



Chattanooga
Autism Center

13th Annual Chattanooga Autism Conference

Seminar: September 8, 2023

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- Martin Pierce and John Huisman are taking new clients in all listed practice areas.
- Call Martin or John at 423-648-4303, or email at MPierce@PierceHuismanLaw.com or John@PierceHuismanLaw.com for more information or to schedule an appointment.
- Appointments available by Zoom, telephone, and in person.

PRACTICE AREAS

1. Estate Planning
2. Elder Law
3. Wills & Trusts
4. Probate, Trust, & Estate Administration
5. Special Needs Planning and Trusts
6. Conservatorships & Guardianships
7. Medicaid and VA Planning
8. Charitable Organizations and Non-Profits
9. Tax Law Matters

PRACTICAL LEGAL ANSWERS FOR AUTISM AND SPECIAL NEEDS

- **Major Issues at Age 18:**
 - Medical
 - Education
 - Employment
 - Living Arrangement
- **Level of Assistance Needed**
 - Supported Decision Making: Advocacy
 - Power of Attorney: Agency
 - Conservatorship: Control

SUPPORTED DECISION MAKING

- Allows individual autonomy and dignity, while providing support on a voluntary basis;
- Can utilize formal or informal agreement;
- Appoints one or more persons to provide advice and support for decision making in specific areas;
- SDM agreement itself generally does NOT grant decision making power;
- SDM agreement can grant authority to *communicate* decisions made by the individual to third parties;
- Individual retains full decision-making authority without limitation;
- Does not presume incapacity;

SUPPORTED DECISION MAKING

- **Typical areas of decision making include:**
 - **Finances**
 - **Medical**
 - **Living Arrangements**
 - **Education**
 - **Employment**
- **Alabama recently passed a new law in 2023 to formally recognize Supported Decision Making Agreements (2023 Acts #2023-134), which took effect 8/1/2023;**
- **Tennessee and Georgia do not yet have a statute formally recognizing SDM Agreements; (doesn't mean you can't use it)**

SUPPORTED DECISION MAKING

- **Summary:**

- Least restricting upon the individual;
- Preserves responsibility and autonomy;
- Recruits and organizes advocates to provide assistance;
- Some states do not formally recognize SDM Agreements;
- Provides no legal protection for the individual;

- **Resources:**

- <https://www.tndecisionmaking.org/>
- <https://supporteddecisionmaking.org/>

DURABLE GENERAL POWER OF ATTORNEY

- **DURABLE GENERAL POWER OF ATTORNEY**
 - Voluntary legal document which allows agent to manage the property (assets, finances, money) of another;
 - Can be effective upon signing, or springing upon a future event, such as disability;
 - Must be “durable,” that is, remain effective after incapacity;
 - Terminates upon the death of the principal;
 - Can be revoked at any time while the principal has capacity;
 - Inexpensive, and covers most legal and financial situations;

DURABLE GENERAL POWER OF ATTORNEY

- **Powers:**
 - Usually very broad, to make almost any legal decision the principal could make if able;
 - Can be individually tailored, and specific to fit wishes of individual—and coordinate with Supported Decision Making
 - Finances—deal with banks, financial advisor, broker, and retirement plans;
 - Real estate transactions;
 - Pay bills, deal with utilities, deal with credit cards and certain insurance providers;
 - File tax returns and deal with other tax matters;

DURABLE GENERAL POWER OF ATTORNEY

- Limitations and Disadvantages
 - Limitations:
 - Does NOT include the power to control—only the power to assist;
 - Can be revoked or counter-manded at any time;
 - No legal protections for decisions/credit/scams
 - Disadvantages:
 - Potential for abuse;

APPOINTMENT OF HEALTHCARE AGENT

- Appoints person to make medical and healthcare decisions for another, including the right to consent to, refuse, or withdraw medical care;
- Takes effect only upon incapacity;
- Agent has access to medical records and information, and ability to receive and consent to disclosure of medical records;
- For minors, parents may grant temporary agency to relative to provide medical treatment as needed (TCA 34-6-301 and 34-6-401)

CONSERVATORSHIP

- Conservatorship is the legal proceeding where a Court removes a disabled person's legal rights and places those legal rights in the Conservator;
- Petition is filed in Chancery Court, and the Chancellor makes the decision;
- Requires medical proof from doctor that conservatorship is needed;
- Legal rights at issue include:
 - Personal rights: determine living arrangements, consent to medical treatment and obtain medical records, visitation of relatives, make educational decisions and determinations, enter into legal contracts, enter into marriage, and voting are just a few examples.
 - Financial rights: handle money, open bank accounts, make purchases, borrow money, investments, and all other financial decisions.

CONSERVATORSHIP

- A Conservatorship should be viewed as the action of last resort or should only be used when there is no reasonable alternative that is less restrictive for the individual;
- A Conservatorship is important when leaving the person's legal rights intact would create a substantial risk that they would cause legal, financial, or physical harm to themselves;
- Can be customized and narrowly tailored to individual situation: only modifying/removing certain rights, while leaving others intact;
- Provides strong legal protection for all areas/rights placed in the Conservator;

SUPPORTED DECISION MAKING VS. POWER OF ATTORNEY VS. CONSERVATORSHIP

- **Financial**
- **Medical**
- **Living Arrangement**
- **Education**
- **Employment**

FINANCIAL ISSUES

- **Social Security Benefits**
 - SSI disability benefits
 - Disabled Adult Child (DAC) disability benefits
- **ABLE Accounts**
 - Eligibility
 - Features and uses
- **Special Needs Trust**
 - Features and uses

FINANCIAL ISSUES: SOCIAL SECURITY BENEFITS

- **Supplemental Security Income “SSI” disability benefits**
 - Must be found to be disabled under Social Security rules
 - Needs-based program: severely limits income and resources (savings) of the disabled individual
 - Watch out for that In-Kind Support and Maintenance (“ISM”)
 - Reduce check by up to 1/3rd
 - Charge a child for room and board
- **Disabled Adult Child (“DAC”) benefits**
 - Must be found to be disabled under Social Security rules
 - Parent drawing SSA Retirement benefits or Disability (“SSDI”) benefits
 - Not needs based—not affected by other income, or resources (savings)
- **Representative Payee**

FINANCIAL ISSUES: ABLE ACCOUNTS

- Achieving a Better Life Experience Act of 2014: New Code sec. 529A
- Created special accounts for disabled persons with Federal Income tax advantages similar to a college savings 529 plan, while protecting eligibility for SSI and Medicaid/TennCare;
- In general:
 - A savings account that does not count against SSI/TennCare, and can be used for many things, and saved for later needs;
 - Contributions are after-tax, and are not income to the beneficiary;
 - Any income or growth within the account is tax free;
 - Withdrawals are tax free if used for “qualified expenses;”
 - State government is first beneficiary upon death of disabled individual

ABLE ACCOUNTS: WHO AND HOW

- **WHO:** Individual, Parent, grandparent, conservator, guardian;
- **HOW:** Accounts can be established with financial advisor; Accounts can also be established on your own with your own state or with any of several other states;
- Account can be controlled by the disabled individual, or managed by a custodian;
- Can work together with SDM, POA, or Conservatorship;
- Typically use with disabled individual's own money (SSA/SSI benefits, or wages);

ABLE ACCOUNTS: CONTRIBUTIONS AND LIMITS

- Annual contributions are capped at \$17,000 per beneficiary (not donor), PLUS up to \$14,580 of Owner/Beneficiary wages or earnings;
 - Overall account value cannot exceed \$350,000 in TN or \$462,000 in GA, after which no additional contributions are allowed (can grow, though);
- SSI disregards account value up to \$100,000. Any amount over \$100,000 is counted as a resource;
 - Special rules for requalifying for SSI when ineligibility is due to ABLE account only;
- **HOWEVER**, Medicaid/TennCare eligibility continue so long as beneficiary otherwise qualifies for SSI--that is, the ABLE account is the **ONLY** reason and resource making him or her ineligible for SSI.

ABLE ACCOUNT PROS and CONS

PROS

- Contributions are not income for SSI purposes
- Growth is Tax Free: makes most of every dollar contributed
- Low cost to establish (no atty fees)
- Clear government approval
- Maximizes every dollar when only able to contribute limited amounts
- Allows for payment of rent (in same month) and HH expenses
- Functionally extends SSI resource limit
- Can be used with supported decision making: beneficiary is the owner

CONS

- Not available if disabled after age 26
- Contribution limit of \$17,000/year (unless owner has wages)
- Limited investment options—controlled by the State program
- Withdrawal options may be limited
- Tax penalty for withdrawal for non-qualified expenses (10%)
- Max account size could be limiting (can achieve max account size in about 16-17 years of investing the max amount)
- Tax savings depends on growth rate (lower growth rate, lower tax savings)

SPECIAL NEEDS TRUSTS

- Assets are owned by the Trust and managed by a Trustee;
- A tool to allow disabled SSI/Medicaid recipients to benefit from resources and gifts that would otherwise make them ineligible for benefits—SNT assets do not count against recipient;
- It can be used to pay for a wide variety of things Medicaid and SSI do not pay for, but not basic room and board;
- Can name a professional Trustee to assist with handling funds and making investment decisions;
- Typically use with 3rd Party funds (parent, grandparent, etc.);

SPECIAL NEEDS TRUSTS

- **SNT can be set up by a Last Will by parent or other relative:**
 - Generally a little less expensive;
 - Combines “parent ownership” of funds during life with Trust ownership after death
 - Postpones creation of Trust until needed if no assets to be set aside for SNP
 - Facilitates funding Trust with Life Insurance
- **Can be set up in life by parent or relative:**
 - Useful so that other relatives can easily list the SNT trust in their estate planning;
 - If other relatives leave a gift to the special needs person outside a trust, that becomes their property and could require a new guardianship/conservatorship, or could disqualify them for government benefits

SPECIAL NEEDS TRUSTS: PROS and CONS

Pros

- Unlimited contributions, not counted as income for SSI
- Not counted as resource/assets for SSI
- Unlimited account value
- Unlimited investment options
- Contingent beneficiary flexibility
- Functionally extends SSI/Medicaid/TennCare resource limit
- Third party established SNT's not subject to Estate Recovery

Cons

- Limited on what can be used for;
- Undistributed income and capital gains are taxed at the trust level at unfavorable rates
- Beneficiary has no involvement with funds, is passive in the process;

ABLE vs SPECIAL NEEDS TRUST

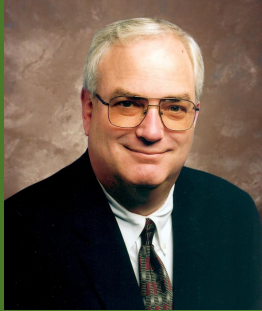
ABLE

- Contributions limited to \$17k/year (plus \$14,580 of owner wages)
- Tax Free Income and Growth
- “Free” set up
- Can be used for rent
- Optional Supported Decision Making, or Owner-controlled
- Estate Recovery

SPECIAL NEEDS TRUST

- Unlimited contributions
- Income and growth taxed
- Must be set up with an attorney
- Only be used for non-room and board
- Requires third-party trustee control
- NO Estate Recovery (typically)

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