

## **ESTATE PLANNING AND THE FAMILY MEMBER WITH A DISABILITY**

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If you have a family member with special needs, such as a lifelong developmental, physical, or mental disability, your personal financial and legal advisors should be made aware of this. This information is crucial in developing an appropriate estate plan.

Needs-based governmental programs, such as Medicaid and Supplemental Security Income ("SSI"), are essential to persons with a disability. Persons with developmental disabilities may live in a variety of settings in their communities. They may live in a group home, an extended family situation, or relatively independently. However, in all these settings there is a services provider who is performing any combination of a number of tasks, which may include (to name a few) assisting with balancing a checkbook, grocery shopping, housekeeping, ensuring hygienic practices, and monitoring medication compliance. These services are provided as home and community-based programs, which are made available and funded through Medicaid. Even in cases where an individual may be living at home with parents, that individual is likely to be receiving services away from home during the day, such as job coaching services in employment or supervision at a workshop. Again, these services are provided and funded through a home and community-based Medicaid waiver program.

To qualify for Medicaid or SSI, an individual may not have assets exceeding a certain minimal threshold – \$4,000 for Medicaid; \$2,000 for SSI. In the event the individual directly received an inheritance exceeding these levels, the individual would be required to pay out-of-pocket for their home and community-based services until once again below the applicable limit. Fortunately, however, the individual can be the beneficiary of a certain type of trust, known as a special needs trust or a supplemental needs trust, without the trust's assets counting against the individual's eligibility. The idea is to name the trust in your will to receive the share that otherwise would have gone to the disabled individual.

The trustee of the trust will have authority to make expenditures from the trust that would be in the individual's best interests and that would enhance the individual's quality of life. The trust can be used to purchase desired goods or services which could not be paid for in any other way. For example, such trusts have been used to purchase electric-powered wheelchairs controlled by a joy stick (neither Medicare nor Medicaid will pay for advanced wheelchairs), a handicap van conversion, or assistive devices. They have also been used to buy video games, entertainment, and trips. Most other expenditures you might think would be desirable to make could be made.

The trust device is a sound, reliable way of providing for a family member with a disability. By contrast, leaving all your property to your other children with a request that the other children "take care of" the one with disabilities carries the risk that the property will be diverted to other uses. One of the other child's creditors may execute a judgment against the property, or the property might get caught up in a divorce proceeding. Or, the sibling may just decide his house renovation is more important or pressing than some

future expenditure for the sibling with the disability.

It is important to get this planning right while you are alive. It is possible for experts to divert an outright inheritance into a particular type of special needs trust after you have passed away. However, the cost for that particular type of special needs trust is that particular trust must include a provision that the State will be reimbursed for Medicaid received by the disabled individual after the individual's death. The reimbursement would take priority over distribution to other family members. By contract, a reimbursement provision is not required in a trust which you establish during your life as part of your estate plan.

The preparation of special needs trust is a specialized area of estate planning. Such trusts require certain provisions to work correctly, and many estate planning attorneys have little knowledge about them. So, make sure you find an advisor who has the requisite expertise.

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