

# Unraveling the Mystery of Conservatorships and Special Needs Trusts

## **Conservatorships – Who, What, Where, When, Why and How?**

Parents have the absolute right to make decisions for their children until they reach the “age of majority” (18 in Tennessee)

*“Parents are the joint natural guardians of their minor children, and are equally and jointly charged with their care, nurture, welfare, education and support . . .”* TCA § 34-1-102

But, what happens when a child with a disability turns 18?

Parents lose the legal authority to make decisions for their child at age 18 regardless of their disability.

So, parents of children with disabilities need to consider whether their child needs a Conservator (a.k.a. Guardian) appointed to assist them with decision making *before* the child turns 18, although a Conservatorship Petition can be filed at any time during the life of the individual with a disability and are often used in Elder Law situations.

### **What is a Conservator?**

A Conservator means “*a person or persons appointed by the Court to provide partial or full SUPERVISION, PROTECTION, AND ASSISTANCE of the person or property, or both, of a disabled person.*” Tennessee Code Annotated § 34-1-101

A Disabled person means “*any person eighteen (18) years of age or older determined by the Court to be in need of partial or full supervision, protection and assistance by reason of mental illness, physical illness or injury, developmental disability or other mental or physical incapacity.*”

So, a Conservatorship is a judicial tool that enables a Court to legally remove SOME decision-making capabilities and transfer them to a surrogate decision-maker for the purpose of protecting the disabled adult’ s person, property, or both.

NOT ALL DECISION-MAKING IS REMOVED

In Tennessee, all Conservatorships are, by their very nature, “limited” conservatorships since the law provides that “*to the extent not specifically removed, the respondent retains and shall exercise all powers of a person who has not been found to be a disabled person.*” TCA § 34-3-107

### **WHAT Decisions are made by the Conservator?**

The decision making authority should be spelled out in the Court Order, and if it is not listed in the Court Order, or reasonably inferred from another right, it has NOT been removed from the individual.

Examples:

Medical decisions - including medication and hospitalization

Educational decisions - including continuing in school beyond 18

Right to Vote - only 3 requirements - 18, Citizen, non-felon

Where the individual will live

### **WHO can be a Conservator, Co-Conservator or Standby Conservator?**

Tennessee statute gives preferences (subject to court determination of what is in the best interests of the disabled person):

- 1) the person or persons designated in a writing signed by the alleged disabled person;
- 2) The spouse of the disabled person;
- 3) Any child of the disabled person;
- 4) Closest relative or relatives of the disabled person;
- 5) other person or persons.

TCA § 34.4-103

### **WHEN should I consider a Conservatorship for my son or daughter?**

Since a Conservatorship does require a Court process, we recommend that you consider this decision BEFORE you need it!

Such as:

doctors appointment,

medical or dental treatment,

medical testing,

IEP decision,

living arrangements.

### **WHERE is the Conservatorship created?**

Actions for the appointment of a conservator may be brought in a court exercising probate jurisdiction ... of any county in which there is venue (in the county of residence of the alleged disabled person.)

TCA § 34-3-101

The Conservatorship CAN be transferred to another county, if the individual moves to another county.

### **Why can't I just have my child sign a DURABLE POWER OF ATTORNEY?**

Several Two problems:

- 1) They may lack competence or capacity to contract
- 2) They will likely be present when you are trying to use the power
- 3) Can't undo a bad deal

### **HOW is the Conservatorship created?**

Our Process...

WHY should I be appointed as Conservator of my child?

CONSERVATORSHIP IS ALSO A VERY IMPORTANT

PART OF YOUR ESTATE PLAN!

## **SPECIAL NEEDS TRUSTS**

Eligibility for Supplemental Security Income:

- 1) Aged (65), Blind or Disabled
- 2) Limited income
- 3) Limited resources
- 4) files an application
- 5) gives SSA permission to contact any financial institutions and request any financial records that the financial institution may have about you.

What is "Income" for SSI purposes?

- Earned Income is wages, net earnings from self-employment, certain royalties and honoraria, and sheltered workshop payments.

- Unearned Income is all income that is not earned, such as Social Security benefits, pensions, State disability payments, unemployment benefits, interest income, and cash from friends and relatives.
- In-Kind Income is food or shelter that you get for free or less than its fair market value.
- (Deemed income no longer applies at age 18)

What is “Limited Income” for SSI purposes?

- Generally, the more income you have, the less your SSI benefit will be. If your countable income is over the allowable limit, you cannot receive SSI benefits. Some of your income may not count as income for the SSI program.

You will want to calculate “Fair Share” of your child’s food and shelter and charge him/her for that portion, keeping records as his/her Representative Payee.

What are “Resources” for SSI purposes?

Resources are things that you own, such as:

- Cash
- Bank accounts, stocks, U.S. Savings Bonds;
- Land
- Vehicles
- Personal property
- Life insurance, and
- anything you own that can be converted to cash to use for food or shelter.

What are “Limited Resources” for SSI purposes?

The limit for countable resources is \$2,000 for an individual

So what if my child has more than \$2000 when we apply for SSI or acquires it later?

Can we just give it away?

When you give away resources to become or remain eligible for SSI, you become ineligible for SSI for a period of 36 months...

When might that matter to YOUR child?

When you are no longer here to take care of this mess for them!

*Estate Planning (Special Needs Planning) is SO important*

Estate AND financial planning designed to provide for and protect a beneficiary with special needs while preserving entitlement to needs-based public assistance programs, if any.

Alternatives to good Special Needs Planning

1) Do Nothing!

*Approximately 60% of Americans die without a Will*

*American Bar Association Study 2004*

Intestate Succession

2) Own Nothing!

*“I have all the Money I will ever need ... if I die by 4:00” Henny Youngman*

3) Disinherit your child with a disability

OR

4) Leave it to a sibling with expectation that they will take care of the child with a disability

Two Problems:

1) They own it outright

2) Subject to - creditors, bankruptcy, personal injury OR DIVORCE

## **SPECIAL NEEDS TRUSTS**

In 1993 Congress enacted legislation that would avoid this harsh result of parents/grandparents disinheriting their children with disabilities.

SPECIAL NEEDS TRUSTS are the most popular estate planning tool for families of children with disabilities and they are sweeping the nation.

### DEFINITION

An agreement under which a person (called a grantor or settlor) places property in the hands of a manager (called a trustee) with language which makes the Trustee legally obligated to follow the terms of the trust document for the benefit of the disabled person (called the beneficiary).

The Property owned by the SNT can be real estate, stocks, collections, a business, bank accounts, cars, life insurance, even a home\*.

\*with potential reduction in SSI

### **Three basic types of Special Needs Trusts**

- 1) “Self -Settled” Special Needs Trust
- 2) “Third Party” Special Needs Trust
- 3) “Testamentary” (within your WILLS)

WHICH TYPE? Depends on source of funds...

### ***SELF SETTLED SPECIAL NEEDS TRUSTS***

This type means the person with a disability has already received a lump sum from a well meaning friend or family member, settlement of a lawsuit, or back payment of an SSA award. (Also known as (d)(4)(A) SNTs)

- 1) Created by: Parent, Grandparent, Conservator, or a Court
- 2) Must be Irrevocable
- 3) Must be used SOLELY for the benefit of the disabled person, but not for shelter or food and cannot be directed by the individual with a disability
- 4) Must include a PAYBACK Provision - that when the person dies, the remaining funds will reimburse TennCare for any medical expenses used for them.

### ***THIRD PARTY SPECIAL NEEDS TRUSTS***

This type of Special Needs Trust is set up for the benefit of the individual with a disability to receive an inheritance or gift from a family member or friend. These are usually “free standing” Inter Vivos (“between the living”) gifts

(Also known as “Supplemental Needs Trust”)

Typically, the Grantor names him/herself as Trustee and another person as Successor Trustee

- 1) Created by anyone who wants to provide for the individual
- 2) Can be revocable

- 3) Wider discretion on spending (beneficiary was never entitled to it) but still must be for their benefit
- 4) Cannot be used for food or shelter or cash to beneficiary
- 5) NOT subject to Medicaid (TennCare) payback
- 6) When the individual dies, remainder goes to whomever grantor designated

Example: Grandfather wants to make sure his grandson who uses a wheelchair and needs PCA services of 30 hours per week will have those hours regardless of TennCare or DIDD funding cuts along the way.

### ***TESTAMENTARY (WILL) SPECIAL NEEDS TRUSTS***

Most parents want to leave their estate for the benefit of their children.

Unfortunately, parents of children with special needs cannot use a “form” Will since to do so will usually cause their child with a disability to inherit a portion of their estate and to disinherit them and hope for the best with governmental benefits and/or siblings is unfair.

Your Wills MUST include a Special Needs Trust for your disabled child or you could actually cause them to become ineligible for the benefits and services they need.

Examples of Testamentary Special Needs Trusts:

You can leave a portion of your estate (ex, 1/3 to each child, with the SNT receiving 1/3)