

LEGAL SMARTS FOR FAMILIES WITH SPECIAL NEEDS CHILDREN

- ✿ Guardianship
- ✿ Government Benefits
- ✿ Special Needs Trusts



GUARDIANSHIP

1. Why should it be considered?
2. What is it?
3. How do you get it?
4. When can you apply?

GUARDIANSHIP

- § My child has severe disabilities.
- § I have always been his caregiver and have cared for him at home.
- § He just turned 18.
- § I am being told I have no legal rights to make medical decisions for him or consent to services on his behalf.
- § He is not able to understand what is needed, why it is needed or what the consequences are if he doesn't receive services or medical treatment.
- § He does not communicate in any way.
- § What do I need to do?

GUARDIANSHIP

Why consider it?

- § At age 18 a special needs child becomes a legal adult
- § They can enter into contracts, be held accountable for expenses
- § Parents no longer have the ability to make medical decisions for them
- § Parents no longer have the ability to know about their medical records

GUARDIANSHIP

What is it?

- § Mentally disabled person sued to take away their right to manage assets and/or personal care
- § Those rights are transferred to a person appointed by the court

GUARDIANSHIP

What is it?

- § Guardian makes medical and care decisions for the disabled person
- § Guardian takes control of assets of the disabled person
- § The disabled person can't sell assets or determine how his or her assets are invested or spent—the guardian has those decisions

GUARDIANSHIP

How do you get it?

- § File an application with the appropriate court (i.e. county in which ward resides)
- § Application will also include a doctor certificate confirming disability (important that family have a doctor who knows of child's disability and limitations)

GUARDIANSHIP

How do you get it?

- § The court will appoint an attorney on behalf of the disabled person to protect their rights.
- § This person will interview the disabled person and give recommendations to the court

GUARDIANSHIP

How much does it cost?

- § Application cost is \$815 in Travis County.
- § Application cost \$316 in WILCO
- § Parents' attorney
- § Disabled Person's attorney ad litem
- § Annual maintenance fees: minimal > \$50 (maybe a bond)

GUARDIANSHIP

When can you apply?

- § Application can be filed no sooner than 6 months before the child's 18th birthday
- § Travis county won't allow court hearing prior to 18th birthday

Asset Protection Tip

Family should consider investing in an umbrella insurance policy that includes family and family's adult child as an insured

Government Benefits

1. SSI
2. Medicaid
3. Should your clients care about these?



Government Benefits

Social Security Income (SSI)

- § SSI provides monthly cash assistance
- § Administered by the Social Security Administration
- § Funded by tax revenues (not employment taxes)

Government Benefits

Social Security Income (SSI)

- § Available to adults who have an disability (must be unable to engage in any gainful activity because of physical or mental impairment that is expected to last for a continuous period of at least 12 months)
- § If earning more than \$1,000 a month, then don't meet this definition
- § Parents' income doesn't matter as long as applying for an 18 year old

Government Benefits

Social Security Income (SSI)

- 2012 Cost of living increase
 - \$698 is the maximum monthly amount
 - \$698 is reduced depending on number of factors.
- (www.ssa.gov)

Government Benefits

Social Security Income (SSI)

- § If the beneficiary is living in the household of another who is providing both food and shelter, the SSI benefit will be reduced by 1/3.
- § If a beneficiary is living with a parent or relative, as long as beneficiary's actual cost of food and shelter doesn't exceed \$694 per month, no reduction in benefit. Counter-intuitive when applying. **See worksheet on website to help with this.**

Government Benefits

Social Security Income (SSI)

- § Texas insurance law makes dependent status available for an unmarried child up to age 25 for insurance purposes
- § Affordable Care Act (Obamacare)—starting in 2014 will increase to age 26

Easy to Get Disqualified!

- § SSI is means based
- § If recipient makes too much money or owns too much, then they are disqualified

Social Security Income (SSI) Disqualifiers

- Owning more than \$2,000
- UGMA UTMA (while child is a minor, not considered a resource)
- A job earning more than \$1,000 a month and don't spend everything they make
- Inheritance—from parents & grandparents

Social Security Income (SSI) Disqualifiers: UTMA Accounts

Once Age of Majority is Attained

In the month the minor attains age 18, all UTMA property becomes available to him or her and is subject to income counting. The UTMA property becomes subject to resource counting the following month.

Social Security Income (SSI)

Things which don't count towards Disqualification:

- First \$20 on income a month
- First \$65 of earnings and ½ of earning over \$65 a month
- Food stamps
- Income tax refunds
- Small amounts of income received irregularly
- Grants, scholarships
- **Money someone else spends to pay for items other than food or shelter**
- Earnings up to \$1,700 per month up to \$6,840 per year for a student under age 22

SPECIAL NEEDS TRUSTS

- § What are they?
- § Why a client would need it
- § The different types
- § Drafting Mistakes

SPECIAL NEEDS TRUSTS

What and why

- § Designed to manage resources while maintaining eligibility for SSI
- § Big Mistake: disinherit special needs child only so they can qualify for SSI & Medicaid
- § The one person who needs an inheritance more than any other is a special needs child!

SPECIAL NEEDS TRUSTS

The different types

- § Payback v. non-payback
 - § (d)(4)(A) funded by beneficiary's assets
 - § Trust must provide that state Medicaid agency will receive amounts remaining in trust upon death up to the amount paid by the state Medicaid program for the beneficiary's services
- § You don't want your inheritance going into a payback!

SPECIAL NEEDS TRUSTS

The different types

§ Third-Party

§ Created by and funded with assets of a person other than the beneficiary

§ No payback provisions required

§ Allows parents, grandparents, relatives and friends opportunity to preserve beneficiary's SSI and to supplement those benefits during lifetime

SPECIAL NEEDS TRUSTS

The different types

§ Third-Party

§ At beneficiary's death, property remaining in trust can pass to another party (i.e. sibling of special needs child).

§ Can be named as a beneficiary of a life insurance policy.

SPECIAL NEEDS TRUSTS

The different types

§ Third-Party

§ Can be testamentary or stand alone

§ If stand alone, parents can create a trust, name it as the beneficiary under a will or living trust or TOD or beneficiary designations (and so can grandparents and other family members) (would not allocate GST if did planning this way however)

SPECIAL NEEDS TRUSTS

Drafting Mistakes

- § Put pay back provisions in a third party trust
- § Include Crummey Powers (for Medicaid and SSI eligibility purposes, granting a disabled beneficiary withdrawal power will create a resource during the withdrawal period—28 day Crummey right could be a solution)

SPECIAL NEEDS TRUSTS

Drafting Mistakes

§ Strict v. Discretionary

§ Texas allows for discretion by the trustee in making distributions from the trust so long as the beneficiary does not have the right to compel a distribution

§ HEMS standard used will cause the trust being treated as a resource

Three Additional Estate Planning Tips

1. Always, no matter what age, have an appointment of a guardian of special needs child
2. POA and RLT should permit agent/trustee to make discretionary non-support distributions to special needs child
3. Check beneficiary designations for IRAs and retirement accounts carefully. Get the stretch with a stand along retirement benefits trust.

You can judge a society upon how it treats its most vulnerable citizens. Aristotle

If anyone does not provide for his relatives, and especially for his immediate family, he has denied the faith and is worse than an unbeliever 1 Timothy 5:8