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Estate Planning for Families With Special Needs

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Gifts

Under current law, assets do not receive a step-up in basis on the date of the gift. A Federal Gift Tax Form 709 must be filed in April of the year following the date of the gift.

Annual Exclusion - Up to $14,000 can be gifted annually during lifetime to as many individuals as donor desires. No limit on how many people or to whom. Must be gift of present interest (right to immediately enjoy the gift). If giving annual exclusion gift to a Trust, then the Trust beneficiary must be given sufficient notice of the contribution and must have the right to withdraw that amount (i.e., *Crummey* power). Assets can be transferred to a trust and still qualify for exclusion (such as a Life Insurance Trust). Gifts that qualify for the annual exclusion typically qualify for the GST tax exemption (see discussion below) but if made to a trust then the trust must be for the benefit of only one beneficiary and the assets of the trust must be includable in the estate of the beneficiary.

Custodial Account - You create an account for the benefit of a minor (person under the age of 21) pursuant to the Uniform Transfer to Minors Act in New York (UTMA). If you name someone other than yourself as custodian, then the account will not be includable in your estate if you die before the minor attains the age of 21.

Section 529 Qualified Tuition Plans - Regulated by both state and federal law. The Plans allow for tax free growth on assets. Money in account can be used for tuition, room and board, books, supplies, and other qualified higher education expenses at post-secondary school (college, graduate school and vocational school). Some states have contribution limits (New York is $375,000). The contributor can be the account owner and should provide for a contingent account owner in case of disability. The account owner does not make investment decisions, but chooses among alternatives offered by the particular state's plan. Contributions are not deductible under federal tax law. New York does allow deductions up to $5,000 of contributions made to New York Plan ($10,000 for a married couple filing jointly). The earnings of the fund are not taxable and withdrawals from the plan are not taxable if used for qualified educational expenses for the beneficiary.

The contributor can make five years of annual exclusion gifts at one time for each beneficiary without incurring federal gift tax. At present time that is $70,000 (5 x $14,000 = $70,000) or $140,000 for a married couple filing jointly. The one caveat is that such contributor cannot make any other annual exclusion gifts to that child for five years. The plan assets are usually not included in the estate of the contributor. However, if the five year election is made, the payments will be included in the contributor's estate if the donor dies before the expiration of the five year period.

If the beneficiary dies the assets are included in the beneficiary's estate. If the beneficiary does not need the money in the account, then donor can name another eligible family member as beneficiary on the account and use the 529 assets to pay for that person's education or donor can close the account and earnings will be subject to federal income tax and an additional 10% federal income tax, as well as state and local income taxes.

Applicable Exclusion Amount (unified credit) - Up to $5,340,000 can be gifted during lifetime without paying a federal gift tax (current rate is 40% and is usually paid by donor). Available applicable exclusion upon death will be reduced upon by amount used to shelter lifetime gifts from federal gift tax. Assets can be transferred to a trust and still qualify for exclusion (such as a Third Party Supplemental Needs Trust).

Generation Skipping Transfer (GST) Tax Exemption Amount - Up to $5,340,000 can be gifted during lifetime to a grandchild or more remote descendant or other individual 37 1/2 years younger than the donor who is not a family member without paying a federal GST tax (current rate is 45% and is usually paid by donor). Up to $5,3400,000 can be transferred upon death but amount will be reduced upon by amount used to shelter lifetime gifts from federal GST tax. Assets can be transferred to a trust and still qualify for exemption.

> **Dynasty Trust** - Some states have no rule against perpetuities or have very long periods. Therefore, assets can be held for multiple generations in trust. New York does not permit Dynasty Trusts.

Tuition Expenses - Can give an unlimited amount to an educational institution on behalf of any person regardless of age or type of school (primary, secondary, vocational, graduate, parochial, etc.). No limit on how many people or to whom. Does not count against annual exclusion gifts or applicable exclusion amount gifts. These gifts are in addition to those gifts.

Will

What is a Will?

Document executed in the presence of a minimum of two witnesses which directs the distribution of assets held in your individual name at the time of your death.

What are some terms used in a Will?

1) Testator/Testatrix - Competent person, 18 years or older, who states his or her wishes with regard to assets held in such person's name in a Will.

2) Probate - Process by which Surrogate's Court governs the administration of the Testator's estate.

3) Executor/Executrix - Person who carries out Testator's wishes upon death of Testator upon receipt of Letters Testamentary from Surrogate's Court.

   - Designate the person most capable of handling the responsibilities to which he/she will be assigned and must have the time and ability to carry out the estate administration. Does not need to be the spouse or a child.

   - Technically, the executor is responsible for gathering all assets, closing all of the decedent's accounts, collecting and paying bills presented to the estate, filing paperwork, disposing of tangible personal property, distributing assets according to the Will and preparing tax returns. However, more often than not, the executor hires an attorney and/or accountant to handle such actions.

4) Guardian - Person who takes care of your minor child (18 years of age or less) if both you and your spouse/child's other parent are deceased.

<u>Trust</u>

<u>What is a Trust?</u>
A separate document or provisions in a Will directing Trustees to manage and control the trust assets (money, real estate, business, etc.) for the benefit of one or more persons.

<u>What are some terms used in a Trust?</u>

1) Grantor/Settlor - Competent person, 18 years or older, who states his or her wishes with regard to assets administered pursuant to the terms of the Trust Agreement.

2) Beneficiary - Person(s) for whom the Trust is administered.

3) Trustee - Legal owner of the trust property (or trust corpus) who holds the property for the benefit of the beneficiary. The Trustees owes a fiduciary duty to manage and preserve assets for the beneficiaries.

    - Trustee may have personal interests in the trust which conflict with the beneficiary. Name someone who can handle the conflict and with whom the other beneficiaries will be comfortable. Otherwise, pick someone else like a corporate trustee. Consider naming a trust advisor, who can be a family member, to work with the corporate trustee.

    - A trustee who is a beneficiary cannot make discretionary distributions to himself under New York law. Therefore, the client must name a co-trustee to serve with such a beneficiary.

<u>Reasons to use a Trust:</u>

- Remove burden of complex financial decision making from family members
- Reduce estate taxes in donor's estate
- Growth of assets outside of both donor's taxable estate and beneficiary's taxable estate
- Avoid capital gains tax on sale of appreciate securities
- Provide security for family members
- Protect family members
- Keep assets in the family
- Medicaid Planning

Types of Trusts:

Testamentary Trusts - Trusts created in a Will to take effect upon Testator's death.

Credit Shelter Trust (or Bypass Trust) - Trust created in an amount equal to an individual's available applicable exclusion amount (unified credit).

Applicable Exclusion Amount - First $5,340,000 is exempt from federal estate tax upon your death. The available applicable exclusion upon death will be reduced by the amount used to shelter lifetime gifts from federal gift tax. . New York law recently changed its estate tax law with the new budget to be as follows:

For deaths as of April 1, 2014 and before April 1, 2015, the exemption is $2,062,500.
For deaths as of April 1, 2015 and before April 1, 2016, the exemption is $3,125,000.
For deaths as of April 1, 2016 and before April 1, 2017, the exemption is $4,187,500.
For deaths as of April 1, 2017 and before January 1, 2019, the exemption is $5,250,000.
As of January 1, 2019 and after, the exemption amount will be linked to the federal amount, indexed for inflation.

Because the estate tax law is so much in flux, many estate planners are using Disclaimer Trusts in place of the mandatory Credit Shelter Trust. Fully funding a Credit Shelter Trust may have an adverse financial impact on the surviving spouse. These Disclaimer Trusts offer the same benefit of the Credit Shelter Trust but have the added benefit of allowing the surviving beneficiaries, usually the spouse, to decide how much to protect from estate tax after first spouse dies. The disclaimer of assets into the Disclaimer Trust must be made within nine months of the Grantor's date of death. The Will may include a provision that allows the surviving spouse to disclaim inherited property, real or otherwise (whether by operation of law or through the Will), so that it can be added to a Disclaimer Trust which would use the testator's applicable exclusion amount.

The Credit Shelter Trust or Disclaimer Trust is often created for the benefit of surviving spouse but can be created for the benefit of children or grandchildren or a class of beneficiaries consisting of the spouse and children. The amount placed in this Trust (and any growth on those assets) will pass free of Federal Estate tax on both Grantor's death and the spouse's death (if created solely for the spouse). This trust will not pass through probate on the death of the surviving spouse (if created solely for the spouse). There is also ease administration of assets if the spouse is disabled or elderly.

In both the Credit Shelter Trust and in the Disclaimer Trust, the Will can provide that the spouse has a limited power to withdraw principal, such as a 5/5 power. A 5/5 power gives the surviving spouse the non-cumulative right to withdraw from the principal, the greater of $5,000 or 5% of the principal each year (or a lesser amount) (IRC §2041(b)(2)). The spouse has the

freedom to withdraw funds with "no questions asked" by Trustees. In that way, the spouse will still have access to the assets without having to always ask the Trustee for a “hand-out.” However, on the death of the surviving spouse, 5% of the principal will be included in the surviving spouse’s estate.

This type of Trust also enables issue to receive assets sooner as both trusts can incorporate a Sprinkling Disclaimer Trust for the benefit of the surviving spouse and issue which would allows for distributions based on differing needs of family members.

These Trusts can also hold retirement accounts. The benefit to this beneficiary designation is that it allows for the application of the decedent’s unified credit against retirement assets. Also, it ensure that assets pass to specific beneficiaries upon death of spouse (i.e., children from first marriage) as opposed to the surviving spouse rolling over the retirement assets into his or her name. The retirement assets will be protected in case the surviving spouse remarries.

Qualified Terminable Interest Property Trust (QTIP Trust) - Trust providing that at a minimum all income is given to surviving spouse, the spouse is the sole beneficiary, spouse can direct Trustee to invest in income producing assets and providing that the Executor must make a QTIP election. The assets are not taxed in the Testator's estate due to the unlimited marital deduction but they are taxed in estate of surviving spouse. Used for many reasons including to ensure that assets pass to children (especially in cases where there are children from a prior marriage), prevent assets from passing to new spouse if spouse remarries following Testator's death; assist with Medicaid planning and to ease administration of assets if spouse is disabled or elderly.

Descendant's Trust (Residuary Trust) - Trust providing that income and principal is distributed to children/grandchildren in discretionary amounts, at certain ages or in discretion of Trustee (or combination of those choices). The assets are taxed in the Testator's estate. Used for many reasons including to ensure that assets do not pass to children until they have reached a certain age when they would be fiscally responsible, keep assets in the family and out of the hands of future spouses or current spouses of children, ease burden of administration, ensure that financial decisions are not made by children alone and to assist with Medicaid planning.

- Two types of trust available: a separate trust for issue and a "pot trust" for issue.
    - Separate trust - each child's expenses are handled separately and individual management can be decided based on the need of such child.
    - Pot trust mimics the way the testator manages property for his children during his lifetime. One trust is administered for the benefit of all of the testator's children and income and/or principal is distributed to the

children when needed. However, such a trust can result in disproportional treatment of the children.

- In general, a trust for the testator's children should include income and principal provisions focusing on whether distributions are:
  - o Discretionary amounts decided by Trustee
  - o Governed by the ascertainable standard (HEMS - health, education, maintenance and support)
  - o At certain ages or
  - o Combination of those choices.

The testator must focus on the unpleasant possibility that the child will not survive the trust term. In such a rare instance, the testator should decide who receives the trust assets upon the death of a child before the age at which the trust terminates.

<u>Intervivos Trusts</u> - Trusts created during lifetime.

<u>Revocable Trust (Living Trust)</u> - Trust that can be terminated or amended by the Grantor during Grantor's lifetime. Used as a Will substitute.

<u>Irrevocable Trus</u>t - Trust that cannot be terminated or amended by the Grantor during Grantor's lifetime. There are many types of irrevocable trusts. We will discuss a few of them below.

Irrevocable Life Insurance Trust (ILIT) - Insurance trust created to own one or more life insurance policies. The Trust can apply for a new policy or can receive an existing policy on your life. Generally speaking, if you live for more than three years after an <u>existing</u> insurance policy is transferred into the Trust, the policy proceeds should not be included in your estate. Applicable exclusion amount is allocated against the cash value of existing policies transferred into the Trust. The three year rule generally does not apply to new policies purchased by the Trustees of the Trust.

Upon your death, the Trustees will collect the insurance proceeds and then administer them for the exclusive benefit of the Trust beneficiaries (usually surviving spouse and then the children). Annual premium is contributed by Grantor to Trust and then Trustees pay the premium. In order for the premium contribution to qualify as an annual exclusion gift, *Crummey* Notices must be given to the beneficiaries of the Trust. But note that this *Crummey* withdrawal right is considered an available asset which can cause a disabled beneficiary to become disqualified for government benefits. Careful drafting must be done to avoid this issue.

§2503 (c) Trust - When a donor contemplates the gift to be used for expenses in addition to education expenses or wants greater investment options for the gift,

instead of making a gift to the §529 Plan (or in addition to), the donor may wish to make a gift to §2503(c) Trust. The Trust is created to receive annual exclusion gifts or applicable exclusion amount gifts for a child or grandchild (and qualifies for the GST Tax Exemption). Upon the beneficiary attaining the age of 21, the beneficiary must be given at least 30 day notice of right to withdraw all trust assets. If beneficiary chooses not to withdraw trust assets, the trust can continue for the benefit of the beneficiary.

This trust passes money to the next generation and avoids probating these assets. The beneficiary's enjoyment of the proceeds is not tied into waiting for the donor to die or for appointment of an Executor or Testamentary Trustee. Additionally, the use of such a trust passes assets outside of the donor's estate before he dies causing there to be less available assets subject to estate taxes and probate upon the donor's eventual death. However, there is a risk inherent with this plan that the beneficiary will take the assets at 21 and not leave them in the trust. Careful guidance must be given to the donor and the beneficiary as to why leaving the assets in the trust is beneficial.

Supplemental Needs Trust - When a third party is now receiving Medicaid or Supplemental Security Income (SSI), which are means tested, or may need these or other government sponsored means tested programs in the future, you may wish to provide for additional funds for such person to supplement means tested government assistance programs. To do so, you create a Supplemental Needs Trust either in your Will or during your lifetime.

The trust assets will be available to help the party, but the trust will not render such person as ineligible for any such government program. Programs that are means tested have strict asset and income limitations. For example, Medicaid limits assets at $14,550. Supplemental Security Income (SSI) limits assets at $2,000. Trust assets are designed so that the assets in the Trust are not under the beneficiary's control and can never be deemed to be potential resources which could render the beneficiary ineligible for means tested programs. Assets are designed to be used exclusively for the beneficiary during the beneficiary's lifetime. In that manner, trust assets add to the quality of the beneficiary's life by supplementing government programs rather than substituting for government programs.

It is possible that federal law would change. It is also possible that the beneficiary would move to another state which has programs with different eligibility requirements. Therefore, since the Supplemental Needs Trust is irrevocable and cannot be amended or revoked, the trust can provide that the trustees have the power to modify the terms of the trust only to ensure the beneficiary's eligibility for means tested programs.

During the beneficiary's lifetime, the trust assets are to be used solely for the disabled beneficiary in a way that does not interfere with the beneficiary's eligibility for government sponsored programs. For example, the trust can purchase a specialized vehicle for the beneficiary's benefit. The trust can invest in housing for the beneficiary. The vehicle or the residence must be owned by the trust. The trust can also provide for family visitation, education,

investment and insurance. Other powers can also be included such as vacation, recreation, restaurant meals, social services, legal services and purchase of goods for the beneficiary such as computers, stereos, televisions, exercise equipment and medical equipment (not covered by Medicaid).

All means tested government benefit programs treat cash as income. Therefore, the beneficiary should never be given cash. Instead, the beneficiary can use a credit card with a strict monthly limit. For example, you could obtain a credit card for the beneficiary but limit it to $250 a month or $500 a month. At the end of each month, the trust can be used to pay the beneficiary's credit card bill. Please note that the beneficiary cannot use a debit card, as a debit card is deemed to be cash.

There are three types of Supplemental Needs Trusts: **Third Party Trust, First Party Trust (Self Settled Trust)** and **Pooled Trust**.

Third Party Trust - When the assets do not belong to the beneficiary before they are contributed to the trust, the trust is considered to be a third party special needs trust. No additions to the trust can be made by any person legally responsible for the beneficiary. Therefore, a third party trust only works if the parent is contributing the assets to a child who is over 18 when they are no longer legally responsible for the beneficiary's care. Upon the death of the beneficiary, the assets can be distributed to whomever the grantors wish.

Gifts to the trust do not qualify as annual gifts because a gift to a trust is not a gift to an individual. Gifts to this trust do not qualify as annual exclusion gifts and must be reported to the IRS on a gift tax return (Form 709) despite the fact that the gifts may be less than $14,000 in any calendar year. Gifts, for federal purposes are not taxable unless the total of reportable gifts exceeds $5,340,000. New York State does not impose a gift tax.

This trust can be funded at any time and by anyone not legally responsible for the beneficiary. You (or anyone else for that matter) can also name the trust as a beneficiary under your Will. This trust can also be the beneficiary of a life insurance policy.

The trust may generate income, perhaps interest, dividends or capital gains. Income is taxable above a certain level and an accountant should prepare a return. The trust can pay these fees. Additionally, the trust does not require court approval of accounts. This trust is designed as a qualified disability trust. Trust income is ordinarily taxed at higher rates. A qualified disability trust is designed to be taxed at the lower individual rate. However, the lower tax rate applies only to contributions made prior to the beneficiary reaching age 65.

SSI is an income supplement for food and shelter for persons who are blind or disabled. Persons who receive SSI also receive Medicaid. The reverse is not true. Therefore, to avoid the risk that the disabled beneficiary's SSI income could be reduced by up to one-third by income "in kind" for housing, the trust uses restrictive language with respect to housing, in particular, to ensure that a third party is not making payments for food or shelter. Income "in kind" refers to indirect income such as the parent paying rent on behalf of the disabled child, mortgage, real property taxes, heating, fuel, gas, electricity, water, sewage and garbage. However, purchasing (or investing in) a house is not treated as income in kind. Medicaid does not recognize income in

kind. Despite the reduction in SSI income, the beneficiary may be better off with the distribution for rent as the SSI income may not cover the rent. A properly drawn trust will allow for trustee discretion in such a situation.

First Party Trust (Self Settled Trust) - A trust funded with the disabled person's assets would be denoted as a first party trust and would be far more restrictive than a Third Party Trust. Under federal law, which is incorporated into New York Law, an individual can transfer all of their assets to a supplemental needs trust for their benefit and become immediately eligible under certain limited circumstances. The beneficiary must be under 65 years of age at the time it is created. The trust must be established by a parent, a grandparent, a guardian or a court. And on the death of the beneficiary, the balance in the trust, if any, is repaid to the State of New York to the extent of Medicaid actually spent on the beneficiary's behalf. Please note, that under current law, the payback refers to Medicaid only, and to no other government programs. However, it does refer to all Medicaid paid during the beneficiary's lifetime and not just since the inception of the Trust. Additionally, under New York law, the social services district (New York State is divided into 58 local social services districts) must be notified of the creation/funding of the trust, the death of the beneficiary, substantial distributions if the trust principal exceeds $100,000, transfers for less than fair market value and proof of bonding if the assets exceed $1,000,000.

If the beneficiary is a minor with assets in UTMA accounts, then the parents will need to file to become the beneficiary's guardians in order to get control over the money in UTMA accounts. The guardianship petition would include a specific application for the creation and funding of the supplemental needs trust. The application will be on notice to the Department of Social Services (DSS). DSS has an interest in the trust and must be a party to the petition as they have a remainder interest in the trust.

This trust has significant restrictions, including accountings and notices to DSS, under certain conditions. The trust cannot be executed or funded without Court approval. Payment of funeral expenses cannot be made until Medicaid is paid back. Therefore, the family may wish to purchase a prepaid burial contract for the beneficiary.

This trust is a grantor trust. Trust assets are to be taxed as though owned by the beneficiary. It is not necessary to obtain a separate tax identification number. If the bank or financial institution insists on a separate tax identification number, then the trust would file an informational return and the beneficiary will be responsible for any tax as though the trust did not exist.

If there is both a First Party Trust and a Third Party Trust created for the benefit of the beneficiary, it would make sense to actually spend the assets in the First Party Trust first so as to reduce the possibility of a payback.

Pooled Trust – A not for profit agency manages the assets of many disabled beneficiaries with separate accounts for each one. These funds are used to pay for items not covered by Medicaid. If there are no family members available to serve as Trustee or the amount of money that will be contributed to the Supplemental Needs Trusts is not great, then a Pooled Trust may

be a better option. With this type of trust, legal fees are minimal and the Trust already exists and is compliant with the Medicaid rules. The not for profit "pools" the beneficiary assets with the assets of other disabled beneficiaries and manages and invests them together. No funds can be distributed directly to the beneficiary but they can be distributed on behalf of the beneficiary to third parties and can pay bills directly. Contributions of assets to this Trust do not count as a charitable contribution even though a charity is running the Trust. Often these not for profits offer both a Third Party Trust option and First Party Trust option.

One of these not for profits is UJA-Federation which has the UJA-Federation Community Trust for Disabled Adults, a Third Party Trust. It can be opened with $100,00 ($20,000 initial contribution with balance paid over five years). Additional contributions can be made during the beneficiary's lifetime. There is no minimum amount that needs to be maintained in the Trust. Upon the death of the beneficiary, you choose where the balance of the account is paid. They also offer the UJA-Federation Community Trust II which is a First Party Trust with a minimum funding requirement of $50,00 payable over four years. Upon the death of the beneficiary, 50% of the assets remain with the Community Trust to assist in caring for other disabled beneficiaries. DSS has a lien on the other 50%. Following the payback, the beneficiary can designate a preferred beneficiary to inherit the balance, if any. Both Trusts offer advocacy services from Federation and Employment Guidance Services (FEGS) and/or Westchester Jewish Community Services (WJCS). The Community Trust II also offers a financial only advocacy option. Additional details for both trusts can be found at http://www.planned-giving.ujafedny.org/communitytrust.php

In addition to these types of pooled trusts, there are also pooled trusts designed for excess income. In order to avoid monthly spend down of excess income in order to qualify for Medicaid (current income level is $809), the beneficiary's excess income can be contributed to a pooled trust. The beneficiary's account can be sued to pay for the beneficiary's living expenses, such as rent, food, utilities and medical supplies not covered by Medicaid.

> **Income Only Trust** - The creation and funding of an Irrevocable Income Only Medicaid Trust will create a five year look back period likely causing the beneficiary to be ineligible for institutional Medicaid for a period of time. The same is not true for home care as the creation and funding of the trust does not create any period of ineligibility for home based care under current law. You need to keep enough money available during the five year period to provide for the beneficiary's comfort and any potential health care needs.

Once the beneficiary transfers assets to the trusts, the beneficiary will have no right to demand the return of these assets. In fact, in order to protect the assets, the trust must provide that under no circumstances can the trustees exercise any discretion to return trust principal to the beneficiary. The beneficiary is entitled to income generated by the assets. With regard to a house transferred into the trust, the income is equivalent to the use and possession of the premises. During the beneficiary's lifetime, the beneficiary retains full right to use, occupy, etc. the house. The beneficiary will also remain responsible for taxes, insurance, upkeep and repair.

The trust is a "Grantor Trust" which means that the beneficiary will be taxed for income tax purposes as though the beneficiary continues to own the assets. Every year, the accountant will prepare trust "fiduciary" returns showing all income, including interest, dividends and capital gains, if any. However, the trust will not pay tax. Instead, the accountant will prepare a 1099 for the beneficiary on behalf of the trust, which will show that the beneficiary remains responsible for all income tax, if any. If the only asset is the house, then there will be no income earned on the Trust.

Trust assets, although gifted to the trust, will remain in the beneficiary's taxable estate. The benefit is that any assets ultimately distributed to the beneficiary's children on the beneficiary's death will be treated as inherited. Accordingly, the children will receive a step-up in basis for all such assets to the fair market value. The trust can contain one or two provisions which would give the beneficiary the right to change the final disposition of the trust assets. One is exercisable during the beneficiary's lifetime and the other by the beneficiary's last will and testament. These powers have several advantages besides the obvious consideration of giving the beneficiary the right to change who will ultimately benefit. The gift to children is uncertain, which renders the gift to them as incomplete, so that there will be no gift tax upon the transfer of assets to the trust. It may be prudent to file a gift tax return which will show no tax due. If the clause exercisable during the beneficiary's lifetime specifically provides that the beneficiary can exercise the power during the beneficiary's lifetime by an attorney-in-fact, then the beneficiary's attorney in fact, who may be his or her child, will have the power to impact the beneficiary's estate plan, at least with respect to trust assets.

In order for the beneficiary to receive any trust principal, the trustees can make cash distributions to the beneficiary's children who in turn can voluntarily gift assets back to the beneficiary or pay for the beneficiary's care.

FUNDING THE TRUST

To fund both revocable and irrevocable trusts, a new bank account is created for the trust in the name of this trust typically under the employer identification number assigned to the trust. However, Revocable Trusts and some irrevocable Grantor trusts use the tax identification number of the Grantor. The assets are transferred from one bank account to the other to fund the trust. To the extent that partnership interests or share in a corporation or limited liability company are transferred, assignment and assumption agreements are also signed. Real estate is transferred into a trust by transferring the real estate with a deed and related transfer documents. Sometimes a nominee agreement is used such as when a co-op board will not approve the transfer. The IRS has approved the use of a nominee agreement which states that the Grantor retains title on behalf of the Trust.

Assets do not receive a step-up in basis on the date of the gift but do receive a step-up in basis if transferred upon death. Therefore, the donor must weigh benefit of giving away highly appreciated assets during lifetime to reduce potential estate tax against the loss of the step-up in basis the donee would have received had the donor passed the same asset to the donee upon death. In general, the capital gains tax the donee will have to pay upon sale of the asset will be less than the estate tax owed on the same asset if the donor's estate will be subject to estate tax. Assets transferred to a Revocable Trust retain the Grantor’s basis since these assets are not removed from the Grantor’s taxable estate.

In planning for a gift of an appreciated asset to an irrevocable trust, the donor should obtain an appraisal of the asset. Appraisals are essential for hard to value assets such as real estate, art, collectibles and closely held business interests. These appraisals will be the basis for determining the fair market value of the gift and can be challenged by the IRS. Therefore, the donor should work with the attorney to consult a valuation expert knowledgeable about the specific asset to be gifted.

Gifting highly appreciated assets makes sense when the donor is in a higher tax bracket than the donee. By doing so, the donee can sell the asset and be taxed in a lower tax bracket than the donor. Conversely, when an asset depreciates, the donor should first sell the asset if the donor can take advantage of the capital loss on his own return. Following the sale, the donor then gifts the sale proceeds to the donee.

Since the gift is valued as of the date of the gift for gift tax purposes, any post-gift increase in the value of the property escapes the donor's estate which will reduce estate tax owed upon the donor's death. Therefore, in deciding which assets to gift, consideration should be given to how much the asset is expected to appreciate in the future in addition to the present value of the gift and its appreciation to date.

The Federal Gift Tax Form 709 must be filed in April of the year following the date of the gift if more than the annual exclusion is gifted or if a discount was taken when valuing annual exclusion gifts. On the Form 709, the donor reports the fair market value of the gift on the date of the transfer, the tax basis (as donor) and the identity of the recipient. The donor must

attach supplemental documents to support the valuation of the gift, such as financial statements and appraisals.

There is no joint gift tax form. If a husband and a wife each make a taxable gift, each spouse must file a Form 709. If husband and wife are splitting an annual exclusion gift, then each of them must file a Form 709 to reflect the split gift.

The gift tax is a tax on the transfer of any type of property by one individual to another while receiving nothing, or less than full value, in return. The taxable transfer includes a gift of the use of or income from property, the sale of an asset for less than its full value and an interest-free or reduced-interest loan. The tax applies once the donor has exhausted his lifetime applicable credit amount.

The Form 709 should be prepared by the donor's attorney or by the donor's accountant with review by his attorney. A copy of the Form 709 should be keep in the donor's file at the attorney's office since copies will be needed upon the death of the donor and in the event the donor intends to make future gifts.

Beneficiary Designation Form

A form used to name a beneficiary of a particular asset such as an IRA, 401(k) Plan or Life Insurance. These assets pass outside of your Will and are not subject to probate.

- Bequests of retirement assets to charitable organizations can be a sound device for avoiding income tax on the assets held in the retirement accounts.

- Naming a trust under your Will can ensure that retirement assets are preserved for successive generations. A Supplemental needs Trust can be named. Careful drafting must ensure that the trust is an accumulation trust in order to accumulate the required minimum distribution instead of being a conduit trust requiring distribution of the required minimum distribution each year. However, with an accumulation trust, the IRS looks through to find the oldest possible beneficiary. In addition, a charitable beneficiary will cause the trust not to qualify as a designated beneficiary and will trigger the five year payout rule.

- Transferring ownership of a life insurance policy to a trust can avoid estate tax. Naming a charitable organization as beneficiary of a life insurance policy will also avoid estate tax. Naming a Supplemental Needs Trust will ensure that there are assets to care for the disabled beneficiary.

Health Care Documents and Power of Attorney

Organ/Tissue Donation Form – Form where you indicate whether or not you wish to be an organ donor. You can enroll in the New York State Donate Life Registry which is the confidential database administered by the New York State Department of Health that records legally binding consent for organ, eye and tissue donation. To do so, you can register at the DMV, the Board of Elections or contact the Department of Health.

Living Will - Wherein you specify your wishes concerning the continuance and discontinuance of medical treatments.

Health Care Proxy – You designate someone as health care agent to act for you in connection with specified medical treatment and the decisions described, if the client is unable to act. You should also designate an alternate health care agent to act if the health care agent is unable to serve.

Powers of Attorney – Using a form created under the New York General Obligations Law Article 5, Title 15, you designate someone as attorney-in-fact to act for you, whether or not you are competent, in connection with a broad variety of matters, including real estate, banking and other financial transactions, retirement benefits, gifts and tax matters. Client should also designate an alternate attorney-in-fact if attorney-in-fact is unable to serve. This form must specify that the agent can create and fund trusts in order to effectively transfer assets into (and create) the many types of trusts discussed previously.

Guardianship

Proceeding where the Court declares a person to be incapacitated and someone must be appointed to manage the personal needs and/or property management of such person. There are two New York proceedings which can be brought: Article 17-A under the Surrogate's Procedure Act in Surrogate's court and Article 81 of the Mental Hygiene Law in Supreme Court. Article 17-A – can be used where the individual is mentally retarded or developmentally disabled and which disability occurred before the age of 22 (other than traumatic brain injury). Article 81 is used for an individual of any age and any disability.

Guardianship becomes necessary when minors reach the age of majority and do not have capacity to execute powers of attorney and health care forms. Without guardianship over the child, the parent will be excluded from decision making and doctor's visits. Additionally, as previously discussed, guardianship may be necessary to create a supplemental needs trust for a disabled child.

Charitable Tools

Can give an unlimited amount to a qualifying charity. There is no gift or estate tax because the transfer qualifies for a charitable deduction. Gifts of retirement assets can be a sound device for avoiding income tax on the assets held in the retirement accounts.

Endowment/Endowed gift - Donor makes a gift to a charitable organization that is held in perpetuity. The gift is invested by the organization, and only a portion of its average annual investment return is used for purposes specified by the donor. Any unused income is added to principal. The goal is to ensure that the principal maintains its value over time. Endowments offer donors the ability to have their names, or the name of a loved one, linked to an area of the organization in which they have a special interest or the gift can be unrestricted. Endowed gifts can be pledged over a period of up to five years.

Foundation - A not-for-profit corporation formed with a charitable purpose. In New York, 3 directors are required. The foundation must distribute 5% of its assets each year to other charitable causes. Benefits are control over investments and distributions, family involvement to ensure a legacy of family giving, immediate tax deduction for contributed assets (even though foundation does not distribute all of the assets immediately to other charities), remove low basis taxable assets out of estate without incurring capital gains taxes. Tax deduction limited to 30% of adjusted gross income (AGI) for cash donations to the private foundation and 20% of AGI for appreciated securities. Donor can carry forward any of the unused deduction for an additional 5 tax years. All records are open to the public. Directors can receive compensation.

Donor Advised Fund (DAF) - Donor makes a gift to an organization that runs a DAF. Gift is tax deductible. Each year money is distributed from the account to various charities. Donor can recommend charities to DAF. Benefits are that small amount can be used to fund the DAF account, donor does not need to worry about naming directors, replacements, etc, can be used to establish an endowment that can run automatically after the donor's death, immediate tax deduction for contributed assets (even though DAF does not distribute all of the assets immediately to other charities) and remove low basis taxable assets out of estate without incurring capital gains taxes. Tax deduction limited to 50% of adjusted gross income (AGI) for cash donations to the private foundation and 30% of AGI for appreciated securities. Donor can carry forward any of the unused deduction for an additional 5 tax years. No annual tax returns are due and records are not open to the public. No mandatory annual distributions required. Donor may name account advisors who will have the ability to recommend grants from the account. Donor can select successors, who can continue charitable legacy by recommending grants beyond donor's lifetime. Art work, collectable's and real estate are usually not allowed as a gifted asset and donor does not have say in specific investment decisions or donations.

Ethical Will/Letter of Intent

First mentioned in the Bible:
Genesis 18:19: "I have given [Abraham] special attention so that he will command his children and his household after him, and they will keep God's way, doing charity and justice . . ."

Genesis 49:1 "Jacob called for his sons. [When they came,] he said, 'Come together, and I will tell you what will happen in the course of time.'" The chapter then concludes at 49:33: "Jacob thus concluded his instructions to his sons. He drew his feet back onto the bed, breathed his last, and was brought back to his people."

Beginning in the fifth-century, Jews were encouraged to make ethical wills so as not to lose their Judaism while living outside the land of Israel.

Women who could not own property conveyed oral ethical wills to pass their values to their children. When women learned to write, they began to leave their ethical wills in writing.

Originally transmitted orally but today can be in the form of written document. An ethical will is not considered a legally binding document and is not covered by the New York statutes.

Reasons to write an Ethical Will

- Lay foundation of common values
- Convert life experiences into wisdom to share with future generations
- Provide a link to future generations of your values, principles and beliefs
- Identify what you value most and for what you stand
- Share family history

Common Themes

- Personal and spiritual values and beliefs
- Hopes and blessings for future generations
- Life's lessons
- Love
- Forgiving others and asking for forgiveness
- Principles

In addition to the Ethical Will, families with special needs beneficiaries may wish to write a Letter of Intent to provide guidance to the guardians and trustees about the special needs beneficiary. These letters may include:

- Medical, educational and social history
- Contacts
- Social Agencies
- Professional advisors
- Friends/family members involved with care and those whom should be avoided
- Employment history or training
- Religious training and preferences
- Preferences and history regarding residential environment
- Preferences and history regarding social environment
- Behavioral issues and management
- Burial arrangements

This presentation is for informational purposes only and is not intended as a substitute for legal, accounting or financial counsel with respect to your individual circumstances.

Under IRS regulations we are required to add the following IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding any penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction(s) or tax-related matter(s) addressed herein. This communication may not be forwarded (other than within the recipient to which it has been sent) without our express written consent.

Leslie Levin

Trusts, Estates & Elder Law

Leslie is Special Counsel to the firm. She practices in estate planning, probate, estate administration, trust administration, gift and generation-skipping tax transfer planning, asset protection, charitable planning, special needs planning, guardianships, Medicaid planning and elder law. Leslie assists clients in reducing the tax impact on wealth, helps preserve family-owned businesses and offers her estate-planning expertise in the area of non-U.S. persons. She has experience in transferring real estate, partnership interests and other assets. She also creates and dissolves not-for-profit organizations.

Leslie's clients are diverse, ranging from entrepreneurs, professionals and retirees to new parents, grandparents and domestic partners, as well as directors and officers of charitable entities. She also represents executors and trustees in connection with the administration of trusts and estates, including informal and judicial accountings. Leslie serves as executor for client's estates and as a trustee for a number of trusts. She is an officer and director of a foundation.

As part of her estate planning, special needs planning and elder law practice she prepares:

- Wills, simple and complex
- Health Care Forms
- Powers of Attorney
- Family Limited Partnership Agreements ("FLPs")
- Limited Liability Company Agreements ("LLCs")
- Revocable or "Living" Trusts
- Generation Skipping Transfer ("GST") Tax Exemption Trusts
- 2503(c) Trusts (trusts for minors)
- Life Insurance Trusts ("ILITs")
- Pet Trusts
- Grantor Retained Annuity Trusts ("GRATs")
- Qualified Personal Residence Trusts ("QPRTs")
- Intentionally "Defective" Grantor Trusts ("IDGTs")
- Martial Trusts ("QTIPs" and "QDOTs")
- Private Letter Rulings
- Federal Gift-Tax Returns
- Special/Supplemental Needs Trusts ("SNTs")
- Irrevocable Lifetime Trusts

- Guardianship proceedings
- Medicaid Applications
- NYSARC Applications
- Promissory Notes

As part of her estate administration practice she prepares:

- Probate Proceedings
- Accountings
- Accountings Contests
- Fiduciary Appointments and Resignations
- Inventories
- Disclaimers
- Federal and State Estate Tax Returns

As part of her charitable planning practice she prepares:

- Charitable Trusts
- Federal and State Tax-Exempt Applications and dissolutions
- Certificates of Incorporation
- By-laws
- Minutes

Additional services she provides are:

- Estate Administration
- Will Contests
- Surrogate's Court Litigation
- Asset Disposition
- Post-mortem Planning
- Fair Hearings

AWARDS/RECOGNITIONS

- UJA-Federation of New York Women's Leadership Institute, selected as participant; 2006-2007
- United Jewish Communities Women's National Young Leadership Cabinet Acharai Mentorship Program, selected as participant; 2006
- Brandeis University Alumni Association 2004 Young Leadership Award; 2004
- UJA-Federation of New York: The Leadership Institute, selected as participant; 2003
- Binyan Award, UJA-Federation of New York; 2002
- Dor L'Dor Award, Shaare Zedek Medical Center, Jerusalem; 1997

ADMISSIONS/COURTS

- State of New York, 1998

PROFESSIONAL ASSOCIATIONS

- New York State Bar Association
- Westchester Women's Bar Association
- Women's Bar Association of the State of New York

SELECTED PUBLICATIONS/PRESENTATIONS

- “Estate Planning for Families with Special Needs” Building Communities One Lecture at a Time, April 1, 2014; Lecturer
- “Planned Giving: A Team Approach” Association of Development Officers, February 12, 2014; Panelist
- "The Probate Process from Start to Finish - Administering the Estate Effectively, Determining if Spouse's Elective Share is a Reasonable Option, and Understanding the Laws of Intestacy and How They May Apply" NBI National Business Institute, December 5, 2013; Lecturer
- "Creative Tax and Estate Planning Ideas – A Case Study” UJA-Federation of New York 23rd Annual Westchester Estate, Tax & Financial Planning Conference, May 23, 2013; Lecturer
- "Trusts 101 – Trusts Used for Tax Reduction” NBI National Business Institute, May 13, 2013; Lecturer
- "Estate Administration Procedures: Why Each Step is Important – Foundations of Estate Administration Defined and Preparing to Begin the Administration Process” NBI National Business Institute, December 4, 2012; Lecturer
- "Top 10 Estate Planning Techniques – Annual Exclusion Gifting and Wills" NBI National Business Institute, June 26, 2012; Lecturer
- "Planning for Clients with $5 Million or Less " UJA-Federation of New York 22nd Annual Westchester Estate, Tax & Financial Planning Conference, May 24, 2012; Lecturer
- "The Probate Process From Start to Finish - Administering the Estate Effectively and Determining if Spouse's Elective Share is a Reasonable Option" NBI National Business Institute, September 20, 2011; Lecturer
- "Divorce and Estate Planning: An Unholy Marriage" UJA-Federation of New York 21st Annual Westchester Estate, Tax & Financial Planning Conference, May 19, 2011; Lecturer
- "Estate Planning Basics: Wills and Trusts and Charitable Planning " NBI National Business Institute, May 16, 2011; Lecturer
- "Probate Practice: The Essential Basics - Initiating the Probate Process and Common Probate Problems and How to Solve Them" NBI National Business Institute, August 24, 2010; Lecturer
- "Gift Planning" UJA-Federation of New York Westchester Business and Professional Division Board Meeting, June 8, 2010; Lecturer

- "Nuts and Bolts of Forming and Administering Charitable Entities" UJA-Federation of New York 20th Annual Westchester Estate, Tax & Financial Planning Conference, May 27, 2010; Lecturer
- "Avoiding Ethical Minefields" UJA-Federation of New York 19th Annual Westchester Estate, Tax & Financial Planning Conference, May 21, 2009; Lecturer
- "Top 10 Estate Planning Techniques: Wills and Annual Exclusion Gifting" NBI National Business Institute, May 20, 2009; Lecturer
- "Failure to File," Women's Bar News of the State of New York, October November 2008, Volume 21, Number 1; Author
- "What Will Your Legacy Be?" Purchase College, State University of New York, 2008; Lecturer
- "Fetching Farewell," New York Dog Magazine, November 2005; Quoted
- "Charitable Trusts," Brandeis University Alumni Association, 2002; Lecturer

COMMUNITY SERVICE

- Brandeis University Alumni Association:
  - Lawyers Network, Founder, Past Chair, Past Steering Committee and Member; 2000-present
  - Alumni Club of Westchester and Southern Connecticut Steering Committee; 2011-present
  - Class of 1994 Annual Fund Committee, Chair; 2005-present
  - Alumni National Campaign Committee; 2003-present
  - Reunion, Chair; 1998-1999, 2003-2004, 2008-2009, 2013-2014
  - Family Network, Founder, Past Chair and Member; 2004-2008
- The Jewish Education Project, Westchester Regional Advisory Committee; 2007-2012
- The Leukemia & Lymphoma Society, Light the Night Walk, Antibodies Team (one of the largest and highest grossing fundraising teams in the country), Member; 2001-2008
- Solomon Schechter School of Westchester, Alumni Capital Campaign, Co-Chair; 1999-2001
- UJA-Federation of New York:
  - Westchester Business and Professional Division Board; 2009-present
    - Co-Chair of Division Board; 2013-2015
    - Executive Committee; 2010 - present
    - Spring Breakfast Co-Chair; April 7, 2011; March 14, 2013
    - Planned Giving Co-Chair; 2009-present
    - Nominating Committee; 2011- present
  - Westchester Women's Business and Professional Division Board; 2007-2009
  - Westchester Business and Professional Mothers Division, Founder and Co-Chair; 2008-2009
  - Planning and Grants, Committee on Ethiopian Resettlement; 2003-2008
  - Young Lawyers Division, Steering Committee; 2002-2008

- United Jewish Communities Women's National Young Leadership Cabinet: 2002-2008
    - Class Chair; 2007-2008

EDUCATION

- University of Pennsylvania Law School, Philadelphia, Pennsylvania, J.D.; 1997
- Brandeis University, Waltham, Massachusetts, B.A., summa cum laude, Phi Beta Kappa, High Honors; 1994

EXTRACURRICULAR

Leslie lives in White Plains with her husband, Jason, Vice President of Data Analytics for Carat USA, a large advertising agency in New York with their three children, Nathaniel, Audrey and Joshua, and two cats, Coconut and Car.