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Special Trusts

Sometimes it just doesn't work for someone to own any property. The classic example of this is a person who is legally incapacitated because of a mental or physical disability. Such can happen in predictable or unpredictable ways. It's not surprising if a person who is 85 years old suffers from senile dementia or Alzheimer's Disease and thus is not able to manager their financial affairs. A 55-year old man falling off of a roof and suffering a disabling head injury is not predictable.

This article is about the rather predictable situations of someone who is permanently disabled because of a medical condition from childhood, or because of a medical condition at an advanced age. There are a variety of trusts that are useful in protecting people who need special attention. First, we will address the case of children who need such protection.

In the law the concept of a "permanent child" does not refer to a Peter Pan type character, but rather describes the legal situation of a person who has a permanent mental or physical disability so severe that he or she will never have the complete capacity to live independently, making everyday economic and legal decisions.

When meeting with their parents I usually refer to them as "special needs children." Life is not necessarily all that complicated as long as one of the parents is still alive and taking care of the special needs child. Planning for the time when there is no parent around to care for the child demands a more complex estate plan than the usual.

Before I address the orphaned child scenario, I should mention one other estate planning issue peculiar to the special needs child. The extended family of grandparents, aunts and uncles has to be educated to the legal techniques appropriate to the child's circumstances. The proverbial "rich uncle" should not leave property outright to that child in his will. If that is a possibility I usually recommend that the parents of the child establish a "living trust" that is in stand-by mode while they are living, but is also available to receive any bequests from Uncle Albert or Grandpa.

Two benefits flow from that approach: (1) the child will not directly "own" inherited wealth that will necessitate probate court proceedings to appoint a conservator; and (2) the existence of that wealth will not disqualify the child from certain government benefits, particularly Medicaid, that are conditioned on the recipient not owning anything.

So the word has to go out to everyone to be careful in what they do if they want to benefit the special needs child. That includes beneficiary designations on life insurance and retirement accounts. A bachelor uncle who puts that child down as his beneficiary for a life insurance policy or a 401(k) plan has created one big headache.

It is far better for him to consult with the child's parents to identify the supplemental needs trust that the parents established (the "living trust" referred to above) and name the trust as his beneficiary. The trust will then use any such money to pay for those therapies, services and things that are not covered by any government special education or Medicaid program. Similarly, the parents must not neglect that aspect of their estate planning.

Signing the trust document and then neglecting the forms to coordinate a parent's life insurance and retirement accounts mixes a problem into the solution. If the parent's death triggers the pay-out under a "wrong" beneficiary designation, the trustee of the supplemental needs trust may have to sit on the sidelines watching as the probate court conservatorship proceedings chew up resources in legal costs *and* disqualify the child from any needs-based government benefits.

Sometimes a pay-out to the permanently disabled child is unavoidable. The most common example is a personal injury award because of a lawsuit brought on behalf of the disabled child. When that happens the usual solution is to obtain court approval of establishment of a "special needs trust" that can pay for the child's needs which exceed the government benefits. The trust does not disqualify the child because after the child's death the trust is required to reimburse the government for any medical assistance payments made during his or her life. Such proceedings can also be used to "fix" the mess created by (the late) Uncle Albert's well-intentioned, but sloppy, beneficiary designations.

This sort of problem can also arise in the "elder law" field because of the possible need for an extended stay in a nursing home. Such costs are not covered by Medicare. So the purchase of a long-term care insurance policy, years before the need arises, may be wise. Not everyone has such foresight or the money to pay the premiums. The difficult situation is where the person cannot afford to pay for the nursing home from their own income or assets, but is too "rich" to qualify for the Medicaid program covering the cost.

"Medicaid planning" is too complex a subject to include in this article. For one thing, that term can refer to the deliberate impoverishment of an elderly person by transfers to their offspring so as to qualify for Medicaid-paid nursing home care. It is a morally and legally difficult area.

There is one legal method for a disabled elderly person to pass the income test for Medicaid assistance. A "Miller Trust" can be established on his behalf to receive all of his income (assuming he does not meet the low-income requirements). The trustee receives and holds all of the income subject to the requirement that any money left after the person's death be used to reimburse the government for all medical assistance payments.

The other trust that might be appropriate is the Special Needs Trust, discussed above. However, this time the trust would be established in the will or living trust of a spouse who predeceased the disabled spouse. Obviously, this is not universally applicable, but it should not be overlooked by those people so situated.

The special needs of a child or an elderly person will often be best served by a special trust that is dedicated to their best interests while passing the cost of medical treatment off to the Medicaid program. However, it won't happen without foresight and careful planning.

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Patrick J. Gibbs practices law in Roswell with a concentration on Wills, Trusts and Estates. This article is intended to be educational. Legal advice should be obtained as to individual needs before taking any action.