

Special Needs Planning – Planning for Beneficiaries and Clients with Disabilities

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Pre-Need Planning: The Five Critical Planning Documents

- 1) Power of Attorney
- 2) Health Care Proxy
- 3) Living Will
- 4) Last Will and Testament
- 5) Trust

Advance Directives

- Power of Attorney
 - Gifting Provisions
- Health Care Proxy
- Living Will
- DNR & Organ Donation Considerations

The Power of Attorney

What is a Power of Attorney?

- A legal document that grants someone, or multiple other people, the power to manage the financial affairs and make important decisions on someone else's behalf.

Parties

- Principal
 - The Principal is the person who executes the POA
 - The Principal grants certain authorities to the agent(s)
- Agent
 - The Agent is the person who is authorized to make decisions on behalf of the Principal
 - The Agent must agree to follow the instructions of the Principal
 - If there are no specific instructions given, the Agent must act in the best interests of the Principal

Is it “Durable”?

- The POA is durable if it remains in effect even after the Principal becomes incapacitated (unless the Modifications section specifically states otherwise)

Capacity

- In order for the POA to be effective, the Principal must have capacity at the time of signing
- New York Definition of Capacity: Section 5-1501 (NY GOL) defines capacity as the “ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney.”

When is the POA effective?

- State-specific
- In NY, a specific agent can only act after that agent has signed the POA in the presence of a notary.
 - If there are two or more agents, who are designated to act TOGETHER, then the POA takes effect when all agents have signed in the presence of a notary.

Who should have a POA?

- Anyone who can!
- 18+
- Avoid Guardianships/Conservatorships **where possible**
- Are gifting provisions really that important?
 - YES!!!
- Should also have a Health Care Proxy!

Key POA Provisions

- What types of provisions should the attorney consider including?
 - Gifting
 - Estate tax planning provisions
 - Medicaid planning provisions
 - Trust provisions (creating, amending, revoking, funding, decanting, etc.)
 - Exercise of powers of appointment
 - Life estate – purchases, retain, etc.
 - Beneficiary designation changes
 - Compensation for the agent
 - Control over digital assets
 - Life insurance
 - Retirement accounts
 - Loans/promissory notes
 - Etc.

Key POA Provisions

- Should I include a provision appointing a guardian if necessary?
 - IT DEPENDS!
 - Be careful with nominating a guardian of the person and/or property
 - Consider whether guardians of person should conform to the agent named in the Health Care Proxy, where applicable
 - Possible language:
 - “If it becomes necessary to appoint a guardian of my person (*or property?*), I hereby nominate pursuant to Mental Hygiene Law Section 81.17 JOHN DOE to serve as guardian. If JOHN DOE is for any reason unable or unwilling to serve as guardian, I nominate JANE DOE to serve as guardian.

Health Care Proxy

- Health Care Proxies may be governed by state statute
- A Health Care Proxy solely covers the appointment of an agent to make **substituted health care decisions**, effectuating the wishes of the principal.
- Generally, a Health Care Proxy empowers an agent to make any and all health care decisions on behalf of the principal. These decisions may include issues relating to medications, therapy, the change of treating physicians, and any other issues that arise in the course of medical treatment.
- Under New York State law, for example, **unless your agent knows your wishes** about artificial nutrition and hydration (feeding tubes), the agent will not have the authority to make decisions about these measures.
- The Principle may elect to make organ or tissue donations on their Health Care Proxy .

Planning for Our Children

- Age 18 – no one else can make decisions for them
- Power of Attorney
- Health Care Proxy
- Will
- Financial Advisor – time to get responsible and financially savvy

Last Will and Testament

- A will is a legally-binding statement directing who will receive your property at your death
- A will allows you, as the Testator, to appoint a legal representative , the Executor, to carry out your wishes
- A will allows you to choose an appropriate guardian for minor children
- A will allows you to set up various “Testamentary” trusts, such as SNTs and Minor Trusts
- A will covers only probate property
 - Property passing outside of probate, not covered by the will:
 - Jointly-owned property
 - Property in trust
 - Life Insurance proceeds (with named beneficiary)
 - Property with a named beneficiary, such as IRAs or 401(k) plans

Trusts

- A trust is a legal document which allows the “Trustee” to hold legal title to property for another person, called a “Beneficiary.”
- Trusts avoid probate
- Trusts are private documents, unlike wills, and only “interested parties” know the terms of the trust
- Trusts can create certain tax advantages for both the Creator and the beneficiaries.

Trusts (cont.)

- There are many different types of trusts:
 - Revocable Living Trust
 - Main Purpose: Avoiding Probate
 - Credit Shelter Trusts and Life Insurance Trusts
 - Main Purpose: Tax Planning
 - Irrevocable Medicaid Asset Preservation Trusts:
 - Main Purpose: Protecting property from creditors and utilizing government benefit programs
 - Supplemental Needs Trusts or Special Needs Trust:
 - Main Purpose: Passing assets to a loved one with special needs without compromising his or her government benefits
 - Irrevocable Trusts
 - SLATs
 - “Crummey Trusts”
 - ILITs

Supplemental Needs Trusts

- A special needs trust is established for a person with special needs to supplement rather than supplant any benefits the person with special needs may receive from government programs and is designed to hold and manage assets for that person's benefit while not compromising his or her access to important government benefits.
- A properly drafted special needs trust will allow the beneficiary to receive government benefits while still having funds in the trust.
- There are two main types of special needs trusts:
 - First-party trust
 - Third-party trust
 - Both name the individual with special needs as the beneficiary

First and Third Party “Special” Needs Trusts

	Source of Funds	Who Establishes	Trustee	Distribution Upon Death
First Party Trust	Disabled Individual's funds prior to age 65	Parent, Grandparent, Guardian, Court, The Individual*	Grantor's wishes	Medicaid payback, then remainder beneficiaries
Third Party Trust	Anyone except beneficiary	Anyone except beneficiary	Grantor's wishes	Grantor's wishes

*Special Needs Trust Fairness Act (December 2016)

Previously, such trusts could only be established by a parent, grandparent, legal guardian or a court. Under the new federal law, individuals with disabilities can create a special needs trust for themselves rather than relying on others to do so. State's must adopt the law.

Income Taxation of SNTs

- Third Party Trusts
 - All testamentary SNTs taxed as its own entity
 - Inter vivos SNT *generally* taxed as its own entity (non-Grantor Trust)
 - K-1 issued and tax paid by income beneficiary
 - Keep an eye out for income that is NOT distributed
 - Taxed at compressed trust brackets
 - Inter vivos SNT may also be taxed as a Grantor Trust
 - If SNT include G-Trust provisions, income will be taxed to the Grantor/Settlor
 - Consider a “Qualified Disability Trust” for SNTs that don’t generate much income
 - Non-grantor trust
 - Income tax exemption available

Income Taxation of SNTs cont.

- First Party Trusts
 - *Generally* taxed as a Grantor Trust
 - Beneficiary reports income on individual 1040
 - Look at IRC Sections 671-678 (Grantor Trust provisions)
 - Does the Beneficiary retain a reversionary interest?
 - » The Trustee has discretion to distribute for the benefit of the Beneficiary = Reversionary Interest
 - Does the trust provide that income can be used for the benefit of the Beneficiary/Grantor?

Guardianships

- When an individual lacks capacity and there is no valid power of attorney in place authorizing someone else to manage his or her financial affairs, the only resort may be a guardianship proceeding
- In a guardianship proceeding, the individual is declared incapacitated and a guardian is appointed to manage the incapacitated person's property and/or personal needs.
- There are huge drawbacks in having to resort to a guardianship proceeding, including the time and cost of the proceeding and the emotional toll on the incapacitated person and his/her family members.

Revocable Living Trusts

- General Purposes: Avoiding probate; Privacy
- Assets held in a revocable trust are considered “available” assets for Medicaid purposes as if the Grantor owned the property outright

Irrevocable Medicaid Asset Preservation Trust:

- Main Purpose: Protecting property from creditors and utilizing government benefit programs
- Requirements:
 - Irrevocable
 - Grantor should not serve as Trustee
 - No principal can go to Grantor
 - Any principal or income that can be distributed to the Grantor or Grantor's spouse will be considered available for Medicaid purposes
 - Discretionary payments to Grantor / Grantor's spouse will be available even if subject to an ascertainable standard
 - "HEMS" will not be acceptable for Medicaid purpose
 - 5 x 5 power is not good
 - Ensure Trustee discretion
 - Be careful with the ability to swap assets and changing Trustees

The Planning Team

- CPA/Accountant
- Financial Advisor
- Social Worker/Geriatric Care Manager
- Attorney

The Planning Team

- To adequately meet the needs of the client, it is important to build a team of professional advisors.
- This team should work together to integrate the client's tax planning, estate planning, financial planning, and retirement planning.
- Each advisor will be able to focus on their area of expertise, while maintaining an understanding of the “big picture”

The Planning Team: Communication

- The key to an effective plan is to put the various team-members in touch with each other
- It is important that the client inform all advisors of all other professionals he/she is working with on the long-term goals, and give permission to all advisors to communicate with each other
- It is important that these advisors can communicate directly with each other, to ensure that they all have key information and are working towards the same goal
 - Goal: A thorough, holistic approach

The Planning Team: Various Roles

CPA Planner

- Tax planning and preparation
- Overall financial planning
- Projection of long-term income and expenses
- Financial record-keeping

Estate Attorney/Special Needs Attorney

- Estate Planning
- Document Preparation
- Special Needs Planning
- Planning for Incapacity

Financial Advisor

- Wealth Management
- Investments
- Long Term Care Insurance

Geriatric Care Manager/Social Worker

- Assess, plan, coordinate, monitor and provide services for the client



Elizabeth Forspan is a Partner with Forspan Klear LLP, a New York law firm. Elizabeth's areas of practice include Elder Law, Trusts & Estates and Taxation.

Elizabeth speaks throughout the United States on various aspects of Elder Care Planning, Tax Law and Estate Planning. She was the recipient of the prestigious Max Block Award for Outstanding Article in the Category of Technical Analysis, awarded by the New York State Society of Certified Public Accountants' CPA Journal for her article "Casualty Losses for Property Damaged by Hurricane Sandy".

Elizabeth has been named a Super Lawyers Rising Star in the areas of Estate Planning and Probate in 2016, 2017, 2018, 2019, 2020 and 2021. Elizabeth has been featured in New York Magazine, MarketWatch, and she has been quoted in the New York Times.

Prior to co-founding Forspan Klear LLP, Elizabeth was a Tax Manager with Ernst & Young LLP, where she focused on Mergers and Acquisitions and Executive Compensation.

Elizabeth earned her Juris Doctor from Fordham University School of Law and her B.A. from Queens College of the City University of New York, where she graduated *summa cum laude* and is a member of Phi Beta Kappa.

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