

A SPECIAL CHILD NEEDS SPECIAL PLANNING



INTRODUCTION

The mere idea wrenches the heart of any parent: if 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 minor 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.

Planning for the care of a special needs child certainly tops the list of emotionally-charged topics. It's certainly something that parents would prefer to not think about. But if there is ever a set of circumstances that cry out for planning, it is that of a family with special needs children. If those children are minors, then the need for planning is even greater.

Fortunately for those who must address such issues, the peace of mind parents gain from a well-designed estate plan makes planning for the unthinkable more than worth the effort.

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

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 incapacitated 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 minor children, 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. Often, the financial guardian is not one person, but an entity, such as a bank or a professional money management institution. Or one person can be appointed to wear both hats.

Probate judges have tremendous discretion over who they may appoint as guardians. There's very little assurance that the judge's appointments will be the same individuals you would choose unless you take legal steps before the need arises. In fact, if qualified family members aren't available or deemed suitable, the judge may very well appoint professional guardians who may be strangers to you and your child.

The guardian will be supervised by the probate judge. The guardian is usually required to obtain judicial approval before undertaking any significant or out-of-the-ordinary financial transactions on your child's behalf. Busy schedules and heavy caseloads often mean that it can take weeks—or even months—before a transaction can be reviewed and approved by the court. (In some states,

such matters may be brought before a sort-of assistant judge called a Magistrate or some similar title.) That may create problematic delays in providing care and comfort for your child.

Because the court is involved in supervising their activities, guardians frequently hire attorneys to help them navigate the legal system. The fees for these attorneys—as well as the fees charged by the guardian and costs charged by 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 impairment, they may require specialized treatment that encompasses therapy, housing, education, adaptive equipment, and in-home care, among 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 and estate 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 the child's eligibility for government 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 needs children often face. To keep an impaired child eligible for important federal and state benefit programs, the child can have few assets or resources. That leaves parents with a difficult choice: provide a legacy for their special child and hope it will be sufficient for all his or her needs *without receiving government benefits*, or make the child a virtual pauper and retain his or her eligibility for government assistance. In other words, leaving an inheritance for a special needs child in the same manner as other children will mean sacrifice of 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 the child's eligibility for government aid. Setting one up is a fairly simple process.

Working with your estate planning attorney, you either create a “stand-alone” Special Needs Trust or include the provisions in your Living Trust or will to create a Special Needs Trust after you or you and your spouse pass away. Since a Special Needs Trust under a will requires a probate proceeding that lasts the life of the child, the Living Trust is more popular because it avoids probate.

The stand-alone Special Needs Trust is generally meant to be funded while you are alive. That means you or someone else will add money to it. But in more cases, a Special Needs Trust will be created under the parents’ Living Trust at death and will be funded from their estate or life insurance.

In the trust agreement, you appoint trustees for your child’s 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 finances if you create and fund a stand-alone Special Needs Trust.

During your lifetime, you can serve as trustee and remain in complete control over your child’s finances. Should you die, however, your successor trustees will step in and take care of your child’s finances on your behalf.

Unlike the guardian a probate court might appoint, your successor trustee is someone you know and trust. Relatives or close family friends can be appointed to manage your child’s finances. To work with financial institutions and manage the estate, you may also want a trusted financial advisor to work with the trustee.

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 these instructions. So you can rest assured your child’s education, housing, and other needs are being taken care of.

Best of all, the Special Needs Trust will preserve your child’s eligibility for federal, state and charitable benefit programs. Generally speaking, this is accomplished by providing that the funds can only be withdrawn from the Special Needs Trust for purposes other than those covered under the governmental and private benefit programs.

PLANNING WITH A DISABLED INDIVIDUAL’S 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, a product defect, or an accident, for example, may lead to a child’s lifelong impairment. When that’s the case, a lawsuit – and sizable settlement – can be the result.

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

When the federal government enacted the Omnibus Reconciliation Act of 1993 (OBRA `93), one of its purposes was to close the door on Medicaid abuse. Legislators realized that taxpayers sometimes deliberately impoverished themselves – and often used trusts to do so – to establish 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 impaired individuals who receive damage awards. The law 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 her trust will be used to repay whatever government assistance that was received during his or her lifetime.

Although these trusts are authorized by federal statutes, there are variations from state to state. 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 or the probate courts will hand that money over to minor children. Instead, the money will be turned over to a guardian who will hold the money in a probate court guardianship for the child. If you haven’t nominated someone to serve as a guardian, the probate court will appoint someone for you, who could be a stranger to you and your family.

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. As discussed, parents of special needs children face an even greater imperative to do this essential planning.

A Special Needs Trust can be included in a Revocable Living Trust that is created for normal estate planning goals that most parents share. The SNT would go into effect when the parents die. Other children can receive their inheritance as the parents wish, without limitations due to the Special Needs Trust.

A Special Needs Trust can be added to your present Living Trust if you have one. If not, then a Living Trust can be written and implemented in short order by a skilled estate planning attorney.

There are significant benefits to Living Trust planning for parents in addition to caring for the needs of a special child. For more information about Living Trust, request our report entitled

Living Trusts: Weighing the Benefits. Or visit our website, www.zimmerlawfirm.com and request more information.

A Special Needs Trust is but one aspect of planning for your special child if you should be incapacitated or pass away. Legal, financial and estate planning are necessary and should be coordinated. This Report is meant only as an introduction to planning with a trust, and is not intended to be comprehensive. For a better understanding of your options and legal advice, see a qualified estate planning lawyer. Do not act on the principals discussed in this report without guidance of a qualified attorney.

ADDITIONAL REPORTS

Request any reports of interest to you or your family. Simply call our office at 513.721.1513 or visit our website at **www.zimmerlawfirm.com**.

- A Child with Special Needs, Needs Special Planning
- A Family Guide to Ohio Medicaid Planning
- Aid & Attendance: Special Care Pensions Wartime Veterans
- Are Your Bank Accounts Safe? FDIC Insurance Can Cover You – with the Right Planning
- Asset Protection: Reducing Risk, Promoting Peace of Mind
- Beware of Living Trust Scare Tactics
- Charity Begins at Home: The Charitable Remainder Trust
- Creating a Lasting Legacy: The Best Things in Life Aren't Things
- Dangers of Do-It-Yourself Wills and Living Trusts
- Estate Planning Basics for Families with Young Children
- Estate Planning with Individual Retirement Accounts (IRAs)
- Family Farm: The Next Generation
- Family Wealth Trust: Calculating the Benefits
- Funeral Planning: Options for You and Your Family
- Getting the Most Out of Your Life Insurance: The Irrevocable Life Insurance Trust
- Grandparents' Guide to Second Generation Planning
- Keeping Up with the Ever-Changing Estate Tax
- Living Trusts: Weighing the Benefits
- Paying for Nursing Home Care: A Guide to Medicaid Planning
- Peace of Mind: Planning for All of Life's Contingencies
- Planning It Right the Second Time Around
- Probate: A Process, Not a Problem
- Probate: An Executor's Role and Responsibilities
- Protecting Your Assets with the Family Limited Partnership
- Protecting Your Assets with the Limited Liability Company
- Should You Trust Your Estate Plan – Estate Plan Reviews Ensure Protection for Your Family and Assets
- Special Valuation Benefits for Farms and Other Business Real Property
- The Impact of Divorce on Your Estate Plan
- The Nightmare of Living Probate

- The Trouble with Joint Tenancy
- To My Dog Lucky I Leave \$10,000
- Trust Administration: Prior Planning Prevents Problems
- 23 Non-Tax Reasons to Make a Living Trust
- What Every Senior Should Know About Probate
- Where There's a Will, There's Probate
- Your Life, Your Final Say

ABOUT THE ZIMMER LAW FIRM

Zimmer Law Firm, LLC is a charter member of the American Academy of Estate Planning Attorneys. It is the only member firm in Southwestern Ohio. The Firm has been providing quality estate planning services since it was founded in 1993. The fastest growing demand for its services has been asset protection from the cost of long term nursing care. Whether you need an Elder Law attorney, an attorney for general estate planning with trusts or wills, or an attorney to help settle an estate, our team of qualified staff are here to help you and your loved ones.

In these turbulent times, access to an experienced lawyer to protect your estate and accomplish your goals is more important than ever. If you or your family would like a complimentary consultation to discuss your estate plan or how to protect your estate from depletion to pay for long term nursing care, call us today at **513-721-1513** or visit our website at **www.zimmerlawfirm.com**. Check our website for upcoming seminars, or learn more about the firm at www.avvo.com where you will also find testimonials from our clients. See why *Cincinnati Magazine* recognizes us as a Five Star Wealth Manager. If you would like to receive email announcements for upcoming seminars, call to be added to our seminar mailing list.

A MESSAGE FROM THE FIRM FOUNDER



The goals of Zimmer Law Firm are to make asset protection and estate planning pleasant, easy, and understandable processes for clients. We believe that planning is much more than just creating legal documents. Rather it is about establishing relationships with clients and their family by providing a continuum of services through the passages of their lives. What we do makes an important difference and we take great professional pride and satisfaction in that.

If you or your loved ones would like a complimentary consultation to review your estate plan or to implement a plan, visit our website at www.zimmerlawfirm.com or call us today at 513-721-1513 (Toll-Free 1-866-799-4050) to schedule an appointment. See for yourself why *Cincinnati Magazine* has recognized the Firm as a Five Star Wealth Manager. For the latest news about estate planning or

upcoming law firm events, subscribe to our blog and “like” us on Facebook. Check our website for upcoming educational events. We continue to expand our capabilities and services to meet the demands of a complex and changing estate planning world. Our experience has shown us what was a solution yesterday may no longer be adequate to fully protect our clients today.

This report reflects the opinion of the Zimmer Law Firm. It is based on our understanding of state and federal laws and is intended only as a simple overview of the planning issues. We recommend you do not base your own planning on the contents of this report alone. Review your estate planning goals with a qualified estate planning attorney.

ABOUT THE ACADEMY

The Academy is a national organization dedicated to promoting excellence in estate planning by providing its exclusive membership of attorneys with up-to-date research on estate and tax planning, educational materials, and other important resources to empower them to provide superior estate planning services. The Academy expects members to have at least 36 hours of legal education each year specifically in estate, tax, probate and/or elder law subjects.. The Academy has also been recognized as a consumer legal source by *Money Magazine* and *Consumer Reports Money Adviser*, and its Education Department has been quoted by other consumer press.

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HOW TO CONTACT US



9825 KENWOOD ROAD, SUITE 201

CINCINNATI, OHIO 45242

(513) 721-1513

(513) 287-8623 Fax

Toll-Free 1-866-799-4050

WWW.ZIMMERLAWFIRM.COM

INFO@ZIMMERLAWFIRM.COM

