



SPECIAL NEEDS PLANNING

# *10 Mistakes to Avoid*

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# 10 Costly Mistakes to Avoid

## *When Planning for a Loved One with Special Needs*

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## 1 Doing Nothing

The most popular estate plan in the United States is doing nothing. While not a good idea for anyone, it is particularly troubling when there is a loved one with special needs. If someone does nothing and then dies or becomes incapacitated, his or her estate is managed under the rules set forth in his state's probate code. The state probate code does NOT consider whether a loved one has special needs. This could cause the wrong person being named to manage your loved one's care or could even cost your loved one access to essential public benefits. Doing nothing is not an option.

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## 2 Disinheriting the Loved One

Many families who have a loved one with special needs rely on SSI, Medicaid or other government benefits to provide food and shelter. To protect these benefits, you may have been advised to disinherit your loved one with special needs. This is never a good idea; this is the person who needs your help most! If there are no assets set aside for the loved one, he or she will depend on public benefits. Public benefits rarely provide more than welfare-level care. However, a well drafted third-party special needs trust provides legal protection for your loved one's inheritance that can then

be used to supplement the loved one's public benefits.

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### 3 Assuming Others Will Care for Your Loved One

Some people decide the best option is to not leave any assets to the loved one, but to leave them instead to someone else (usually a sibling) with the promise to care for the loved one. This plan is fraught with landmines. Even well-intentioned siblings have their own

lives and financial concerns and may focus on their concerns rather than the loved one's.

Other issues also arise, such as when a person left the money divorces and the funds go to a spouse who has no interest in protecting the loved one. The sibling with the "extra share" may predecease

the their sibling with disabilities or become incapacitated. His or her heirs may not care for your loved one as thoughtfully and completely as hoped. If the sibling loses a lawsuit, faces financial difficulties or has significant creditor problems, that child may resort to using funds intended for their loved one, or a court may require that sibling to turn that money over to the creditor.



However, if you create a third-party special needs trust, you protect everyone. The trust will provide a way to leave clear and legally binding instructions to care for your loved one. It protects the assets you've set aside for your loved one's care. When you provide clear instructions and a helpful structure, you lessen the burden on all and you support a loving relationship among them, which also protects your loved one with special needs.

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#### **4 Using a One-Size-Fits-All Special Needs Trust**

While a special needs trust will provide legal protection for your loved one, some special needs trusts are unnecessarily inflexible and generic. Many trusts are off-the-shelf and not customized to the loved one's needs. The trust may preserve government benefits, but does so by preventing the trustee from making distributions that could otherwise enhance the quality of life of the loved one. Many of these bare bones trusts have a distribution standard that prevents the trustee from making distributions that may reduce or eliminate public benefits. This prevents distributions that may be in the best interests of the beneficiary. Other attorneys make special needs trusts "irrevocable" upon signing. While this is sometimes appropriate,

most people prefer a revocable trust to retain their right to improve and change the trust as the years pass. Over time, their loved one's evolving needs can dictate the trust's provisions, and -- just as important -- changes in the law can be reflected in the trust. The special needs trust must be flexible and personalized to your loved one's needs.

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## **5 Failing to Plan for More Than Public Benefits**

The main issue with one-size-fits-all special needs trusts is that the only goal is preserving public benefits. While preserving public benefits is important, it should not be the only goal. The special needs trust should be designed to enhance your loved one's quality of life in all aspects. This can include financial planning for the life of a loved one, planning for where the loved one will live, planning for the persons who will provide advocacy, developing a lifetime management team, and developing a plan for proper caregiving. Special needs planning is not about the document; it is about making sure your loved one with special needs has the legal protections necessary to fully enhance his quality of life when you are no longer there to do so.

## 6 Not Using a Professional Who Focuses on Special Needs Planning

Too many plans fail because the professional who created the plan did not understand the unique needs of persons with disabilities. Sometimes it is a financial planning professional who treats special needs persons' unique financial needs the same as everyone else. Sometimes it is the estate planning attorney who doesn't understand the specific public benefit rules and creates a plan that fails the legal requirements. Sometimes, these lawyers inserts a government "payback" provision into the trust rather than allowing the remainder of the trust to go to other family members upon the death of the loved one. These government "payback" provisions are only necessary in certain types of special needs trusts. An attorney and financial advisor who understands how to plan for persons with special needs can save the family hundreds of thousands of dollars, or more.



## **7 Failing to Include Others in The Planning**

A key benefit of creating a special needs trust that is effective immediately is that your extended family and friends can also make gifts or leave inheritances to the trust you create. This will reduce the cost to the family in trying to set up different plans for different situations. Often family members wish to leave funds to a loved one with disabilities. A letter explaining that you have created a trust that will protect your loved one's benefits, enhance their life, and preserve assets may be warmly received. The letter should also provide instructions on how to properly name the trust as a beneficiary.

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## **8 Choosing the Wrong Management Team**

The choice of who is responsible to manage your loved one's assets is one of the most challenging aspects of creating a sustainable plan. During your life, you can manage the special needs trust. When you and your spouse can no longer serve as trustees, you must choose who will serve according to the instructions in the trust. It is generally recommended that you create a team to help. One of the most effective teams is having

a professional serve as trustee, while family members serve as part of a trust advisory committee or trust protector. This way, the trustee is responsible for keeping apprised of the public benefit rules, managing the day-to-day finances, providing disbursements, maintaining records, and preparing accountings, while the family makes sure the trustee is doing what it is supposed to do. If the wrong person is put in charge (or the right person dies and there is no plan for succession), the entire special needs plan will fall apart.

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## 9 Failing to Protect the Loved One From Predators

All too often, loved ones with special needs fall victim to predators. This can be a financial scam where they take over their assets or a trick that deprives them of much-needed care. Predators are particularly attracted to vulnerable beneficiaries, such as the young and those with limited self-protective capacities. With a trust, you limit access to the information about your loved one's money. It further protects them because the loved one cannot direct where assets go.

## **10 Failure to Properly “Fund” and Maintain the Plan**

A special needs plan must have assets to make the plan work. This is an excellent time to bring together your financial planner and special needs planning attorney to assist in creating a lifetime plan. The financial advisor can create sample future scenarios that show how much is needed to fund a plan and then present different ways to accomplish this goal. Sometimes, it is adding a life insurance policy and naming the trust as beneficiary, or it may use existing assets. The attorney can then make sure the plan created will meet the needs of the loved one throughout her life. Finally, the plan should be reviewed every three to five years to make sure it continues to meet the loved one's needs. By doing so, you have created an effective special needs plan that will last a lifetime.



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