Grab Your Water Wings: how and when to use a Pooled Special Needs Trust when planning for the elderly client

By Michele P. Fuller

Consideration of a Pooled Special Needs Trust as a planning tool for obtaining or preserving means-tested governmental benefits, such as Supplemental Security Income (SSI), Section 8 housing, Medicaid, Veteran benefits, Waiver services, and long-term care Medicaid Assistance, is under-utilized among elder law practitioners when planning for a single individual over the age of 65. There is a debate even among top practitioners as to their use for the elderly disabled client with excess assets. However, in my opinion, there is no other planning method for a single individual by its nature and design that preserves the assets of the individual for their sole benefit in order to supplement their care and increase their quality of life. Whether a client is currently receiving long term care Medicaid Assistance and unexpectedly receives funds as a result of a cause of action or an inheritance, or is in need of obtaining benefits for an initial Medicaid application, becoming a member of a Pooled Special Needs Trust should be considered as part of the planning process for the practitioner assisting the single elderly disabled client who is in need of Medicaid Assistance. Other planning options exist for married couples that are of greater benefit and pooled trusts are typically not advisable in those situations.

A Pooled Special Needs Trust is an exception to the general rule that trusts are generally countable assets, and were created as an exception pursuant to 42 USC §1396(p)(d)(4)(C). Pooled trusts are also referred to as "(d)(4)(C)" trusts as a shortened reference to the statute, or PAT's (pooled account trust). The term "pooled" refers to the investment structure whereby the individual's funds are pooled together for greater return on investments. Based on economies of scale, a pooled trust is also intended to allow the

cost of administration, including asset management fees, to be spread among all the participants at a cost savings to all.

A pooled trust has several elements which must be met in order to become a member of the trust, and has several important differences from what practitioners think of as a classic special needs trust drafted for a specific individual:

1. To join, an individual must be disabled (which is also required for a (d)(4)(A) special needs trust),

2. There is no age limit to join a Pooled Trust (unlike a (d)(4)(A) which limits age to 65 or less for both the creation and funding of the trust),

3. The trust must be established and managed by a non-profit corporation,

4. Each individual's funds are allocated to separate accounts, but are pooled together for investment purposes, and established for the sole benefit of the individual,

5. The Grantor can be *the disabled individual*, parent, grandparent, guardian, or the court. At times an individual who is appointed power of attorney for the Grantor will sign on their behalf. A power of attorney is not named in the statute as an acceptable Grantor, and would only be allowable if the power of attorney were to specify that the agent had the authority to create a trust.

6. With a (d)(4)(C) trust, any assets remaining at the death of the beneficiary are retained by the non-profit, and those funds must be used for the benefit of other disabled individuals. However, most pooled trust administrators will allow an individual to choose to reimburse the State and allow the remaining funds to be distributed to the family. The family may also choose to allow remaining assets to be

retained for the benefit of a disabled family member who would then be able to become a member of the pooled trust themselves. These options are particularly useful when planning for a single individual with fairly significant assets who is entering a nursing home, and must be given careful consideration based upon the likelihood that there would be enough assets remaining after death to both reimburse the State and leave assets to be distributed to the family depending on each individual's situation.

When planning for the single individual over age 65, often the use of a pooled trust is more flexible than using what is commonly referred to as "half-a-loaf" planning. Half-a-loaf planning involves gifting approximately one-half of the excess assets and placing the remaining one-half into an annuity (so as to render the person "otherwise eligible" for Medicaid, i.e. they have sufficiently divested sufficient assets to be able to meet the $2,000 limit in countable assets). The gift results in a penalty period during which the individual must pay for their nursing care privately. The annuity pays the nursing home during this time on a monthly basis. If the practitioner under or over estimates the annuity payment to the nursing home it can negatively impact the client. Using a pooled trust in place of the annuity allows for minor adjustments in the monthly fee which can vary month to month, or major adjustments, especially if there is an unexpected hospitalization. In addition, if there is any overage, the remainder can be used for additional care or needs of the Beneficiary during their lifetime.

If an individual is receiving 24 hour care in a nursing facility, typical disbursements include guardianship fees, legal fees, Guardian Ad Litem fees, hair care, podiatry, handicap or medically necessary transportation, additional attendant care, and translators. Many individuals with memory loss can, over time, lose their ability to speak

English if it is not their primary language, and interpreters have been necessary in cases where there is no one to assist with communication needs. Some of the most frequent disbursements are for bed holds. If an extended hospitalization occurs, the Beneficiary is very likely to suffer a loss in capacity due to the trauma of the event. This is compounded if they are discharged to an unfamiliar environment and unfamiliar caregivers. It can also be very stressful on the family to search for another facility in a short period of time or face placement in an undesirable facility. Other common disbursements are for the preservation and maintenance of the home, including taxes and necessary repairs like roofing and window replacement, lawn care, snow removal, etc.

Despite the benefits to the aged individual in need of Medicaid Assistance for their long term care, many respected practitioners do not consider using pooled trusts for their clients. There are several reasons for this. First, its use and the advantages are not well known among elder law practitioners. For many years, those that did know of the pooled trust as a planning tool had no issue with the transfer of excess assets to obtain benefits for their clients. However, beginning with the implementation of the Deficit Reduction Act of 2005, the planning options for single individuals was severely limited. Many elder law attorneys recall the days of serial gifting fondly. After that planning method was eliminated, pooled trusts became more attractive and after a period of time the State began imposing a penalty for the transfer. Pooled trust administrators and their counsel have successfully challenged the imposition of penalties, which the administrative law judges have consistently characterized as an allowable conversion of assets. Since successfully challenging the State's policy, no further penalties have been imposed to date. Many practitioners and their clients choose to employ planning tools or

methods which may not be as beneficial to the client rather than run the risk of having to appeal an unfavorable decision. An appeal can compound the stress and expense of an already exhaustive process, and the family may face additional pressure from a nursing facility for payment or eviction of their loved one.

There is also a national debate among experts as to whether the transfers for those over age 65 are allowable by the federal Medicaid policies, promulgated in the Social Security Administration Program Operations Manual (POM's). However, as Medicaid is a federal benefit implemented by each state according to its own plan, policies regarding transfers for the over 65 population may vary state to state. For example after similar policies were litigated in Oregon and Wisconsin, the State of Oregon does not allow transfers for the over 65 without penalty, while Wisconsin does allow them. In Michigan, there is a current bill pending in the Senate regarding pooled trusts and their administration, which would codify the State's position that transfers for individuals over the age of 65 are allowable. However, from a public policy standpoint, due to the direct benefit to the individual, and because remaining assets after death are used to either reimburse the State or retained by a non-profit organization for the benefit of other individuals with disabilities, pooled trusts are a planning tool for elderly disabled individuals that is worth preserving.

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