



Patti Goroski

## FAMILY FINANCIAL MANAGEMENT

MT199117HR, REVISED 10/20

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

By Marsha A. Goetting, Ph.D., CFP®, CFCS, Family Economics Specialist;  
Wendy Wedum, Pondera County MSU Extension FCS/4-H Agent; Carrie Krug,  
Richland County MSU Extension FCS Agent

*Parents with children who are minors or young adults have specific estate planning concerns. One concern is how to provide funds for the children if one or both parents die. Another issue is managing inherited assets until children reach financial maturity and can manage the assets themselves. Another concern is who will care for minor children if both parents die? Families who have a child with special needs have to address additional planning considerations. This MontGuide summarizes legal ways to address these concerns.*

## Naming a Guardian and Conservator

Often the hardest decision facing parents is agreeing on who they want to be responsible for raising their children and managing their inherited assets. Parents should consider choosing someone whose values, lifestyle, childrearing, and educational beliefs are like theirs.

A written will is the legal document used to name a guardian for minor children and a conservator of assets if both parents die. A **guardianship** provides for the care of children until they reach the age of 18. The guardian has the power and responsibility of a parent. The guardian makes decisions about the children's lives, including education, religious training, and medical treatments. Parents should discuss guardian choices with older children because Montana law allows youth ages 14 and over to request the court to appoint someone other than the person named in the parents' wills.

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, the parents can nominate one person as guardian and another as conservator. While parents may name their choice for a guardian and conservator in a will, a district judge reaches a decision based on what is in the best interests of the child.

After deciding on a guardian and conservator, parents should discuss financial and childcare arrangements with the people 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.

Give potential guardians and conservators time to consider the responsibility of raising your children and managing their assets.

Attorneys recommend the nomination of a **backup guardian** and **backup conservator** in each parent's will. Circumstances may prevent the parents' first choice from carrying out the duty. Parents should review their choices regularly, especially if personal and financial situations change for the named guardian and/or conservator. For example, if the selected guardian or conservator moves, divorces, marries or has a major illness, parents may wish to nominate others.

If parents decide to change their guardian and/or conservator, they should inform the current nominees. Then parents should either write new wills or add a "**codicil**" (amendment) to their current wills to name a new guardian and/or conservator.

Montana law requires every guardian and conservator to complete and sign an "Acknowledgement of Fiduciary Relationship and Obligations" when they assume the guardian and/or conservator appointment. Each signer acknowledges he/she assumes the duties and responsibilities of a fiduciary. They must work exclusively for the benefit of the deceased person's estate and its beneficiaries, the ward under any guardianship, or the protected person under any conservatorship. The form is available online at <http://www.montana.edu/estateplanning/acknowledgementoffiduciaryrelationship.pdf>.

## Estate Plan for a Married Couple with Minor Children

Mary and John are in their early 30s. They 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 two children. They discussed the possibility that the survivor could remarry and have more children. However, they still felt comfortable leaving assets to the surviving parent.

They accomplished their estate planning goals by titling their car, house and investments in joint tenancy with rights of survivorship. Upon the death of either spouse, the property

passes to the survivor without probate because of the joint tenancy title.

Mary and John also named one another as **primary beneficiary** and their two children as **successor beneficiaries** on their life insurance policies. If both parents die and their children are still minors, they will need to nominate a conservator to manage the life insurance proceeds until their children reach age 18.

They did not want to use the more formal route of including a testamentary minor's trust in their wills to hold the life insurance proceeds for the benefit of their children. Their attorney suggested they name a custodian under the Montana Uniform Transfer to Minors Act (UTMA); <http://store.msuextension.org/publications/FamilyFinancialManagement/MT199910HR.pdf>. The UTMA would allow the life insurance proceeds to remain under management of the custodian until their children reach age 21, if the parents specify this maximum age restriction. The custodian distributes funds directly to the guardian until the children reach age 18. From age 18 until the child's 21st birthday, the custodian manages the life insurance proceeds for the benefit of Mary and John's children. When the young adult is age 21, the custodian turns over the money. This action avoids the need and cost of a court procedure to appoint a conservator to manage the only asset of value inherited by the children, the life insurance proceeds.

## Alternatives to Young Adults Receiving an Inheritance at Ages 18 or 21

**Conservatorship:** Montana law provides for the conservator to manage inherited assets for children until they reach age of majority, which is 18 years. Or, a custodian can manage the assets until they reach age 21 as mentioned previously under UTMA.

When children reach age 18, they typically receive the property, regardless of their ability to manage it. However, if grounds exist at the time the child turns 18 to warrant the extension of the conservatorship (i.e., special needs, substance abuse), a district judge may consider this factor before the young adult assumes outright control of the assets.

Many parents may believe their 18-year old is bright, but conclude that he/she is unprepared to manage \$100,000 or \$500,000 in assets. Instead of leaving the assets directly to the children through a conservator or a custodian, parents can leave the assets in a **testamentary trust** for the children's benefit.

**Testamentary Trust (TT):** A testamentary trust (TT) goes into effect at the death of both parents. The parents decide on a **trustee** to manage the trust assets. The parents can specify which of their assets should pass directly to a TT in their wills. Also, they can list the TT as the beneficiary of savings accounts, certificates of deposit, stocks, bonds, and mutual funds.

For example, parents can use a Payable on Death (POD) designation on their checking or saving accounts, and certificates of deposit. If they have a TT in their wills, the POD beneficiary is the trust. They can also place a transfer on death (TOD) registration on their stocks, bonds, and mutual funds designating the TT as beneficiary. The TT then becomes the holder of the securities.

For real property, parents can use a transfer on death deed (TODD) to name the TT as the designated beneficiary. The TT can become the beneficiary of life insurance if both parents should die in the same accident or if the spouse named as primary beneficiary dies before the insured spouse.

Parents can prepare a TT agreement in their wills, giving the **trustee** the power to manage the trust assets and use the income for the children's benefit. The trustee can be a friend or family member, several individuals, a corporate entity (such as a bank or trust company) or any combination of these. The initial trustee maintains full control of the TT until his/her death or incapacity or until the children reach the age of the trust's termination. Should either situation arise, a successor trustee then manages the trust.

A testamentary trust avoids the formal court procedure, cost and inflexibility of conservatorship that must pass assets to the children at age 18. The TT agreement can indicate any age (25, 30, and so on) at which point the trust terminates and the assets pass to the children.

The **trustee** has the responsibility of following the parent's directions for distributions. Typically, the trustee makes distributions for the health, education, maintenance 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. If the duties are extensive, parents often include a provision for a payment to the trustee if they are a friend or relative.

Parents who want to encourage their children to seek education beyond high school may include a provision in the trust that provides them with extra money for this purpose. Parents may also provide a lump sum distribution when their children earn associate, bachelor's, master's, or doctoral degrees. If the children do not seek further education, a distribution of the trust assets may occur later.

For more information about trusts read MSU Extension MontGuide, *Revocable Living Trusts* (MT199612HR), available from your local MSU Extension office or online at <https://store.msuextension.org/publications/FamilyFinancialManagement/MT199612HR.pdf>.

## Protecting Assets for Minor Children From a Prior Marriage

Parents with children from a prior marriage may wish to guarantee these children inherit specific properties. One way to accomplish this goal is for the parent to keep some property in his/her name only. Each parent can then write

a separate will or provide for a testamentary trust in a will to designate which children are to receive what assets and under what circumstances.

For example, consider a recently married couple who have children from a previous marriage. The couple has 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 a designated amount of life insurance proceeds for his son's benefit. The only properties the couple owns in joint tenancy with right of survivorship are their vehicles. The parents title the remaining assets in just one name—some in her name and some in his name.

Provisions in the wife's will designate most of the household contents to her husband. She designates a testamentary trust as the beneficiary of her savings accounts, certificate of deposit and mutual funds for her daughter's benefit. The testamentary trust is valid only after the death of her mother.

## Assuring Children Receive Their Parents' Cherished Personal Possessions

Nearly all parents have personal or heirloom belongings they want to hand down to their children. The Montana Uniform Probate Code contains a provision allowing a person to create a separate list in a will to name who receives tangible personal property such as jewelry, quilts, collections, firearms, and so on.

The list **cannot** distribute cash, certificates of deposit, securities, or real property because all of these assets have titles. The list is not part of the will but separate from it. The list must identify both the items and the persons to receive them with reasonable certainty. An individual can hand write the list or it can be computer generated and printed. As the parents add new possessions, they can easily update the list without the formalities required for new wills or codicils. The parents should sign and date the list each time they change the content. For further information, request the MSU Extension MontGuide *Who Gets Grandma's Yellow Pie Plate* (MT199701HR) from your local Extension office or online at <https://store.msuextension.org/publications/FamilyFinancialManagement/MT199701HR.pdf>.

## Planning for a Child with Special Needs

When there is a family member who may rely heavily on public benefits to care for himself or herself, estate planning becomes more complex and important. A child with special needs could outlive both parents. Therefore, parents need to plan a guardianship and a conservatorship or a trust to manage assets for the child in the event of their deaths.

Estate planning attorneys can help parents with minor children and those with special needs plan their estates. When planning for a family member with special needs, advice from an attorney with expertise in disability planning is essential, as relevant laws, regulations and planning options continue to change at the state and federal level. An attorney can help parents weigh advantages and disadvantages of the various estate planning tools and techniques available for children with special needs.

**Special needs trust.** In most cases a "special needs trust" is the preferred option. With the help from their attorney, one set of Montana parents developed an estate plan that places their assets in a "supplement needs trust" for their child who has Down Syndrome. When established by the disabled individual, or a representative on their behalf, these trusts are called "special needs trusts. Specially worded legal language safeguards that trust income and assets will not make a child with special needs ineligible for government programs and benefits.

The special needs trust can exist during the lives of the parents if they would like to make gifts to it before death. Or, the parents can structure the special needs trust to come into existence upon their deaths as a testamentary trust within their wills. The parents choose the testamentary special needs trust for the purpose of managing the inheritance of their child with Down syndrome.

The supplemental needs trust does not include a payback provision, which means that the creator of the trust can direct the trustee to distribute the remaining trust property to future beneficiaries. In contrast, self-settled special needs trusts (those created by the disabled person for the disabled person's benefit) must include a provision that distributes any remaining trust property to Medicaid up to the amount of the benefits paid on their behalf.

The parents realize their child with Down syndrome will never be able to make her own important decisions, so they have nominated an older sister as guardian. The parents also made the sister trustee of their testamentary special needs trust. The sister is well informed about the needs and care of an individual with Down syndrome. After the death of the child with special needs, the remaining trust funds are distributed according to the parent's written wishes in the trust document. In this case, the parents named the Global Down Syndrome Foundation as the beneficiary.

**ABLE accounts.** Another option for those with disabilities may be an Achieving Better Life Experience (ABLE) account; <http://store.msuextension.org/publications/FamilyFinancialManagement/mt201809HR.pdf>. Parents can set up an account for their disabled child who meets eligibility requirements. The maximum amount for a contribution as of 2020 is \$15,000 per year and may be adjusted from time to time. The first \$100,000 in the ABLE account is exempt from the Supplemental Security Income (SSI) individual

resource limit eligibility test. The maximum limit for an ABLE account in Montana is \$396,000.

ABLE accounts must include a payback provision to Medicaid for benefits expended on the beneficiary's behalf. This feature makes ABLE accounts a less attractive option for special needs planning than a supplemental needs trust. For further information about ABLE, read MSU Extension MontGuide, Montana ABLE Accounts (MT201809HR), available from your local Extension office.

**Montana Self Sufficiency Trust (MSST).** This is a fund generating income to purchase supplemental services for people with special needs, without jeopardizing their eligibility for government benefits. This private, nonprofit corporation has a volunteer board of directors. The MSST takes 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 people with disabilities and chronic illnesses.

For investment purposes donors set up individual trust accounts that are pooled. Earned income then transfers 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. One organization providing for pooled trusts in Montana is Rural Dynamics at <http://ruraldynamics.org>.

## 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 the management of assets to provide financial resources needed by the children until they reach an age at which they become financially responsible. A third concern is deciding 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 process is for parents to reach decisions about a guardian, conservator, and/or trustee. Parents who have a child with special needs, whether he/she is a minor or adult, need to plan to provide protection and financial security for the rest of the child's life.

## Acknowledgements

Representatives from the Business, Estates, Trusts, Tax and Real Property Law Section (BETTR), State Bar of Montana, reviewed this MontGuide.

## Other Resources

- *Possibilities: A financial resource book for parents of children with disabilities* (2010). Parent Advocacy Center for Educational Rights (PACER Center), 8161 Normandale Boulevard, Minneapolis, MN 55437. 1-888-248-0822; 1-952-838- 9000; <https://www.pacer.org/publications/possibilities/>
- *A Family Handbook on Future Planning* (December 2003). Sharon Davis, Ph.D., Editor, Rehabilitation Research and Training Center on Aging with Developmental Disabilities, Department of Disability and Human Development, College of Applied Health Sciences, University of Illinois at Chicago. [www.wrightslaw.com/info/future.planning.arc.pdf](http://www.wrightslaw.com/info/future.planning.arc.pdf)
- *Special Needs Alliance* <https://www.specialneedsalliance.org/>, a national alliance of attorneys for special needs planning. The site includes resources for parents.
- *Montana Parent Training & Information Center*. Funded by the U.S. Department of Education, Office of Special Education Programs (OSEP) through Individuals with Disabilities Education (IDEA). The center performs a variety of direct services for children and youth with disabilities, families, professionals, and other organizations that support them. [www.montanapti.org](http://www.montanapti.org)

## Disclaimer

This publication is not a substitute for legal advice. Rather its purpose is to help parents become better acquainted with some of the methods used in estate planning to provide for minor children and those with special needs. Laws are constantly evolving. Statements in this MontGuide are based solely on the laws in force on the date of this publication.



MT199117HR, REVISED 10/20  
**FAMILY FINANCIAL MANAGEMENT  
(ESTATE PLANNING)**

**To download more free online MontGuides or order other publications,** visit our online catalog at [www.store.msuextension.org](http://www.store.msuextension.org), contact your county or reservation MSU Extension office, or e-mail [orderpubs@montana.edu](mailto:orderpubs@montana.edu).

Copyright © 2020 MSU Extension

We encourage the use of this document for nonprofit educational purposes. This document may be reprinted for nonprofit educational purposes if no endorsement of a commercial product, service or company is stated or implied, and if appropriate credit is given to the author and MSU Extension. To use these documents in electronic formats, permission must be sought from the Extension Communications Coordinator, 115 Culbertson Hall, Montana State University, Bozeman, MT 59717; E-mail: [publications@montana.edu](mailto:publications@montana.edu)

The U.S. Department of Agriculture (USDA), Montana State University and Montana State University Extension prohibit discrimination in all of their programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital and family status. Issued in furtherance of cooperative extension work in agriculture and home economics, acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture, Cody Stone, Director of Extension, Montana State University, Bozeman, MT 59717.