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A Short Introduction to Special Needs Planning

Estate planning by parents who have children with disabilities involves many challenges, including the following:

- How do you leave funds for the benefit of the child without causing the child to lose important public benefits?
- How do you make sure that the funds are well managed?
- How do you make sure that your other children are not over-burdened with caring for the disabled sibling, and that any burdens fall relatively evenly among the siblings?
- What is fair in terms of distributing your estate between your disabled child and your other children?
- How do you make sure there's enough money to meet your disabled child's needs?

Often, parents of children with special needs try to resolve these issues by leaving their estates to their other children, leaving nothing to the disabled children. They have a number of reasons for this approach: The disabled child shouldn't receive anything because she can't manage money and would lose her benefits. She doesn't need any inheritance because she will be taken care of by the public benefits she receives. The other children will take care of their sister.

This approach is to be discouraged for a number of reasons. First, public benefits programs are often inadequate. They need to be supplemented with other resources. Second, both public benefits programs and individual circumstances change over time. What's working today, may not work tomorrow. Other resources need to be available, just in case. Third, relying on one's other children to take care of their siblings places an undue burden on them and can strain relations between them. It makes it unclear whether inherited money belongs to the healthy child to spend as he pleases, or whether he must set it aside for his disabled sister. If one child sets money aside, and the other doesn't, resentments can build that may split the family forever.

The better answer to many of these questions is a "Special Needs Trust." Such trusts fulfill two primary functions: The first is to manage funds for someone who may not be able to do so himself or herself due to disability. The second is to preserve the beneficiary's eligibility for public benefits, whether that be Medicaid, Supplemental Security Income (SSI), public housing, or any

other program. They come into play in a multitude of situations, including parents planning for a disabled child, a disabled individual coming into an inheritance or winning or settling a personal injury claim, or one spouse planning for a disabled spouse.

First, a short explanation of what trusts are and how they work: A trust is a form of ownership of property, whether real estate or investments, where one person – the trustee – manages such property for the benefit of someone else – the beneficiary. The trustee must follow the instructions laid out in the trust agreement as to how to spend the trust funds on the beneficiary's behalf – whether and when to distribute the trust income and principal. In general, trusts fall into two main categories: self-settled trusts that the beneficiary creates for himself with his own money and third-party trusts that one person creates and funds for the benefit of someone else.

Each situation and each benefit program has its own rules which affect the drafting, funding and administration of special needs trusts. The public benefit programs in many ways track the treatment of trusts in terms of creditor protection. Just as you generally cannot create a trust for your own benefit and protect the trust funds from creditors, you usually cannot create a trust for your own benefit and have the funds uncountable for purposes of Medicaid, SSI and other public benefits programs.

However, Medicaid and SSI have provided for "safe harbors" that permit the creation of self-settled supplemental needs trusts in certain circumstances. These are often referred to as (d)(4)(A) or "payback" trusts referring to the enabling statute and the requirement that at the death of the beneficiary the state be paid back its Medicaid expenditures on her behalf to the extent sufficient funds remain in the trust.

So-called "third-party" special needs trusts are usually created by parents and grandparents for the benefit of children and grandchildren with disabilities. These can be much more liberal than the statutory self-settled special needs trust and do not need to include a payback provision.

For more information about special needs planning in general and special needs trusts in particular, contact your special needs planner today.

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