

A no-nonsense newsletter for estate planners and financial advisors from The Dayton Foundation

The Ohio Community Pooled Flexible-Spending Trust A New Option for Loved Ones with Disabilities

By Jesse B. Beasley, Esq., Certified Elder Law Attorney

In the past, financial and estate planners have had limited options in working with clients who wanted to provide for the needs of disabled family members.

Consider this situation: Mrs. Smith, a widow, has provided for her mentally retarded daughter, Jane, all of her life. Jane lives at home and receives disability benefits from Social Security. Mrs. Smith's plan was to leave all of her estate to her son, so that he could provide for Jane. Tragically, her son was killed in an automobile accident. Mrs. Smith does not want to interfere with Jane's benefits, and is concerned with leaving her assets to her other daughter, who is going through a divorce and has always had problems with creditors.

The Disability Foundation, Inc., a supporting organization of The Dayton Foundation, has recently added another tool to address planning for families like Mrs. Smith's. The Ohio Community Pooled

Flexible-Spending Trust is joining the Ohio Community Pooled Annuity Trust in assisting families with this planning. Either option is available to provide for the special needs of family members, without interference with needs-based benefits.

Benefits To Be Preserved

The first step in disability planning is determining what benefits are being received. Some disability benefits are available without regard to the other resources that the disabled individual has at his/her disposal. For example, eligibility for Social Security disability benefits is not dependent upon having minimal income or assets. Other disability benefits, such as Supplemental Security Income ("SSI") are "needs-based" or "means-tested." If an applicant/beneficiary has more than \$2,000 in countable resources, he/she is not eligible for SSI benefits, even though he/she meets the disability criteria for such benefits.

It is often difficult to determine whether a client is receiving Social Security disability, SSI disability, or a combination. Both programs are administered by the Social Security Administration. Both benefits are typically directly deposited into a banking account. And, typically, the Administration will not discuss an individual's benefits without having its signed authorization forms submitted. One clue is the amount of the benefit: the maximum SSI monthly benefit is \$603 in 2006. If a person's benefit is above that amount, it is likely to be Social Security disability; if it is at or below that amount, it is likely SSI. But, because this issue is crucial, it is important to go to the trouble of ascertaining the exact nature of the benefit.

There is a similar distinction in the health benefits field. Once an individual receives Social Security/SSI disability benefits for two years, he is qualified for Medicare coverage. Medicare is not a needs-based

benefit. Medicaid is. In Ohio, an individual cannot have available countable resources exceeding a value of \$1,500 and have Medicaid assistance.

A well-meant inheritance for a disabled child could halt his/her SSI disability income and terminate the child's health care coverage under Medicaid. If that happens, the inherited funds may be consumed by health care costs and basic subsistence expenses, instead of otherwise benefiting the child.

Pooled Trusts

In 1993, Congress authorized the creation of "pooled" trusts to hold funds for people with disabilities, without interfering with either SSI or Medicaid benefits. The State of Ohio, in operating the Medicaid program, recognizes and exempts these trusts.

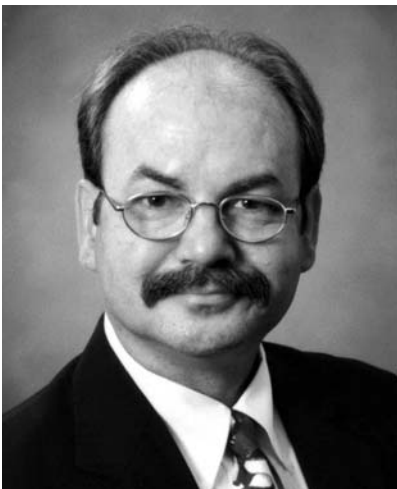
A pooled trust has to be established and managed by a non-profit organization. The Disability Foundation's Trusts maintain a separate account for each disabled participant, but "pool" the funds for investment purposes. The account for the beneficiary has to be established by the beneficiary's parent, grandparent or guardian; by a court; or by the individual himself or herself.

Finally, the Trust must provide that, at the death of the individual, any amounts remaining in the account either are retained by the trust, or are dedicated to repay the Medicaid program for the benefits provided to the individual. (In the Ohio Community Pooled Trusts, most assets remain in the Trusts, to help others with disabilities.)

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"...the Trusts can be as innovative as the individual's ability to enjoy the world around him...."

—Jesse B. Beasley, Esq.



JESSE B. BEASLEY, ESQ.

A New Option for Loved Ones with Disabilities

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Options with The Disability Foundation

In 1998, The Disability Foundation established the Ohio Community Pooled Annuity Trust. When a family sets up an account in this Trust, an annuity calculation is made, and a monthly benefit determined. Each month that amount is credited to the individual's spending account. The amount in the spending account at any point in time is the amount available for the person's needs. (If the family wants to purchase something of a higher value, monthly benefits need to be accumulated to reach that amount.) A major advantage of this Trust is that the monthly benefit is guaranteed for the life of the individual. Parents need not worry that funds might not last.

Recently, The Disability Foundation added the Ohio Community Pooled Flexible-Spending Trust. As the name implies, it provides an option to families who do not want the annuity limitation in the other trust. Here, the only limit on the amount that can be spent is the amount in the individual's account. This provides more flexibility, if a major purchase is needed. However, it also requires more financial monitoring, if the funds are intended for long-term use.

The addition of the Flexible-Spending Trust provides families with a local source for either of two pooled trust philosophies: (1) providing a guaranteed benefit for the life of the individual, or (2) allowing the family to control when funds are used.

Expenditures

Pooled trusts are not intended to produce income for the beneficiary. (If income were paid to the beneficiary, that itself could disqualify him/her from SSI/Medicaid.) The Ohio Community Pooled Trusts provide for the special needs of

beneficiaries, by directly purchasing "supplemental services" for them.

Examples of such services include payment for cable television, club memberships, vacations, pets, subscriptions and participation in hobbies, sports or other activities. If the individual needs a companion to be able to engage in a supplemental service activity, the Trust can pay for that companion as well. Finally, if there are medical or health care needs that are not covered by Medicaid, the Trust can cover such expenses.

The main limitation on expenditures is that Trust funds should not be used on basic necessities, such as essential food or shelter. Apart from this restriction, the Trusts can be as innovative as the individual's ability to enjoy the world around him/her. As is perhaps best described by regulation, supplemental services include: "other expenditures used to provide dignity, purpose, optimism and joy to the beneficiary..." (Ohio Administrative Code, Section 5123:2-18-01(C)(2)(w))

Uses of Pooled Trusts

A major advantage in utilizing either of The Disability Foundation's Ohio Community Pooled Trusts is that the family does not have to go to the trouble and expense of creating a private trust agreement that complies with all of the requirements of the SSI and Medicaid programs. Perhaps more significantly, the family does not have to locate someone to serve as trustee, who has or will develop the knowledge of SSI and Medicaid to administer such a trust. Here, we already have the trusts and the trustees.

Parents and grandparents can provide for disabled children and grandchildren in their estate plans by including either of these Pooled Trusts. But the Trusts can be used practically any time a disabled individual receives funds.

Establishing an account may be appropriate to deal with a personal injury settlement, a Social Security/SSI back-payment or a lottery

winning. A "double-benefit" also can be accomplished: if the parent needs nursing facility care, she can establish an account for her disabled child with all of her countable resources, and both of them qualify for Medicaid assistance. Timing is important in both SSI and Medicaid, so planning discussions should begin prior to actual receipt of funds.

Conclusion

Planning for disabled family members can be as complicated as the programs designed to assist them.

The traditional plan of "disinheriting" the disabled child and relying on other family members to provide for him or her may work. But that plan suffers from the fact that assets each of us owns are subject to what happens in our lives, including family disintegration, litigation and death. If something untoward happens to the person entrusted with funds intended for another, those funds may not be available for the intended purpose.

The Ohio Community Pooled Trusts protect against that possibility, while allowing funds to be available. The Greater Miami Valley is fortunate to have both The Disability Foundation's Annuity and Flexible-Spending Trusts as options in planning for our most vulnerable citizens.

To discuss setting up an account in either of the Trusts, contact Kevin Hayde, Executive Director of The Disability Foundation, at (937) 225-9939. 📞

Note: Solutions differ from case to case. The above does not constitute professional financial or tax advice.

Jesse B. Beasley is a Certified Elder Law Attorney by the National Elder Law Foundation. He is a past Chair of the Estate Planning, Trust and Probate Law Committee of the Dayton Bar Association and serves on the Board of Trustees for the Area Agency on Aging. He is a frequent speaker on Elder Law topics and was the legal architect of The Disability Foundation's Ohio Community Pooled Flexible-Spending Trust.

"The Greater Miami Valley is fortunate to have both [of] The Disability Foundation's ... Trusts as options in planning for our most vulnerable citizens."

—Jesse B. Beasley, Esq.

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