

Third-Party Special Needs Trusts: Caring for Children with Disabilities

We are all aware of the importance of getting our financial and legal affairs in order. For parents of children with disabilities, the importance of doing advance planning is magnified. There are a myriad of issues facing parents of children with special needs. Perhaps one of the biggest concerns is how to provide for their child when the parents are no longer around. While there is no perfect replacement for parents' love and care, some planning methods are better than others.

Consider John and Sally's family: John and Sally have three adult children: Charlie, Emily and Sam. Charlie and Emily are independent and doing well. Sam, age 37, has a developmental disability and is living with John and Sally. Caring for Sam is very important to John and Sally. They understand that Sam will never be able to live independently or support himself. He will need a home, income and a support system provided for him for the rest of his life.

Without appropriate estate planning, Sam will inherit from his parents. Since Sam is not able to manage financial assets, this would most likely require the court appointment of a guardian or conservator (the language varies from state to state). The guardian or conservator, in turn, would have to request court permission for distributions to be made for the benefit of Sam and account to the court each year. In addition, the assets that Sam receives would prevent him from obtaining certain types of governmental assistance benefits (particularly SSI and Medicaid) without the assets first being spent down on the cost of his care. The area of governmental benefit programs is complex, as Sam may be entitled to services or cash from more than one program, with each program having its own eligibility and reporting requirements.

John and Sally are considering estate planning. They are thinking of leaving all their assets to Charlie and Emily since they have promised to take care of Sam. Is this a good solution? Actually, this solution has serious problems. No assets are legally protected for Sam and he may live a long time. Charlie and Emily may not live up to their commitment. This could happen with the best of intentions should Charlie or Emily have financial problems, become disabled themselves, get divorced or die. Sam's security is imperiled.

Enter the special needs trust: One good solution for John and Sally's situation might be the creation of a third-party special needs trust (also known as a supplemental needs trust) for Sam. This could be either a trust created under a will (a testamentary trust) or an inter-vivos (living) trust drafted specifically for this purpose, or even a special set of provisions in the trust that John and Sally are considering for their own assets. A plan with such a trust does not rely on the moral commitments of others to be successful. The term "third-party" special needs trust means that the assets used to fund the trust do not belong to Sam; they are assets of a "third-party." In this case the assets used to fund the trust may be assets of John and Sally. Also, the assets of a third-party special needs trust will not have to be used to repay Medicaid for medical assistance Sam receives.

In many cases parents such as John and Sally do not have sufficient assets to meet their child's needs after the parents are gone. One of the best ways to address this concern is with life insurance. By purchasing life insurance, the parents can create a pool of money to fund the special needs trust, which will ensure the highest quality of life for Sam.

Sam's special needs trust would be designed to hold his inheritance. It needs to be carefully drafted so that the assets in the trust can be used to enhance Sam's lifestyle but not cause him to lose his needs-based benefits. If an intended beneficiary has a disability and is not capable of managing his or her own money, then this beneficiary may also be supported in the community through a variety of means-tested entitlement programs, such as Supplemental Security Income (SSI) and Medicaid. In most of these means-tested programs, the beneficiary's receipt of funds will terminate the beneficiary's participation in the program. Special needs trusts can allow the beneficiary to maintain eligibility for most means-tested programs, while still allowing the trustee to access trust funds to pay for goods and services that enhance the quality of the beneficiary's life.

For example, the state Medicaid system may pay very little in the way of dental care; however, the funds in the trust set up by John and Sally can be used to pay for Sam's dental care. Funds can also be made available to take Sam on a trip to Disneyland, Disney World, or on similar quality-of-life excursions. Neither of these types of distributions will reduce Sam's needs-based benefits.

The stand-alone special needs trust is an especially good idea if there are other family members or friends who want to gift or bequeath assets for Sam's benefit. They can be provided with the information on how to transfer assets to the stand-alone special needs trust. This type of trust can be created by anyone for anyone else. Grandparents can set up a trust for grandchildren. A sibling can set up a trust for another sibling. A child can set up a trust for a parent. A friend can create a trust for another friend.

Of course, there is no one perfect solution that works just right for each and every situation. It is important to remember that in creating a third-party special needs trust; you must make sure that it conforms to the applicable laws where the trust is created, and also where the beneficiary resides. But use of a well-crafted special needs trust can help maintain maximum flexibility to improve the quality of life of the child with special needs.

For expert help with special needs planning for a family member with a disability, contact us at 866-ELDERLAW or through the website of the Special Needs Alliance, www.specialneedsalliance.com.