Plan Well When Leaving Assets to One Child for Another Disabled Child

Suppose you have three children: Bob, Susan and Tim. Tim is disabled and on SSI (Supplemental Security Income) and Medicaid. He can't manage his own money and is not allowed to maintain countable resources above $2,000. You and your spouse, if married, have considered how to leave your assets upon the second of you to pass away.

Two plans that lay people come up with to try to solve their concerns about how to leave assets when considering a child who is disabled follow:

They sometimes disinherit the child who is disabled. They rationalize that all of Tim's needs are met by SSI and Medicaid and they don't want to cause his ineligibility for benefits by leaving money to him upon the second parent to die.

Others may pick a responsible child with whom to leave assets to help Tim. In this case, the parents choose Susan. They know Susan loves Tim and exhibits a strong interest in Tim's well-being. She's very responsible so they leave what would have been Tim's one-third share, to Susan.

Both plans above are ill conceived and flawed.

In the first plan, imagine that the SSI or Medicaid benefits are severely diminished or go away altogether in the future. This means Tim will need more help. Which leads to the second plan; the money left with Susan. Is the money still there?

Consider that the second parent dies and Susan receives two-thirds of the estate, one share passed to Bob and Susan received two shares, hers and Tim's. Susan and her husband believe that "what's mine is yours and yours is mine" theory as many couples do.

Many years go by and throughout the years, their community assets get commingled together with Susan's inherited separate property assets to the extent that the inherited assets can no longer be traced.

Susan and her spouse, Richard, divorce and the inherited assets become diminished due to the commingling and failure to keep the funds segregated.

A different situation that may occur, is that Susan receives the inherited money, then dies. Susan's Will gives her assets to Richard. Susan and Richard had two boys in college when Susan died and Richard later remarries. Now, Richard is likely spending money that was left for Tim in mind (remember Tim?) on Richard and Susan's two boys and on his new wife.

Not the outcome you had in mind? The parents should have considered leaving Tim's share in a Testamentary Supplemental Care Trust which could have been written into their Wills coming into effect upon the second parent's death. This trust should be written in such a way as to legally avoid being considered as a countable resource in order to prevent loss of Tim's benefits. The trust should also

provide alternate trustees in the event something happens to Susan and name remainder beneficiaries in the event there are assets remaining when Tim passes.

Now Tim's assets will be protected from Susan's death or divorce and will provide a legal shelter to prevent his loss of means tested public benefits. Always consider consulting a qualified estate planning attorney when addressing your estate planning needs.

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