



Setting up a special needs trust for a disabled loved one

A spouse, child or other loved one with special needs may require special care both during and after your lifetime. To make sure that your loved ones receive appropriate care, you'll need to carefully consider how much of your estate to allocate toward funding that care and how to structure that gift to best protect the assets that you leave for their benefit. A trust specifically designed to address "special needs" can meet these objectives.

The nature and severity of your loved one's medical needs or disability as well as whether the disabled person has any potential to be self-sufficient are two of the foremost factors in making such decisions. For example, a mildly disabled person who is not self-sufficient but is ineligible for government disability will likely need long-term living arrangements. This may require subsidizing housing or needs in excess of his or her potential earning capacity. On the other hand, you may need to develop a different strategy for a severely disabled person who may be able to count on some level of government assistance and may not need a great deal of additional financial assistance to achieve an acceptable standard of living.

Determining eligibility for government benefits

If the disabled person is or will be eligible for government assistance or benefits, you should identify whether eligibility for such programs is "need-based" or solely

determined based on the person's disability. To be eligible for need-based programs, such as Supplemental Security Income (SSI) and Medicaid, the disabled person's assets will be taken into account. The general rule is that the applicant cannot have more than \$2,000 in assets. Therefore, if the disabled person directly inherits more than \$2,000, the inheritance will interrupt the government assistance. However, with special planning, you may structure an inheritance so that money is available for the beneficiary's needs but is not under the beneficiary's control and therefore, not "counted" as belonging to the beneficiary for aid eligibility purposes.

This planning takes the form of a trust for the benefit of the disabled person, sometimes called a "special needs trust" or "supplemental needs trust." The most common type of special needs trust is an irrevocable trust set up by a parent or other family member. For example, if a disabled child is expected to receive gifts or an inheritance while his or her parents are living, such as from a grandparent or other family member, the parents can establish the trust during their lifetimes as a standalone irrevocable trust. The extended family should direct any inheritance intended for that child to the special needs trust and never to the child individually, since making direct gifts could jeopardize need-based eligibility. In addition, if you have a disabled spouse, you may want to consider leaving assets to him or her in a supplemental needs trust that is created and funded upon your death. That way the assets can be properly managed by a trustee and used to benefit your surviving spouse without interrupting any government benefits he or she may be receiving.

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To preclude trust assets from counting toward a disabled person's eligibility for benefits, the trust should be structured so the beneficiary cannot receive payment on demand. The beneficiary's distributions could be left entirely to the trustee's discretion or the trust may have guidelines authorizing certain expenditures and prohibiting others, especially if there are other resources available to the beneficiary. For example, the trust may allow distributions for education or personal care items, while disallowing the use of principal for the disabled person's basic needs such as food and shelter, since those can be met by other programs. Such a provision would likely not reduce or interrupt benefits such as those provided by Social Security. More specifically, the trust provisions might authorize a trustee to use principal to pay the following for the disabled person:

- Medical treatments and equipment not covered by the government benefits
- Advocacy to help the disabled person access and continue receiving needed services
- Residential expenses such as repairs, maintenance, real estate taxes and utilities
- Computer equipment, Internet service or cable television
- Vacations, social events and other entertainment items
- Funeral and burial costs

As long as the trustee is given absolute discretion, the assets will not be considered to be owned by the disabled person and will not be used when determining the beneficiary's eligibility to receive government benefits. In addition, persistent family members and creditors will not be able to access the trust, even through a court action.

Be sure to name one or more contingent special needs trust beneficiaries so that the assets will not inadvertently pass to the disabled person's estate upon his or her death. If the disabled person's estate is entitled to the trust assets, then the government agencies that provided the basic support would likely claim the assets. Instead, consider naming the

disabled person's descendants, other loved ones or even charities as contingent beneficiaries. You may also investigate the options for naming an advocate or caregiver for your child when you are no longer able to act in that capacity.

Analyzing additional funding considerations

When creating or updating an estate plan, consider how much money to put into the special needs trust. Once you determine the funding amount, you need to identify the assets in your estate that will be used to fund the special needs trust. Some assets, such as retirement accounts, are not best suited for this purpose. Distributions accumulated within the trust would be subject to income tax at a highly compressed trust tax rate. A trust reaches the top income tax bracket (37%) with over \$14,450 of income for 2023.

ABLE accounts

An ABLE account is another potential planning option for eligible disabled individuals. ABLE accounts are loosely modeled on 529 education savings plans that help families save for college. Individuals may make gifts (subject to certain applicable thresholds) to the account of an eligible recipient and money can be withdrawn tax free when the funds are used to pay for qualified disability expenses. The account may be used for qualified expenses without interfering with the disabled individual's eligibility for governmental benefits. In certain instances, an ABLE account can serve as a cost-effective alternative to a special needs trust or can be used in addition to a special needs trust for a more comprehensive plan.

Taking the next step

In establishing a plan to care for your loved one when you are no longer able to, you should work with a qualified estate planning attorney who is familiar with this specialized area. With detailed information, those involved in the planning can more realistically evaluate the capabilities of your loved one, help the family estimate his or her future financial and personal needs, and ensure that the appropriate documents are in place.



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