



ESTATE PLANNING FOR SPECIAL NEEDS CHILDREN FACT SHEET



1. Purpose. To provide special needs families basic information regarding estate planning considerations either in preparation for, or as a supplementation to consultation with an attorney.

2. References.

a. Omnibus Budget Reconciliation Act of 1993 ("OBRA 93"), 42 U.S.C. §§ 1382b(e)(5), 42 U.S.C.A. § 1396p(d)(4).

b. Sebastian V. Grassi, Jr., *Special Needs Requires Special Attention: Estate Planning for a Family with a Special Needs Child*, 43 INST. ON EST. PLAN. ¶ 907 (2009).

3. Discussion.

a. In preparing for the future needs of your child with a disability, you must first determine your goals for the child and what living arrangements you want for your child during adulthood. You should make a conservative assessment regarding whether you expect that your child will continue to require lifetime care or oversight to manage his personal affairs. For purposes of this information paper, it is assumed that your special needs child is not capable of living autonomously.

b. Even if you want to support your special needs child for the child's entire life, this arrangement may not be feasible financially or practically with expected life spans even for children with disabilities expanding with advancements in medical care. Although planning for your death and your child's adult years may be difficult or even depressing, delaying this process is fraught with risk to our child. The alternative to full parental support is public assistance programs such as Medicaid and Supplemental Security Income (SSI). Receipt of public benefits contingent on the applicant having total assets of less than \$2,000, however. Should you fail to take action to ensure your child will not inherit assets or property directly from you so as to jeopardize receipt of public benefits, you may significantly compromise and impoverish your child's quality of life.

c. Establishing an estate plan for your special needs child requires careful consideration of your goals, resources, and consultation with an attorney. Nevertheless and as a starting point for consideration or consultation, listed below are four potential estate planning options.

(1) Giving assets directly to the special needs child. This option is not recommended because receiving the assets would likely disqualify the child from public benefits. Be advised that your failure to "choose" an estate planning option would likely result by default in the execution of this option. In other words, should you fail to

establish an alternate estate plan, upon your death your child would likely inherit property from you outright under state law.

(2) Disinheriting the special needs child by specifically excluding him by name in your will. Although this arrangement might maintain your child's financial eligibility for Medicaid and SSI, it is not recommended. First, disinheriting your child would render him dependent on Medicaid and SSI for all support needs. Second, your child would have nothing to fall back on should government benefits later be reduced or eliminated.

(3) Distributing property by your will to a relative or friend with the expectation or "understanding" that the property will be used for the special needs child, whom you have excluded by name in your will. As appealing as this option might appear because it is simpler than a trust, it is also not recommended. First, the arrangement would not be legally enforceable. You would have no way to insure that the recipient of the property would fulfill your wishes after you die; the recipient would be the legal owner of the property and could sell or squander the assets as the recipient desires. Second, even assuming the recipient desires to give effect to your wishes to use the property for your child, the assets might nevertheless be taken ("seized") by the recipient's creditors or ex-spouse.

(4) Establishing a Special Needs Trust (SNT) either through your will ("testamentary"), or during your lifetime ("inter vivos"). Establishing a SNT is highly recommended because the funds in the trust would not be counted as assets of the child so that the child could continue to receive Medicaid and SSI for basic support needs. The SNT is designed to supplement but not replace the proceeds provided by Medicaid and SSI. Consequently, the law requires that the proceeds from the SNT cannot be used for the child's food, shelter and clothing because these benefits are provided by Medicaid and SSI. Nevertheless, money from the trust can be used for things that may improve the child's quality of life including such items as recreation and transportation, telephone and television services, mobility aids, prescription medications, and periodic outings and vacations.

If you have any questions regarding estate planning for special needs children, you should call the Fort Benning Legal Assistance Office at 706-545-3281/3282 to meet with an attorney.



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