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SPECIAL NEEDS PLANNING (& TRUSTS)

By
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What is "Special Needs Planning"?

Special Needs Planning is the legal area concerned with planning to benefit someone who is disabled or incapacitated due to physical, emotional, or mental needs or conditions (the "Beneficiary"). A primary goal of Special Needs Planning is to design and build an effective structure and plan for the long-term care and well-being of a Beneficiary.

A Beneficiary is often unable to manage assets or income. Or, the receipt of assets or income by the Beneficiary may very well jeopardize the Beneficiary's financial eligibility for important means-tested governmental benefits, like Supplemental Security Income (SSI) or Medicaid.

There are ways to navigate through the complicated maze of federal and state rules and regulations and protect and provide for a Beneficiary while preserving governmental benefits. There are also ways to use legal documents to effectively handle and manage the assets and income of a Beneficiary.

People who want to give assets to a Beneficiary, or people who are responsible for taking care of a Beneficiary, are urged to explore the options available to help a Beneficiary to the fullest extent, while maximizing the benefits, assets, and income that are available to a Beneficiary. Failure to do so can result in the depletion of assets as well as the loss of useful governmental benefits. It can also result in the breach of a legal representative's duties in caring for a Beneficiary.

Likewise, professional advisors are encouraged to learn how to identify special needs issues and what to do when the needs are present.

Please remember -- There are effective ways to avoid COSTLY MISTAKES when planning for a Beneficiary.

What Are the Goals of Special Needs Planning?

With Special Needs Planning (including a Special Needs Trust), you may be able to achieve one or more of the following goals:

- Provide solutions and peace of mind where there are often problems and difficult circumstances.
- Provide for effective handling and management of the Beneficiary's assets and income.
- Preserve and maintain eligibility for governmental benefits for the Beneficiary.
- Enhance the Beneficiary's quality of life through lifecare planning.
- Maximize and preserve the private support available to the Beneficiary.
- Avoid guardianship or conservatorship of the Beneficiary.
- Maintain as much control as possible over assets made available for the benefit of the Beneficiary.
- Reduce the burden and responsibilities of other family members or heirs for the care of the Beneficiary.
- Provide for efficient disposition of remaining assets at the Beneficiary's death.

What Are Typical Situations for Special Needs Planning?

Special needs situations often involve planning to use assets provided by someone else for the benefit of a Beneficiary or planning to use a Beneficiary's own assets for the Beneficiary's care.

The first situation can be referred to as *planning with other people's money*. The **second situation** can be referred to as *planning with the Beneficiary's own money*. Although this is a basic distinction, it is extremely important.

Example of planning with other people's money: The parents of Mary, a child who has special needs, may want to leave assets at their deaths to be used for Mary's benefit. Assume that Mary receives SSI and Medicaid. If the parents leave the assets outright to Mary, she could have excessive resources and lose her eligibility for SSI and Medicaid. Also, Mary is unable to manage the assets and use them properly. A guardianship or conservatorship may even be required. The worst case scenario is that the assets must be spent and depleted before Mary is once again eligible for the governmental benefits.

A solution would be for the parents to create a supplemental needs trust which would receive the fund and which would be managed by a trustee for Mary's benefit. (A supplemental needs trust is a type of special needs trust.) The trustee would be given the discretion to use the trust fund for the supplemental needs of Mary, that is, those needs not otherwise met by SSI and Medicaid. Thus, Mary would receive the benefits from the governmental programs as well as the supplemental benefits provided by the trust fund.

At Mary's death, the remainder of the trust fund could be distributed to persons selected in advance by her parents.

Example of planning with the Beneficiary's own money: Jim, an adult under the age of 65, is severely injured in a car accident. As a result, Jim is permanently disabled, and needs Medicaid to pay for his long-term medical care.

Jim's legal representative files an Oklahoma lawsuit against the negligent driver. The case is about to settle with the negligent driver's insurance company agreeing to pay \$500,000 as damages.

If Jim receives the settlement award outright, he will be ineligible for Medicaid because he has excessive assets. However, if the court creates a certain type of trust for Jim under very specific Oklahoma Medicaid laws and regulations, and the trust is funded with the settlement award after paying certain debts, Jim may still be eligible for Medicaid benefits and obtain the use of the settlement award to pay his for special needs. One primary requirement, however, is that at Jim's death, the State of Oklahoma Medicaid Program must be paid back from the remaining assets in the trust to the extent that Medicaid benefits were paid for Jim. This is known as a "(d)(4)(A) trust."

As you can see, there are valuable planning opportunities in both of these types of situation. However, there are basic differences in the laws and rules that must be applied very carefully.

What Should You Do in Special Needs Situations?

The first step is to proceed cautiously. Taking action merely for the purpose of getting something done right away usually results in greater, if not irreversible, problems.

The second step is to look at the situation as one of opportunity. Learn as much as possible about the needs of the Beneficiary and the benefits and resources available to the Beneficiary.

The third step is to find an attorney qualified to advise you in the area of Special Needs Planning and eligibility for governmental benefits. Be inquisitive and selective in this respect. Find someone with the "know how" and with whom you feel comfortable working.

Plaintiffs' attorneys are especially urged to seek the counsel of a qualified attorney when dealing with an injured client who may be eligible for or is already receiving governmental

benefits. It is important that they even do this prior to the completion of a settlement as they consider other issues, such as taxes, structured settlement possibilities, and resolution of any Medicaid, Medicare, or other liens.

Conclusion

Special Needs Planning is a unique area of law and requires careful application as well as consideration of other important issues, including tax-related matters. Although there can never be any guarantees or complete certainty in such a complex and often-changing area of law, techniques and options exist which are extremely helpful to many individuals in special needs situations.

We are privileged to be able to help clients with Special Needs Planning, including preparing Oklahoma Special Needs Trusts.

We hope that this paper provides you with useful information with respect to Special Needs Planning and that you will Contact Us if you ever need any help with a special needs situation.

Thank you,

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