

TRUSTS FOR THE DISABLED CHILD

Thomas F. Kennedy
KENNEDY & ASSOCIATES
Attorneys-at-Law

Board Certified
Estate Planning and Probate Law -
Texas Board of Legal Specialization

5851 San Felipe, Suite 925
Houston, Texas 77057
(713) 783-7444
(713) 783-6601 (Fax)
E-MAIL: tkennedy@houstonestateplanning.com

TRUSTS FOR THE DISABLED CHILD

- There are 54 million disabled Americans.
- 20 million of whom are severely disabled and will benefit from special needs planning.
- One in five Americans have some level of disability.
- One in ten Americans has some level of disability which requires care.

TRUSTS:

- Have a Settlor (Grantor)
- Trustee (Manager)
- Beneficiary
- To qualify for government benefits must be **IRREVOCABLE**.
- Individuals can be ineligible for Government Benefits if they have income or assets greater than those allowed under government plans.
- Supplemental Needs Trust (also known as “Special Needs Trust”) place the assets of a trust beneficiary (the disabled or incapacitated person) in such a trust and then qualify the beneficiary for government assistance programs that would otherwise be unavailable to the beneficiary because of the asset and income limits of program recipients.

Types of Government Disability Benefits include:

- Supplemental Security Income (SSI)
- Medicaid
- They have “countable” income and “countable” resource criteria.
- If parents leave an inheritance directly to a disabled child, the child will be ineligible for governmental benefits because the disabled child will have excessive countable resources.
- Parents cannot establish a §529 plan for a child nor establish a TUTMA or TUGMA account for the child. They count as countable resources.
 - Will disqualify the disabled child.
- Additionally, there are government programs (such as training programs) that require the

child be approved for Medicaid to be eligible for those programs.

- Life insurance plays a big role - can be used to fund a Special Needs Trust
- Ideally, Trust should be a lifetime (“intervivos”) trust, as opposed to a testamentary trust.
- Then the extended family (i.e., grandparents, etc.) can make lifetime contributions to the trust.
- Third Party Trust - Established by someone other than the beneficiary with assets not owned by the beneficiary (i.e., by parents for a disabled child).
- Self Settled Trust - Established using the funds of the disabled beneficiary and for the benefit of the disabled beneficiary.
 - must have a “payback” provision to the state.
 - Payback provision repays Medicaid assistance paid on behalf of the disabled beneficiary.
- Disabled Child Cannot Inherit
 - Under Will
 - Under Life Insurance, Annuities
 - Under IRA
 - Under 401(k), etc.
 - In Intestacy

because if they do, they may (probably will) exceed the countable resources.

- The Assets should be left to the Special Needs Trust.
- Last Will and Testament cannot say property is left “per stirpes” - will disqualify disabled child.
- Be careful of distribution of Personal Belongings - they can disqualify disabled child.
- All Beneficiary designations (i.e., life insurance, retirement, etc.) need to be coordinated.
- Disabled Child should be encouraged to work and live life to fullest and achieve the best they can achieve even though they may have income which could cause them to be ineligible.

Special Needs Trust Needs to be a Separate Document:

- Laws change.
- Document can be grandfathered if laws change.
- Reserve the right to revise the trust to keep in conformity with its purposes.
- Funds can go back to the family.
- What About Disinheriting?
- What About Leaving Funds to Other Children and Letting Other Children take care of Disabled Child?
 - But what if other children die?
 - or have creditor problems?
 - or are sued, or become bankrupt?
 - or are divorced?
- Gifts to a Special Needs Trust do not Qualify for the Gift Tax Annual Exclusion.
- Social Security Disability Income and Medicare Do Not Have Asset Limitations.
- Charitable Trusts for Disability
 - The CRT funds the Special Needs Trust during disabled child's life.
 - At child's death, remainder goes to the home where child lives.
 - Life Insurance will be used to fund the other children, offsetting the gift to the CRT.
 - Selecting right Trustee and Guardian is very important.

Sources: Special Needs Future Planning Audio CD by Mary Anne Ehlert and Brian Rubin sponsored by New York Life; Special Trusts - When and How to Use Them by Deborah Green - State Bar of Texas Advanced Estate Planning and Probate Law Course 1998; New Special Needs Trust Options from the ARC of Texas Master Pooled Trust - H. Clyde Farrel, State Bar of Texas Advanced Estate Planning and Probate Law Course 2001.