Frequently Asked Legal Questions

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Martin L. Pierce, Attorney
Certified Estate Planning Specialist
Member, National Academy of Elder Law Attorneys
Qualified & Charter Member, Kingdom Advisors
www.martinpiercelaw.com
423.648.4303
mpierce@martinpiercelaw.com

Martin L. Pierce, a native of Memphis, Tennessee, received his undergraduate degree, *summa cum laude*, from Tennessee Technological University in 1978, and that institution's Outstanding Young Alumnus Award in 1988. Martin received his law degree, with highest honors, from the University of Memphis in 1981, where he was a published member of the *Law Review*. He is licensed in Tennessee and Georgia, as well as the U.S. Tax Court and the U.S. Supreme Court.

Martin works primarily in the areas of: (1) Estate Planning, Wills, Trusts, Elder Law, Probate, Family Succession Planning, Medicaid & VA Planning, Special Needs Trusts (Disability Planning), Qualified Income (Miller) Trusts, Conservatorships, Guardianships and Charitable Planning; (2) Business Entity Law, including Corporations, LLCs and Partnerships, Nonprofits, Tax-exempt 501(c)(3), Contracts, Agreements, Buy-Sell Agreements, Leases, Real Estate documents, Foundations, etc.; (3) Employee Benefits, Retirement Plans, Cafeteria Plans, Health Savings Accounts, COBRA and ERISA; and (4) various other Tax law matters.

He is a **Certified Estate Planning Specialist** through the ABA, National Association of Estate Planners & Councils, and the Tennessee Supreme Court. An **AV** Preeminent rated lawyer with Martindale-Hubbell, he is also a *Mid*-South *Super Lawyer*® in the areas of Estate Planning and Elder Law, was selected to *Best Lawyers in America* for Trusts and Estates, and is an AVVO Top-Rated Lawyer. He is also a member of the National Academy of Elder Law Attorneys, and he is an Accredited Attorney with the Department of Veterans Affairs. A member of the Chattanooga Estate Planning Council (Past President, 2006-07) and the Chattanooga Tax Practitioners (President, 2007-08), he was also a Charter Member of the Chattanooga Planned Giving Council. He is a member of the Georgia, Tennessee and Chattanooga Bar Associations.

Martin is the co-founder of several local nonprofit organizations, including First Things First and the IMPACT School at Silverdale Baptist Academy. He has served on the Boards of many nonprofits, including Chattanooga Christian School, Chattanooga Resource Foundation, Bryan College President's Roundtable, Bethel Bible Village, Lighthouse Counseling Center, Big Brothers/Big Sisters, Optimist Club, and Paraclyte Counseling Resources. He currently serves as a Member of the Boards of Choices, LifeLine, and Relevant Hope. He has experience establishing, counseling, and representing nonprofits and tax-exempt/501(c)(3) charities.

Martin is in his 37th year of law practice in Chattanooga, where he began with Stophel, Caldwell & Heggie, P.C. in 1981. In 1984 he joined Chambliss & Bahner, PLLC (Partner in 1987 and Head of the Tax & Estates Section). In 2002 Martin joined the national law firm of Husch & Eppenberger, LLC (where he was Head of the Estate Planning and Employee Benefits for the State of Tennessee). On January 1, 2005, Martin opened his own practice to more cost-effectively serve his clients.

A Member of the Christian Legal Society and a Certified & Charter Member of Kingdom Advisors, Martin and his family attend Harvest Bible Chapel Chattanooga, where he is a Deacon.

Martin's office is located at 4513 Hixson Pike, Suite 109, Chattanooga (Hixson), Tennessee 37343. His office telephone number is (423) 648-4303, and he may also be reached by e-mail at MPierce@MartinPierceLaw.com. The website for Martin's firm, PIERCE LAW FIRM, PLLC, is www.MartinPierceLaw.com.

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Special Needs Trust or ABLE Account?

Why consider a Special Needs Trust (SNT)? Because Medicaid may be your child's only way of securing health care benefits and because SSI benefits may be your child's only significant source of income. Your child can lose those benefits if "helped" the wrong way.

Both Medicaid and SSI are "means tested" programs. That generally means your child must be poor enough to qualify. And, we definitely do not want to provide funds to help our children in a way that causes them to lose Medicaid and SSI. That is where Special Needs Trusts come into play. Simply put, SNTs are important tools that help your child qualify for and remain qualified for Medicaid and SSI, while also helping him or her meet other needs. In some ways, SNTs let us have our cake and eat it too. Special Needs Trusts can be used to fund a variety of supplemental needs ranging from:

- 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;
- Travel;
- Entertainment;
- Expenses associated with bringing relatives/friends to visit with the beneficiary;
- Vacations;
- Telephone, cable, internet and other digital services;
- Computers;
- Radios, stereos and musical instruments;

- Training and education programs;
- Caretaker Expenses;
- Purchase of furniture for the beneficiary;
- Purchase and adapting of an automobile for transportation to medical treatment;
- 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.

The general rule is that when a Medicaid or SSI beneficiary transfers assets to another person, the beneficiary is penalized. Special Needs Trusts ("SNT") are an exception to the rule. A SNT is a spendthrift trust created for a disabled beneficiary which supplements but does not replace public benefits for which the beneficiary may be eligible. A SNT must be carefully drafted and implemented to conform to statutory/regulatory requirements to assure continued SSI and Medicaid eligibility. SSI and Medicaid rules regarding SNTs are similar but not identical. Technical rules protecting incapacitated persons must be adhered to.

ABLE Accounts. The Achieving a Better Life Experience Act of 2014 created new IRS Code Section 529A and the ABLE account, a savings vehicle for disabled people that offers the same tax-free growth available in 529 college-savings plans. Eligible families will be free to select a plan sponsored by any state that has approved the accounts. You can set your account up in any of the states with the program.

A disabled person or family/friends can make one-time or regular contributions, which grow tax-free if they are used for "qualified expenses." In the case of the 529 ABLEs, that includes education, housing, transportation and employment training. If used for other purposes, investment gains are subject to income tax and a 10% penalty.

The account owner—a parent or guardian/conservator appointed to make decisions on behalf of that disabled individual—will pick from the plan's investment options.

The biggest benefit of an ABLE account is that disabled individuals can have as much as $350,000 in TN and $462,000 in GA and still qualify for benefits including Medicaid and Supplemental Security Income (SSI), a federal program for disabled people with low incomes. Previously, to qualify for SSI, a person could have no more than $2,000 in assets.

To qualify for an ABLE account, a minor or adult must be blind or have a severe physical or mental disability before age 26. The person must also be entitled to SSI or SSDI benefits or, with some exceptions, have a doctor's diagnosis.

Annual contributions to 529 ABLE accounts are currently capped at $15,000 per beneficiary, and each beneficiary is restricted to just one such account. Such limits make it harder to amass significant savings with 529 ABLE accounts in a short period of time, making Special Needs Trust the continuing option.

Check the fees and investment options for the States to determine where to set up and account.

For families that can fund a Special Needs Trust (SNT), deciding whether to use that or a 529 ABLE account—or both—is complicated. Because the SNT trust typically costs from $2,000 to $5,000 to set up (I actually charge less than the bottom end of that range!), they often make sense only if there is at least $25,000 or $30,000 available to invest. With the trusts, investment gains are taxable. But families can make unlimited contributions without affecting a beneficiary's eligibility for government benefits.

Perhaps the biggest downside to an ABLE account applies to beneficiaries who receive Medicaid. If beneficiaries die with money in ABLE accounts, a state has a right to seek repayment for Medicaid benefits paid out and benefits received after creating the ABLE account – Estate Recovery. In contrast, when the beneficiary dies, a Special Needs Trust is not required to reimburse the state for Medicaid benefits—unless the beneficiary funded the trust with his or her own earnings or savings.

For more information, See http://ablenrc.org/

Power of Attorney or Conservatorship/Guardianship?

A **Durable General (Financial) Power of Attorney** is a signed, dated and notarized document that specifically provides authority to another to make financial and other decisions on behalf of the person granting the authority. The person named acts as the agent of the one granting the authority. The person granting the authority must be of majority age and have the capacity to grant the authority. The power of attorney can avoid the need for a legal Conservatorship or Guardianship in some cases.

A "**Conservator**" is appointed for a "disabled person." (Conservator is the name usually used in Tennessee, while you will likely see the term Guardianship in Georgia or Alabama.) A "disabled person" is a person age 18 or over who needs partial or full supervision, protection and assistance by reason of mental illness, physical illness or injury, development disability or other mental or physical incapacity. Note that the definition of a "Guardian" applies only to a minor--someone under age 18.

Who May File the Petition. Any person "having knowledge of the circumstances necessitating the appointment of a conservator" may bring the Petition. Statutorily, the law is expansive when identifying those who should raise the question of a competence or capacity. The reason for this is logical. The action does nothing but bring the person for whom legal protections are sought to a judicial forum where the question is to be answered. The initiation of the process does not create an inference of inability or incapacity. Neither does it answer the question.

How the Petition Is Filed**.** The Petition must be made under oath and must contain a good deal of information and notification to protect the overall process.

Where the Petition is Filed. An action for the appointment of a Conservator may be brought in the Court that has probate jurisdiction in the county in which the alleged disabled person resides.

The concept of the alleged disabled person's residence is where his or her legal residence is maintained, not the residence the person happens to be in at the time the concern is raised.

Who May Be Appointed. The statutes instruct to make the determination of conservator based on "the best interests of the disabled person"; however, the statute does list individuals and the priority in which they should be considered, as follows:

- The person designated in a writing signed by the alleged disabled person;
- The spouse of the disabled person;
- The closest relative to the disabled person; or
- Another person.

Appointment of Guardian Ad Litem. After the filing of the petition, the Court usually appoints a Guardian ad litem to evaluate the situation. The appointment can be waived by the court if the Petitioner is either the disabled person or if the Court determines that it is in the best interests of the disabled person. The Guardian ad litem has a duty to the Court to impartially investigate the facts and make a report to the court. The Guardian ad litem is not an advocate for the respondent.

What Can the Respondent Do. The alleged disabled person has the ability to argue against the appointment of a Conservator. The respondent may require that a hearing be held on the issue of his or her disability. The respondent has the right to attend the hearing and have an attorney appointed to represent his or her interest. At the hearing, he or she can present evidence to establish that he or she is not disabled and may cross examine witnesses brought by the Petitioner. If the respondent is found to be disabled, he or she is able to appeal the decision.
Appointment of Conservator. Upon the Court's appointment of a conservator, Letters of Conservatorship (Guardianship) are issued to the conservator. The Conservator is then able to administer the disabled person's estate (assets, money, property) with these letters.

Bond for the Conservator. A bond from the Conservator may be required. The amount of the bond is equal to the total of the fair market value of all the personal property of the disabled person and the anticipated amount of all income generated from the disabled person's property, including real property, for one year. The Court can excuse the Conservator's posting of the bond if it finds that it would be unjust or inappropriate in the situation.

Inventory and Accountings. Within 60 days of his or her appointment, the Conservator is to file with the Court an inventory of the disabled person's property. The inventory includes a list of the property and its estimated fair market value. It also includes the source of any income, the amount received, and the timing of the payments. No later than 60 days after each anniversary of the Conservator's appointment, an accounting must be filed with the Court. The accounting itemizes the receipts and expenditures made by the Conservator during the previous 12 months.

OTHER OPTIONS: It should be noted that there are some options to utilizing a Conservatorship/guardianship. For example, a family may reach **agreement** and put the terms in writing to set out how things will be handled. This process may be arrived at with the help of a qualified third party through a **family mediation** process that replaces the need to go to Court at all; that is, replaces the Conservatorship/Guardianship process. Some families use a **Business Entity** to handle affairs, again instead of going to Court for the appointment of a

Conservator/Guardian. **Life Insurance** (particularly in a **Trust**) is another flexible device for dealing with a special needs situation. Contact us to explore all of your options for your particular situation.

Joint Accounts/Beneficiary Designations (POD/TOD) or Will or Revocable Trust?

A **Will** is a legal document that transfers assets to your beneficiaries at your death. A Revocable Trust does the same thing, but there the similarity ends. A Will only has legal significance after death. If you become physically or mentally disabled during your lifetime, a Will is of no consequence until you die.

Your Will is a legally binding statement directing who will receive your property at your death. It also appoints a legal representative to carry out your wishes. However, the Will covers only "probate" property. Many types of property or forms of ownership pass outside of probate. Jointly owned property, property in trust, life insurance proceeds and property with a named beneficiary, such as IRAs, 401(k) plans or annuities, all pass outside of probate.

A **Revocable (Living) Trust** allows the Trustee designated in the document to assume control of the assets held in the trust upon your disability to manage your assets for your support and maintenance and to pay your bills. The Trustee can be a spouse, a parent, a sibling, or a financial institution with trust powers. In addition, a Revocable Trust can provide privacy, while a Will is a public record after it is probated. With a Revocable Trust, you can give your Trustee the power to continue handling your funds long after you are gone.

Funding?

ECF: Employment and Community First CHOICES – if qualify for waiver (application required and while funds are available for fiscal year)

DIDD: Department of Intellectual & Developmental Disabilities -- if qualify for waiver

Tennessee Family Support program - application required

Orange Grove Family Support - they only take applications January through March

Note: Most of these are mutually exclusive; that is, will not provide funds if you are under the other's program/waiver

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