

7 Key Questions Parents Should Ask About Special Needs Trusts

by

R. Kellen Bryant

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KEY QUESTION #1: Should I consider a special needs trust for my child? Parents whose children require – or are likely to require – governmental assistance to meet their basic needs should consider establishing a special needs trust. Many disabled people rely on Supplemental Security Income (SSI) or other government benefits for their food and shelter. SSI benefits usually provide nothing more.

Parents may have been advised to disinherit their disabled children – the children who need their parents' help the most! – to protect those benefits. The special needs trust allows parents to provide for more than subsistence even after they are incapacitated or gone.

KEY QUESTION #2: What “special needs” will this trust meet? The special needs trust is designed to promote the disabled person's comfort and happiness without sacrificing eligibility for essential government benefits. Special needs can include medical and dental expenses, annual independent check-ups, necessary or desirable equipment (such as a specially equipped van), training and education, insurance, transportation, and essential dietary needs. If the trust is sufficiently funded, the disabled person can also receive spending money, electronic equipment and appliances, computers, vacations, movies, payments for a companion, and other self-esteem and quality-of-life enhancing benefits.

KEY QUESTION #3: When should I create this trust? Because none of us knows when we may die or become incapacitated, it is important to plan for your special needs child early, just as you would for other dependents, such as minor children. In most cases, it is wise to take care of a special needs trust alongside your regular estate planning, such as your will, health care proxy, and power of attorney. The trust can be set up inside your will (coming into existence only after your death) or right away as a standalone entity. I will gladly explain the pros and cons of both options.

KEY QUESTION #4: What funds can we put into our child's trust? In addition to putting in any savings you have set aside for your child, you can leave some or all of your assets to the trust through your will. You can also name the trust as a beneficiary of life insurance or retirement benefits. Couples routinely purchase so called “survivorship” or “second to die” life insurance policies that are specifically directed to fund the trust. Such policies are often the most cost efficient way to ensure that your child's trust has the level of assets needed to ensure maximum care and comfort for life. Finally, the trust can receive inheritances from other people who love your child. Extended family members and friends can make gifts to the trust or remember the trust as they plan their own estates.

KEY QUESTION #5: Who will manage our child's trust? During your life, you can manage the trust. When you or your spouse can no longer serve as trustee, whoever you have chosen can serve according to the instructions that you have provided. Some parents choose another family member, while others choose a professional trustee or a team of advisors.

KEY QUESTION #6: Can't we just ask our other children to use our money for our special needs child's benefit? Yes, you can – and that can be a good solution for a brief time. However, it is not a lasting solution because of the many potential problems:

- What if the child with the money divorces? The spouse may be entitled to half of the assets and will likely not care for your other child.
- What if the child with the money dies or becomes incapacitated while your special needs child is still living? Will his or her heirs care for your special needs child as thoughtfully and completely as you have?
- What if your child loses a lawsuit and has to pay a large judgment or has other significant creditor problems? The court will certainly require that your child turn over that money to the creditor.

Many siblings prefer that the money be placed in trust. It facilitates easier record-keeping and allows them to rely on the assistance of a professional trustee, if needed. Siblings of a special needs child often feel a great responsibility for that child and have felt so all of their lives. Providing clear instructions and a helpful structure lessen the burden on the siblings, supporting a loving and involved relationship among the children.

KEY QUESTION #7: Are trusts confidential? Yes, you decide who has access to the information about your child's special needs trust. This protects your child – and other family members who may be serving as trustees – from financial predators.

10 Vital Issues Parents of Special Needs Children Must Consider in Their Estate Plans

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Parents of special needs children must address a number of issues when developing and implementing an estate plan that will meet (1) their needs, (2) the needs of the special child, and (3) the needs of the remaining family members. Here are 10 important issues that should be considered:

ISSUE #1: Determining and naming the person(s) or entity who will succeed the parents in caring for the special needs child. This is the issue that disrupts the planning process for special needs parents – or may even cause the planning to stall completely – with very unfortunate results. Often, parents feel the need to find the perfect choice, or they debate about persons from either side of the couple's families. No doubt, this is the most important decision in the process, but it also has to be recognized that the decision is not permanent until the parents are deceased or incapacitated. It is far better to make a good choice now and change it later, if you like, than endlessly debate the "perfect choice" and never actually take care of things before it is too late.

ISSUE #2: Using a trust as part of the estate plan. This tool is absolutely critical for handling funds left for the benefit of a special needs child. Under Virginia law (and the law of most other

states), any funds that are left directly to a minor must be the subject of guardianship proceedings where the parents (or survivor) are usually appointed as guardians for the child to manage the funds until the child reaches age 18. That's right – even though you are the “natural guardian” of your child, you cannot legally access or control your child's money without a court order.

The process involves a Surrogate's court hearing, which will involve two lawyers, one representing the parents, and one representing the child. Your child's lawyer is appointed by the Court to write a report and make a recommendation to the judge. This process continues each year when the parents must account for the assets and all expenditures. The Court is likely to require prior approval any time funds are to be expended from the child's account. At age 18 the remaining funds are turned over to the child, no matter what.

Then the courts generally require the guardian to file a surety bond (from an insurance company) in an amount equal to the funds under administration. This requires the payment of a bond premium each year from the child's funds. Talk about cumbersome!

Leaving assets for the benefit of a child in a trust avoids this entire process. Where there are minor children (with or without special needs) in a family, there should always be a trust in place as part of the estate plan to avoid at all costs the financial guardianship process.

ISSUE #3: Selecting successor trustee(s). This is an important decision in any estate plan, and it is critical in a special needs trust because of the unique provisions that will be contained in the trust. The person(s) or entity chosen as successor trustee should have the following attributes:

- Knowledge of the parents' thoughts regarding what should and should not be provided for the special needs child;
- The ability to deal with governmental entities to secure benefits for the special needs child;
- The ability to invest and manage assets;
- The ability to periodically review the living conditions and status of the special needs child and interface with the day-to-day caregiver(s) for the child if the Trustee is not in this role; and
- The ability to deal with other family members who may wish to be involved with the care of the special needs child.

ISSUE #4: Including special needs provisions in the trust. These provisions are designed to keep the assets in the trust from disqualifying the special child from receiving governmental benefits. As we are all aware, once certain income and asset levels are exceeded, the special child will be disqualified from receiving Medicaid or Social Security Benefits. The idea is to set aside the family funds for the benefit of the special child for services and items that are not provided by the governmental programs. The trust assets are a supplement to and not a replacement for the governmental benefits that may otherwise be available for your child.

ISSUE #5: Addressing and revising support language and distribution language for benefits intended for the special needs child under the estate plans of other family members. Assets received directly by the special needs child under the estate plan of another family member, such as grandparents or siblings, require the guardianship process described above. Assets should never be left directly to the special needs child. Instead, they should always be put into a special needs trust (also called a supplemental needs trust) for the child's benefit. A regular trust that one might use for other children is *not* enough. The trust must contain specific language and provisions regarding how the funds are to be used and the

restrictions on the Trustee's discretion to make distributions to or for the special needs child. Parents need to confirm with other family members that any benefits designated for the special needs child are properly coordinated with their own estate plan and the special needs trust provisions.

ISSUE #6: Dealing with Uniform Transfers to Minors Act (UTMA) accounts. Well-meaning special needs parents and other family members often set up accounts for the benefit of the special needs child under UTMA arrangements. These will create problems when the child reaches age 21 (or 18 depending on the language used to set up the account). At that point the funds belong to the child and we are back to the two familiar villains of the special needs child's estate plan: **Guardianship** and **Benefit Disqualification**. As a result, UTMA accounts seem like an easy solution, but have major disadvantages. In most cases, a special needs trust is a much better idea.

ISSUE #7: Anticipating living arrangements in the future. This is another area that special needs parents often put off because there is no simple answer and the landscape constantly changes. It is important that special needs parents start exploring living arrangements and become familiar with as many options and techniques as possible. Bear in mind that the current governmental mindset is away from institutional arrangements and an emphasis on community-based living situations. It is vital that you arrange all of your legal documents and financial plans as flexibly as possible so your child's Trustee or guardian can handle these issues as they evolve over your child's lifetime.

ISSUE #8: Considering the need for guardianship or the level of guardianship for a special needs child. The current trend in the courts and the social services community is away from total guardianship for a special needs child who turns 18 and is considered an adult. In the old days, there was a rush to start court proceedings and impose complete guardianship under the mental health code. However, today the emphasis is on the least invasive and restrictive arrangement that will work in the particular situation. As your child approaches the age of 18, you should consider what form of guardianship may be needed and anticipate the process prior to the birthday. I will be happy to help you with these matters.

ISSUE #9: Using a letter of intent. A letter of intent is a written document you create setting out the key features of your child's current lifestyle and future possibilities. It is not legally binding, but can be very helpful for any future guardian, caretaker or trustee who needs to make decisions for your child. It can also be an excellent tool to help you organize and focus your thoughts on planning for your special needs child. The letter of intent should be signed and dated by both parents, but you do not have to follow any specific format. It can be a long, detailed writing – or a simple set of bullet points. Typed or handwritten, long or short, conversational or formal language – whichever is easiest for you. The most important thing is that your thoughts and desires are on paper. The topics to cover might include:

- Biographical and family information,
- List of preferred doctors, counselors, and advisors (CPA, lawyer and so on),
- Location of important legal and financial documents,
- Personality traits and preferences of the child,
- Behavior management issues,
- Important daily routines,
- Important friends and companions,
- Current and future living arrangements,
- Medical complications, and

- Parents' desires for the child's upbringing, such as education, religion, future employment, if any, and so on.

ISSUE #10: Taking the next step. When you start adding up the above issues – future uncertainty – changes in government – health care – medical issues you might face – and the need to maintain a normal family setting if other siblings are involved, it may seem overwhelming. Please don't allow yourself to become paralyzed by these issues. If you wait until you "have the time" to sit down and sort all this out, you won't likely get anything accomplished.

Please... Act Today. Illnesses, accidents, medical emergencies and other catastrophes happen every day to good people. Ask yourself, "If I didn't come home tomorrow, what would happen to my family? What would happen to my special needs child? Who would, could and should, take my place – and what should they do when they took over the controls?" You need to be ready today because life's uncertainties often strike when least expected.

8 Costly Mistakes to Avoid When Planning for Your Special Needs Child

by

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COSTLY MISTAKE #1: Disinheriting the child. Many disabled people rely on SSI, Medicaid or other government benefits to provide food and shelter. You may have been advised to disinherit your disabled child (the child who needs your help most!) to protect that child's public benefits. But these benefits rarely provide more than subsistence, and this "solution" does not allow you to help your child after you are incapacitated or gone. When your child requires – or is likely to require – governmental assistance to meet their basic needs, you should consider establishing a special needs trust.

COSTLY MISTAKE #2: Ignoring the special needs when creating a trust for the child. A Trust that is not designed with your child's special needs in mind will probably render your child ineligible for essential benefits. The Special needs trust is designed to promote the disabled person's comfort and happiness without sacrificing eligibility. Special needs can include medical and dental expenses not covered by Medicaid, cutting edge or non-traditional treatments or therapies, necessary or desirable equipment (such a specially equipped vans), training and education, insurance, transportation, and essential dietary needs. If the trust is sufficiently funded, the disabled person can also receive computers, books, games, vacations, movies, payments for a companion, and other self-esteem and quality-of-life enhancing benefits – the sorts of things you now provide.

COSTLY MISTAKE #3: Creating a "generic" Special needs trust that doesn't fit. Even some Special needs trusts are unnecessarily inflexible and generic. In most cases, an attorney with some knowledge of the area can prevent a trust from invalidating the child's public benefits; however, many trusts are not customized to the child's specific needs. As a result, the child fails to receive the benefits that the parent provided when they were alive. Another mistake is when lawyers put a "pay-back" provision into the trust rather than allowing the remainder of the trust to go to others upon the death of the special needs child. These pay-back provisions are

necessary in certain types of special needs trusts – and not necessary in others. An attorney who knows when they should be used can save your family hundreds of thousand of dollars, or more.

COSTLY MISTAKE #4: Procrastinating. Because none of us knows when we may die or become incapacitated, it is important to plan for your special needs child early, just as you would for other dependents, such as minor children. Unlike other beneficiaries, your special needs child may never be able to compensate for your failure to plan. A child without special needs can obtain more resources as he or she reaches adulthood and can work to meet essential needs. Your special needs child may not have that opportunity.

COSTLY MISTAKE #5: Failing to invite other people to contribute to the trust. A key benefit of creating the trust now is that your extended family and friends can make gifts to the trust or remember the trust as they plan their own estates. In addition to the gifts and inheritances from other people who love your child, you can leave your own assets to the trust in your will. You can also name the trust as a beneficiary of life insurance and retirement benefits.

COSTLY MISTAKE #6: Choosing the wrong trustee. During your life, you and your spouse can manage the trust. When you and your spouse are no longer able to serve as trustee, the person or persons you specify in the trust instructions will become the new trustee, such as a professional trustee or a team of advisors. Make sure that whomever you choose is financially savvy, well-organized, and ethical.

COSTLY MISTAKE #7: Relying on your other children to use their money for the benefit of your special needs child. This can be a temporary solution, such as during a brief incapacity, if your other children are financially secure and have money to spare. However, because of the potential problems, this solution will not protect your child after you and your spouse have died or when siblings have their own expenses and financial priorities. For example...

- What if your child with the money divorces? His or her spouse may be entitled to half of the funds and will not likely care for your special needs child.
- What if your child with the money dies or becomes incapacitated while your special needs child is still living? Will his or her heirs care for your special needs child as thoughtfully and completely as your child with the money did?
- What if your child with the money loses a lawsuit and has to pay a large judgment or has other creditor problems? The court will certainly require your child to turn that money over to his or her creditors.

When you create a special needs trust, you protect all of your children. The trust facilitates easier record-keeping and allows your other children to rely on the assistance of a professional trustee, if needed. Siblings of a special needs child often feel a great responsibility for that child, as they have all of their lives. When you provide clear instructions and a helpful framework, you lessen the burden on all of your children and build a loving, involved relationship that benefits your child with special needs.

COSTLY MISTAKE #8: Failing to protect your special needs child from predators. Thieves, con men and other criminals look to take advantage of those who are most vulnerable, like your special needs child. A child trapped in the system with precious little resources and without anyone to look after their affairs can easily fall prey to these predators. When you establish a special needs trust and properly structure your estate plan to protect your special

needs child, you ensure that your child will never be left alone, will always be provided for, and will always have a trustworthy person – either a guardian or trustee, or both – watching over them.

You're Invited to Call or E-mail.

“If you have questions about estate planning for a special needs child – or any other aspect of estate planning – please don't hesitate to call. I'll be happy to answer your questions, at no cost or obligation. You can reach me at (904) 399-2829 or e-mail Kellen@kellenbryantlaw.com.” – *Kellen*

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