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Estate Planning For Families with Special Needs

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Kristen M. Lewis is co-founder of The Bowden Law Firm, LLC. She is a member of the American College of Trust and Estate Counsel, the Special Needs Alliance, and the Academy of Special Needs Planners. She is the former Co-Chair of the Long Term Care, Medicaid and Special Needs Trust Committee of the Elder Law, Disability Planning and Bioethics Group of the Real Property, Trusts and Estates Section of the American Bar Association.

Disabilities affect families in all socio-economic strata. Everyone knows someone who is challenged by a disabling condition – whether it is a physical, mental or intellectual disability that is no one's fault (such as Down Syndrome or Autism), or one that is caused by the actions or inactions of third parties (such as in a personal injury scenario). Addressing the "special needs" that result from such disabilities can be a tremendous challenge. Families trying to secure the future of loved ones with disabilities are becoming fierce advocates for them, as they assemble teams of allied professionals with specific expertise designed to address all aspects of their current and future care. An essential member of the team is an attorney who recognizes the myriad issues implicated by the disabling condition of an heir or other intended beneficiary under a family's estate plan. In most cases, a network of Special Needs Trusts ("SNTs") will serve as the foundation of an effective plan designed to maximize the options available for those with disabilities. Thus, families of modest means, and those of great wealth, are increasingly engaging in SNT planning. However, many traditional estate planning attorneys are uninformed about SNTs, and about the complexities of planning for persons with disabling conditions. The Bowden Law Firm boasts nationally recognized expertise in this specialized area of the law. Although planning for families challenged by the special needs of beneficiaries with disabilities can be complex, there is some basic, yet essential, advice that every family must consider and address as part of the process.

Do not disinherit the beneficiary with special needs. This is an outdated and incorrect approach that many traditional estate planners still espouse today. Properly drafted SNTs can supplement, not supplant, any means-tested government benefits for which the beneficiary is otherwise eligible as a result of his disability.

Know the difference between government benefits that are "means-tested" and those that are based on a worker's employment history. Although a SNT is designed primarily to preserve means-tested government benefits for which the beneficiary is eligible as a consequence of his disability (e.g. Medicaid and Supplemental Security Income, for persons of limited resources), the SNT must also be coordinated with employment-based benefits (e.g. Medicare and Social Security Disability Income, which typically derive from the work record of the beneficiary's retired, disabled or deceased parent). Many traditional estate planning attorneys do not recognize this distinction. Indeed, some families also need to be educated about this important point! Furthermore, even if the SNT beneficiary does not need to rely on Medicaid for health insurance coverage, there are many programs for which a person must be "Medicaid eligible" to participate, e.g. "life skills" programs designed to maximize the beneficiary's independence.

Know the difference between a "first-party" and a "third-party" SNT. The rules that apply to "first-party" or "self-settled" SNTs (i.e. funded with assets that legally belong to the beneficiary with special needs) are much more stringent than those that apply to "third-party" SNTs funded with assets which derive from someone other than the beneficiary. Most families must establish a network of several SNTs, i.e. at least one first-party SNT and multiple third-party SNTs designed to receive funding from different sources at different times.

Select an appropriate Trustee for SNTs. Serving as the Trustee of a SNT is not for the faint-of-heart. Whether the SNT is established under a Will or during life, there are numerous traps for the unwary in administering a SNT. Professional trustees are strongly recommended, either to serve as the sole Trustee or as a Co-Trustee with a family member or other individual.

Consider an appropriate allocation of estate assets to fund a SNT, which may not necessarily be an equal split among the beneficiary with a disability and those without disabling conditions. Although it is easy to recognize that a beneficiary with special needs will likely require a larger share of the family's resources, it is often a difficult decision for a family to augment that beneficiary's share at the expense of his siblings or other beneficiaries without disabilities. However, since most families have numerous asset pools and sources of funding for the ultimate benefit of all of their beneficiaries, there are usually several creative options to assuage any concerns along these lines.

Coordinate beneficiary designations for non-probate assets. Although clients are well aware of the need to utilize SNTs for probate assets passing under a Will for the benefit of a beneficiary with disabilities, many neglect the necessary coordination of assets that are not subject to the terms of a Will, e.g. life insurance, qualified plan accounts (IRAs, 401(k)s), and certain joint assets, which typically pass by means of separate Beneficiary Designation forms or by operation of law. This can completely destroy a special needs plan!

Coordinate the estate plans of other family members who may wish to benefit the beneficiary with special needs. Once a family has decided to maintain the eligibility of a beneficiary for means-tested government benefits, the family must work closely with other well-intentioned relatives who may wish to help secure the future of that beneficiary. The process becomes a veritable joint venture which can be facilitated by the estate planning attorney in a diplomatic and cost-effective manner that does not require each and every family member to include a SNT under their own estate plans.

Assemble a team of "allied professionals" to help secure the future of a beneficiary with special needs. In addition to an estate planning attorney who is familiar with the legal requirements for SNT planning, the following allied professionals are valuable members of the team: (i) a Life Care Planner or Care Manager; (ii) a life insurance professional who is familiar with the distinct challenges faced by family members with special needs; (iii) an investment advisor who knows how to manage funds for beneficiaries with special needs, taking into account their generally lower investment risk tolerance; (iv) a government benefits specialist and claims processor; (v) a special needs advocate; (vi) a special education expert to assist in developing an "Individualized Education Plan" for school-aged beneficiaries with special needs; (vi) a home accessibility specialist; (vii) an accountant who is familiar with the deductions to which families may be entitled as a consequence of special

needs expenditures. The estate planning attorney often serves as the "quarterback" of this team of allied professionals, and makes recommendations and referrals for team members. This process is truly a team effort!

Appoint an appropriate legal Guardian for the beneficiary with special needs. Many parents do not realize that they can and should designate a legal Guardian under their Wills for an adult child with disabilities who requires the protection of a Guardian. Many do not realize that once a child attains 18 years of age, they no longer have the legal right to make health care decisions for an adult child unless and until they qualify as a court-appointed Guardian. Taking steps to secure the appointment of a parent or other person as the child's legal Guardian during the parents' lifetime, coupled with a testamentary successor Guardian appointment to take effect once that parent or person dies, provides complete protection for the adult child with disabilities who requires the permanent protection of this important court-supervised team member.

Consider estate planning for the adult child with disabilities. Many adult children with disabilities are legally capable of signing their own Wills and disability documents, including a financial power of attorney and a health care directive, to the extent that their disabling conditions do not unduly impair their testamentary or contractual capacity. Furthermore, the appointment of a Guardian or Conservator for a person with a disability does not in and of itself remove the person's right to make a Will.

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The Bowden Law Firm is ideally suited to advise clients who are trying to secure the future of family members challenged by disabilities of all types, both in the estate planning context and in many other areas of the law. We embrace the team concept, and look forward to serving as the team's quarterback in a planning process that will provide priceless peace of mind for years to come.