

Making A Case For Maryland Special Needs Trust

A parent of a child with special needs lives with very real obstacles and challenges. Thoughtful deliberation and extensive research, combined with insight and guidance from trusted professionals and advisors, are essential to developing an effective estate plan that provides adequately for the future of a special needs child.

Conceptually, the goal is to provide for that child in a manner which does not adversely affect his or her qualification for the common means-tested benefits such as Supplemental Social Security Income (SSI), Medical Assistance or Medicaid (MA) and/or housing subsidies. The last thing a parent wants is for the contemplated distribution of assets to a child to render him or her ineligible for the all-important government support.

Is the only solution for a parent to disinherit a special needs child and distribute assets to other family members who promise to provide for that child's support?

The simple answer to a complex question is No!

It is possible to structure a distribution of assets in an estate plan to a child to supplement rather than supplant government benefits to which a child may be entitled using a trust under Md. Code Ann. Trusts & Estates §14-401 et seq., the Maryland Discretionary Trust Act (Acts 1994, c.418 § 1, eff. Oct. 1, 1994). The Act allows funds of a third party, including a parent or guardian, to be contributed and set aside in a discretionary trust for the special needs of a person with disabilities without losing means-tested government benefits - and provided the trust cannot receive or own any property in which the beneficiary has any interest.

In drafting a trust under the Act, it is essential that the Trustee be given sole discretion over the trust expenditures for food, shelter, utilities and transportation. Md. Code Ann. Trusts & Estates §14-402(b) (3) specifically provides that "a trust may be used to assure that trust property is available to provide for the needs of the beneficiary to the extent not provided for by other sources, including public and private benefit programs for which the beneficiary would or might be eligible if the trust did not exist." A properly-drafted trust may ensure that the trust assets are not considered an available resource for purposes of qualifying the beneficiary for means-tested benefits, and unlike an outright gift or inheritance, would not preclude eligibility for those benefits. On the other hand, a poorly written trust can lead to a loss of benefits in addition to other potential legal and financial hardships.

Pursuant to Md. Code Ann. Trusts & Estates § 14-115(b), it is the policy of the State of Maryland to encourage the use of a special needs trust or supplemental needs trust by an individual of any age with disabilities to preserve funds to provide for the needs of the individual not met by public benefits and to enhance quality of life. Furthermore, as evidenced by the often-cited 1979 Court of Appeals of Maryland case (*The First National Bank of Maryland et al. v. Department of Health and Mental Hygiene et al.*, 284 Md. 720, 399 A.2d 891), a trust instrument which stipulates that trustees should pay income for the support of a beneficiary and pay so much of the principal in their absolute and uncontrolled discretion for said support is a discretionary trust insofar as it relates to the trust principal under the laws of the State of Maryland. The trustees cannot be compelled to pay the principal of such trust absent a showing that the trustees acted dishonestly, arbitrarily or from an improper motive.

Although the First National case involved a Common Law Special Needs Trust rather than a Maryland Discretionary Trust Act Trust, the important principle set forth applies in the context of both types of trusts. Specifically, if the trust principal is not available to pay for the cost of care, the trustee cannot be compelled to invade the principal and the trust cannot be considered an available resource of the beneficiary.

A parent of a child with special needs should consider meeting with an attorney to discuss incorporating a properly-drafted special needs trust into an estate plan.

Taking that step may ensure that the child receives the benefits which the child's parent (or parents) has worked so hard to secure without jeopardizing the child's eligibility for important government benefits