



Special needs require special lawyers.

Beyond Special Needs Trusts: Important Planning for the Family with Special Needs

By Kerry R. Peck and D. Rebecca Mitchell

The parents of a child with special needs face many challenges. In addition to learning how to be a parent and care for a child, they must also learn about the nature and extent of the child's disabilities, the special care and services necessary to help the child achieve maximum potential, where to find and how to access services and resources, and how to pay the related expenses.

A parent of a child with special needs inevitably worries about who will fill their critical role when they die. Due to the dramatic increase in awareness of special needs trusts, they may recognize the value of including such a trust in their estate plan. Parents may not, however, be aware that their child will not be fully protected unless they also address other important estate planning issues.

Planning for a Parent's Disability. Disability can prevent a parent from sharing the day-to-day responsibilities of parenting a child with special needs while placing additional care giving and decision making responsibilities on the non-disabled parent. Advance planning can reduce the stress of the non-disabled parent and enable a re-allocation of financial resources as intended by the parent with disabilities.

Healthcare Advance Directives for Parents. Both parents should sign healthcare advance directives to authorize the non-disabled parent, or another person,

to make healthcare decisions for the parent with disabilities. This may avoid the need for court appointment of a legal guardian and reduce the stress of the non-disabled parent or other caregiver.

Designation of Guardian to Serve During Parent's Disability. Parents may designate a guardian for their child with special needs in their wills. It is also prudent to plan for a guardian to serve during the disability of a parent. Although simultaneous disability of both parents is highly unlikely, it is possible that an automobile accident or other tragic event could result in the death of one parent and the disability of the other. The parents' healthcare advance directives can include a designation of guardian for the child with special needs, or they can use separate documents for such designations to clarify their intention that the appointment take effect during their disability.

Short-Term Guardianship. State law may authorize parents to appoint a short-term guardian to make healthcare and other personal decisions for their minor child. A short-term guardian may have legal authorization to act without a court appointment and may have authority to make residential placement decisions unrelated to healthcare when the parents are unable to make such decisions themselves. These appointments usually expire after a specified time-period, but new appointments may be possible.

Stand-By Guardianship. Generally, the

parents' nomination of a guardian is viewed by the court as a recommendation, not a mandate. There is no certainty that the nominated person will actually be appointed guardian. In some states, it is possible for parents to achieve more certainty regarding implementation of their choice of guardian by designating a stand-by guardian. It may also be possible to obtain a court appointment of the stand-by guardian while the parents are alive and under no disability. This may be especially desirable where it is anticipated that there may be problems with access to medical care for the child with special needs or a contest over who will be appointed guardian upon the parent's disability or death.

Advance Directive for Minor's Healthcare Decisions. Another option available in some states is a special healthcare advance directive signed by the parent, authorizing an agent to make healthcare decisions for a minor child. This document can provide greater certainty regarding the identity of the authorized decision maker during the time necessary to obtain appointment of a guardian. It may eliminate the need for emergency court proceedings to address urgent medical issues, and, where the parent's disability is not permanent, it may allow court involvement to be avoided altogether.

Property Powers of Attorney for Parents. Both parents should sign powers

of attorney for property, authorizing agents to manage their financial affairs during a period of disability. As with healthcare advance directives, court proceedings may be avoided and caregiver stress may be reduced.

Special Provisions for Special Needs. The agent or guardian of a parent with disabilities may be able to use that parent's income and assets to meet the basic support needs of a dependant minor child. However, without clear advance authorization from the parent with disabilities, there may be a question concerning the authority of the agent or guardian to use income and assets for non-support expenses of the child with special needs or for expenses after the child has reached the age of legal adulthood. Therefore, it is prudent to include powers to assure that the parent's finan-

cial resources may be used as intended by the parent to pay all types of expenses incurred by, or on behalf of, the child with special needs.


Use of Financial Resources for a Child with Special Needs. If intended by the parent, the agent should be authorized to use income and assets to pay non-support expenses of the child during the child's minority and after the child becomes an adult and to pay other expenses after the child reaches adulthood—at least to the extent that the expenses are not paid by governmental or charitable programs. As with special needs trusts, it may be preferable to specifically authorize the agent to pay for comforts and luxuries and other supplemental or special needs expenses and omit reference to the use of income and assets to pay for care, support, maintenance, or similar items. This will help to

clarify the authority of the agent with respect to the use of financial resources when there are public benefits and limit the potential for problems with benefits eligibility due to the agent's authority to make payments on behalf of the child with special needs.

Authority to Create and Fund Special Needs Trust. Whether or not the parent has included a special needs trust in his or her will or living trust, the agent should be authorized to create and fund a special needs trust for the benefit of the child, and the authority should be broad enough to allow the agent to create a self-settled payback trust for the child's own assets, if needed, as permitted by federal law.

Agency Protector. Due to the inability to predict all future issues, the power of attorney might authorize the agent or an

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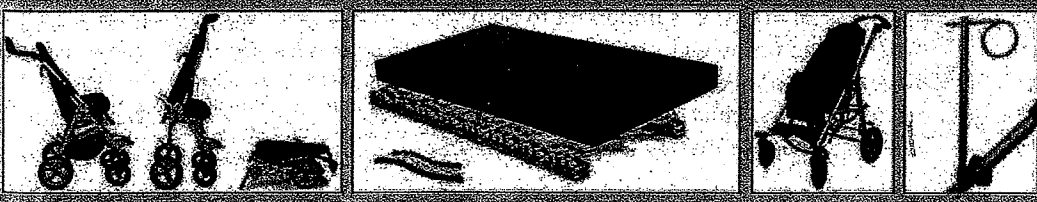


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agency protector to amend the terms of the power of attorney at a future time, as dictated by changing circumstances, similar to the use of a trust protector in a trust.

Authority for Self-Settled Trust for Parent. To maximize available options, the parents' powers of attorney should include provisions authorizing the agent to create and fund a self-settled special needs payback trust for their own benefit, if deemed appropriate by the agent. Gifting powers can also be included, if desired, to allow gifts from the parent with disabilities to the non-disabled parent or to others.

Planning for Adulthood. It is important to plan for the day when the child with special needs reaches the age of adulthood. Upon reaching the designated age (usually 18), the child automatically becomes an adult, with all of the rights and responsibilities that accompany this status, regardless of his or her actual mental capacity. Where a child with special needs will not be fully able to manage healthcare, other personal decisions, and/or financial affairs upon reaching adulthood, an evaluation of the child's ability to sign powers of attorney should be done, unless the disabilities are so severe that legal guardianship will clearly be required.

Powers of attorney may be appropriate where the new adult with special needs is capable of understanding the material factors involved in appointing an agent and is not in need of a decision maker who can make decisions contrary to his or her wishes. In addition to the standard powers included in most powers of attorney, it is important to consider adding the following powers:

- the power to represent the principal in connection with special education decisions and procedures,
- the power to represent the principal in connection with applications for governmental benefits,
- the power to represent the principal in connection with residential arrangements,

- the power to create and fund a self-settled special needs payback trust for the child's own benefit, and
- the power to obtain protected medical information governed by the Health Insurance Portability and Accountability Act of 1996 (a.k.a. HIPAA).

Powers relating to gifts and disclaimers of interests in property may also be appropriate in some cases.

The new adult with special needs who has the capacity to sign powers of attorney may still be vulnerable to exploitation by unscrupulous individuals. Therefore, if he or she will be independent enough to be in unsupervised settings, it may be wise to consider limited guardianship for powers relating to legal contracts. This would provide the option of invalidating unwise contracts, which might be signed without the knowledge of the agent/parent. When planning for a limited guardianship petition, it is critical to find a physician knowledgeable concerning the distinctions between various types of mental capacity and the appropriate use of limited guardianship to avoid unintentionally creating a question concerning the validity of the powers of attorney.

Guardianship. Where the disabilities are severe, legal guardianship may be necessary. Guardianship may be limited to personal decisions where there are no income or assets in the name of the child, which must be managed by a guardian. However, for protection of the adults with disabilities, it may be wise to have the court make an adjudication of incompetency as to financial decisions so that contracts or other legal documents signed by the person with disabilities may be voided if necessary.

Planning for Funds Already in the Name of the Child. Where funds have been transferred to a Uniform Gift to Minor's Account in the name of the child with special needs, it is important to plan whether the funds will present problems when the child becomes an adult. If management by the child is an issue or if the child may need to qualify for government-

tal benefits that count assets when determining eligibility, it may be preferable to plan a spend-down of the assets in the account, on non-support expenses, prior to the day when the child reaches adulthood. If the amount of funds is substantial, it may be necessary to consider the creation of a self-settled special needs payback trust.

Planning for Gifts from Relatives During Life of Parents. In order to protect funds which might be transferred to the child with special needs by other relatives or friends, either through gifts or bequests, parents should consider how to communicate to the most likely persons the potential impact of gifts on the child's present or future eligibility for governmental benefits. This could include recommendations concerning the use of a special needs trust to protect any funds which may be planned for the child. If appropriate, the parents can consider setting up a special needs trust to receive any gifts, which may be made during the parent's lifetime. There are many options for such trusts, and an experienced special needs planning attorney can assist the parents to choose the options that will best achieve their goals and objectives.

The challenges faced by parents of a child with special needs are great, but they are accompanied by many options which did not exist in the past. By taking advantage of these planning opportunities, parents will be able to more fully protect their child with special needs and other family members and achieve greater peace of mind as a result. •

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