



# Estate Planning for Individuals with Special Needs

# Special Needs Estate Planning

- Benefits involved
- Guardianships or Power of Attorneys
- Estate planning
- Special Needs Trusts/Wholly Discretionary Trusts
- STABLE accounts

# What Benefits are Involved?

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SSI/SSDI/SS

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Medicaid/Medicare/Private insurance

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TANF/Food stamps

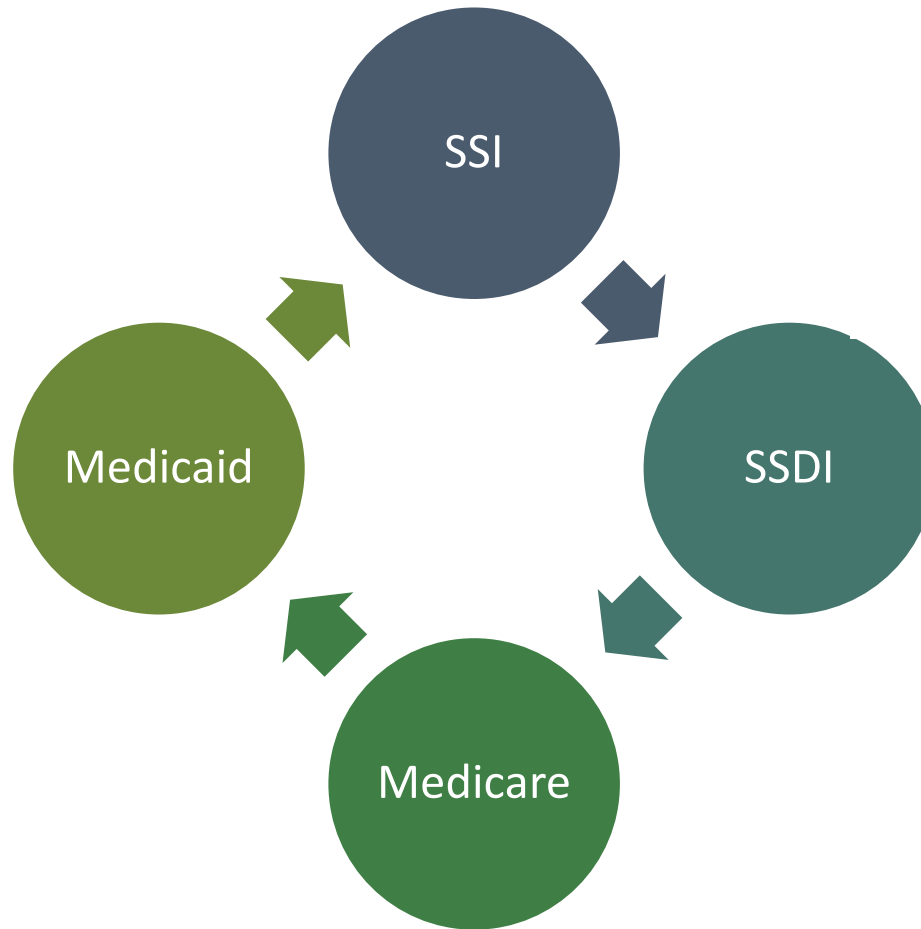
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HUD subsidized housing

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Medicaid DD waiver

# BENEFITS



# Supplemental Security Income and Medicaid

- These are needs-based benefits which look at resources and income
- Countable resources must be below \$2,000 for both programs
- Income must be low
  - \$914 maximum amount received while on SSI
  - Deeming issues for minors

# Exempt Resources

- Household goods
- Residence
- One vehicle
- Irrevocable funeral contract
- Life insurance w/ total face value  $\leq$  \$2000
- Exempt trusts/STABLE accounts

# Value of Benefits

- SSI--\$914 per month maximum
- SSDI—disabled adult child benefits, if child was disabled before age 22
- Medicaid
  - Medical/hospital care
  - Prescriptions
  - Basic dental/vision
  - Residential/institutional
  - Medicaid waiver through DD Boards—SELF, Level One, Individual Options

# Guardianship Requirements

- Ward incompetent
- Guardianship necessary
- No less intrusive method



# Guardianship Terms

- Guardian
  - Person appointed by Probate Court to act on behalf of Ward
- Ward
  - Person for whom a guardian as been appointed
- Incompetence
  - Probate Court Order/Determination stating you have mental impairment caused by mental/physical ailment; developmental delay; chronic substance use

# Guardianship Terms cont.

- Incompetence cont.
  - Further, the person is incapable of:
    - Taking care of self and/or property,
    - Meeting legal obligations.

# Reasons for Guardianship

- Managing funds and property
- Medical
- Placement
- Programming
- Education

# Types of Guardians

- Natural Guardian
- Guardian of Person
- Guardian of Estate
  - If estate is more than \$25,000
- Limited Guardian
- Interim Guardian
- Emergency Guardian

# Who is the Guardian?

- Over 18
- Competent
- Guardian of Person – no residence req't
- Guardian of Estate - Resident of state in general
  - Unless named in written document such as Will, Durable POA or notarized statement
  - Must be bonded by insurance company
- “Suitable”
- In general, agency can't be guardian
- Guardian must not have been charged or convicted of crime of theft, physical violence, sexual, alcohol, or substance abuse

# Nomination of Guardian

- Parent may appoint guardian of minor in Will
- Nomination of guardian for adult who is incompetent
  - Written designation – e.g. power of attorney
  - Witnessed or Notarized
  - Nomination in Will is not sufficient

# Out of State Guardian of Estate

- Court may appoint if nominated in
  - Will by a parent of a minor, or
  - Durable Power of Attorney, or
  - writing that is notarized and witnessed (2111.121), or
  - if selected by a minor 14 years old or older (2109.21)

# Procedure of Application

- Application – Probate Forms

[https://www.supremecourt.ohio.gov/legalresources/rules/superintendence/probate\\_forms](https://www.supremecourt.ohio.gov/legalresources/rules/superintendence/probate_forms)

- Notice to alleged Ward and next of kin

- Next of kin could include spouse, children, parents, and siblings.

- Depends on who is living, e.g., if a child is applying to be guardian, child must notify other siblings and spouse of parent.
- The other family members have a right to file a competing application.



# Procedure of Application

- Investigation
  - Personal contact by investigator
  - Notice of rights
  - Notice of hearing
  - At least 7 days prior to hearing

# Hearing Rights of Potential Ward

- Counsel if requested
  - At Court expense if indigent
- Independent Expert Evaluation
  - At Court expense if indigent
- Family/Friends present
- Present evidence
- Cross-examine
- Transcript for appeal
  - At Court expense if indigent

# Hearing Procedure

- Magistrate v. Judge
- Guardian must prove all elements
  - Incompetence
  - Need for Guardian
  - No less restrictive alternative
  - Guardian suitable
- Clear and convincing evidence

100%

Beyond Reasonable Doubt



Clear and Convincing

50%



Preponderance

Probable Cause

Suspects

# Special Considerations

- Voting—the ward can vote, if able
- Driver's License—ward can drive, if able
- Marriage—need court and guardian approval (Guardianship of person terminates upon marriage)
- Wills—need court approval

# Post Appointment Reviews

- Every Two Years (see local rules)
- By Request of Ward (every year)
- Motion to Review (see local rules)
- Complaints
  - Filed by Ward or family

# Probate Court

- Is the Superior Guardian
- Guardians always subject to Probate Court Orders and Rules

# Guardianship Duties

- Act in best interests of ward
- Follow all Legal Requirements
- Submit all required reports
- Comply with court orders
- Get mandated training
  - Check local rules



# Guardianship Duties

- Change of residence
  - Notice to Court if not more restrictive
  - Prior Written Permission if more restrictive
- Location of Legal Papers
  - Check local rules
- Report Changes in Ward's status

# Guardianship Duties

- Complaints
  - Assist ward
  - Provide Response
  - Follow Court orders
- Report abuse/neglect
- Representative Payee for Social Security
  - Guardian of Person can apply to be Rep Payee
  - SS is not reported to Court since SSA administers

# Understanding Ward's Needs and Wants

- Must meet at least quarterly
- Person centered planning

# Termination or Removal

- Ward no longer incompetent
  - Proven by SEE
  - Termination
- Guardian resigns
  - New guardian appointed
- Guardian removed
  - Best interest of ward

# Guardianship Avoidance

- Avoid Probate Court if possible
  - Saves time and money
  - Privacy

# Guardianship Avoidance

- Healthcare Power of Attorney
  - Medical decisions and placement
- Durable General Power of Attorney
  - Financial, business, real estate, etc.
  - Can be as broad or narrow as you want
- Advance Directive for end-of-life care
- Mental Health Directives

# Special issues with Mentally Ill

- Signed POA
- Become institutionalized or in psychiatric hospital
- Refuses doctor to speak to agent
  - Doctor must follow patient wishes because patient has not been deemed incompetent
- Only option is to apply for a guardianship
  - Can still keep DGPOA, if that has not been revoked

# Formal Tools for Estate Planning

- Will (Last Will & Testament)
- Trust
- Durable (Financial) Power of Attorney
- Health Care Directives
  - Living Will
  - Health Care Power of Attorney



# More Documents to Consider

- HIPAA Release
- DNR
- Organ Donation
- Ohio Appointment of Representative for Disposition of Bodily Remains

# Special Needs Estate Planning

- First Party Trust (Special Needs Trust)
- Third Party Trust (Wholly Discretionary Trust)
- Pooled Trusts
- STABLE accounts

# First Party Trusts

- Also called Medicaid Payback Trusts or d4a trusts
- 42 U.S.C. 1396p(d)(4)(A)
- Used for funds which disabled person owns
  - Inheritance
  - Litigation proceeds
  - Child support in *Castle* cases
  - Improperly drafted third party trust
  - Large Social Security back payment

# First Party Trusts—Basic Requirements

- Established by:
  - Beneficiary, if competent
  - Parent
  - Grandparent
  - Guardian
  - Court
- Beneficiary must be disabled and under age 65
- Must have a payback provision at beneficiary's death; not state specific
- Must be for the sole benefit of the beneficiary
- Trustee must have broad discretion

# Third Party Trusts

- Used for Estate Planning purposes
- Established by a third party (parent) for the benefit of the disabled beneficiary
  - Anyone can contribute
- Ohio Revised Code 5163.21 and 5801.01(Y)
- Assets funding the Trust should never be owned or possessed by beneficiary
- No Medicaid payback provision
  - At beneficiary's death, remaining assets given to whoever grantor designates.

# Third Party Trusts cont.

- Third party trust can be used with revocable family trust
  - You can include your non-disabled children with your overall estate plan
- Advocacy provision
  - Having a care coordinator in place to help Trustee after you pass away

# Care Coordination/Advocate

- “Feet on the ground” person for Trustee/family
- Speaks to and visits with beneficiary over concerns
- Reports back to Trustee and family members
- Provides support for medical and placement issues
- “Buffer” between family members

# Securing Care Management Services

- The trustee can act as a care manager, or
- A professional Care Manager can be the eyes and ears of a trustee who lives at a distance or does not have the knowledge to deal with appropriate benefits, services, placement, etc.
- The Care Manager fulfills the role that was often carried out by the parents







# Professional Care Managers

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- Health and human services specialists who typically help families access care for older relatives or those with disabilities
- The Care Manager acts as a guide and advocate -- identifying problems and offering solutions, while encouraging as much independence as possible



## What Else Can Care Managers Do?

- Assist with and monitor government benefits
- Make regular visits to the beneficiary
- Recommend appropriate disbursements from the Trust
- Recommend placement, providers
- Evaluate adequacy and quality of existing placement, services, and providers
- Prepare an annual care plan for the Trustee

# Professional Care Manager

- Hickman Lowder Lidrbauch & Welch has a Care Coordinator (Janelle Leonard) on staff that may be used by a Trustee or successor Trustee to serve as a Care Manager
- She is available to work with Trustees and successor Trustees for the benefit of special needs trust beneficiaries
- Trust resources may be used to pay for the cost of her services



# Important Considerations for both First and Third Party Trusts

- If the beneficiary receives SSI and trust assets are used to pay food and shelter, the monthly SSI payment maybe reduced.
- The disabled beneficiary cannot serve as the Trustee.

# Pooled trusts

- Irrevocable trust
- Managed by a nonprofit organization(2 in Ohio – Community Fund Ohio and Disability Foundation)
- Can be third party or first party
- Useful for people who have no trustee
- In Ohio, an aged 65+ individual can contribute
- Red-tape dealing with a nonprofit

# ABLE/STABLE accounts

- Like a 529
  - Can rollover 529 to ABLE (limited to the contribution limits below)
- Medicaid Payback (to the point of opening of account)
- \$17,000 annual contribution limit
- If employed, can contribute additional \$13,590
- \$100,000 maximum before becomes a countable resource
- Maximum lifetime contribution is \$517,000

# ABLE/STABLE accounts

- Must be considered disabled under Social Security or be proved by their standard.
- Must be disabled before the age of 26.
- SSA and ODJFS Oversight
  - Notice of large or questionable distributions
  - Documentation of purpose of distributions
- Overall, STABLE accounts are a useful tool, especially for SSI recipients.
  - Provides for more financial freedom overall, and **food and shelter expenses can be paid.**



Questions??





Thank  
You

# Hickman **Lowder**

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