

Trust Can Allow Assets to Pass to Disabled Family Members

By Wesley E. Wright and Molly Dear Abshire, as published in the Houston Chronicle Senior Living Section on February 18, 2009.

As our population has grown over the years, so has the proportionate number of persons who are disabled. Frequently, a parent or grandparent will want to leave assets upon their death to the person who is disabled. Sometimes the assets are left to the disabled as a result of no will at all, passing then by intestate succession to the person who is disabled.

Bernie Krooks, a New York attorney and president of the Special Needs Alliance, attorneys who specialize in special needs trusts, says, "Parents and grandparents need to adopt a more aggressive view towards planning for this event. If you have a lineal descendant who you know is disabled enough to receive public benefits either now or later then to leave money directly to the person is ill advised. Why? Because the receipt of the funds is likely to knock the loved one off of benefits, if on them now, or prevent becoming eligible for the benefits if the person would have been eligible later."

Special needs trust are generally the way to go. Some people think that disinheriting the person is the best way, then informally appointing other children to "take care" of the person. This is almost never the best approach if the goal is to be fair to the family member who is disabled. The ones who agree to take care of the person may have a change of heart and the money may never get to the loved one or the person may have a sundry of issues that arise such as bankruptcy, divorce or disability.

Why not allow the disabled person's share to go into a special needs trust with the person named as the beneficiary? Then the assets can be managed by a trusted family member or friend or if there is enough money to justify such then a corporate trustee could be appointed. The beneficiary is then able to continue to receive or access public benefits and has a trust to pay for the extras the public benefit will not cover. This trust is usually written into the parent or grandparent's will and, if so, is known as a testamentary special needs trusts. Another type of special needs trust allows a person to establish the trust during the lifetime of the grantor who is setting it up and allows for money to be advanced into the trust while the grantor is still alive. This type of trust is known as an *intervivos* special needs trust. If the funds actually end up inadvertently being given to the person who is disabled anyway, then there is one more opportunity to get the best of two worlds i.e. the continued opportunity to enjoy public benefits while having a trust fund for extras. This would be a self-settled special needs trust which allows a person under 65 years of age to place their own assets into a self-funded trust that will be protected from being counted as a resource against the beneficiary so long as the trust was properly drafted.

This trust is generally considered to be less favorable in that one of the terms of the trust requires that any assets left in the trust upon the death of the beneficiary shall be paid to the State (Texas) to the extent that Medicaid benefits were paid out to the beneficiary during his or her lifetime. The previously mentioned trusts have no such requirement so any money left in the trust upon the death of the beneficiary can be distributed to a remainder beneficiary such as another child or family member of the grantor.