

Practical Tips for Special Needs Planning

This month's issue of *The ElderCounselor*[™] examines the unique planning requirements of families who have loved ones with special needs. Understanding the pitfalls associated with special needs planning is a must for all who assist families with children, grandchildren or other loved ones (such as parents) with special needs.

Tip #1: Special needs beneficiaries require special planning. As a society, we have come a long way since 1987 regarding stereotyping people with special needs and these individuals' planning requirements, but there remain numerous misconceptions that often result in costly mistakes when planning for special needs beneficiaries. These misperceptions may become even more costly in the future as fiscal pressures cause state and federal governments to cut back funding for people with disabilities. Thus, it is critically important that loved ones proactively and properly plan for these individuals.

The fiscal pressures of the federal and state governments make proactive planning for special needs beneficiaries increasingly more important. It is important not to make the mistakes below that could cause special needs beneficiaries to rely exclusively on shrinking government funds, or that place them in unduly restrictive or ineffective structures.

Tip #2: Don't disinherit the special needs beneficiary. Many disabled persons receive Supplemental Security Income ("SSI"), Medicaid or other government benefits that provide basic food, shelter and/or medical care. The loved ones of the special needs beneficiaries may have been advised to disinherit them - beneficiaries who need their help most - to protect the public benefits. But these benefits rarely provide more than basic needs. And this solution (which normally involves leaving the inheritance to another sibling) does not allow loved ones to help their special needs beneficiaries after they themselves become incapacitated or die. The best solution is for loved ones to create a special needs trust to hold the inheritance of a special needs beneficiary. A properly drafted special needs trust will protect public benefits a disabled beneficiary may be receiving, and it will provide for proper care of that individual throughout their lifetime.

Tip #3: Don't rely on siblings to use their money for the benefit of a special needs beneficiary.

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Many family members rely on their other children to provide, from their own inheritances, for a child with special needs. This can be a very temporary solution, such as during a brief incapacity, if the other children are financially secure and have money to spare. However, it is not a solution that will protect a child with special needs after the death of the parents or when siblings have their own expenses and financial priorities.

For example, what if an inheriting sibling divorces or loses a lawsuit? His or her spouse (or a judgment creditor) may be entitled to half of it and will likely not care for the child with special needs. What if the sibling dies or becomes incapacitated while the child with special needs is still living? Will his or her heirs care for the child with special needs as thoughtfully and completely as the sibling did?

Siblings of a child with special needs often feel a great responsibility for that child and have felt so all of their lives. When parents provide clear instructions and a helpful structure, they lessen the burden on all their children and support a loving and involved relationship among them.

Tip #4: Procrastination can be especially costly for special needs beneficiaries. None of us know when we may die or become incapacitated. It is important for loved ones with a special needs beneficiary to plan early, just as they should for other dependents such as minor children. However, unlike most other beneficiaries, special needs beneficiaries may never be able to compensate for a failure to plan. Minor beneficiaries without special needs can obtain more resources as they reach adulthood and can work to meet essential needs, but special needs beneficiaries may never have that ability.

Tip #5: Don't ignore a special needs beneficiary when planning. Planning that is not designed with the beneficiary's special needs in mind will probably render the beneficiary ineligible for essential government benefits. A properly designed special needs trust promotes the comfort and happiness of the special needs beneficiary without sacrificing eligibility.

Special needs can include medical and dental expenses, annual independent check-ups, necessary or desirable equipment (for example, a specially equipped van), training and education, insurance, transportation and essential dietary needs. If the trust is sufficiently funded, the disabled person also can receive funds to be used for quality-of-life-enhancing expenses: the types of benefits families currently provide to their child or other special needs beneficiary. However, the rules often change on the types of expenses that can be paid for by a special needs trust. Therefore it is important to continually seek advice when drafting or administering a special needs trust.

Tip #6: A special needs trust does not have to be inflexible. Some special needs trusts are unnecessarily inflexible and generic. Although an attorney with some knowledge of the area can protect almost any trust from invalidating the beneficiary's public benefits, many trusts are not customized to the particular beneficiary's needs. Thus the beneficiary fails to receive the benefits that the parents or others provide while they were alive.

Another frequent mistake occurs when the special needs trust includes a pay-back provision rather than allowing the remainder of the trust to go to others upon the death of the special needs beneficiary. While these pay-back provisions are necessary in certain types of special needs trusts, an attorney who understands this area and knows the difference can save family members and loved ones hundreds of thousands of dollars, or more.

Tip #7: Exercise great caution in selecting a trustee. Loved ones or family members can manage the special needs trust while alive and well if they are willing to serve and have proper training and guidance. Once the family member or loved one is no longer able to serve as trustee, they can choose who will serve according to the instructions provided in the trust. Families or loved ones who create a special needs trust may choose a team of advisors and/or a professional trustee to serve. Whoever they choose, it is crucial that the trustee is financially savvy, well-organized and of course, ethical.

Tip #8: Invite others to contribute to the special needs trust. A key benefit of creating a special needs trust now is that the beneficiary's extended family and friends can make gifts to the trust or remember the trust as they plan their own estates. For example, these family members and friends can name the special needs trust as the beneficiary of their own assets in their revocable trust or will, and they can also name the special needs trust as a beneficiary of life insurance or retirement benefits. Unfortunately, many extended family members may not be aware that a trust exists, or that they could contribute money to the special needs trust now or as an inheritance later.

Tip #9: This is an ever-changing area of the law. The rules applicable to special needs trusts and planning are constantly changing. For example, the Affordable Care Act now makes private health insurance an option for people with special needs. However, private insurance will still not cover the costs of long-term care and other services or equipment necessary for a loved one with special needs. Thus, even if the family chooses private insurance, the special needs beneficiary may still require Medicaid eligibility, necessitating a special needs trust. Please contact us if you have questions about these options.

Conclusion

Planning for a special needs beneficiary requires particular care and knowledge on the part of the planning team. A properly drafted and funded special needs trust can ensure that a special needs beneficiary has sufficient assets to care for him or her, in a manner intended by loved ones, throughout the beneficiary's lifetime. Please contact us if you have any questions regarding planning for special needs beneficiaries.

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