

## Elder Law: Should you have a special needs trust?

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BY Julian Gray and Frank Petrich

Bill and Susan are a happily married couple in their late 50s. They have three children: Alice, Jan and Sam. The two daughters are married and live in states other than Pennsylvania.

Sam, the youngest of the three adult children, has been disabled since youth and has been receiving Supplemental Security Income (SSI), which is not to be confused with Social Security Disability Insurance (SSDI).

SSI is operated by the Social Security Administration. By being an SSI recipient and observing some very strict income and resource rules, Sam has his medical needs met through the Medical Assistance program. His needs are such that certain services would not be otherwise available to him and/or would be prohibitively expensive for his parents to provide to him. In addition, Sam has no resources of his own.

Bill and Susan have begun to realize they, in the future, may no longer be able to care for Sam and, equally important to them, they don't want to jeopardize the services paid for by the Medical Assistance program.

They also are aware that they are not going to be around forever and want to make plans, equally, for all three of their children in their respective wills.

They realize it is not realistic for them to think either one of their daughters would be able or willing to take Sam into their own homes if Bill and Susan were to die before Sam. Additionally, they have had issues if both daughters perceive a favoritism toward Sam.

Overtly favoring Sam in their wills, they feel, could lead to an estrangement on the part of the sisters towards Sam (money does do funny things to people).

What Bill and Susan, after going through the estate planning process with their lawyers, decided to do was create, now, a "Special Needs Trust."

While there are different types of special needs trusts (which we will discuss in a future column), Bill and Susan's trust for Sam is called a "Third Party Special Needs Trust"; third party because it would be funded with monies not those of the beneficiary (Sam).

In addition, other family members could contribute monies to this trust, if they wished, to benefit Sam. Then in Bill and Susan's wills, they could additionally fund ("pour over" to) the trust with monies that would, but for the trust, have gone directly to Sam.

Why is this important? This special needs trust will supplement, not supplant, the Medical Assistance and SSI benefits received by Sam while preserving and maintaining the funds from which special items and services can be made available to him.

This trust will also avoid the disruption and anxiety which can be caused by the discontinuance of benefits and help promote stability for Sam. The trust will allow Sam to be eligible for any additional benefits when they may be available from time to time in the future.

If the benefits Sam presently receives are inadequate to meet his needs, the trust assets can fill those gaps. Even if available benefits adequately cover Sam's material needs, trust assets may be used to enrich his quality of life without jeopardizing the needed benefits he is now receiving. Additionally, to the extent that trust assets remain after Sam's death, they may go to other beneficiaries (Alice, Jan and/or their children or to whomever Bill and Susan wish).

The next critical decision Bill and Susan must make is the trustee(s) of their respective trusts. This is probably the most difficult decision they will have to make. Being a trustee is a very serious undertaking. Every trustee is held to a high standard of performance, considerably higher than for the management of her/his own affairs.

In a special needs trust, a trustee can be given substantial discretion over the funds entrusted to them. But, the trustee is required to administer the trust for the beneficiary's (Sam's) benefit to supplement, not supplant any benefits Sam receives from SSI and Medical Assistance. The trustee must help ensure that the trust assets are not considered available to Sam and

do not count as his property in determining eligibility for Medical Assistance or SSI.

In Bill and Susan's case, it may be well to consider both a corporate trustee (one with experience in dealing with the complex issues of a special needs trust) and a family member (Alice, Jan or someone else) who can take into consideration more personal issues relating to Sam but without having to deal with the day-to-day trust administration activities.

Having made a trustee decision, completing their wills and other estate planning documents, Bill and Susan can now feel more comfortable that they have helped ensure Sam's future well-being along with helping the familial relationships among all three of their children.

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