

ESTATE PLANNING FOR PARENTS OF CHILDREN WITH DISABILITIES

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Estate planning for parents of children with disabilities presents special challenges. The goal of most parents who have a disabled child is to protect his or her assets in such a way as to enrich their child's life while preserving the public benefits available to the disabled child. The financial and personal well being of a disabled child can only be properly protected by utilizing special needs planning. This article will focus on the use of a Special Needs Trust to accomplish this goal.

There are a number of government programs to support disabled individuals. These programs include Supplemental Security Income (SSI), Social Security Disability Insurance (SSD), Medicare, and Medicaid. SSI is a needs-based program under which benefits are paid only to persons who meet welfare limitations with respect to both income and resources. Persons receiving SSI in most states are automatically entitled to Medicaid. Consequently, the receipt of cash or other assets, either through a Will or as a beneficiary of a retirement account or life insurance policy, will frequently disqualify a disabled individual from receiving SSI and Medicaid. If the disabled child has substantial physical needs, the loss of these benefits can be devastating.

Parents of disabled children have three options with respect to estate planning. The options are as follows: distribute assets outright to the disabled child, distribute assets to the disabled child's siblings with the understanding that they will hold the assets for the benefit of the disabled child, or distribute assets to a Special Needs Trust.

I would not recommend leaving property outright to the disabled child because the child may become ineligible for SSI and Medicaid. The second method discussed above is to leave the assets to the disabled child's siblings. This method will not result in disqualification from government benefits. However, this method can be risky. Assets distributed outright to siblings are legally owned by the siblings. The assets then potentially exposed to creditors, divorce action, misappropriation or mismanagement by siblings.

The third -- and I believe proper -- method is to establish a Special Needs Trust. A Special Needs Trust is designed so the funds are not considered "available" to the beneficiary. If properly drafted, it will allow for the continuation of government benefits, reserving the trust funds for purposes that will enhance the enjoyment and well being of the disabled beneficiary. To be properly drafted, it must be a discretionary rather than a support trust. A

support trust includes language which states that the trust funds can be used for the health, welfare, and support of the beneficiary. If the proceeds are available to the disabled child for these reasons, then the appropriate government authority can require that the trust funds be distributed from the trust to replace government benefits. A discretionary trust, allows the trustee to utilize the trust funds to supplement government entitlements. The discretion to utilize the trust funds lies solely with the trustee, not the beneficiary.

A Special Needs Trust can be established through a Will (testamentary trust) or during lifetime (intervivos) through a separate trust document. An intervivos Special Needs Trust provides a vehicle for parents and grandparents to make gifts during their lifetime or bequests at death to a disabled child. A testamentary trust would not be created until the parents' death. Therefore, a person passing away prior to the parents could not leave money to the trust.

The estate plan for parents of disabled children should contain Wills, Living Wills, General Durable Powers of Attorney and a Special Needs Trust. Attorneys often overlook the possibility of preparing documents for the disabled child. Often the child is sufficiently competent to execute documents. In those cases, Wills, Living Wills and Powers of Attorney, also should be considered for them.

In conclusion, if you have a disabled child, special planning exists which can maximize and enhance the disabled child's quality of life. Without proper legal advice, the goals of the parents to enrich the lives of their children may never be achieved.