

Estate Planning Basics: The Importance of Special Needs Trusts



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What is Estate Planning?

When asked this question, most people immediately think:

- Wills; or
- Estate Tax Planning

Why Plan?

- To have a say (a BIG say) in what happens to yourself, your loved ones, and your assets, when you cannot.
- If you don't plan:
 - Probate Court Judge gets a big say
 - People you don't want or don't know may be put in charge
 - Legislature has an estate plan for you
 - Assets can end up with people you don't expect
 - Forgone opportunities to save taxes and protect assets

Most Common Estate Planning Documents

- Will
- Trust or Trusts
- Durable Power of Attorney
- Health Care Proxy
- HIPAA Authorization
- Guardianship/Conservatorship
Appointment/Nomination

What does a Will do?

- Specifies distributions
- Nominates Personal Representative (executor) to be sure terms of Will are followed.
- Can nominate guardians and conservators of minor or incapacitated children.

What is Probate?

- Many people believe avoiding probate is the most important estate planning objective.
- Actually, it is the least important.
- And sometimes, we deliberately want a probate.
- What matters in planning is to maximize your odds of getting the most of what you want, and the least of what you don't want. Follow that rule, and then employ the tools that get you there.

Probate Process

- Petition to have Will allowed and Personal Representative (executor) appointed.
- Inventory and marshal assets
- Give notice to creditors, heirs-at-law, and beneficiaries.
- Pay income and estate taxes (if any)
- Pay debts of decedent
- Make distributions to beneficiaries
- File official Account and close.

What Assets go through Probate?

- A Will may control disposition of all, most, some, little, or none of your assets at death.
- Probate Assets: Whatever assets are held purely individually at death.

What Assets Do Not go through Probate?

- Non-probate assets:
 - Jointly held assets with one or more surviving joint owners
 - Assets with a Death Beneficiary Designation (POD, TOD, ITF, and Death Beneficiary) with living takers – Life Insurance, IRAs, Qualified Retirement Plans, annuities, some brokerage accounts and CDs, some US Savings Bonds
 - Life estates
 - Assets owned by trusts

Trusts

- Not just for John D. Rockefeller any more.
- Many kinds, many purposes.
 - Avoid probate (if funded)
 - Manage assets during life and even long after death.
 - Asset protection
 - Protection of irresponsible or vulnerable beneficiaries from themselves
 - Estate tax reduction
 - Planning for long-term care needs and disabled person's public benefits
 - Provide for charitable intentions
 - Lots more!

Trustees

- Self
- Family Members
- Friends
- Professionals
- Institutions
- Beneficiaries as Trustees
- Guardians as Trustees

Most Common Trust: the “RLT”

- Revocable Living Trust – “RLT”
- Centralized Asset Management during life
 - Readily accepted by financial institutions, as opposed to Durable Power of Attorney
 - Cannot manage IRAs & Qualified Retirement Plans
- Probate Avoidance (if funded)
- Estate Tax reduction/elimination for married couples (\$1M/\$2M Mass up to 16%; \$5.34M/\$10.68M federal at 40%)

Most Common Trust: the RLT

- Provide for succession of management (Trustees)
- Extremely flexible: if you can dream it, and it isn't impractical, we can draft it.
- Provide for lifetime asset protection, divorce protection, public benefits protection for children, grandchildren, etc.
- Eliminate (up to \$5.34M) estate taxes at each subsequent generation's death

Most Common Trust: the RLT

- Does NOT:
 - Provide Asset Protection for the creator
 - Protect against costs of long-term care (nursing homes, Medicaid)
 - Save estate taxes for single individuals
 - Affect the creator's income taxes

Incapacity Documents

- Revocable Living Trust (to the extent funded)
- Durable Power of Attorney
- Health Care Proxy
- HIPAA Authorization

Durable Power of Attorney

- Present power concurrent with the Principal.
- Principal can revoke/overrule at any time.
- Authority ends at death of Principal.
- Even with RLT, important for assets RLT cannot own, plus powers not relating to assets at all.
- Robust list of successor Agents/Attorneys-in-Fact
- Most DPoAs are cookie cutter. Key powers often missing or inappropriately drafted.

Health Care Proxy

- Springing power
- Authority of Health Care Agent effective when attending physician notes in medical record Principal unable to make or communicate informed medical decision.
- Not usually effective for day-to-day decision making
- Hospital fill-in-blank forms effective for 95% of cases. Good HCP effective 99% of cases.

HIPAA Authorization

- Health Insurance Portability and Accountability Act of 1996 regulations effective April 15, 2003.
- Authorizes doctors, hospitals, other medical professionals, and health insurance companies to speak with and share information with people you specify.
- Why need HIPAA Authorization if you already have a Health Care Proxy?

Other Health-related Documents

- Living Wills
- Other Advance Directives
- DNRs
- Anatomical Gift Forms

Guardians for Children

- New for Massachusetts July 1, 2009:
 - Can *appoint* (not merely nominate) guardians for minor children to take effect on your incapacity or death (subject to subsequent ratification by probate court)
 - Can appoint guardians for minor children, nominate guardians for incapacitated adult children, and nominate conservators for minor and incapacitated children, to be effective not only at death, but also in the event you become incapacitated.
 - Previously, nominations were only effective at death (nomination was by Will).

Special Needs Trusts

- Governed by rules set out by you
- Holds and disburses assets for a beneficiary
- Two Special Needs Trusts – Where did the assets come from?
 - Third Party: Other People's Money
 - First Party: Disabled Person's Money

Special Needs Trusts, Cont.

- Why are special needs trusts important for estate planning?
 - Public benefits asset tests
 - Management of assets for vulnerable beneficiaries from themselves and from others – creditor protection, divorce protection and other threats

What makes a special needs trust a special needs trust?

- Person must have a disability
- Supplement but not supplant language
 - Does that mean never distribute when it affects public benefits?
 - NO – should be flexible, sometimes its ok to affect public benefits. Don't tie a trustees hands.

What makes a special needs trust a special needs trust?

- Wholly discretionary standard for trustee to make distributions
 - Not HEMS
 - There should never be an opportunity for a beneficiary to demand a distribution
- Spendthrift clause – the trust assets cannot be alienated, cannot be available to a creditor of the beneficiary

Is a special needs trust right for my child?

- Common myths
 - My child is not on benefits now so I don't need a special needs trust
 - The stigma
 - Trusts are: Expensive, difficult, burdensome

First Party – The (d)(4)(A) Trust

- Established by a parent, grandparent legal guardian or by court order
- Funded with assets of the disabled person
 - Settlements
 - Estate planning mistakes
 - After discovered assets
 - Overflow SSI or SSDI payments
 - Child support or alimony
 - UTMA's and other accounts
 - Parents or Grandparents for Long Term Care planning
- Estate Recovery or “Payback” provisions
- Established and funded prior to age 65

Third-Party SNT

- Used in parents estate planning
- Intended to provide supplemental funds for living expenses not covered by other income sources
- Anyone can establish and there are no age restrictions to establish or fund
- “Living” SNT lets others contribute – OPM
Other People’s Money
- Trustee has discretion over distributions

The SNT Trustee Responsibilities

- What are the trustee's responsibilities?
 - Invests/manages assets
 - Distributes funds
 - Keeps books
 - Files tax returns
 - Hires advocates and care managers, etc., as needed

Selecting an SNT Trustee

- The hardest part of your planning!
- Parent's often need guidance with this
- Options
 - Your other children
 - Uncle Bob is really good with money
 - Banks and Trust Companies
 - Professionals

Selecting a SNT Trustee

- Best Practices
 - Parent or Family Member *with* professional co-trustee
 - What is the cost of a Professional or Corporate Trustee?
 - Cost of Professional Trustee can be a really good deal!
 - 1% - 2% of assets plus costs
 - Successor trustees – Have a deep list, think about every contingency, remove and replace powers.
 - Only YOU know what is best for your family!

Funding Your Trust

- What assets will you use to fund your special needs trust?
 - Real Estate
 - Cash, Investments
 - Retirement Funds
 - However, there are special tax considerations.
 - Life Insurance
 - Term
 - Permanent
 - Survivorship

THANK YOU!

Questions?