

EFFECT OF EDUCATIONAL TRUSTS FOR CHILDREN ON ELIGIBILITY FOR HUMAN SERVICES PROGRAMS - BACKGROUND MEMORANDUM

Senate Concurrent Resolution No. 4032 (attached as an appendix) directs a study of the feasibility and desirability of exempting funds set aside in a trust for a child's education when determining the child's eligibility for certain human services programs. The study states that grandparents and other relatives of the child often want to invest money in trust accounts and other types of investments to provide money for the child's postsecondary education. The study also states that certain human services programs do not exempt the funds in educational trusts and other investments as assets in determining eligibility for these programs. This study is similar to the study directed by Senate Bill No. 2187. The information contained in the background memorandum for Senate Bill No. 2187, especially as it relates to supplemental needs trusts, is applicable to this study. An educational trust made by a grandparent may be viewed as a supplemental needs trust for educational purposes. This study assumes an awareness and understanding of the other background memorandum.

LEGISLATIVE HISTORY

The legislative history reveals that the impetus for this study came from a concern of an attorney who is actively involved in estate planning. The attorney did not know how to advise clients who want to set up a trust for a grandchild when the parents of that child are in circumstances that may require public assistance. The attorney's concern is that government agencies may invade the trust to reimburse the agency for the cost of the assistance.

EDUCATIONAL TRUSTS AND PUBLIC ASSISTANCE

It is difficult to say how an educational trust might affect public assistance benefits without knowing more about the particular trust language. In the application process for food stamps and the children's health insurance program (CHIP), trust assets are not included in determining eligibility; eligibility is based upon income. In considering eligibility for Medicaid and temporary assistance for needy families (TANF), trust assets can be considered as available depending upon the language in the trust. If the trust is available for the support of the child while on Medicaid or TANF, all assets would be considered available in determining eligibility. Beginning January 1, 2002, there is not an asset test for children and families under Medicaid.

This makes issues moot relating to asset availability in an educational trust for a minor child Medicaid recipient or for a minor child whose parents are Medicaid recipients. The only issues arise in TANF.

The TANF program is similar to Medicaid in that under North Dakota Administrative Code (NDAC) Section 7-02-01.2-21, TANF requires all assets that are actually available to be considered when determining eligibility. Assets are actually available when at the disposal of a member of the TANF household. If a member of a TANF household has a legal interest in an asset and has the legal ability to make it available for support of that person or if a household member has the lawful power to make an asset available or cause the asset to be made available, the assets are considered available in considering eligibility for TANF. Under NDAC Section 75-02-01.2-22, the asset limitations for TANF are \$5,000 for a household consisting of one person and \$8,000 for a household consisting of two or more persons.

If an educational trust created by a person not in the household is properly drafted, there should not be a TANF eligibility issue. It appears that a grandparent may set up a trust for the benefit of a grandchild for educational purposes without the trust assets being available to reimburse moneys spent on TANF programs received by the grandchild's parents. The grandparents would need to draft the trust as to prohibit access to funds in the trust while the child is in a TANF household. If the trust states that the trustee may not make distributions from trust income or principal except for postsecondary education expenses and provides that the child must be enrolled in a university, college, or vocational program while between the ages of 18 and 23 at the time of distribution, it seems the trust assets cannot be counted as available to the child for purposes of TANF.

There are two issues besides asset eligibility levels. The grandparent settlor of an educational trust must be careful so as not to exclude themselves from Medicaid eligibility. The look-back period is 60 months if assets were transferred to an irrevocable trust. Otherwise, the look-back period is 36 months. In addition, the trust must be drafted so that income from the trust does not affect government assistance programs. Income distributed by the trustee is considered in income eligibility requirements for all of the programs mentioned in this memorandum, including Medicaid, TANF, CHIP, and food stamps.

If a parent in the household or other responsible household member sets up a trust for a child in that household, educational trust assets could affect eligibility for TANF. A transfer of assets without adequate consideration by the parent or other responsible household member disqualifies the household for a certain period of time. It appears that a parent not in the household could set up an educational trust without the assets in that trust being considered in eligibility.

OTHER ISSUES

Gifts under the Uniform Transfer to Minors Acts are not trusts per se but may have been one of the issues contemplated in the creation of this study. North Dakota Century Code (NDCC) Chapter 47-24.1 provides for a procedure by which a person may choose a custodian for the receipt of property for a minor beneficiary. Under Section 47-24.1-14, the custodian of the gift has the power to "deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the custodian considers advisable for the use and benefit of the minor" Under the same section, a minor or any interested person may petition the court to order the custodian to expend custodial property for the minor's benefit as the court considers advisable. These laws make the custodial property "available" for TANF purposes.

There are other means of funding the educational needs of a grandchild. For example, a grandparent may set up an educational IRA or may place money in a state-qualified tuition program. This state does not have a state-qualified tuition program. However, in either case, the outcome in determining whether an asset is available depends on whether the funds are

accessible by a member of the TANF household. In addition, under North Dakota Administrative Code Section 75-02-01.2-23, certain assets are exempt from consideration even if accessible; however, the section neither lists an educational IRA or state-qualified tuition program.

SUGGESTED STUDY APPROACH

The same study approach as is recommended for Senate Bill No. 2187 is recommended for this study. The committee may consider placing into law requirements for educational trusts to be not counted as assets for government assistance programs. The committee may consider a bill draft that contains specific requirements or a bill draft that requires the Department of Human Services to create rules that may include boilerplate forms for acceptable educational trusts. To make this determination, the committee may want to receive testimony from interested parties to determine whether information on these trusts is readily available to attorneys and the residents of this state or if there is discord between attorneys and the department in interpreting educational trusts. If the availability of these trusts is unknown to attorneys or the public, if how to draft these trusts is unclear to attorneys, or if there is discord between attorneys and the department, the committee may want to take legislative action. Interested parties include the Department of Human Services, county social services agencies, attorneys, investment professionals, and individuals interested in creating educational trusts.

ATTACH:1