

33rd Annual Tax Symposium

PLANNING FOR DISABLED CLIENTS

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I. **CAPACITY TO EXECUTE DOCUMENTS**

A. Testamentary Capacity to Make a Will.

1. Michigan statutes provide the requirements for someone to make a valid will. MCL 700.2501 provides the following requirements:
 - a. Must be at least 18 years old and have sufficient mental capacity to make the will.
 - b. Will have sufficient mental capacity if meets all of the following tests:
 - i. The individual has the ability to understand that he or she is providing for the disposition of his or her property after death.
 - ii. The individual has the ability to know the nature and extent of his or her property.
 - iii. The individual knows the natural objects of his or her bounty.
 - vi. The individual has the ability to understand in a reasonable manner the general nature and effect of his or her act in signing the will.
2. This is a low bar.

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B. Capacity to Execute a Trust.

1. The Michigan Trust Code now provides that the test for competency to make a will is the same test as required to make a trust. MCL 700.7601
2. Previously, the requirements to make a trust required competency to contract. This was a higher standard.
3. The prior standard could have resulted in the will being valid, but a trust signed at same time being invalid.

C. Capacity to Execute Other Documents.

1. Medical Durable Power of Attorney (Health Care Directive):
 - a. Must be 18 years old or older and of “sound mind.”
 - b. “Sound mind” not defined.
2. Durable Power of Attorney.
 - a. Individual must have mental competence to reasonably understand the nature and effect of his action Persinger v. Holst, 248 Mich App. 499 (2001)
3. Deeds
 - a. Must have sufficient mental capacity to understand the business of which he was engaged and understand the value of his property. Barrett v. Swisher, 324 Mich 638 (1949)
4. Contracts
 - a. Must have sufficient mind to understand in a reasonable manner the nature and effect of the act in which the person is engaged. Persinger v. Holst, 248 Mich App. 499 (2001)

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II. REPRESENTING THE CLIENT

- A. Who is the client?
 - 1. Is it the disabled or elderly client, or is it their son/daughter/friend, etc.? Or an agent under power of attorney?
 - 2. Need to be careful of elder fraud/abuse (See Financial Exploitation Prevention Act discussed below.)
 - 3. If dealing with the person who is not the disabled or elderly person – verify that they have the right to participate in the meeting.
 - 4. Is there a confidential relationship with the client, or is it with the third party?
 - 5. Be aware of conflict of interest and undue influence situations.
- B. Who is paying the bill?
- C. Who is signing the engagement letter?
- D. Make sure your recommendations are for the benefit of the client and not the person bringing the client to you.
- E. Financial Exploitation Prevention Act (MCL 487.2085) (FEPA)
 - 1. Was adopted in September 2021.
 - 2. Purpose - to prevent financial abuse of vulnerable adults.
 - 3. Vulnerable adult:
 - a. An adult who, because of mental or physical impairment or advanced age, is unable to protect himself or herself from covered financial exploitation.

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4. FEPA requires financial institutions to institute training and policies to recognize financial abuse and take action.
5. Pursuant to the statute, “covered financial exploitation” occurs when a transaction is “...performed through deception, manipulation, coercion, intimidation, or improper leveraging of a caregiver relationship...”, and involves one or both of the following:
 - a. A fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual who uses or attempts to use the financial resources of another individual for monetary or personal benefit, profit, or gain.
 - b. A fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual that results or is intended to result in depriving another individual of rightful access to or use of benefits, resources, belongings, or assets.
6. The statute requires financial institutions to report the suspected exploitation to Adult Protective Services or to law enforcement as applicable.
7. The financial institution can freeze transactions for 10 days if they suspect financial exploitation.
8. Financial institutions have broad immunity for actions taken under FEPA.
9. If you know the client will be engaging in a large financial transaction, best practice is to notify the financial institution in advance to get clearance, rather than risk the transaction being frozen for 10 days.

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III. DOCUMENTS NEEDED FOR THE CLIENT

- A. Last Will and Testament
- B. Trust
- C. Medical Durable Power of Attorney
- D. General Durable Power of Attorney
- E. HIPAA Authorization Form
- F. Funeral Representation Designation

IV. LAST WILL & TESTAMENT

- A. Provides for a Personal Representative (Executor) and the disposition of the client's assets.
- B. Client must have testamentary capacity to make a will.
- C. Personal Representative is in charge of gathering the decedent's assets, paying decedent's creditors, and distributing remaining assets to beneficiaries as provided in the Will.
- D. If client created a Trust, the last Will and Testament will typically have a "pour-over" provision allocating remaining assets of the Estate to the Trust.

V. TRUSTS

- A. Does the client need to preserve government benefits?
 - 1. If so, will need a Special Needs Trust.
 - 2. If not, can utilize a normal Trust.

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- B. Many clients with disabilities utilize government benefits – which are needs-based.
 - 1. Most common programs are Supplemental Security Income (SSI) and Medicaid.
 - 2. SSI is administered by the Social Security Administration and provides a monthly income payment to qualified indigent individuals with disabilities.
 - 3. Medicaid is a Federal and State program administered by the Michigan Department of Health and Human Services. It provides payment for medical care and treatment.
 - 4. Both programs are needs-based – client can't have over \$2,000 in countable assets.
 - 5. Five-year lookback – can't transfer assets within 5 years of applying for Medicaid.
- C. The dilemma is how to provide for the disabled client without forfeiting SSI and Medicaid benefits.

VI. SPECIAL NEEDS TRUSTS (SNT)

- A. The Special Needs Trust has been developed in order to provide benefits to the disabled client without forfeiting government benefits.
- B. First Party SNT and Third Party SNT.

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- C. First Party SNT is created with the beneficiary's own assets:
 - 1. This Trust allows the disabled client to continue to receive government benefits, but upon the death of the beneficiary, the Trust assets must first be used to reimburse the state Medicaid agency for the amounts paid on behalf of the beneficiary before any other creditors or beneficiaries are paid.
 - 2. A First Party SNT is most common in the case of a personal injury settlement in order to allow the disabled individual to obtain government benefits.
 - 3. Generally better to use a Third Party SNT.

- D. Third Party SNT:
 - 1. Created by someone other than the disabled individual – typically parent or grandparent funds the Trust.
 - 2. No Medicaid payback upon the death of the disabled individual. Assets upon death of the disabled individual pass in accordance with the Trust terms to other beneficiaries.
 - 3. Assets in the Third Party SNT are treated as non-countable for purposes of determining qualification for government benefits.
 - 4. However, in the administration of the Trust, the Trustee must make sure that the use of the funds does not cause the Trust assets to be imputed to the beneficiary, thereby disqualifying the beneficiary from government benefits.

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- E. What types of expenses can be paid by the SNT?
1. No distribution should be made directly to the beneficiary.
 2. General intent is to enhance the disabled individual's life experience when certain needs are not being covered by government programs.
 3. However, payment for basic shelter-related expenses or food will reduce the beneficiary's SSI benefits.
 4. Special needs allowable payments include the following:
 - a. Medical Needs: Special Needs include those things that are necessary or reasonable for the beneficiary's care not already covered by government public benefits, including, but not limited to:
 - i. medical, psychological, and dental treatment;
 - ii. experimental or holistic rehabilitative therapies;
 - iii. private rehabilitative or educational training;
 - iv. medications/drugs;
 - v. treatment;
 - vi. massage;
 - vii. dietary needs;
 - viii. therapy; and
 - ix. home care.

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- b. Maintenance and Living Expenses: Special Needs includes the beneficiary's maintenance and living expenses including, but not limited to:
 - i. home modifications;
 - ii. utilities not covered by public benefits;
 - iii. laundry;
 - iv. hair cutting and styling;
 - v. bedding;
 - vi. medical apparatus;
 - vii. supplies; and
 - viii. food supplements.

- c. Transportation: Special Needs includes both a vehicle for the beneficiary's benefit, and the modification, improvement, and maintenance and upkeep of same. It can also include paying for taxis, paratransit, ambulance or any other type of transportation that can aid beneficiary.

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- d. Enrichment Items and Activities: Special Needs includes activities and items (including the maintenance of items) by which the beneficiary's life may be enriched and made more enjoyable, including but not limited to;
 - i. furniture;
 - ii. radios, televisions, audio, video, and computer equipment;
 - iii. adaptive equipment;
 - iv. adaptive toys;
 - v. electronic devices and equipment;
 - vi. recreational opportunities;
 - vii. sporting events;
 - viii. trips;
 - ix. family visits;
 - x. visits to friends and relatives; and
 - xi. any other tangible or intangible item that in the Trustee's sole and absolute discretion would enrich or benefit the beneficiary.

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F. SNT as a Sub-Trust or Stand-Alone Trust.

1. The Special Needs Trust can be created as a Sub-Trust of the grantor's general revocable or irrevocable trust.
2. However, the better practice is to create the SNT as a separate "Stand Alone" SNT.
3. The Sub-Trust which is part of a larger trust may have language which runs contrary to the typical provision of an SNT, or may have language that could cause the disqualification of the SNT.
4. Thus, the better practice is to create a separate, revocable SNT. This would be the only document that might need to be reviewed by a government agency, and generally is easier to interpret and administer.
5. The parent's revocable trust would allocate the disabled child's portion of their estate to the stand alone SNT.

VII. ABLE ACCOUNTS

- A. The Achieving a Better Life Experience Act (ABLE Act) allows funds to be set aside for certain disabled individuals.
- B. Allowed by Internal Revenue Code Section 529A and works similar to a college savings plan under Section 529.
- C. Can be created for or by an individual who becomes disabled before age 26.
- D. Can only be funded by the annual exclusion amount (\$18,000 in 2024) each year.
- E. There can only be one ABLE account per individual.

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- F. The assets in the ABLE account grow tax free and distributions are not taxed to the beneficiary if used for “qualified disability expenses” which can be very broad – generally any expense that helps improve the health, independence and/or quality of life of the disabled individual.
- G. The assets in the ABLE account belong to the disabled individual, but do not disqualify the individual from government benefits even if the amount is over \$2,000.
- H. However, upon the death of the disabled individual, the ABLE funds need to be used to repay Medicaid.
- I. The ABLE account can be created after age 26 as long as the disability began prior to age 26. This will increase to age 46 effective Jan 1, 2026.

VIII. MEDICAL DURABLE POWER OF ATTORNEY (MDPOA)

- A. Michigan Statutes (MCL 700.5506-700.5515) authorize an individual age 18 or older, who is of sound mind, to designate someone as the Patient Advocate for that individual.
- B. The Patient Advocate can exercise powers concerning the care, custody, and mental health treatment decisions for the patient.
- C. Only effective when the patient is unable to participate in medical or mental health treatment decisions.
- D. The MDPOA is also known as an Advanced Health Care Directive.
- E. The MDPOA may include language allowing the Patient Advocate to withhold or withdraw treatment that would then allow a patient to die only if the patient has expressed in a clear and convincing manner that the Patient Advocate is authorized to make such a decision, and that the patient acknowledges that such a decision could result in the patient’s death.

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- F. However, the law does not allow the Patient Advocate to make a medical treatment decision to withhold or withdraw treatment from a patient who is pregnant that would result in the pregnant patient's death.
- G. Strict requirements for signing of the MDPOA:
 - 1. Must be signed in the presence of and signed by two witnesses
 - 2. A witness cannot be:
 - a. The patient's spouse, parent, child, grandchild, sibling, presumptive heir or known devisee at the time of the witnessing.
 - b. The patient's physician or Patient Advocate.
 - c. An employee of a life or health insurance provider of the patient.
 - d. An employee of a health facility that is treating the patient, or of a home for the aged where the patient resides or of a community health services program or a hospital that is providing mental health services to the patient.
 - 3. The patient must appear to be of sound mind and under no duress, fraud, or undue influence.
- H. A copy of the MDPOA should be provided to the clients' doctors and any hospital treating the client.
- I. The MDPOA is revocable.
- J. The MDPOA can appoint successor Patient Advocates also.

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IX. GENERAL DURABLE POWER OF ATTORNEY (MCL 556.201, ET SEQ)

- A. A General Power of Attorney authorizes someone (the “Agent”) to handle financial and other matters for the client (the “Principal”).
- B. A Durable Power of Attorney is effective even if the Principal is later determined to be incompetent.
- C. Michigan adopted the Uniform Power of Attorney Act (“UPOAA”) effective July 1, 2024, which has been adopted in approximately 30 states.
- D. The idea behind the UPOAA is to make the Power of Attorney statutes and forms uniform among various states, and make the forms easier to use.
- E. A big change to Michigan law is that the Power of Attorney will be durable if it is properly executed. Under prior law, the document had to provide that it was a Durable Power of Attorney.
- F. Michigan law allows the Power of Attorney to be “springing” – only effective upon the happening of certain events, such as a determination by a doctor that the individual cannot handle his or her financial affairs.
- G. If the Power of Attorney is signed and notarized, it will be an “acknowledged” Power of Attorney with the signatures presumed to be genuine and a Durable Power of Attorney.
- H. A photocopy or electronic copy has the same effect as the original.
- I. UPOAA adds new rules regarding acceptance of the Power of Attorney:
 - 1. Person receiving a Power of Attorney has 7 days in which to either accept it or ask for an opinion of counsel as to its effectiveness.
 - 2. Person cannot request an additional different form of the power of attorney.

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3. A person refusing to accept an acknowledged Power of Attorney is subject to a court order mandating acceptance of the power and has liability for reasonable attorney's fees and costs incurred to mandate acceptance of the power.
- J. The Michigan statute includes a Statutory Form Power of Attorney which provides authority for the Agent in the following categories:
1. Real Property
 2. Tangible Personal Property
 3. Stocks and Bonds
 4. Commodities and Options
 5. Banks and Other Financial Institutions
 6. Operation of Entity or Business
 7. Insurance and Annuities
 8. Estates, Trusts, and other Beneficial Interests
 9. Claims and Litigation
 10. Personal and Family Maintenance
 11. Benefits from Governmental Programs or Civil or Military Service
 12. Retirement Plans
 13. Taxes

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- K. A power of attorney executed prior to the effective date of UPOAA is still effective if it was executed in compliance with the Power of Attorney requirements at the time it was signed.
- L. Agent is to sign an Acknowledgment of his or her duties as agent.

X. HIPAA AUTHORIZATION

- A. The Health Insurance Portability and Accountability Act (HIPAA) restricts access to “protected health information” by anyone not involved in the treatment of the patient without the patient’s permission.
- B. Clients may want their spouses or certain family members to be able to contact their doctors and obtain protected health information.
- C. Client should sign an authorization to allow a health care provider to disclose the protected health information.
- D. The authorization should name who is entitled to obtain the information and the duration of the authorization.
- E. The authorization may be revoked by the patient at any time.
- F. The authorization needs to be signed and dated by the patient. No witnesses or notary signature required, but probably a better practice to have at least one witness.

XI. FUNERAL REPRESENTATIVE DESIGNATION

- A. Periodically, there may be a dispute regarding a decedent’s wishes regarding funeral arrangements.

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- B. Michigan Statute MCL 700.3206 (3) provides the power to make decisions regarding funeral arrangements and the handling, designations, or disinterment of a decedent's body to the following in order of priority:
1. If the decedent was a service member at the time of the decedent's death, a person designated to direct the disposition of the service member's remains according to a statute of the United States or regulation, policy, directive, or instruction of the Department of Defense.
 2. A designated funeral representative.
 3. Surviving Spouse.
 4. The individual or individuals 18 years of age or older in the following order of priority:
 - a. The decedent's children.
 - b. The decedent's grandchildren.
 - c. The decedent's parents.
 - d. The decedent's grandparents.
 - e. The decedent's siblings.
 - f. A descendant of the decedent's parents who first notifies the funeral establishment in possession of the decedent's body of the decedent's decision to exercise his or her rights to make funeral arrangements.
 - g. A descendant of the decedent's grandparents who first notifies the funeral establishment in possession of the decedent's body of the descendant's decision to exercise his or her rights to make funeral arrangements.

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- C. The designation must be in writing, dated, and signed voluntarily by the declarant in the presence of 2 witnesses who also sign the designation.
- D. Alternatively, the designation may be signed and dated by the declarant before a notary public.
- E. The statute has provisions dealing with a situation where an individual who has these rights cannot be located.