

Estate Planning for Families with Disabled Beneficiaries

Overview

Clients who have a family member with a disability generally need estate planning advice that is structured to provide maximum care and financial support for that beneficiary, without jeopardizing the beneficiary's eligibility for government benefits. Disability laws, government entitlement programs, and tax law should all be considered in designing the most effective plan.

Identifying the Disabled Beneficiary's Needs

Designing an effective estate plan for a client with a disabled family member requires complete information about the nature of the family member's disabilities. The nature of the beneficiary's disabilities will often dictate how much care and financial resources will be needed for the beneficiary in the future.

Planning Options

A natural parental inclination is to make outright bequests to children in equal shares either during the parents' lifetimes or at a parent's death. This may work for nondisabled children, but may have detrimental consequences for the disabled beneficiary. At a minimum, such a bequest could disqualify the beneficiary for government benefits and could subject the beneficiary to back charges. Thus the general rule in estate planning for disabled children is that a disabled beneficiary should not be given an outright bequest.

Trusts

A trust can be an effective vehicle for transferring assets for the benefit of a disabled beneficiary while protecting assets from the claims of creditors and protecting the beneficiary's eligibility for government benefits. If drafted properly, the trust should not disqualify the beneficiary for government benefits. Depending on the beneficiary's circumstances, a trust may also offer a great deal of flexibility.

Testamentary Trust

A trust may be testamentary or inter vivos. The benefit of a testamentary trust (in a will or by way of a lifetime revocable trust) is that it may easily be changed simply by changing the will or amending the revocable trust. If the full extent of the beneficiary's disability is not known, or if the beneficiary's disability may be cured, or if government assistance rules change, a testamentary trust gives the parents the option of waiting to establish a trust at either or both deaths rather than establishing a trust during either lifetime for the disabled beneficiary.

Inter Vivos Trusts

An inter vivos trust is created during the lifetime of the settlor and may be either revocable or irrevocable. This type of trust helps to avoid creating resources in the disabled beneficiary's own name and makes supplemental resources immediately available for the disabled beneficiary. If the trust is irrevocable and the parents or settlors retain no incidents of ownership in the property, income generated by the trust assets will be taxed to the trust or the beneficiary, not the parents, and the property will not be included in the settlor's estate. Generally, there are three types of inter vivos trusts that may be used to provide for a disabled beneficiary: a support trust, a fully discretionary trust, and a community trust.

Support Trust. A support trust provides for the beneficiary according to specific standards such as health, maintenance, and support. The trust may be either a mandatory support trust or a discretionary support trust. In the former, the trustee is required to pay out of a certain amount of income or principal for the disabled beneficiary's support. However, when the disabled beneficiary has an absolute right to receive such income and principal, it may be attached by creditors and will likely be included in the income/resource base for eligibility for government benefits.

Discretionary Trust. A fully discretionary trust, sometimes referred to as "special needs trust," can be used to provide maximum protection of both income and principal. The trust assets should be shielded from the claims of creditors and should not count as an available resource in determining eligibility for government benefits as the disabled beneficiary has no right to any of the trust assets in a fully discretionary trust.

For maximum protection and preservation of trust assets, and to preserve the disabled beneficiary's eligibility for government benefits, a special needs trust typically allows distributions to be made only to cover the beneficiary's nonsupport needs. The purpose of such a trust is to simultaneously create a supplemental and/or emergency fund while not displacing any public or private assistance for basic support that might otherwise be available to the disabled beneficiary. Special needs trusts often state the settlor's intent that the trustee increase the choices available to the disabled beneficiary so that his or her comfort and personal dignity are enhanced by trust expenditures.

Community Trust. A Community Trust may be established during the donor's lifetime or at the donor's death and be a more feasible alternative to other forms of testamentary or inter vivos trusts. In Oregon, the Association of Retarded Citizens of Oregon has established the Oregon Pooled Trust, which it manages to help families provide supplementary funds for a disabled family member. Currently, a \$500 enrollment fee is required to open a fund, but no minimum deposit is required. Although initial or additional funds are often deposited upon the death of the donor, they may be deposited at any time. Funds deposited go into a pooled bank investment trust fund that provides for the supplemental needs of the beneficiaries during their lifetimes. Although funds are pooled for investment purposes, each beneficiary has a separate account consisting of his or her asset share of the trust. After an account is funded, assets cannot be withdrawn and

only the fund's trustee can make disbursements from the account. However, family members or other interested parties may make written requests for disbursements to the trust director.

Guardianship or Conservatorship

Another means of planning for effective financial support and management for a disabled beneficiary is through a guardianship or conservatorship. A guardianship or conservatorship may be needed when a disabled individual is incapable of managing finances and has money and property that requires management and protection. Because all guardianships and conservatorships are under court supervision, they can be cumbersome, inflexible, and expensive to administer.

Conclusion

Estate planning for families with a disabled beneficiary requires an understanding of the beneficiary's disability and long-term care needs, the various government assistance programs available to the disabled beneficiary and the tax consequences of transferring assets to or for the benefit of the disabled beneficiary. To determine the most effective plan for providing for a disabled family member, the intent of the donor and the circumstances of the beneficiary should be discussed with an attorney.

This material is intended for general informational purposes only and should not be construed as legal advice or a legal opinion on specific facts or circumstances. You are urged to consult an experienced lawyer concerning your particular factual situation and any specific legal questions you may have.