



# Future Planning



## Section 3

## **Special Needs Planning Basics**

1. Visualize the lifestyle you want for your special needs child if both parents are no longer living.
2. Identify a guardian, conservator, or trustee for your child.
3. Obtain a strong understanding of government benefits, such as Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI ).
4. Plan ahead to protect your child's financial future.
5. Take action to assure that your special needs children and your non-special needs children are not excluded in your will.
6. Establish a special needs trust or supplementary trust to preserve government benefits.
7. Have provisions been made to fund these trusts with insurance.
8. Coordinated your special needs planning with other relatives.
9. Draft a written Letter of Intent.
10. Begin setting aside money for your special needs child.
11. Establish living arrangements for your special needs child if both parents are no longer living.
12. Consider your child's ability to earn income and how the income will affect government benefits.

## **A Letter of Intent**

Many of you have heard about the importance of creating a document that contains the kind of information that only a family member can create - and which provides a format to communicate the vision of your desires and concerns for your child to his/her future caretakers. A Letter of Intent will serve this purpose.

**The most important asset your child has is YOU.**

Think for a moment about the specific instructions or guidelines you give to your child or his/her caretaker when you leave for just an evening or a weekend. Imagine if you went away and never came back. Certainly you have a picture of what you would like his or her life to look like after your death. However, the next caretaker may not have the same ideas and insight as you. We have designed this Letter of Intent to provide you the format to communicate your desires and concerns to current and future caretakers.

This is not a legally binding document, but it is perhaps one of the most important documents you can prepare for the future well being of your child. If you have entrusted a dedicated sibling, friend, relative, trustee, or organization to look after your child when you are gone, you can help to guide them by providing them the knowledge that only you, as a parent, possess.

### **Sample Topics:**

- Biographical and Family Information
- Medical History
- Important People
- List of Advisors
- Location of Important Documents
- Personality Traits and Preferences
- Personal Care Information
- Important Daily Routines
- Additional Information
- General Statement of Desires
- Your Checklist

Of course, you should periodically review and revise this letter - perhaps on your birthday, or your child's. Be flexible, be clear, and feel free to make it as personal as you wish.

## The Guardianship Process May 6, 2014

PRESENTED BY CHRISTA MARTINEZ  
LEGAL CASE MANAGER  
CATHOLIC CHARITIES

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- **What is a Guardianship?**
- A Guardianship is a court appointed relationship between a competent adult (Guardian) and an incapacitated person (Ward); a Guardian is appointed by a probate judge to manage their affairs and make decisions regarding:
  - Health & benefits of the ward
  - Safeguard their well-being
  - Provide a safe environment or placement of the ward

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### Types of Incapacity

- **Developmental Disability:** life long disabilities attributed to mental/physical impairments manifested prior to age 18. Examples are intellectual disabilities, autism, & cerebral palsy.
- **Physical Incapacity:** medical conditions resulting in impairment. Example: stroke victim & closed head injury.

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**Types of Incapacity**

- **Mental Deterioration:** Diseases that reduce mental cognition or memory. Most often associated with geriatric-population and include dementia and Alzheimer's.
- **Mental Illness:** Illnesses that may include emotional instability, behavioral changes, and cognitive dysfunction or impairment.

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• **When can I start the Guardianship Process?**

- Our Program can start this process two months prior to the eighteenth birthday

OR

- Any time **after** the individual has turned eighteen

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• **What do I need to get started?**

- The Court requires that an attorney is retained to file the appropriate documents on your behalf.

- If utilizing services through Catholic Charities, intakes are completed by phone (210)293-1009 ext 252

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- **What do I need to get started?**

- Intakes consist of Ward's:
- Name
- DOB
- Social Security Number
- Amount of SSI received
- Physician's contact information
- Date of last appointment
- Contact information for siblings

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- **What do I need to get started?**

- Intakes consist of Guardian's:
- Name
- DOB
- Contact information

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#### Eligibility of the Guardian

- Potential Guardians are asked qualification questions, regarding any prior CPS/APS involvement as well as having a background check performed
  - The court does not allow for individuals with felonies to become Guardians
- Only biological/adoptive parents who are still married can become Co-Guardians

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- **Why do I need to provide the doctor's information?**
- The guardianship is based on the diagnosis given by the doctor
- It must be the MD that signs the document
- The document does expire if not filed in a timely manner
- It must be the original (the Court will not accept copies)

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- **What happens after the Physician's Certificate is completed?**
- **Waivers are sent to the required family members**
- **The attorney will then draw up the application to appoint the guardian and an appointment is scheduled with the potential guardian to sign it**
- **The signed application is then filed with the Probate Clerk's Office**

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### What do I need to bring to the application signing appointment?

- **Two photos of the potential ward**
- **The filing fees for the Court (if applicable)**
- **Your photo ID**
- **Any additional documents as instructed by attorney**

[illegible]



- **Guardianship process continued...**
- A citation is issued to the individual being placed under guardianship
- This is either done by the Sheriff's Deputy or a Process Server
- The Court Investigator will contact the Guardian to gather more information
- The Judge will assign an Attorney Ad Litem to represent the proposed ward
- The Attorney Ad Litem will make a visit to the potential ward's residence

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- After all previous steps are completed a Court hearing can be set
- For the hearing you will need to bring the following:
- Photo of the potential ward
- The fee for the bond (\$100.00 or \$375.00)
- The Attorney Ad Litem fee if applicable

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- **What are my responsibilities as a guardian?**  
*Duties of the Guardian*
- Duty of care, control, and protection
- Duty to provide clothing, food, medical care and shelter
- Duty to file a yearly report on condition & well being
- Duty to renew bond every year
- Duty to cooperate yearly with Court Monitor

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***Expectations of the Guardian***

- Assure that the ward is housed
- Frequent and meaningful visits
- Ensure that the ward is receiving available benefits
- Obtain psychological, social, educational or vocational training as appropriate
- Authorize and arrange medical, dental, vision and surgical as needed

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**Counties Served**

- Atascosa
  - Bandera
  - Bexar
  - Comal
  - Frio
  - Gillespie
  - Guadalupe
  - Karnes
  - Kendall
  - Kerr
  - Medina
  - Wilson
- \*Please note, fees will vary based on the county

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***Alternatives to Guardianship***

- Catholic Charities Guardianship Services provides less restrictive alternatives such as: Power of Attorney for Healthcare, Directive to Physician, Financial Power of Attorney, and Money Management
- MUST HAVE LEGAL CAPACITY!

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***Alternatives to Guardianship******Power of Attorney***

- Authorizes another adult to act on your behalf.
- The power given to this person may be either specific or general.

***Financial Power of Attorney***

- The durable POA may be limited so that it takes effect only upon your disability.
- It must be signed by you and notarized, but does not need to be witnessed.

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***Alternatives to Guardianship******Medical Power of Attorney***

- This document gives another adult the authority to make health care decisions for you.
- It takes effect upon written certification by a physician that you lack capacity to make health care decisions.
- Must be signed by you in the presence of two (2) witnesses.

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***Alternatives to Guardianship******Directive To Physician/ Living Will***

Allows an adult with capacity to instruct physicians to withhold artificial means of extending the natural process of dying.

To make a valid Directive to Physician, one must be:

- at least eighteen (18) years old
- of sound mind and free will, and
- witnessed by two (2) qualified persons.

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### Resources

- Catholic Charities-Guardian of the Person Only & Powers of Attorney (210) 293-1009
- Catholic Charities-Money Management Program (Low income clients over the age of 55) (210) 293-1009
- Community Justice Legal Clinics (210) 212-3740
- ARC of Texas for pooled trust: [www.thearcortexas.org](http://www.thearcortexas.org)
- Texas Guardianship Association [www.txguardianship.org](http://www.txguardianship.org)
- Alamo Local Authority for IDD [www.alacos.com](http://www.alacos.com)

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### Thank You!

**Catholic Charities Archdiocese of San Antonio, Inc.**  
**Guardianship Services and Money Management Program**

202 W. French Place  
 San Antonio, TX 78212  
[www.ccaosa.org](http://www.ccaosa.org)

Telephone: (210) 293-1009 Facsimile: (210) 293-0799

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## **Guardianship Quick Facts**

### **Alternatives to guardianship**

#### **(for person with capacity)**

Durable Power of Attorney

Medical Power of Attorney

Trusts

#### **(for person without capacity)**

Appointment of representative payee for Social Security benefits

### **Guardianship Process (for person without capacity)**

- Obtain statement from doctor
- File application for guardianship with the court
- Serve the proposed ward
- Have attorney ad litem appointed to represent proposed ward
- Attend hearing with attorney ad litem and proposed ward
- Obtain bond
- File inventory of ward's estate with the court
- File application for monthly expenditures with the court
- File plan for management of ward's investments with the court
- File account and report with the court annually

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## Brief Comparison of Power of Attorney and Guardianship

Durable Power of Attorney for Financial Matters	Guardianship
<p><b>Who's involved?</b></p> <p><i>Principal</i> – person who gives another person permission to act for him or her  <i>Agent</i> – person who has permission to act for principal</p>	<p><i>Ward</i> – person who court has determined lacks physical or mental ability to take care of self  <i>Guardian</i> – person approved of and appointed by court to handle personal matters for ward such as health (guardian of the person) or financial matters for the ward (guardian of the estate) or both (guardian of the person and estate)</p>
<p><b>Capacity required?</b></p> <p>Yes. Principal must understand that he or she is giving authority to the agent in order to have a valid POA</p>	<p>No. Ward must be incapacitated or guardianship will not be established</p>
<p><b>How initiated?</b></p> <p>Principal decides needs power of attorney; goes to lawyer to prepare document or prepares document for self</p>	<ul style="list-style-type: none"> <li>• Someone decides the ward needs a guardian, applies to the court to have a guardian appointed (usually hires a lawyer to do this);</li> <li>• a medical evaluation is required;</li> <li>• an attorney is appointed to represent the proposed ward (paid out of the proposed ward's estate);</li> <li>• a hearing is held</li> <li>• if the court decides a guardianship is necessary, a guardian is appointed</li> </ul>
<p><b>Binding on 3<sup>rd</sup> parties?</b></p> <p>No, a third party such as a bank does not have to allow an agent to conduct business for a principal</p>	<p>Yes, all parties are bound by the court's order authorizing the guardian</p>
<p><b>How terminated?</b></p> <p>Principal may revoke</p>	<p>Court must terminate</p>
<p><b>Court Oversight?</b></p> <p>No</p>	<p>Yes</p>

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# PLANNING FOR CHILDREN WITH SPECIAL NEEDS

for  
Military School Districts' Cooperative  
June 2, 2014

PREPARED BY THE LAW FIRM OF

## FARRELL & PAK PLLC

1000 MoPac Circle W Austin, Texas 78746 W p (512) 323-2977 W f (512) 708-1977 W [www.txelderlaw.com](http://www.txelderlaw.com)

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www.mgmillerlaw.net*

***What You Should Know About  
Guardianship, Estate Planning &  
Special Needs Trusts***

**H. CLYDE FARRELL**  
CERTIFIED FINANCIAL PLANNER™  
CERTIFIED ELDER LAW ATTORNEY  
FARRELL & PAK PLLC, AUSTIN, TEXAS

***IF I CAN'T BE THERE--***

- Who will make decisions?
- Who will provide care?
- What care will be needed?
- How will it be paid for?

***PLANNING STEPS***

- 1-**Make a Care Plan**
- 2-Identify trustee(s) and care manager(s)
- 3-Sign legal documents
- 4-Fund the plan (sign beneficiary designations, buy life insurance if needed)

***THE CARE PLAN***

- Where will my child live?
- What care & support will be needed?
- Who will provide care and support?
- Who will pay for it?

***THE CARE PLAN: STAGES OF LIFE***

- Until age 18: SSI & Medicaid available only if parents' assets & income are low.
- Age 18 on: Only child's assets & income considered by SSI & Medicaid.
- Age 18 on: Guardian needed if your child cannot make his/her own decisions.
- Age 18 on: If guardian not needed: *everyone* needs powers of attorney.

***BENEFITS OF DURABLE  
POWER OF ATTORNEY***

- Allows management of financial decisions for an adult during times of incapacity or diminished capacity
- Can allow account management with agreement of financial institution
- Doesn't allow management of Social Security or VA benefits (They have their own procedures)
- May avoid need for guardianship
- But doesn't remove your child's right to make his/her own decisions ("have the last word")



***BENEFITS OF MEDICAL  
POWER OF ATTORNEY***

- Encourages immediate surgery or other care
- Avoids disputes as to who has authority when decisions must be made
- Avoids a guardianship for medical decisions



***BENEFITS OF DIRECTIVE TO PHYSICIANS (LIVING  
WILL)***

- Allows you to decide whether to place limits on life support in case of a terminal condition
- Allows you to decide what those limits will be
- Allows you to decide who will make the final decision
- Minimizes the risk of conflict and guilt in your family



***WHY A GUARDIANSHIP MAY BE NEEDED***

- When child reaches age 18, parents no longer have the right to make the child's legal and medical decisions.
- Child may already have incapacity (mental inability to sign a power of attorney with understanding) at 18
- Incapacity may start after 18 (from accident or onset of a condition)

***WHY A GUARDIANSHIP MAY BE A HEADACHE***

- Parent(s) (or someone) must apply to a court to be guardian, pay attorney & filing fees
- Also must pay for an attorney for the "proposed ward"
- Child/proposed ward may contest guardianship
- Annual reports/accounts (track every cent)

***SOME BENEFITS ARE BASED ON FINANCIAL NEED***

- Supplemental Security Income (SSI)-cash
- Medicaid-With SSI, full medical care
- Mental Health or Developmental Delay (MH hospital, Supported Living Centers, Community Centers)-sliding scale fees
- QMB-pays Medicare co-payments & deductibles & Part B premiums
- Others: food stamps, TANF, housing subsidies, Medicaid home care

***OTHER BENEFITS ARE NOT BASED ON FINANCIAL NEED***

- Social Security Disability, Retirement, Childhood Disability Benefits-cash
- Medicare (with most Social Security benefits)-limited medical care
- Medicare Supplement Insurance or HMO-covers Medicare co-payments & deductibles; requires paying premiums

**SSI: THE KEY BENEFIT**

- **UNTIL AGE 18**, assets & income of parent(s) living with child are considered
- **Benefits:**
  - Maximum \$721/month cash payments
  - Medicaid automatically linked to SSI
- **Eligibility:**
  - Disability (or age 65+)
  - Less than \$721/month *countable* income
  - Less than \$2,000 *countable* assets

**SSI DOESN'T COUNT...**

- **As Income--**
  - First \$20 of any income
  - First \$65 of earned income
  - One-half of the rest of earned income
  - Food stamps, housing subsidies, etc.
- **As Resources--**
  - Ownership interest in a residence
  - One vehicle (certain restrictions apply)
  - Business Property

**EXCEPTION – USING THE  
PRESUMED MAXIMUM VALUE RULE**

- Unlimited food & shelter counts as \$260.33/month "income"
- SSI benefit is reduced from \$721/month to \$461/month (or \$481 if there is other income of at least \$20)
- Payments must go directly to providers (landlord, mortgage, grocery, utilities, etc)

**PLANNING STEPS**

- 1-Make a Care Plan
- 2-Identify trustee(s) and care manager(s)
- 3-Sign legal documents
- 4-Fund the plan (sign beneficiary designations, buy life insurance if needed)

**WHAT IS A TRUST, ANYWAY?**

- **Grantor**, such as a parent, gives assets to a
- **Trustee**, who invests assets and makes distributions to or for a
- **Beneficiary**, such as the Grantor's child

**HOW IS A TRUST CREATED?**

- Testamentary Trust: created in your will, with your assets after your lifetime, *or*
- Living ("Inter Vivos") Trust: created during your lifetime, can continue afterward
  - "Standby Third-Party Trust": Funded later
  - Immediate Trust: Funded now

#### **HOW DO TRUSTS PROTECT BENEFITS?**

If the trust is properly *drafted* and *administered*, the public benefits "means tests" usually do not count-

- Trust assets *or*
- Trust income *or*
- Trust distributions to or for the beneficiary

#### **POSSIBLE TRUSTEE SAFEGUARDS**

- Co-Trustee and/or
- Trust Protector (can remove Trustee)
- Authority to turn it over to a Pooled Trust
- And always-alternate trustees

#### **HOW CAN TRUST DISTRIBUTIONS NOT COUNT AS "INCOME"?**

- The Trustee (or anyone) can provide only for "Special Needs" (not "income") by-
  - Never giving cash directly to the beneficiary
  - Providing no food or shelter to the beneficiary (usually)
  - Making all payments directly to providers

#### **WHO CAN BE TRUSTEE?**

- Any qualified individual(s), such as family members
- Bank or trust company
- Pooled Trust

#### **QUALIFICATIONS FOR AN INDIVIDUAL TRUSTEE**

- Keeps good books (or will hire bookkeeper)
- Knows the law (or will follow legal advice)
- Known investing (or will follow financial advice)
- Understands & will follow the care plan
- Can manage potential disagreement with beneficiary

#### **PLANNING STEPS**

- 1-Make a Care Plan
- 2-Identify trustee(s) and care manager(s)
- 3-Sign legal documents
- 4-Fund the plan (sign beneficiary designations, buy life insurance if needed)

#### **WHAT LEGAL DOCUMENTS DO I NEED?**

- Will or Living Trust
- "Third-Party" Special Needs Trust (SNT)
- "Self-Settled" SNT (Standby)
- Financial Power of Attorney
- Medical Power of Attorney
- Directive to Physicians

#### **WHAT IF I WANT TO MAKE DIRECT GIFTS TO MY CHILD?**

- Child will lose Medicaid & any other means-tested benefits **UNLESS—**
- Child "spend downs" on exempt assets (home, car, personal items, etc.)
- Child transfer assets to a "self-settled" Special Needs Trust—which must repay Medicaid after Child's death

#### **WHAT IF MY CHILD RECEIVES SOMETHING OUTSIDE A TRUST?**

- Examples: settlements, inheritances, gifts
- Your child can transfer it to a trust for his/her own benefit but loses SSI & Medicaid unless
  - Trust is "established by" a parent, grandparent, guardian or court, &
  - "Child" is under 65 when trust is created, &
  - Medicaid is paid back at child's death
- Solution: "Standby Self-Settled Special Needs Trust"
- Note: A trust funded directly with assets other than the child's is not "self-settled" so does not have to pay back Medicaid at the child's death.

#### **WHY NOT JUST GIVE IT TO OTHER INDIVIDUALS?**

- If you give it to someone else ("Good Child") to use for your child with a disability,
- Good Child may die before beneficiary, leaving it to spouse or children of the donee
  - Good Child may have urgent needs of his/her own
  - Good Child may have business failure or get sued, so creditors get it
  - Assets might be stolen from Good Child by a spouse or other person

#### **PLANNING STEPS**

- 1-Make a Care Plan
- Identify trustee(s) and care manager(s)
- 3-Sign legal documents
- 4-Fund the plan (sign beneficiary designations, buy life insurance if needed)

#### **BENEFICIARY DESIGNATIONS**

- ...are needed on—
- Retirement Accounts (IRA's, 401k's, etc.)
  - Annuities (Deferred, TRS, ERS)
  - Joint Accounts With Survivorships
  - Employee Death Benefits
  - Life Insurance

#### **HOW TO DO LIFE INSURANCE PLANNING?**

- A-Ask your brother-in-law how much he has
- B-Ask an agent how much someone your age should have
- C-Think of numbers until one feels right
- D-Give an agent or planner your care plan and financial data, and ask how much is needed (if any) to fund the plan
- (The right answer is D.)

#### **HOW MUCH LIFE INSURANCE?**

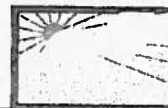
- What would it cost per year to implement the care plan if I died today?
- What is my child's life expectancy?
- How much money invested today would be needed to fund the care plan?
- How much assets &/or income would be available if I died today?
- How much (if any) *more* is needed in life insurance?

#### **REVIEW OF PLANNING STEPS**

- 1-Make a Care Plan—what will your child need when you are gone?
- 2-Identify trustee(s) and care manager(s)
- 3-Sign legal documents: will or trust, SNT for your money, SNT for child's money, powers of attorney for yourself (and maybe for your child at age 18)
- 4-Fund the plan (sign beneficiary designations, buy life insurance if needed)

#### **BENEFITS OF PLANNING**

- Utilizes all available public benefits
- Mobilizes family members & professionals
- Maximizes your child's well-being, independence & security
- Gives anything left after child's lifetime to family, not gov't
- You enjoy well-earned *peace of mind*



## ***Summary of Public Benefits for Persons With Disabilities***

By H. Clyde Farrell, Attorney at Law

June 2014

***The following benefits are not "means-tested" (your assets and income don't matter):***

**Social Security Disability Benefits:** Monthly cash payments, with amount depending on how much you paid in Social Security taxes while working. Eligibility generally requires working for ten years in employment covered by Social Security, but length of time is less for younger workers. For information on Social Security benefits of all kinds, try [www.ssa.gov/](http://www.ssa.gov/).

**Social Security Childhood Disability Benefits (formerly called Disabled Adult Child Benefits):** Monthly cash payments, with amount depending on taxes paid by the beneficiary's parent who is entitled to retirement *or* disability benefits. The "child" must be dependent on the parent. If the "child" is age 18 or over, he or she is eligible only if under a disability that began before age 22. Unless the person has such a disability, benefits are available only to age 18 (or 19 for a full-time student).

**Social Security Survivor's Benefits:** Monthly cash payments, depending on amount of Social Security taxes paid by the worker. Required relationship to the worker: (1) Surviving spouse of any age, caring for at least one child, under 16 or disabled before age 22, of the deceased worker; or (2) Child of the deceased worker who is under age 18 or age 18 and attending school, *or* over age 18 and disabled before age 22; or (3) Surviving spouse or divorced spouse, age 60 or older; or (4) Disabled surviving spouse age 50-60.

**Medicare:** Pays hospital, physician and other acute-care medical fees, with substantial copayments and deductibles. Long-term care benefits are limited to intermittent skilled home care for homebound persons, and up to 100 days of skilled care in a nursing home. Eligibility requires (1) Age 65 and eligible for Social Security or Railroad Retirement benefits, or (2) entitled to Social Security and Railroad Retirement Disability benefits, after 24 months of entitlement to cash payments (except for end-stage renal disease and ALS, which have shorter waiting times or none at all). For Medicare information, try [www.medicare.gov](http://www.medicare.gov).

***The following benefits are "means-tested" (your assets and income must be below certain levels for you to qualify):***

**Supplemental Security Income (SSI):** Monthly cash payments up to a maximum of \$721 if you have no other income that counts. Benefit is reduced dollar-for-dollar by any countable income, but some income (for example, some of your earned income and certain benefits) does not count. Requires a disability *or* age 65; less than \$721 in countable income for an unmarried individual or \$1,082 for a couple; and less than \$2,000 in countable assets if unmarried, \$3,000 for a couple. Your home, one vehicle, personal and household items, and certain other assets do not count.

**SSI-and TANF-Linked Medicaid:** Comprehensive medical care with little or no cost for copayments. Includes nursing home care, intermediate care or home care if needed. Available to

all beneficiaries of SSI and TANF (Temporary Assistance to Needy Families). For information on all Medicaid programs in Texas, try [www.dhs.state.tx.us/](http://www.dhs.state.tx.us/) and <http://cms.hhs.gov>.

**Medicaid Nursing Home and Intermediate Care:** Pays for nursing home care if needed, or intermediate care for persons with developmental disabilities, to the extent your income is not sufficient. Also pays for the same hospital, physician and other medical expenses as SSI-related Medicaid, to the extent they are not paid by Medicare or health insurance. Income limit is \$2,163 per month, but this does not apply to income run through a "Qualified Income Trust" (Miller Trust). Countable assets of an unmarried person are limited to \$2,000 (not counting the residence, certain vehicles and certain other assets). If the beneficiary is married and the spouse is not in a nursing home or other medical institution, the spouse may keep all his or her income and enough income of the Medicaid-eligible spouse to provide the spouse at home \$2,913 per month; and the spouse may keep at least half the couple's assets but sometimes much more, depending on the couple's income.

**Medicaid "Waiver" Home and Community Services:** Pays for home care, Assisted Living Facility or intermediate care (ICF-MR) and the same medical services as SSI-linked Medicaid. Requires a "medical necessity" for nursing home care (or developmental disability for intermediate care). Financial eligibility is generally the same as for nursing home Medicaid, except the spouse can almost never keep more than the greater of \$23,448 or half the couple's assets (not to exceed \$117,240). In Texas, these programs are always underfunded by the Legislature so develop long waiting lists. They include the following programs: Community Based Alternatives (CBA), Community Living Assistance and Support Services (CLASS), Medically Dependent Children (MDC), Home and Community Based Services (HCS), Medically Dependent Children (MDS), Deaf Blind/Multiple Disability Program (DBMD). Under the recently-established managed care program, the benefits of all those programs are now also referred to as "Star+Plus Waiver."

**Other Medicaid Home Care:** Pays for home care for persons needed help with activities of daily living and does not require proof of a "medical necessity" for nursing home care. However, amount of care available is generally less than with the "waiver" programs, and these programs do not pay for prescription medications or any other medical care. Requires less than \$2,163 per month income (which cannot be reduced with use of a "Qualified Income Trust") and less than \$2,000 in countable assets (or \$3,000 for a married couple with one or both receiving benefits). Includes the following programs: Primary Home Care, Family Care, Frail Elderly.

**Qualified Medicare Beneficiaries:** Pays your Medicare Part B premium (usually \$104.90 per month); and pays your Medicare copayments and deductibles (acts as a free Medicare Supplement insurance policy). Requires less than \$973 countable income for an individual (\$1,331 for a couple) and less than \$7,160 countable assets for an individual (\$10,750 for a couple). A related program, **Specified Low-Income Medicare Beneficiaries**, pays only your Medicare Part B premium, but its income limits are higher: \$1,167 for an individual, \$1,573 for a couple.

Information on benefits generally:

[www.govbenefits.gov](http://www.govbenefits.gov) , [www.benefitscheckup.org/](http://www.benefitscheckup.org/),  
<http://www.governor.state.tx.us/disabilities/>

*Caution: This is a very brief summary of complex programs. For example, it provides very little information as to what income and assets are **not** counted for eligibility purposes. There are also programs not mentioned above that are important to some individuals. Do not decide **not** to apply based on anything in this summary. It is not intended as legal advice.*



# Creating a Special Needs Trust

If something were to happen to you today, who would be there to protect the needs of your loved ones — especially those with special needs? A Special Needs Trust can help ensure they will have the resources necessary to live complete and fulfilling lives.

According to "The National Survey of Children with Special Health Care Needs," conducted in 2009-2010, 15.1% of U.S. children under the age of 18 (approximately 11 million children) have special health care needs.<sup>1</sup> This study found that 23% of households with children include at least one child with a special health care need.<sup>2</sup> In the past 25 years, the definition of "special needs" has broadened, making financial and estate planning vital for the care givers of these children. Think of all your current and possible future special needs-related expenses, such as special residential homes, employment assistance and other costs. And, while it may be tough to meet these obligations now, imagine the implications after you're gone.

## There is Some Help from Uncle Sam ...

Social Security Disability Insurance (SSDI), Supplemental Security Income (SSI), and Medicaid<sup>3</sup> are three sources of government benefits available to eligible disabled individuals. SSDI is a non-needs-based benefit that is available to all taxpayers who have earned sufficient credits, based on their taxable income. SSI and Medicare are both needs or income-based programs; they are available to those who are disabled or blind and have limited resources. One of the most important benefits of SSI is that it automatically makes a recipient eligible, and in some states, qualified, for Medicaid. For those not receiving SSI, Medicaid eligibility is determined by state law. SSI may also entitle an individual to other benefits and services, such as food stamps and payment of Medicare premiums, depending on the state of residence. Medicaid provides comprehensive coverage for medical care, physical therapists, occupational therapists, medical equipment, recreational and social programs, rehabilitative and custodial services.

## ... But Not Without Conditions

The government puts a major condition on the receipt of SSI and Medicaid benefits. The programs offer support to a special needs dependent only if the total value of their assets falls below a certain threshold; for most states, this threshold is \$2,000. Therefore, if the monthly income and value of all assets exceeds \$2,000, the government cuts back or eliminates support.<sup>4</sup> The policy rationale being that SSI and Medicaid are meant for those who have limited resources. If a special needs dependent is found to have enough income or assets, the government will not assist until such time as income and/or assets are "spent down."

The limit applies only to those assets in the dependent's name. This may seem like an easy standard to maintain, especially when the dependent is

## Ask the Right Questions

*When carefully structured by an estate planning or guardianship law attorney, a Special Needs Trust could ensure your financial resources are able to provide a lifetime of quality care for your loved one.*

*When creating a Special Needs Trust, ask yourself the following key questions:*

- *What are the goals and objectives for my loved one, now and in the future, when I am no longer there to care for that person?*
- *What is the average cost of my loved one's supplemental needs above and beyond government benefits?*
- *What level of support must you provide for other family members?*
- *Who is the designated trustee(s)?*
- *What funding vehicles should I use for my trust?*

not working; but often times, special needs dependents may inadvertently lose or have their benefits decreased upon receipt of large gifts, inherited property, death benefits from a life insurance policy or a retirement plan. These well-meaning gifts from caregivers and/or loved ones may increase the value of the dependents assets beyond the \$2,000 limit, thus jeopardizing receipt of governmental benefits.

However, there is an estate planning tool that can be used to maintain government benefits. By indirectly providing care and/or assets to the special needs dependent, the caregiver supplements the government aid.

## **Supplementing Federal Support**

Supplementing federal and state support is why many people turn to a Special Needs Trust. This estate-planning tool can offer an affordable way to help meet the ongoing needs of a person with a disability — or to provide a substantial gift — without affecting eligibility for government funding. More importantly, if something happens to you, a Special Needs Trust can help provide financial security for your loved one's continued care.

Specifically designed to provide funds to supplement the basic necessities (food, shelter and clothing), a Special Needs Trust may help pay for additional items such as medical therapy or procedures not covered by SSI or Medicaid, including:

- Cable
- Computer
- Education
- Recreation
- Television
- Transportation
- Travel
- Travel guardians
- Vacations

## **Special Needs Trust: How it Works**

An irrevocable trust is created for the dependent's benefit. In it, there are specific terms that supplement the dependent's government benefits. There are three types of special needs trust; (1) Third Party Trust; (2) Qualified Self-Funded Trust [or First-Party Trust]; and, (3) Qualified Pooled Trust. The qualified pooled trust is typically created and administered by a non-profit organization for the benefit of many special needs dependents. A qualified self-funded trust is created by the dependent, typically with funds awarded from a lawsuit. Our focus here will be on the third-party special needs trust which can be created by anyone, for the benefit of a special needs dependent. Typically, the caregiver(s) is the grantor of the trust, a separate person is named the trustee and the special needs dependent is the beneficiary (can also be one of several beneficiaries). The trust has specific provisions which allow the trustee to use assets for the dependent's benefit. The trustee can use these assets during the caregiver's life or after their death.

The trustee uses assets to purchase special supplies and/or medicine, pay education fees, pay rent, take vacations, etc; essentially paying for those items not covered by SSI or Medicaid. The key is not to give the money directly to the dependent, but to make payments on the dependent's behalf. If the asset is not in the dependent's possession, it is not counted and therefore not included in the \$2,000 threshold. By paying for those needs not covered by SSI or Medicaid, the trust maintains the dependent's federal and/or state assistance. This is what is meant by *supplementing* the government benefits. The government pays for the necessities, but the trust pays for everything else by making payments on behalf

of the beneficiary. The trust can be created during the grantor's life (Inter-Vivos Trust) or at his or her death (Testamentary Trust).

**Testamentary Trust.** For anyone looking to create a bequest to a special needs beneficiary upon his/her death — a testamentary Special Needs Trust may be most suitable. Established through a will (or a revocable living trust) and implemented upon the grantor's death, a Special Needs Trust is created based on the terms and conditions specified in the will (or revocable living trust). The trust receives all assets allocated to it from the deceased's estate. This option offers a secure way to lock in a lump sum for your dependent's continued care.

**Inter-vivos (Living) Trust.** In certain situations, an inter-vivos (living) Special Needs Trust may be more appropriate. With this trust, the trustee can access the liquid funds to help pay any special medical or supplemental expenses while the grantor is still living. Your attorney will help you determine how much you can borrow at any particular time without affecting a loved one's eligibility for government assistance.

### **Providing Gifts Through a Trust**

Both a testamentary and living trust can offer a viable way for friends, grandparents or other relatives to make a substantial gift to a special needs dependent to help supplement their care without jeopardizing federal and/or state assistance. Friends and relatives can either contribute to a caregiver's existing special needs trust or create a new trust that addresses the immediate and future special needs of the dependent.

### **Funding a Special Needs Trust**

The funding vehicle you select for your Special Needs Trust can have a dramatic impact on the amount of resources available for your loved one. Investments or other financial resources are one vehicle and can potentially multiply the value of your trust fund over the years. But at the same time, today's fluctuating market and evolving tax laws can lessen the value of these savings.

Permanent life insurance is another vehicle that can provide a death benefit, as well as a host of short and long term advantages. These include the opportunity to accumulate cash value for the future, on a tax-deferred basis, and the ability to access cash value through withdrawals and loans to help meet expenses over the years.<sup>5</sup> In addition, one can leverage premium payments, since the face amount of the policy is often greater than the premium cost.

If life insurance is used, typically the policy will insure the life of the grantor/caregiver, while the trust is the owner and beneficiary of the policy. The trustee will either purchase a new policy or an existing policy will be transferred into the trust.<sup>6</sup> This ownership arrangement prevents the special needs beneficiary from having direct control or management over the funds, which could otherwise put him or her at risk of losing government benefits.

The face amount of the life insurance policy should be at least equal to, if not more than, the estimated amount necessary to meet your dependent's needs over his or her lifetime. Your understanding of your loved one's diagnosis, prognosis, functional skill level, earning potential and abilities will assist in determining the appropriate amount of life insurance that will be required. The life insurance policy can insure the life of either one or two individuals. A single life policy pays a death benefit after the individual insured's death. A survivorship policy pays the death benefit after both insureds have died.<sup>7</sup>

The premium payments begin to create cash value for the trust, which may be accessed by the trustee through loans during the insured's lifetime.<sup>8</sup> You may want to name other children or relatives as

successor beneficiaries of the trust to receive any remaining funds in the event that your special needs dependent dies before the trust principal is depleted, or even before the insured's death. You may also consider naming a qualified charity as the successor beneficiary.

## **Whole or Universal Life: A Permanent Solution**

There are a wide variety of life insurance policies to choose from, but a permanent whole life or universal life policy may be the best options to fund a Special Needs Trust. Both provide death benefit protection<sup>9</sup> and allow tax-deferred cash value accumulation.

## **Selecting Trustees**

The trustee(s) you select will be responsible for administering the policy proceeds after your death. It is generally wise to choose at least one individual who is quite familiar with your dependent's needs to serve as trustee or co-trustee.

The trustee will oversee the financial management of funds in the special needs trust in the event of your death. You can appoint an individual trustee, joint trustee and/or a corporate trustee.

Ideally, the trustee should have the following skills:

- Understands public benefits;
- Conforms to all statutory fiduciary requirements;
- Has sound investment management skills and resources;
- Uses discretion in the best interest of the disabled beneficiary;
- Understands the implications of taxes regarding a special needs individual;
- Keeps detailed and accurate books and records;
- Coordinates and monitors needed services such as care managers and nursing care that the disabled beneficiary receives; and,
- Knows your dependent and is familiar with their present and future needs.

## **Other Considerations**

### **Appointing Guardians**

Guardianship<sup>10</sup> is another pressing issue for people currently caring for individuals with special needs. Often siblings, aunts or uncles, or the child's grandparents are the first choice to act as guardian should the caregiver die or become incapacitated. Guardianship, however, requires a substantial amount of consideration as it is a major commitment and familial ties alone is often not enough to guarantee that the dependent will be cared for properly.

Unfortunately, guardianship practices vary by state, and there is no unifying federal guideline on which to rely. Also, depending on state guidelines, guardianship may result in a special needs adult losing any right — even limited — to self-determination in medical care, housing choices, etc. That is why a lawyer specializing in special needs planning should always be consulted and asked to draft any binding documents.

## Letter of Intent

A Letter of Intent, written by the caregiver/guardian of a special needs individual, provides instructions to a trustee/guardian about the type and level of care to be provided, including specific instructions regarding health care, education and living arrangements. The letter serves as a set of "soft instructions" outlining the dependent's likes, dislikes, habits, strengths, weaknesses, or goals so the trustee or guardian has a better idea of the dependent's needs. While not a legal document, Letters of Intent should be witnessed and notarized.

## Conclusion

If you provide care for a person with special needs or wish to create a substantial gift, a Special Needs Trust can be of tremendous help. It is one of the few estate-planning strategies that may not affect your loved one's eligibility for Federal and/or state assistance.<sup>11</sup> And, when funded by life insurance, a Special Needs Trust can provide an affordable solution that may multiply the value of your savings over the years. It is an opportunity to ensure the care you give now will last a lifetime.

To learn more about the use of life insurance in funding a Special Needs Trust, contact your New York Life agent.

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<sup>1</sup> U.S. Department of Health and Human Services, Health Resources and Services Administration. See <http://childdata.org/browse/survey?s=1> (last reviewed 1/18/2013).

<sup>2</sup> See note 1, *supra*.

<sup>3</sup> Known as Medi-Cal in the State of California.

<sup>4</sup> Check the Social Security Web site: [www.ssa.gov](http://www.ssa.gov) for more detailed information on SSI and Social Security Disability Insurance, as well as a more complete definition of "disability" for Social Security purposes. For more information about disability benefits for children, request the booklet, "Benefits for Children with Disabilities" Publication No. 05-10026.

<sup>5</sup> Loans and withdrawals reduce any available policy cash values. In addition, loans against a policy accrue interest at the current rate and decrease the death benefit by the amount of the outstanding loan and interest.

<sup>6</sup> *Ibid*.

<sup>7</sup> A Survivorship Purchase Option Rider (SPO) on a survivorship policy can allow a surviving spouse to purchase more insurance after the death of the first to die, usually for up to three months. (Note: This would increase the required premium payments). The availability and/or terms of this rider may vary by state.

<sup>8</sup> See note 6, *supra*.

<sup>9</sup> Provided premium requirements are met.

<sup>10</sup> Check with your state laws to ensure that guardianship is applicable.

<sup>11</sup> Consult with local tax and legal advisors to see if state benefits may be affected.