

Legal Planning for a Young Person with Disabilities

Presenters:

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The Big 3 Legal Questions

1. Public Benefits?
2. Sheltering Private Funds? Estate Planning, Special Needs Trusts, & ABLE
3. Guardianship? Alternatives?

I. Public Benefits Overview

- ◆ Common Benefits for Minors: Special Education, Children's SSI, Children's Special Health Care, Family Support Subsidy
- ◆ Common Benefits for Age 18 or Older:
 - Through the Social Security Administration (SSA)
 - Supplemental Security Income (SSI)
 - Social Security Disability Insurance (SSDI)
 - Home Help Benefits, Michigan Rehab Services, Community Mental Health (CMH) Services, etc.



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SSI & SSDI: Similarities

- These are both cash benefits to recipients
- Recipient must be medically eligible (severely disabled)
- Questions common to both to establish medical eligibility:
 - ◆ Is the claimant working?
 - ◆ Is he/she suffering from a medically determinable disease or condition expected to last 1 yr. + or result in death?
 - ◆ Does the disease or condition meet or equal a condition found in the "Listing of Impairments"?
 - ◆ Does the disease or condition prevent him/her from returning to past relevant work?
 - ◆ Is he/she precluded from performing any substantial work activity on a sustained basis taking into account his/her age, education, and work experience?

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SSI & SSDI: Differences

- ◆ SSI is a needs-based program
 - **\$2000 asset limit** (countable assets)
 - Recipient must be low income – below the SSI benefit rate
 - Comes with Medicaid (Medicaid also has a **\$2000 asset limit** and covers a wide range of services, incl. CMH services) 
 - How much does the recipient receive per month? Amount is determined annually; varies based on living arrangement and work. Monthly rates for 2020, based on living arrangement:
 - Independent/Sharing expenses - \$783
 - Living in Household of Another - \$522

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...SSI & SSDI: Differences

- ◆ SSDI is based on payment of FICA taxes by benefit recipient or qualifying relative
 - Often kicks in when recipient's qualifying relative (typically a parent) becomes retired, disabled, or deceased, if recipient's condition / disease has onset before age 22
 - No asset limit
 - Comes with Medicare, but recipient may be eligible to receive Medicaid as well, *if Medicaid asset and income rules are satisfied* 
 - How much does the recipient receive per month? Depends on the payment of FICA taxes.

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How Does Work Affect SSI?

- ◆ In general, the first \$85/mo. earned does not affect the SSI payment amount
- ◆ After that, for every \$2 earned, you lose \$1 from your SSI check
- ◆ Example: Earn \$285/mo. from McDonalds...
 - The first \$85 has no affect
 - The next \$200 earned will reduce SSI check by \$100

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How Does Work Affect SSDI?

General Rule:

If the recipient earns more than the “Substantial Gainful Activity” (SGA) limit, he/she is **Not Disabled** and receives no SSDI. SGA is \$1260 (gross) in 2020.

This rule is relaxed in several ways. Examples:

- 9 month trial work period when you can make any amount.
- Extended Period of Eligibility when you can get SSDI without reapplication for any month your earnings are below SGA.
- Offsetting expenses (IRWE and Subsidy) – can apply to SSI and SSDI.

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II. Tools to Shelter Private Funds

Whose money is it??

Third-Party Funds	First-Party Funds
✓ Parents or others can keep funds in their own names during their lifetimes	X The person with the disability cannot give his/her funds to another to be held in the other's name
✓ Third-Party Special Needs Trusts	✓ First-Party Special Needs Trusts: Freestanding or Pooled
✓ ABLE Accounts	✓ ABLE Accounts

Remember: A person with disabilities may use more than one of these "tools."

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Special Needs Trusts

- ◆ Special needs trusts allow private funds to be set aside for the benefit of a person with disabilities, without jeopardizing the person's eligibility for public benefits. (Assets held by an SNT are not countable by SSI or Medicaid.)
- ◆ How much can be contributed to an SNT? An unlimited amount.
- ◆ General Rules:
 1. Trust funds must be used for the sole benefit of the person with the disability.
 2. Trustee must have sole, absolute discretion.
 3. Trust funds must be spent on things not already covered by public benefits, i.e., on supplemental needs.

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Types of Special Needs Trusts: Again, Whose Money Is It?

- ◆ If the trust will be funded by a parent or other party, the trust should be a **Third-Party Trust**.
- ◆ If the trust will be funded by the person with the disability, the trust must be a **First-Party / Self-Funded Trust**. There are two types:
 - 1) Freestanding, Exception A Trust
 - 2) Exception C, Pooled Trust

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Third-Party v. First-Party Special Needs Trusts

Third-Party Trusts	First-Party/Self-Funded Trusts
- Often funded by parents through a will or living trust; better than "disinheriting"	
- Can be funded while the parents are alive, or by others such as grandparents	
- Can be revocable	
- Party setting up trust chooses trustee	
- Party setting up trust chooses where any remainder will go	

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Third-Party v. First-Party Special Needs Trusts

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First-Party/Self-Funded Trusts

- Funded by the person with the disability, i.e., with \$ that is already “in his or her pocket”
- Examples of funds: retroactive benefits, unexpected inheritance, lawsuit proceeds
- Irrevocable
- The trustee depends on the type of trust (see next slide)
- The remainder provision depends on the type of trust (see next slide)

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First-Party / Self-Funded Trusts

Freestanding, “Exception A” Trusts

- Party setting up the trust chooses the trustee
- Required remainder provision: Medicaid payback
- Sometimes requires a trip to court and/or court supervision

“Exception C” / Pooled Trusts

- Master trust is set up by a non-profit, such as Hope Network; persons with disabilities join with a joinder agreement
- Non-profit serves as trustee
- Required remainder provision: remainder may stay with the non-profit
- Sometimes requires a trip to court

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*Achieving a Better
Life Experience*

ABLE Accounts

- ◆ The ABLE Act – The Achieving a Better Life Experience Act of 2014 – allows tax-advantaged savings accounts for persons with disabilities.
- ◆ Funds not counted toward the countable asset limit for needs-based public benefits (up to \$100,000 for SSI).
- ◆ Michigan ABLE accounts can be opened. For more info on MI ABLE, go to: miable.org
- ◆ Joining another state's program is an option, and Ohio's STABLE program has been popular.

Things to Know about ABLE Accounts...

- ◆ The MI Dep't of Treasury administers this program; a private company does direct management and investment.
- ◆ The person with the disability is the "designated beneficiary" and must have a "qualifying disability" with onset before age 26.
- ◆ The beneficiary owns the account - allows for more independence for the beneficiary, but issues re: proper management of funds may arise. An agent under a power of attorney, parent of a minor, or guardian may control the account.
- ◆ The beneficiary may have only one account. (Extended family members and divorced parents need to coordinate.)

... Things to Know about ABLE Accounts...

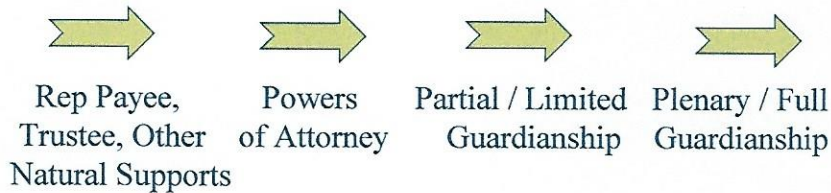
- ◆ Contributions may be made by anyone (first- or third-party funds).
- ◆ Total annual contributions to the account, from all sources combined, may not exceed \$15,000 (= annual gift tax exclusion). Note: this annual cap precludes the use of ABLE accounts for most estate planning.
- ◆ In Michigan, the maximum that can be held in the account is \$500,000. (But, remember the 100K SSI limit.)
- ◆ Income earned by the account is not taxed.
- ◆ In Michigan, there is a state income tax deduction for contributions, up to \$5,000 (individual return) and \$10,000 (joint return) per year. There is no federal income tax deduction.

... Things to Know about ABLE Accounts

- ◆ The account is, in general, irrevocable.
- ◆ Funds must be spent on “qualified disability expenses” such as: education, housing, transportation, employment training & support, assistive technology, health, financial & legal fees, funeral & burial, & basic living expenses.
- ◆ A restricted debit card is available in some cases.
- ◆ Mandatory Medicaid payback. At the beneficiary’s death, and after outstanding qualifying expenses are paid, any remaining funds go to the state Medicaid program, up to the amount of benefits paid on the person’s behalf since the account was established. Note: this requirement essentially converts third-party funds to first-party funds.

III. Guardianship / Alternatives to Guardianship

Continuum of Support



In determining who needs a guardian, consider the circumstances, support needs of the individual, and his/her capacity to make informed decisions.

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Two Types of Guardianship

- **Developmental Disability (DD)** –covers mental and physical impairments that manifest at birth or before 22 (autism, CP, etc.)
 - Guardianship of the Person and/or Estate(\$)
 - Plenary (full) or Partial
- **Legally Incapacitated Individual (LII)** –generally covers mental and physical impairments that manifest later in life (mental illness, dementia, etc.); catch-all
 - Guardianship and/or Conservatorship(\$)
 - Full or Limited

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Proceedings for DD Guardianship

- ♦ **Do the petitioners have to hire an attorney?** Not required, but can be beneficial.
- ♦ **What must be filed?** A petition must be filed in the probate court of the county where the person with the disability resides. Psych report and report to accompany must also be filed. (Know the type of psych report to get!) Some counties require other documents, like medical forms and background checks.
- ♦ **Is going to court necessary?** Yes. There must be a hearing, and notices must be sent to all interested persons. The petitioner(s) and the person with the disability must be present. The psychologist / psychiatrist must testify. There is a separate attorney there for the person with the disability.

Proceedings for DD Guardianship

- ♦ **Expense?** There is no filing fee for the petition, but there may be fees to the psychologist/psychiatrist and/or attorney for the petitioner.
- ♦ **When should the petitioners start this process?** Absent special circumstances involving minors, a few months before the person's 18th birthday or after. The court hearing cannot be held until the person is 18.

Alternatives: More on Powers of Attorney

- ◆ POA: Document by which one can give another authority to make decisions on his/her behalf
- ◆ Person signing must be 18 years of age or older and able to form the intent to sign
- ◆ There is no court involvement; signing is voluntary; they are revocable
- ◆ Most entities accept powers of attorney, with the exception, generally, of the SSA
- ◆ Different types: **General Durable** (finances and other general matters) and **Healthcare**