Legal Matters for Caregiving Families

Special Needs Trusts, ABLE Accounts, Guardianships & More

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Martin L. Pierce, Attorney
Certified Estate Planning Specialist
John G. Huisman, Attorney
National Academy of Elder Law Attorneys

PIERCE & HUISMAN, PLLC
4513 Hixson Pike, Suite 109
Chattanooga, Tennessee 37343
Martin@PierceHuismanLaw.com
John@PierceHuismanLaw.com
423.648.4303

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Pierce & Huisman focus their practice on Estate Planning, Elder Law, Wills, Trusts, Probate, Conservatorship, Special Needs Trusts, Businesses (LLCs, corporations, partnerships), Succession Planning, Contracts, Entrepreneur Law, Start-ups, Nonprofit & Tax-exempts, Prenuptial Agreements, Employee Benefits and Tax law. The Firm provides an exceptional degree of excellence in law practice and superb personal attention to individuals, families and businesses in handling their legal matters.

Martin Pierce, a Certified Estate Planning Specialist, has been practicing with larger law firms as well as in a solo practice in East Tennessee and North Georgia for over 38 years, and he brings a wealth of experience and expertise to the new Law Firm.

A member of the National Academy of Elder Law Attorneys, Mr. Pierce is licensed in Tennessee and Georgia, and he has been selected in *The Best Lawyers in America*, as a Mid-South Super Lawyer®, as an AVVO rated "Top Lawyer," and he has earned the "AV" Preeminent rating by Martindale-Hubbell. He has been the President of the Chattanooga Estate Planning Council and the Chattanooga Tax Practitioners. He has been highly involved in the community over the years, having co-founded several local nonprofit organizations and ministries, including First Things First. He has served on the Boards of Chattanooga Christian School, Chattanooga Resource Foundation, CHOICES, Relevant Hope, Bethel Bible Village, Lighthouse Counseling Center, the IMPACT School at Silverdale Baptist Academy, the Chattanooga Optimist Club and Paraclyte Counseling Resources. He currently serves on the Board of LifeLine. A Certified and Charter Member of Kingdom Advisors® and a member of the Christian Legal Society, he also currently serves as Deacon at Harvest Bible Chapel Chattanooga.

John Huisman has extensive experience during his 14-year career in the areas of Business Transactions, Entrepreneur Law, Litigation, Workers' Compensation, Probate, Elder Law and Estate Planning law areas. In addition to litigation experience, Mr. Huisman has focused on helping entrepreneurs and small- and medium-sized businesses with business structures and transactions. He also has served as Vice President and General Counsel of an import and distribution business. Mr. Huisman uses this hands-on experience to better counsel business and individual clients with the knowledge of what it takes to help businesses grow and succeed.

Mr. Huisman is licensed in Tennessee and Georgia and is a member of the Chattanooga Estate Planning Council and the Christian Legal Society. He has been involved in serving the Greater Chattanooga community in a number of capacities, and currently serves on the board of directors for Choices Pregnancy Resource Center, and has also served as volunteer with CO.LAB, UTC Veterans Entrepreneurship Program, Covenant College Seed Project, and on the Troop Committee of BSA local Troop 80. He has also served as a Ruling Elder of Grace Presbyterian Church of Lookout Mountain.

IMPORTANT DISCLOSURE

The information provided is not written or intended as tax or legal advice and may not be relied on for purposes of avoiding any Federal tax penalties. Individuals are encouraged to seek advice for their specific situation from qualified tax or legal counsel.

ADVANCE DIRECTIVES

Dealing with Incapacity

Incapacity can be the most difficult, and possibly most expensive, event that befalls you and your family. It is extremely important that decisions regarding the transition of financial management, decision-making and healthcare be provided for as soon as possible for every adult. For one believed to be suffering from Alzheimer's, it is necessary to deal with advance directives as early in the process as possible and while the afflicted person still has mental capacity to deal with it.

Three Basic Documents. Advance directives generally deal with two fundamental issues. First, a person (or persons) must be identified and empowered with the legal authority to make decisions for another in a way that others will legally recognize, rely upon, and follow the instructions of the power holder. Second, this must be set forth in a legal document (or documents) that not only identifies the proxy and empowers them, but which also sets out any specific desires, wishes and any limitations to the power given. Having appropriate legal documents prepared (or, at least, reviewed) by an attorney is critical.

These documents are:

- Durable General Power of Attorney;
- Appointment of Health Care Agent (Durable Power of Attorney for Healthcare);
- Advance Care Plan (Living Will); and
- Revocable Trust (possibly).

1. **Durable General Power of Attorney**. The general power of attorney allows another to manage the property (assets, finances, money) of another. It can be effective upon execution or be springing -- that is, become operative only upon the occurrence of future incapacity as certified by one or more licensed physicians.

The document must be "durable," which means that it expressly contains wording confirming that the power will remain effective (or become effective upon incapacity, if springing) even when and after the principal (person granting the power) has become incapacitated.

- Effect of Principal's Death. Generally, the death of the principal terminates the power of attorney.

- Effect of Appointment of Conservator. The appointment of a Conservator for the principal does not automatically revoke or terminate the power of attorney. Instead, the attorney in fact is generally accountable to the Conservator, and the Conservator usually has the power to revoke or amend the power of attorney.

- Powers Granted. Extremely broad and general powers, including the ability of the one appointed (the attorney-in-fact) to make practically any decisions and taking almost any actions that the principal could take or do for himself or herself if able. There are a few exceptions and limitations to the attorney-in-fact's powers to act on behalf of the principal.

- What the Attorney-In-Fact Cannot Do. Among actions that the attorney-in-fact generally cannot take on behalf of the principal are the following:

    - Make gifts unless this power is specifically set out in the document, except the fulfillment of charitable pledges;
    - Exercise any powers granted to the principal under a trust;
    - Change beneficiary designations on any death benefits from a life insurance policy, employee benefit plan or retirement account; or
    - Renounce or disclaim any property through a gift, will, or intestate succession.

- Gifts Under Power of Attorney. If the power of attorney expressly authorizes the attorney-in-fact to make gifts to individuals other than charitable organizations, then the gifts can be made, but only to the extent that they are in accordance with the principal's personal history of making such gifts.

- Advantage of Using a General Power of Attorney. The primary advantage of using a durable general power of attorney is that it is usually inexpensive to prepare and can avoid the need for a Conservatorship in some instances.

- Disadvantages of Using General Power of Attorney. There is the potential of abuse by the attorney-in-fact, and it will not avoid probate at the principal's death.

2. **Appointment of Healthcare Agent**. This document appoints a person to make medical and healthcare decisions for another. This includes the rights to consent to, refuse or withdraw health care.

- Document Requirements. There are strict rules about wording needed and how the document must be signed and witnessed or notarized, so it is best to have a lawyer involved in the process.

- Conservator. Unlike the Durable General Power of Attorney, a Conservator cannot revoke or amend a health care power or replace the named Agent.

- Access to Medical Records. The health care Agent has access to the principal's medical records and information and also has the ability receive and review records and to consent to the disclosure of medical records.

3. **Advance Care Plan**. Also commonly called a Living Will is a person's statement or declaration (if he or she wants to make it) of how he or she desires to be treated (or not treated) under certain circumstances. It usually covers terminal conditions, comas or a persistent vegetative state, and other extreme medical conditions. Degrees of care, when to cease care, and whether or not to provide food and/or water are often covered. Many people set forth their desire not to be left on machines indefinitely and/or not to have heroic medical intervention

in specified circumstances or conditions. Sometimes other documents, such as a Do Not Resuscitate (DNR) order is also signed.

Estate Planning Issues

1. Introduction. Estate planning for one who is becoming disabled or who is elderly has a different dynamic than estate planning for younger individuals. Factors include the adult children and possibly adult grandchildren, a set way of life (independence issues), a focus on cash flow and management of expenses, reduced risk of a "second" marriage, and less time remaining for any estate tax planning to be accomplished. The management of the individual's cash flow is often of great importance.

2. How property passes on death. To understand how to advise the person, it is important to understand the four ways property passes upon death.

(a) Beneficiary Designation, POD, TOD - Life insurance, retirement plan, accounts, CDs, etc.

(b) Operation of Law – Joint tenancy with right of survivorship, tenancy by the entireties

(c) By Will – Everything else not passing by beneficiary designation or by law passes by the client's Will (or under a **funded** Revocable "Living" Trust)

(d) Intestate Succession under Statute – If the client dies without a Will or funded Trust, state law applies its intestate succession rules. Oftentimes this means that the surviving spouse takes everything if there are no children, but only one-half if there is a single child, and only one-third if there is more than one child. The children divide the remaining amount. If the client is not survived by a spouse, then the children take equally by representation. Representation means that the children of a deceased child take what would have been the deceased child's share if he or she had survived.

3. Second Marriages. One of the most difficult situations to address occurs when there is a second marriage. This is because more often than not, one spouse brought more wealth to the marriage than the other. This creates several competing desires for the estate plan.

4. Distribution Outright or Distribution to Trust? One of the primary questions to be answered is whether to distribute the decedent's wealth outright to his or her beneficiaries or to place the wealth in trust for them. Each option has pros and cons. Many times the determination lies in a combination of factors including the size of the estate; whether the beneficiary has demonstrated the ability to make good financial decisions, both with regard to investing and expenditures; and the character of the beneficiary's spouse.

5. Will or Revocable Trust? In preparing an estate plan, there are two main testamentary documents that can be utilized, a Will and/or a Revocable "Living" Trust. Which is best for a particular person or couple depends on what they are trying to accomplish. Both a Will and a Revocable Trust can be revised by the client at any time prior to death or incapacity. Both documents set forth the process, powers and plan for the distribution of the client's wealth after death.

(a) Passive Will or Active Revocable Trust. A Will does not become active until the individual dies. A Revocable Trust is active and must be maintained during the individual's lifetime and after death. A Revocable Trust must be funded with the client's wealth prior to his or her death. This involves the re-titling of assets into the name of the trust. Commonly, brokerage accounts, bank accounts and real property are re-titled in the name of the Revocable Trust. Of course, the re-titling of assets places some additional cost on a plan with a Revocable Trust rather than a plan with only a Will.

(b) To Probate or Not to Probate. Assets that pass by the Will must go through probate. Assets that pass by the Revocable Trust do not go through probate. Many people desire to have their estate avoid probate. It is perceived that probate is a costly procedure that can significantly extend the time it takes to distribute assets and close an estate. While this is true in many states, it is not necessarily true in Tennessee.

The costs of probate in our area are not excessive and much of the work can be done by the estate's personal representative (Executor). Furthermore, many of the estate settlement activities that involve an attorney when a Will is probated still occur when the distribution is guided by a Revocable Trust. The probate of the Will and notice of the probate starts the clock for outstanding creditors to come forward. If they do not present their claims within a certain amount of time, their claim is barred. The Revocable Trust has no such time limit or barring of claims.

In addition, when a client utilizes a Revocable Trust, this does not mean that a Will is not required. It is customary for a client to have a "pourover Will" in conjunction with a Revocable Trust. An important part of the pourover Will is to name the estate's personal representative. Even though the pourover Will is filed with the court, it says nothing more than that everything the client possesses (and failed for whatever reason to re-title in the Trust) passes through the Will and is "poured over" into the Revocable Trust.

(c) Maintain Privacy. Another use of a Revocable Trust is to maintain privacy. Because the Revocable Trust is never probated, it does not become a public document. Thus, the distribution plan does not become public knowledge.

(d) Disability. A Revocable Trust can be very effective to manage one's affairs upon his or her disability, thus avoiding the need of a Conservatorship. The Trust provisions provide for a successor Trustee to assume the management responsibilities. This provides a relatively seamless transition in the management of money and other affairs. On the other hand, a client with a Will and no Revocable Trust normally relies on a durable power of attorney to accomplish the same results.

Conservatorship

Once a Conservatorship process begins, lawyers, families, individuals, providers and other professionals involved should concern themselves with the conservatorship adjudication, the appointment of the Conservator, and the powers granted to the Conservator.

1. Definitions. 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.

2. 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.

3. 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.

4. 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.

5. Who May Be Appointed. The statutes instruct that the determination of conservator is to be made 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.

6. 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 in some circumstances and when 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.

7. What the Respondent Can 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.

8. 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.

9. 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 bond if it finds that it would be unjust or inappropriate in the situation.

10. 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.

SPECIAL NEEDS TRUSTS

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)
        - Medicare
    - Needs-Based type
        - Eligibility determined on disabled person's monthly countable income and resources

- Supplemental Security Income (SSI)
- Medicaid

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.
   - 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
   - If properly drafted, proceeds will not affect government benefits as funds are held by a Trust

4. Who Should Establish an 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 we help without affecting government assistance?"

5. What Does an 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 an SNT Work?
   - Stipulates how the monies contributed to the Trust are disbursed for the beneficiary
   - State- & Federal-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. Most lawyers are NOT familiar with complex Medicaid rules.
   - Names a Trustee who is responsible to carry out terms of the Trust Agreement

7. Third-Party SNT

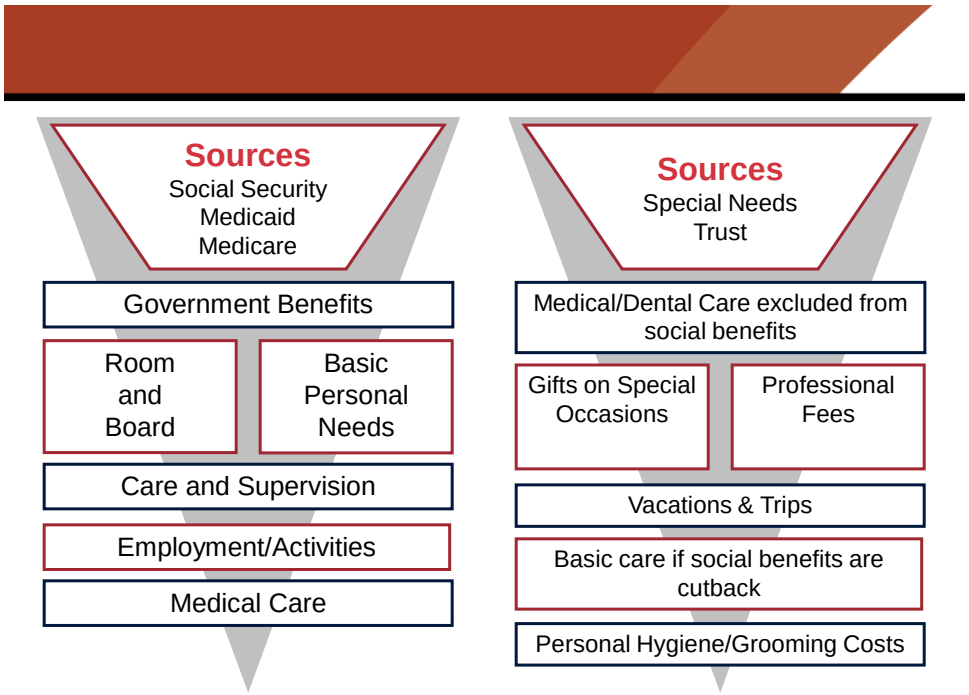
- Dependent upon state law, the Trust can be set up by anyone
- Beneficiary and donor can be any age
- Donor sets up Trust by gifting into an Irrevocable Trust, or at death, as part of his or her estate plan
- No need to pay back Medicaid if properly drafted
- Trust provides for remainder beneficiary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

8. 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/friends can be named as Trustee

9. Alternate Methods of Funding a Third-Party SNT

- Lump-Sum Payment(s)
- Annual Payments
- Life Insurance
- Here is another way of looking at the value of a Special Needs Trust.



- On the left you see the basic sources of government-provided benefits: Social Security, Medicaid and Medicare. It is through these typical programs that basic medical and personal needs are met, along with essential care and supervision, employment and other related activities for the special-needs person.

- On the other hand, if we look at the graphic on the right, by using a Special Needs Trust, two things happen:
  - All the benefits in the left graphic are still maintained, but you are also able to provide medical and dental care that may be excluded from social (i.e., government) benefits.
  - Additionally, the Special Needs Trust can make allowances for gifts on special occasions like birthdays and educational or developmental milestones.
  - Funding personal hygiene and grooming costs can be part of the Trust's objectives.

What Expenses *Can't* a Special Needs Trust Pay For?

Special needs trusts are designed to supplement, not replace, the kind of basic support provided by government programs like Medicaid and Supplemental Security Income (SSI). Special needs trusts pay for comforts and luxuries -- "special needs" -- that could not be paid for by public assistance funds.

This means that if money from the trust is used for food or shelter costs on a regular basis or distributed directly to the beneficiary, such payments will count as income to the beneficiary. This can affect eligibility for government benefits like Medicaid and SSI. One of the trustee's most important jobs is to use discretion in making distributions from the trust so as not to jeopardize the beneficiary's eligibility for these government benefits.

If the beneficiary receives SSI, here are some basic expenses that should not be paid through a special needs trust without consultation with a special needs attorney.

- Cash given directly to the beneficiary for any purpose
- Food or groceries
- Restaurant meals (except if given as an occasional gift)
- Rent or mortgage payments
- Property taxes
- Homeowners or condo association dues
- Homeowners insurance if the insurance is a mortgage requirement
- Utilities such as electricity, gas, and water
- Utilities hookup or connection charges

However, many of these payments will only cause a one-third reduction in SSI benefits. The trustee may determine that the benefit of the trust making these payments far outweighs the loss of income.

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 up your account in your home state or in any state that provides for ABLE accounts.

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 (called a STABLE account in Georgia) is that disabled individuals can have as much as $100,000 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.

Please note that account balances exceeding one hundred thousand dollars ($100,000) will be considered a resource of the Account Owner for purposes of the Supplemental Security Income program under title XVI of the Social Security Act.

The lifetime Contribution limitation for ABLE TN is currently three hundred fifty thousand dollars ($350,000) and for STABLE in Georgia, the lifetime Contribution limit is currently $468,000.

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. If you are employed, you may be able to contribute an additional $12,140 from your income – increasing your total yearly contribution limit to $27,140. 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 more info, see http://ablenrc.org

Contact Information for Mr. Pierce:

Martin L. Pierce, Attorney
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Martin@PierceHuismanLaw.com
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