

Estate Planning & Elder Law

Estate Planning for Families with Special Needs Children

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Estate planning is an important aspect of a family plan for any parent. However, for tax and nontax reasons, estate planning takes on even greater significance for the parent of a child with special needs.

A will allows an individual to select beneficiaries, establish the times at which beneficiaries receive the assets and choose the fiduciaries who administer the estate and any trusts created under the will. In the absence of a designated guardian under a will, the court must determine who will be guardian of the person and property of a minor child (i.e., who will raise the child). This is a decision that any parent, but especially the parent of a child with special needs, must carefully consider. Further, a will is important to ensure that assets are not placed in a child's hands before the child is responsible enough to invest and use the assets prudently.

For the parent of a child with spe-

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cial needs, a will is especially important. Leaving assets outright, or in a trust that is not a special needs trust, to a child with special needs can result in the disqualification of the child from receiving government assistance. An individual who otherwise would qualify for assistance due to a disability would be disqualified from receiving governmental benefits such as SSI and Medicaid if the child has assets in excess of \$2,000 in his or her name.

With a properly structured will, assets allocated to a special needs child can be held in a trust which does not affect the child's eligibility for these governmental benefits. The trustee of this special needs trust could be allowed to use trust income and principal to supplement but not replace benefits that are available from governmental assistance. The assets can be used for luxury items, such as travel, books and other expenses that are not provided for by Medicaid or other governmental programs. If a child moves to a new state, an attorney in that state who specializes in special needs planning should evaluate whether any special needs trust requires modification to comply with state law.

A special needs trust can be a trust created during a parent's lifetime or a trust created under the parent's will. The advantage

of establishing a lifetime trust is that the trust can be used as the recipient of gifts or bequests from the parent and grandparents. This gifting can accomplish tax planning for a family by removing value from the parents' estates.

One issue that a parent developing a plan must face is how to allocate assets among children, based on each child's needs. Factors to consider include the potential ability of each child to earn a living, the likely financial needs of each child and the assets available. A child with special needs may be less likely than other children to be self-supporting as an adult, but may also have less of a need for large sums of money, since his or her lifestyle may be modest and at least partially funded by government aid. One possible solution is to leave a specific dollar amount to a special needs trust, with the remaining assets divided among the other children. This maximizes the likelihood that the appropriate amount will be available to the child with special needs, while making sure that such child does not receive significantly more than he or she needs (thereby tying up assets until the child's death).

Thought must also be given to who is best qualified to make financial decisions on behalf of a child. The trustee (and successors) should meet three key characteristics: he or she should be someone who the parent trusts implicitly, someone who has some financial savvy and someone who has values that closely resemble those of the parent and will apply those values in making decisions on behalf of the child.

When selecting a trustee for a special needs trust, it is important to designate someone who is sensitive to the unique needs of the beneficiary.

In developing an estate plan, consideration must be given to the tax consequences of the plan. This is important so that the assets available to pass to a special needs child and other family members can be maximized.

A power of attorney allows an individual to appoint people to manage his assets and make investment decisions on his behalf. Having this document avoids the necessity of having to go to court to get someone appointed as a guardian if an individual cannot manage his or her own affairs. For a child with special needs who attains age 18 and is capable of making financial decisions for himself, it is important for this individual to have a power of attorney giving someone the power to make financial decisions on his behalf where appropriate.

It is important to consider for an adult child with special needs whether having a power of attorney is adequate or if parents should be named guardian of the child to better protect the child's interests. A power of attorney will permit parents to assist a child with his financial, investment and legal decisions but will not preclude the child from handling his own affairs. If there is a concern that the child cannot adequately manage his own affairs at all or could be taken advantage of, guardianship is important to eliminate the child's rights to handle his own financial affairs. A guardianship can be fully protective or could be limited in its scope. The guardianship process typically takes three to six months, so this should be started approximately six months before the child attains age 18.

Health care proxies serve two purposes.

First, this document asserts an individual's desire to be free from the use of life-sustaining or prolonging procedures and medications if the individual becomes irreversibly or terminally ill. Second, the health care proxy can direct a health care agent appointed to make a wide range of medical and health care decisions if the individual is unable to articulate his or her own preferences.

Again, this is an important document for all individuals, including an adult child with special needs who is capable of appointing an individual to act on his or her behalf where appropriate. To prevent a child from participating in these decisions, a guardianship proceeding is necessary.

Insurance is an important asset used in connection with an estate plan. Insurance can be used to ensure that sufficient assets are available to provide for the lifetime care of the child with special needs and to provide sufficient assets to care for any other children until they finish schooling and are able to earn a living. This is critical for a family with a child who will need sufficient assets to maintain his or her care over an extended period of time. The beneficiary of an insurance policy should be coordinated with the estate plan.

Families who do their best to protect their children with special needs often make several critical mistakes in developing their family plan, including the following:

1. Custodial accounts in a child's name will affect the child's eligibility for government assistance. Custodial accounts are often established long before the child's special needs are recognized. If such an account has assets in excess of \$2,000, the parents must deplete the account, or the assets must be allocated to a pooled trust or first-party special needs trust, in order for the child to

qualify for Medicaid assistance. Going forward, if there is a goal to allocate assets to or for the benefit of that special needs child, a special needs trust can be established by parents or other family members and gifts can be made directly to this trust account.

2. Often, parents may have worked to develop a special needs trust to which their estate plan is tied, however they forget one critical issue. Life insurance policies and retirement plan accounts pay to designated beneficiaries and do not pass under an individual's will. It is vital that parents make sure that any assets allocated to a child with special needs be allocated to such child's special needs trust. If a life insurance policy or retirement plan account is paid directly to a special needs child, the receipt of the assets will affect the child's ability to receive government assistance.

3. A discussion with extended family members who may want to benefit a special needs child is a difficult and awkward conversation for parents to have; however, the discussion is critical. Well-meaning grandparents may allocate a portion of their estate to the grandchild with special needs directly or indirectly (i.e., only if a child of theirs is not alive), and while intentions are good, the receipt of these monies could affect the grandchild's ability to receive government benefits. If the parents of a special needs child feel there are family members who might make gifts or bequests to his or her special needs child, the parents should discuss this issue with family members to make sure that they understand that to the extent that they do want to leave assets to a special needs child, the assets should be left to the special needs trust created for the benefit of that child.

Estate planning is essential for any parent, but takes on additional significance for the parent of a child with special needs. ■