

Funding a Special Needs Trust with Real Estate

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Creating a third party funded Special Needs Trust for a child with a disability as part of your estate plan is only part of the preparation necessary to ensure that your child is financially sound and protected after your death. Though this topic is broad with unique issues for each family, for many clients, the topic most fraught with anxiety is how to make sure that the family real estate passes into the Special Needs Trust and remains the child's home. You have several options for funding a Special Needs Trust with real estate at death including wills or another trust. However, there are also a number of pitfalls that are important to avoid.

Last Will and Testament

Using a will to fund a Special Needs Trust with real estate is the most common estate planning method for passing real estate at death. Wills are straightforward and relatively inexpensive to create during your lifetime and can also be changed and modified relatively easily.

The negative aspect of funding a Special Needs Trust with a will is that the property will have to pass through probate before it can be titled in the name of the Special Needs Trust. Probate can take many months and can be costly. Accordingly, it is worth investigating other options to fund a Special Needs Trust.

Revocable Living Trust

To avoid delays and a reduction of other funds ultimately passing to the Special Needs Trust, another option to consider is a revocable living trust. The advantage to a revocable living trust is that distribution of the trust creator's assets at the death of the trust creator avoid probate, thereby passing the real estate to the Special Needs Trust with relative ease and less expense. The process of administering a revocable living trust upon the death of the creator is free from the court system and is thereby also more private. Though somewhat more costly to establish during your lifetime, cost savings are achieved after death with the relative ease in distribution of assets to the Special Needs Trust and other Revocable Living Trust beneficiaries.

In order for real estate to pass from a revocable living to a Special Needs Trust at death outside of probate, the Revocable Living Trust must own title to the real estate. This would involve retitling ownership of the home into the Revocable Living Trust during your lifetime.

Irrevocable Asset Protection Trust

If you are considering additional planning to protect assets for children without disabilities or to protect assets from a future spenddown for long-term care costs, an irrevocable asset protection trust could be the vehicle used to fund the Special Needs Trust at death. Similar to the Revocable Living Trust, an irrevocable Asset Protection Trust avoids probate and can be easier and faster to administer at death. An Asset Protection Trust can also be drafted to mitigate taxes at death and protect assets during your lifetime so that the maximum amount of funds are available to fund the special needs trust at death.

Pitfalls to Avoid

Administration of a Special Needs Trust containing real estate can be particularly difficult for trustees. In fact, some professional trustees will refuse to administer a trust with real estate and may insist on transferring the real estate into the name of the child beneficiary. Depending on the public benefits being used by the child with a disability, transferring the real estate to the child beneficiary could subject the real estate to collection through an estate recovery claim at the time of the child's death and a loss of the family home from being passed down to future generations or other parties named as remainder beneficiaries of the Special Needs Trust. Before selecting a trustee, it is important to know their position regarding ownership of real estate by a Special Needs Trust.

When funding a Special Needs Trust with real estate it is important to consider how the real estate will be supported and maintained. Most individuals with disabilities have limited income or income that is unlikely to increase substantially in the future, and the costs of maintaining a home are high. Future payment of property taxes, property insurance, maintenance and home repairs are important considerations. Accordingly, you should be realistic regarding the amount of additional resources the Special Needs Trust will need to support real estate for the beneficiary. Funding a Special Needs Trust with real estate and no additional assets to support the real estate can result in disappointment for a child whose Special Needs Trust lacks the resources to retain real estate for the long term.

The family home is very often the most valuable asset in an estate, both financially and emotionally. Having a plan in place that best suits your family's needs is critical when protecting a loved one with a disability. If you have additional questions or want to investigate creating a Special Needs Trust for your child, We are happy to help you craft an estate plan that is well-suited to your family's situation.