Winter 2021/2022

Estate Planning Update Winter 2021/2022 - Important Planning Considerations for Special Needs Beneficiaries

Parents enjoy a certain expectation that, at some point, their children will assume responsibility for themselves. This expectation transforms when a child has special needs. The future care and well-being of a differently abled child can be an overwhelming concern for parents, particularly when coupled with the very real day-to-day anxieties of managing the child's special diet treatment protocols, therapies and specialists and advocating for educational, living and vocational needs.

These future care concerns fall into two linked but distinct general areas: physical and emotional care on the one hand and financial security on the other. Physical and emotional care concerns elicit questions, such as: Who will assume the role of primary caregiver after my disability or death? Is it appropriate to place this responsibility (and burden) on a sibling or another family member? How will the successor caregiver know my special needs child's likes, dislikes, wants and hopes? Where will my child live and with whom? Concern for financial stability leads to questions, such as: Will government programs be available to assist with my child's care after my death or disability? Would these programs be suitable or sufficient? Should there be some type of funding through an estate plan or special needs trust to supplement government programs? How much is enough, and who should be the trustee?

Notwithstanding these anxieties, with proactive and mindful planning, parents can create and provide a more certain future for their child (as well as meet their planning goals for the rest of their family). The first step is to engage the services of an attorney whose practice has a strong focus on special needs planning.

Special needs planning is a subset of traditional estate planning. The notion that estate planning is essential only to families with significant wealth is a common misperception. In fact, organizing an efficient and appropriate allocation of family assets that meets the needs of all members—especially when one child has special needs—is a goal that should be shared by all, regardless of the size of the estate.

Too often, parents of a child with special needs mistakenly believe they can resolve special needs planning issues by simply leaving their estates to their other children, reasoning that the special needs child should not receive property because of his or her inability to manage it, that public benefits will adequately provide for the child or, most unrealistically, that their other children will assume full financial responsibility for their sibling.

This informal approach can create more problems than it solves, the most troubling of which is the inability to ensure that the money will be used to benefit the special needs child when the designated recipient receives the property outright. No matter how principled and purposeful the intent may be to benefit the special needs child, the funds could be subject to that recipient's creditors or other beneficiaries. For example, the premature death of a recipient could result in the property passing to the recipient's heirs to the complete exclusion of the special needs child. Worse, the property could pass to the recipient's spouse in the event of a divorce. Moreover, the devastating consequence of disqualification for public assistance benefits can occur if it is deemed that the special needs child's legally enforceable interest in property was intentionally circumvented through disinheritance. Unfortunately, there is no legal recourse for the special needs child in these unintended circumstances.

For all these reasons, the special needs trust (SNT) has become a very important estate planning tool to resolve these concerns. The SNT fulfills two primary functions. First, the SNT is a mechanism to manage property for someone who may not be able to do so for himself or herself due to a disability. Second, and often more importantly, the SNT preserves the

beneficiary's eligibility for public assistance, such as Medicaid, Supplemental Security Income (SSI), public housing, and food and energy assistance, to name a few, and allows those benefits to be supplemented with the assets held in the SNT.

Public assistance benefits programs have become the financial and healthcare safety net for most of our country's individuals with special needs. A troubling dilemma is created as healthcare costs continue to rise, sweeping changes are proposed to curb the growth of the government programs that pay for them, and individuals continue to live and require care longer than ever before. Notwithstanding the importance of these benefits for many disabled individuals, there are certainly situations, particularly among wealthier families, where they may choose not to consider or access such programs. There are also circumstances in which disabled individuals may not meet the cognitive or physical eligibility requirements.

Each family has its own facts, and each public benefit program has its own rules, all of which may affect the drafting, funding and administration of SNTs, should an SNT be appropriate for a particular family. Collecting counsel and advice from a skilled legal practitioner will help avoid unnecessary pitfalls with future eligibility for these programs and minimize potential crises for successor caregivers. Raising a special needs child can test the very depths of personal tenacity and grit. And, when thinking and worrying about the future of that child, parents can find no substitute for proactive and mindful planning led by the empathetic hand of a skillful special needs planning practitioner.