



**WEBSTER & GARINO**

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INDIANA LAW FIRM

**ESTATE PLANNING FOR FAMILIES  
WITH SPECIAL NEEDS CHILDREN AND  
ADULT SPECIAL NEEDS CHILDREN**

Parents of a special needs child often question who will care for their child in the future once they are no longer able to provide that care. It is normal to want to provide the special needs child, as with all children, the best life possible. However, there are special considerations with special needs children as minors and as these children move into adulthood. Specialized estate planning is a crucial part of protecting the special needs child's interests as protecting their interests and financial wellbeing requires more planning.

There are a number of estate planning steps you can take to ensure that your special needs child is protected throughout his or her lifetime.

It is important to keep in mind that you should start the process early. We recommend starting the planning process before your child turns 18 in order to avoid gaps in benefits once your child transitions from a child to an adult at age 18.

It is also important to consult with individuals who can help you consider all of the legal alternatives and help you select the best options given your particular situation. These options will depend on a number of factors, including:

- The ability of your child to communicate wants and needs regarding his or her care
- The ability of your child to feed, dress and take care of his or her own basic needs
- Whether your child is employable
- Whether your child will require outside care
- Whether your child is able to make suitable independent decisions
- Whether your child is susceptible to undue influence





### **First: Choose and Appoint a Guardian for Your Special Needs Child or Adult Child.**

As with a parent of any child, it is important to have your Will prepared to designate your preferred guardian and alternate for a minor child. For a parent of a special needs adult child, depending on your child's level of functioning, it is important to have a legal guardian appointed once your child reaches the age of 18 while you are still alive.

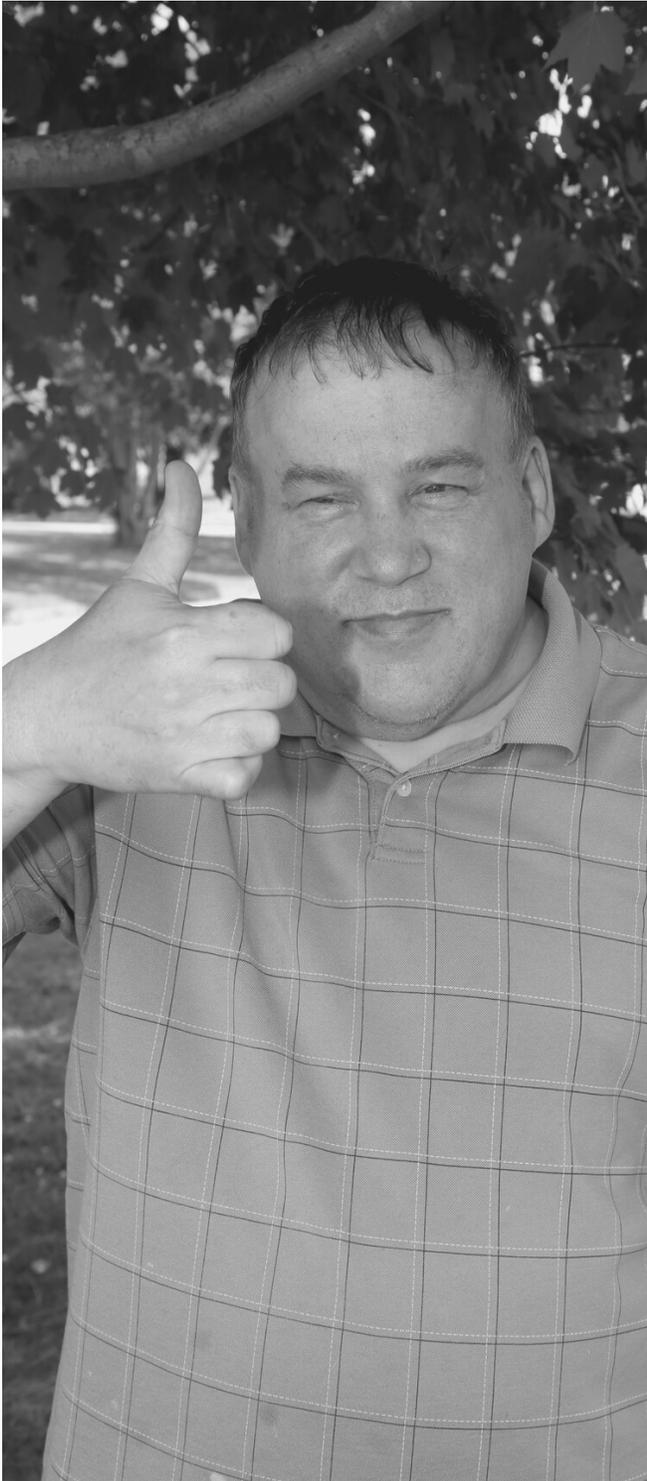
Once a person turns 18, they are considered an adult in the eyes of the law and are expected to make their own decisions, particularly with regard to medical treatment and finances. However, a person can make these decisions only if he or she is deemed competent and able to understand the consequences of his or her decisions. Otherwise, these decisions will not be considered legally binding.

If your special needs adult child is unable to make his or her own financial

decisions, manage his or her finances, make other significant life decisions, or provide for his or her own personal care, you or another trusted individual will need to be involved in the child's decision-making process. Being appointed a guardian of the special needs adult child is the legal mechanism to accomplish this. It is important to seek legal assistance to appoint a guardian who can care for your adult child and make decisions on his or her behalf.

Most often, a parent is appointed guardian. An adult sibling or close family friend are other options. This is an important decision as a legal guardian will have a significant role in your child's life. A Court action is required in order to appoint a guardian. A Special Needs and Estate Planning Attorney can help you and your family through this process.

## Second: Consider Creating A General Durable Power of Attorney and Healthcare Power of Attorney.



If your adult child is high functioning and is able to make his or her own decisions, a Power of Attorney can be a helpful option. A Power of Attorney is a legal document in which a person appoints another individual to make decisions for him/her and which allows that person to take actions on his or her behalf.

A General Durable Power of Attorney allows the adult child to appoint a trusted individual to help with financial decision-making and functions.

A Healthcare Power of Attorney allows the adult child to appoint a trusted individual to assist with important healthcare decisions, including routine healthcare decisions and important end-of-life decisions.

Whether a Power of Attorney is an option for your child will depend on your child's level of mental capacity. Your child must be considered mentally competent in order to execute a Power of Attorney. It will also be very important to ensure that the individual named to act on behalf of your child is trustworthy and that your child has the ability to determine if someone is taking advantage of him or her. If your adult child cannot execute a Power of Attorney, a guardian should be named by way of a legal action, as set forth above.

### **Third: Consider Your Finances and Optimize Benefits for Your Special Needs Child.**

It is possible that your special needs child will need assistance throughout his or her lifetime. This can be expensive. Therefore, it is particularly important to consider your finances and evaluate benefits that can provide the maximum benefit for your child. There are a number of options for benefits that can help your child in the future.



#### **Life Insurance**

The first option is life insurance. This can be a viable option to provide financial stability to your child after your passing. This can also be a source of funds for your child's future caregiver. It is important to work with a knowledgeable and reputable financial advisor who can help you assess the amount of insurance and the type of insurance which will most benefit your child.

#### **Periodic Review of Your Financial Picture**

We also suggest that you review your current financial picture and consider if you are on track for your own future and for caring for your child, even once you pass away. It is important to review your finances periodically as you may find that your view of the future and on what resources are required may change. For instance, as your child grows, you may discover that he or she may need less

assistance – or more assistance – than you realized when they were young. A trusted financial advisor may also be able to assist you with these periodic assessments and plans.

It is also important to keep track of expenses related to caring for your child and maintaining your child's lifestyle. A budget can be useful in assessing what financial resources may be necessary for the future. It is also important to consider unexpected expenses, which may periodically occur.

#### **Determine Eligibility for Medicaid and/or Supplemental Security Income**

There are times when a parent attempts to obtain Supplemental Security Income (SSI) benefits for his or her special needs child only to be told that the parent's income is considered, making the child ineligible for benefits. If that has happened to you, you should consider reapplying on behalf of

your child once your child reaches age 18. Once your child reaches age 18, he or she is considered an adult and your income will no longer be considered for determinations of your child's eligibility for government benefits. These government benefits programs can be important parts of your special needs child's future financial plan.

Qualification for SSI and Medicaid is extremely complicated and varies from State to State.

Further, the rules can vary from year-to-year. As of now, your child's non-exempt assets must be less than \$2,000 to qualify for SSI and Medicaid. It is important to consult with an experienced Special Needs and Estate Planning Attorney who can assess your unique situation, explore the best options for your child and family, and who can help allocate assets to allow your child to qualify for these government benefits.



#### **Fourth: Create an Estate Plan that Will Protect Your Special Needs Child Once You Pass Away.**



It can be particularly concerning and worrisome to consider how your special needs child will be cared for once you pass away. A Special Needs and Estate Planning Attorney plays a critical role in ensuring that you have the necessary Estate Plan in place to provide as much protection as you can for all members of your family.

In order to prepare for an Estate Planning consultation, it is important to keep track of your budget, your assets, and your overall financial picture so that the Estate Planning Attorney can best assist you.

The first step is creating a valid Will to establish your preferences on guardianship if your child is a minor.

However, estate planning for a special needs child can be much more complicated when it comes to passing down assets. If your child would benefit from SSI and/or Medicaid benefits, it is important to ensure that your child does not directly receive assets which would exceed the current \$2,000 asset maximum for eligibility.

Being able to qualify for governmental financial support can be critical depending on the medical and other supportive needs of a special needs child or adult child. However, due to strict asset and income limits attached to these government benefits, special planning becomes critical so that the individual does not risk losing eligibility for this support.

## Special Needs Trusts

One option is a Special Needs Trust. A Special Needs Trust (also known as a supplemental needs trust) is a legal structure used to hold financial assets for the benefit of a disabled beneficiary. There are two primary types of Special Needs Trusts. In either situation, a Special Needs Trust can be used to provide for a variety of needs.

One type is a First-Party Special Needs Trust, which is typically used if a disabled individual receives proceeds from a lawsuit or inheritance.

The second type is a Third-Party Special Needs Trust. This type of trust can be used to hold assets from a variety of sources, including assets passing as inheritances via an estate plan or as gifts from family members during their lifetimes. Well-meaning family members may unknowingly make a misstep by naming the disabled family member in his or her will. Doing so could actually cause the individual to lose important government benefits, including SSI and Medicaid – both of which have strict asset limits. Alternatively, with the help of a Special Needs and Estate Planning Attorney, family members can be educated about leaving their inheritance or life insurance benefits to a Special Needs Trust, which then allows the trustee to use those resources to improve the beneficiary's quality of life without negatively impacting eligibility for government benefits.

It is important to carefully select a trustee, who will be responsible for managing the assets in the trust and for making distributions to improve the quality of life for the disabled individual. The trustee has a significant degree of power, though he or she is bound by fiduciary duties to care for the beneficiary and to carry out your wishes. Because of this, it is important to carefully consider selection of the trustee. The trustee must be able to understand the person's needs and know how to budget, invest money, and keep an accurate accounting of funds. The trustee should also be willing to seek the guidance of an attorney as distributions are subject to complicated legal rules and restrictions. Sometimes, it makes sense to name a professional to serve as a trustee, and it can be especially helpful to name a "trust protector" – who is often an attorney who can ensure that the trust is being managed properly and pursuant to federal and state laws. You will also want to name a successor trustee in the event that the initial trustee is unable or unwilling to serve.

The rules for creation of Special Needs Trusts are complicated, as are the rules for appropriate management of those trusts. Families will want to establish a trust only under the guidance of an experienced Special Needs and Estate Planning Attorney as the rules are complicated and subject to change, especially when governmental benefits are an issue. It is important to consult an attorney with experience specifically in Special Needs Trust creation to ensure that the trust is valid.

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## ABLE Accounts

Another option, which can be used alone or in combination with a Special Needs Trust, is an ABLE Account.

ABLE stands for “Achieving a Better Life Experience,” and became an option with Congress’ passage of the ABLE Act of 2014. It provides a mechanism to allow the special needs person to have some savings by way of a tax-free account.

One benefit of an ABLE account is that distributions are tax free so long as funds are used to cover “qualified disability expenses.” Qualified ABLE expenses could include transportation, employment training and support, assistive technology, personal support, health care expenses, financial management services, and other expenses that help improve health, independence, and quality of life. An attorney can help you determine what constitutes a qualified disability expense. Another benefit of an ABLE account is that assets below \$100,000 are not counted as assets used to determine eligibility for many government benefit programs, including SSI.

ABLE accounts are intended to help both children and grown adults, and they can be used in conjunction with a Special Needs Trust.

The main rule is that a beneficiary’s disability must be diagnosed before his or her 26th birthday and the condition must be expected to last at least 12 consecutive



months. In addition, the individual must be receiving benefits under SSI or Social Security Disability Insurance or will need to obtain a disability certificate from a doctor.

An important limitation to an ABLE account is that contributions are limited to the federal gift tax exclusion amount. Also, funds that remain in an ABLE account following the special needs individual’s death can be recaptured by the government to repay Medicaid expenses the individual incurred. However, the family can use account assets to pay for funeral and burial expenses before the government repayment is imposed.

When used in conjunction with an overall plan, ABLE accounts can be an important planning tool and an effective mechanism for creating funds that can improve your child’s quality of life as an adult. A Special Needs and Estate Planning Attorney can help evaluate an overall strategy for helping to best prepare to provide care for your special needs child or adult child throughout his or her lifetime.

## **DISCLAIMER / ATTORNEY MESSAGE**

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We hope that this e-book has helped you better understand Estate Planning for families with special needs children and adult special needs children. If you have additional questions, please feel free to contact an eminent domain attorney at Webster & Garino LLC.

