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Disability Planning and Supplemental Needs Trusts

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Planning for Disability

- Who can nominate a guardian?
- Where should nomination occur?
- Guardians nominated by a parent or spouse are given priority of appointment by the probate court





Planning for Disability

When disabled person turns 18:

- Do they have legal capacity to make decisions about personal affairs or healthcare?
- Do they have money that needs management?



A woman with brown hair tied back is sitting on a blue couch, leaning forward and coloring a drawing on a piece of paper. She is wearing a light green long-sleeved shirt. To her left, a young girl with blonde hair in pigtails is also coloring, wearing an orange shirt. To her right, a young boy with brown hair is sitting and holding a green marker, wearing a grey and white striped polo shirt. They are all focused on their coloring. The background shows a living room with a white wall decorated with several orange circular ornaments, a potted plant, and a wooden shelf.

Can Guardianship and Conservatorship be avoided?

If disabled adult has capacity:

- **Durable Power of Attorney** to appoint agent to make financial decisions
- **Health Care Proxy** to appoint agent to make health care decisions
- **HIPAA Release** to allow access to medical information





Planning for Guardianship and Conservatorship

If a guardian or conservator is needed:

- Start process before or when they turn 18
- Consider consulting with an attorney to assist with the process
- Talk with their medical providers
- If developmentally disabled, will need Clinical Team Report completed
- If other disability, will need Medical Certificate completed





Planning for Guardianship and Conservatorship

- Guardian or conservator may seek appointment of co-guardian or co-conservator to provide for continuity as guardian or conservator ages.
- Parents can nominate guardian or conservator of adult disabled child in their wills.

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Planning for a Disabled Person's Inheritance



Outright inheritance vs.
inheritance in trust

Maintaining eligibility
for public benefits

Management of
inherited assets



Planning for a Disabled Person's Inheritance

Estate plan should direct a disabled person's inheritance to a supplemental needs trust (SNT) for the disabled person's benefit.

- Assets in the SNT will be available for disabled person's benefit, and allow them to maintain eligibility for public benefits such as MassHealth and SSI



Why not leave everything to the sibling?

- Lack of control
- Creditors
- Divorce
- Increases the sibling's assets (e.g. income taxation, financial aid, taxable estate)





How is a Supplemental Needs Trust (“SNT”) created?

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- Parents or other relatives can create a SNT by working with an attorney who specializes in disability planning
- Non-profit agencies manage pooled disability trusts
 - PLAN of Massachusetts and Rhode Island
 - ARC of Bristol County
 - Guardian Trust





First-Party vs. Third-Party Trusts

First-Party / "Self-settled" trust

- Funded with the disabled person's own money – e.g. savings, employment income, outright inheritance, legal settlement, lottery winnings
- (d)(4)(A) Trust
 - Established by the disabled person, disabled person's parent or grandparent, or a court
 - Must be established and funded before disabled person turns 65
- (d)(4)(C) Pooled Trust
 - Managed by non-profit agency
 - No age limit to apply for trust account*





Self-settled trusts must include a **Medicaid payback provision**:

Upon beneficiary's death, state Medicaid agency can recoup money from the trust up to the amount of Medicaid benefits it paid out during the beneficiary's life.

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First-Party vs. Third-Party Trusts

Third-Party Trust

- Funded with funds from a third party (e.g. a parent or other relative)
- No Medicaid payback requirement
- Disabled person's own funds cannot be contributed to a third-party trust
- Stand alone Supplemental Needs Trust; Testamentary Supplemental Needs Trust; Continuing trust created under third-party's intervivos trust; (d)(4)(C) Pooled Trust



A Note on (d)(4)(C) Pooled Trusts

- For three decades, Massachusetts has permitted individuals age 65 and over to create and fund pooled (d)(4)(C) trusts after age 65 as permissible transfer not subject to penalty
- A law was passed and went into effect March 1, 2024 is not considered a permissible transfer and is subject to a penalty period as a transfer of assets for less than fair-market value if the transfer occurred within the MassHealth look-back period.
- September 6, 2024 Governor Healey signed into law a provision that restores the viability of pooled trusts for seniors aged 65 or older. This new law (added to Section 28 of G.L. 118E) restores penalty rule that went into effect March
- It goes into effect on December 6, 2024

Supplemental Needs Trusts: General Rules

- Discretionary trust. Trustee must have sole discretion to make payments of income or principal to the disabled person ("beneficiary") or on their behalf.
- Beneficiary can have no right to amend, revoke, or demand payment from the trust.
- Disabled person must be sole beneficiary during his or her life, though there can be remainder beneficiaries of trust.
- Beneficiary cannot serve as trustee.
- Trustee can be a relative, trusted friend, or professional/independent trustee, such as a lawyer or bank.



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Supplemental Needs Trust as Beneficiary of Retirement Assets

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SECURE Act & SECURE Act 2.0

- Impacts inherited retirement accounts
- Restricts the ability for beneficiaries to “stretch” retirement distributions over their lifetime
- Now, most non-spouse beneficiaries of inherited retirement benefits must withdraw all retirement funds within 10 years





Supplemental Needs Trust as Beneficiary of Retirement Assets

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SECURE Act & SECURE Act 2.0

- An exception to the SECURE Act rules: retirement benefits payable to a Supplemental Needs Trust
- If retirement benefits are payable to a SNT, distributions can be stretched over the life expectancy of the disabled individual.
- SECURE Act 2.0 allows charities to be named as remainder beneficiaries
- SNT must be carefully drafted and include certain terms in order to qualify for this exception
- Important to consult with attorney who specializes in disability planning if you are planning to name a SNT as beneficiary of a retirement account





Supplemental Needs Trusts: Choosing a Trustee

- Family member
 - Trusted friend
 - Professional trustee (bank, law firm)
 - Pooled trust
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- Legal/financial experience is helpful, but not necessary (can hire advisors)



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Supplemental Needs Trusts: Administration

- Assets held in properly-drafted and administered SNT are not countable when determining eligibility for benefits
- Income generated by SNT is countable only to the extent distributed to the beneficiary
- Best practice: funds in the trust can be paid to vendors or other third-parties directly, rather than distributing money out to the beneficiary directly
- Special rules when beneficiary receives Supplemental Security income (SSI)



Supplemental Needs Trusts: Administration

Examples of Permissible Distributions for SSI*:

Automobile/van	Accounting fees	Acupuncture	Appliances	Public transportation costs
Clubs and club dues	Dental work not covered by Medicaid	Home furnishings	Fitness equipment	Funeral expenses
Gasoline	Haircuts/salon services	Home improvements	House cleaning	Laundry service
Legal fees	Musical instruments	Non-food grocery items (toiletries, paper products)	OTC medications and supplements	Personal care services not covered by Medicaid
Pet care and supplies	Educational Expenses	Travel / vacations	Utility bills	

*Subject to sole-benefit rule



Supplemental Needs Trusts: Administration

Examples of Distributions that will
reduce SSI Benefits:

- Paying for rent/shelter expenses
- Paying for food (e.g. groceries or restaurant meals)
- Cash distributions to the beneficiary
- Paying for a service already paid for by another source
- Distribution not for the beneficiary (i.e., made primarily for the benefit of another person)



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Supplemental Needs Trusts: Administration

- Once trust is funded, must provide notice of the trust to any public agencies from which the disabled person receives benefits (e.g. MassHealth, Social Security, housing authority).
- Once funded, trust will receive its own tax ID number and trustee will need to file income tax returns each year.





ABLE Accounts

- Similar to 529 plans for education.
- Funds can be contributed by the disabled individual or anyone else.
- Must have “qualifying disability” that began prior to age 26.
- Up to \$18,000 per calendar year. If more than \$100,000 accumulates in the account, the excess is countable towards the SSI resource limit, and benefits could be suspended.

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ABLE Accounts

- "Qualified expenses" include assistive technology, housing, basic living expenses, education, transportation and more.
- If ABLE account funds are used on unqualified expenses, may incur penalties.
- Disabled beneficiary may be able to manage account themselves; otherwise, parent or authorized representative can manage for them.
- Funds in ABLE Account are subject to estate recovery upon the beneficiary's death.



Examples

- John and Sally Smith have two adult children, Jack and Jill. John and Sally expect they will leave their children a sizeable inheritance. Jack is disabled, requires assistance with all aspects of financial and healthcare management, and currently receives SSI benefits. He presently lives with Jill, and John and Sally know that Jill will always act in Jack's best interests. John and Sally are setting up their estate plan and want to know the best way to plan for Jack's inheritance.
- Should John and Sally leave Jack's inheritance to him directly with the understanding Jill will help him set up his own trust, to Jill under the condition she promises to always provide for Jack, or directly to a trust for Jack that John and Sally create?

Examples

- Jane Doe's son, James Doe, will celebrate his 18th birthday in a few months.
- James is disabled, does not have legal capacity, and relies fully on Jane to make medical and financial decisions for him.
- James will continue to need support in these areas indefinitely.
- What, if anything, should James and Jane consider to allow Jane to continue supporting James after he turns 18?

Examples

- Tim is disabled and receives SSI and MassHealth benefits
- Tim's aunt left an inheritance of \$40,000 for him in her Will, but did not leave it in a continuing supplemental needs trust or create a stand-alone supplemental needs trust for him so it will go to him outright
- What should Tim do with his inheritance in order to remain eligible for his benefits?

Examples

- Anna is the beneficiary of a Supplemental Needs Trust and receives SSI benefits.
- Anna wants to go on a vacation this winter, to somewhere with a little more sunshine.
- Anna has requested that the Trustee of her trust make a distribution to pay for the cost of her vacation.
- Can the trustee do this without impacting Anna's benefits?



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Q & A & THANK YOU

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