Conduct a thorough consultation
These days, parents of minor and adult children with disabilities are more likely to have acknowledged their child’s disabilities, if not sought treatment for them. But we do encounter reluctance in labeling family members as having a disability, which requires us to be creative in discovering this information. I recommend asking if any of the beneficiaries have lineal descendants or spouses with disabilities or conditions affecting their ability to support themselves, and if it is possible that the lineal descendants could be contingent beneficiaries. It is also important to know what government benefits the beneficiary receives or may require in the future. Medicaid, Home and Community-Based Services Waivers, and Supplemental Security Income (“SSI”) are means-tested government benefits. These programs categorize an inheritance as unearned income in the month received. An inheritance will also be treated as a resource if not properly spent down or transferred to an exempt trust in the month received. The increase in income and/or resources is likely to jeopardize the beneficiary’s ongoing eligibility for Medicaid, Waiver, or SSI. Conversely, Medicare and Social Security Disability Insurance are not means-tested.

Realize disinherition isn’t the only option
The expectation is for other family members to financially provide for the individual receiving Medicaid and/or SSI in exchange for receiving a larger inheritance, but if the recipient reconsiders looking after his or her relative, or is sued, marries an uncooperative spouse, divorces, has creditor issues, or has an addiction, it is likely the assets will never be used for the intended beneficiary. There are also concerns that this arrangement establishes a constructive trust. There are many other planning techniques available, including first-party or third-party special needs trusts.

Recognize the ramifications of disclaimer
The Medicaid and SSI agencies will treat disclaimer as an improper transfer of resources, and the value of the disclaimed property will still be imputed to the individual. R.C. 5101:1-39-07(B)(14); POMS SI CHI 00830.330. Therefore, disclaimer is not an effective tool if the beneficiary wishes to retain his or her Medicaid and SSI eligibility.

Remove ascertainable standard language
It is not unusual to leave assets in trust, nor is it unusual to include “health, education, maintenance, and support” as a loose distribution guide for the trustee. This same language will cause the trust to be a countable resource when determining Medicaid eligibility, even if the term “special needs trust” is used. R.C. 5111.151(G)(2). If the trust beneficiary will need Medicaid or SSI, it is best to make the
trust purely discretionary and not include an ascertainable standard. If the trustee needs guidance, the parents or caregivers may wish to draft a non-binding letter of intent to share their future wishes for the beneficiary.

Review the trust agreement in its entirety
Even if the scrivener does not include an ascertainable standard in the trust administration portion of the trust, it is still possible for the trust to be counted as a resource if the spend-thrift clause includes ascertainable standard language. In addition to the terms noted above, other terms that should be avoided when preparing special needs trusts are medical care, care, comfort, welfare, and general well-being. R.C. 5111.151(G)(2).

Provide broad discretion
Some estate planners include language preventing the trustee from making any distribution for a beneficiary’s food and shelter when the beneficiary is a Medicaid or SSI recipient. The reasoning behind this is understandable; those who receive Medicaid or SSI are subject to rules regarding the amount of income and assets/resources he or she has access to in order to meet their basic needs and still be financially eligible for the programs. A payment by a third party for a Medicaid or SSI recipient’s food or shelter affects the beneficiary nearly as harshly as giving him or her cash, which is countable unearned income and could jeopardize Medicaid or SSI eligibility. There are circumstances, however, when it may be in the beneficiary’s best interest for the trust to pay for food or shelter despite the penalty, and it is important that the trustee have the power to do so. For example, if the trustee pays the beneficiary’s $1,000 per month rent (shelter), the beneficiary’s monthly SSI of $674 will be reduced, but not dollar-for-dollar. The Social Security Administration employs formulas to determine the “value” of the rent payment. If the child with a disability is 18 or older and competent, he or she may wish to execute a durable power of attorney to revoke or amend a trust agreement or distribute trust property, the power must be granted in both the power of attorney and the trust agreement. R.C. 1337.18(A)(1)(a); R.C. 5806.02(E).

Consider the need for adult guardianship
Most estate planners will include a guardian nomination for minor children in the parents’ wills pursuant to R.C. 2111.12, but some children require a guardian as adults. According to R.C. 2111.121, a parent may nominate a guardian for an incompetent adult child, but to be effective, the nomination must be in writing, signed by two witnesses, and notarized. Most wills are not notarized, and therefore it may be appropriate to make the nomination in a separate document that is witnessed and notarized.

Evaluate real property options
If the individual with a disability is also incompetent, it is poor planning to leave him or her real property if they cannot manage it. Even though real property is an exempt asset if the Medicaid or SSI recipient owns and resides in it, if the individual is now or one day is found to be incompetent, the real property will be a guardianship asset and subject to probate court supervision if it needs to be sold or mortgaged. It may be more appropriate to transfer title of the home to a discretionary trust for the benefit of the individual, allowing the trustee to maintain the real property.

Review beneficiary designations
As we all know, the beneficiary designation supersedes will or trust provisions. Some assets have de facto beneficiaries that can include a spouse or child. Your clients must review their beneficiary designations regularly to confirm the beneficiary designations are consistent with their written estate plans. It is necessary to use the company’s forms and not rely on a letter or a note in the margin of the old form which, surprisingly, was the method a bank advised a client to use recently. This method, predictably, failed.

Consider estate planning for the adult child
If the child with a disability is 18 or older and competent, he or she may wish to execute a durable power of attorney for finances, a health care power of attorney, and/or a living will. For those with capacity to sign them, these documents are less restrictive alternatives to guardianship. It may also be advantageous to include educational provisions, or to draft a separate educational power of attorney, for adult children with disabilities who are continuing their education beyond age 18. Additionally, a declaration for mental health treatment may be appropriate for individuals with mental health issues.

To many, an inheritance can be an unexpected windfall after the death of a loved one. For people with special needs, an inheritance could instead unintentionally backfire and cause them to lose residential providers, health insurance, or cash benefits. Great care is required when preparing estate plans that may affect individuals with disabilities; if a special needs tree falls in a client’s estate planning forest, there is no doubt you will hear it, and the ramifications for the beneficiary can be significant.

Amanda M. Buzo is an associate at Hickman & Lowder Co., L.P.A. Her areas of practice include probate, settlement services for personal injury attorneys, special needs trusts, and estate planning with a focus on individuals or families with disabilities. The firm’s website is www.hickman-lowder.com. She can be reached at (216) 861-0360 or abuzo@hickman-lowder.com.