

*COORDINATING ESTATE PLANNING
WITH SPECIAL NEEDS*

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1. *FINANCIAL MANAGEMENT / PERSONAL MANAGEMENT*

A. **(UNIVERSAL) DURABLE POWER OF ATTORNEY**

Texas Universal Durable Power of Attorney Statutory Form
Caregivers should have this for transition planning and emergencies.

Can be made effective immediately or upon disability of the person who signs the Power of Attorney. (Exhibit A)

B. i) **DIRECTIVE TO PHYSICIANS (Living Will)**

ii) **POWER OF ATTORNEY FOR HEALTH CARE**

iii) **HIPAA AUTHORIZATION (PROVIDES ACCESS TO MEDICAL RECORDS)**

iv) **DECLARATION OF SUCCESSOR GUARDIAN**

Texas allows several forms for Directive to Physicians

Attached: Exhibit 1 (Directive to Physicians)

Exhibit 2 (Medical Power of Attorney)

Exhibit 3 (Form of Declaration of Successor Guardian)

C. **LIVING (INTER VIVOS) TRUSTS**

Revocable and changeable trust is created (“Grantor Trust” assets are deemed to be in the Grantor’s estate, simpler income tax planning for Grantor).

Alternative: A Trust may be made irrevocable for federal estate tax planning as well as for “first party” Special Needs Trusts.

Special Needs and Property Management Planning are assured by your selection of the Trustee (person or entity who has power to control all assets in the Trust).

Assets owned by the Trust are not in your “probate” Estate.

D. **TESTAMENTARY TRUST**

Comes into effect upon the death of the party that creates the Trust (irrevocable upon creation). Used for similar purposes as “living trust”, i.e. general and estate tax- minimization, Special Needs and Asset Management Planning, etc.

E. **PROTECTION THROUGH THE COURT**

i. **GUARDIANSHIP OF THE ESTATE**

Extensive planning strategies can be used to avoid this type of guardianship and still protect the person with special needs. Requires Guardian to report with “Annual Accounting” and request permission to deal with accounts.

Management Trust Alternative in Texas.

ii. **GUARDIANSHIP OF THE PERSON**

Some planning strategies can be used to avoid and still protect the person with special needs. Guardianship of the Person can be specifically directed to allow an incapacitated person to retain more rights.

2. COORDINATING GOALS WITH AVAILABLE STRATEGIES

OVERVIEW: GENERAL GOALS FOR THE FAMILY OF A PERSON WITH SPECIAL NEEDS

- PERSONAL SECURITY AND SAFETY
- MAINTAIN CURRENT STANDARD OF LIVING
- STABILITY WHEN PRIMARY CARETAKER DIES
- SMOOTH TRANSITION OF CARE PROVIDERS

A. FAMILY ESTATE MANAGEMENT / DISTRIBUTION ALTERNATIVES

i. **If no planning is done:**

- a. Special Needs Person is presumed competent to manage his or her Person, to contract and make discretionary decisions for health care, residence, activities and association.
- b. Estate - Effect of principal support person dying without a Will? If the caretaker (parent) dies *WITHOUT A WILL*, then TEXAS will determine to whom, what amount and when the Estate will be distributed.

All children will receive the Texas law specified share at age 18 (community and separate property of deceased person).

The Person with Special Needs may be rendered ineligible for SSI/ Medicaid benefits until assets are "**spent down**" and that person is without assets.

ii. **Simple Will / Contingent Trust / Tax Planning Will with general bequests.**

A valid written Will avoids the estate distribution problems of the person who has no Will. The estate document can even provide for asset management through a Trust. HOWEVER, if assets valued over \$2,000, directly or through a trust are deemed to be owned by a Special Needs Person who otherwise qualifies, (s)he will be disqualified for "Needs Tested" federal and state benefits (SSI and Medicaid).

See Review : NEEDS TESTED GOVERNMENTAL BENEFIT PROGRAMS.

iii. **Simple Will / Contingent Trust / Tax Planning Will where nothing passes directly to the individual with Special Needs.** All Estate assets are owned and managed by a **Special Needs Trust** (created through the Will or by a separate Trust Agreement):

- a. Create trust now, which can be revocable or irrevocable.
 - Avoids probate process for assets owned by the Trust.
 - **"THIRD-PARTY CREATED" SPECIAL NEEDS TRUST EXCEPTION FOR TEXAS MEDICAID ELIGIBILITY.**
 - Assets placed into the trust avoid probate, are owned by the Trust and pass under terms of the Trust Agreement.
 - Privacy is maintained.
 - Named trustee manages the property and distributes according to Trust Agreement directions.

iv. Dealing with the ownership and management of Assets that are *owned by the person* who has special needs but whose *special needs make him or her otherwise eligible* for "needs tested" benefit governmental programs. See Review: **GOVERNMENTAL BENEFIT PROGRAMS**

3. GOVERNMENT BENEFIT PROGRAMS

Every state that participates in the (Federal) Supplemental Security Insurance program must provide Medicaid coverage to qualified individuals. Texas qualifications are based on the SSI (Federal) qualifications. "Medicaid waiver" programs operated in Texas expand benefits to people not eligible for SSI (*Further information from the Texas Department of Health and Human Services [DADS] can be found by calling 211 or 1.800.833.5948*).

Some individuals with qualifying physical or mental conditions with income and assets below a certain level are eligible for SSI / Medicaid. Texas Medicaid Waiver eligibility is currently 300% of the SSI payments (approximately \$2,130 for a single person) and no assets valued above certain level (\$2,000 for individual + exempt assets). Texas long-term care assistance benefits (Nursing Home and Assisted Living) are governed by Medicaid Eligibility Rules.

A. FINANCIAL ELIGIBILITY (TEXAS)

i. General Rule

Countable resources can not exceed \$2,000 per person (or \$3,000 for married persons). Excluded Assets for qualification: *Homestead*, regardless of value or extent (caution as to residency), *life insurance* with a face value up to \$1,500, *automobile* of any value if needed for transportation for medical services / employment, furnishings/ personal belongings each having a certain value are not evaluated, and burial funds.

ii. "THIRD-PARTY" TRUST

(Assets to fund the Trust are not considered as owned by the Special Needs Person) Without a "Medicaid Lien" that can limit the disposition of assets after death of a person with Special Needs (as with "self-created" trusts, below). **Planning is important!**

B. "SELF-CREATED" TRUSTS

Must comply with Federal Law and Regulations issued by Social Security Administration (OBRA 1993, FCA 1999) in order for the Beneficiary that is otherwise eligible to retain financial eligibility.

*[Examples of funds deemed to be owned by a person with special needs: Trust created under a lawsuit (settlement), Gifts from family members directly to the Person with Special Needs.] ****

"Self-created" Trusts must be submitted to SSA or Texas Department of Health and Human Services and approved for eligibility determination.

TRUSTS THAT RETAIN ELIGIBILITY FOR SSI / MEDICAID ***

1. Trust for disabled person under 65 containing his/her assets if established by parent, grandparent (if Person is under age 18), legal guardian or Court. Upon the beneficiary's death the trust assets must be used to reimburse the state for medical assistance paid. Section 1396p(d)(4)(A), a "Supplemental Needs Trust" *
2. Trust funded with pension, Social Security and other income payable to the person, on the death of the individual the state has the right for medical reimbursement. ("Miller Trust")
3. Trust for disabled person managed by a nonprofit association under a pooled income fund approach, after person's death the unused funds remain the pooled fund for the other beneficiaries or be applied to repay the state for Medicaid expenses (excess may be directed to the family). *Example: ARC of Texas Pooled Trust*

*** Self-Created Supplemental Needs Trust - Upon the death of the grantor (or spouse or dependent minor children), **remaining trust corpus must be directed first to repay the Medicaid Lien**. This exemption applies to trusts to retain / attain SSI / Medicaid eligibility with the assets deemed to be owned by the Beneficiary.