

# Use a Special Needs Trust to Protect Your Loved One with a Disability

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Nearly one in ten people in the United States copes with special needs that exist as a result of a disability. In other words, approximately 25 million people suffer from or care for someone suffering from a wide range of disabilities including autism, down syndrome, traumatic brain injury, and a variety of mental illnesses. All families should create estate plans to protect their loved ones from the expensive and often long process of probate, but for families dealing with special needs, it is even more important. Individuals who receive government and other restricted benefits and services may lose those benefits if they receive an inheritance. For this reason, proper planning is essential.

When families are planning for the future, they should be aware that while the services available through government programs may be substantial (e.g. medical coverage through Medicaid), the actual cash benefits are generally quite small and oftentimes force the individual with a disability to live below the poverty level. Currently, most people with disabilities in the U.S. live at 60 percent of the poverty level. The maximum Federal SSI monthly payment is just under \$512 for an individual living independently. This means that for an individual with a disability to have any type of meaningful lifestyle, family or local charities must provide supplemental assistance. Government benefit programs do permit the family to provide some supplementary income and resources to the person with a disability. However, the government regulations are very strict, and they are carefully monitored.

You can disinherit a family member with a disability or leave a morally obligated gift to another family member to provide for the person with a disability. The problem with these strategies is that no matter how good the intentions of others – life happens. The family member might get sued or divorced or otherwise lose the money. If this happens or if you disinherit your loved one, they may not have the funds needed to pay for living expenses not covered by his or her benefits.

The best way to ensure that a disabled family member will be provided for after you are gone is to create a Special Needs Trust (SNT). The SNT manages resources while maintaining the individual's eligibility for public assistance benefits. How is this done? Simply put, the family leaves whatever resources it deems appropriate to the SNT, which is managed by a trustee on behalf of the person with the disability. While government agencies recognize SNTs, they have imposed some very stringent rules and regulations upon them. This is why it is vital that any family contemplating using a SNT consult a qualified estate planning or elder law attorney who is knowledgeable about SNTs and government benefits. One wrong word or phrase can make the difference between an inheritance that really benefits the person with a disability, and one that causes the person to lose access to a wide range of needed services and assistance.

As an illustration, suppose that the trust instructed the trustee to pay the person with the disability \$100 a month for life. Such a mandatory income provision might jeopardize government benefit programs, which only allow the person with a disability to have \$70 of income each month without a reduction in benefits.

The first thing that may come to mind for families who have had experience with government benefits is that the government says that a person with a disability cannot have a trust. This is correct. However, the person with the disability does not own the SNT. The trust is established and administered by someone else. The person with special needs is nominated as a beneficiary of the SNT and usually the only one who receives the benefits. Furthermore, the trustee is given the absolute discretion to determine when and how much the beneficiary should receive.

Given the government's stringent requirements, it is critical that the trust be carefully worded and shows clearly that the trust:

- Is established by a person other than the person with the disability.
- Is managed by a trustee (and successor trustees) other than the person with the disability.
- Gives the trustee the absolute discretion to provide whatever assistance is required.
- Should never give the person with the disability more income or resources than permitted by the government.
- Must be used for supplementary purposes only (should add to the things provided by the government benefit program, not supplant them).
- State that public benefits be used to cover essentials – food, medical care, housing, etc.
- Defines what is meant by supplementary/special needs in general terms, as well as in specific terms related to the unique needs of the person with the disability.
- Provides instructions for the person's final arrangements (family should assume that when the individual with the disability dies, no relatives will be alive who know what the creators of the trust would have wanted).
- Determines who should receive the remainder of the trust after the individual with the disability dies.
- Provides choices for successor trustees – people or organizations that will take a personal interest in the welfare of the person with the disability.
- Protects the trust against creditors or government agencies trying to obtain funds to pay for debts of the person or the family.
- Is a back up to all other supports and services.

It is important to know, while the majority of public assistance funds come from the federal government (which provides guidelines for SNTs), it is the responsibility of each state government to regulate trusts and administer the federal benefits. As long as the federal guidelines are followed to the letter, the state will accept the SNT, and the trust will fulfill its function.

Special needs planning is not something to take lightly. Many families may think that they have a plan in place that will provide for their loved one with a disability, but if that plan does not include a SNT, it may not provide the protection they need. Families may find the task of planning for someone with a disability daunting, but with the help of qualified professionals, this important task can be completed effectively with a minimum amount of stress. When you are looking for an estate planning or elder law attorney to help you through this process be sure they have experience

working with special needs planning. You should feel comfortable and confident that you have chosen someone who can help you take care of this very important planning.

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