



**VISHNICK MCGOVERN MILIZIO LLP**  
**ATTORNEYS AT LAW**

**ESTATE PLANNING  
FOR  
FAMILIES WITH SPECIAL NEEDS CHILDREN**

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## Note

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## About the presenter

**James F. Burdi** is a partner in the law firm Vishnick McGovern Milizio LLP, with offices in Lake Success and Midtown Manhattan. He concentrates his practice on estate planning, estate and trust administration, and special needs planning. Mr. Burdi is admitted to practice in the New York Courts and in the Federal Courts for the Southern and Eastern Districts of New York. He is a frequent lecturer on estate planning and administration, in the community and in the continuing legal education program at St. John's School of Law.

Mr. Burdi received his law degree from St. John's School of Law and holds a B.A. in Government and Politics from St. John's University. He is a member of the New York State and Nassau County Bar Associations and a member and Past President of the Columbian Lawyers' Association of Nassau County.



## **1. REASONS TO PLAN**

### **Common Mistakes**

- a) Leaving gifts or bequests directly to a special needs child:
  - i. possible loss of benefits;
  - ii. likelihood of mismanagement or improvident use;
  - iii. vulnerability of individual to fraud or undue influence;
  
- b) Expecting siblings or other family members to be ready, willing and able;
  - i. marriage, divorce, children;
  - ii. bankruptcy or other financial hardship;
  - iii. longevity and other health issues;
  - iv. resentment caused by dependency.
  
- c) Assuming physicians, bank officers and other professionals will always work with you:
  - i. authority as a parent ends at age 18;
  - ii. HIPAA and other privacy laws and policies;

### **Advantages to Planning**

- a) Re-establish authority over adult child for care and placement issues;
- b) Overcome privacy restrictions - access to medical and financial records;
- c) Protect child's assets from government liens and help child qualify for benefits;
- d) Establish roadmap for child's future care;
- e) Provide a succession plan for when parents are deceased or disabled;
- f) Take financial burden away from siblings;
- g) Maximize child's independence.

## 2. SPECIAL NEEDS VS. ORDINARY PLANNING

### What's different

- a) Child's needs may extend long past attaining the age of majority;
- b) Child's assets and income affect his or her eligibility of benefits;
- c) Court may retain jurisdiction on a continuing basis;
- d) Natural tendency toward equal distribution of your estate among children may not be appropriate.

### What's the same

- a) Spouse's interests and needs of other children, especially minors, must still be addressed:
  - i. Wills or Trusts;
  - ii. Non-testamentary dispositions;
  - iii. Providing for children during minority.
- b) Estate tax and income tax considerations:
  - i. IRA's, 401(K)'s, etc.
  - ii. Estate tax minimization.
- c) Planning for your own future disability or catastrophic illness:
  - i. Power of Attorney;
  - ii. Health Care Proxy;
  - iii. Trusts.

**Caution:** Although the interests of the special needs child may be a top priority, do not ignore your overall estate plan.

### **3. WILLS AND NON-TESTAMENTARY DISPOSITIONS**

#### **a) Last Will and Testament:**

- i. effective at death;
- ii. must be filed with Surrogate's Court upon death and admitted to probate;
- iii. Court appoints the Executor nominated in the Will, to manage and settle estate;
- iv. Court also appoints Trustees and Guardians named in Will for minors or disabled individuals;
- v. affects all property solely in decedent's name; does not affect property with a named beneficiary or joint owner.

#### **b) Non-testamentary Dispositions**

- i. joint accounts;
- ii. beneficiaries named on insurance policies, annuities or retirement plans
- iii. TOD or POD designations;
- iv. living trusts - revocable and irrevocable;
- v. UTMA accounts.

#### **c) Avoiding Probate - Factors to Consider:**

- i. relative expense;
- ii. likelihood of contest;
- iii. out of state property;
- iv. convenience;
- v. advantages to Court supervision and Court orders.

#### 4. SPECIAL NEEDS TRUST AND SUPPLEMENTAL NEEDS TRUST

a) Background: Matter of Escher, a 1978 NY case which upheld the ability of third party to establish a trust for a disabled person which:

- i. does not render the disabled person ineligible for benefit and
- ii. is not subject to claims by any government agency providing benefits.

This case and the body of law that developed after it were codified in 1993 as Section 7-1.12 of the Estates, Powers and Trusts Law.

b) Operative terms:

- i. discretionary;
- ii. clear intent to supplement and not "supplant" benefits;
- iii. prohibition from use in any way that would diminish or impair eligibility for benefits;
- iv. no right on part of beneficiary to invade or assign;
- v. can authorize payments for virtually any legitimate purpose.

c) Third Party SNT:

Can be testamentary (created by Will) or *inter vivos* (created during lifetime by a trust agreement)

- i. An SNT can be a beneficiary of bank accounts, insurance policies, IRAs or pension funds, can own life insurance, and can receive payments or gifts from more than one source. Gift tax and income tax considerations may apply.
- ii. With how much should an SNT be funded? Considerations:
  - (A) Needs of beneficiary;
  - (B) Relative wealth of family;
  - (C) Needs of other family members;

## (D) Consideration of Life Insurance

### d) Self-Settled SNT:

- i. Often sought by Guardians to protect the assets of a disabled or incapacitated individual under either Article 81 and 17-A.
- ii. Prevents spend-down during beneficiary's lifetime but assets upon death will be used to pay-back benefits, with balance, if any, distributed to named or described remaindermen;
- iii. Easier to administer funds in a trust than in a guardianship. Some counties waive annual accountings;
- iv. Must be under 65 years of age;
- v. Court approval no longer required.

### e) Trustees:

- i. Family member v. corporate or outside trustee;
- ii. Commissions;
- iii. Conflicts of interest.

## 5. OTHER TRUSTS

### a) Pooled or Community Trust:

- i. Maintained by an agency or charitable foundation;
- ii. Single trust with separate accounts for beneficiaries;
- iii. If funded with third party assets, upon beneficiary's death, agency usually retains part of remainder (e.g. first \$25,000.00) with balance going back to family;
- iv. Funding with first party funds exempt from Medicaid transfer rules even if beneficiary is over 65, but pay-back applies;
- v. Especially useful with modest amounts or where there is no reliable friend or relative to act as trustee.

b) Pooled Income Trust:

- i. shelters excess income to qualify for benefits;
- ii. can be an effective tool but is not part of estate planning - it is based on use of beneficiary's income;
- iii. pay-back can be to organization rather than state.

c) Spendthrift Trust:

- i. can be used for any person who might be improvident with money;
- ii. not a preferred tool for special needs planning but useful with spendthrifts, substance abusers or immature adult beneficiaries;
- iii. Section 7-1.6 of Estates Powers & Trusts Law authorizes Court to require payment of principal to an income beneficiary if needed for support or education. Spendthrift provisions can exempt trust funds from application of law.

d) Trust for Minors:

- i. can push age for distribution out from 18 to a selected age, or direct incremental payments;
- ii. eliminates need for Court ordered guardianship;
- iii. testamentary trusts in Wills are ideal tools for providing for minors:
  - (A) distribution plan can be tailored to needs;
  - (B) guidelines or strict rules for distribution can be fully described;
  - (C) no bond need be required;
  - (D) payments can be made or withheld in Trustee's discretion.



## **6. GUARDIANSHIP**

### **Types of Guardianship**

- a) Guardian of the Person or Property of an Infant:
  - i. An infant is a child under 18;
  - ii. Usually brought in Surrogate's Court when:
    - (A) infant has no living parent (guardianship of person); or
    - (B) infant has inherited property over \$10,000.00 (guardianship of property).
  - iii. May be brought in Supreme Court or Surrogate's Court when an infant is a plaintiff in a lawsuit and there is a recovery (verdict or settlement);
  - iv. With few exceptions, ends at age 18;
  - v. Disbursements prior to age 18 require Court approval;
  - vi. Budgets can be submitted for approval of periodic payments;
  - vii. Annual accountings required; bond may be required;
  
- b) Guardianship under Article 81 of Mental Hygiene Law:
  - i. Based on a determination of incapacity of person to provide for personal needs and/or property management;
  - ii. Can be used for both infants and adults;
  - iii. Requires a hearing on notice to "AIP" (Alleged Incapacitated Person), spouse, parents, adult children, adult siblings, any other person with whom AIP resides;
  - iv. Court appoints a Court Evaluator to oversee case;
  - v. Alleged Incapacitated Person has right to counsel;
  - vi. Initial and Annual Reports required;
  - vii. Court can fashion authority of guardian to suit IP's specific needs, including placement, care and financial planning;
  
- c) Guardianship of Intellectually Disabled or Developmentally Disabled Person under Section 17-A of Surrogate's Court Procedure Act;

- i. Simpler and less expensive than Article 81;
- ii. Brought in Surrogate's Court. In most counties, Court requires a short hearing with respondent's presence;
- iii. Usually sufficient remedy for special needs adults; standard practice for adults in community residences;
- iv. Limited authority as to property, but can be coupled with a Court-ordered trust;
- v. Authority for medical decisions is broad and may include decisions to withhold or withdraw life-restoring treatment;
- vi. Requires certification by two physicians or one physician and a psychologist;
- vii. Standbys can be named in initial petition;
- viii. Guardian can be a non-profit organization.

## 7. OTHER CONSIDERATIONS

### a) Powers of Attorney

- i. statutory form prescribed in NY General Obligations Law;
- ii. names one or more agents and/or one or more successors, to act on behalf of principal;
- iii. powers include real estate, banking, claims, insurance, benefits, **and more**;
- iv. power to gift can be modified; default is \$5,000/year;
- v. revocable at any time;
- vi. dies with principal;
- vii. some financial institutions insist on their own forms-- inquire as needed.
- viii.

### b) Health Care Proxies

- i. prescribed by New York Public Health Law as proper instrument for conferring authority or an agent to make medical decisions;
- ii. becomes effective when attending physician determines patient is no longer able to make own decisions;
- iii. names one agent as well as alternates;

- iv. can add organ donor language or instructions regarding extraordinary care;
- v. may not be sufficient for withholding or withdrawing artificial nutrition or hydration without additional language.

c) Living Wills

- i. also known as "advance medical directives";
- ii. gives direction regarding life support, nutrition and hydration in the event of terminal illness or other catastrophic medical condition;
- iii. not self-enforcing in New York;
- iv. can be combined with Proxy or can be a stand-alone document;
- v. religious considerations.



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