

Special Needs Planning for Extended Family Members

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Estate planning for families who have a son or daughter with special needs not only includes creating the appropriate legal instruments for the nuclear family - it extends to other family members such as grandparents, aunts, uncles, brothers and sisters.

One of the primary goals in special needs planning is to direct family assets into an appropriate supplemental needs trust in order to preserve eligibility for important government benefits. Very often, well-meaning friends and relatives will make gifts and bequests for the benefit of your family member with a disability in a manner that is not effective for tax and supplemental needs planning purposes. For example, grandparents frequently want to leave property for the benefit of a grandchild with special needs. They will either leave the property to the parent of the grandchild, with the expectation that the parent will use it appropriately for the grandchild, or they will leave it directly to the grandchild. Either approach may be problematic for tax purposes since the parent would then be considered the owner of property for gift and estate tax purposes. Also, the property would be subject to claims from the parents' creditors.

Another common scenario is that grandparents and other extended family members do not amend their estate plan to accommodate for the unique needs of a grandchild, niece or nephew with special needs. The estate plan of an extended family member may inadvertently result in a loss of eligibility for important government benefits by providing for an outright bequest, a support trust with an outright distribution at a specified age, or other distribution of assets from their estate plan.

While steps can be taken to reclaim eligibility through the use of a self-settled trust in many instances, this can be a costly proposition and usually involves a potential pay-back of remaining trust assets to the state Medicaid agency upon the death of the family member with a disability.

We recommend that any family member whose estate plan may result in a distribution of assets to a family member with a disability have that plan reviewed by a competent attorney who can properly advise on what revisions, if any, may be necessary to protect the long-term interests of their family member with a disability. Any distribution for the benefit of a family member with a disability should be made into a carefully crafted supplemental needs trust. In order to make this transfer irrevocable, the supplemental needs trust receiving the assets must be irrevocable.

Please note that many estate planning instruments are intentionally created to be revocable upon signing and only become irrevocable upon amendment or upon the death of the person who created the trust. Therefore, consultation, if possible, with an experienced attorney should occur prior to transferring assets into a supplemental needs trust in order to avoid potential adverse tax or other undesirable consequences.

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