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Special Needs Trusts | Elder Law | Long Term Care Planning | Medicaid | Probate | Wills & Trusts
Incapacity Planning | Guardianship | Developmental Disabilities | Veteran's Benefits

What You Should Ask your Special Needs Attorney

By Travis Finchum
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There are several goals of this discussion. First is to provide you a broad understanding of the topics you should be considering for your loved one with special needs. You will need to go and do more research on your own and I will try to direct you to reliable sources for this information. Next, the more prepared and knowledgeable you are, the more efficient your time should be with your lawyer. You don't want to go into that first meeting with no questions; not even knowing what to ask. With all of the free resources out there, you should already have the answers to the easy questions. You just need to know where to find them. Why would you want to pay a lawyer his or her hourly rate to tell you answers to the easy questions that you can find in 5 minutes on your own. Save the tough questions for the expert. Finally, the more efficient you are with your lawyer, the less time it will take for him or her to help you accomplish your goals, which should result in lower legal fees for you. Come right out and say something like this at your meeting: I want to make this as easy as possible on you so if there are things I can do to save your time, are you willing to work with me on our fees. Every dollar I have is very important to my loved one's future.

We will break the discussion into several sections:

- Personal and professional questions to ask the lawyer,
 - public benefits for the special needs person,
 - legal planning for the parents or caregivers, and
 - legal planning for the individual with special needs.
1. First, the personal questions (keep this part short – you should already know the answers to most of these questions and you are paying for these answers). We are just trying to gauge the personality of this person and see if you will be able to work with them and trust them with your planning.
 - a. What is your legal background?
 - b. How long has you been working in this field?
 - c. What made you get into this field?
 - d. Do you serve on any organizations/boards that serve individuals in the area that serves people like my child?
 2. Next, the professional questions (again, keep it short):
 - a. How many cases have you handled planning for a family with a special needs family member?
 - b. Have you seen situations similar to mine before?
 3. Then questions more specific to your situation: I need money (income) and services (medical and otherwise) for my family member.
 - a. Social Security – do we qualify for a monthly check from Social Security?
 - i. Is SSI (Supplemental Security Income) an option for monthly income – could be up to \$750/month (in 2018)?
<https://www.ssa.gov/ssi/text-over-ussi.htm>
 - ii. Is Social Security dependent’s benefits available for a minor child and spouse caring for my child (is a parent getting a Social Security check – either retirement or disability)?
<https://www.ssa.gov/planners/retire/applying7.html#h0>
 - iii. Are Social Security survivor’s benefits available — has a parent died?
<https://www.ssa.gov/benefits/survivors/>
 - iv. Are Social Security Childhood Disability Benefits (CDB) available for a disabled adult child – is a parent of a disabled child retired, disabled or deceased? <https://www.socialsecurity.gov/pubs/EN-05-10026.pdf>

- v. Has my special needs family member worked enough to vest in the Social Security disability (SSDI) or retirement (RIB) programs?
<https://www.socialsecurity.gov/disabilityssi/>
 - vi. You should go onto Social Security's website – www.socialsecurity.gov – and open an account for every person with a Social Security number. There you will find work history and if a person is getting Social Security benefits an explanation of their benefits.
 - vii. A minor may not be eligible for SSDI or RIB benefits because they have not worked and many not be able to get CDB benefits because both parents are still alive, not retired and still working. They also may not be eligible for SSI because until the minor reaches age 18 there is a “deeming” or counting of the parents’ income and resources against the minor and thus the minor may not qualify financially. This deeming stops when the minor turns age 18. If your loved one is nearing or at age 18, SSI should be strongly considered. It is monthly cash and comes with Medicaid medical coverage.
 - viii. Most Social Security benefits can be applied for online at www.socialsecurity.gov or at your local Social Security office by appointment - <https://secure.ssa.gov/ICON/main.jsp>
- b. What Medical coverage is available for my loved one?
- i. If the individual is eligible for an SSI check (see above) they automatically get Florida Medicaid medical coverage.
<http://www.myflfamilies.com/service-programs/access-florida-food-medical-assistance-cash/medicaid>
 - ii. If SSI isn't an option, can we still get Medicaid medical coverage through an application with the Florida Department of Children and Families? <http://www.myflfamilies.com/service-programs/access-florida-food-medical-assistance-cash/medicaid>
 - iii. Can we qualify for Family Medicaid (there is no disability or asset test, only household income requirements)? If you can get this Medicaid the whole family may be covered. Must have a minor child in the household. <http://www.myflfamilies.com/service-programs/access-florida-food-medical-assistance-cash/medicaid>

- iv. Can we get onto a Medicaid Waiver program? The big one is administered through the Agency for Persons with Disabilities. <http://apd.myflorida.com/ibudget/> This Waiver program comes with medical coverage as well as other services for the individual with an intellectual or developmental disability. There are other waiver programs too. <http://www.dcf.state.fl.us/programs/access/docs/ssifactsheet.pdf>
 - v. Is Medicare available now (unlikely) for my loved or in the future (very likely)? <https://www.medicare.gov/people-like-me/disability/getting-medicare-disability.html>
 - vi. Is my loved one eligible for medical coverage as a dependent of a Veteran? https://www.va.gov/opa/publications/benefits_book/Chapter_1_Health_Care_Benefits.asp
 - vii. Are they covered on your personal group insurance you may get through work?
 - viii. Should you look for a private insurance plan through the exchange. www.healthcare.gov ?
 - c. What about other services?
 - i. Are we eligible for services through APD (Agency for Persons with Disabilities)? <http://apd.myflorida.com/>
 - ii. Are there local organizations, including non-profits that provide services to individuals like my loved one?
4. We need to discuss your estate plan.
- a. Just like the flight attendants always instruct: “If you are traveling with small children, put your oxygen mask on first before helping others.” You need to be covered first to then be able to focus on your loved one.
 - b. Make sure you have someone properly designated to make medical and financial decisions for you, if you become incapacitated or disabled. You do this through a Healthcare Surrogate and a Durable Power of Attorney.
 - c. If your child is still a minor, you need to designate a legal guardian to serve until they are 18 years of age. Then consider an adult guardianship discussed later under planning for your loved one.

- d. You may have a lot of resources or not so much. You are an integral part of this entire system of support for your loved one. Probably the greatest fear of a parent with a child with special needs is who will step in when I am gone. Will they care as much as I do? Will they be able to ensure that my loved one is safe, happy and fulfilled?
- e. Plan to have any resources you want to leave for your loved one to be held in a Special Needs Trust (a “SNT”). This type of SNT is different than the type that would be established with funds already belonging to the beneficiary (like through a personal injury award or an unplanned inheritance already received).
 - i. There are many ways to do one of these types of SNT’s.
 - ii. A SNT can be embedded within a Last Will and Testament or another Trust, such as a revocable living trust. These will go into effect later, usually upon the death of the person setting it up.
 - iii. A SNT can be set up as a stand-alone Trust so that others can start putting funds in the trust now or direct any inheritance they want into the SNT through their estate plans. This one is good if multiple individuals may want to leave funds for the special needs beneficiary.
 - iv. You may also want to consider opening an account within an existing Trust for disabled individuals, called a Pooled Trust, but this one is different than a d4C Pooled Trust discussed later. This Pooled Third Party SNT can be very cost effective and provide a professional alternative for oversight at very low cost. They do not have any Medicaid payback on the death of the beneficiary like some other Special Needs Trusts.

5. Consider legal planning for your loved one.

- a. Consider whether you will need to establish a guardianship for your loved one when they turn 18 years of age.
- b. Your loved one may be capable of signing advance directives (Healthcare Surrogate/Medical Power of Attorney) for medical decision-making or a Durable Power of Attorney for financial decision-making after they turn 18.
- c. Recognize that if they sign advance directives or a power of attorney that they still retain all of their legal rights so therefore can revoke or rescind these documents as well as still be susceptible to influence or coercion

from bad actors. Sometimes the individual has good defenses and will continue to rely on trusted family members or friends so you may wish to try the advance directives first. You can always resort to guardianship later if you need to. An excellent resource on this subject is “Lighting the Way to Guardianship and other Decision-Making Alternatives” published by the Florida Developmental Disabilities Council. This manual and program delves into the guardianship process but also the alternatives that exist to guardianship which may be less costly, intrusive or restrictive. The manuals are free on line.

<https://www.fddc.org/sites/default/files/file/publications/Guardianship%20Family%20Manual%200.pdf>

- d. A guardianship (or guardian advocacy for individuals with an intellectual or developmental disability) proceeding entails removing certain legal rights and delegating those rights to another (the guardian). Therefore, the individual no longer has the right to do certain things – like make medical decisions, determine where they will live, handle their finances, enter into contracts, etc.
 - i. A Guardianship is an adversarial legal process – the person who is the subject of the guardianship proceeding (the “alleged incapacitated person” or “AIP”) will have a lawyer appointed by the court. The person filing for the guardianship (the “petitioner”) may not be required to have a lawyer if the AIP has an intellectual or developmental disability that qualifies under the developmental disabilities statute – chapter 393 of the Florida Statutes. It is likely still a good idea for the petitioner to be represented by legal counsel.
 - ii. Guardianships are serious matters – we are attempting to take away a person’s civil rights. The proper legal process must be followed (“due process”).
 - iii. Often court filing fees can be waived if the AIP has no resources. Also the AIP’s court appointed attorney can be paid by the state if the AIP has no money.
 - iv. There will be some expenses for the petitioner. Depending on the local circuit rules there may need be: background criminal checks

- that require fingerprinting and a fee for the check, credit reports or other requirements.
- v. The AIP will be “served” by a process server and should be read the legal filing. An in-person hearing is required and the hearings are recorded.
 - vi. The court will determine which civil rights should be removed from the AIP and given to the Guardian. Any rights not removed are retained by the AIP.
- e. If your loved one has some resources – maybe from a personal injury award, gifts from family members, or an inheritance – consider an ABLE account or a Special Needs Trust to hold the funds.
- i. ABLE Accounts are tax-free savings accounts that allow funds to be accumulated for a person with a disability while excluding the funds in the ABLE account for eligibility for most government assistance programs (SSI, Medicaid, housing assistance, food assistance).
 - ii. Florida’s ABLE program can be found at www.ABLEUnited.com. This is where you can open an account and find lots of information about ABLE accounts.
 - iii. There are two types of Special Needs Trusts (SNT’s) that can be useful for holding larger sums of money. One is an Under Age 65 Special Needs Trust, also called a d4A Trust (after the last 3 digits of the federal law that permits these types of trusts – 42 U.S.C. 1396p(d)(4)(A)). For this type of trust you will definitely need an attorney who is very familiar with SNT’s to help you understand all of the complexities of this trust and to draft the rather sophisticated legal document.
 - iv. The other type of SNT is called a Pooled Trust or a d4C SNT (after the same federal law). This trust is established and overseen by a non-profit organization so it is much quicker and easier to set up an account for a disabled individual within one of these pre-existing trusts. <http://www.guardiantrusts.org/available-trusts/guardian-pooled-trust/>
 - v. Both SNT’s and ABLE Accounts allow for a beneficiary who is eligible for programs like SSI, Medicaid and Medicaid Waiver programs to

have money over the resource limits for these programs, as low as \$2,000, and still be eligible for the program. You get the best of both worlds, keep the program and the money.

- vi. Some disabled individuals may benefit from both an ABLE account and a SNT since they can work in conjunction with each other. Ask about both an ABLE Account and a Special Needs Trust.
- f. A competent adult, even one with an intellectual or developmental disability, should consider a Last Will and Testament if they have any resources. So all the things we talked about for you for your future planning can mostly apply to your adult son or daughter as well.

More materials and the electronic version of these materials, which has the working hyper links to all of the websites referenced here can be found at:

<http://specialneedslawyers.com/blog/>

If the links don't work when you click on them you may need to type them but they should all get you to the right area.