

# Estate planning when you have special needs children: *What you should know about third-party special needs trusts*

Some of you may have read articles I've written in the past concerning estate planning techniques to minimize estate taxes, protect assets, or to facilitate the transfer of property without the cumbersome and expensive probate process. While these topics are certainly worthwhile, none of them are as important as the question facing parents or grandparents of special needs children regarding what inheritance, if any, to leave those children. Before continuing, I wish to define "special needs children" as follows: children who, due to illness or injury, are mentally, physically, or emotionally disabled to such a degree that they currently are, or may become, eligible for means-tested government benefits such as Supplemental Security Income ("SSI") and Medicaid.

For those of you who are the parents or grandparents of these children, you probably have, at some point, wondered who would take care of them once you're no longer able. You also may be reluctant to bequeath your assets directly to these children not only because they may be unable to handle the responsibilities associated with properly managing those assets, but also because of concern for them losing their much-needed government

benefits. What to do?!

You have four options: (1) go ahead and leave your assets to these children, (2) disinherit the children altogether, (3) leave assets to a sibling or other relative with instructions to use those assets for the care of the special needs children, or (4) create a special needs trust for the benefit of these children and fund that trust with the assets you wish to leave for the children's care. For obvious reasons, options 1 and 2 are entirely unsatisfactory. But what about the viability of options 3 and 4?

Of those two options, creating a special needs trust is, by far, the best. Now, some of you may be thinking: "Why should I pay some overpriced attorney to draft a trust for my children when I can simply leave my assets to their steadfastly reliable older brother or aunt." Well, you can. But there are dangers to that strategy which you may not have contemplated.

First, there is always the danger that the older sibling or aunt you believe to be so reliable may not put the interest of your special needs children first whenever they have unfettered access to a large portion of your inherited assets such as all, or part, of your qualified retirement plans (e.g. 401K, IRA, annuity, private pension, etc.); a vehicle you've left to them to transport these children to their

various appointments; a homestead for the children to live in; a relatively large portion of cash to help with various expenses of the children's daily care; and perhaps many other assets. Those whom you think are so dependable may find the temptation of all this wealth too much and abdicate their duties to the children you love so much.

But suppose they don't! Assume that they care for your children just as much as you. Even so, leaving assets to them outright is still a dangerous gambit. Do you know what creditors that trusted relative may have? Do you understand that if you leave your resources to them outright, those resources will be subject to the claims of their creditors? Suppose that aunt you hold in such high regard has an automobile accident in which one or more persons die, and even though she did not intend to kill anyone, the accident was clearly her fault. Those assets you left her for the care of your children can be seized to pay for claims brought against her by the estate of the persons killed in the accident. This is just one of an almost uncountable list of examples illustrating how assets left outright to that trusted individual may not ever be used for what you intended.

Thus, unquestionably, the best thing to do is to

create a third-party special needs trust ("SNT") for those children and grandchildren. Drafting this type of trust, however, takes considerable expertise because the assets in the trust need to be available for the beneficiaries but not considered a "countable resource" with respect to the SSI, Medicaid, or any other public benefits regulations; otherwise, the beneficiaries — i.e., the special needs children — could be disqualified from receiving their government benefits.

An SNT established by and funded with assets of someone other than a special needs child — e.g. a parent or grandparent — is a "third-party" trust. (A trust established with a special needs child's assets, such as an inheritance or lawsuit settlement, is a "first-party" trust and is beyond the scope of this article.) Under existing law, assets contained in a properly drafted and administered third-party SNT are excluded for purposes of determining a special needs child's financial eligibility for means-tested government benefits such as SSI and Medicaid.

This type of trust, however, does not remove all the difficulties of planning for special needs children. For example, because the trustee of a third-party SNT is given complete discretion in making distributions to or for the



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benefit of those children, selecting the appropriate person or entity to serve as trustee of this type of trust is vital. Selecting the right trustee requires considering a multitude of factors such as: the trustee's health, integrity, reliability, and financial acumen; the trustee's ability to understand and anticipate the effect that trust distributions will have on the beneficiaries' means-tested government benefits; and the trustee's ability to understand and respond to the needs of the beneficiaries. Although such an important decision can seem overwhelming to families engaged in this type of planning, it is the role of the estate planning attorney drafting the trust to help guide family members' decisions in this area. Ultimately, however, it is the parents, or grandparents, funding the trust who must make this important decision.

While I'm sure the reader is contemplating the costs of creating and administering these types of trusts, there are ways to implement this type of planning strategy in a cost effective manner. Perhaps one of the best and most efficient planning techniques is for the parents to create a stand-alone SNT for the benefit

of their special needs children that is drafted in such a manner as to be able to accept gifts and inheritances from grandparents and other relatives or friends. This avoids having to prepare separate third-party SNTs for each person wishing to give or bequeath property to those children.

## Conclusion

The principal purpose of third-party created and funded SNTs is to provide an inheritance for special needs children without risking the loss of important means-tested government benefits. But even if a special needs child does not receive means-tested government benefits, a third-party SNT can protect the child from his or her disabilities, predators, and creditors. Therefore, because a third-party SNT provides flexibility and protection, it is a valuable tool parents and grandparents of special needs children should consider when preparing their estate plan.

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