



*Elder Law Practice*

## Protecting Assets for a Child With a Disability

By Bradley J. Frigon, CELA, CAP

Estate planning and lifetime planning for parents of a child with a disability present special challenges. The goals of the parents are to utilize their assets in such a way as to enrich their child's life while, at the same time, preserving the child's public benefits.

### Estate Planning Options

Parents of a child with a disability have four options with respect to estate planning:

- Disinherit the child;
- Distribute the assets directly to the child;
- Distribute the assets to a sibling with the understanding that the sibling will use the assets for the benefit of the child with a disability; or
- Distribute the assets to a trust for the benefit of the child with a disability.

### Disinherit the Child

The first estate planning option is to simply disinherit the child. If the parent's estate is relatively modest, and the child's needs are great, this may be the best approach, because any legacy from the parents would be inadequate to meet the significant needs of the child.

### Distribute the Assets Directly To the Child with a Disability

The second option is to make a gift to the child with a disability. The negative consequence of this option is that distributing the assets to the child with a disability will disqualify the child for any means-tested public benefits. This may render the child ineligible for supplemental security income (SSI), Medicaid, or federally-assisted housing, as well as for supported employment and vocational rehabilitation services, group housing, and other services. In addition, the child

may be charged for program benefits previously received.

### Distribution to a Sibling Or Related Party

The third option is to distribute the assets to a sibling or related person with the understanding that the sibling will use the monies for the benefit of the child with a disability. Distribution to other children is a risky proposition. If assets are distributed to a sibling, the assets are held in the name of the sibling. The assets are then exposed to the creditors of the sibling. The assets may also be claimed in a divorce action and be subject to misappropriation or mismanagement. Additionally, if the sibling spends more than \$10,000 per year of the inheritance on the child with a disability, a taxable gift may result. Any income earned by the assets will be taxed to the sibling.

### Supplemental Needs Trust Created for the Benefit of a Child With a Disability

A trust created by a third party for the benefit of, but not utilizing the property of, a disabled child, is typically referred to as a Supplemental or Special Needs Trust. A Supplemental Needs Trust established for a disabled child does not require a pay-back provision as mandated by the disability trust provisions of 42 U.S.C. §1396p(d)(4)(A) and C.S.R. 15-14-412.8.

Third party trusts are established with assets contributed by individuals other than the disabled child for the benefit of the child. The terms of the trust will determine whether the trust fund is countable as a resource or income for Medicaid eligibility. A trust that authorizes the trustee to use principal or income for the support

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## Older Americans Month 2012

May is Older Americans Month, a perfect opportunity for state and local elder bar sections and committees to show their appreciation for older adults in our communities.

This year's theme for Older Americans Month is "Never Too Old to Play," which highlights the important role older adults play in sharing their experience, wisdom, and understanding, and in passing on that knowledge to other generations in a variety of significant ways.

Please share with *Bifocal* news about your elder bar section's or committee's plan for an Elder Law Day program in your community. We may include a profile of your event in upcoming

issues of *Bifocal* to inspire other elderbar sections and committees across the country. E-mail [Jamie.Philpotts@americanbar.org](mailto:Jamie.Philpotts@americanbar.org).

### Child with a Disability

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of the beneficiary will probably require the trust assets to be considered as an available resource and disqualify the beneficiary from receiving public benefits. This would be true even if the trustee had complete discretion to make distributions of principal and/or income.

A trust that limits distributions to or for the benefit of the disabled child for non-support or supplemental needs will not be considered as a countable resource. Although the trust is still a discretionary trust, the trustee is limited to making use of the trust funds for non-support purposes.

### Note

Bradley J. Frigon is a Certified Elder Law Attorney and a member of the Council of Advanced Practitioners of the National Academy of Elder Law Attorneys. Read more of the author's articles at [www.bjflaw.com](http://www.bjflaw.com).

The information in this article is provided as a public service and is not intended as legal advice. Such advice should be obtained from a qualified elder law attorney. To find one in your area, visit [www.NAELA.org](http://www.NAELA.org).

The National Academy of Elder Law Attorneys (NAELA) joins *Bifocal* in celebrating Elder Law Month this May. To learn more about Elder Law Month, visit the [Elder Law Month Page on the NAELA Web site](#). For questions about Elder Law Month, or to receive NAELA's free *Questions and Answers When Looking For An Elder Law Attorney* brochure, e-mail NAELA Communications Specialist [Abby Matienzo](mailto:Abby.Matienzo@naela.org) or call 703-942-5711 #230.

