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ESTATE PLANNING FOR GIFTS BY PARENTS TO SPECIAL NEEDS CHILDREN By Randy Spiro

Trusts are good vehicles to hold gifts by parents to their children who have disabilities and who have qualified for programs and benefits based on indigency. The Trust can allow a third person to be Trustee after the parents death and to give that person discretion in making distributions for the benefit of the child. The Trust can go on for the entire life of the special needs child.

If the child acquires assets, he or she may be thrown off the program he or she previously qualified for. In some cases, the government entity which previously paid benefits may have a lien to recover the value of those benefits. That lien could attach to the assets that the child inherits at the death of his or her parents.

A Special Needs Trust is one which contains provisions designed to avoid these problems and to prevent the trust assets from being treated as a resource of the child. Central to accomplishing this result is a provision stating that the Trust cannot be used to pay any benefits that the child would otherwise qualify to receive from any government program. In other words, the Trust can only be used for things above and beyond the benefits which the special needs child already qualifies for.

It is critical that the child not be Trustee of his or her Trust, that the trust be irrevocable, and that Trust benefits be paid out for the benefit of the child and not directly to him or her. Since the Trust will go on for the child's entire life, it should designate a succession of many Trustees and should even have a procedure for naming additional Trustee should the child outlive all of the Trustees.

Some parents like to create a Trust for the child while they are living and to transfer assets to it. This author is not high on this strategy because the parents, while they are living, can use their own funds for the child and because the parents can include a provision in their revocable trust that says when both parents die the assets for the special needs child can be allocated to a newly created Special Needs Trust.

This article does not speak to Special Needs Trusts that are created to house the proceeds of personal injury settlements or awards which are transferred by the child to his or her Special Needs Trust.