

Planning for Children with Special Needs

Parents of children with special needs face a particularly difficult planning choice -- to provide for the child without regard to public benefits, or plan with preservation of public benefits in mind. Generally speaking, those public benefits available for the support of a special needs child are "resource tested," which means that a recipient may not qualify for benefits if he or she has resources beyond that allowed by law. As you might well imagine, the resource limitations are very small. Parents are often most concerned about preserving the medical benefits provided through the federal Medicaid system as administered by each state.



Without those benefits the cost of caring for a special needs child through his or her life can be very expensive.

There are basically five options:

Disinheritance. There is no requirement that you include a child in your will or trust. If you have limited resources, you may find that disinheriting your child, as emotionally painful as that may be, is your best option. If the child has no resources available, then benefits such as Supplemental Security Income (SSI) and Medicaid will be available.

Informal Trust: Some parents choose to leave a gift to another family member and rely on the moral obligation of that person to care for the special needs child. Although such an arrangement would not disqualify the special child from receiving benefits, that moral obligation cannot be enforced. Therefore, the recipient of the gift may either deliberately ignore your wishes or circumstances may make it impossible for that person to carry out your wishes. What would happen, for example, if that trusted person predeceased your special needs child? This is not a recommended approach.

Pooled Funds. Some non-profit associations have established pooled funds, sometimes referred to as pooled trusts, for the care of special needs individuals. These are not considered available resources and, therefore, do not preclude receipt of public benefits. However, if there are funds remaining at the death of the child in his or her account, they must either be used for the benefit of other fund beneficiaries or used to repay the state for any medical benefits paid on behalf of the child. Most parents prefer that funds left at the death of the special needs child be distributed to other family members.

Support Trust. You may establish a trust for the benefit of your child. However, if the trust requires the trustee to make payments for the child's support, the child will be disqualified from receiving SSI and Medicaid. Therefore, unless the trust is of sufficient size to provide for all of the child's needs (including medical care) through his or her lifetime, you should consider another alternative.

Special Needs Trust. For most parents, this type of trust is the most effective way of providing for their special needs child. It is a trust designed to supplement, but not replace, the public benefits to which your special needs child will be entitled. To be effective, it is very important that the trust be properly drafted and should be done with the assistance of a qualified attorney. Specifically, the trust must provide that the trustee *may*, but is not *required*, to provide assistance to the child. The trust should not give the child more income or resources than the child is permitted to have to qualify for public benefits. We recommend that (1) the trust have a "poison

pill” clause which permits the trustee to terminate the trust if its existence would have the effect of disqualifying the child for public benefits, and (2) that the trustee be authorized to amend the trust as necessary to comply with changes in the law.

You may create a special needs trust during your life. Or, you may create it at your death by a will or revocable living trust. If you fund a trust during your life, contributions to the trust will be subject to gift tax. Alternatively, if you fund a special needs trust at your death, it will be included in your taxable estate.

The selection of a trustee is very important. A bank or trust company is an option. But, if the trust is small, the fees charged are likely to be too much for the trust to bear. Perhaps more importantly, few parents are willing to have their special needs child in the hands of an 800 number which reaches the trust officer of the day.

A family member is perhaps a better choice. However, it is important to make certain that whomever you choose is willing to serve. And, it’s important to name one or more back-up trustees, all of whom have indicated a willingness to serve.

Virginia Fiduciary, PLC, will act as trustee of special needs trusts in appropriate circumstances.

It is not only important to have the right kind of trust, but careful consideration as to how that trust will be funded is equally as important. The funding must be in line with the child’s needs. Remember, the trust can only augment public benefits and cannot allow the trust to pay for those things which the public benefits are meant to cover such as medical and basic care and support. Therefore, it is not necessary to over-fund the trust. Likewise, if you have insufficient resources to adequately fund the trust, you should consider life insurance.

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Since you can’t speak for your child after your death or disability, it’s a good idea to leave instructions regarding your child’s special needs and ongoing care, including residential placement, education, religion, final arrangements, and any other information which will be important to those who will care for your special needs child after you can no longer do so.