

## **The Estate Planning Advisor**

**By Richard J. Shapiro**

### **“Trigger” Trusts – Does Your Will Have One?**

When meeting with an attorney to prepare their estate plan, people typically focus on the disposition of assets upon their deaths. Unless the client is already dealing with a disabled spouse or child, little thought usually is given to protecting a beneficiary's inheritance if a beneficiary becomes disabled later in life. Unfortunately, this lack of foresight can have devastating consequences for the beneficiary and the entire family.

In order to qualify for most “means tested” governmental programs, there is a limit on the amount of assets an individual can own. For example, to receive SSI an individual cannot have more than \$2,000 worth of assets. Similarly, to receive Medicaid an individual cannot have more than \$13,800 worth of assets. If a person receiving such governmental assistance receives an outright inheritance, the beneficiary will lose his or her governmental benefits until his or her total assets are “spent down” to the permitted asset limit.

There is a simple solution to this problem. By including a “trigger trust” provision in a will, assets left to a disabled beneficiary receiving government benefits would not pass directly to that beneficiary, but would instead be distributed into a supplemental needs trust that conforms to the provisions of Section 7-1.12 of the New York Estate Powers and Trusts Law. When assets are funded into the special needs trust, the beneficiary remains qualified for government benefits, and the trust assets can be used to supplement the beneficiary's care and enhance their quality of life. To the extent the trust assets are not used, they can pass upon death of the disabled beneficiary to the other estate beneficiaries, or as otherwise designated in the will.

Under New York law, a person would qualify as a beneficiary of a supplemental needs trust if they are “a person with a severe and chronic disability,” which includes mental illness, developmental disabilities, or other illness or impairment that now or in the future may give rise to the need for long-term specialized care. For example, if upon the death of the first spouse the surviving spouse is in poor health, then a supplemental needs trust created under the deceased spouse's will for the benefit of the surviving spouse can be implemented and funded. By keeping the assets in trust, the surviving spouse would continue receiving any benefits they may be entitled to, notwithstanding the value of the assets in the supplemental needs trust. The trustee of the supplemental needs trust (typically one or more adult children) can utilize the trust principal and income to “supplement” the needs of the surviving spouse, with expenditures permitted for a wide array of uses such as clothing, entertainment, travel, gifts and the like.

One caveat in connection with funding a supplemental needs trust for a surviving spouse: if at the time the trust is funded the spouse is already receiving Medicaid or SSI, then the trust can be “invaded” by the county Department of Social Services (“DSS”) to satisfy the spousal elective share, which is approximately one-third the value of the deceased spouse's estate. Even if DSS exercises the elective share, however, the remaining approximately two thirds of the deceased spouse's assets can be left in the

supplemental needs trust for the surviving spouse's benefit, with the remainder to pass to the children or other beneficiaries upon the surviving spouse's death.

The trigger trust language in the will should be broadly drafted to permit the creation of a supplemental needs trust for *any* trust beneficiary who may subsequently require special needs assistance. In the event an adult or minor child develops a special needs condition even years after the will is signed, his or her share of the inheritance would be protected from the spend down requirement. If no beneficiary ever develops a disability, then the trigger trust clause is not utilized and the assets can pass to the beneficiaries as originally intended.

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*Richard J. Shapiro is a partner with the Middletown law firm of Blustein, Shapiro, Rich & Barone, LLP. Mr. Shapiro is a member of the National Network of Estate Planning Attorneys, the National Academy of Elder Law Attorneys, the New York State Bar Association (Trusts and Estates and Elder Law Sections), and the Hudson Valley Estate Planning Council. He can be reached at (845) 692-0011 or at [rshapiro@mid-hudsonlaw.com](mailto:rshapiro@mid-hudsonlaw.com). The information in this article is for general information purposes only and is not, nor is it intended to be, legal advice, including legal advice for Internal Revenue Code purposes as described in IRS Circular 230.*