

WILLMS, S.C.

LAW FIRM

MEMORANDUM

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TO: Clients and Friends of Willms, S.C.

FROM: Jessica A. Bourke

DATE: September 12, 2011

RE: The Benefit of a Special Needs Trust

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**Introduction**

According to the U.S. Census Bureau, an estimated 36 million people in the United States live with some form of disability. One-fifth of disabled adults live in poverty, meaning they may lack access to the essential resources conducive to leading a full, fulfilling life. For those who care for a loved one with a disability, those broad statistics matter very little. What matters is making sure that the person you are responsible for has the resources to obtain good healthcare, good education, and a good quality of life. This memorandum outlines the options available to individuals who are trying to plan for the care of a loved one with special needs. In particular, it addresses the following widely-held misconceptions:

- A disabled person has to spend all their money before they can take advantage of government benefits programs, so I should disinherit my child/other relative because they will just have to get rid of the money anyways.
- The safest route is to give money to the person caring for the disabled person, and specifically instruct them only to use it for the disabled person's care.
- My money is in a revocable trust, so if I need nursing home care, my money is absolutely protected. Then when I die, the money passes to my children in revocable trusts, so their money is also protected in case they have a disability.

**Why You Don't Have to Disinherit Your Loved One**

The idea that a disabled individual must be "poor" before he or she can take advantage of government benefits programs is not entirely baseless. Both Supplemental Security Income (SSI) and Medicaid (also known as Medical Assistance, MA, or T-19) provide benefits to disabled individuals and are means-tested programs. "Means-tested" means that an individual must have assets and income below a certain level in order to be eligible.

Therefore, if an individual has too much wealth, they may not qualify for either program. This can be very unfortunate when an individual has too much wealth to qualify for these programs, but not enough to live comfortably or pay for necessary medical expenses.

The key to eligibility for SSI and MA is that only “countable” assets are factored into the determination. Several types of assets are “exempt” from being counted. Examples of exempt assets include: a house, a car, personal possessions, prepaid burial expenses, certain types of income-producing property, and funds placed inside properly drafted special needs trusts.

Because there are so many ways for a disabled individual to own assets and still qualify for government benefits, it is not necessary to write the disabled person out of your will. Indeed, because there are many things government benefits will not provide even if a person does qualify, disinheritance could actually work a great disservice to that individual. SSI provides a set cash benefit, and MA provides health care and long-term care financing. The programs do not pay for “the extras”: a handicapped accessible van or improvements to a person’s house to make it more functional. They may not pay for experimental procedures or top-of-the-line, cutting edge physical therapy. They do not pay for vacations or travel to family get-togethers or a day at the movies.

### **Why You Should Not Give the Money to Someone Else to Use for the Individual**

This is an option that many family members believe will work well. Instead of bequeathing funds directly to the disabled individual, they will give their estate to a non-disabled family member, and that family member will make sure the disabled individual is taken care of. In an ideal world, this would work. In the real world, the non-disabled individual with the funds may not always have the disabled person’s best interests in mind. More likely, the non-disabled individual could experience financial troubles, or be sued, or get divorced. There are numerous ways this strategy could go wrong, leaving the disabled individual without necessary financial resources.

### **What a Special Needs Trust Can Do**

Placing funds into a special needs trust for an individual helps ensure that the funds will be used for the benefit of the disabled individual, and also allows the funds to be disregarded for purposes of applying for government benefits. The funds in the trust can then be used for things that the disabled individual would not otherwise be able to enjoy: the handicapped-accessible van, the addition to the house to make it more accessible, the vacation, or the pet they would like to own.

In order for a special needs trust to work this way, it must be properly drafted. The revocable trusts we use as highly-effective estate planning tools may not be as effective in regards to government benefit eligibility. The Social Security Administration does not care about the name of the trust or the intention of the grantor; the SSA will only deem a trust a special needs trust if it meets very specific criteria. In order for a trust to be disregarded for government benefit purposes, it must be irrevocable, and the trustee of the trust must have

sole discretion in making distributions to the beneficiary. The disabled beneficiary cannot have any control of how the trust funds are used, and cannot have a right to demand distributions or go to court to compel distributions. Cash can never be paid directly to the beneficiary. Instead, the trust funds are used to pay directly for goods and services. If the beneficiary is on SSI, there are additional restrictions on how the funds may be used.

The type of trust you create also depends on how much money is going into the trust and where the money is coming from. There are different rules depending on whether the funds being put into the trust are the disabled beneficiary's own funds, or are the funds of a third-party, like a parent or other relative. If a large amount of money is being placed in a trust, a free-standing trust where you can act as trustee with the assistance of a financial institution may be preferred. If, on the other hand, there is a relatively small amount of money going into the trust or a suitable person to act as trustee does not exist, it may be more cost-effective to place the funds into a pooled trust account, where a corporate trustee with government benefit expertise manages several trust accounts at one time and therefore keeps the administrative costs low.

### **Summary**

A special needs trust can be a highly effective way to transfer wealth to loved one with a disability without interfering with their ability to obtain government benefits. These trusts come in a variety of shapes and sizes, and can be tailored to fit each individual situation. Because the rules are so narrowly construed, it is essential to consult with a legal professional who understands these parameters.

Our firm has created individual special needs trust for clients for current use or use at some point in the future. We can also insert provisions into a will so that a special needs trust can be created upon one's death. We can include specific language into durable power of attorney documents authorizing an agent to create a special needs trust in the event you are not able to do so yourself.

If you believe that a special needs trust may help effectuate your estate plan, or even be the first component of your estate plan, please do not hesitate to contact our office and speak with us about your options.

**END OF MEMO**