

# Legal Planning



*For Children With Special Needs*



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# When Your Child Has A Disability....

If you are raising a child with a physical or developmental disability, we understand the obstacles and difficulties you face on a daily basis.

Between running to and from specialist's appointments, IEP meetings, occupational and speech therapy and caring for your child's basic needs, among other things, there is little time to take care of the tasks of today, let alone plan for tomorrow.

But, as you already know, there are also legal and financial concerns that must be considered for the future such as:

- Who would raise your child if something unexpectedly happened to you and/or your spouse?
- How can you ensure enough money is left behind should your child require a lifetime of care?
- What happens when your child turns 18? How can you continue to make medical and financial decision on his or her behalf? And,
- How can you ensure your child is not taken advantage of financially or emotionally if you are no longer there to protect him or her?

The answers to all of these questions are found in the pages of this guide. While each legal situation is as unique as your child, we wrote this guide as a basic overview for busy parents with disabled children who simply need a roadmap for the future and simple action steps that tell them what to do and where to start.

However, if you would like to learn more about your individual situation and how to put a fortress of protection around your child through all of life's transitions, you can also skip ahead to page <insert page > for a certificate to meet with our attorneys for a free **Initial Consultation** (\$300 value) at no charge.





# Protecting Your Child Starts With Naming Legal Guardians

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Naming legal guardians is one of the first, and most important steps a parent can take to ensure their child is raised by the people they want in the event of their unexpected death or incapacity.

It is no secret that caring for a disabled child can be challenging. That is why you want to choose someone who will love and care for your child the way you would if you were not around to raise him or her. You will also want to choose someone who cares about giving your child the best opportunities and quality of life that he or she deserves.

When choosing legal guardians, we always advise parents to look beyond the obvious choices. Many times, parents will choose a guardian because they have the most financial resources at their disposal. However, as you will learn in this guide, there are many other ways to ensure your child has enough financial resources to last a lifetime. Choosing a guardian based on financial status should not be your primary concern.

Instead, consider the candidates whose values and outlook on life are similar to your own. You will also want to choose someone who will be committed to your child for life, as many disabled children require supervision and support well into their adult years.

## **Other considerations when choosing a legal guardian include:**

- Whether the potential guardian has a similar parenting style to yours.
- Is your child already comfortable with this person?
- Is the potential guardian willing to take on the responsibility?
- Will they be emotionally able to care for your child(ren) after your death?

Once you have decided whom to name as trusted guardians, work with an estate planning lawyer to legally document your wishes. You should leave a copy of your documentation with your chosen caregivers, your child's school, babysitters and any other concerned party in the event something happens to you and/or your spouse.

# Starting The Process Of Guardianship When Your Child Turns 18

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*Naming legal guardians is not to be confused with the process of guardianship that you will likely go through when your child turns 18.*

While naming guardians when your child is a minor is necessary to ensure that the person *you want* raises your son or daughter if the unthinkable happens, you must also go through a separate process of setting up a guardianship once your child turns 18 and becomes a “legal adult”.

During this process, a local court must give someone (usually the parents) legal authority to continue to make medical and financial decisions for the young adult if it is determined that they are mentally or physically unable to do so for themselves.

At this time, the parents can also name interested parties who can serve as guardians for the disabled adult should the parent pass away or become unable to serve. Your attorney will walk you through the process of guardianship and help your family prepare for this necessary court procedure prior to your son or daughter’s 18<sup>th</sup> birthday.



# Protect Your Child's Resources By Setting Up A Special Needs Or Supplemental Needs Trust

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A “special needs” or a “supplemental needs” trust is a legal tool used by families to ensure their child has enough financial resources to meet their future needs without jeopardizing their eligibility for state or governmental aid.

If your child already receives benefits from Social Security or Medicaid, you know they are very limited and cannot possibly cover all the expenses necessary to enjoy the quality of life you desire for your son or daughter.

For that reason, many well-meaning parents will choose to leave their disabled child a large portion of their estate in a will, without realizing their child could lose their benefits as a result (which in the case of Medicaid, may be the only health care option available to your child!). Instead, parents of children with special needs should set up a special needs trust which will “hold” assets for your child without actually putting them in his or her name. The assets in the trust will then be administered by a trustee of your choosing and according to the rules you set forth in your estate plan.

This helps to keep Medicaid and Social Security benefits intact while providing your child with additional resources necessary for his or her care.





# How The Special Needs Trust Works

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Special needs trusts can be set up and funded in numerous ways. The special needs trust can be either revocable or irrevocable and can spring to life upon your passing or be set up during your life.

If you are the only one to contribute, then a trust that springs to life upon your death may be the best choice.



If other family members, such as grandparents, aunts or uncles will also be contributing to the trust, then it makes the most sense to create the trust now. If you are sure that you will be the only contributors, then you might want to consider a revocable trust, as it can be changed throughout your lifetime to reflect the choices you want to make over the course of time.

One of the biggest considerations that needs to be made is who will be the trustee. This is the person who will administer the trust that has been created to care for your loved one. Careful thought needs to go into choosing this person, as he or she will have a significant impact on the life of the person cared for by the trust. The trustee will also have access to funds and will make a lot of important decisions.

Your lawyer can help you to define the role of this person through your legal documents, but you still want to choose someone who is trustworthy and has your loved one's best interests at heart. He or she should also be very familiar with the specific needs of the person they will be responsible for, which could range from medical concerns to favorite foods and hobbies.

Additionally, you want to choose someone who has the ability to create and execute a reasonable budget. One option is to name both a family member and a professional as co-trustees.

# Funding a Special Needs Trust

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Knowing where the funding or financial resources will come from to fund a special needs trust can add an extra layer of concern. Medical concerns and housing options are certainly just the tip of the iceberg when it comes to planning for the rest of your child's life!

Chances are, you have been dealing with these expenses all along and are concerned that there will be nothing left to provide for your loved one.

Of course, if you have a valuable estate to leave behind, much of this can be used to fund the trust. Whether you dictate that real estate be sold upon your death to benefit your child or you have created some sort of savings program that will meet his or her needs, then you're doing really well. Your lawyer will help you direct these funds to the correct place.

However, for what is probably the majority of the population, leaving such a sizeable estate behind to care for a child with special needs is just not in the cards. So, what do you do in a situation like this? One common answer is to purchase a life insurance policy that pays out directly to the special needs trust.

Perhaps surprisingly, there are policies that are set up to pay off only when the second parent passes away, and these can be quite inexpensive. They are often referred to as "second-to-die" policies.

Another option for funding the trust is to ask others to contribute. Tax incentives allow for considerable breaks on money that is given in the form of gifts annually. For those looking for such an incentive, the special needs trust can be a worthwhile recipient for an annual contribution.

In these cases, it is recommended that you set up the special needs trust as an irrevocable trust. In order to make it easy for others to contribute, the trust should be created during your lifetime rather than upon your death.

# How Much Money Should Be In the Trust?

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Determining the proper amount to fund a special needs trust is something that you will likely want an experienced lawyer to help with.

There are some resources available for free, however, that can offer some guidance, including the MetDesk Special Needs Calculator at <http://www.metlifeiseasier.com/metdesk/>.



Keep in mind that because there is no real way to predict how costs will change, it is a good idea to re-evaluate your numbers from time to time.

When determining how much you will need to fund your trust, a few categories and expenses you may want to consider include:

- Housing
- Medical care
- Care assistance
- Education
- Employment
- Replacement for assets
- Special equipment
- Transportation

A lawyer with experience funding special needs trusts will have a comprehensive list of considerations and will work with you to determine appropriate numbers.

With the right guidance, you can rest easy knowing your child will be financially cared for in your absence.



# It Takes a Village: How To Build A Network Of Support

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As much as any parent hates to admit it, none of us are invincible. At some point, disability, illness or even death may prevent you from giving your child the care he or she deserves. That is why it's critical that you start building a team of caregivers and trusted advisors *now* who can immediately jump in on your child's behalf if a crisis situation occurs. Starting now will also help to ensure that you have the *right* people in place who will not take advantage of your child when he or she needs help the most.

Ideal members of your team may include your chosen guardians, a trusted doctor or specialist, an estate planning attorney, a financial advisor and dedicated family and friends. After creating your "support team", be sure to communicate regularly with everyone so they know exactly what to do and how to help if called upon in an emergency.

Another great way to help your team is by composing a *Letter Of Intent* that would be included as part of your estate plan to help guide your support team in your absence. Remember, the documentation that you create with your lawyer will be quite detailed and will take an incredible amount into consideration, but it will likely not cover every possible concern or wish you may have for your child's future care. For that purpose, many parents work with their lawyer to create a Letter of Intent.

The Letter of Intent is along the lines of a personal letter, rather than being a more formal legal document. It is used to supplement the special needs plan in order to provide additional information in the following ways:

- Parents often use it to address wishes that do not fall under the purview of legal requirements.
- This document is also useful for addressing information about your child that is subject to change. While various other special needs planning documents tend to be more static, the Letter of Intent can be changed out as the information in it needs to be updated.
- A Letter of Intent is used to discuss topics that are just too lengthy to include in the special needs trust such as your child's preferences, dislikes, favorite activities, etc.

The letter is typically addressed to the people who will be caring for your child once you are unable to fulfill that role. When the time comes, your attorney will share the Letter of Intent with the child's caregivers, as well as with the trustee. They can use the letter to help interpret your desires and to help follow through on the wishes you have for your child.

# Avoiding Mistakes In Special Needs Planning

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As special needs lawyers, we realize disabled children have unique planning needs. Unfortunately there are many misconceptions when it comes to securing the legal and financial future your child deserves. Even well-meaning caregivers and service organizations do not fully understand issues and give bad advice. It is critical for these families to understand their options because these misconceptions can result in costly mistakes. Below are just a few.

## **COSTLY MISTAKE #1: Disinheriting your child to preserve government benefits**

As previously mentioned, many children and adults with special needs rely on government benefits such as SSI and Medicaid for their basic needs (including health insurance). There are some well meaning people and attorneys who would suggest that you disinherit your child to protect his or her benefits. But government benefits provide only enough to secure food, clothing and shelter. So what happens after you become incapacitated or pass away? Will your child be able to maintain the life that you have so carefully crafted for them? Probably not. If your child is likely to require government assistance to meet his or her basic needs, you should consider establishing a Special Needs Trust. Again, if done properly, a Special Needs Trust can protect your child's public benefits and help them maintain their lifestyle, even after you are no longer there to support them.

## **COSTLY MISTAKE #2: Procrastination.**

It is critical that all parents with minor children do estate planning. You just never know when you might become incapacitated or die. But, it is even more critical that parents of kids with special needs plan early. That is because a child without special needs will be able to work and provide for their own financial well-being when they become adults. However your child with special needs may never be able to do that. Plan early because your failure to properly plan for them can never be undone.

## **COSTLY MISTAKE #3: Creating a "DIY" or generic special needs trust.**

Special Needs Trusts must be created by a lawyer who focuses in this area of the law. That is because special needs trusts are subject to both federal and state laws and the laws of each state can vary. It is possible to create a DIY or generic trust that can protect your child's government benefits, but most likely they are not designed to meet your child's particular needs. It is critical to design a trust that will ensure that your child's specific requirements are considered. For example, your child may require, or greatly benefit from, special group programs, individualized physical therapy, or other things that a generic trust simply does not address.

# Finding the Right Special Needs Attorney

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As you have learned, there are a lot of considerations that need to be made when it comes to planning for children with special needs, and you want to be sure you have an attorney who is well-versed in your options. All parents want to protect their children, and those with children with special needs sometimes find that they must take extra steps to make this happen. The right special needs lawyer can help make this a reality. There are a number of qualified special needs lawyers, but you are likely looking for someone who truly understands your specific situation. These days, a search for any sort of professional usually starts on the Internet. You can use your favorite search engine to find qualified special needs planning lawyers. Another important resource is other families. It is likely that you know of other families in similar circumstances, and their recommendations often mean more than a pretty web site or a great per-hour fee.

Once you have a list of candidates, it makes sense to do a little pre-interview. By asking each professional the same questions, you will have an apples-to-apples comparison when it comes time to make your choice.

## **Consider asking the following questions:**

- How many years of experience do you have in Special Needs Planning?
- What led you to this kind of work?
- What is your overall educational and professional background?
- How would you describe a Special Needs Trust and what it means for my family?
- What are your typical fees? Do you bill hourly or will I have the benefit of flat fees?
- Do you recommend any specific products, and if so, are you affiliated with those companies?
- Can you provide references of other families similar to mine who have used your Special Needs Planning services?

You will likely have other questions that are important to you. For example, are there specific considerations that come into play regarding your child's particular disability? Are there other family members or caregivers that need to be involved in the planning process? What government and other resources are available, and how does your special needs planning affect eligibility? Of course, the overall goal is to find someone knowledgeable who can guide you as you put your plan together. In the end, you should feel confident that you have created a plan that will protect and care for your disabled child when you are no longer able to do so yourself.



# Conclusion

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Planning for a child with disabilities is an extremely important and time-sensitive task. Your child is counting on you to create a plan that not only protects him or her now, but well after you are gone. Special needs planning makes that a possibility and gives you some level of control over the future.

By planning now, you can have the peace of mind knowing everything will be taken care of, no matter what happens. Your attorney will also help you set up financial structures such as special needs trusts so that you can focus on choosing the *right* guardians for your child—and not just those who have enough resources to care for him or her in your absence.

If you are ready to get started with your planning, the lawyers of the **Smith Barid Law Firm** would love to meet with you and discuss your family's unique needs. By using the certificate on the following page, we invite you to come in and meet with us for a comprehensive **Initial Consultation** (\$300 value) at no-charge.

Remember, you are your child's greatest advocate and lifeline for the future. Gathering the information you need costs you nothing, but failing to take action can cost your family *everything* if the unthinkable happens. Use the certificate, on the next page, to make an appointment and learn the options available for your family. We look forward to meeting with you.



# *Gift Certificate*

For a free Initial Consultation

with

**Michael Smith or Richard Barid**

(A (\$300 value))

**Michael Smith and Richard Barid  
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Savannah, GA 31406**