



**5<sup>th</sup> Annual SOUTHEAST ADULT AUTISM SYMPOSIUM**

**WEBINAR: July 23, 2021 12:00pm**

**PIERCE & HUISMAN, PLLC**

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(we are lawyers, after all)

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**Martin Pierce and John Huisman are not affiliated with alzheimer's association or New York Life**

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- Martin Pierce and John Huisman are taking new clients in all listed practice areas.
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- Appointments available by Zoom, telephone, and in person.

## PRACTICE AREAS

1. Estate Planning
2. Elder Law
3. Wills & Trusts
4. Probate, Trust, & Estate Administration
5. Special Needs Planning and Trusts
6. Conservatorships & Guardianships
7. Medicaid and VA Planning
8. Charitable Organizations and Non-Profits
9. Tax Law Matters

# Planning for Special Needs: Legal Means and Methods

- **Supported/Guided Decision Making**
  - Power of Attorney
  - Representative Payee
  - Trusts: Special Needs Trust
  - ABLE Accounts
- **Conservatorship—Legal Control**
  - Court Petition
  - Court supervised and controlled

# Planning for Special Needs

- **Major Issues at Age 18:**
  - **Medical Treatment and related community services**
  - **School and Education**
  - **Government Benefits**
  - **Other Legal Decisions:**
    - **Living Arrangement**
    - **Driver's license**
    - **Marriage**
  - **Other Financial Decisions:**
    - **Control of income and resources**
    - **Saving and Spending**

# Supported Decision Making

- **Supported/Guided Decision Making**
  - When is this appropriate?
  - How does it work?
- **Use of Power of Attorney**
- **Financial Aspects:**
  - **Representative Payee for Social Security Benefits**
  - **Special Needs Trust—Trustee is in control**
  - **ABLE Accounts—Custodian to assist if necessary;**
    - Custodian is not required for an ABLE account

# Conservatorship

- Conservatorship is the legal proceeding where a Court removes a disabled person's legal rights and places those legal rights in another person.
- The disabled person is called the "Ward," the person receiving the rights is the "Conservator"
- A Ward's legal rights include:
  - Personal rights: determine living arrangements, consent to medical treatment and obtain medical records, make educational decisions and determinations, enter into legal contracts, enter into marriage, and voting are just a few examples.
  - Financial rights: handle money, open bank accounts, make purchases, borrow money, investments, and all other financial decisions.

# Conservatorship

- A Conservatorship should be viewed as the action of last resort or should only be used when there is no reasonable alternative that is less restrictive for the individual
- A Conservatorship is important when leaving the person's legal rights intact would create a substantial risk that they would cause legal, financial, or physical harm to themselves.



# Modifying or Removing a Conservatorship

- How: An attorney files a motion in Court for the modification or complete removal of the conservatorship;
- Who: Anyone could file
  - Notice must be given to the Conservator and Ward;
  - Notice to other close family members is advised;
  - Court may appoint a guardian ad litem to perform an independent investigation;
  - Court may appoint an attorney to represent the Ward;
- What: medical proof and other lay witness proof is essential to remove the conservatorship—less proof to modify depending on the circumstances;

# Conservatorship

- Conservatorships can be tailored to individually to each person's specific needs and circumstances;
- Can allow broad control of personal decision making, with limited financial oversight;

# ADVANCED DIRECTIVES

- **Durable General Power of Attorney;**
- **Health Care Agent (Durable Power of Attorney for Healthcare);**
- **Advance Care Plan (Living Will); and**
- **Revocable Trust (possibly), for managing specific assets placed into the Trust.**

# ADVANCED DIRECTIVES: DURABLE GENERAL POWER OF ATTORNEY

- **DURABLE GENERAL POWER OF ATTORNEY**
  - Allows agent to manage the property (assets, finances, money) of another;
  - Can be effective upon signing, or springing upon a future event, such as disability;
  - Must be “durable,” that is, remain effective after incapacity;
  - Terminates upon the death of the principal;
  - Can be revoked while the principal has capacity;
  - Inexpensive, and covers most legal and financial situations;

# ADVANCED DIRECTIVES: DURABLE GENERAL POWER OF ATTORNEY

- **Powers:**
  - Usually very broad, to make almost any legal decision the principal could make if able;
  - Finances—deal with banks, financial advisor, broker, and retirement plans;
  - Real estate transactions;
  - Pay bills, deal with utilities, deal with credit cards and certain insurance providers;
  - File tax returns and deal with other tax matters;

# ADVANCED DIRECTIVES: DURABLE GENERAL POWER OF ATTORNEY

- **Limitations and Disadvantages**
  - Limitations: POA must have specific provisions to allow the following powers:
    - Make Gifts;
    - Exercise powers under a Trust;
    - Change beneficiaries on life insurance, POD, TOD beneficiary provisions;
  - Disadvantages:
    - Potential for abuse;
    - Does not avoid probate;

# ADVANCED DIRECTIVES: APPOINTMENT OF HEALTHCARE AGENT

- Appoints person to make medical and healthcare decisions for another, including the right to consent to, refuse, or withdraw medical care;
- Takes effect only upon incapacity;
- Conservator cannot revoke or amend a healthcare power, or replace the Agent;
- Agent has access to medical records and information, and ability to receive and consent to disclosure of medical records;

# ADVANCED DIRECTIVES: ADVANCED CARE PLAN/LIVING WILL

- A person's statement or declaration of how he or she desires to be treated (or not treated) under certain circumstances;
- It usually covers terminal conditions, comas or a persistent vegetative state, and other extreme medical conditions;
- Specifies degrees of care, when to cease care, and whether or not to provide food and/or water;
- Many people set forth their desire not to be left on machines indefinitely and/or not to have heroic medical intervention in specified circumstances or conditions;
- Provides guidelines, is not binding like a POST (physician's order), or DNR;



# Special Needs Trusts

- Assets are owned by the Trust and managed by a Trustee;
- A tool to allow disabled SSI/Medicaid recipients to benefit from resources and gifts that would otherwise make them ineligible for benefits—SNT assets do not count against recipient;
- It can be used to pay for a wide variety of things Medicaid and SSI do not pay for, but not basic room and board;
- Can name a professional Trustee to assist with handling funds and making investment decisions;

# Special Needs Trusts

- **SNT can be set up by a Last Will by parent or other relative:**
  - **Generally a little less expensive;**
  - **Combines “parent ownership” of funds during life with Trust ownership after death**
  - **Postpones creation of Trust until needed if no assets to be set aside for SNP**
  - **Facilitates funding Trust with Life Insurance**
- **Can be set up in life by parent or relative:**
  - **Useful so that other relatives can easily list the SNT trust in their estate planning;**
  - **If other relatives leave a gift to the special needs person outside a trust, that becomes their property and could require a new guardianship/conservatorship, or could disqualify them for government benefits**

# Governmental Benefits v. Special Needs Trust

## Government Benefits

### SSI/Medicaid

- Medical Care
- Room and Board
- Basic Personal Needs
- Care and Supervision
- Employment/Activities

## SPECIAL NEEDS TRUST

- Medical/Dental not provided by Medicaid
- Basic care if governmental benefits are cut back
- Personal Hygiene and Grooming
- Gifts and Special Occasions
- Vacations and Trips
- Professional Fees

# Special Needs Trusts: Qualified Expenses

- Own a home (beneficiary pays rent);
- Health and dental treatment and equipment for which there are not funds otherwise available;
- Rehabilitative expenses and occupational therapy services;
- Medical and diagnostic treatment beyond Medicaid benefits, even though not medically necessary or lifesaving;
- Medical insurance premiums;
- Supplemental nursing care;
- Supplemental dietary needs;
- Eyeglasses;
- Companionship; Expenses associated with bringing relatives or friends to visit with the beneficiary;
- Private case management;
- Travel; Entertainment; Cultural Experiences; Movies
- Vacations; Electronic devices, musical instruments
- Phone, Computer, Internet, Cable
- Training and education programs;
- Caretaker Expenses;
- Purchase of furniture for the beneficiary;
- Purchase of an vehicle; adapting vehicle for the needs of the beneficiary
- Renovations to a house to adapt to the needs of the beneficiary;
- Reading and educational materials; and
- A burial plot and pre-paid burial expenses.

This is not an exhaustive list.

# Special Needs Trusts: Pros vs Cons

## Pros

- Unlimited contributions, not counted as income for SSI
- Not counted as resource/assets for SSI
- Unlimited account value
- Unlimited investment options
- Contingent beneficiary flexibility
- Functionally extends SSI/Medicaid/TennCare resource limit
- Third party established SNT's not subject to Medicaid recovery

## Cons

- Limited on what can be used for;
- May be subject to Medicaid estate recovery (First party trust)
- Income and capital gains are taxed at the trust level at unfavorable rates
- Beneficiary has no involvement with funds, is passive in the process;

# WHAT ARE ABLE ACCOUNTS?

- Achieving a Better Life Experience Act of 2014: New Code sec. 529A
- Created special accounts for disabled persons with Federal Income tax advantages similar to a college savings 529 plan, while protecting eligibility for SSI and Medicaid/TennCare;
- In general:
  - A savings account that does not count against SSI/TennCare, and can be used for many things, and saved for later needs;
  - Contributions are after-tax, and are not income to the beneficiary;
  - Any income or growth within the account is tax free;
  - Withdrawals are tax free if used for “qualified expenses;”

# ABLE ACCOUNTS: WHO AND WHY

- Who: Anyone who cares about, or desires to help or provide for, a person with a disability can set up or contribute to an ABLE account;
- WHY: Provide financial assistance to someone who will need Medicaid and/or SSI public benefits assistance (the funds would otherwise be countable income and resources);
- WHY: Enable disabled persons to live above the poverty level, with limits, and with a significant personal safety-net, in a way that allows for significant self-determination where appropriate.

# WHAT QUALIFIES FOR A DISABILITY?

- Beneficiary must have a disability before age 26;
  - Includes qualifying for SSI/SSDI disability benefits (some exceptions);
  - Has been diagnosed by a qualified physician with a physical or mental disability resulting in marked and severe functional limitations that is expected to last no less than 12 months.
- Any written diagnosis used to qualify for an *ABLE TN* account must be retained by the Designated Beneficiary or the Designated Beneficiary's Legal Representative and made available to *ABLE TN* or the IRS upon request.



# ABLE ACCOUNTS: HOW

- **Accounts can be established with financial advisor such as George Wealth Management;**
- **Accounts can also be established on your own with your own state or with any of several other states;**

# CONTRIBUTIONS AND LIMITS

- Annual contributions are capped at \$15,000 per beneficiary (not donor), PLUS up to \$12,760 of Owner/Beneficiary wages or earnings;
  - Overall account value cannot exceed \$350,000 in TN or \$462,000 in GA, after which no additional contributions are allowed (can grow, though);
- SSI disregards account value up to \$100,000. Any amount over \$100,000 is counted as a resource;
  - Special rules for requalifying for SSI when ineligibility is due to ABLE account only;
- **HOWEVER**, Medicaid/TennCare eligibility continue so long as beneficiary otherwise qualifies for SSI--that is, the ABLE account is the **ONLY** reason and resource making him or her ineligible for SSI.

# ABLE: “QUALIFIED DISABILITY EXPENSE”

An expense is considered a "Qualified Disability Expense" if:

- (1) You incurred the expense at a time when you were an Eligible Individual;
- (2) The expense relates to your disability; and
- (3) The expense helps you to maintain or improve your health, independence, or quality of life.

# ABLE ACCOUNT PROS and CONS

## PROS

- Contributions are not income for SSI purposes
- Growth is Tax Free: makes most of every dollar contributed
- Low cost to establish (no atty fees)
- Clear government approval
- Maximizes every dollar when only able to contribute limited amounts
- Allows for payment of rent (in same month) and HH expenses
- Functionally extends SSI resource limit
- Can be used with supported decision making: beneficiary is the owner

## CONS

- Not available if disabled after age 26
- Contribution limit of \$15,000/year (unless owner has wages)
- Limited investment options—controlled by the State program
- Withdrawal options may be limited
- Tax penalty for withdrawal for non-qualified expenses (10%)
- Max account size could be limiting (can achieve max account size in about 16-17 years of investing the max amount)
- Tax savings depends on growth rate (lower growth rate, lower tax savings)

# ABLE vs SPECIAL NEEDS TRUST

## ABLE

- Contributions limited to \$15k/year (plus \$12,140 of owner wages)
- Tax Free Income and Growth
- “Free” set up
- Can be used for rent
- Optional Supported Decision Making, or Owner-controlled

## SPECIAL NEEDS TRUST

- Unlimited contributions
- Income and growth taxed
- Must be set up with an attorney
- Only be used for non-room and board
- Requires third-party trustee control

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