Trusts & Special Needs Trusts
Section

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Confidential Relationships – The Unconscious Fiduciary

By I. Mark Cohen

Introduction

A confidential relationship is a fiduciary relationship and carries with it serious responsibilities and liabilities. One should never enter into a fiduciary relationship without first carefully considering the consequences. Yet, in our field of Elder Law, where we are often working with those who are elderly, infirm, and of diminished capacity, it is easy to find people who unknowingly (and often to their chagrin) have entered into a confidential relationship with the person they are "helping out."

The issue generally arises in the context of litigation where the aggrieved party is using it as a basis to establish equity jurisdiction. Two scenarios typically give rise to the aggrieved party's assertion of a confidential relationship: (i) the wrongdoer had been deeded property having orally promised that it would be returned, and now refuses to return it; or (ii) the wrongdoer had been unjustly enriched by abusing the trust of the aggrieved party, who reasonably, and detrimentally, relied upon the wrongdoer. In both cases the successful assertion of a confidential relationship shifts the burden of proof to the defendant, avoids defenses such as the statute of frauds and the statute of limitations, and allows for the imposition of equitable remedies such as a constructive trust and restitution.

Confidential Relationships Defined

Relationships such as an attorney-client, physician-patient, trustee-beneficiary, guardian-ward, partner-partner, agent-principal[1] and parties to a pre-marital agreement are presumed to be confidential relationships. In each instance the principal must put the beneficiary's interest ahead of her own. But when does an informal "helper" become a fiduciary? According to Prof. Scott, a confidential relationship may be presumed whenever two persons are standing in such a relationship to each other that one must necessarily repose trust and confidence in the good faith and integrity of the other.[2] Courts have noted that the concept of a confidential

1. Childress v. Currie, 74 S.W.3d 324 (Tenn. 2002) (A confidential relationship arises as a matter of law when an unrestricted power of attorney is granted to the dominant party. No such presumption arises, however, until the power of attorney has been exercised.); 2. Scott on Trusts, Section 2.5.;

Fall 2008: What's Inside

Message from the Chair

Sharon Kovacs Gruer

At the 2008 NAELA Symposium in Hawaii, the Trusts and Special Needs Trusts Section conducted a lively round table discussion on ethical wills and incentive trusts, which was well received. The section is continuing some of the initiatives started under the guidance of our immediate past chairs, Patti Dudek and Richard Courtney, and the current Steering Committee is working toward completing these endeavors.

The draft of the Aspirational Standards for attorneys who draft Special Needs Trusts and represent trustees of Special Needs Trusts has been submitted to the Professionalism and Ethics Committee for their consideration and comments, and we are awaiting their response. We hope these standards will help improve the quality of service for people with disabilities, elders and their families.

We have also drafted a brochure on Supplemental Needs Trusts that is available for NAELA members for their clients.

We have a telephonic seminar scheduled for November 13, 2008 to discuss the administration of Special Needs Trusts, including setting expectations of beneficiaries (and their families), housing issues, vehicles and investments. Patti Dudek and Frank Dana will be speaking at that telephonic session.

The Trust and Special Needs Trust Steering Committee members for the 2008-2009 year are Elizabeth Luckenbach Brown, I. Mark Cohen, Richard A. Courtney, Frank J. Dana, Randy Drewett, Bill Edy, Barbara S. Hughes and Ellen Makofsky. The Executive Committee Liaison for the 2008-2009 year is Steve Silverberg. We thank all of them for their hard work.

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relationship cannot be reduced to a catalog of specific circumstances, invariably falling to the left or right of the definitional line.[3] Nonetheless, the essence of such a relationship is trust and reliance on one side, and a corresponding opportunity to abuse that trust for personal gain on the other.[4] Accordingly, a confidential relationship appears "when the circumstances make it certain the parties do not deal on equal terms, but on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed."[5]

Although courts often use sweeping language to describe the elements of a confidential relationship, all such determinations are fact-based. And when these facts are examined a much narrower pattern of behavior emerges. In every case, there must be (i) a pre-existing relationship of such a nature that (ii) the beneficiary reasonably trusted the principal to look after his interests.

Pre-existing relationship

Courts uniformly agree that the confidential relationship must be established prior to the conduct in question.[6] After all, how can one reasonably trust a stranger they have never dealt with before to put their interest ahead of the stranger's. If the focus on reasonableness of the aggrieved party's trust is based entirely on the transaction, then the aggrieved party is arguing status, not relationship. There are a number of statuses that, as a matter of law, are fiduciary, such as attorney-client or physician-patient, but an informal confidential relationship must be determined by the facts of the case, and the existence of the relationship must therefore precede the transaction.[7]

Reasonableness of Trust

The second prong of the confidential relationship test is whether the aggrieved party's trust that the wrongdoer would put the aggrieved party's interest ahead of his own was reasonable. This is always a question of fact. There is no informal relationship, no matter how close, that is presumed fiduciary.[8] Not every child is justified in trusting every parent, no spouse is presumed by that status to be a fiduciary to the other spouse, and, although the Bible may make us our brother's keeper, the law does not so presume.

Close Family Relationships

There is a spectrum of relationships that ranges from very close family to casual business acquaintance. One can more readily demonstrate reasonable trust in a close family relationship than in an ordinary business setting. For example, after it was determined that her elderly aunt could no longer live alone, a niece moved in to help out. The elderly aunt depended on the niece for her daily activities -- dressing, eating, bathing, and going to the bathroom -- and the niece took control of the aunt's checkbook and bill payments. The relationship between the niece and the aunt demonstrates a confidential relationship because the aunt reasonably depended on the niece for many of her activities.[9]

On the other hand, there are numerous reported cases where the close family relationship did not arise to the level of a confidential relationship. In *Hopkins v. Hopkins*[10] Ne'er-do-well son, having borrowed and used his parent's property over many years without repayment, realized that he had gone to the well too many times. The son offered to sell his business property to his parents to raise cash to pay off his debts (alimony, gambling losses and unpaid taxes). The parents purchased the property and leased it back to the son at favorable rates. The son made only one payment and eventually was evicted by the parents for nonpayment of the lease. He left, taking much of the parent's property with him and started a competing business nearby. Upon being evicted from that new location for nonpayment of the lease, he attempted to return to the original property. Incredibly, the parents agree and re-lease the property to him. Once again, he made sporadic payments. The son asked the parents for a $350,000 loan to pay off debts and the parents refused. After several acrimonious exchanges, the son departed. The parents then sold the property at a profit. The son sued, alleging that because of the parent-child relationship the parents were in a confidential relationship and should give him the profits from the sale of the property. The court looked at the law and facts and did not find any presumption of a parent-child confidential relationship such that the burden of proof or of production is shifted. Further, the court found: (i) no special reliance by the son upon the word, advice or judgment of the parents; (ii) no surrendering by him of his independence in making business judgments; (iii) no automatic or habitual manipulation of his actions by them; and (iv) no position of superiority or domination over the son. In fact, the court found no evidence that the son relied upon anything from the parents other than their willingness to bail him out.[11]

Friends

When the close relationship is that of a friend, a confidential relationship is still possible, but it is generally harder to prove. In *Shearer v. Healy*[12] decedent inherited a tract of land from his adoptive mother and,

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at her request, executed a will that devised the remainder of his estate to his mother's friend ("Friend"). A year before his death, however, decedent revoked his prior wills and wrote a new will leaving his estate to his drinking buddy and boyhood friend ("Buddy"). Mother's Friend sued. At trial it was determined that Friend had conducted most of decedent's business affairs for him throughout his lifetime. However, after decedent retired Buddy moved in, kept up the house and did the cooking. The court held that a confidential relationship existed between the decedent and Friend, but not between the decedent and Buddy. Thus, since the estate went to Buddy, no confidential relationship was abused.

In another case, the decedent's will left her property to a church. The Reverend of this church had been the decedent's negotiator on several deeds for the sale of the land. They talked often in private and the Reverend conducted most of the decedent's business affairs. The Reverend (i) selected the attorney who wrote the will devising the property to the church, (ii) conducted business for the decedent at her bank, and (iii) took her to the doctor. The court concluded that a confidential relationship existed because the decedent reasonably relied upon and trusted the Reverend.[13]

Business Relationships

In a business setting it is common for the parties to trust each other. After all, why would they do business with one they do not trust. Courts are, however, far more reluctant to overturn business transactions, deeds and contracts on the grounds that one party thought the other was acting as their fiduciary. Theoretically, it should be difficult, if not impossible, to show that a business person reasonably expected the other party to subordinate his interest in favor of the aggrieved party. Nevertheless, there seem to be two classes of cases where the courts find a confidential relationship even though other equitable doctrines might work better. The first class has been termed "near joint ventures" by Prof. Anderson because the business relationship was akin to a joint venture or a partnership.[14] Had these cases been so classified, the fiduciary relationship would have been clear. The second class has been termed "failed fraud" by Prof. Anderson because the defendant's alleged fraud is contradicted by a signed writing.[15]

An example of the "failed fraud" can be found in *Basile v. H & R Block, Inc.*[16] In this case, the tax preparer convinced the plaintiffs to enter into a "rapid refund service" but did not disclose to them (a) that the plaintiffs would be paying interest ranging from 32% to 151%, and (b) that the tax preparer was receiving some of that interest. Trial court granted summary judgment for the defendant finding that there was no confidential relationship. On appeal, the court reversed and remanded noting that a confidential relationship and the resulting fiduciary duty attaches whenever one occupies towards another such position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the other's interests. The court specifically rejected arguments that a confidential relationship could only exist between two individuals, or that some degree of personal intimacy was a prerequisite for the creation of a confidential relationship. Nor did it matter that the plaintiffs in this case did not remember the name of the individual tax preparer who compiled his or her documents, or that they were only in his presence for a half-hour. The evidence suggested the plaintiffs trusted not only the individuals who staffed any given H & R Block office but H & R Block as an organization. On this issue, Block's television commercial campaign (" We're here when you need us") ("Income taxes is all we do") ("confiding in H. and R. Block is like being able to confide in one of your

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3. In re Estate of Scott, 316 A. 2d 883 (Pa. 1974). **4.** Id.; **5.** Frowen v. Blank, 425 A.2d 412, 416-17 (Pa. 1981).; **6.** Roy Ryden Anderson, The Wolf At The Campfire: Understanding Confidential Relationships, 53 SMU L. Rev. 315, 325. (Prof. Anderson notes that this limitation is invariably stated as a self-evident truism and is unaccompanied by comment, explanation or discussion.); **7.** Id.; **8.** See, e.g., Nuckols v. Nuckols, 228 Va. 25, 36-37, 320 S.E.2d 734, 740 (1984).; **9.** Upman v. Clarke 359 Md. 32, 753 A. 2d 4 (2006).; **10.** Hopkins v. Hopkins, No. 2050385 (Ala. Civ. App. 3/9/2007).; **11.** Id, at 30. **12.** Shearer v. Healy, 247 Md. 11, 230 A. 2d 101 (1967).; **13.** Sellers v. Qualls, 206 Md. 58, 110 A. 2d 73 (1954). **14.** Anderson, n.6 at 366.; **15.** Id.; **16.** Basile v. H & R Block, Inc., 2001 Pa. Super. 136.

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Meet Your Steering Committee Members

Ellen G. Makofsky, Esq.

Ellen G. Makofsky, Esq. is a partner of the Elder Law and Trusts and Estates law firm Raskin & Makofsky located in Garden City, NY. Ms. Makofsky is a Certified Elder Law Attorney ("CELA"). She is a past Chair of the Elder Law Section of the New York State Bar Association ("NYSBA") and serves as Secretary of The Estate Planning Council of Nassau. Ms. Makofsky is the author of "Advance Directives" a column which regularly appears in the Elder Law Attorney a quarterly publication of the NYSBA .

Barbara S. Hughes

Barbara S. Hughes is a partner in the Madison, WI law firm of Hill, Glowacki, Jaeger & Hughes, LLP and practices in the areas of elder and special needs law, estate planning, probate and trust administration, and Wisconsin's marital property law. A past director and past chair of the Elder Law Section of the State Bar of Wisconsin, she is an advisor to the section's board. Ms. Hughes currently serves on the National Academy of Elder Law Attorneys Trusts SIG. For NAELA, she has served two terms on the board of directors, given presentations at the 2004 Institute and 2008 Symposium, chaired the 2006 Advanced Institute and the Membership Committee, and has been a member of the Program and Education Committee, the Professionalism and Ethics Committee, and the steering committee for several Institutes, the Maui Symposium, the 2008 Special Needs UnProgram, and the 2009 Annual Meeting. She is a member of the Special Needs Alliance, the State Bar of Wisconsin, Dane County Bar Association, and Madison Estate Council, of which she is a past director. She is the author of the ethics chapter in the State Bar of Wisconsin's Advising Older Clients and Their Families, Vol. 1, co-author of "Planning with Special Needs Youth Upon Reaching Majority: Education and Other Powers of Attorney" in NAELA Journal, April 2005, and several NAELA News articles. Her pro bono service includes long term intensive work on task forces and committees to reform and modernize the Wisconsin guardianship statutes and to create the WisPACT, Inc. pooled and community trusts for Wisconsin individuals with disabilities. She was chosen as a Wisconsin Super Lawyer by her peers from 2006 through 2008 and is named in Best Lawyers in America in both elder law and trusts and estates.

I. Mark Cohen, J.D., LL.M., CFP®

I. Mark Cohen is a founder and senior partner of Cohen & Burnett, P.C., a firm that focuses on trusts and estates. He is also founder and chairman of Navigator Wealth Management, LLC, an independent RIA serving families in the Northern Virginia region.

Mark received his B.A. in 1980 from California State University at Long Beach, his J.D. in 1984 from the University of Arizona, served as a Lt., JAGC, U.S. Naval Reserve from 1984-1987, and received his LL.M., Tax in 1989 from Marshall-Wythe School of Law, College of William & Mary. Mark was an adjunct professor at Golden Gate University from 1985-1987 and has published numerous articles and conducted many seminars on estates and trusts.

Mark is a member of the Virginia State Bar; the Northern Virginia Estate Planning Council where he was a past president; the National Academy of Elder Law Attorneys; and the Legislative Committee of the VSB Wills and Trusts section. He is also an inactive member of the Arizona Bar Association.

Elizabeth Luckenbach Brown

Elizabeth Luckenbach Brown is a partner with Jaffe, Raitt, Heuer, & Weiss, Professional Corporation in Southfield, Michigan. She practices in the areas of estate planning and probate, with a particular emphasis in probate litigation, special needs planning and Elder Law.

She received her BA from Michigan State University School of Journalism in 1991 and her J.D. from De Paul University College of Law in 1997. She is admitted to practice in Illinois, Michigan, the U.S. District Court for the Eastern District of Michigan, the U.S. District Court for the Western District of Michigan, and the U.S. Court of Appeals, Sixth Circuit.

Elizabeth is a frequent speaker and author on topics such as Elder Law, special needs planning, and estate planning and probate. She is an Adjunct Professor at the University of Detroit Mercy School of Law. She currently serves on the Board of Directors for the Children's Center in Detroit and is active in the State Bar of Michigan, serving on the Unauthorized Practice of Law Committee; the Oakland County Bar Association, serving on the Membership Committee; and the National Academy of Elder Law Attorneys. In 2005, Elizabeth was featured in the Michigan Lawyer's Weekly "Leaders in the Law" section as one of five "up and coming lawyers" in the state.

Randy Drewett, CELA

Randy Drewett, CELA, whose office is located in Beaumont, Texas, has been licensed to practice law for 30 years. His practice is limited to estate planning, elder law and veterans benefits law. He is board certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization and is a Certified Elder Law Attorney by the National Elder Law Foundation. Randy is a graduate of Lamar University and South Texas College of Law. He is a regular speaker for NAELA, the State Bar of Texas and the University of Texas. Randy is the host of a weekly radio talk show, The Randy Drewett Estate and Elder Law Show, now in its 12th year.

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Richard A. ("Rick") Courtney, CELA

Richard A. ("Rick") Courtney, CELA, chairs the Elder Law, Estate and Special Needs Planning Group of the Jackson law firm of Frascogna Courtney, PLLC. Rick is the only Certified Elder Law Attorney in Mississippi and was selected in 2006 and 2007 as a "Mid-South Super Lawyer" in the field of Elder Law. He is a former Assistant Dean and current Adjunct Professor of Elder Law at Mississippi College School of Law, where he has taught since 1991. He has a comprehensive Elder Law, public benefits, trust administration, special needs planning, and life-care planning practice. Rick and his wife, Ruthie, have adult twin daughters, one of whom has a disability.

William Thomas Edy, JD, LLM, MBA, CFP

William Edy received his AB from Case Western Reserve University (Magna Cum Laude), in Cleveland, Ohio where he was elected to Phi Betav Kappa, a national honor society and to Phi Alpha Theta, a national honorary history society. He then received his EdM from Harvard Graduate School of Education, where he was elected to Phi Delta Kappa, a national honorary education society. He then received his JD from the New England School of Law, Boston, Summa Cum Laude, graduating 2nd in his class of 97. While at New England, he also studied Labor Relations as a special student at Harvard Law School. Upon graduating from law school, Mr. Edy continued his legal studies at the University of Miami, where he received his LLM in Taxation. In 1994, he received his MBA from Nova Southeastern University. He is also a Certified Financial Planner (CFP).

Frank Dana

A native of Columbia, South Carolina,. Mr. Dana graduated from Davidson College in 1972, and from Duke University Law School in 1975.

He has been in private law practice in Greenville from 1975-1982 and 1986-Present, and was also part of the C&S Bank Trust Department from 1982-1986. He is a member of the National Academy of Elder Law Attorneys, the South Carolina Bar Association and the Greenville Estate Planning Council. He and his wife, Susan, have a daughter, Caroline.

*Frank was Certified as an Elder Law Attorney by the National Elder Law Foundation in 2003.

Call for Articles

Have you had an interesting case recently? Have you had a horror story or two that you are willing to share? Do you have previously-published articles that are still relevant? If the answer to any of these questions is "yes," please send us your articles! The Trusts and Special Needs Trusts SIG publishes two newsletters each year: a Fall and a Spring edition, and they are only as good as you make them. Remember, it doesn't need to be a major time commitment; we will take anything from 25 to 2500 words … but we can't print your articles if we don't receive them. If we receive too many for one newsletter, we will hold them for the next one. Please send your articles to Sharon Kovacs Gruer (skglaw@optonline.net) and Meredith Hansen (mhansen@naela.com).

Unsung Heros

Do you know a NAELA member who has been accomplishing, without recognition, great things for elders in his or her community? Someone who has contributed time and energy for the sole purpose of bettering the lives of elders? NAELA's Member Relations Committee is seeking these "unsung heroes." If you know of someone you would like to bring to the attention of fellow NAELA members, please send the individual's name and a brief description of what he/she is doing to Shirley Whitenack, chair of the Member Relations Committee at sbw@spsk.com. Please send copies of your suggestions to Terry Alexander (talexander@naela.com).

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own") was not helpful to its case. While the result may be laudable, the legal reasoning is flawed. Where, for example, is the prior relationship required of a confidential relationship? The court is straining to find an equitable remedy to avoid the parole evidence rule. A simpler solution is to hold that a tax preparer is a per se fiduciary rather than to create a confidential relationship out of a single transaction.

The Consequences of a Confidential Relationship

A confidential relationship is a fiduciary relationship with all that it implies – avoidance of a conflict of interest, duty of loyalty and prudence, full disclosure, avoidance of legal defenses such as the parole evidence rule, statute of limitations, statute of frauds, and availability of equitable remedies.[17] As Justice Cardozo famously put it:

> *Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions . . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.*[18]

17. Thigpen v. Locke, 363 S.W.2d 247 (Tex. 1962).; **18.** Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928). **19.** Anderson v. Burt, 507 So. 2d 32, 36 (Miss. 1987).; **20.** Gordon v. Thornton, 584 S. W. 2d 655, 658 (Tenn. Ct. App. 1979); **21.** Williams v. Moran, 248 Md. 279, 285, 236 A 2d. 274, 278-79 (1967); **22.** Cannon v. Cannon, 384 Md. 537, 865 A.2d 563 (2005).

Funding a Special Needs Trust: How Much is Enough?

By Evan Farr

Parents or guardians want to ensure that their children with special needs will remain financially secure even when they are no longer there to provide support. Given the significant, ongoing expenses involved in the care of a special needs child and the uncertainty about what needs may arise after the parent or guardian is gone, and what public benefits may be available, determining how much a special needs trust (SNT) should hold is no small feat.

Fortunately, help in calculating a "special needs goal" is available from financial planners with expertise in disability issues, as well as from special needs calculators, which are accessible free of charge on the Internet. Using a special needs calculator is an excellent way to help your clients begin making concrete plans for the future of their special needs children. Based on information your clients provide to you about anticipated income and expenses, the calculators can offer a realistic estimate of how much your child will need in lifetime financial support. Financial planners suggest re-running this type of calculation periodically, particularly as the special needs child nears adulthood, to ensure the estimate reflects the most accurate, up-to-date information about needs and circumstances.

Getting Started

The first step in determining the amount that parents should set aside in a SNT is for them to consider their goals and their expectations for the child's future. If they haven't yet created a Memorandum of Intent or an Advance Care Plan for the child, this is the time to recommend that they draft such a document. The Letter of Intent or Advance Care Plan should address factors such as the child's medical condition, guardianship needs, ability to work and desired living arrangements, all of which will drive the special needs calculation.

Once your client has considered the "big picture," they'll need to identify the child's future income sources and living expenses. You should identify relevant categories (e.g., public benefits income, transportation costs).

Next, your clients will need to tackle the most arduous part of the process– placing a dollar value on each category. They can start by listing any current income or expenses likely to continue into the child's adult years. They''ll need to consider income from sources such as life insurance proceeds, gifts, inheritances, and legal settlements, as well as from employment and public benefits such as Supplemental Security Income and Social Security Disability Income.

Bearing in mind that the trust should not be paying for medical or other expenses that are covered by public benefits, broad categories of expenses include, but are not necessarily limited to:

- Housing: rent, mortgage payments, utilities, insurance, taxes, maintenance.
- Transportation: car payments, auto insurance, fuel, repairs, public transportation costs.
- Medical care not covered by public benefits: doctor visits, therapy, prescription drugs, which are not covered by benefits
- Care assistance: respite, custodial.
- Special equipment not otherwise covered: assistive technologies, durable medical equipment, computers, service animals.
- Personal needs: grooming, hobbies, entertainment, vacations.
- Education and employment costs: tuition, books, supplies, tutoring
- Future asset replacement costs: for a car, major appliances, electronics, furnishings.

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Funding a Special Needs Trust: How Much is Enough?

(continued from page 7)

Running the Calculation

Prior to running the calculation, your client may need to indicate the child's life expectancy and the number of years remaining until their own retirement. Once they've entered all required data, you can run an analysis of the funding needs based on preset assumptions about the rate of inflation and after-tax investment returns. The calculators indicate the amount of annual savings required to meet the desired goal.

Considering "What Ifs"

Financial planners advise that running alternative calculations can help your clients plan adequately for worst- and best-case scenarios. One variable to consider is the child's ability to earn income. For example, if he or she is able to work more than expected, earned income may cover more expenses, but SSI payments will likely be reduced. As the child's disability advances, he or she may need to leave the workforce, potentially increasing SSI payments but also adding new expenses.

Another critical factor is the impact of higher or lower investment returns on the amount that must be set aside. If the child is very young, your clients may plan to invest aggressively, pursuing a higher rate of return than if they were nearing adulthood. An investment "rule of thumb" is that you generally can take somewhat greater risks with a longer-term investment because you have more time to recover from dips in the market. If your clients anticipate a lower rate of return for any reason, they will need to compensate by setting aside more in savings.

As you can see, to some extent this is more of an art than a science. You can help your clients make their best guess, or refer them to a financial planner who specializes in this field and who can bring to bear his or her experience with many families in similar situations.

Finding the Funds – Using Life Insurance

Once your clients have a realistic estimate in hand, they'll need to consider how to fund this need without sacrificing such financial goals as college for their other children and retirement for themselves. They will also need to balance the current needs of their special needs child with their wish to benefit their other children, as well as cover their own current expenses. They may not be able to completely fund the dollar amount resulting from the above calculations, but having a target can greatly assist their planning.

Many parents find that a second-to-die life insurance policy is the easiest option to fund a SNT because the premiums are often lower. However, a joint first-to-die policy might make more sense for many parents, especially if one parent is the primary wage earner and one parent is the primary caregiver for the special needs child. With a first-to-die policy, if the wage-earner parent dies first, the policy will provide funds needed for the caregiver parent to be able to continue providing the care; if the caregiver parent dies first, the policy will provide funds needed for the wage-earner parent to hire a replacement caregiver.

In short, how much your clients fund their SNT and how large an insurance policy to purchase will be a question of balance among their current needs, their retirement funding, the needs of their other children, if any, and the anticipated needs of their special needs child.

Finally, be sure to recommend that your clients create or update their estate plan and determine which of their assets they'll leave to the SNT. Also remind them to advise their relatives of the need to direct gifts and bequests to the SNT, rather than the child, to avoid the risk of disqualifying the child from eligibility for public benefits.

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