



### Special Needs Requires Special Planning

By Samah T. Abukhodeir, Esq., The Florida Probate & Family Law Firm, Miami, Florida

Approximately 78% of millennials (ages 18-36) and 64% of people in Generation X (ages 37-52) have not drafted their estate planning documents.<sup>1</sup> Within this 78% of the population, we are seeing more special needs children and families. It is especially important that families with special needs individuals plan for the future by creating an estate plan which accounts for the complexity of the law governing this area.

Many people do not realize that the law allows for individuals receiving Supplemental Security Income ("SSI") or Medicaid benefits to still receive these benefits while receiving an inheritance, personal injury settlement, or divorce settlement. A person's eligibility for these benefits is preserved if the assets or property are titled in a "Special Needs Trust."

The Special Needs Trust assets are exempt from the Medicaid eligibility calculation and other public benefits such as SSI, but those held in a regular trust are not. Therefore, it is essential that an experienced special needs estate planning attorney appropriately draft these documents so the SSI or Medicaid benefits are not lost.

Historically, federal law disallowed disabled individuals below the age of 65 from establishing a Special Needs Trust on their own behalf. It was only when the Special Needs Trust Fairness Act passed in December 2016 that people with disabilities were allowed to create their own Special Needs Trust without relying on another to do so on their behalf (for example, in a guardianship).<sup>2</sup> In addition to disabled individuals now having the ability to establish their own trust, a parent, grandparent, legal guardian or court still has the ability to establish a Special Needs Trust on behalf of the disabled individual.<sup>3</sup>

Despite the rule changes regarding who can create a Special Needs Trust having been updated within the last few years, many of the requirements for a Special Needs Trust mirror those of traditional revocable and irrevocable trusts. As is required with all manner of trusts, a Special Needs Trust will require a trustee.<sup>4</sup> The trustee is empowered with managing and distributing the trust assets. Under Florida law, the trustee's obligations include: to "administer the trust in good faith,"<sup>5</sup> to administer the trust "solely in the interests of the beneficiaries,"<sup>6</sup> to "act impartially in administering the trust property,"<sup>7</sup> and to "administer the trust as a prudent person."<sup>8</sup>

When choosing a trustee for a Special Needs Trust, it is essential to choose a trustee who has experience administrating these types of trusts and has knowledge regarding Medicaid rules and regulations. Therefore, it is important to appoint competent and capable individuals as trustee that can adequately meet their obligations.

In conclusion, there are a multitude of considerations when preparing estate planning documents, especially when involving a special needs family member. Properly prepared estate plan documents for special needs individuals will ensure their needs are met and their interests protected. ■

#### Endnotes:

- 1 <https://www.aarp.org/money/investing/info-2017/half-of-adults-do-not-have-wills.html>
- 2 42 U.S.C. §1396p(d)(4)(A).
- 3 42 U.S.C. §1396p(d)(4)(A).
- 4 Fla. Stat. §736.0402 (2007).
- 5 Fla. Stat. § 736.0801 (2007).
- 6 Fla. Stat. § 736.0802 (2016).
- 7 Fla. Stat. § 736.0803 (2007).
- 8 Fla. Stat. § 736.0804 (2007).

## *Ethics Questions?*

**Call The Florida Bar's Ethics Hotline: 1-800-235-8619**