

Trusts for special needs

Providing support without jeopardizing benefits

Parents and grandparents of a child with a lifelong disability, such as autism, have a special estate planning challenge. On the one hand, they want to provide the financial support that the child never may be able to provide for himself or herself. On the other hand, they want to protect the child's eligibility for the full range of government support programs, including health care.

Distributing assets outright to a special needs person is likely to result in a disqualification for government benefits. Completely disinheriting the child is not a good idea, because government benefits alone may not be enough. Giving property to other family members with the "understanding" that it will be used for the benefit of the special needs person may work for some families, but there are risks. For example, such assets will be vulnerable to creditors, including potential ex-spouses should there be a divorce.

The better course, for many families, is to establish a "third-party" special needs trust. A "first-party" special needs trust is one established for oneself, with one's own assets. The assets of first-party trusts must be used to repay state Medicaid agencies that have paid for medical services. No such requirement applies to third-party trusts that are created for others.

This is a complicated area of law, and the rules vary from state to state, so the advice of a lawyer well-versed in special needs trusts will be essential.

Funding the trust

A special needs trust has to be fit into the estate plan as a whole. Very often the parents of a special needs child will provide that child with an enhanced share of the estate. For example, if there are three children, the estate may be divided 40-30-30, or 50-25-25.

Another approach is to divide the estate equally but supplement the provision for the special needs child with a life insurance policy, perhaps a second-to-die policy if both parents are living. This can be an affordable way to be confident that the special needs trust will be funded at an adequate level for the child's entire life.

Choosing the trustee

In general, a family member should not be the sole trustee of a special needs trust. A professional trustee or a corporate trustee, such as a bank trust division or a trust company, is a better choice. The trustee will be given sole and absolute discretion in making distributions. Therefore, the trustee needs to be familiar with the legal requirements of special needs trusts and with government benefit programs. Investment management skills are a must if the trust is intended to last for many years. It's also important that the trustee be free of conflicts of interest, which someone who is a remainder beneficiary of the trust would have.

To provide guidance for the trustee, the parents should prepare a letter that explains the purposes of the trust and the needs of the child. This can cover the child's likes, dislikes, needs and preferences, and other information that will be essential to make the trust plan a success.

Special needs organizations have prepared samples of such “letters of intent” to provide a starting point for parents taking this path.

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