

Special Needs Require Special Planning

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Families with a member who has special needs understand that mainstream solutions are not enough to solve everyday issues that often arise. Likewise, mainstream estate planning is insufficient to address the unique issues involved in planning for someone with special needs.

It is imperative to develop an estate plan for a person with a special need because the financial consequences can be devastating if a plan is not properly created or does not exist. The use of a health care proxy, power of attorney, last will and testament and special needs trust can address most of the concerns and goals of families planning for an individual with special needs. Here, the special needs trust really holds the spotlight.

Special needs trusts (also known as “supplemental needs” trusts) allow a disabled beneficiary to receive gifts, lawsuit settlements, or other funds without losing eligibility for certain government programs. Such trusts are drafted so that the funds in the trust are considered to belong to the beneficiary, and therefore, are excluded in determining the individual’s eligibility for public benefits.

As the families of disabled beneficiaries and the individuals themselves know, public benefits programs have restrictions that, if not observed, would disqualify the beneficiary from public benefits. Creation of a special needs trust in compliance with the requirements can provide amazing benefits to the individual.

Special needs trusts aren’t designed to provide basic support, but are created to pay for comforts and luxuries that could not be paid for by public assistance funds. These trusts are normally used to pay for things like education, recreation, counseling and medical attention beyond the simple necessities of life. Additionally, the funds in these trusts can be used to pay for medical and dental needs, annual independent check-ups, necessary or desirable equipment (such as specially

equipped vans), training and education, insurance, transportation and essential dietary needs. These are needs beyond those provided for by public assistance funds and provide greater quality of life.

If the trust is sufficiently funded, the disabled person can also receive spending money, electronic equipment and appliances, computers, vacations, movies, payments for a companion and other life enhancing expenses.

Frequently, special needs trusts are created by a parent or other family member and funded during their lifetime, or at death with life insurance. Special needs trusts may also be set up in a will as a way to leave assets to a disabled relative. Regardless of how they’re set up, it’s important to note that the child may be at any stage of life, even adulthood, when the trust is created or funded. These trusts, if funded with assets not owned by the disabled individual, do not need to comply with Medicaid and SSI requirements.

The best approach is to create these trusts at an early age for a child to ensure they are protected in the event of a death or disability of their caretaker. However, planning at any time is better than not planning at all. Because of the unique nature of the trust, an appropriate advisor should be consulted.

A disabled individual can also create the trust for him or herself with their own funds, depending on the public benefits they seek. These trusts are known as “self-settled” trusts and are frequently established by individuals disabled following an accident or medical malpractice resulting in a personal injury award or settlement. Although Medicaid and SSI are quite restrictive, making it difficult for a

beneficiary to create a trust for his or her own benefit and still retain eligibility for Medicaid benefits, both programs allow two “safe harbors” permitting the creation of special needs trusts with a beneficiary’s own money if the trust meets certain requirements.

The first of these allowed self settled trusts is called a “payback” or “(d)(4)(A)” trust which is created with the assets of a disabled individual under age 65 and is established by his or her parent, grandparent or legal guardian or by a court. It must provide that at the beneficiary’s death any remaining trust funds will first be used to reimburse the state for Medicaid paid on the beneficiary’s behalf. Medicaid and SSI also permit “(d)(4)(C)” or “pooled trusts” where the resources of many disabled beneficiaries are managed by a non-profit association. Pooled trusts may be for beneficiaries of any age and may be created by the beneficiary herself. At the beneficiary’s death the state does not require repayment for its Medicaid expenses provided the funds remain in the trust to benefit other disabled beneficiaries.

Regardless of who creates a special needs trust, choosing a trustee is an important and often difficult issue. The trustee must have the necessary expertise to manage the trust, make proper investments, pay bills, keep accounts and prepare tax returns. The trustee must

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also be familiar with the beneficiary and his unique needs.

Because many attorneys and advisors don't understand the options, people have been advised to disinherit a child with special needs to protect that child's public benefits. But this "solution" prevents you from helping your child after you are incapacitated or gone. If your child requires, or is likely to require, governmental assistance for basic needs, consider establishing a special needs trust and inform the trustee and potential caretakers about the benefits the parent(s) provided the disabled person while they were alive—tangible and intangible—to ensure these quality of life measures continue.