



888.222.1328

Use a Special Needs Trust to Protect Your Loved One with a Disability

Who will care for your children if untimely death or disability strikes? The mere idea wrenches the heart. Since nobody can escape the effects of mortality, each of us must recognize the need for an estate plan.

In the best of circumstances, establishing an estate plan requires careful consideration and good legal advice. This challenge intensifies, however, when it involves a child with special needs.

Before we explore estate planning strategies for parents of special needs children, let's look at why all parents need an estate plan.

A PAGE FROM OLIVER TWIST

"A ward of the court" may sound like something out of the nineteenth century, but that's precisely what becomes of children whose legally disabled or deceased parents have failed to plan for their care. Unless you've created an estate plan that details who should assume responsibility for your child, the court will step in. This is true regardless of the size of your estate.

Children take center stage in probate court because the court wants to ensure that a responsible person supervises their physical needs and financial affairs. Without proper planning, the court will appoint a guardian to assume responsibility for your child's personal care. The court will also appoint a conservator to oversee your child's financial affairs. Often, the conservator is not a person, but an entity, such as a bank or a professional money management institution.

Probate judges have tremendous discretion in the appointment of guardians and conservators. Thus, there is little assurance that the judge's appointments will be the same individuals you would choose. In fact, if qualified family members aren't available or deemed suitable, the judge may very well appoint professional guardians and conservators unfamiliar to you and your child.

The probate court judge will supervise both the guardian and conservator assigned to your child's case. The conservator is usually required to obtain judicial approval before undertaking any significant financial transactions on your child's behalf. Busy schedules and heavy caseloads often mean that it can take weeks—or even months—before a financial transaction can be reviewed and approved by the supervising judge. This may create devastating delays in providing care and comfort for your child.

Because the court is involved in supervising their activities, guardians and conservators frequently hire attorneys to help navigate the legal system. The fees for these attorneys—as well as the fees charged by the conservator, guardian, and the probate court itself—are billed to the estate you left behind for your child's benefit. These expenses leave less money to provide for your child's care, education, and other requirements.

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UPPING THE ANTE: PLANNING FOR THE SPECIAL-NEEDS CHILD

Every parent has a responsibility to plan for the unthinkable. When the child has physical, emotional, or mental challenges, careful estate planning is even more crucial, for three important reasons:

1. Children with these challenges have greater needs. Depending on the degree of their disability, they may require specialized treatment including therapy, housing, education, adaptive equipment, and in-home care, among many other costly services. The need for this care may extend throughout their childhood, or even their entire lives. Providing the appropriate degree of care requires careful financial planning.
2. A specially tailored estate plan is the only way to ensure that you can provide for your child without jeopardizing his or her eligibility for government and private benefit programs.
3. For parents of children with special needs, proper estate planning is the only way to protect the child's financial interests in the present, as well as in the future after you're gone.

THE HORNS OF A DILEMMA

A painful dilemma that parents of special needs children often face is keeping a disabled child eligible for important federal and state benefit programs. Why is this difficult? Because the child can have no assets. That leaves parents with a difficult choice: provide a legacy for their child and hope it will be sufficient for his or her needs, or make the child a virtual pauper and retain his or her eligibility for government assistance.

Fortunately, there is a simple answer within reach of nearly everyone—the Supplemental Needs Trust.

HOW THE SUPPLEMENTAL NEEDS TRUST WORKS

The Supplemental Needs Trust allows a parent, grandparent, or guardian to provide funds for a disabled child without disrupting his or her eligibility for government aid. Thankfully, implementing a supplemental needs trust is a fairly simple process.

With the assistance of your estate planning attorney, you appoint trustees for your child's Supplemental Needs Trust. The trustees manage the assets you transfer to the trust for your child's benefit. In the event of your disability or death, the trustees will also supervise your child's care.

During your life, you can serve as trustee and remain in complete control over your child's care. When you pass, your successor trustee steps in and cares for your child's well-being on your behalf. Unlike the appointment of a guardian and conservator, these trustees are people you know and trust. Relatives, close family friends, or your trusted financial advisors, can be appointed to supervise your child's personal care.

As part of setting up your child's Supplemental Needs Trust, you will provide detailed written instructions to direct your trustees' activities. Trustees are obligated by law to strictly follow your written instructions—thus giving you the assurance that your child's needs are being attended to according to your wishes.

Best of all, the Supplemental Needs Trust preserves your child's eligibility for federal, state, and charitable benefit programs. The only caveat is that the funds withdrawn from the Supplemental Needs Trust must be used for purposes other than those covered under the governmental and private benefit programs.

PLANNING WHEN THE DISABLED INDIVIDUAL HAS ASSETS

A child's disability may be the result of negligence or preventable error, such as a doctor's misdiagnosis, a mistake at the hospital, or a product defect. Such errors could lead to a lifelong impairment. If such a heart-wrenching event should occur, a lawsuit—and a sizeable settlement—can be the result.

In most cases, the disabled child will be the recipient of the settlement. Should this occur, the disabled child will become ineligible for government support.

When the federal government enacted the Omnibus Reconciliation Act of 1993 (OBRA '93), it intended to close the door on Medicaid abuse. Legislators realized that taxpayers sometimes deliberately impoverished themselves—and often used trusts to do so—to retain eligibility for Medicaid and other government aid programs. OBRA '93 closed the door on that abuse. In fact, Americans who give away their assets to qualify for government aid can be effectively banned from federal assistance for a period of time, based on the value of the assets given away.

Fortunately, OBRA '93 left the door open for disabled individuals who receive damage awards. A disabled individual may use their own money to fund a trust—similar to the Supplemental Needs Trust—without jeopardizing eligibility for federal, state, and private charitable benefit programs. Going by such names as a “Disability Trust” or “Medicaid Pay-Back Trust,” these trusts are similar to the Supplemental Needs Trust with one significant exception—when the disabled individual dies, any money left over in the trust will be used to repay any government assistance the individual received during his or her lifetime.

Although these trusts are authorized by federal statutes, many states have not officially approved them. An estate planning attorney well versed in this aspect of the law can provide you with the assistance to make navigation of the process manageable.

BUYER BEWARE: ESTATE PLANNING SHORT-CUTS THAT CAN DERAIL YOUR GOALS

While many parents acknowledge the need for estate planning for their children, some take short-cuts that create additional problems.

One of the biggest and most frequent mistakes that parents make is naming their children as beneficiaries of their insurance policies, qualified pension plans, stocks, and other financial instruments.

Unfortunately for these families, neither the financial institutions nor the probate courts will hand that money over to minor children. Instead, the money will be turned over to a conservator who will hold the money in trust for the child. Without proper estate planning, the probate court will appoint a conservator for you—once again, giving you little assurance that your child's affairs will be handled by those you trust.

PLANNING FOR THE UNTHINKABLE

As difficult a subject as it might be, all parents owe it to their children to ensure that they're well cared for, even under the most unthinkable of circumstances. This is especially true for parents of special-needs children.

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At Morris Hall, we focus on protecting families from the expense and delay of probate and minimizing tax consequences. We also implement basic and advanced estate planning strategies for clients, and assist in the administration of our clients' estates upon death or disability. Since we practice estate planning exclusively, we are able to answer the complex questions and concerns consumers have about estate planning.

Morris Hall is staffed with experienced attorneys and paralegals who are trained in the complex areas of trust, trust administration, probate, elder law and tax law. Our firm's aim is to help you, our client, understand the basic principles of estate planning and why each individual needs a plan. We have helped thousands of individuals secure their assets. We are confident that our experience will help ease your mind and the minds of the family you leave behind. By taking advantage of the services that we have to offer, you can be assured that your legacy and your family will be protected.

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