

Estate Planning for Parents of Children with Special Needs

Six Choices

Six Choices for Estate Planning

You have six choices with respect to your estate planning and provision for your disabled child:

First - Disinheritance. You can simply disinherit the child. This is not a good idea even if your child has minimal needs, because most needs are being covered by public benefits.

Second - Gift to Disabled Child. The problem is if your child is receiving means-tested public benefits or may receive means-tested public benefits in the future, the gift from you will disqualify your child from receiving those benefits. The medical benefit may be worth hundreds of thousands or even millions of dollars over your child's lifetime.

Third - Distribute to Siblings. You can make a distribution to a sibling with the understanding they will take care of the disabled child. This is a risky proposition. Assets you leave to your disabled child's sibling are subject to creditors of that sibling. If your healthy child is in an automobile accident and has inadequate insurance, the injured party can recover all of your healthy child's assets, including those you wanted set aside for your disabled child. They may also be claimed in a divorce action and there is a risk of misappropriation or mismanagement by the sibling.

Fourth - Support Trust. Establishment of a support trust. Many parents working with inexperienced lawyers establish support trusts for the benefit of their disabled children. These trusts are considered "available" for public

benefit purposes and disqualify the disabled child from receiving public benefits.

Fifth - Special Needs Trust. The solution is to establish a special needs trust for the disabled child. The trust is designed so that the assets are not available for public benefits purposes. By utilizing such a trust the child can retain public benefits and also enjoy the assets left by the parent.



and is simply receiving Social Security Disability and Medicare, a support trust may be more appropriate than a special needs trust. However, if there is any possibility that the child may be receiving means-tested public benefits in the future, a special needs trust is usually the better choice.

Reasons for Trust

Besides protecting public benefits there are other reasons for establishing a trust for your disabled child. These reasons are usually associated with Achieving Independence for your child. The benefits in establishing a trust include the following:

- Control of trust assets
- Protection from friends
- Money management

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ABOUT US

We are an Elder Law and Special Needs Trust Law Firm. Located in Little Rock, Arkansas, we focus on helping individuals obtain Medicaid benefits without losing their home, Long Term Care Planning for victims of Alzheimer's Disease and other related disorders, Special Needs Trust solutions for families with children with special needs, and Preserving Eligibility for Public Benefits for personal injury victims.

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Funding the Trust

When you establish your trust decide how much money will be needed to fund the trust. For many families their first instinct is to divide their assets on death equally among their children. When there is a disabled child, this may not be a good formula. Your healthy children probably are able to work and support themselves. Your disabled child may not be able to work at all or his or her work may be limited.

What will happen to that child if public benefits disappear?

The best way to answer this question is to focus on the needs of the disabled child. The best way to determine the needs of the disabled child is to prepare a detailed budget that will give you an idea of what you feel your child will need in the future to live a lifestyle that you envision for that child.

One way to calculate the cost of meeting your child's future needs would be to quantify those needs by completing a budget and then multiplying by a factor that will determine the amount of money that would need to be invested to produce an annual income sufficient to meet your child's needs. For example, if you believe that your investments will produce a 5% rate of return, you would use a factor of 20. You divide the number 100 by 5% to get the 20. If you believe that you could get a 3% rate of return, the number would be 33.

Once you have calculated the amount you will need to determine where you will get the money to put into the trust. Most parents would like to leave their healthy children something, so begin by setting aside an amount for them. Then compare the amount you have left over with the amount you feel you will need for your child. In many instances, there will be a significant shortfall. Consider purchasing life insurance to make up that shortfall. Try to avoid buying term insurance, because your child's need will not go away. Over time, the cost of term insurance will increase significantly. You are usually better off buying a smaller amount of whole life insurance.

Selection of Trustee

Parents. Generally, parents will serve as trustee of a special needs trust as long as either parent is alive. The problem arises when the parents die.

Family Members. The most common option for selection of a trustee is a family member. There are two reasons why family members are preferred. There is a perception that the family member will not charge a fee and a belief that the family member has the best interest of the disabled child at heart. Neither of these assumptions are necessarily valid. Fees charged by professional trustees are modest, usually about 1% of trust assets per year. Because of professional expertise, they are usually able to invest the money to more than offset the 1% charge. Appointing siblings of the disabled person as trustee puts them in a bad position. One of the trustee's jobs is to say "no" to the disabled person if they make unreasonable requests for trust distributions. This builds resentment between the disabled child

and the sibling trustee.

Professional Trustee. Professional trustees include banks, attorneys, CPAs and other professionals. Financial advisors are usually prohibited from serving as trustee if they are going to manage the money. The advantages in selecting a professional trustee are that they are able to provide expert money management and they are familiar with public benefit laws.

Co-Trustees. Another solution is usually to have a family member and a professional serve as co-trustees. The professional brings the expertise in money management and public benefits laws. The family member is in a better position to know your disabled person and his or her needs.

Duties of Trustee

In selecting a trustee it is important to understand the trustee's duties. The trustee is a fiduciary, which means that he or she must act in the best interest of the beneficiary of the trust. The trustee is held to a high standard of performance. Trustees must invest the trust assets in accordance with the Prudent Investor Act or the Prudent Man Rule, depending on state law. They must furnish accountings in accordance with the Principal and Income Act. They must carry out the terms of the trust agreement, and they must be loyal to the beneficiary.

The trustee should set an agenda for distributions to the beneficiary. If the trustee distributes cash directly to the beneficiary, it is likely that this will adversely affect the beneficiary's public benefits. It may even cause these benefits to be lost. If the trustee distributes money to third party providers of goods and services, as a general rule, this has no effect on the beneficiary's public benefits. This is the best way to make distributions.

But if a trustee makes distributions to a third party for food and shelter for the beneficiary, this is called in-kind support and maintenance or ISM. These distributions cause a reduction in the SSI benefit of approximately one-third, but do not affect most other benefit programs.

There are certain distributions for goods which are permitted that usually have no effect on public benefits eligibility. These are as follows:

- Purchase a home;
- Furniture;
- Handicap van or regular car.

In addition, there are certain distributions for services that have no effect on public benefits eligibility. These are as follows:

- Medical insurance;
- Telephone bills;
- Services of a care manager;
- Vacations;
- Medical treatment for which public funds are unavailable;
- Difference between a private and semi-private room in an institution;
- Installation of a burglar alarm or monitoring/response system in home.

Reporting Guidelines

If the beneficiary is receiving SSI, then the reporting require-

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ments of the Social Security Administration must be satisfied. Once the trust is funded, the trust should be sent to Social Security for approval. The following events must be reported to Social Security:

- Address. Change in Beneficiary's address.
 - Employment. Change in employment status.
 - Living Arrangements. Change in the arrangements (such as adding or losing a roommate).
 - Income. All income (including the receipt of any direct income or ISM from the Trust)
 - Resources. Any change in countable resources.
 - Medical Insurance Coverage. Any change in the Beneficiary's medical insurance coverage.
 - Marital Status. Any change in the Beneficiary's marital status.
 - Physical or Medical Condition. Changes or improvements in Beneficiary's physical or mental condition (for example, the Beneficiary improves so much that he or she is no longer considered disabled).
 - Medical Facility. Admission to or discharge from any health facility or public facility (such as a hospital or nursing home).
 - Travel. Any trip outside the United States.
 - Other Public Benefits. New eligibility for other public benefits.
- As you can see, the establishment and administration of a special needs trust is complex. However, it is critical for your disabled child's future.

Sixth - ABLÉ Account. ABLÉ Accounts, which are tax-advantaged savings accounts for individuals with disabilities and their families, were created as a result of the passage of the Stephen Beck Jr., Achieving a Better Life Experience Act of 2014 or better known as the ABLÉ Act.

The beneficiary of the account is the account owner, and income earned by the accounts will not be taxed. Contributions to the account, which can be made by any person (the account beneficiary, family and friends), must be made using post-taxed dollars and will not be tax deductible for purposes of federal taxes, however some states may allow for state income tax deductions for contribution made to an ABLÉ account.

Eligible individuals and their families will be allowed to establish ABLÉ savings accounts that will largely not affect their eligibility for SSI, Medicaid and other public benefits. The legislation explains further that an ABLÉ account will, with private savings, "secure funding for disability-related expenses on behalf of designated beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, Medicaid, SSI, the beneficiary's employment and other sources."

The ABLÉ Act limits eligibility to individuals with significant disabilities with an age of onset of disability before turning 26 years of age. You need not be under the age of 26 to be eligible for an ABLÉ account. You could be over the age of 26, but must have had an age of onset before the individual's 26 birthday. The total annual contributions by all participating individu-

als, including family and friends, for a single tax year is \$15,000. Upon the death of the beneficiary the state in which the beneficiary lived may file a claim to all or a portion of the funds in the account equal to the amount in which the state spent on the beneficiary through their state Medicaid program. This is commonly known as the "Medicaid Pay-Back" provision and the claim could recoup Medicaid related expenses from the time the account was open.

Do I have to wait for my state to establish a program before opening an account?

No. While the original law passed in 2014 did stipulate that an individual had to open an account in their state of residency, this provision was eliminated by Congress in 2015. This means that regardless of where you might live and whether or not your state has decided to establish an ABLÉ program, you are free to enroll in any state's program provided that the program is accepting out of state residents.

How is an ABLÉ account different than a special needs trust?

An ABLÉ Account will provide more choice and control for the beneficiary and family. Cost of establishing an account will likely be considerably less than either a Special Needs Trust (SNT) or Pooled Income Trust. With an ABLÉ account, account owners will have the ability to control their funds and, if circumstances change, still have other options available to them. Determining which option is the most appropriate will depend upon individual circumstances. For many families, the ABLÉ account will be a significant and viable option in addition to, rather than instead of, a Trust program.



THE RAYMON B. HARVEY LAW FIRM

Arkansas Elder Law & Special Needs Trusts

Practice areas include:

- Long Term Care Planning and Medicaid Eligibility
- Special Needs Trusts (Estate Planning and Personal Injury)
- Estate Planning (wills, trusts and powers of attorney)
- Guardianships
- Probate (settling a decedent's estate)

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ELDER LAW & SPECIAL NEEDS TRUSTS

Raymon Harvey's family settled in Arkansas over 150 years ago. He grew up in El Dorado and studied in Jonesboro and Memphis. Raymon has a B.A. and M.A. from Arkansas State University and J.D. from Memphis State University. Since 1997 his law practice has been located in Little Rock where it is limited to Elder Law, Special Needs Planning and Estate Planning.

Raymon is a member of the National Academy of Elder Law Attorneys, the Arkansas Bar Association and the Arkansas Trial Lawyers Association as well as a Charter Member of the Special Needs Alliance. As member of the Arkansas Bar Association he served as Chairman of the Elder Law Section and served as Chairman and author for the Arkansas Elder Law Desk Manual published in 2013.

Raymon has been AV® rated (highest category) by Martindale-Hubbe® Attorney Peer Rating System for legal ability and ethical standards since 2008. The Arkansas Times named him the Best Lawyer in Arkansas for Elder Law from 2014 through 2018. Best Lawyers in America named Raymon as one of the Best Elder Law Attorneys in America from 2014 through 2018.

A frequent lecturer, Raymon has been a presenter for many national and state organizations and numerous local groups.

EDUCATION

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