

Estate Planning for Families with Minor and/or Special Needs Children

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How to provide your children's physical and financial care in case of you or your spouse's death. Includes instructions concerning special needs children and for children from a previous marriage.

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PARENTS WHO HAVE CHILDREN WHO ARE

minors or young adults have particular estate planning concerns that should be carefully considered. One concern is how to provide funds for the children if one or both parents die. Another is management of assets until children reach maturity and can manage assets well. An additional issue is who will care for minor children if both parents die. If a child, or other family member, has special needs, additional planning considerations must be addressed. This MontGuide summarizes methods for addressing these concerns.

What if one parent dies?

Mary and John have a typical young-family estate planning concern. In their early 30s, Mary and John have two children, ages 5 and 7. Mary and John assume that if one of them died, the survivor would use family assets to provide for their children. They discussed the possibility that the survivor could remarry and have more children, but they still felt comfortable leaving everything to the surviving parent. Their estate planning goals were accomplished by titling their car, house and investments in joint tenancy with rights of survivorship so that if either spouse died, the property would pass to the survivor. Mary and John also have named one another as the primary beneficiary and their two children as successor beneficiaries on their life insurance policies.

How to name someone to take care of children

A written will is a legal document used to nominate a guardian for minor children and a conservator of assets for them should both parents die. A **guardianship** provides for the care of a child until he or she reaches the age of 18. The guardian has the power and responsibility of a parent and makes decisions about the child's

upbringing, schooling, religious training and medical treatment.

A **conservatorship** provides for management and distribution of money and property left to children until they reach the age of 18. One person can perform both the guardianship and conservatorship functions, or one individual may be named as guardian and another individual as conservator. While parents may nominate a guardian and conservator in a will, the district judge makes a decision on what is the best interest of the child.

Often the most difficult decision facing parents is agreeing on who they want to assume the responsibility of raising the child and managing the money. Parents should consider choosing someone whose values, lifestyle and childrearing beliefs are similar to theirs. They should discuss with older children their preferences because Montana law allows youth ages 14 and over to request the court to appoint someone other than the person nominated in the parents' wills.

Once a decision is made, parents should take time to discuss all financial and child care arrangements with the conservator and/or guardian they have chosen. Asking someone to raise children or to manage assets for them may be an overwhelming request. Parents should not expect an immediate answer. Potential guardian and conservators should be given time to seriously consider the consequences of their acceptance.

Attorneys recommend the naming of a backup guardian and conservator in the will in case circumstances prevent the parents' first choice from carrying out the obligation. Parents should re-evaluate their choice periodically, especially if personal and financial situations change for either the parents or the designated guardian and conservator. For example, if the guardian or conservator nominated divorces, marries or has a major illness, parents may wish to nominate someone else.

If parents decide to change to another guardian and conservator, they should inform the current nominees. Then the parents should either write new wills or add “codicils” (amendments) to the present wills nominating a new guardian or conservator.

Are there alternatives to children receiving inheritances at age 18?

Montana law provides for the conservator to manage inherited property for children until they reach age of majority, which is 18 years. When children reach 18 they receive the property, regardless of their capability to manage it.

Many parents may believe their 18-year old is bright but conclude that he or she is incapable of managing \$100,000 or \$500,000 in assets. Rather than leaving the assets directly to the children and nominating a conservator to manage the assets until the children reach age 18, parents can have the assets left in a trust for the children’s benefit. The parents can indicate which assets pass directly to the trust in their wills.

As an example, insurance proceeds can be paid into the trust if both parents should die in a simultaneous accident. Savings accounts, stocks, bonds, and mutual funds that are in the parents’ names can also be directed to the trust. Parents can prepare a trust agreement giving their selected trustee the power to manage the trust assets and use the income for the children’s benefit. The trustee can be the person creating the trust, a friend or family member, several individuals, a corporate entity (such as a bank or trust company) or any combination of these. As the initial trustee, the settlor can maintain full control of the trust until his or her death or incapacity.

The trust agreement becomes effective only upon the death of both parents. A trust can avoid the inflexibility of conservatorship that passes assets to the children at age 18. The trust agreement can indicate any age (25, 30, and so on) at which the trust terminates and assets pass to the children.

The trust document states how parents wish the money to be spent, who should be the trustee, and when the trust should terminate so assets pass to the children. The trustee has the responsibility of following the parent’s directions for health, education and support of the children as outlined in the trust agreement. The trustee writes checks for the children’s living expenses, education and other costs. Parents often make arrangements for trustee compensation if the duties are fairly extensive.

Parents who want to encourage their children to attend college sometimes include a provision in the trust that gives children extra money and a lump sum distribution upon receipt of their bachelor’s, master’s or doctoral

degrees. If the children do not attend college, trust distribution is often deferred to a later age.

For further information on trusts read MSU Extension MontGuide, *Revocable Living Trusts* ([MT199612HR](#)), available from your local Extension office.

What if parents have a child with special needs?

When there is a family member who will never be able to care for himself or herself, estate planning is more complex and more important. A special needs child could outlive both parents. They must plan for guardianship and management of assets for the child when they are gone.

One alternative is to leave assets to other children and instruct them to care for the special needs child. But some parents have decided that solution would be too burdensome to the other children. Additional disadvantages are that the funds would be subject to possible loss if the person entrusted with the money dies, divorces, becomes disabled and needs public benefits, or acquires debts that leave the money subject to creditors’ claims.

Another alternative is to leave some assets outright to the non-special needs children and some assets in trust to provide income for the support of the child with special needs. A consequence of this decision may result in the child becoming ineligible for need-based government benefits. In addition, the income could be claimed by the State of Montana for reimbursement if the child with special needs has to be in a state-supported care facility.

A third alternative is a “special needs trust.” As an example, with help from their attorney, one set of parents developed an estate plan that places their assets to a “special needs trust,” also known as a “supplemental needs trust” for a child who has Down’s syndrome. Special wording in the trust ensures that the assets will not be used in place of public benefits and that trust income and assets will not make the child with special needs ineligible for government programs. The parents know that their child will never be able to make her own important decisions, so they have nominated an older sister as guardian and conservator. The sister is well informed about the needs and care of an individual with Down’s syndrome. Upon the death of the special needs child, the trust funds are then distributed in accordance with the stated wishes of the parent – perhaps to his or her other children.

What protections does Montana provide for children with special needs?

The Montana Self Sufficiency Trust (MSST) is a fund that generates income to purchase supplemental services for special needs people, without jeopardizing their

eligibility for government benefits. This private, nonprofit corporation, governed by a volunteer board of directors, was formed to take advantage of a Montana statute that allows for a cooperative venture between private individuals and the State of Montana to provide for the future of persons with disabilities and chronic illnesses.

Donors set up individual trust accounts that are pooled for investment purposes. Earned income is then transferred to the State Trust Fund. The State, through the Department of Health and Human Services, uses income from the MSST to purchase supplemental services designated in Lifecare Plans of trust beneficiaries. A guide (Montana Self-Sufficiency Trust Handbook) is available from Parents, Let's Unite for Kids (PLUK) at: http://pluk.org/Pubs/MSST_2005_190KB_PDF.pdf or call (800) 222-7585.

Montana law required that every guardian and conservator complete an "Acknowledgement of Fiduciary Relationship and Obligations." The form is available online at www.montana.edu/estateplanning/acknowledgementoffiduciaryrelationship.pdf.

What if parents have children from a previous marriage?

Parents who have children from a previous marriage may wish to assure that these children inherit specific properties. One way this goal can be accomplished is by the parent keeping some property in his or her name only. Each parent can then write a separate will or testamentary trust in the will to designate which children are to receive what assets and under what circumstances.

As an example, consider a recently married couple who each has children from a previous marriage. They have agreed that neither of them wants to leave everything to the surviving spouse. The wife has a 10-year old daughter. The husband has two children, a 24-year old daughter and a 14-year old son. His divorce settlement requires that a stated amount of life insurance proceeds be designated for his son's benefit. The couple owns no property in joint tenancy with right of survivorship except their cars. Their other assets are titled in just one name – some in her name and some in his name.

The wife's will leaves the household contents to her husband. Other assets to a testamentary trust for her daughter's benefit. The trust comes into existence only at the mother's death. Mother's separate listing of tangible personal property that is attached to the will names her daughter to receive all jewelry. The trust is named as beneficiary for the life insurance proceeds.

The mother did not want to have the life insurance proceeds pass outright to her daughter, because there was a chance the child's biological father would be appointed

conservator to manage the funds until the 10-year old daughter reached 18. The trust agreement instructs the trustee (a local bank) to use the income and as much of the principal as necessary for the care and education of her daughter. Any assets remaining in the trust are to be distributed in yearly equal installments starting on the daughter's 25th birthday with the trust terminating when the daughter reaches age 30.

The husband's will leaves the household contents to his wife. He has also named her as beneficiary on one of his insurance policies. He left his coin collection to his daughter and his antique firearms to his son.

At first he considered dividing his other assets and insurance proceeds equally between his two children. However, he decided distributing his estate in equal shares may not provide adequately for each of his child's needs. He feels his 14-year old son would need more financial support than his 24-year old daughter, who already has a college degree and a well-paying job.

The father's will directs that all the assets designated for his two children pass into a trust. The trust agreement requires that the income be used for the care and education of his son. When the son reaches age 22 the assets that remain in the trust are to be distributed equally to both children.

This couple also nominated guardians for their minor children in their wills. Deciding who to nominate was even more difficult for them than it is for most people because they discussed the plans with former spouses who are still their children's biological parents.

How can minor children receive cherished personal possessions?

Nearly all parents have personal heirloom possessions they want to hand down to their children. The Montana Uniform Probate Code contains a provision allowing a person to refer in his or her will to a separate list disposing of tangible personal property such as rings, quilts, coin collections, and so on.

The list cannot be used to dispose of cash, certificates of deposit, securities or any property that has legal title. The list is not part of the will but separate from it and must identify both the items and the persons to receive them with reasonable certainty. The list must either be in the handwriting of the person who wrote the will or be signed by him or her. The separate listing can be changed as new possessions are added without the formalities required for new wills or codicils. The list should be dated and signed each time a change is made. For further information, request *Who Gets Grandma's Yellow Pie Plate* (MT199701HR) from your local Extension office.

Is an attorney necessary for estate planning?

Yes. Estate planning attorneys can help parents with minor and/or special needs children plan their estates. When planning for a special needs family member, advice of an attorney with expertise in disability planning is essential, as relevant laws, regulations and planning options continue to evolve. A qualified attorney can help parents weigh advantages and disadvantages of various estate planning tools and techniques.

Summary

Parents with minor children face major estate planning decisions. One concern is how to provide income for the children if one or both parents die. Another challenge is how assets will be managed to provide financial resources needed by the children until they reach an age at which they become financially responsible. A third problem is directing who will care for their children should both parents die. Wills and trusts can help parents achieve their estate planning goals.

Often the most difficult part of the planning is for the parents to reach decisions about guardians and conservators, and ensuring that appropriate decisions are made that will provide protection and financial security for a special needs family member who will need assistance for the rest of his or her life.

Acknowledgements

The Business, Estates, Trusts, Tax and Real Property Law Section, State Bar of Montana, has approved this MontGuide and recommends its reading by all Montana parents.

Other Resources

Possibilities: A financial resource book for parents of children with disabilities (2001). Parent Advocacy Center for Educational Rights (PACER Center), 8161 Normandale Boulevard, Minneapolis, MN 55437. 1-888-248-0822; 1-952-838- 9000; www.pacer.org

A Family Handbook on Future Planning (December 2003). Sharon Davis, Ph.D., Editor. www.wrightslaw.com/info/future.planning.arc.pdf

Self Sufficiency Trust of Montana: A MSST Handbook (2003). Katharin A. Kelker, Ed.D. http://pluk.org/Pubs/MSST_2005_190KB_PDF.pdf

Special Needs Alliance, www.specialneedsalliance.com, a non-profit organization providing access to information and assistance in planning for persons with special needs

Montana Code Annotated §72-3-109

Disclaimer

This publication is not designed as a substitute for legal advice. Rather it is designed to help parents become better acquainted with some of the methods used in estate planning to provide for children. Future changes in laws cannot be predicted and statements in this MontGuide are based solely on the laws in force on the date of this publication.



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