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DON'T LET YOUR ESTATE PLAN HARM YOUR DISABLED LOVED ONE

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Don’t Let Your Estate Plan Harm Your Disabled Love One

by David Silver

Living with a disability is challenging enough, please don’t let your estate plan make it more difficult. If you have assets that will go to a disabled person at your death, it could result in your disabled loved-one losing public benefits upon which he or she relies. In order to help protect your disabled loved-one, it is important that you understand the type of benefit(s) being received by your disabled loved-one and to make sure that you control how your assets will flow at your death in order to avoid any unintended consequences.

An understanding of what happens to your assets after you die is a topic for a separate article, but it is important to understand that, if you do not have a Will, the state of North Carolina has created one for you. You need to know where your assets might end up in order to avoid jeopardizing a disabled loved-ones public benefits. It is also important to understand the type(s) of public benefits that your disabled loved-one is receiving. The most common public benefits for the disabled that I deal with in my law practice are SSDI, SSI and Medicaid.

SSDI is Social Security Disability Insurance. It is similar to private disability insurance, and it is not a needs-based program. If your loved one worked for over 10 years and then became disabled, they are likely receiving SSDI. Your loved one could receive an inheritance of millions of dollars from you and still qualify for SSDI.

SSI stands for Social Security Income, and it is a needs-based program for people with low income and minimal assets. SSI is designed to provide income for food, shelter and other basic needs of the elderly, blind and disabled individuals. To qualify for SSI, a disabled person must have income of less than $771 per month, and have countable assets of under $2,000.00. If your loved one was born with a disability, he or she would likely qualify for SSI.

SSI will provide your loved one with a small monthly check that will hopefully pay for their basic needs. However, this check will not be sufficient to pay for activities, pay for trips, buy certain products or equipment, or do any other number of things to improve your loved ones’ quality of life.

Medicaid is a need-based health insurance program that covers disabled individuals (among others) who have countable incomes of less than $1,041 per month and countable assets of under $2,000. In addition to basic health insurance, Medicaid also provides for some services specific to the disability.

Even if your loved one could get by without the small SSI check based upon your inheritance, the loss of Medicaid's health insurance would be costly, and possibly irreplaceable if the Affordable Care Act's ("Obamacare") ban on denying coverage for pre-existing conditions is repealed. Fortunately, there are a few methods for leaving assets to a disabled loved one without risking disqualification for SSI or Medicaid.

The simplest, but most risky, method is to leave money to a third party and trust that they will use the funds for your loved one. Since the assets are not owned by the disabled loved one, they can't be countable assets. However, if the third party dies, gets sued, gets divorced, or gets greedy, there is no recourse.

The safest, but costliest, method is to leave money to a Special Needs Trust (often also called a Supplemental Needs Trust or SNT). An SNT is a type of trust that can pay for those things that will improve your disabled loved ones' quality of life, but is not considered a countable asset when determining SSI, Medicaid or most other public benefits. If the disabled person's own money is put in an SNT, then Medicaid must usually be "paid-back" from any funds remaining in the SNT when the disabled person dies. However, if the SNT is not funded by the disabled person, then Medicaid is not entitled to receive any of the funds remaining in the SNT at death.

An SNT is a formal document, and bad things may result (like benefit ineligibility or Medicaid payback) if the SNT is not done correctly.

The newest tool available is an ABLE account. The Achieving a Better Live Experience Act, signed into law in December of 2014, allows states to set up savings accounts for disabled individuals that will not be considered a countable asset for SSI, Medicaid, or other federal benefits. Similar to Roth IRAs, the accounts must be funded with post-tax funds and they grow tax-free, but funds can be withdrawn at any time. The maximum contribution to an ABLE account is $14,000 per year, and it wont be considered an asset for SSI until the account grows to over $100,000. Only one ABLE account per person.

To be eligible for an ABLE account, the person must be under 65 and have had a disability that began before the age of 26. Similar to a 529 College Savings Plan, an ABLE account is opened with the state of North Carolina (or any other state). It doesn't matter whose money is used to fund the ABLE account, but Medicaid will have a claim of payback against any remaining funds at the disabled person's death. If the disabled person can't manage the funds, that person's parent, guardian or attorney-in-fact can establish the account and have signature authority over the account.

If you wish to provide for a loved one with a disability following your death, I usually recommend creating an SNT. However, if the amount of assets you would leave at your death to your disabled loved one is under $14,000, then an ABLE account would allow you to cost-effectively provide for your loved one without jeopardizing eligibility for public benefits.

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