

# Special Needs Planning is SPECIALIZED

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All families with a disabled loved one, whether 1 day old or 50 years old, share very common special estate planning problems. Some of these problems are as follows:

1. To make sure that there will always be someone to look after their child when they are no longer around.
2. That their children continue to receive basic government benefit programs (SSI & Medicaid).
3. To leave enough funds so that their child will always have the extra things that they now offer.
4. To find someone to manage the trust funds who is trustworthy.
5. To assure that 50 years from now that their child be given dignified final arrangements.
6. To avoid family friction.
7. To avoid lengthy probate processes.
8. To trust some professional to put these things into place.

Even though we have these concerns many families don't plan for the future of their children. Less than 50% of families with children with disabilities, take the time to prepare a Will. Those that don't find out the hard way that their children all stand to receive an equal inheritance. When the person with the disability receives the inheritance and loses their benefits, or the money is squandered, the inheritance does not result in a gift to the individual but a gift to the State and Federal Government.

It's not that families don't worry about the future, but studies show that families may cope with their situation by emphasizing the present, and living one day at a time, or cope by avoiding communication about the family

member's disabilities. Lack of adequate or desired services may be a further barrier to planning, as well as not knowing where to go to get the appropriate help. The process can be complicated and cost can also influence planning decisions.

Common factors that motivate families to do planning for their children are: 1) significant occurrence such as vacation, or death or illness to a care giver, 2) financial issues/financial planning, 3) concerns raised by other family members, 4) attending an estate planning seminar. I hope this article will motivate to plan.

All too often when it comes to planning the future for a person with disabilities, all that a family does is contact an attorney to prepare Last Wills and Testaments. The person with a disability is excluded from a direct inheritance and a sibling or other family relative, is left with a few dollars to take care of the loved one with special needs. Tragically one of the first steps in this process, preparing Last Wills and Testaments usually becomes the only step.

A Will is not a complete estate plan, especially for those families who have a developmentally disabled loved one. The average attorney, like the typical member of the community, rarely has the background and the experience in the world of the disabled to provide adequate counsel, and the average family rarely has the financial resources to pay for the attorney's education in the specialized field. It is relatively easy to find out whether or not your attorney has the expertise in this area, just by asking him a few simple questions in regards to SSI benefits. How much money can a person with disabilities have in their name? What are some of the exempt assets that a person with disabilities own? How many Special Needs Trust have you drafted?

will not only include planning for your estate but will also create a separate estate on behalf of the person with a disability, which is designed to provide a comfortable standard living with maximum amount of government benefits. This usually involves disinheriting the child with disabilities in the parents will and leaving that child's share to a Irrevocable Special Needs Trust, which will manage the resources in such a way that the requirements for benefits will never be violated. The use of a Special Needs Trust will solve the problems we listed above, such as protecting government benefits, avoiding probate, leaving sufficient funds, and providing final arrangements. Proper planning solves other issues such as avoiding family conflict. By setting a plan in place and writing a letter of instructions, you will leave no doubt as to your intent, and will name the successor trustees and conservators to make sure that there will always be someone to look after your child when you are no longer around.

A proper Estate Plan for special families

A Special Needs Trust is also known as a Supplemental or Discretionary Trust. The basic concept is that the trustee has discretion on how the assets are spent on behalf of the beneficiary with a disability, and the beneficiary does not have any access to income or principal of the trust. The trust supplements the government benefits and does not supplant them. Since the trust is irrevocable, the trust will own the assets, and not the person with the disability. That is the magic that makes a Special Needs Trust work! All assets are owned by the Special Needs Trust, and not by your son or daughter, thus, keeping them eligible for government benefits. Social Security Administration even has a regulation found in their Program Operations Manual (POMS, 5101120.200), in which Social Security defines that Special Needs Trust are to be irrevocable. Not only does it meet the government regulations, but an irrevocable trust keeps the assets out of the estate of the individual with the disability. An irrevocable Special Needs Trust also encourages other family members to give to the Special Needs Trust, whereas they may not do so if the trust is part of your estate.

A Special Needs Trust is different from a Support Trust. Most family **revocable** trusts are considered Support Trusts, because the trust is to provide for the health, welfare, maintenance, comfort, and support for the trustors during their lifetime. Under existing case law, a Support Trust cannot be used on behalf of a disabled beneficiary, as the courts reason that the trustee has the power and duty to care for the general welfare of the person with a disability and the trustee's powers and trust purposes are identical with SSI's goal to

care for the general welfare of the person with a disability. Since SSI has helped fulfill the purpose of the trust, SSI may pull the benefits and charge for overpayment for past benefits paid. This is why it is important to seek counsel from someone who knows how to plan for your son or daughter's future.

Since the parents are the creators of the Special Needs Trust they can dictate the terms of distribution upon the demise of their loved one. The funds may go to the other remaining children or family members. Families may also want to consider gifting to their trustee, guardian or conservator for their support for their loved one during their lifetime. Also, at this point in time, charities ought to be considered. Charities which are near and dear to your heart, would greatly appreciate a gift. Without such generosity, such organizations may not continue to exist in the future in light of current budgetary restrictions on government programs assisting disabled individuals. Although it is an area not often emphasized by Estate Planning attorneys', each family should strongly consider those programs that have benefitted their child during his or her lifetime, and make a gift in accordance as they set in their heart to do.

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