

Estate Planning Considerations
The Special Needs Trust

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Social Security's Supplemental Security Income Program (SSI), Medicaid, and other "means-tested" government benefits often constitute all or a majority of the resources available to a special needs adult. Parents who have a special needs child nearing the age of adulthood must exercise extra attention to their estate plans. One of the most pressing concerns for parents with a disabled child is how to continue the type of care that has been provided by the child's parents when they are no longer able or available to provide that care. According to a Lifeinsurance.com article, MetLife Special Needs Planning conducted a survey and found that sixty percent of parents who cared for a child with a disability did not expect that child could live independently once they reached adulthood. Eighty-eight percent of those parents did not establish a trust for their child. A special needs trust is a legal vehicle to address planning concerns by ensuring a special needs individual will continue to have an enriching and comfortable life while also maintaining their eligibility for public benefits.

Various estate planning techniques exist to provide for a special needs child; however, the special needs trust is typically the central document for parents to consider. The special needs trust is a supplemental trust designed to manage assets placed in trust for the special needs child who is the beneficiary of the trust. The special needs trust is structured to provide additional care and resources while not jeopardizing the governmental resources the adult-child receives. Special needs trusts must be established by either a court, a parent, a grand-parent, or legal guardian for the sole benefit of a disabled individual.

There are two broad types of special needs trusts: self-settled special needs trusts (also referred to as first person trusts) and third-party special needs trusts. Self-settled trusts consist of assets of a disabled individual under the age of sixty-five that are established from the assets of the disabled individual. A self-settled trust requires a "payback" provision. The payback provision states that remaining funds in the trust after the death of the beneficiary will be used to repay the state Medicaid agency for the assistance provided to the disabled individual during his or her life. Third-party special needs trusts are funded with the assets of someone other than the disabled individual. Third-party trusts, , can be either inter vivos trusts, created during the life of the person who establishes the trust for the disabled person. , Alternatively, testamentary trusts are created through a Will of a third person and take effect upon funding after that third person's death. If any individual, whether family member or otherwise, make gifts to the special needs child to an inter vivos trust provides that those gifts do not affect the child's eligibility for SSI and Medicaid. Additionally, third-party funded trusts are exempt from the payback requirement of self-settled trusts. This feature makes the third-party trust attractive to parents who have both disabled and non-disabled children because any remaining funds can be designated to pass to other non-disabled heirs.

Special needs trust must be carefully structured when considering the level of discretion granted to the trustee as well as how the use of the trust assets will be used for the beneficiary. For example, if the special needs trust paid for basic repairs in the beneficiary's home or car, that cost is considered a resource that covers the necessary daily needs of living that should be provided under needs or means based programs such as Social Security Supplemental Income or Medicaid. In broad terms, the key consideration for a special needs trust providing distributions for the beneficiary is the trust should be used for non-necessary items. Supplemental trusts could cover, for example, expenses such as transportation, personal hobbies the beneficiary likes to engage in, entertainment, or other medical expenses beyond those covered by Medicaid.

The choice of an individual or an institution to be the trustee of the special needs trust is one of the most important decisions a family will make because the proposed trustee will have absolute

discretion over the trust, including distributions from the trust. Designating a family member to be a trustee of a special needs trust can be a burdensome role. The trustee must assume fiduciary duties that assure the proper investment of assets and administrative tasks. The requirements imposed on the trustee of a special needs trust are further complicated by the constant requirement to avoid distributions that might disqualify the beneficiary from needs-based benefits. Constant attention to federal and state regulations is required. A corporate trustee or a lawyer with expertise in these types of trusts should be considered as an option to ensure the trust will be handled with professional care. A family might prefer that a parent or family relative appointed as guardian serve as the trustee to assure there is someone personally connected who understands the special needs of the beneficiary. A parent, who created the special needs trust could start as the trustee and then designate a corporate trustee as a successor (replacement) trustee. Special needs trust provisions can direct the trustee, consult with an attorney with expertise in public benefits and trust law to review the actions of the trustee and address any questions or concerns of the trustee. Parents or Guardians should also draft a letter of intent to assist the trustee and future caregivers as to the special needs beneficiary's daily needs and instructions to ensure the special needs child receives proper care.

Parents or guardians should consult with their investment advisor, accountant and lawyer to determine appropriate levels of funding levels for the trust to assure sufficient lifetime care for the child. The team of professionals should work with the parent or guardian and review current and future budgets considering amounts paid by the parents from their own funds as well as estimating the monthly expenses private and public programs may provide.

There are various sources that can fund a special needs trust. Special needs trusts can be funded by transferring savings and other investments into the trust that can include real estate. A special needs trust can also be designated as a beneficiary of a retirement account. Recently, the House of Representatives overwhelmingly passed The Setting Every Community Up For Retirement Act (SECURE Act), which is pending passage in the Senate. The Act would change the post-death Required Minimum Distribution (RMD) rules for inherited retirement accounts (IRAs) and other defined contribution retirement plans. Instead of the designated beneficiary being able to withdraw plan assets over the life expectancy of the designated beneficiary, withdrawals must be withdrawn over a 10-year period after the death of the plan participant. However, the Act makes an exception to this 10-year rule where those with disabilities and chronic illness will continue to receive life expectancy distributions. In the alternative, a retirement account could be liquidated and distributed in its entirety to the special needs trust. This option would eliminate the use of RMDs; however, the deposit of the lump sum in the special needs trust would result in income taxation of the full amount distributed at significantly higher income tax consequences than those imposed on an individual receiving a lump sum distribution. Stretching out the IRA distributions over the disabled beneficiary's lifetime is a highly effective estate planning and tax strategy because it ensures the longevity of a steady stream of financial income for the beneficiary. This technique also spreads the taxable income the special needs trust will receive from the IRA over several years, as opposed to one lump sum, thereby lowering income taxes. Our firm will continue to monitor this legislation as the SECURE Act moves through the legislative process.

Creating a special needs trust is a complex process. Legal and financial professionals, working as a team, can help to create a trust that meets the needs of the special needs beneficiary while assuring peace of mind to parents that have integrated this into their permanent estate plan.