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Estate Planning
Special Needs Planning

Newsletter



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A Divorce May be the Time to Consider a Special Needs Trust

Unfortunately, in this country half of the marriages end in divorce. Some of those families may have children with special needs; children who have been disabled from birth, or who have suffered a disabling injury. When a family with a special needs child is going through a divorce, the family should pay attention to how the property division will affect the special needs child.

A disabled child will not always be covered by a parent's health insurance policy. If that child is unable to work, the chances are that the child will receive medical treatment through Medicaid. However, Medicaid is a mean-based program. That means, in order to qualify, the child may not have assets and income over a certain level. Special attention, therefore, must be paid to things like child support, and the property settlement for the parent who will live with the child. If not handled properly, the property settlement and support arrangement could jeopardize the child's eligibility for Medicaid and Supplemental Security Income.

One possible answer could be the creation of a special needs trust. A trust is simply a legal arrangement where one person, called a trustee, holds property for the benefit of another. With a special needs trust, assets can be used to supplement a disabled person's life, and pay for the things Medicaid will not cover. A properly drafted and administered special needs trust will structure the assets to maintain the disabled person's eligibility for public benefits.

Creating a special needs trust in a divorce can avoid the situation where the property settlement unexpectedly disqualifies the child for public benefits, and creates a tool where other family members may be able to help enhance the disabled child's quality of life without jeopardizing the availability of medical care. ■

William J. Kovatch, Jr., Attorney at Law, PLLC provides elder law services. The practice of elder law includes the representation of the elderly and the disabled in connection with:

- estate planning (wills and trusts)
- estate administration
- the application for public benefits such as Medicaid
- advance medical directives
- the creation of powers of attorney
- guardianship
- conservatorship,
- disability planning
- long-term care planning.

William J. Kovatch, Jr. is a member of the National Academy of Elder Law Attorneys, and admitted to practice law in:

- The District of Columbia
- New Jersey
- New York
- Pennsylvania
- Virginia

Can You Use the Stock Market Downturn to Your Advantage?

For people who have enough money, a proper estate plan could involve giving gifts while they are still alive. A gift is not taxable income to the person who receives it. But, the giver may be subject to the gift tax.

Under current law, a person may give up to \$12,000 per year to a single person without incurring gift tax liability. This is called the gift tax exemption. In addition, a married couple may combine their exemptions and give up to \$24,000 per year to a single person. Moreover, a person may give up to \$1 million over and above the gift tax exemption during his or her lifetime without incurring gift tax liability.

When a person gives shares of stock as a gift, those shares are valued for the purposes of calculating the gift tax exemption on the date that the stock is given. When the stock market declines in value, a person may be able to give more shares of stock as a gift, without reaching the gift tax exemption. Thus, more potential wealth can be transferred out of a person's estate during his or her lifetime, possibly saving in eventual liability for estate taxes, gift taxes and generation skipping transfer taxes.

This particular strategy may not work for everyone. It assumes that the decline in stock value is temporary, and that the value of the shares will rise over time. Moreover, it could create a problem if you find yourself in need of Medicaid to pay for a nursing home in the future. In the end, whether such a strategy makes sense for your situation is something you need to discuss with your financial advisor and your estate planning attorney. ■

What Is an Advance Medical Directive? Do I Need One?

If nothing else, every person should consider what would happen if, due to an accident or medical problem, you could not make your own decisions. We've all seen cases in the news of loved ones fighting over what to do with an adult who has suffered a brain injury and now only exists in a vegetative state. Would your loved ones know what you would want to be done?

The answer is to create an advance medical directive. This document tells your doctors who you would want to make your medical decisions if you were unable to do so yourself. In addition, it gives that person guidance on how to make those medical decisions.

There are many forms out there for advance medical directive, or living wills as they are sometimes called. Many states adopted suggested forms, which you are not legally required to use. Most of those forms list a number of types of treatment, such as being placed on a respirator, and ask you to check whether you would accept or decline such care.

Many doctors, however, are not comfortable with this type of form. Those doctors see such instructions are too restrictive. Medical conditions can be fluid. Treatment, such as a respirator, may be required temporarily to stabilize a person first, in order to consider what their next step should be.

The better course is to use your advance medical directive to appoint clearly who will make the medical decisions for you. This person is called your health care proxy. The advance medical directive should also say what qualities of life are most important to you, and what the goals of your medical care should be. If the proposed treatment is not likely to restore or preserve the qualities of life you hold most dear, the advance medical directive would instruct your health care proxy to decline the treatment.

Having a properly drafted document, however, can only do so much. The real value in creating the document is to have you consider what qualities of life you find most important, and to communicate that to the person you choose to be your health care proxy. ■

This newsletter is for informational purposes only, and not meant to constitute legal advice. Quality legal advice requires a thorough look at the facts and circumstances surrounding your situation.