

**HOW TO DIVIDE YOUR ESTATE:  
Does your estate plan need to provide equally for all of your children?**

**by Barbara A. Isenhour**

A difficult consideration for parents as they prepare their estate plan is deciding how to divide their estate among several children when one child has special needs. Should the estate be divided equally among the children so that feelings are not hurt? Should the estate be left to the non-disabled children with the understanding that they will look after their sibling who has special needs? Should all or most of the estate go to the child with special needs since that child's future needs may be much greater than those of the other children?

These are hard questions and there is no single answer for all cases. While this issue may not be a concern to families with substantial wealth, for most families with a special needs child this is a huge issue and one that is not always given the attention it is due.

Factors that can influence the decision about how to divide your estate include:

- Your total net worth;
- The ages of your children;
- The anticipated needs of your special needs child and your care plan for that child when both parents are gone;
- The needs of your other children;
- Family dynamics and relationships between siblings.

**Ken and Susan's Estate.** To illustrate the factors to consider in deciding how to divide your estate, let's look at a hypothetical family, Ken and Susan Shaw. Ken and Susan have three children, Tim, Sarah and Carrie. Sarah has cerebral palsy. Ken and Susan's estate consists of the following:

Home	\$300,000
Cash and investments:	\$150,000
Ken's IRA	\$100,000
Susan's IRA	\$50,000
Life insurance	\$200,000

If Ken and Susan died together, there will be \$800,000 to provide for their children.

**When There Are Minor Children.** Ken and Susan prepared their first estate plan when their children were ages 5, 3, and 1. They prepared a budget for what it would cost for their nominated guardian to raise three small children if they died while the children were young. This would include child care, health insurance, medical expenses, and room and board expenses incurred by the guardian. Even with their estate of \$800,000 and monthly social security survivor's benefits for the children until age 18 (and lifetime survivors' benefits for Sarah as a disabled child), Ken and Susan did not feel comfortable in

allocating a larger share of their estate to Sarah while the children were minors or still in college.

If Ken and Susan had family members who could have afforded to pick up the expenses of raising their children, they may have considered leaving a larger share of their estate to Sarah. This factor varies greatly within families. Some families have many layers of potential guardians if the parents died with minor children. Some families also have potential guardians who could easily absorb the cost of raising additional children without the need for financial support from the parents' estate. For Ken and Susan there were a limited number of options for a suitable guardian to raise their children, and their selected guardian would need funds to provide for the financial needs of all three children.

Although Ken and Susan decided to leave their estate to a common trust until their youngest child, Carrie, was twenty-five, they wanted any balance remaining in the trust when Carrie turned twenty-five be set aside for Sarah only.<sup>1</sup>

**When the Children Are Adults.** When their youngest child turned twenty-five, Ken and Susan decided to review their estate plan and see if changes needed to be made. By this time their estate had appreciated in value and was now worth one million dollars. Their estate now included a rental home that Ken and Susan purchased. Sarah and two of her school friends who also have special needs live in the house together, and a full-time caregiver lives with the girls. The caregiver is paid in part through a Medicaid community waiver program, but Ken and Susan, and the parents of the other two girls also contribute to the cost for the caregiver.

In discussing their priorities, Ken and Susan are clear that they want to be sure that Sarah's current living arrangement continues after their deaths. Sarah loves the independence of living with friends her age, but it requires a full-time caregiver, and the Medicaid program that helps with the care may not be funded in the future.

**Should Sarah Be "Disinherited"?** Ken and Susan ask their attorney if they should consider leaving their estate to Tim and Carrie only, with the expectation that Tim and Carrie will look after Sarah. Their concern is that they do not want to jeopardize Sarah's government benefits by leaving a bequest to her in their estate plan.

There are inherent problems with this approach. While Tim and Carrie may have a very good relationship with Sarah now, family relationships can change over time. If Tim or Carrie died before Sarah, their estate plans could leave money intended for Sarah's care to their spouses instead. What if Tim or Carrie lost their job, developed a serious illness, went through a divorce, or had a judgment from a lawsuit entered against them? Any of

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<sup>1</sup> While this article is not intended to address financial planning issues for parents, if Ken and Susan could afford a term insurance policy in their budget, that policy could be used to fund an additional amount for Sarah's lifetime needs in addition to the amount they will need to raise all three children while they are young.

those events could wipe out the funds that Ken and Susan intended to be used to provide for Sarah during her lifetime.

**Special Needs Trust for Sarah.** A trust is the only way to ensure that the funds intended to be used for Sarah are protected from creditors and unexpected life events that could undermine Tim and Carrie's good intentions. And to be sure that Sarah's eligibility for SSI, Medicaid, vocational rehabilitation programs, or other needs-based government benefits would be preserved, the trust would need to be a "special needs trust." The trustee would have the discretion to supplement but not replace any government benefits that Sarah was receiving.

Ken and Susan's lawyer assures them that a well drafted special needs trust should preserve Sarah's future eligibility for government benefits. While there is no guarantee that existing program rules will never change, the trustee can be given considerable flexibility to deal with future changes in the law. And the risk to Sarah of such changes is certainly less than the risk she would face in being left out of their estate plan altogether.

After considering the alternatives, Ken and Susan decide they wish to use a special needs trust for Sarah's benefit.

**How to Divide the Estate.** Once Ken and Susan decide that they will include Sarah in their estate plan, they then have to address the hardest question – how much should be left for Sarah and how much should be left for the other two children?

The first thing Ken and Susan need to consider is their intended care plan for Sarah after they are gone. What will it cost to be sure this plan is realistic? While parents cannot completely control what will happen to the care plan for a special needs child after their deaths, they can at least analyze the cost for the "ideal" care plan and incorporate that into the discussion of how to allocate their estate between their children.

In Ken and Sarah's case they know they want to leave the rental house to Sarah's trust so she can continue to live there with roommates and a live-in caregiver. They know the cost to pay a full-time caregiver will be expensive, especially if the Medicaid program that currently pays a portion of that cost is eliminated in the future. They also know that if they are not alive, it may be necessary to hire a professional case manager to oversee the day-to-day operation of Sarah's care plan.

Parents like Ken and Susan are not able to plan for a special needs child in a vacuum. In addition to reviewing Sarah's needs, Ken and Susan must take into account the needs of their other children. In their case, Tim has a very good job and no children to support. Carrie, on the other hand, has a two year old child, just went through a difficult divorce this year, and is struggling financially.

The important thing for exceptional parents to remember is that there is no right or wrong answer to the question of how to divide their estate among their children. The decision

should not be made by their lawyer or their children. These people may give them input into the decision process, but it is ultimately the parents who need to weigh all of the relevant factors and decide what feels right to them.

In deciding how to divide your estate among your children, the following are some general principles to consider:

1. The relative needs of your children should be given great weight.
2. The way you divide your estate among your children is not a reflection of who you love the most.
3. Your estate plan should reflect what you want to happen if you were to die tomorrow, not five or ten years from now. You can always revise your estate plan in the future as circumstances change (provided you have sufficient mental capacity).
4. It is an admirable goal to make everyone happy, but it may be more important to provide for the neediest family members even if it generates some resentment or disappointment.
5. Communicating your decisions to your family about how you are dividing your estate and the reasoning behind that decision will help eliminate disappointment, surprise and resentment after your death.
6. You can always provide that any amount remaining in trust when your special needs child dies will be distributed to your other children (or grandchildren).

In Ken and Susan's case, they ultimately decided to leave 80% of their estate to a special needs trust for Sarah. They specified that Sarah's share was to include the rental house where she is currently living. They felt this should be adequate to ensure that Sarah could continue to live for many years where she is now, with the help of rent from roommates and possible help from the Medicaid program. Sarah's trust includes a provision that, at her death, any remaining funds in the trust will be distributed to Tim and Carrie.

Even though Tim has no financial needs, Ken and Susan decided to leave him \$25,000 because it gave them peace of mind to make a modest provision for him in their estate plan. The remainder of their estate will go to Carrie to help with her financial problems. Ken and Susan intend to revisit this allocation in three years. If Carrie is in better financial shape at that time they may reduce her 20% share and increase Sarah's share accordingly.

Ken and Susan decided to have a family meeting and let their children know about the changes they made to their estate plan and why they allocated their estate as they did. In talking with their children, Susan and Ken stressed the following:

1. It was very important to them for Sarah to have a community-based setting after they were gone; and the share allocated to Sarah was intended to make that possible.

2. Sarah's care needs are very expensive and a substantial portion of the care is currently provided by Ken and Susan without compensation. When they are no longer living, it will take money to replace that care. While Tim and Carrie would certainly do what they could to continue providing some of that uncompensated care, they have jobs and other responsibilities, and it would be unrealistic to expect them to provide all the care Sarah would need.
3. Medicaid could not be counted on to provide indefinitely the community-based benefits Sarah currently receives.
4. They do not want Sarah to be a financial burden to Tim and Carrie; their estate plan was intended to protect all three children.

There is no right or wrong answer to the question of how much of your estate should be allocated to your special needs child. The important thing is that you consider all of the options, not just the default option of dividing your estate equally among your children. Although the process of deciding how to allocate your estate at death can be challenging, knowing that your final choice is the result of careful and thoughtful consideration of all of the options will help give you that all important peace of mind.

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