

OAST & HOOK

ESTATE PLANNING FOR PARENTS OF CHILDREN WITH SPECIAL NEEDS

For parents of a child with special needs, the use of a special needs trust is the most effective way to help that child. A special needs trust is developed to manage resources for the benefit of the special needs child while maintaining the child's eligibility for public assistance benefits. While government agencies recognize special needs trusts, they have imposed some stringent rules and requirements upon the implementation and use of these trusts. *It is vital that a family contemplating the use of a special needs trust consult an experienced Elder Law attorney.*

A special needs trust is established by a trust agreement. The trust agreement must clearly show that:

- The trust is established by the family and not by the child with special needs.
- The trust is managed by a trustee other than the child with special needs.
- The trust gives the trustee the absolute and uncontrolled discretion to provide whatever assistance the trustee deems advisable.
- The trust never gives the special needs child more income or resources than permitted by the government.
- The trust is used only for supplementary purposes.
- The trust provides instructions for the special needs child's funeral arrangements.
- The trust determines who will receive the trust assets after the death of the child with special needs.
- The trust provides for successor trustees.
- The trust protects the trust assets against creditors or government agencies trying to obtain funds to pay the debts of the child with special needs.
- The trust provides for early termination if the trust jeopardizes the special needs child's eligibility for public benefits.
- The trust authorizes the trustee to amend the trust if necessary to comply with changes in the law.

A special needs trust may be created either within the parents' wills or in an inter vivos trust agreement. An inter vivos special needs trust may be either revocable or irrevocable. A revocable special needs trust is considered part of the parents' estates for estate tax purposes. If the special needs trust is irrevocable, then the creation and funding of the trust is treated as a gift for gift tax purposes.

The special needs trust must have a trustee who will properly manage the trust assets. The choice of the trustee is a critically important decision. In most instances, a family member will be designated as the trustee. Banks or trust companies are other choices; however, their fees make them inappropriate for the administration of small trusts. Oast & Hook serves as the trustees of special needs trusts.

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