

Elder Law Column

Special Needs Trusts for a Disabled Child

Providing long-term care of a disabled child can be a challenge. This is especially true where the disabled child will not be able to independently provide for all of his or her own needs.

I recently prepared a Special Needs Trust for a client. I thought you may want to learn about this kind of instrument and particularly how you may help your disabled adult child.

If a disabled adult is found to be unable to obtain gainful employment, the adult may qualify for governmental assistance from Social Security and/or Medicaid. Eligibility usually depends on the assets available to the disabled adult and his or her income from all sources.

Your disabled child could be receiving or may in the future receive assistance from Medicaid. You may want to examine your Will or your Trust to see exactly how you are providing for your disabled child.

Perhaps you have not included any inheritance for that particular child. You may believe that the government will take care of your disabled child for his or her lifetime. In general, that may be true.

However, most governmental programs necessarily restrict such assistance to well-defined needs. Particular medical care or specialized therapy may not be approved.

Certain dietary needs or supplements may not be provided. Extras like haircuts, permanents, and special clothing, may not be approved.

Nonetheless, there is a way to help your adult child with these extras or with medical needs not otherwise provided by Medicaid or similar programs. However, your help should not affect your child's eligibility or level of assistance by Medicaid.

Both State and Federal statutes allow you to provide limited help. The

mechanism for this help is a Special Needs Trust. This kind of Trust can be created at any time your child is less than 65 years of age. The Trust may provide benefits to your child beyond the age of 65, but the Trust must be created before your child reaches that age.

You could create a Special Needs Trust now, or you could create such a Trust in your Will or your Trust. If it is to be created in the future, either in your Will or your "living" Trust, the Special Needs Trust may be referred to as a "Springing" Special Needs Trust. Regardless of when the Trust is created, it must be done prior to your child reaching the age of 65 years.

The Special Needs Trust must also be irrevocable. That is, you cannot change it once you create it. A family member or a third party may act as the Trustee. Or, a bank or other private company may act as a Trustee.

The Special Needs Trust may not provide for ordinary expenses of food, shelter, clothing, and/or other incidentals of support currently provided by governmental entities.

The Special Needs Trust must be created by a parent, grandparent, or legal guardian. It can also be created by a Court Order.

There is no limit on how much money you can place in the Trust. However, upon the death of your child, any balance in the Trust must go to the State, up to the amount of governmental assistance provided to your child. After paying back the government for its assistance, any remaining balance can then go to whomever you designate.

Alternatively, the Special Needs Trust may be created and managed by a nonprofit organization, provided that the nonprofit organization retains all remaining funds at

the death of your child.

All assets placed in the Special Needs Trust are required to be owned by your disabled child. A gift to your child may meet this requirement. One source of such funds may be a personal injury award resulting from an insurance payment or a judgment following a lawsuit. Another source may be from an inheritance, including a distribution from your estate upon your death.

Whatever the source, the funds can be protected by placing them into a qualified Special Needs Trust. This might be protection from inappropriate use by your disabled child or protection from exploitation by friends or relatives. The term "qualified," refers to a Special Needs Trust that meets state and federal laws. Being qualified, these funds will not be countable assets for Medicaid purposes.

To find out more about Special Needs Trust, you should consult with an Elder Law Attorney. To locate an Elder Law Attorney, call the National Academy of Elder Law Attorneys at (520) 881-4005, or, consult your local Yellow Pages.

YOUR QUESTIONS: Do you have a particular question that you would like answered? To better serve the regular readers of this Elder Law Column, please direct your questions in writing to Michael A. Jensen, Elder Law Attorney, PO Box 571708, Salt Lake City, Utah 84157. From time to time, I will attempt to answer some of those questions.

Michael A. Jensen is an Elder Law Attorney, member of the Utah State Bar, and member of the National Academy of Elder Law Attorneys. He earned his Law Degree, *Cum Laude*, at Boston College Law School; M.B.A. at Harvard; and B.S. in Physics and Math at the University of Utah, graduating *Cum Laude*. Mr. Jensen's law practice includes Elder Law as well as other civil litigation and helping small to medium business owners plan for their succession. He has also successfully argued on Elder Law and other issues before the Utah Supreme Court and the Court of Appeals. He can be reached at 266-2009, and has offices in downtown Salt Lake City and in Murray.