

Court Can't Create a Special Needs Trust Where There Wasn't a Will

February 7, 2011 by [Deirdre Wheatley-Liss](#)



While courts have the power to interpret a person's intent in a Will to create a Special Needs Trust for a disabled beneficiary, even when the Will does not specifically create such trust, the courts can't create a Special Need Trust out of thin air if the person didn't have a Will. [Stacey C. Maiden, Esq.](#), of our [Trusts, Estates and Elder Law Department](#), shares this recently crafted holding from the case of [IMO Estate of Margaret A. Flood](#).

The New Jersey Appellate Court recently considered the unique question as to **whether a court could establish a Special Needs Trust in an intestate estate**. In this case, the decedent was survived by 4 children. Two of the children were disabled and beneficiaries of supplemental security income (SSI) and Medicaid programs. One of the children received special residential services and other benefits from the division of developmental disability (DDD). The decedent died without a Will, which under the New Jersey intestacy statute distributes her property equally among her four children.

The decedent did consider estate planning in 2004 and according to the certification of her daughter-in-law, she was concerned about protecting the inheritance of her disabled daughters from any obligations to reimburse the governmental entities that provided benefits and services. The decedent did not consult an attorney until March and April of 2008, and she died on May 24, 2008 having never executed a Will or a testamentary trust.

The lower court permitted the establishment and funding of supplemental benefit trusts for the decedents two disabled daughters by applying to doctrine at probable intent. The Appellate Court reversed stating that in the absence of a testamentary disposition, the decedent's estate passed by way of the law of intestacy, and her children's interests vested immediately upon her death (N. J.S.A. 3B:1-3.)

The Appellate Court stated that the doctrine of probable intent has no application in the absence of a Will. The Court found that the doctrine of probable intent has never been applied to create a testamentary disposition when the decedent failed to execute a Will. "In essence the doctrine of probable of intent is rule of construction or interpretation and therefore, presupposes an existing testamentary disposition." The court concluded that the existing case law precludes application of the doctrine of probable intent to create a testamentary disposition where none existed.



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C O U N S E L L O R S A T L A W

The moral here? You need to be responsible for how your assets are passing to disabled beneficiaries in the event of your death by creating a Will that take their disability into account. For further information, see an in-depth analysis of the case by my colleague told in a rally in his posting [Doctrine of Probable Intent Cannot Be Used to Create Special Needs Trusts for Intestate Decedent](#).

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