person to continue to receive benefits but to have a fund that could be used to enhance their quality of life, to supplement but not supplant the benefits they were getting,” said Providence attorney Gene M. Carlino.

> *“[Clients] are able to engage in the planning without having to involve parents or grandparents or other individuals on their behalf.” — Kristin N. Matsko, Providence*

‘Discriminatory’ law?

As originally enacted, §1917(d)(4)(A) of the Social Security Act protected the assets in a disabled individual’s trust only when the trust was established “for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court.”

The plain language of the statute meant that disabled people could not set up a trust themselves, even if they were fully competent to manage their own affairs.

Margot G. Birke, immediate past president of the Massachusetts chapter of the National Academy of Elder Law Attorneys, said the language of the original statute created a “gap in the law” for disabled clients who were mentally competent.

“If the person wasn’t disabled to the point of needing a guardian, who was the one who was going to petition the court?” she said.

According to Carlino, the way the statute was written reflected a “discriminatory assumption” that a person who is disabled is not competent to form a trust and, therefore, the trust had to be formed by specified third parties.

“We could have a competent but disabled individual who was forced to go to court to establish a special needs trust to protect the inadvertent receipt of wealth or risk being knocked off benefit programs,” Carlino said.

Carol C. Klyman agreed that the original statute was discriminatory.

“For 23 years the law has basically presumed that if you’re disabled, you’re incapacitated or stupid,” said Klyman, who practices in Springfield, Massachusetts.

Adamsky said the way the statute was written often forced clients to petition the Probate & Family Court for establishment of a trust because they no longer had living parents or grandparents, and there was no guardian in place since they were able to take care of themselves despite their disability.

Going to court could be an expensive proposition for the client on many fronts.

Carlino noted that an unanticipated inheritance or settlement could make a client ineligible for government benefits for the several months it might take to get a court to authorize a special needs trust. Moreover, he estimated a client might incur upwards of $2,000 to $3,000 in legal fees and costs just to go to court to protect a $15,000 personal injury settlement.

Cordell said it could cost a client between $1,500 and $5,000 to get a special needs trust in place through the state courts, and that the mere “logistics” of getting a petition through the courts could be a challenge.

“Sometimes the difficulty was explaining to judicial personnel the nature of these trusts because a lot of special needs planning is undertaken by third parties outside of the courthouse,” Cordell said. “It’s not a regular occurrence in the Probate Court system to be dealing with these types of petitions.”

> *“We could have a competent but disabled individual who was forced to go to court to establish a special needs trust to protect the inadvertent receipt of wealth or risk being knocked off benefit programs.” — Gene M. Carlino, Providence*

Welcome relief

Passage of the Special Needs Trust Fairness Act was a legislative priority of NAELA.

Carlino, president of NAELA’s Rhode Island chapter, worked with the organization’s public advocacy arm to solidify the backing of the state’s two congressmen, Democrats James R. Langevin and David Cicilline.

According to Carlino, it was an “easy sell.”

“As it turns out, Jim Langevin, being a disabled person himself, was already one of the sponsors, and David Cicilline was glad to sign on as a co-sponsor,” Carlino said.

Birke called the enactment of the Special Needs Trust Fairness Act “immensely significant.”

“The change opened up a whole world of opportunity for people who are disabled,” Birke said. “It’s cheaper [to set up a trust], and it’s faster. And very often, by the time you need that kind of trust, you don’t have a parent or a grandparent. And most people didn’t need guardians.”

The act amended §1917(d)(4)(A) by inserting “the individual” after “for the benefit of such individual by.”

Matsko said she does not see the amendment as hurting the business of attorneys in the estate planning field. To the contrary, she said the new law “makes it better for everyone.”

“It enables us to have more flexibility when establishing special needs trusts,” she said. “It won’t change the fact that attorneys will still be called upon to draft those trusts and to advise trustees and beneficiaries. In that regard, the only thing it’s doing is circumventing court intervention that was bad for everybody. Clients don’t like to pay when they shouldn’t have to.”

Because of the quirk in the old law, Adamsky said on several occasions he recommended that clients set up a first-party special needs trust for a disabled child in anticipation that the child might receive an asset like an inheritance or personal injury settlement after the parents had died.

“We’d set up the trust as a vessel ready to handle those assets. Now this change in the law says you don’t have to be that cautious,” he noted.