

A Special Child Needs Special Planning

The mere idea wrenches the heart of any parent: if untimely death or disability strikes, who will care for your children? Because no one is immortal, most of us recognize the need for an estate plan, preferably one that appoints a suitable guardian for our children, sees to their financial needs and avoids probate.

In the best of circumstances, it's a task requiring clear thinking and good legal advice. But when a child has special needs, the challenge intensifies.

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 spells out who should assume responsibility for your child, the courts will step in. And that's true whether you've left behind an estate worth millions or nothing at all.

When children take center stage in probate court, it's because the court wants to ensure that a responsible person is supervising their physical needs and financial affairs. The court will appoint a guardian to assume responsibility for your child's personal care. To oversee your child's financial affairs, the court will appoint a financial guardian or conservator.

Often, the financial guardian or conservator is not one person, but an entity, such as a bank or a professional money management institution.

Probate judges have tremendous discretion in whom they may appoint as guardians and conservators. So, there's very 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 who may be strangers to both you and your child.

Both guardian and conservator will be supervised by the probate court judge 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. That 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 them navigate through the legal system. The fees for these attorneys—as well as the fees charged by the conservator, guardian and the probate court itself—all come out of the estate you've left behind for your child's benefit. These expenses leave less money to provide for your child's care, education and other requirements.

UPPING THE ANTE: PLANNING FOR THE SPECIAL-NEEDS CHILD

Clearly, every parent has a responsibility to plan for the unthinkable. But when the child has physical, emotional or mental challenges, careful estate planning is even more crucial, for three important reasons.

First is the simple fact that these children have greater needs. Depending on the degree of their disability, they may require specialized treatment that encompasses therapy, housing, education, adaptive equipment and in-home care, among many other costly services. The need for this care may extend throughout their childhood and last well into adulthood, or even their entire lives. Providing the appropriate degree of care requires careful financial planning.

Here's the second critical reason why parents of a special child need a special estate plan: it 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.

Finally, for parents of children with special needs, estate planning is the only way to protect the child's financial interests today as well as in the future, when you may no longer be on the scene.

THE HORNS OF A DILEMMA

It's a painful dilemma that parents of special children often face: to keep a disabled child eligible for important federal and state benefit programs, the child can have no assets. That leaves parents with a difficult choice: provide a legacy for their special child and hope it will be sufficient for all his needs, or make the child a virtual pauper and retain his eligibility for government assistance.

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

HOW THE SPECIAL NEEDS TRUST WORKS

The Special Needs Trust allows a parent, grandparent or guardian to provide funds for a disabled child without disrupting her eligibility for government aid. Setting one up is a fairly simple process.

Working with your estate planning attorney, you appoint Trustees for your child's Supplemental Needs Trust. The Trustees will 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.

While you live, you can serve as Trustee and remain in complete control over your child's care. Should you die, however, your Successor Trustees will step in and take care of your child's well-being on your behalf.

Unlike the guardian and conservator a probate court might appoint, these Trustees are people you know and trust. Relatives or close family friends can be appointed to supervise your child's personal care. To work with financial institutions and manage the estate, you may also want to appoint as Trustees your trusted financial advisors.

As part of setting up your child's Special Needs Trust, you will provide detailed written instructions to direct your Trustees' activities. By law, Trustees must follow your instructions to the letter. So you can rest assured they are attending to your child's education, housing and other needs as you would wish.

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

PLANNING WHEN THE DISABLED INDIVIDUAL HAS ASSETS

One of the most heart wrenching aspects of a child's disability is that it may be the result of negligence or preventable error. A doctor's misdiagnosis, a mistake at the hospital, or a product defect, for example, may create a child's lifelong impairment. When that's the case, a lawsuit—and sizeable settlement—can be the result.

In most cases, the disabled child himself will be the recipient of the funds. And that can make him ineligible for government support.

When the federal government enacted the Omnibus Reconciliation Act of 1993 (OBRA '93), one of its intents was 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 resoundingly closed the door on that abuse. In fact, Americans who give away their assets to qualify for government aid can be effectively “blackballed” from federal assistance for a period of time which varies depending on the value of the assets given away.

Fortunately, however, OBRA '93 left the door open for disabled individuals who receive damage awards. It allows them to use their own money to fund a trust very similar to the Special Needs Trust without jeopardizing their 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 Special Needs Trust with one significant exception. When the disabled individual dies, any money left in his trust will be used to repay whatever government assistance he received during her lifetime.

Although these trusts are authorized by federal statutes, many states have not as yet officially approved them. That's why you may need the assistance of an estate planning attorney well versed in this aspect of the law if your child's situation fits into the scenario described above.

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

While acknowledging the need for estate planning for their children, some parents take short-cuts that create as many problems as they solve.

One of the biggest mistakes parents make—and it happens with alarming frequency—is naming their children as beneficiaries of their insurance policies, qualified pension plans, stocks and other financial instruments.

Unfortunately for these parents and their children, 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. If you haven't appointed a guardian or conservator, the probate court will do so for you, and once again, you'll have little guarantee that those in charge of your child will be the people you would have selected.

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, come what may. Parents of special-needs children face an even greater imperative to do this essential planning.

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