

The Special Needs Trust

This Legal Planning Tool Can Help Protect The Financial Future For A Disabled Child

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Planning for your disabled child's financial future will protect his or her financial security and eliminate the emotional strain placed on family members left with the responsibility to care for this child upon your death.

One of the most important concerns parents of a disabled child have is the uncertainty of the future and the realization that they will not always be around to protect their child. Special needs trusts are among the most effective legal planning tools available to provide you with a means to address these issues and offer assurance that your child will be taken care of when you are deceased.

Protecting Federal and State Benefits for Your Disabled Child

A special needs trust is intended to permit Supplemental Security Income (SSI) participants and Medicaid recipients to receive some additional services or goods. A special needs trust allows a disabled child access to funds that extend beyond food, shelter, and clothing. These basic needs are provided by SSI, and the medical and long term support and services are offered through Medicaid. SSI and Medicaid are federal and state programs designed for low-income and low-asset individuals.

Each program has independent eligibility criteria setting maximum levels of income and financial resources that the individual must maintain to secure or retain such benefits. In order to qualify for SSI or Medicaid, a disabled individual can not own more than \$2,000 in assets, excluding certain items such as a car and in certain circumstances a home. Fortunately, the government has established rules allowing any additional assets over the \$2,000 limit to be held in a trust for a recipient of SSI and Medicaid, as long as certain parameters are met.

Creating a special needs trust provides a vehicle to preserve the disabled person's eligibility for federal and state benefits by keeping assets out of his or her name. A special needs trust accomplishes this objective by setting aside all assets for expenses other than the child's

basic support. The special needs trust is not permitted to provide for room and board, but can pay for out of pocket medical and dental expenses, annual checkups, eyeglasses, transportation and vehicle purchase, education, insurance, rehabilitation, home health aide, goods and services that add pleasure and quality of life and entertainment (i.e. vacations, a movie, concert, or a ballgame).

There have been some significant changes to the law which affect the transfer of the assets to special needs trust. Congress enacted the Omnibus Budget Reconciliation Act of 1993 to ensure that only individuals who truly need assistance have access to it. As a result, current law specifically provides for several types of trusts that are approved by the government for use by individuals who either presently are, or expect in the future, to become eligible for SSI or Medicaid benefits.

Generally, there are two types of special needs trusts for disabled persons. The first and most commonly used is the third party special needs trust. This trust is established with funds that belong to someone other than the disabled beneficiary. For instance, a parent or grandparent may create such a trust and fund it during their lifetime with a gift of cash, life insurance, or another asset. Upon the death of the disabled individual, any assets that remain in the trust can be designated to other family members. If the trust is properly drafted, Medicaid will not be entitled to any form of reimbursement for long-term care services when the disabled individual dies. A third party special needs trust is a good idea for families where aunts, uncles, and grandparents want to leave money for a disabled child.

The second type of special needs trust is the self-settled special needs trust, and federal and state law recognize two versions of it. These trusts are established with funds already owned by the disabled person or his or her spouse. Both types require that the disabled person is under the age of 65 at the time the trust is created, and these trusts can be established by a parent, grandparent,

court, or legal guardian of the disabled beneficiary.

The first version of the self-settled special needs trust is the (d)(4)(A) trust. It is typically used to protect proceeds of a personal injury lawsuit or hold the proceeds of an inheritance to which the beneficiary is entitled, so that the beneficiary remains eligible for Medicaid benefits to pay for basic health care expenses.

The potential disadvantage to a (d)(4)(A) trust is that those assets remaining in the trust upon the beneficiary's death must first be spent to reimburse Medicaid for those health care costs which Medicaid paid on the beneficiary's behalf. However, after Medicaid is reimbursed, any unused assets can go to other family members.

The disadvantages associated with a special needs trust are offset with the fact that the rate Medicaid patients can be charged is oftentimes significantly less than what the same individual would have been charged for privately paid medical care. Therefore, those reimbursable expenses are generally much less than the cost to provide for the beneficiary's medical care in the event that the individual was ineligible for any government benefits.

The second type of self-settled special needs trust is commonly referred to as a pooled-account trust. This trust is typically used in a situation where the disabled individual does not meet the criteria necessary to establish a (d)(4)(A) trust. The pooled-account trust can be created by a parent, grandparent, court, guardian, or by the disabled individual himself. It is managed by a non-profit association which pools the funds of multiple beneficiaries for investment purposes, while maintaining separate accounts for each beneficiary.

The potential disadvantage to the pooled-account trust is similar to the (d)(4)(A) trust. However, a pooled-account trust allows the individual who established the trust to make an election to choose that any assets remaining upon the death of the beneficiary can either be paid to the non-profit entity

that managed the assets, or used to reimburse Medicaid. A pooled-account trust is often a better option when the amount of assets held in the trust are insufficient to make it practical from an economic standpoint to appoint a corporate trustee for purposes of managing the trust assets.

Eliminating the Emotional Stress of the Individual Responsible for Your Disabled Child's Care

In lieu of establishing a special needs trust, your alternative is to leave a fixed sum of money to your disabled child's caretaker, typically a sibling or other close relative, with the understanding that the money will be spent on the disabled child.

This alternative is problematic for several different reasons. First, the money you left to the caretaker on your child's behalf is subject to that caretaker's legal judgments, divorce settlements, and can even be lost in bankruptcy. Second, the caretaker is not subject to any legal obligation to use the funds on behalf of the disabled child, and therefore, can spend the money as they desire. Third, the caretaker may be subject to negative tax implications, in that they may be subject to a higher tax rate than if the money was held in a Special needs trust. Finally, in the event that the caretaker dies before the disabled child without leaving a Will or does not provide for the child under their Will, the money would go to his or her heirs.

Special needs trusts should be considered when you begin your estate planning. It is never too early to begin planning for your disabled child's financial future. Your plan should be prepared by a qualified attorney to ensure your goal to provide lifelong care for your disabled child is accomplished.

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