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A Thorough Estate Plan Includes Your Child with Special Needs

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Any well-rounded estate plan plans for your incapacity and ultimately your death. With the use of foundational, thoroughly drafted estate planning documents, you can ensure that your affairs are in order. But, if you have a special needs child, grandchild or other beneficiary, there is a bit more you should consider.

Outlined here are 3 common myths associated with special needs planning along with an ideal solution:

Does your child with special needs have to be disinherited? No. While we recognize and understand that disinheriting your child with special needs may seem like an easy solution to ensure she maintains her public benefits at your death, it is poor planning. Imagine your daughter having no nest egg to supplement her public benefits after you are gone? Surely there will be things she needs besides what her Supplemental Security Income (SSI) and Medicaid benefits will cover. If she's completely disinherited, she runs the risk of having to do without the things that offer her independence and quality of life.

Can you leave assets outright to a child with special needs? No. Many children with special needs receive needs-based government benefits. These benefits are awarded based on the child's income and assets, among other things. If your child received an outright inheritance, then she would be at risk for losing those benefits, which she depends on for her care support, health related expenses, food, and shelter.

Should you leave your assets to another child expecting him to use those funds to provide for your child with special needs? No. Even if one of your other children plans to serve as the caregiver for your child with special needs after you can no longer serve in that role, it is never a good idea to leave all your assets to that caregiver child. Why? Well, what if your caregiver child gets sued, files for divorce, goes through bankruptcy, has sticky fingers, needs long term care, or prematurely passes away? Suddenly the assets you intended be used for your child with special needs are at risk. And, in most cases, if any of those circumstances occurred, a majority, if not all, of the assets would be lost.

So, what's the solution? A **third-party Supplemental Needs Trust**.

In the simplest of terms, a third-party Supplemental Needs Trust is a revocable trust that is funded with assets of a third-party (e.g. a parent or grandparent) for the benefit of a person with special needs. This type of Supplemental Needs Trust is not typically funded until after the third-party has passed away. In

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essence, it allows a parent to leave assets for the benefit of a child with special needs without fearing that such an inheritance would jeopardize the child's public benefits.

The key parties involved with a Supplemental Needs Trust are as follows:

Grantor: This is the person who creates the Trust, which is typically a parent or grandparent.

Trustee: This is the person who holds legal title to and will manage the Trust assets for the benefit of the beneficiary.

Beneficiary: This is the beneficiary with special needs who benefits from the Trust assets.

Residual Beneficiary: This is a person(s) or charity(ies) that will receive the remainder of the Trust assets upon the death of the child with special needs.

Assets in a third-party Supplemental Needs Trust are not "available" to the beneficiary; therefore, they do not affect the beneficiary's ability to qualify for public benefit programs, like SSI and Medicaid. However, the Trustee is permitted to use assets in the Trust for the beneficiary's "supplemental needs". Let's say the child is capable of living independently, wishes to take vacations, loves owning and caring for a pet, or desires to make gifts to family members or friends. Assets in a third-party Supplemental Needs Trust create a nest egg that can be used for these purposes.

A well-drafted third-party Supplemental Needs Trust should:

- Never include a payback provision. In other words, assets in a third-party Supplemental Needs Trust never have to be paid back to the State as reimbursement for benefits paid out to the beneficiary. When the child with special needs passes away, the remaining Trust assets are distributed to the residual beneficiary(ies) originally identified by the Grantor.
- Never permit the child with special needs to add her own funds to the Trust. This is considered a co-mingling of funds and can jeopardize the integrity of the Trust. Remember, assets in this type of Supplemental Needs Trusts should only be those of a third-party.
- Never restrict the Trustee's discretion on how to use Trust assets. In some cases, a well-funded Trust can be used to provide for better housing options than what public benefits provide even if it means foregoing the benefit itself. If the Trust is too restrictive, then the Trustee would not be able to use the assets for the beneficiary's shelter-related expenses, which would be devastating.
- Never allow the beneficiary to compel distributions from the Trust. Instead, give the Trustee sole and absolute discretion over all distributions. This, of course, means choosing a prudent and responsible Trustee.

In summary, if you have a child with special needs(or grandchild) that you would like to provide for at your death, then you should consider adding a third-party Supplemental Needs Trust to your overall estate plan. This effective tool minimizes risks and ensures that your loved one will be provided for after you are gone.