

Guardianships and Special Needs Planning

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Estate Planning for Everyone.

What We Will Cover

- Introduction to Special Needs Planning
- Guardianships/ Conservatorships
- Trusts for People with Disabilities
 - First-Party Special Needs Trusts
 - Third-Party Special Needs Trusts

Note: This presentation contains GENERAL information only and NOT legal Advice.
This presentation does NOT establish an attorney-client relationship

Special Needs Planning

- Continues to be an emerging area of the Law
- Emphasis on assisting **families AND individuals** with special needs by:
 - Providing a voice (Guardianship & Alternatives)
 - Preserving Public Benefits
 - Enhancing quality of life beyond what Public Benefits can provide
- Planning & Prevention
- This Practice has become extremely multidisciplinary

Special Needs Planning

- MUCH more than just filling out a form special needs trust
- Comprehensive services and plans involve taxes, finances, guardianships/conservatorships (when necessary), health care planning, powers of attorney/health care directives (when appropriate), public benefits planning, and much more

Common Scenarios for Special Needs Planning

- Parents who have a child with disabilities.
 - What happens when my child turns 18?
 - Who takes care of my child when I die?
 - Divorce situations
- Personal Injury Cases
- Adult-onset and progressive conditions
- Long-Term Care Planning
- Self-Advocacy

Guardianship/Conservatorship

- Court Proceedings to appoint someone to make personal decisions for an “incapacitated” adult (called a “Guardian”) or to make financial decisions for a person who is unable to manage finances (called a “Conservator”)
- Guardianship usually not necessary until age 18
- Alternatives include Power of Attorney, Health Care Directives and certain trusts
 - Must have capacity to create these documents

Who can be a Guardian?

- Priority is not binding, but it includes:
 - A current guardian, other than a temporary or emergency guardian,
 - A person nominated as guardian by the respondent,
 - An agent appointed by the respondent under any medical directive or health care power of attorney or, if none, any designated surrogate,
 - The spouse or reciprocal beneficiary of the respondent or a person nominated by will or other signed writing of a deceased spouse or reciprocal beneficiary;
 - An adult child of the respondent;
 - A parent of the respondent, or an individual nominated by will or other signed writing of a parent; and
 - An adult with whom the respondent has resided for more than six months before the filing of the petition.
- An owner, operator, or employee of a long-term care institution or other care settings at which the respondent is receiving care **may not** be appointed as guardian unless related to the respondent by blood, marriage, or adoption, or otherwise ordered by the court

What does a Guardian do?

- HRS 560:5-314, 315 and 316.
- Guardian makes decisions concerning a ward's support, care, education, health, and welfare.
- Apply for and receive money payable to the ward
- Take custody of the ward and establish the ward's place of custodial dwelling
- Consent to medical or other care for the ward;
- Consent to the marriage or divorce of the ward; and
- If reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well being.

What can a Guardian NOT do

- Duties of a Conservator (e.g. borrow money; sell/convey property, substantial investments; loan money, etc.)
- Actions not consistent or in the best interest of the Ward
- Make medical decisions that are inconsistent with the Ward's individual instructions on healthcare directives, etc.
- Standard limitations of fiduciary – no lying, cheating, stealing, etc.
- NOTE: Guardian CANNOT commit Ward without a hearing.

Who needs a Guardian?

- Only an “incapacitated person” needs a guardian.
- What type of Guardian is necessary?
 - Limited/Unlimited
 - Emergency
 - Temporary substitute
- Others may get by with alternatives

Incapacitated

- An “Incapacitated Person” is “an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance.” HRS 560:5-102.

Always Seek Alternatives FIRST

- Guardianship proceeding is long, expensive
- Guardians are appointed for life (their own or the incapacitated person's)
- Many duties of the Guardian
- Limits rights of the Ward
- Attorney is “of record” for duration of the Guardianship

Alternatives

- Durable Power of Attorney documents
- Healthcare Directives
- Surrogacy?

When to Seek Guardianship

- A person with a disability will need a guardian:
 - After the person turns 18
 - When the person is unable to “receive and evaluate information or make or communicate decisions to such an extent that the person lacks the ability to meet essential requirements for physical health, safety or self-care, even with appropriate and reasonably available technological assistance.”
 - All alternatives have been explored

Guardianship Process

- Petition the Family Court (preferred, even if Conservatorship is also needed)
- Serve Notice of hearing on interested parties
- Attend Hearing
- Assist the individual by making decisions that the individual would have made, had the individual had capacity.
- Can manage day-to-day finances (e.g. paychecks, Social Security); make medical decisions, and day-to-day decision making
- File Annual Report on Individual's status with the Court

Many Types of Trusts

- There are many types of trusts available.
- There is no one-size-fits-all template!

What is a Trust?

- Settlor/Grantor = Person who owns property and makes instructions for its management
- Trustee = Manager of the property for the benefit of the Beneficiaries
- Beneficiaries = end-users. Could be the Settlor during life
- Manage assets during life and distributes them after death
- Avoids Probate
- Can also “exempt” income/assets from means-testing

Special Needs Trusts

- Type of trust designed to preserve a beneficiary's Public Benefits and improve quality of life.
 - Assets owned by the trust do not count against a beneficiary's eligibility (if administered properly)
 - The ability to shelter resources to benefit a family member with disabilities
 - The ability to help the beneficiary live more comfortably and productively than is usually possible on public benefits
 - The ability to provide financial management

Two Types of SNTs

- Two types
 - First- Party (Self-Settled)
 - Third-Party (Created by someone else)
 - “Pooled Trusts” could be either First Party or Third Party;
currently none in Hawaii

First-Party vs. Third-Party

First-Party	Third-Party
<ul style="list-style-type: none">- Funded with Beneficiary's OWN assets- Must be created by Parent, Grandparent, Guardian or Court (or if Pooled Trust, by the person with a disability)- Must be for sole benefit of a disabled beneficiary- Must be funded by age 65 (possible exception for Pooled Trusts)- Pay-Back Provision	<ul style="list-style-type: none">- Funded with any property NOT owned by beneficiary- No pay-back provision- More flexible, but fewer statutory protections

The “special needs trust”

- 42 USC 1396p(d)(4)(A).
- This is the payback trust.
- Established by parent, grandparent, or court.
- Beneficiary under the age of 65.
- Maybe a good option for “emergency” planning.
- No transfer of asset penalty, as long as trust is funded prior to age 65.
- “Sole Benefit Rule”

“Sole Benefit” rule?

- Many changes to the POMS went into effect this year, most significantly, those on 5/15/2013.
 - Paying parents to care for their minor children (what about a contract)
 - Paying third party for travel to visit beneficiary OK
 - Allowing other parties to reside in trust-owned real property?
 - Payment to a third party that results in the receipt of goods or services by the trust beneficiary – ok
 - Payment of travel necessary for beneficiary to obtain medical treatment

Payback Issues

- Repayment clauses in D4A trusts can be difficult – especially for a Trustee.
 - Medicaid must be paid back, but can you pay for attorney fees, taxes, accountants, trustee fees, or requests for distributions made PRIOR to death but not paid as of date of death?
 - Multiple jurisdictions required to be paid?
 - From what date? See *First Capital Surety & Trust v. Delaware* (September 27, 2012).

The “pooled special needs trust”

- 42 USC 1396p(d)(4)(C)
- Pooled special needs trusts are a type of first party trust that is managed by a nonprofit agency
- Assets in the trust are exempt for Medicaid purposes, and transfer of asset penalties do not apply to funds transferred into this trust.
- Assets remaining in the trust upon the death of the beneficiary may remain in the trust or may be used to pay back Medicaid
- No pooled special needs trust currently operating in Hawaii.

Special Needs in Estate Planning

- 3rd Party SNT is the traditional method, but many ways to draft.
 - Sub-Trust funded upon death of Settlor?
 - Stand-Alone Trust? Revocable/Irrevocable?
 - Many public benefit considerations – can/should trustee distribute in a way to eliminate or reduce benefits? Sometimes you WANT to intentionally reduce benefits
 - Can it be used for OTHER purposes (e.g. an SBT for medicaid planning purposes of the PARENT?)

Third-Party Special Needs Trusts

- Traditional Special Needs Planning for clients who wish to leave something of financial value to a beneficiary who has a disability.
- Trustee to have discretionary powers over the trust funds with only precatory language to apply funds for the beneficiary's "special" or "supplemental needs", taking the Beneficiary's public benefits eligibility into consideration

What can an SNT pay for?

- Really, anything
- BUT for every action, there is an equal and opposite reaction...
 - Food?
 - Shelter?
 - Sole Benefit? (for 1st Party SNTs)

Essential Steps of Special Needs Planning

- Establish Networks -
 - Family Members
 - Family-to-Family groups
 - Professionals – Lawyers, accountants, social workers, medical
 - Individual
- Prepare for Transitions
 - Individual Advocacy; Guardian; Conservatorship
 - Special Education; Vocational Rehab; Independent Living; Other
- Maximize Independence and Public Benefits
 - Special Needs Trusts – could need 1st Party and/or 3rd Party

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Questions?



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