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Why Plan for the Future?

The number of individuals in this country with disabilities has grown significantly in the past decade. Advances in medical treatment and technology have led to increased survival rates and longer life expectancies for adults with disabilities. New breakthroughs in treatment for mental illness have also had an effect on both quality of life and life expectancies. Because of this longer life span, future planning is important in order to secure essential services and financial resources for persons with disabilities, especially after the death of their parents.

Failure to plan leads to a lack of choices. Bureaucratic solutions may be forced on individuals with developmental disabilities or severe and persistent mental illness. If you and your family do not develop a financial plan for the future, the state of Michigan will do so for you. The consequences may not be what you would choose for your son or daughter with a disability. In most instances, the real issue is not whether a plan will be needed, but when it will be needed, and what methods will be most effective for your individual situation.

Effective Planning Can Provide:

1. Access to necessary services
2. Ability to afford these services
3. A personally selected third party to direct how the individual
4. with a disability should be treated and his/her affairs handled
5. Possible less restrictive alternatives to guardianship
6. Alternative residential settings which may avoid unnecessary institutionalization
7. Family members or friends who are prepared for their roles in assisting the individual with a disability

Failure to Plan May Lead To:

1. Loss of personal freedom for the individual
2. Inadequate community support networks
3. Forced institutionalization or inappropriate placement
4. Inadequate financial resources
5. Overdependence on public benefit programs
6. Overwhelmed, and frustrated family members

What Estate Planning Options are Available?

1. Direct bequest - leaving a specific gift of assets to a beneficiary.

(Generally we do not recommend this option)

Advantages

- a. Parents can designate a specific amount or portion of the estate they choose to go directly to their child
- b. Satisfaction to parents regarding meeting financial needs of son or daughter
- c. Flexible: can change amount in will at any time prior to death
- d. No trustee or guardian required

Disadvantages

- a. Most likely would make adult child ineligible for government benefits such as SSI and Medicaid.
- b. Public mental health system will claim this amount toward the cost of care. As a result, child would not benefit from gift.
- c. Child could be exploited financially by others or could misuse funds.

2. Disinheritance - leaving nothing to the individual with a disability.

(Generally we do not recommend this option)

Advantages

- a. Child would continue to be eligible for all government benefits
- b. No danger of financial misuse by child or exploitation by others
- c. No danger of claims being made for cost of care by public mental health system

Disadvantages

- a. Emotionally difficult for many parents to do this
- b. No assurances that the adult child's needs are met after the parent's death
- c. Possible criticism from other family members
- d. Government benefits may change in the future child inadequately supported

3. Morally Obligated Gift - leaving assets to another individual and asking him or her to use them for the benefit of the child with a disability.

(Generally we do not recommend this option)

Advantages

- a. Individual with a disability could continue receiving government benefits as funds would not be in his/her name

- b. Extra funds would be available to meet needs of the individual with a disability
- c. Satisfaction for parents to know that they are helping meet the needs of their son or daughter with a disability
- d. No trust fees or guardianship necessary
- e. Distribution at discretion of person in control
- f. No accounting required

Disadvantages

- a. Informal agreement- cannot be legally enforced
- b. Sibling of other beneficiary is not legally obligated to spend money on behalf of individual with a disability
- c. Money could be considered joint property in the case of divorce of a family member-could be claimed by estranged spouse in a settlement agreement
- d. If sibling's or other individual's own family has financial disaster, money meant for individual with a disability may go for their use
- e. Beneficiary may resent extra responsibilities and decision-making duties on behalf of individual with a disability
- f. Other family members may be resentful of sibling with "extra share" of inheritance
- g. Income is taxable to family member receiving bequest
- h. Morally obligated person may feel compelled to use their own funds if inheritance runs out
- i. Sibling may pass away and gift would be distributed to other individuals

4. Support trust - trust instrument drafted in a standard format for support and maintenance of beneficiary usually with instructions or schedule for distribution of funds. (We recommend this option in limited situations only)

Advantages

- a. Could provide monetary support for individual with a disability after death of parents
- b. No danger of monetary exploitation of individual-provides financial control
- c. Satisfaction to parents, knowing they have made financial provisions for their son or daughter
- d. Avoids probate procedure
- e. Can be revocable or irrevocable
- f. If irrevocable, may be some tax advantages

Disadvantages

- a. Will cause child to become ineligible for government benefits
- b. Public mental health system will attach these funds for past or present cost of care

- c. Requires fees to be paid to set up trust, and for trustee, if applicable
- d. Trust instrument may be somewhat inflexible in regards to distribution
- e. Some banks will not work with small trusts
- f. Must file tax returns

5. **Third Party Funded Special Needs Trust - trustee uses own discretion regarding when and how to distribute principal and interest, limiting expenditures to supplemental needs. (Most highly recommended option)**

Advantages

- a. Provides money for extras above and beyond basic support
- b. When written correctly, can preserve eligibility for government benefits for child with disability
- c. Can escape being seized for cost of care
- d. Provides ultimate flexibility re: distribution and investment of funds
- e. Parents can be satisfied that have made provisions to meet financial needs of their son or daughter
- f. Assets directed to this trust can avoid probate process
- g. Can be revocable or irrevocable (must be irrevocable to meet Medicaid and SSI standard)

Disadvantages

- a. Fees are involved in setting up trust and administering trust
- b. Necessary to choose reliable trustee, who can work with the individual with a disability and other family members
- c. May be challenged at some future date, but so far, wording has been upheld in Michigan and nationwide

6. **Special Needs/Pay Back Trust (or Exception A Trust):** Option created under the Omnibus Budget Reconciliation Act (OBRA) of 1993. Provides an option for an individual with a disability (under the age of 65), who has assets of his or her own, to create a trust and preserve Medicaid and SSI eligibility.

(We recommend this option when Medicaid recipients receive funds)

Advantages

- a. Provides money for extras above and beyond basic support (food and shelter)
- b. When written correctly can preserve eligibility for government benefits for person with disability

- c. Allows beneficiary to use funds in trust over his or her lifetime while retaining Medicaid and SSI benefits
- d. Can provide funding for specialized equipment not covered by most government benefit programs, such as adaptive computerized communication systems, motorized wheel chairs, additional therapy sessions...and to improve the individuals' quality of life (t.v.'s VCR's, stereo's, computer, vacation, car, car maintenance, tuition for school, camp fees, additional personal assistance, etc.).
- e. Provides a way to deal with an unexpected lump sum, such as an inheritance, insurance payment, or personal injury award
- f. Family member (parents, sibling) can act as trustee
- g. After the state(s) is paid back for the cost of medical care, other family members could receive a distribution from the trust
- h. Other people can use this trust for their own Medicaid planning (for example, grandparents or parents could transfer their funds to this trust and qualify for Medicaid with no transfer penalty)

Disadvantages

- a. Funds are subject to restrictions on how they are spent. Payments to vendors or third parties for items other than food and shelter are allowed, but payments directly to the individual or for food and shelter on a regular basis are considered income to the beneficiary, and may reduce or eliminate benefits payments or eligibility.
 - b. Individual beneficiary must be considered disabled under Social Security or SSI definitions
 - c. Rules from Medicaid and SSA require that the trust be irrevocable
 - d. Fees will be involved in drafting the trust document and for trust administration
 - e. May not provide protection against current lien for cost of care. Typically this lien would need to be settled prior to establishing a sub- account.
 - f. Medicaid and SSA employees at the local level are not familiar with this category of trust, fees will be involved in defending the trust
 - g. Must file tax returns for the trust and the beneficiary
 - h. At beneficiary's death any remaining funds must reimburse the state(s) up to the amount of Medical assistance the person received
 - i. Trust should be established with court approval
7. Special Needs/Pooled Trust -Option created under the Omnibus Budget Reconciliation Act (OBRA) of 1993. Provides an option for an individual with a disability (regardless of age), who has assets of his or her own, to create a trust

and preserve Medicaid and SSI eligibility. (We recommend this option when, Medicaid recipients receive money, for small families, for gifting, and for Medicaid planning for seniors)

Advantages

- a. Provides money for extras above and beyond basic support (food and shelter)
- b. When written correctly, can preserve eligibility for government benefits for person with disability
- c. Allows beneficiary to use funds in trust over his or her lifetime while retaining Medicaid and SSI benefits
- d. Can provide funding for specialized equipment not covered by most government benefit programs, such as adaptive computerized communication systems, motorized wheel chairs, additional therapy sessions...and to improve the individuals quality of life (t.v.'s VCR's, stereo's, computer, vacation, car, car maintenance, tuition for school, camp fees, additional personal assistance, etc.)
- e. Provides a way to deal with an unexpected lump sum, such as an inheritance, insurance payment, or personal injury award
- f. Non-profit organization acts as trustee, with family members and/or friends as advisors
- g. Sub-accounts can be established directly by the person with a disability (among other parties) regardless of age (although there may be a divestment penalty imposed for those over the age of 65)
- h. Other people can use this trust for their own Medicaid planning (for example, grandparents or parents could transfer their funds to this trust and qualify for Medicaid with no transfer penalty).

Disadvantages

- a. Funds are subject to restrictions on how they are spent. Payments to vendors or third parties for items other than food and shelter are allowed, but payments directly to the disabled individual or for food and shelter on a regular basis are considered income to the beneficiary and may reduce or eliminate benefits payments or eligibility
- b. Individual beneficiary must be considered disabled under Social Security or SSI definitions
- c. Medicaid rules require that the trust be irrevocable.
- d. Fees will be involved in opening a sub-account and for trust administration
- e. May not provide protection against current lien for cost of care: Typically this lien will need to be settled prior to establishing a sub- account.

- f. Medicaid and SSA employees at the local level are not familiar with this category of trust
- g. Fees will be involved in defending the trust
- h. The sub-account and the beneficiary must file tax returns.
- i. At beneficiary's death any remaining funds must be retained by the non-profit to assist other individuals with disabilities. If not, the funds must reimburse the state up to the amount of Medical assistance the person received.
- j. Non-profit organization acting as trustee is also the remainder beneficiary. There is a built in conflict of interest.

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