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## Costly Mistakes

to Avoid When  
Planning for a Child  
with Special Needs



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Long Island's *Signature* Elder Law, Special Needs and Estate Planning Law Firm

### **COSTLY MISTAKE #1:** Disinheriting the child.

Many families who have children with special needs rely on SSI, Medicaid or other government benefits to provide food, clothing and shelter. You may have been advised to disinherit your special needs 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. If your child requires governmental assistance to meet their basic needs, you should consider establishing a Special Needs Trust.

**COSTLY MISTAKE #2:** Ignoring 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 your child's comfort and happiness without sacrificing eligibility.

Special needs can include medical and dental expenses, annual independent check-ups, necessary or desirable equipment (such as specially equipped vans), training and education, insurance, transportation, and essential dietary needs. If the trust is sufficiently funded, your child can also receive electronic equipment & appliances, computers, vacations, movies, payments for a companion, clothing and other self-esteem enhancing and quality-of-life expenses: 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. Many trusts are not customized to the particular child's needs even though the trust does not disrupt government benefits. Thus the child fails to receive the benefits that the parent provided when they were alive.

Another mistake I see is when lawyers put a government "pay-back" provision into the trust rather than allowing the remainder of the trust to go to other family members upon the death of the child with special needs. These government "pay-back" provisions are necessary in certain types of special needs trusts. An attorney who knows the difference can save your family hundreds of thousands of dollars, or more. All too often, attorneys make Special Needs Trusts "irrevocable" upon signing. While this is appropriate in some cases, most parents prefer to retain their right to improve and fine tune the trust as the years pass. Over time, their child's evolving needs can dictate the trusts provisions and, just as important, changes in the law can be reflected in the trust. If there's one thing that can be said for sure about the law in this area, it's that the law will be different in the future.

**COSTLY MISTAKE #4:** Procrastinating. Because none of us know when we will die or if we will become incapacitated, it is important to plan for your child with special needs early, just as you would for other dependents such as minor children. Unlike most other beneficiaries, your child with special needs may never be able to compensate for your failure to plan. A minor beneficiary without special needs will have the ability to obtain more resources when he or she enters the workforce. Your child with special needs may not have that opportunity.

**COSTLY MISTAKE #5:** Failing to invite contributions from others to the trust. A key benefit of creating a Special Needs 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. You can also consider whether making the trust the beneficiary of a life insurance policy makes sense now, while you are healthy and insurance rates are low.

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 or retirement benefits.



**COSTLY MISTAKE #6:** Choosing the wrong trustee. During your life, you can manage the Special Needs Trust. When you and your spouse are no longer able to serve as trustee, you can choose who will serve according to the instructions that you have provided in the trust. You may choose a team of advisors. You may choose a professional successor trustee. Make sure that whomever you choose is financially astute, well-organized, and, most important, ethical and caring.

**COSTLY MISTAKE #7:** Relying on your other children to use their money for your child with special needs. You can rely on your other children to provide for your child with special needs from their own monies or from an inheritance. That can be a temporary solution for a brief time, such as during a brief incapacity, if your other children are financially secure and have money to spare.

However, relying on siblings is not a long-term solution that will protect your special needs child after you and your spouse have died. Even well-intentioned siblings have their own lives and financial concerns because of the many potential problems they face.

What if your child with the money divorces? His or her spouse may be entitled to half of it and may not take care of your child with special needs. What if your child with the money dies or becomes incapacitated while your child with special needs is still living? Will his or her heirs then care for your child with special needs 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 significant creditor problems? The court will certainly require your child to turn that money over to the creditor. If 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 child with special needs often feel a great responsibility for their sibling and have felt so all of their lives. When you provide clear instructions and a helpful structure, you lessen the burden on all your children and you support a loving and involved relationship among them.

**COSTLY MISTAKE #8:** Failing to protect the child with special needs from predators. An inheritance from parents who fund their child's Special Needs Trust by will rather than by revocable living trust is in the public record. 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 children's inheritance. This protects your child and other family members, who may be serving as trustees, from predators.

**COSTLY MISTAKE #9:** Failure to properly "fund" and maintain the plan. Every trust-based estate plan requires changes to asset ownership and beneficiary designations. If the plan includes life insurance protection (done with an "Irrevocable Life Insurance Trust"), these asset transfers become complicated.

Your attorney should direct which asset goes where, and why. If you suspect the assets were not properly transferred or if you are unsure as to what you need to do, take action! Call your attorney and request a report. Improper fund maintenance is one of the most common reasons that estate plans fail.

