

ESTATE PLANNING

# Powerful Ideas: Documents You Need

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Crafting an estate plan generally involves a process in which a client engages professionals and advisors to help evaluate their personal and financial situation to develop a coordinated plan to protect their family and assets. An important component of any estate plan is having the appropriate legal documents in place to:

- Ensure that assets are distributed according to one's wishes;
- Minimize exposure to transfer taxes (estate, gift, and generation skipping transfer taxes);
- Protect assets from creditors or mismanagement; and
- Reduce the administrative burden and cost of probate or legal proceedings.

Having a comprehensive estate strategy is important for families with a person with special needs since that individual, very often, will have a lifelong support requirement. Additionally, an individual with special needs may rely on some form of government benefits. If the caregivers of the person fail to prepare, the individual's qualification for government benefits could be jeopardized, and their future care and support may be unprotected. For this reason, it is important that advisors and professionals who possess experience and knowledge regarding special needs issues be utilized to meet the unique challenges, pitfalls, and opportunities presented. Additionally, after strategies are implemented, it is necessary to have them reviewed periodically to determine if they require updating or modification due to changed circumstances or changes in the law.

Following is a list of documents that should be considered as part of an estate plan for families with an individual who has special needs.

## Last Will and Testament/Revocable Living Trust (RLT)

Without wills/RLTs, the assets of a deceased individual (excluding assets that pass by a beneficiary designation) will pass according to a state's intestacy statutes. Generally, at the death of a surviving spouse, state intestacy statutes result in assets passing to children outright (if over the age of majority). Accordingly, relying on state intestacy laws could cause an individual with special needs to receive a substantial sum of assets outright, disqualifying the individual from certain government benefits. For this reason, it is imperative that families with a beneficiary who has special needs execute a will/RLT that provides for the individual in a manner that will not disqualify him/her from government benefits. (Usually, this involves leaving assets to a special needs trust for his/her benefit.) If a RLT is utilized, a "pour over" will is necessary to fund the RLT with any assets remaining in the testator's estate at death. The benefit of utilizing RLTs include reduced probate expenses and increased privacy (if assets are funded to the trust during the grantor's lifetime). The increased privacy provided by a RLT may reduce the opportunity for a family member or another individual to interfere, in hope of a financial gain, with the trust's distribution structure. Additionally, a RLT created by a caregiver provides a mechanism that maintains availability to the caregiver's assets and access for a beneficiary with special needs if that caregiver becomes disabled or incapacitated.

## Financial Power of Attorney

A financial power of attorney gives the designated agent the right to manage and control the assets of the principal (the person who executes the document). This power can become effective upon the execution of the document or upon the principal's incapacity. A financial power of attorney can give the designated agent the power to continue to manage assets in a manner that benefits an individual with special needs, including the power to fund a trust for his/her benefit. To validly create a power of attorney, the principal must have capacity and understand the powers he or she is granting to the agent at the time of signing the document.

## Medical Power of Attorney

A medical power of attorney designates an agent to make healthcare decisions for the principal if he/she is unable to do so. Having a document in place detailing the principal's wishes upon his/her incapacity can alleviate some of the stress and burden that may exist for family members who would otherwise be forced to make decisions without direction as to the principal's wishes. As discussed above, to validly create a power of attorney, the principal must have capacity and understand the powers he or she is granting to the agent at the time of signing the document.

## Medical Power of Attorney for an Individual with Special Needs

For parents of minors with special needs, it is also prudent to consider executing a medical power of attorney to ensure that a successor caregiver can make healthcare decisions on the child's behalf. It will be necessary to ensure that the medical power of attorney complies with the requirements of the Health Insurance Portability and Accountability Act (HIPAA) so that the successor caregiver of a minor with special needs has access to his/her health information.

## Special Needs Trust (Third-Party and/or First-Party)

Special needs trusts are used to provide for the supplemental needs of a trust beneficiary in a manner that does not disqualify an individual with special needs from government benefits. Assets of a special needs trust are generally available to provide for the beneficiary's needs that are not otherwise provided by government programs (such as education, entertainment, and vacations). A third-party special needs trust is created by someone other than the individual with special needs and is funded with assets not belonging to him/her. There are several types of first-party special needs trusts, but generally they are funded with the assets of the individual with special needs and may require that "payback" provisions be included to reimburse, at death, the public benefit programs that provided support and services to the beneficiary during his or her life.

## Letter of Intent

Though not a legally binding document, the letter of intent may be one of the most important components of an estate plan. The letter of intent provides fiduciaries and other caregivers with specific instructions regarding the day-to-day care of a person with special needs and allows the caregivers to relay their hopes and goals for him/her. Trustees and guardians of an individual with special needs can refer to the letter of intent when making daily decisions regarding asset management and care. The medical history of the individual can be included in the letter of intent to ensure that all fiduciaries and representatives have a clear understanding of his or her health care needs and required maintenance. The letter of intent can provide a detailed background as to the type of government benefits available or provided in the past, including prior forms and contact information for case workers or other officials involved in providing for his or her care.

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