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Special Needs Trusts: Special legal considerations for the family and personal injury & divorce attorneys when there is an individual with disabilities



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The Use of Special Needs Trusts in Estate Planning

Most parents want to leave assets to their children when they die. If an individual with a significant cognitive disability receives assets, they may not have the capacity to make good decisions about how those assets are used and they may become ineligible for important federal and state resources and services. The individual can lose Social Security Income (SSI) and Medicaid and the assets may also be subject to recoupment by Medicaid or by the State if the individual is receiving residential services.

Upon realizing this, parents decide to disinherit the child with disabilities, leaving everything to the non-disabled children with verbal instructions to use part of the inheritance for the benefit of the sibling with disabilities. While this may appear to be a good idea, it can have equally negative results.

For example, the non-disabled child may not use the inheritance on their sibling's behalf, and is under no legal obligation to do so. Even if the non-disabled sibling uses the assets exactly as the parents intended, they can be claimed by creditors, can have negative tax consequences on the non-disabled sibling, and can be subject to equitable distribution in the event of divorce.

To avoid these negative consequences, it is recommended that parents establish a special needs trust. A special needs trust can protect the assets while; at the same time, making the assets available to protect and enrich the life of the person with a disability without jeopardizing benefits available from the government. A special needs trust is a unique legal document that contains a set of instructions describing how assets placed into trust will be administered on behalf of a person with a disability. It must be carefully worded and is best written by professionals familiar with disability services and programs.

Parents and other family members can use a special needs trust to hold assets for a disabled person. Even families with modest assets should establish a trust; typically, such trusts are not funded until one or both parents die. A special needs trust can be funded through life insurance or estate assets distributed through one's Will. So long as the assets have never vested in the person with a disability, the special needs trust need not contain a provision reimbursing Medicaid and other providers.

Trust funds can be used to purchase independent professional opinions as necessary, fill in gaps in services, provide additional recreation and other amenities, pay for a private residential placement or buy a vehicle used to transport the beneficiary of the trust.

At the death of the beneficiary, any remaining trust property is disposed according to the instructions written in the trust document by the donor. For example, property might go to other family members or to a charity. Slovak Baron & Empey, LLP frequently works with families to establish special needs trusts as part of their estate plan.

The governing regulations for special needs trusts can be found at 42 U.S.C. § 1396p.

Using Settlement Proceeds to Fund a Special Needs Trust

When an individual with disabilities receives a settlement in a personal injury case due to medical malpractice, personal injury, an automobile accident, and similar events, care must be taken at the time of the settlement to protect that individual's eligibility for government benefits such as SSI and Medicaid. Many important government benefits have economic means tests – meaning, in order to be eligible, one must have assets no greater than \$2,000 and income below a specified amount. Accordingly, unrestricted access to settlement funds can cause an individual to be ineligible for these very important benefits.

Many individuals with disabilities require care and services throughout their lifetime and the costs of those services can often quickly deplete even a large settlement award. Therefore, it is prudent to conserve settlement funds in a manner that will provide benefit to the individual with disabilities while ensuring that the funds do not negatively affect eligibility for governmental benefits. In order to accomplish this goal, settlement proceeds must be placed into a special needs trust. Federal law permits placement of settlement proceeds into a special needs trust that is for the sole benefit of the individual with disabilities. Such trusts are referred to as "self-settled" trusts because they are funded with the disabled individual's own funds. They also are referred to as "OBRA '93" trusts, after the federal law that permits their creation.

By placing settlement funds into a properly drafted special needs trust, those funds will be available to supplement government benefits and enhance the quality of life for the individual with disabilities.

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There are specific requirements for self-settled special needs trusts that are not imposed on trusts funded by third parties as part of an estate plan. For example, unlike special needs trusts set up by parents as part of their estate plan, self-settled trusts must have a “payback provision” providing that on the death of the beneficiary of the trust the state Medicaid agency will receive all amounts remaining in the trust up to the amount of assistance provided. The requirements for self-settled trusts are complicated and; therefore, it is critical that the personal injury attorney consult with a special needs attorney who has expertise in drafting and administering self-settled trusts in order to assure that the trust protects eligibility for important government programs. Slovak Baron & Empey, LLP frequently works with personal injury and medical malpractice attorneys and families to establish self-settled trusts.

When Divorce Occurs

Divorce presents many challenges, especially for couples with children. Parents often strive to put individual differences aside and make decisions that are in the best interests of their children. When one or more of those children have disabilities, this is of critical importance. Careful planning and consideration must go into divorce and custody agreements in order to protect the interests of the child, maximize access to vital disability-based services and supports, and preserve publicly-funded disability benefits. Parents and attorneys must carefully consider the needs of the child with disabilities, and

reflect those considerations in the language of any agreements that are signed by the parents or submitted to the court. The following are important issues to consider during this process:

Child Support – In most divorce situations, child support is required; however, where improperly structured, child support can cause a child with disabilities to be ineligible for SSI and Medicaid benefits. The Social Security Administration considers child support “unearned income” and counts 2/3rds of child support payments as income when determining eligibility for SSI and Medicaid. It is, therefore, recommended that the divorce agreement direct child support be paid into a special needs trust for the benefit of the child with disabilities. This trust is separate and different from any special needs trust created as part of either of the parents’ estate plan. Specialized legal consultation can help ensure that the trust is established and funded in a way that will preserve future benefits.

Life Insurance & Disability Policies – It is quite common in a divorce agreement that one or both parties are required to maintain life insurance for the benefit of the child. While well-intentioned, when improperly planned, this can also cause future eligibility problems for SSI and Medicaid if the child with disabilities is listed as a beneficiary. To avoid this problem, insurance beneficiary designations must be carefully structured to direct the child with disabilities’ share to a special needs trust created as part of one or both of the parents’ estate plan.

Estate Planning & Special Needs Trusts –

Often, well-meaning family members plan to leave money to a child with a disability. Doing so, however, can have devastating consequences. It is, therefore, advisable that each party agree not to direct Will bequests or make any beneficiary designation to the child with disabilities; but, rather, to a special needs trust created as part of one or both of the parents’ estate plans.

With careful planning and consideration, a divorce does not need to limit or disrupt services to a child with disabilities. Parents of a child with disabilities in a divorce situation are encouraged to share this information with their attorneys so that the interests of their child are protected in the process. Slovak Baron & Empey, LLP has years of experience helping families and routinely advise parents, family law attorneys, and the courts on these important matters in order to improve the quality of life for individuals with disabilities.

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