

Special Needs Trust Workshop

Family Share



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Martin L. Pierce is a native of Memphis, Tennessee, and received his undergraduate degree, *summa cum laude*, from Tennessee Technological University in 1978. He received that institution's Outstanding Young Alumnus Award in 1988. Martin received his law degree, with honors, from the University of Memphis in 1981, where he was a published member of the *University of Memphis Law Review*. He is licensed to practice law in Tennessee and Georgia, as well as before 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, Medicaid & VA Planning, Special Needs Trusts, Conservatorships, Guardianships and Charitable Planning, (2) Business Entity Law, including Corporations, LLCs and Partnerships, Nonprofits, Tax-exempt Organizations, Contracts, Leases and Agreements, (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-accredited National Association of Estate Planners & Councils and the Tennessee Commission on Specialization ([TNSpecialists](#)). He is also a member of the National Academy of Elder Law Attorneys, and he is a Department of Veterans Affairs, Accredited Attorney. Among other professional organizations, he is a member of the Chattanooga Estate Planning Council (Past President, 2006-07), the Chattanooga Tax Practitioners (President, 2007-08), and was a Charter Member of the Chattanooga Planned Giving Council. He is also a member of the American Bar Association, and 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 the Chattanooga Christian School, Bethel Bible Village, Lighthouse Counseling Center, Big Brothers/Big Sisters of Chattanooga, and the Chattanooga Optimist Club. He currently serves on the Boards of Paraclyte Counseling Resources and LifeLine. He has extensive experience in establishing, counseling, operating, representing, teaching, and speaking about nonprofits and 501(c)(3)s as well as various legal, business and tax aspects concerning them.

Martin is in his 34th year of law practice in Chattanooga, where he began with Stophel, Caldwell & Heggie, P.C., in 1981. He moved to Chambliss & Bahner, PLLC, in 1984 (where he became a Partner in 1987 and was the Head of the Firm's 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 practice areas for the Firm's three offices in the State of Tennessee). On January 1, 2005, Martin opened his own practice to more personally and cost-effectively serve his clients.

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This outline is intended to be informational and educational. It does not provide legal advice. Neither your attendance nor the presenter's answering a specific audience member's question creates an attorney-client relationship.

SPECIAL NEEDS TRUSTS

Martin L. Pierce, Certified Estate Planning Law Specialist

Why should you consider a Special Needs Trust (SNT)? Because Medicaid may be your child's only way of securing health care benefits; SSI benefits may be your child's only significant source of income; and ... your child can lose those benefits if you or someone else tries "to help them" the wrong way.

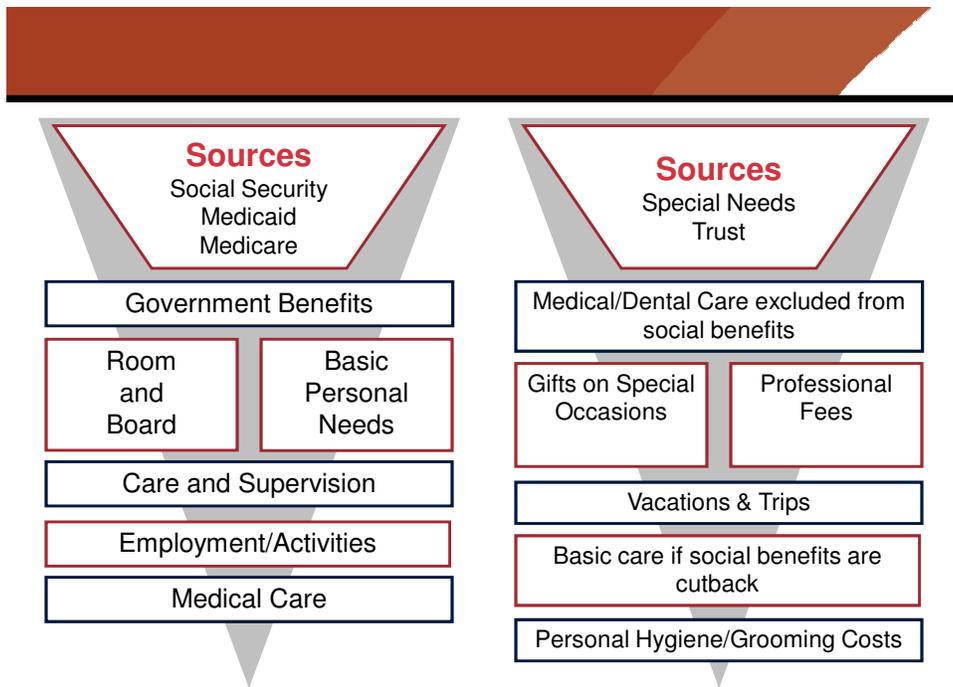
Both Medicaid and SSI are "means tested" programs. In plain language, that generally means your child must be poor enough (under standards set by SSI and Medicaid) to qualify. However, as important as Medicaid is, you should also keep in mind that it "won't put groceries on the table!" Medicaid pays health care bills, but never puts money in the beneficiary's pocket. So, while we definitely want to help our children "with the groceries," we don't want to do it in a way that causes our loved ones 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:

- A home, including adjacent land, if the beneficiary lives there or intends to return to it;
- 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;
- Companionship;
- Private case management;
- Cultural experiences;
- Expenses associated with bringing relatives or friends to visit with the beneficiary;
- Vacations;
- Movies;
- Telephone service and answering machines;
- Television and cable equipment and services;
- Computers;
- Radios, stereos and musical instruments;
- Training and education programs;
- Caretaker Expenses;
- Recreation, entertainment and travel for the beneficiary and a caretaker;
- Purchase of furniture for the beneficiary;
- Purchase of an automobile for transportation to medical treatment;
- Renovations to a house to adapt to the needs of the beneficiary;
- Cost of adapting a car or van to the needs of the beneficiary;
- Reading and educational materials; and
- A burial plot and pre-paid burial expenses.

There are two varieties of Special Needs Trusts: those created with the beneficiary's money (self-settled) and those created with someone else's money (third-party). Federal and state laws recognize two versions of the self-settled SNT. Some beneficiaries establish individual trusts pursuant to 42 U.S.C. § 1396p(d)(4)(A) (referred to as a "d4A trust" or "Miller Trust"). Second, those who do not meet the criteria necessary to establish a d4A Trust are usually eligible to fund a "d4C Trust" or "pooled trust".

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.



SPECIAL NEEDS TRUSTS

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A Special Needs Trust may be established to provide supplemental resources to a beneficiary with physical or mental disabilities. This type of trust may be dedicated to the care of the special needs beneficiary. An attorney with specialized knowledge and expertise works with the family to help them create a trust that meets their needs.

1. TWO TYPES OF GOVERNMENT BENEFITS

- Pension / Insurance type
 - Benefits based on contribution into the program, not based on a person's financial need
 - Social Security Disability Insurance (SSDI) http://ssa.gov/pgm/links_disability.htm
 - Medicare www.medicare.gov
- Needs Based type
 - Determine eligibility on disabled person's monthly countable income and resources
 - Supplemental Security Income (SSI) <http://www.ssa.gov/ssi>
 - Medicaid www.cms.hhs.gov

2. DID YOU KNOW?

- Disabled adults who may qualify for both Medicaid and Supplemental Security Income, may not receive these government benefits if their assets exceed \$2,000
- A strategy: Place assets (including inheritance, gifts, life insurance, etc.) in a carefully drafted trust.

- Distributions from a Special Needs Trust will not jeopardize a beneficiary's eligibility for needs-based government assistance such as Medicaid and Supplemental Security Income (SSI), if properly established and administered within a certain trust arrangement. You should work with an attorney who is familiar with special needs and creating Special Needs Trusts.
- Key Law to Discuss with your Attorney: OBRA 93 (42 U.S.C. Section 1396)
- Limits ability of individuals to transfer their own assets to others in order to qualify for Medicaid
- Exception – Medicaid Payback Trust
 - aka: “First Party” Trust
 - Allows an individual to receive funds in certain types of Trusts while still receiving needs based benefits

3. WHAT IS A SPECIAL NEEDS TRUST?

- A means of enhancing an individual's quality of life beyond the basic care provided by government benefits
- Can be set up to send a child to camp, take vacations, travel to visit relatives, buy sports equipment, or to pay for other therapeutic needs that do not fall under day-to-day living or “maintenance” expenses
- If properly drafted, proceeds will not affect government benefits as funds are held by a Trust

4. WHO SHOULD ESTABLISH A SNT?

- Caregiver or donor (often parents and grandparents) can establish a Third Party Trust for a child, sibling, spouse or loved one who is disabled
- Anyone who asks the questions:
 - “Who will take care of them when I'm not around?”
 - “How can I pass on a part of my estate without affecting government assistance?”

5. WHAT DOES A SNT DO?

- Coordinates available resources
- Ensures continuation of government benefits
- Provides supplemental needs for life
- Improves quality of life
- Directs final distributions

6. HOW DOES A SNT WORK?

- Stipulates how the monies contributed to the Trust are disbursed for the beneficiary
- State specific language is necessary - you should employ the services of an attorney who is familiar with the laws and regulations pertaining to Trusts of the appropriate state. Not all lawyers are familiar with complex Medicaid rules.
- Names a Trustee who is responsible to carry out terms of the Trust Agreement
- The Trustee is obligated to act both in accordance with these provisions and in the interests of the beneficiary

7. TYPES OF SNTs

There are many types of SNTs or ways SNTs can be created to fit the needs of the family. Some examples are:

- Self-settled trust available in limited circumstances
- Primarily set up by Court or approved by Court
- Meets strict definition of disability (Social Security)
- Trust is irrevocable
- After beneficiary's death, the state is reimbursed for all Medicaid benefits paid to or for the beneficiary, up to the limits of the assets remaining in the trust
- Trust exists for the sole benefit of the specific disabled beneficiary
- Does not provide for basic maintenance needs like food, clothing and shelter that are otherwise provided by government benefits

8. THIRD PARTY SNT

- Dependent upon state law, the Trust can be set up by anyone
- Beneficiary and donor can be any age
- Donor sets up Trust by gifting into an Irrevocable Trust, or at death, as part of their estate plan
- No need to pay back Medicaid if properly drafted
- Trust provides for remainder beneficiary
- Does not provide for basic maintenance needs like food, clothing and shelter that are otherwise provided by government benefits

9. TRUST AGREEMENT CAN ESTABLISH REGULAR PAYMENTS TO OR FOR THE BENEFICIARY

- For specific expenses
- To provide for unforeseen needs by Trustee exercising discretionary powers on behalf of the beneficiary
- Family members or friends can be named as Co-Trustee to work with the Corporate Trustee
- The 3-Step Process of Setting Up a Special Needs Trust
- Submit the following:
 - Draft of the new Trust document (including state-specific language protecting the beneficiary's government assistance) provided by your attorney
 - A copy of the original document if it is an existing Trust
 - List of the assets that will fund the Trust

Conservatorship or Guardianship (Tennessee law; Georgia is similar)

1. Once a Conservatorship or Guardianship process begins, lawyers, families, individuals, providers and other professionals involved should concern themselves with the conservatorship/guardianship adjudication, the appointment of the Conservator/Guardian and the powers granted to the conservator or guardian.

2. A "Conservator" is appointed for a "disabled person." 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.

3. 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.

4. How the Petition Is Filed. The Petition must be made under oath and must contain certain information

- Name, address, date of birth, social security number, residence and mail address of the respondent;
- Description of the alleged disability;
- Petitioner’s name, age, social security number, residence and mailing address and relationship to the respondent;
- Proposed conservator’s name, age, social security number, mailing address and relationship to the respondent;
- Closest relative’s name, mailing address and relationship to the respondent;
- Summary of the facts supporting the Petitioner’s allegations;
- Name of respondent’s physician or psychologist with either a sworn medical examination, a sworn statement that the examination has occurred but the report not yet received, or that the respondent refused to be voluntarily be examined;
- If it is desired, a request that the conservator (if appointed) also manage the property of the respondent. If property is to be covered, then the respondent’s financial information with fair market values, sources of income, usual monthly expenses and a proposed plan for the management of the respondent’s property must be submitted.

5. 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/lives (usually Chancery Court). 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.

6. 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 (generally set forth in a Durable General Power of Attorney);
- The spouse of the disabled person;

- The closest relative to the disabled person; or
- Another person.

7. Appointment of Guardian Ad Litem. After the filing of the petition, the Court must appoint 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.

8. 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.

9. Appointment of Conservator. Upon the Court's appointment of a conservator, Letters of Conservatorship are issued to the conservator. The Conservator is then able to administer the disabled person's estate (assets, money, property) with these letters.

10. Bond for the Conservator. A bond from the Conservator may be required by the Judge. 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.

11. 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.

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