

ESTATE PLANNING

# Powerful Ideas: Documents You Need

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Crafting an estate plan generally involves a process whereby a client engages professionals and advisors to help evaluate their personal and financial situation in order 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 pursuant 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.

Having a comprehensive estate plan is important for families with a person with special needs since very often that individual 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 engage in the planning process, the individual's qualification for government benefits could be jeopardized and their future care plans left uncertain. For this reason, it is important that advisors and professionals with specific experience and knowledge regarding the unique challenges and opportunities for persons with special needs are utilized. Additionally, after a plan is implemented, it is necessary to have the plan reviewed periodically to determine whether it requires updating based on changed circumstances or a change in the law.

Following are 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 via beneficiary designation) will pass according to 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 an 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). Increased privacy could reduce the opportunity for a family member or other individual to interfere with the individual with special needs for financial gain. Additionally, an RLT creates a mechanism for the assets of a caregiver to remain available to a beneficiary with special needs upon the caregiver's disability or incapacity.

## 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.

## 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.

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

It is also prudent to consider executing a medical power of attorney for an individual with special needs to ensure that his/her caregiver is able to make healthcare decisions on his/her 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 caregiver of the individual 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 for through 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 some may require that "payback" provisions be included to reimburse certain programs for benefits provided to the beneficiary during his/her lifetime.

## 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 needs of the individual with special needs and allows the caregivers of the individual 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 the individual's health care needs and required maintenance. The letter of intent can provide a detailed background as to the type of government benefits available, including prior forms and contact information for case workers or other officials involved in providing for the individual's care.

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