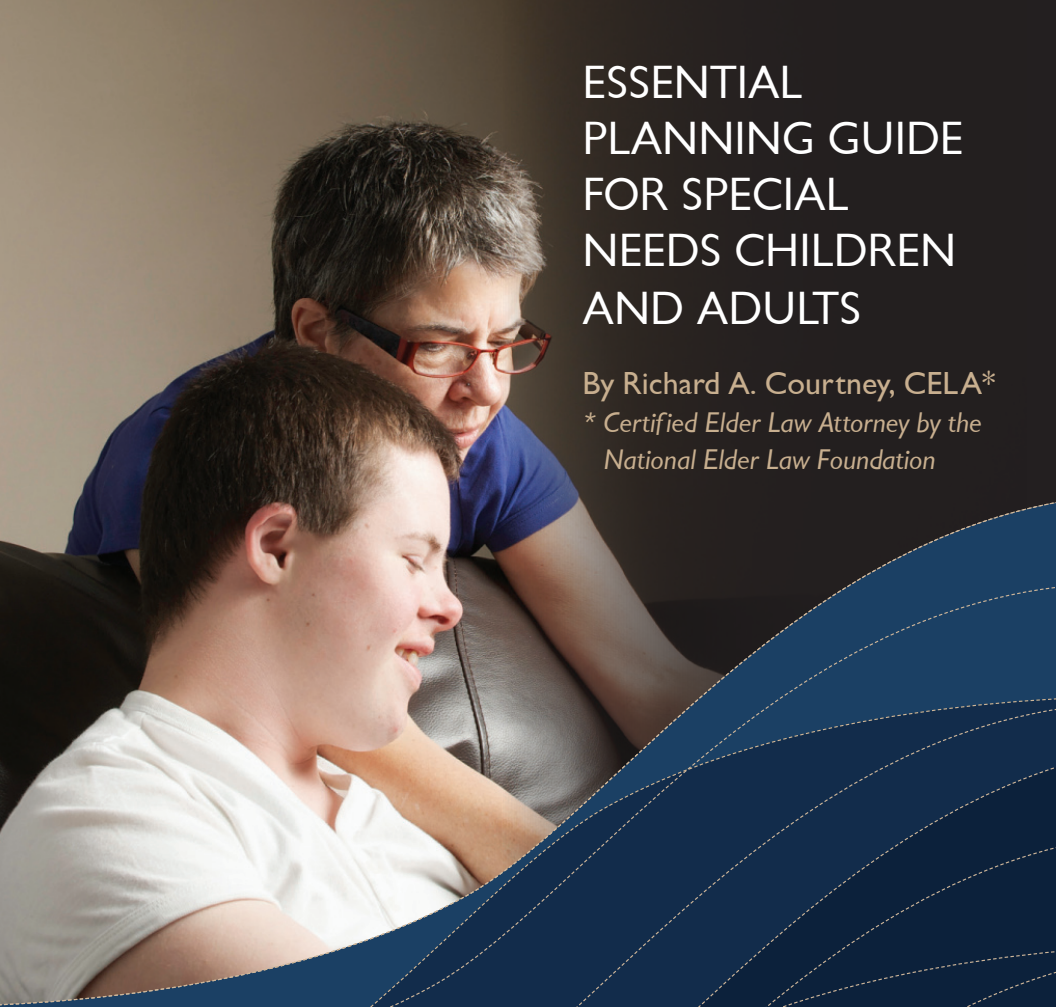

ESSENTIAL PLANNING GUIDE FOR SPECIAL NEEDS CHILDREN AND ADULTS

By Richard A. Courtney, CELA*
** Certified Elder Law Attorney by the National Elder Law Foundation*

CELA

Courtney Elder Law Associates

Elder Law • Special Needs Planning • Estate Planning

FRASCOGNA COURTNEY, PLLC

NOTE: The materials in this publication have been prepared for the purpose of providing accurate general information regarding the subjects covered. The information herein is not intended or offered as legal advice, nor may it be construed as such by any person. The reader should seek competent professional advice from an attorney before applying any information in this guide to his or her personal situation.

RICHARD A. COURTNEY, CELA*
Frascogna Courtney, PLLC
4400 Old Canton Road, Suite 220
Jackson, Mississippi 39211
Telephone: (601) 987-3000
Toll-free: (866) ELDERLAW
E-Mail: rcourtney@frascourtlaw.com
Web: www.ElderLawMS.com
*Certified Elder Law Attorney by the National Elder Law Foundation

ABOUT THE AUTHOR

***RICHARD A. ("Rick") COURTNEY** has practiced law since 1978 and is a founding partner of the Jackson law firm of Frascogna Courtney, PLLC, where he chairs the Courtney Elder Law Associates planning group. His primary areas of practice are elder law, public benefits law (Medicaid, Medicare and SSI), personal asset protection and estate planning, trusts and trust administration, special needs planning for persons with disabilities, guardianships and conservatorships, nursing home and disability rights, and probate administration. Rick is the first attorney in Mississippi to be designated a Certified Elder Law Attorney by the American Bar Association-accredited National Elder Law Foundation. He is a former Assistant Dean and Adjunct Professor of Law at Mississippi College School of Law and current Adjunct Professor of Law at University of Mississippi School of Law. Licensed to practice before all state and federal courts in Mississippi, Rick is a former Director and member of the Council of Advanced Practitioners and the Trusts and Special Needs Section Steering Committees of the National Academy of Elder Law Attorneys; the Probate and Trust Law Section of the American Bar Association; the Trusts and Estates Section of the Mississippi State Bar; the Mississippi Estate Planning Council; the Mississippi Financial Planning Association; and Past President of the Special Needs Alliance, a national organization of special needs planning attorneys. He is a Fellow in the American College of Trust and Estate Counsel, has been included in Best Lawyers in America in elder law and estate and trust law, and has been designated a Mid-South Super Lawyer annually since 2006 in the field of elder law by Law & Politics, Inc., through professional review and peer recommendation. In May 2009, Rick was awarded the 15th Annual Theresa Award by the New York-based Theresa Foundation, for community service and professional advocacy on behalf of children and adults with special needs. In 2014, he was named a Fellow of the National Academy of Elder Law Attorneys, that organization's highest honor. Rick testified before a Congressional committee in September 2015 in support of federal legislation that would empower adults with disabilities in their own financial planning.*

Rick and his wife, Ruthie, have adult twin daughters, one of whom has a disability. Rick has been active in community involvement as a Director of Mustard Seed, Inc., President and Director of the Cerebral Palsy Foundation of Mississippi, Inc., President of the Advisory Board of Hospice Ministries Inc., a director of the Heritage School for children with learning disabilities, member of the Occupational Therapy Council of Advisors for the Mississippi State Department of Health, and a member of the Alzheimer's Association-Middle Mississippi Chapter. He has written articles and has delivered many presentations for lawyers, judges, health-care professionals, and community groups on elder law, estate planning and other topics of interest to older adults, Baby Boomers, and families with special needs.

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ESSENTIAL PLANNING FOR SPECIAL NEEDS FAMILIES

Richard A. Courtney, Certified Elder Law Attorney

According to the 2016 Annual Disability Statistics Compendium, in 2015, there were over 39.9 million persons with disabilities living in the community in the United States, (12.6% of population).[1] In 2016, 16.3% of all Mississippians had disabilities, and 22.5% of persons age 18 and over. Advances in medical treatment and technology have led to increased survival rates and longer life expectancies for children and adults with disabilities. New breakthroughs in treatment for mental illness have also had an effect on both quality of life and life expectancies. A great number of persons with disabilities have no medical insurance coverage and no real hope of obtaining it. Many disabled adults who are unable to work rely on the Medicaid program to meet their basic medical expense needs and on the Supplemental Security Income (SSI) program of the Social Security Administration to assist with the costs of food, clothing and shelter. Children under 18 who meet the Social Security definition of disability are eligible for Medicaid in most states, and those children whose parents' household income is very low may also be eligible for SSI assistance.

Because of this longer life span and the need to preserve these public benefits as well as all other economic benefits, future planning is important in order to secure essential services and financial resources for persons with disabilities, especially after the death of their parents.

Failure to plan leads to a lack of choices. Bureaucratic solutions may be forced on individuals with developmental or other disabilities or severe and persistent mental illness. If the family of such a person does not develop a financial plan for the future, the state will do so for them. The consequences may not be what the family would choose for their son or daughter with a disability. In most instances, the real issue is not whether a plan will be needed, but when it will be needed, and what methods will be most effective for the disabled individual's situation.

[1] disabilitycompendium.org

Some of the **benefits of effective planning** are:

- Access to necessary services
- Ability to afford these services
- Personal selection of a third party to direct the affairs of the individual with a disability
- Possibly less restrictive alternatives to guardianship
- Alternative residential settings which may avoid unnecessary institutionalization
- Equipping family members or friends to assist the individual with a disability

Some of the **disadvantages of failure to plan** may be:

- Loss of personal freedom for the individual with a disability
- Inadequate community support networks
- Forced institutionalization or inappropriate placement
- Inadequate financial resources to meet all needs
- Overdependence on public benefit programs
- Overwhelmed and frustrated family members or caregivers

Illustration

Mrs. Client has an adult son, John, who has a significant developmental disability and lives in her home. Mrs. Client's income is limited, and John has been declared eligible to receive Supplemental Security Income (SSI) payments by reason of his disability. John's mother has indicated her desire to give him a generous gift in her will or possibly before her death. Mrs. Client is concerned about how John can retain his disability benefits and how he will be able to meet all his needs after her death. She is confronted with several planning options:

1. **Direct bequest**. Mrs. Client may leave a specific gift of assets to John in her will.

The **possible advantages** of this option include:

a. Assets will go directly to the child
b. Satisfaction to parent in leaving sufficient funds to meet financial needs
c. Flexible: can change amount in will at any time prior to death
d. No trustee or guardian required (unless child has been determined legally incapacitated and a guardian has been appointed)

The **possible disadvantages** of this option include:

a. Excess resources would disqualify John for SSI and Medicaid
b. Public health system may claim this amount toward the cost of care
c. Child could misuse the funds or be exploited financially by others

2. **Disinheritance.** Mrs. Client could disinherit the child in her will and leave him nothing.

The **possible advantages** of this option include:

a. Child would continue to be eligible for all government benefits
b. No danger of financial misuse by child or exploitation by others
c. No danger of claims being made against the parent's funds for cost of child's care by public health system

The **possible disadvantages** of this option include:

a. Emotionally difficult for parents to do this
b. No assurances that the adult child's needs are met after the parent's death, since funds are going to others
c. Possible criticism from other family members
d. Government benefits may change in the future resulting in the child being inadequately supported

3. **"Morally obligated" gift**. Mrs. Client can leave all assets to John's brother and ask him to use them for John's benefit and support.

The **possible advantages** of this option include:

a. John could continue receiving government benefits as funds would not be his
b. Extra funds would be available to meet needs of the individual with a disability
c. Satisfaction for parents to know that they are leaving sufficient funds to meet the needs of their child with a disability
d. No trust fees or guardianship necessary
e. Distributions will be at discretion of person in control
f. No accounting required

The **possible disadvantages** of this option include:

a. Informal agreement – brother not legally obligated to use funds for John
b. Money could be considered brother's property in the case of brother's divorce -- could be awarded to estranged spouse in a settlement agreement

c. If brother's own family has financial need, they may use money meant for John
d. Brother may resent financial and decision-making responsibilities for John
e. Other family members may resent brother's "extra share" of inheritance
f. Income on the gifted funds is taxable to brother receiving bequest
g. Brother may die and gifted funds would be distributed to his children or wife

4. **Support Trust**. Mrs. Client can have a trust drafted in her will (or outside her will) which requires that the funds left in that trust be used by the named trustee for the "health, education, support and maintenance" of John.

The **possible advantages** of this option include:

a. Could provide monetary support for John after death of his parents
b. No danger of exploitation of John -- financial control by trustee
c. Satisfaction to parent, knowing she has provided for John
d. Avoids probate procedure

The **possible disadvantages** of this option include:

a. Will likely cause John to become ineligible for government benefits
b. Public health system may attach these funds for cost of care
c. Trust instrument may not provide adequate guidance to trustee
d. Must file tax returns

As noted, **none** of the above options ensure **both** use of the funds for the disabled child's benefit and retention of his public benefits (SSI and/or Medicaid). For this reason, **we do not generally recommend these options**. There is, however, another option: **The Special Needs Trust.**

Defining the Basic Terms

What is a "trust"? Trusts are arrangements for financial management that have been used since the days of the Roman Empire. The following definitions apply to trusts in general and are important in order to understand special needs trusts as described later in this treatment. A trust is an agreement in which someone (called the **"grantor"** or **"settlor"**) transfers ownership and control of certain money or property (called the trust **"corpus"** or **"principal"**) to a person or financial institution (called a **"trustee"**), who is legally responsible for investing, managing and spending trust assets for the benefit of another person (called the **"beneficiary"**). The grantor may also be the trustee or a beneficiary of the trust. However, except for revocable living trusts, the same person may not be both sole trustee and sole beneficiary of the same trust. Trusts may be created in two ways: a **"testamentary"** trust is established in the grantor's last will and testament and will take effect only at the grantor's death; while an **"inter vivos"** or living trust is created by a grantor to take effect immediately or prior to the grantor's death. A trust may be **"revocable"** (meaning the grantor retains the right to revoke the trust or require that the trust property be distributed to the grantor) or **"irrevocable"** (meaning the grantor gives up the right to "undo" the trust and take back the trust assets).

Many trusts used in estate planning to provide for children or grandchildren require the trustee to spend trust funds for the "support and maintenance" of the beneficiary. These are called **"support"** trusts, and the beneficiary can legally enforce payments from the trust to pay for food, clothing, shelter and other basic support needs. However, a trust may give the trustee "sole discretion" to determine whether expenditures will be made from the trust, for what purposes and in what amounts. This is called a **"discretionary"** trust, and the beneficiary generally cannot compel the trustee to spend trust funds for particular purposes. Every trustee has a "fiduciary" responsibility, which is a legal requirement to exercise the highest degree of care and utmost good faith in handling the trust assets for the benefit of the beneficiary, in keeping with the grantor's directions as set forth in the trust document.

The Purposes of Special Needs Trusts

"Special needs trust" is the term commonly used to refer to any trust established to hold and manage funds for a person with a disability. The primary purposes of such a trust are (1) to prevent the trust assets and disbursements from disqualifying the disabled beneficiary for Medicaid and/or SSI benefits and (2) to provide effective management of the trust assets so as to best meet the needs of

the beneficiary. Most of the rules governing special needs trusts are found in the laws and regulations of the Medicaid and SSI programs. However, administrative and judicial interpretations of the laws and regulations about these programs change frequently, and it is **imperative** that any special needs trust be administered under the guidance of an attorney and/or trustee who has some expertise in these benefit programs. For this reason, most individual family members will not be qualified to serve as trustee. Nevertheless, the trustee who administers the trust will be responsive to the needs of the beneficiary as communicated through other responsible family members as parents, guardians or conservators.

The special needs trust will provide funds that can be used to **supplement** the basic support and medical coverage furnished by the public benefit programs. The types of things a special needs trust can purchase and provide for the beneficiary include supplemental medical and dental care, training, education, treatment and rehabilitation programs, eye glasses, hearing aids, transportation (including vehicle purchase), maintenance, insurance, purchase or modification of housing, psychological support services, recreation, travel, entertainment, electronic equipment (such as radios, television sets, audio and video devices, and computer equip¬ment), supplemental attendant and custodial care, and any other care or services that would enhance the quality of life of the beneficiary and which would not be paid for by private insurance or government entitlements.

Types of Special Needs Trusts

As stated above, the primary purpose of a special needs trust (SNT) is to hold resources in such a way that they do not become "countable resources" and that trust disbursements do not constitute "countable income" to the beneficiary and thereby disqualify him or her for SSI or Medicaid. There are two basic types of SNTs based on who is placing assets in the trust.

Third Party Special Needs Trust

Mrs. Client can have a trust drafted in her will (or outside her will) which gives the selected trustee the discretion to use the funds in that trust for John's "supplemental needs" – that is, his needs which are not met by his public benefits.

Parents of a disabled child who merely leave assets through their wills or trusts to that child or the child's guardian will unwittingly disqualify the disabled child for Medicaid or SSI assistance. Guardianship funds held for a child are deemed to be resources of that child. It is imperative that families of disabled children or adults take particular care in crafting an estate plan which will access all available resources for the disabled person's future needs and which will not

result in disqualification by accident. Congress has recognized the need to allow for flexibility in such programs to assist the disabled and has acknowledged the use of trusts to do so.

A SNT may be created by the parents, grandparents or anyone else who wishes to establish a fund that can later receive gifts of money or assets for the disabled beneficiary by lifetime gift(s) or by last will and testament gifts. The assets in this type trust will be used for the disabled beneficiary's needs during his/her lifetime, and the assets remaining in the trust at the death of the beneficiary will be distributed to the persons and in the manner prescribed in the trust (such as to other children or family, non-profit groups, etc.). This trust, called a **"third party"** trust, will not provide for any recovery by Medicaid, thus permitting all the trust assets to be distributed to the designated remainder beneficiaries at the death of the disabled primary beneficiary.

The **advantages** of this option include:

a. Provides money for extras above and beyond basic support
b. When written correctly, can preserve eligibility for government benefits for child
c. Can escape being seized for cost of care by health care system
d. Provides ultimate flexibility regarding distribution and investment of funds
e. Parents are satisfied that they have made financial provisions for child
f. Assets placed in trust outside parent's will can avoid probate process
g. Can be revoked or amended, or irrevocable, by the grantor while grantor living
h. Assets in this trust protected against any debts or liabilities of the disabled child

The **possible disadvantages** of this option include:

a. Fees are involved in setting up trust and administering trust
b. Necessary to choose reliable trustee, who can work with the individual with a disability and other family members
c. May be challenged at some future date, but so far, has been upheld nationwide

Self-Settled Special Needs Trust

This type trust may be established to receive the funds or assets (such as a lawsuit settlement, inheritance, life insurance benefits) of a disabled person under age 65 and preserve his or her eligibility for Medicaid or SSI benefits.

A SNT created to hold the assets already owned by the beneficiary, or that the beneficiary is entitled to receive through a lawsuit settlement, inheritance or life insurance settlement, is called a **"self-settled"** trust. Federal law (42 USC §1396p(d)(4)(A)) states that the assets of a disabled person placed in an irrevocable trust for that person's benefit are exempt from the individual's countable assets if the trust is:

> (A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1614(a)(3)) and which is established for the benefit of such individual by the individual, a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a state plan under this title.

Thus, the essential elements of such a trust are: **age** of the beneficiary; **disability**; a **single beneficiary**; a **qualified creator** of the trust; and **repayment to Medicaid** upon the beneficiary's death. The beneficiary whose money or assets are being used to fund the trust must be under age 65 when the trust is established. Under current Medicaid policy, the trust assets retain their exempt status after the beneficiary reaches age 65, but the person's right to contribute additional assets to the trust terminates at that time. Such a self-settled trust may be created (that is, the trust document signed) by a competent adult beneficiary, the beneficiary's parent, grandparent, legal guardian or a court. At the beneficiary's death, Medicaid must be first in line to recover from the trust assets the amount Medicaid has paid for the beneficiary's medical care. Any remaining balance in the SNT can be paid to those persons designated by the creator of the trust (the "remainder beneficiaries").

The **advantages** of this option include:

a. Provides money for extras above and beyond basic support
b. When written correctly can preserve eligibility for government benefits for child
c. Allows funds for beneficiary's needs while retaining Medicaid and SSI benefits
d. Can provide funding for specialized equipment not covered by most government benefit programs, such as adaptive computerized communication systems, motorized wheel chairs, additional therapy sessions - and to improve the individuals' quality of life (TVs, VCRs,

stereos, computer, vacation, car, car maintenance, tuition for school, camp fees, additional personal assistance, etc.).

e. Provides a way to deal with an unexpected lump sum, such as an inheritance, insurance payment, or personal injury award
f. After the state is paid back for beneficiary's Medicaid bill, other family members could receive a distribution from the trust
g. Other people can use this trust for their own Medicaid planning (for example, disabled child's parent could transfer their funds to this trust and qualify for Medicaid with no transfer penalty)

The **possible disadvantages** of this option include:

a. Fees are involved in setting up trust and administering trust
b. Necessary to choose reliable trustee, who can work with the individual with a disability and other family members
c. Must be irrevocable (but can be amendable)
d. May be challenged at some future date, but so far, has been upheld nationwide
e. Must make disbursements from trust only for beneficiary's needs, possibly in accord with state rules and limitations

[**NOTE:** Parents, grandparents or others who may wish to give the disabled beneficiary money or property during their lifetimes or in their wills should NOT put such gifts in the self-settled SNT. Assets in this trust will be subject to Medicaid's right to recovery at the beneficiary's death. They should create a "**third party**" SNT for the disabled beneficiary, which does **not** have the Medicaid payback provision. They can then designate the remainder beneficiary(ies) who will receive any trust assets after the disabled beneficiary's death.]

Benefits of Special Needs Trusts

The benefits of special needs trusts for the disabled and their families are obvious. This is the only way to preserve assets for the unforeseen future needs of such a person, while achieving current access to entitlement benefits and resources which can cover the costs of medical care and monthly food, clothing and shelter costs. It is well documented that, in many situations in which a disabled person receives an inheritance or litigation settlement, s/he subsequently succumbs to his/her own poor judgment or to the influence of family members or others that results in waste of the settlement proceeds. The SNT can name a professional trustee or co-trustee who will manage and invest the trust assets in a wise manner that will protect the trust funds from such improvident influences and provide security for the beneficiary into the future. And the SNT has certain advantages over a conventional guardianship. Whereas a guardianship is, by state statute, limited in the types of investments the guardian can make (i.e., investments offered by federally-insured financial institutions), a trustee is not limited to those types and has greater latitude and flexibility in the investments which can be made in order to obtain a greater return. Additionally, if settlement of litigation or a probate is the sole reason for establishing a guardianship (such as a "guardianship of the estate" for a minor's claim), the Chancery Court can approve disbursement of the settlement proceeds to the trustee of the SNT and no guardianship will be necessary. The SNT will not then be subject to the bond, accounting or "prior court approval" requirements that are part of the guardianship statutes, unless the Chancellor imposes any of such requirements.

Summary of Disability Benefit Programs

There is great confusion among the vast majority of people, including knowledgeable professionals, regarding public benefit programs. In order to know whether a trust will help a person with a disability obtain or retain eligibility for a particular benefit program, it is imperative that the specific program be identified. Eligibility for some public assistance programs is dependent upon the recipient's income and assets, while eligibility for other programs is not. The following is a brief and basic description of the most common public programs and their eligibility criteria.

Social Security Retirement is the program that pays a monthly retirement income to persons over age 65 (or 62 who elect early participation) who have, during their worklife, paid into the Social Security retirement system

for a minimum of 40 quarters. This is an insurance-type program in that one pays into the system and, at the prescribed age, begins to draw benefits from their "paid-up" account. The monthly payment amount is determined by the amount of the recipient's earnings during the highest earning years and the amount of Social Security taxes paid in. The amount or eligibility for such payment does **not** depend on the recipient's assets or income (except for recipients age 62-full retirement age in some circumstances). Therefore, a special needs trust is not necessary to protect these benefits upon receipt of litigation or life insurance settlements or other resources.

Social Security Disability Insurance (SSDI) is designed to pay a monthly income to persons who are not yet retired and eligible for Social Security Retirement, but who have worked and paid into the system and have become disabled from engaging in substantial gainful work. In effect, it is taking the person's earned retirement benefit and beginning to pay it when the person is removed from the workforce by disability rather than retirement. To be eligible for SSDI, a person must be determined to be disabled from performing "substantial gainful activity". This basically means that, due to a severe physical or mental impairment, s/he is unable to work more than part-time and without extensive supervision at any job for which s/he is qualified by education or experience. After a person is determined through the federal hearing process to be eligible for SSDI, earnings from part-time or sporadic work of no more than **$1,170** ($1,950 if blind) (2017) per month will be considered "not substantial" and will usually not disqualify the person. Eligibility for SSDI is **not** dependent upon the recipient's current assets or income (except for the employment income issue). Therefore, a special needs trust is **not** necessary to protect these benefits upon receipt of litigation, inheritance, life insurance settlements or other resources.

Social Security Survivor's Benefits entitles the surviving spouse (including divorced spouse if married over ten years) and/or child(ren) of a deceased recipient of Social Security Retirement or SSDI to a monthly payment based on the eligibility of the deceased spouse or parent. If the surviving spouse or child is entitled to a benefit under any program of the Social Security system in his/her own right, s/he will generally be entitled to receive the higher of the two benefits only. Survivor's benefits are **not** dependent on the income or assets of the recipient. Therefore, a special needs trust is **not** necessary to protect these benefits upon receipt of litigation, inheritance, life insurance settlements or other resources.

Childhood Disability Benefits. A **disabled adult child** (over age 18) may be entitled to Childhood Disability Benefits (CDB) (formerly Disabled Adult Child, or DAC) based on the eligibility of the parent for SS Retirement or

SSDI, **if** the child is dependent on the worker, was disabled prior to age 22 and remains disabled after age 22. (Note: The adult child will lose the CDB benefit if s/he marries someone who does not receive a similar disability benefit.)

Supplemental Security Income (SSI) is a federally-administered Social Security program that provides monthly payments for food and shelter needs to persons who are aged, blind or disabled and whose assets and income are low enough to meet a "means test". SSI recipients must meet the same disability criteria as for SSDI; however, it is not necessary that a person have worked or paid Social Security taxes to be eligible for SSI. An SSI recipient may have only limited income (maximum $735 for individual, $1,300 for a couple in 2017) and limited assets (maximum $2,000 countable assets in 2017). Since the SSI program is intended to provide a minimal level of support assistance and pays a maximum monthly payment of $735, any other countable income received by the SSI recipient (through gifts, earnings, trust disbursements, etc.) will reduce this payment dollar for dollar. Therefore, countable income of $735 or more per month may disqualify the recipient for SSI benefits. For purposes of the SSI resources test, certain assets are considered exempt and will not be counted in determining eligibility. (See the later section entitled "SSI and Medicaid Income and Resource Rules".) Therefore, eligibility for payments under the SSI program is dependent upon income and resources, and a special needs trust is generally necessary to protect these benefits upon receipt of a litigation or life insurance settlement or inheritance.

Medicare is a medical insurance-type program developed to pay medical costs for retired or disabled persons who have paid into the Social Security system and who may no longer have employer-related medical insurance to pay such costs. Any recipient of Social Security Retirement is eligible for Medicare coverage beginning at age 65. Also, a recipient of SSDI under age 65 becomes eligible for Medicare twenty-four (24) months after the date of disability. Medicare Part A pays for hospitalization costs and Part B pays for doctor visits, outpatient therapies, medical equipment, home health care, etc. Contrary to popular belief, Medicare only pays part of the first 100 days of nursing home care for qualified nursing home residents, and only the first 20 days in full. There are premiums, deductibles and co-payments for Part B Medicare coverage. This coverage is **not** dependent upon income or assets. Therefore, a special needs trust is **not** necessary to protect these benefits upon receipt of litigation, inheritance, life insurance settlements or other resources.

Medicaid provides payment of medical expenses for persons age 65 or over or disabled (in accordance with Social Security disability definitions), who also qualify in terms of limited assets and income. Medicaid is administered by state

agencies under a federally approved medical assistance plan. For many disabled individuals who cannot obtain other medical insurance, Medicaid provides the only safety net for health care. Medicaid pays for many more services than Medicare, including prescription drugs and nursing home care. In Mississippi, any SSI recipient is automatically entitled to receive Medicaid benefits. If the beneficiary receives income or has assets that are in excess of the SSI limits, s/he is likely to lose his or her SSI eligibility -- and the automatic Medicaid coverage along with it. The loss of Medicaid coverage can be a more serious problem than the loss of SSI benefits, especially if alternative medical insurance is not readily available. In Mississippi, there are a number of Medicaid programs, including for nursing home care and home-and-community-based services, which are not tied to SSI eligibility and are available to non-SSI recipients. Medicaid coverage is dependent upon income and assets.

The Medicaid program is a broad range of services provided to many different "**coverage groups**". A summary of these groups that apply to adults follows, along with statements for each group regarding: (1) the "income limit" for that group (i.e., the maximum countable income a person can have to be eligible); (2) the "resources limit" (i.e., the maximum cumulative value of countable resources a person can own to be eligible); and (3) whether there is a "transfer penalty" for eligibility (i.e., whether transfer of assets by the applicant will result in any period of ineligibility).

SSI-Eligible. Any Mississippi resident who receives any payment of SSI benefits is automatically eligible for Medicaid services. The income and resource limits of the SSI program apply.

Disabled Child Living at Home (DCAH). Severely disabled children under age 18. "Institutional" (nursing home) income limit of 300% of SSI FBR (3 x $735) or $2,205 per month (2017), with no deeming of family income or assets to disabled child. SSI resource limit of $2,000 applies, and there is no transfer penalty. Child must require regular assistance with at least two (2) activities of daily living (ADLs) – eating, bathing, dressing, toileting or walking. Children who are not eligible for other Medicaid programs because the income or assets of their parents are too high may be eligible for Medicaid through the Disabled Children Living at Home category of eligibility. A child must meet all the following eligibility criteria:

(i) The child is under 18 years of age and determined to be disabled using Social Security disability rules.

(ii) Requires a level of care at home that is typically provided in a hospital or nursing facility or intermediate care facility (including an intermediate care facility

for the mentally retarded);

(iii) Can be provided safe and appropriate care in the family home;

(iv) As an individual, does not have income or assets in his or her name in excess of the current standards for a child living in an institution ($2,000 assets and $2,205 income); and

(v) Does not incur a cost at home to the Medicaid Program that exceeds the cost Medicaid would pay if the child were in an institution.

Qualification is not based on a diagnosis or disability alone, but the child's medically documented institutional level of care needs from the preceding 12-months. A child who is medically stable, even though disabled, is not considered in need of this level of care. 42 CFR §§435.225, 409.31-409.34, 440.10, 440.150, and 483.440.

Qualified Medicare Beneficiary. An individual who is Medicare-eligible and whose income is below 100% of the federal poverty level + $50 ($1,040 individual / $1,385 couple) is eligible for this Medicaid program. Medicaid will act like supplemental insurance to Medicare, paying the monthly Medicare Part B premium as well as other Medicare deductibles and co-payments for the individual's medical services. There is no resource (asset) limit for this coverage.

Specified Low-Income Medicare Beneficiary (SLMB). An individual who is Medicare-eligible and whose income is below 120% of the federal poverty level + $50 ($1,230 individual / $1,652 couple) is eligible for this Medicaid program. Medicaid will pay the monthly Medicare Part B premium only for the individual.

Healthier Mississippi Waiver. The individual cannot be covered by Medicare and the individual must be age 65 or over, or if under age 65, must be disabled using SSI program rules; and total monthly income can be no more than 135% of the federal poverty level ($1,387 for an individual / $1,853 for a couple using income of both members of the couple, even if only one member is applying). Countable assets may not exceed $4,000 ($6,000 for couple). No doctor's certification of disability is required. If any household income is from wages, the allowable income limit is higher. Disabled children can qualify for this program. The income limit is based on the parents' income and the number of other children in the family. Only 6,000 recipients state-wide are authorized for this coverage group.

Working Disabled. An individual who is disabled and working at least 40 hours per month may be eligible for Medicaid assistance if his ***earned*** income is below $5,015 single / $6,741 couple and ***unearned*** income is below $1,387 single / $1,853 couple, and if countable assets are less than $24,000 single / $26,000 couple. If gross ***earned*** income is greater than $3,035 single / $4,071 couple, the recipient must pay a monthly premium in the amount of five percent (5%) of "countable earnings" (1/2 gross earnings - $40). There is no transfer penalty applied to this program and the "spousal impoverishment" rules (see Long-Term Care group below) do not apply.

Home and Community-Based Services (HCBS) Waiver Programs. Mississippi has obtained federal waivers to use Medicaid funds to offer services in "home and community-based" programs designed to help recipients avoid institutionalization. These include: (1) ***Elderly and Disabled Waiver***, which provides respite, adult day care, meals, homemaker and other services for older persons with deficits in at least 3 of the activities of daily living; (2) ***Independent Living Waiver***, which provides personal care attendant services to persons with physical disabilities who are cognitively able to help self-direct their care; (3) ***Intellectually/Developmentally Disabled (ID/DD) Waiver***, which provides "day-habilitation", respite care, attendant care, and speech/physical/occupational therapies to persons who would, without such services, require the level of care in an Intermediate Care Facility for the Intellectually Disabled; (4) ***Assisted Living Waiver***, which provides homemaker, attendant care, medication supervision, social and recreational therapies, transportation and other services to residents of personal care homes and other congregate living facilities who would otherwise require placement in a nursing facility; and (5) ***Spinal Cord/Traumatic Brain Injury Waiver***, which provides services to persons with traumatic brain or spinal cord injuries necessary to help them avoid institutionalization. There are other eligibility criteria, services and population limitations on these groups. The monthly income limit for these groups is generally the nursing home income limit ($2,205 in 2017) for an individual. The resource limit is $4,000 and liberalized resource and "spousal impoverishment" rules apply (see following section). There is a Medicaid transfer penalty for these groups.

Long Term Care (or Nursing Home) Group. This coverage pays nursing home costs in excess of the Medicaid recipient's monthly share of cost. A single Medicaid applicant may have monthly countable income of up to $2,205 (2017) and countable assets of up to $4,000 to qualify for Medicaid for LTC. Under **"spousal impoverishment" rules** for married applicants, the at-home spouse ("community spouse" or CS) may keep all of his/her own separate income, plus enough of the applicant's income to get the CS's income up to $3,022.50

(2017) per month (the "monthly maintenance needs allowance") if the CS's separate income is less than this amount. The CS may own separate countable resources of up to $120,900 (the "community spouse resource allowance"). Assets may be assigned from the nursing home spouse to the community spouse to achieve these levels. In addition, the applicant (nursing home spouse) may have separate income of up to $2,205 and separate countable assets of up to $4,000. The separate income (Social Security, etc.) of the applicant spouse that is not assigned to the CS as part of the monthly maintenance needs allowance must be applied to pay nursing home cost as the applicant's "share of cost", but the community spouse's income and assets need not be spent for this care. Medicaid transfer penalties are imposed for uncompensated transfers of resources by the applicant or the applicant's spouse.

There are many misconceptions about Medicaid eligibility for nursing home care. Medicaid will pay nursing home costs for persons who are disabled and whose "countable" income and assets are under certain limits. While these limits are low, a number of assets are excluded in determining "countable" assets and income.

(1) **Excluded Assets**: A number of assets are **not counted** when determining eligibility for Medicaid. These include: the entire value of the residence (***unless*** it is in a revocable living trust); all household furnishings; up to two automobiles, based on use; certain life estate or inherited interests in property; some income producing property; property used in trade or business for self-support; certain mineral and timber rights; term life insurance policies; prepaid or designated funeral contracts and burial plots; and certain retirement or annuity accounts in pay-out mode (such as IRA from which the applicant is taking regular periodic distributions).

(2) **The "Look-back Rule"**: Many people have heard: "You have to wait 3 years after giving anything away to get Medicaid." The Truth: For gifts made more than five (5) years before a Medicaid application is filed, there is no disqualification at all.

The Deficit Reduction Act of 2005 ("DRA") changed the look-back for transfers made **on or after February 8, 2006**, the effective date of DRA. The new law requires disclosure of all transfers made to anyone within **five (5) years** prior to Medicaid application, whether they were transferred to a trust or otherwise. Certain transfers are not penalized, included but not limited to: transfers to a spouse, to a blind or disabled child, or to a child who has lived with and cared for the individual for at least two years prior to entry into nursing home, and to certain trusts for persons with disabilities.

(3) **Transfer Penalty**. Under the current law, the penalty period for gifts made to others does not begin to run until the Medicaid Applicant has **both** entered a nursing home **and** has filed a Medicaid application that is approved. Medicaid will be denied for a period of time based on the amount given away

during the look-back period. The delay in Medicaid would be one month for every $5,700 given away prior to June 30, 2014, increasing to one month for every $6,405 transferred after June 30, 2016. Therefore, if the applicant gave away $57,000 on June 1, 2014, and goes into a nursing home and applies for Medicaid December 1, 2017 (within 5 years after the gift), he may qualify for Medicaid based on the assets limit above but would not qualify for immediate Medicaid payments to the nursing home. The ineligibility period for the transfer is 10 months ($57,000 ÷ $5,700 = 10). If his assets are below the Medicaid eligibility limit ($4,000) and he is approved for Medicaid, he must private pay for his nursing home for the first 10 months after Medicaid eligibility begins.

The DRA has dramatically changed the Medicaid eligibility rules. Therefore, it is imperative that, if substantial gifts have been made, a Medicaid application must **NOT** be filed prematurely. ***Consult an experienced elder law attorney about any gifts and their effect on Medicaid eligibility.***

(4) **Estate Recovery**: Federal law requires that each state Medicaid agency seek to recover reimbursement from the estate of each deceased Medicaid recipient for nursing home or home and community based waiver services paid by Medicaid after the recipient was 55 years of age. This claim will be waived by Medicaid (a) if there is a surviving spouse; or (b) if there is a surviving dependent who is under the age of twenty-one (21) years or who is blind or disabled; or (c) as provided by federal law and regulation, if it is determined by Medicaid or by court order that there is undue hardship. Estate recovery against a residence may also be waived if the property value is less than $75,000 and there is a surviving spouse, child or grandchild.

A 2011 state court case also held that Medicaid has no claim against the Medicaid recipient's ***homestead property*** at death IF the residence value is less than $75,000 equity AND s/he is survived by a spouse, child or grandchild who would take the residence as an inheritance. *Estate of Darby v. Stinson*, 68 So.3d 702 (Miss. App. 2011) A December 2015 Attorney General's Opinion established that Medicaid cannot require an applicant to waive this homestead protection.

SSI and Medicaid Income and Resource Rules

Recipients of SSI and Medicaid benefits must comply with the SSI income and resource rules. Recipients of non-SSI state Medicaid benefits must comply with the Medicaid income and resource rules. These rules are outlined below. [NOTE: A few Mississippi Medicaid programs, such as the Children's Health Insurance Program (CHIP) and certain programs for pregnant women, welfare-eligible families and children under age 19, do not have a resources and/or income limit for eligibility.]

Income: "Income" is generally defined for **SSI** purposes as anything of value received during a month which could be used to purchase food or shelter support. 20 C.F.R. § 416.1102. Income does not include: medical care and services; social services; proceeds from sale or exchange of a resource; income tax refunds; payments from credit life or credit disability insurance; loan proceeds; payments made to others for non-food/shelter items or services. 20 C.F.R. § 416.1103. "Earned income" includes gross wages and net earnings from self-employment, including in-kind payments. 42 U.S.C. § 1382a(a); 20 C.F.R. § 416.1110. "Unearned income" includes: payments from trusts or annuities, pensions, Social Security benefits, disability benefits, veterans' benefits, railroad retirement, unemployment compensation, alimony or other support payments; dividends, interest and royalties; rents (net of lease expenses); life insurance benefits, gifts and inheritances; prizes and awards; and in-kind support and maintenance. 42 U.S.C. § 1382a(a)(2); 20 C.F.R. § 416.1121. "Countable income" for SSI purposes is calculated by subtracting from the individual's total earned and unearned income various amounts, including the first $65 of earned income, earned income used to pay impairment-related work expenses of a disabled (not blind) person, and one-half of the remaining earned income. Income from non-eligible family members can be "deemed" available to the SSI applicant. Food and shelter expenses paid for by another (including by a trust) is considered "in-kind support and maintenance" (ISM) and will generally reduce the recipient's SSI payment by one-third (if the recipient resides in the household of another) or by one-third plus $20 (if the recipient lives in a household other than that of the person providing ISM).

Mississippi's **Medicaid** Eligibility Policy and Procedures Manual, Chapter 200, Page 2002 defines "income" as "anything an individual receives in cash (and in some cases in-kind) that can be used to meet his/her needs for food or shelter. Medicaid is required, in accordance with 42 C.F.R. 435.721, to use SSI financial eligibility requirements for SSI recipients. "SSI income policy applies unless a subsequently issued Medicaid statute or regulation supersedes the SSI policy." The state policy pertaining to in-kind support and maintenance is found at page 2118 of the EPPM: "ISM is an SSI policy principle that may be applicable to all categories of eligibility as described below for SSI-related categories and FPL or institutional categories…." Therefore, for non-SSI Medicaid eligibility in Mississippi, the full value of ISM may be counted as income.

As noted above, not all income is counted in determining eligibility. As a general rule, "**countable income**" is all income accessible to the recipient after certain reductions permitted by regulations. However, certain types of income (including properly planned trust distributions) will not result in reduction or elimination of the SSI or Medicaid payment.

Resources: "Resources" for **SSI** purposes refers to any cash, liquid assets, real or personal property of the individual or spouse that can be converted to cash to pay for support. 20 C.F.R. §416.1201. All funds in jointly-owned accounts that can be withdrawn by the recipient are considered the recipient's resources, regardless of source of the funds. Assets received are considered income in the month received and resources as of the first moment of the next month. Excess resources of a non-SSI family member, like income, can be "deemed" to be resources of the individual SSI recipient. The following resources, among others, are considered "non-countable" or exempt for SSI eligibility purposes: entire value of individual's home and land adjacent to it; "current market value" (CMV) of household goods, personal effects up to $2,000, and wedding/engagement rings and disability-related equipment regardless of value; CMV of an automobile of any value; trade or business assets necessary for claimant's self-support; non-business property essential for self-support; all term life insurance; cash value of all life insurance if the total face value of cash value policies is $1,500 or less; cash or in-kind replacement to replace or repair a lost or damaged resource (such as casualty insurance proceeds) if used for that purpose within nine months; value of burial spaces for claimant or entire family; up to $1,500 for an individual ($3,000 for a couple) of burial expense fund; and federal or state disaster relief funds. 42 U.S.C. §1382b(a); 20 C.F.R. §416.1210. Assets held by a guardian or conservator are generally considered countable resources of the ward.

Mississippi's **Medicaid** program generally follows the resource criteria used by the SSI program. However, effective October 1, 1989 Mississippi Division of Medicaid received approval from the federal Health Care Financing Administration (HCFA) (now the Center for Medicare and Medicaid Services) to apply more liberal resource policies than those of SSI to various coverage groups. These "liberalized resource policies" allow the spend-down of resources within a month to become eligible for that month and treat the following resources, among others, as non-countable: excess resources ear-marked for private pay nursing home costs for prior months; 16th Section leasehold interests; life estate and remainder interests; mineral rights and timber rights not under production; income-producing property if it produces net annual return of at least 6% of the equity value of the property; promissory notes and loan agreements that produce net annual return of at least 6% of the principal balance; up to two automobiles regardless of use; all household goods and up to $5,000 equity value of personal property; cash value of all life insurance if the total face value of cash value policies is $10,000 or less; burial spaces for family members; and burial funds up to $6,000 for the individual and $6,000 for the spouse.

As noted, a "**countable resource**" is any asset considered by SSI or Medicaid rules to determine eligibility. A SSI recipient is allowed to have only $2,000 or less in countable resources. Some Mississippi Medicaid programs allow the beneficiary to have up to $4,000 in countable resources. If countable resources

exceed the applicable limit during a calendar month (even by a few cents), the beneficiary's public benefits may be terminated. Funds that are received during the month is considered "income" during the calendar month of receipt, but any part of it retained into the next month becomes a "resource" and is then subject to "resource" rules.

Transfer Penalty: Prior to December 1999 an **SSI** recipient could transfer (give away) assets in the month received without adverse effect on his/her eligibility. However, the Foster Care Independence Act of 1999 (FCIA) (P.L. No. 106-169, §206, *amending* 42 U.S.C. § 1382b(c)) implemented a policy to discourage such transfers of resources to obtain or retain SSI eligibility. Under FCIA, an uncompensated transfer of "assets" (defined as income and/or resources) will result in a period of ineligibility for SSI benefits. The length of this ineligibility period is determined by dividing the value of the transferred assets by the SSI monthly "federal benefit rate" (FBR), which is $735 in 2017. The duration of the ineligibility period for any transfer is limited to 36 months.

The Omnibus Budget Reconciliation Act of 1993 (OBRA '93) prescribed periods of ineligibility for **Medicaid** benefits resulting from transfers of assets (giving away assets without value in return). Therefore, various Medicaid programs are subject to transfer penalties, and a denial of Medicaid eligibility will result if a person transfers assets to a "non-exempt" recipient and is receiving Medicaid services or later applies for Medicaid services within five (5) years after the transfer. Unlike the SSI transfer penalty, the Medicaid transfer period is not limited to 36 months and will result in a period of ineligibility dependent upon the amount of assets transferred.

Transfers to certain "exempt" transferees will not result in a transfer penalty. These include transfers to: (1) the individual's spouse or to another for the sole benefit of the spouse; (2) the individual's blind or disabled child, or a trust for the sole benefit of that child; or (3) a trust established for the sole benefit of an individual under age 65 who is disabled. 42 U.S.C. §1396p(c)(2)(B). Also exempt are transfers of the Medicaid recipient's assets to establish a special needs trust pursuant to 42 U.S.C. §1396p(d)(4) for the benefit of the recipient, as outlined below.

Since each income and resource situation is unique, only an attorney who is intimately familiar with the rules and regulations of each SSI and Medicaid program and their differences can properly apply the trust and planning strategies that may assist in attaining or retaining eligibility.

Conclusion

The **third-party special needs trust** is a necessary part of a family's plan to protect Medicaid and SSI benefits of a disabled child or adult from being accidentally terminated. These benefits can provide a huge source of financial assistance over time. In addition, the special needs trust will provide numerous advantages in management and care for the disabled beneficiary.

The **self-settled special needs trust** is the preferred method for (1) settling personal injury cases or inheritance cases for persons who have or may need Medicaid and/or SSI benefits and (2) qualifying a disabled person who owns excess resources for Medicaid and SSI. The trust can be established by or for any person under age 65 with a disability, to hold that person's resources, and thereby establish or continue eligibility for these benefits.

Special Needs Trust Summary

Who's it for?	Any disabled person under age 65 who has or needs SSI or Medicaid (self-settled SNT) Any disabled person of any age who has or needs SSI or Medicaid (third-party SNT)
What's it do?	Makes trust assets "non-counted" resources for SSI or Medicaid eligibility
When's it used?	Lawsuit settlement, inheritance, life insurance receipt, too much assets (self-settled SNT) When doing family estate plan including disabled spouse, child or grandchild (third-party SNT)
Who creates it?	Parent, grandparent, legal guardian or court (for self-settled SNT) Parents, grandparents, anyone else for beneficiary (for third-party SNT)
Why's it good?	Protects SSI and Medicaid; provides trustee management of assets; provides supplemental services and benefits for beneficiary's lifetime

ABLE Act Accounts for Persons with Disabilities

In December 2014, Congress passed, and the President signed into law, the *Stephen Beck, Jr. Achieving a Better Life Experience Act of 2014* (ABLE Act). This law, found at Section 529A of the Internal Revenue Code, provides an opportunity for "qualified" individuals with special needs to have a tax-free savings account that will support their health and independence while preserving their means-tested government benefits. Some individuals with special needs, but not all individuals with special needs, could in fact actually benefit from an ABLE account. As noted in this article, the ABLE Account has some significant limitations that conventional "special needs trusts" do not have.

The ABLE Act allows, but does not require, States to develop programs enabling persons with disabilities to establish an ABLE account modeled on the popular 529 college savings plans. That is, each State must enact its own legislation – this is not a uniform national law. In January 2017, ABLE Account legislation was introduced in the Mississippi legislature. While no Mississippi ABLE account will be likely be active in 2017, a Mississippi resident can establish an ABLE Account in other states that have enacted such plans and that accept out-of-state residents. (See the Appendix attached.)

OVERVIEW

Generally, a **single ABLE account** may be created by or for a **person with a disability that began prior to age 26, with annual contributions to such account not to exceed $14,000** (the annual gift tax exclusion amount in 2017). If the total amount in the ABLE account exceeds the limit established by the State for its 529 accounts ($235,000 in Mississippi), the account will be counted as a resource for Medicaid eligibility. The first $100,000 in an ABLE account will not adversely affect the individual's eligibility for SSI. If there is more than $100,000 in an ABLE account the individual's SSI will be "suspended" until the account is used for allowed expenses and brought back below that level.

Although contributions are not tax-deductible to the contributor, income earned by such accounts will not be taxed. Disbursements from the Account for purposes other than the approved "disability related expenses" will be subject to both income tax and a 10% penalty.

Funds remaining in the account at the beneficiary's death (even funds contributed by parents, grandparents and siblings) must first be used to repay the State for all Medicaid expenditures on the person's behalf made after the date the ABLE Account was established.

COMPARISON OF ABLE ACCOUNT WITH SPECIAL NEEDS TRUST

There are reasons to consider either an ABLE account or a traditional "Special Needs Trust" (SNT) as a method to provide financial resources for a person with a disability. The following sections compare the requirements and allowances of both types of planning techniques.

1. **Who May Open an Account?** An ABLE account may be opened by the disabled beneficiary or by another person, including the guardian or conservator for the disabled individual. The account may be opened in the state where the beneficiary resides or any other state that has an ABLE account administration in place. Similarly, a person with a disability may be the beneficiary of a special needs trust created and managed in another state.

2. **Is There an Age Restriction?** Yes. The beneficiary of an ABLE account or a special needs trust must have a disability. However, an ABLE account cannot be established by or for a person whose disability began after age 26. So, many individuals with a mental illness diagnosis, or traumatic brain injury, if it cannot be documented that the onset was prior to age 26, cannot use ABLE Accounts. There is no such age limit for a beneficiary of a special needs trust.

3. **Who Controls the Funds.** The individual with special needs will have sole control of the ABLE account. There is no Trustee. Therefore, if the individual has a court appointed Guardian or Conservator, court approval may be required to establish such an account and in most cases, court supervision of the account will be required and a surety bond may have to be purchased. The funds and property in a special needs trust will be managed, invested and disbursed by the Trustee of the trust, who cannot be the beneficiary with a disability. The SNT may, therefore, prove more suitable for a beneficiary who cannot effectively manage funds.

4. **Who May Fund the Account?** A "third party" special needs trust is funded by a parent, spouse or someone other than the disabled beneficiary, and can be funded with gifts, life insurance, retirement account beneficiary designation (must be properly done per IRS rules), or bequests at death through the third party's will or trust. A "self-settled" special needs trust may be funded with the assets of the disabled beneficiary, from a lawsuit settlement, inheritance, gift or other assets. An ABLE account may be funded by either the beneficiary's funds or by third parties.

5. **How Many Accounts Can There Be?** The Act allows only one ABLE account for a person with a disability. Therefore, if divorced parents or multiple family members wish to establish funds for such a person, only the first account will

qualify for the advantages of the Act. All other accounts will be countable for SSI and Medicaid purposes and will not have the tax advantages of an ABLE account. However, there is no limit on the number of special needs trusts that can be created for the benefit of the disabled beneficiary, and each such trust may have different trustees and hold different types of assets.

6. **How Much Can Be Put Into the Account?** The ABLE Act limits the amount that can be contributed **annually** to the account. Only $14,000 (the annual gift tax exclusion amount) may be contributed during a calendar year from all sources to the one allowable ABLE account. The Act also limits the **total** amount that can be contributed to such an account in order not to be a countable asset for SSI and Medicaid. If the amount in the ABLE account exceeds $100,000 even for one day, the individual loses Supplemental Security Income **(SSI)**, unlike for a special needs trust. (The federal SSI monthly payment amount in 2017 is $735 a month, or $8,820 annually, and is income tax free to the beneficiary.) The Act also requires that the account balance not exceed the 529 savings plan account limit in the state where the account is created in order not to be countable for **Medicaid** eligibility. In Mississippi, the maximum that may be allowed in an ABLE account for a beneficiary is $235,000. If the balance in the ABLE account ever exceeds $235,000 for even one day, then the account will become a resource for Medicaid eligibility purposes, will not receive tax-free treatment, and will be subject to a 10% federal tax penalty. (A number of states have higher 529 limits than Mississippi – see Appendix.) Special needs trusts have no limits on annual or lifetime contributions. There is no limit for the balance in a special needs trust, making those trusts more suitable for many inheritances or legal settlements.

7. **What Can the Account Be Used For?** Withdrawals may only be taken tax-free from an ABLE account for "qualified disability expenses" which section 529A(e)(5) defines as follows: "education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses" and others approved by IRS regulations." No Disney World Trips. There are no such limitations on disbursements from a "third party" special needs trust, which can often pay for entertainment, recreation, clothing, furnishings and many types of services that are not apparently permitted from an ABLE account. Disbursements from a "self-settled" special needs trust may be more limited by the policies of SSI and Medicaid.

8. **What Happens to the Account When the Beneficiary Dies?** An ABLE account must "pay back" (reimburse) the State when the beneficiary dies, for all the medical services that the State paid (Medicaid, Medicaid Waiver programs, etc.) after the date the ABLE account was created. This pay-back must be made even

from funds contributed by parents, grandparents and others. However, a third party special needs trust has no pay-back requirement, and the remaining trust assets and funds may be designated to pass on to other family members or charities as the creator of the trust desires.

9. **What About the Taxation of the Account?** ABLE accounts are "tax free." In truth, this is a somewhat illusionary benefit when compared to the taxation of special needs trusts. A third party special needs trust, if drafted as a "Qualified Disability Trust" (QDT), has a full $4,050 income tax exemption in 2017. All distributions from the Trust for the benefit of the beneficiary are taxed to the beneficiary, and the beneficiary could have his own exemption of $4,050 plus a standard deduction in 2017 of $6,350. Therefore, use of a third party QDT special needs trust may allow a total of $14,450 to be sheltered from income tax in 2017. An ABLE account with $100,000 (maximum not to lose SSI) would need to earn over 14% for any income tax benefit over a third party special needs trust. Further, investments can easily be selected in the special needs trust which produce no, or minimal, federal taxable income.

For a "self-settled" pay-back special needs trust, all income is taxed to the beneficiary and not to the Trust. Again, the beneficiary could have a $4,050 exemption and $6,350 standard deduction. Therefore, no federal income tax until the income exceeds $10,400, and then at the lowest tax bracket (10% on next $9,325). So, a $100,000 ABLE account is not likely to produce significant income tax benefit, and has more limited uses of the funds in the account than a self-settled special needs trust.

WHEN DOES ABLE MAKE SENSE?

In light of the relative benefits and shortcomings of ABLE accounts when compared to special needs trusts, an ABLE account may be a good planning tool in the following situations for a person with SSI and/or Medicaid benefits:

- If the individual does not have a court appointed Guardian, and the individual is capable of managing his or her own financial account;
- The individual receives an outright inheritance of less than $14,000 (when not left into a SNT for him);
- The individual receives a litigation settlement of less than $14,000, or the annual amount to be received from a settlement annuity is less than $14,000 a year;
- The individual has unspent SSI, Social Security Disability back payments, or earnings that will result in the individual's resources exceeding the allowable amount for SSI and Medicaid, and wishes to "save" that amount (may not exceed $14,000 per year).

We are available to make presentations to groups and organizations to explain how and when an ABLE account could be useful in addition to, and not in lieu of, other necessary special needs planning. Call us if you need a speaker on this topic.

APPENDIX -- ABLE PROGRAMS AVAILABLE JANUARY 2017

Below are details on all 10 of the states currently offering ABLE programs as of 1/1/17; You can use this tool from the ABLE National Resource Center (http://ablenrc.org/) to compare the state programs' investment options, costs, tax benefits, and other perks head to head.

Alaska

- Eligibility: Nationwide
- Minimum to Open: $25
- Annual Fee: $40 (plus an extra $15 if you want paper statements and confirmations)
- Investment Options: 6 portfolio options with funds from BlackRock, Schwab, and Vanguard
- Tax Benefits to State Residents: None
- Special Features: A member of the National ABLE Alliance, a group of 13 states that have pooled resources in order to offer state ABLE programs, and one of the first to go live
- Maximum Account Balance: $320,000
- Program Website: https://savewithable.com/ak/home.html

Florida

- Eligibility: State residents only
- Minimum to Open: $0
- Annual Fee: $0
- Investment Options: 3 portfolio options with funds from Vanguard, Florida PRIME, BlackRock.
- Tax Benefits to State Residents: None
- Maximum Account Balance: $418,000
- Program Website: http://www.ableunited.com/

Kentucky

- Eligibility: State residents only
- Minimum to Open: $5
- Annual Fee: $60
- Investment Options: 5 portfolio options with funds from Vanguard
- Tax Benefits to State Residents: None
- Special Features: Free debit card option to help access funds
- Maximum Account Balance: $235,000
- Program Website: http://stablekentucky.com/

Michigan

- Eligibility: Nationwide
- Minimum to Open: $25
- Annual Fee: $45
- Investment Options: 4 portfolio options with funds from Vanguard and Dimensional Fund Advisors and an FDIC-insured savings account
- Tax Benefits to State Residents: Up to a $10,000 deduction for joint filers and $5,000 for single filers for contributions made to the accounts
- Special Features: Debit card option available starting Feb. 1, 2017
- Maximum Account Balance: $235,000
- Program Website: https://www.miable.org/

Nebraska

- Eligibility: Nationwide
- Minimum to Open: $50, or $25 if signed up for monthly payroll deduction
- Annual Fee: $45
- Investment Options: 4 portfolio options with funds from Vanguard
- Tax Benefits to State Residents: Up to a $10,000 deduction for joint filers and $5,000 for single filers for contributions made to the accounts
- Maximum Account Balance: $360,000
- Program Website: https://www.enablesavings.com/

Ohio

- Eligibility: Nationwide
- Minimum to Open: $50
- Annual Fee: $30 for state residents, $60 for out-of-state participants
- Investment Options: 5 portfolio options with funds from Vanguard
- Tax Benefits to State Residents: $2,000 per contributor
- Special Features: Free debit card option available
- Maximum Account Balance: $445,000
- Program Website: http://www.stableaccount.com/

Oregon

- Eligibility: Oregon ABLE Savings Plan is open to in-state residents; ABLE for ALL savings plan is open to participants nationwide
- Minimum to Open: $0
- Annual Fee: $45 for state residents, $55 for out-of-state participants
- Investment Options: 3 portfolio options with funds from Vanguard and Dimensional Fund Advisors and an FDIC-insured savings account
- Tax Benefits to State Residents: Up to a $4,620 deduction for joint filers and $2,310 for single filers for contributions made to benefit account holders who are under age 21
- Special Features: Reloadable prepaid card available for $1.50 annual fee
- Maximum Account Balance: $310,000
- Program Website: http://oregonablesavings.com/

Rhode Island

- Eligibility: Nationwide
- Minimum to Open: $25
- Annual Fee: $40 (plus an extra $15 if you want paper statements and confirmations)
- Investment Options: 6 portfolio options with funds from BlackRock, Schwab, and Vanguard
- Tax Benefits to State Residents: None
- Special Features: A member of the National ABLE Alliance, a group of 13 states that have pooled resources in order to offer state ABLE programs, and one of the first to go live
- Maximum Account Balance: None
- Program Website: https://savewithable.com/ri/home.html

Tennessee

- Eligibility: Nationwide
- Minimum to Open: $25
- Annual Fee: $0
- Investment Options: 14 portfolio options with funds from Vanguard and Dimensional Fund Advisors
- Tax Benefits to State Residents: None
- Maximum Account Balance: $235,000
- Program Website: http://www.abletn.gov/

Virginia

- Eligibility: Nationwide
- Minimum to Open: $0
- Annual Fee: $39, but waived if you maintain $10,000 daily average
- Investment Options: 6 portfolio options with funds from Vanguard and Fidelity
- Tax Benefits to State Residents: $2,000 per contributor
- Special Features: Free debit card option available
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Planning for Incapacity and Decision-making

Many parents of children with disabilities have asked us "Do I need to get a guardianship over my child?" In many cases, they have been told by their child's medical providers or by the administrator of some residential, employment or activity program that this is required. This may not be so. The following explains the situations where guardianship or conservatorship may be called for and its effects.

Mississippi law holds that the parent of a minor child has full legal authority to make decisions for and manage the affairs of such child. "The father and mother are the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare and education, and the care and management of their estates." Mississippi Code Annotated (MCA) §91-13-1. What is a "minor?" In our state, a minor is a child under age twenty-one (21) who is not "emancipated." Mississippi law defines emancipation as: "(a) . . . when the child: (i) attains the age of twenty-one (21) years, or (ii) marries, or (iii) joins the military and serves on a full-time basis, or (iv) is convicted of a felony and is sentenced to incarceration of two (2) or more years for committing such felony; or (b) . . . the court may determine that emancipation has occurred and no other support obligation exists when the child: (i) Discontinues full-time enrollment in school having attained the age of eighteen (18) years, unless the child is disabled, or (ii) Voluntarily moves from the home of the custodial parent or guardian, establishes independent living arrangements, obtains full-time employment and discontinues educational endeavors prior to attaining the age of twenty-one (21) years, or (iii) Cohabits with another person without the approval of the parent obligated to pay support." MCA §93-11-65(8). (Some states, and the federal government, recognize eighteen (18) as the age of adulthood, or "majority.") Unless one of these conditions has been met, the minor has no legal authority to inherit assets directly or enter into many contracts. The parent must do these things for the child.

State law prescribes several situations in which a child over age 18 but under 21 may act or make independent decisions. At age 18 a child can legally make health care decisions for herself and can serve as the surrogate for another in making such decisions for that person. MCA §41-41-203(a), -205. Every person over age 18 may execute a valid last will and testament, and 18 is the age of majority to serve as an executor or administrator of a deceased person's will or estate. MCA §91-5-1; MCA §91-7-37.

Even though it may be legally permissible for an adult to engage in various transactions, that person must also have the legal "capacity" to do so.

About "Capacity"

Historically, both medical and legal communities have referred to the **abilities to think, reason and act in one's own best interest** as "competence" of the person. One who lost these abilities was called legally or medically "incompetent." More recently, the possession of such abilities has come to be called "capacity," and the loss of such abilities is referred to as "incapacity." There are differences between the diagnostic approach of the medical community and the functional evaluation imposed by the legal community, but in most cases, proof of legal capacity will rely heavily on medical evaluations of competency. Legal standards of capacity tend to be somewhat absolute (that is, if one is deemed to lack capacity to execute a valid complex last will and testament, she would also be deemed to lack capacity to execute a valid simple will). Case law also recognizes that capacity may ebb and flow and that a person may have a **"lucid moment"** or **"lucid interval"** during which he has the required level of capacity, even though this interval is preceded and followed by periods of unbroken incapacity.

Standards of Capacity.

It is also clear that there are different **levels of capacity** to make different kinds of decisions. Capacity can mean different things depending on the type of legal action contemplated for an individual. Among the more common types of capacity that must be considered:

- **Testamentary Capacity.** In order for one to be able to make a valid will, power of attorney or trust, that person (the "maker") must be able to (i) "understand and appreciate the nature and effect of his act" in signing the will [or trust], (ii) understand and recognize "the natural objects or persons to receive his bounty (property)" and their relationship to him, and (iii) be "capable of determining what disposition he desires to make of his property." *Dowdy v. Smith*, 818 So.2d 1255 (Miss. 2002). If a person has this level of capacity at the time she executes a last will and testament or trust, the document is valid even though the maker was incapacitated for some time prior to or after such execution. This rule was upheld in *In re Estate of Byrd*, 749 So.2d 1214 (Miss. 1999). The court case of *Lee v. Lee*, 337 So.2d 713 (Miss. 1976) ruled that, even though a person is found to be unable to manage his property due to incapacity and a conservator is appointed for him, he may still have the level of capacity necessary to execute a valid will. The same level of capacity needed to establish a valid will, trust or power of attorney is required to revoke it.

- **General Contractual Capacity.** The law generally recognizes that a person does not have the capacity to enter into a valid contract if he does not

have "sufficient mental capacity to understand the nature and effect of the particular transaction." *McElroy v. Mathews*, 263 S.W.2d 1 (Mo. 1953). This means the person must understand the performances that each party to the contract is obligated to render and the benefits to each. This is a higher standard than testamentary capacity. A person who has had a conservator appointed for him cannot legally enter into any contract without court approval.

- **Advance Directives.** The Mississippi Uniform Health-Care Decisions Act (MCA §41-41-203(d)) defines decision-making "capacity" for health-care as "an individual's ability to understand the significant benefits, risks and alternatives to proposed health care and to make and communicate a health care decision."

- **Informed Consent.** In order to be able to validly consent to particular medical treatment for oneself, the individual must be able to "understand the diagnosis, the nature of the proposed treatment, the risks inherent in it, the prognosis if the proposed treatment is not undertaken, and the alternative methods of treatment, if any." Regan, John J, Morgan, Rebecca C. and English, David M., *Tax, Estate & Financial Planning* for the Elderly, §14.03 (LexisNexis 2005) This is called "informed consent" and is similar to the ability to give a health care decision under the advance directive above.

Who Makes Decisions for a Person with a Disability

In light of the above explanation of minority and capacity, it is clear that a parent will make all medical and financial decisions for a child under age 18, whether disabled or not. However, a person with a disability who is considered an adult and who has capacity to make his or her decisions will be entitled to do so independently. The Fourteenth Amendment to the U.S. Constitution guarantees the rights of life, liberty and property to every adult citizen. Therefore, a legally competent person will make her own financial and medical decisions and conduct her own personal affairs and interactions without interference from others, including parents. Cognitive, intellectual, behavioral or memory problems that result from a disability may advocate in favor of another person making such decisions. Third parties – like sheltered employment, day programs or residential programs that serve persons with similar disabilities – may demand a surrogate decision-maker with

legal authority over the participant. And doctors and other medical providers, in seeking to comply with health care privacy regulations, may refuse to communicate with the parent of an adult patient with a disability without evidence of such legal authority. A person with a disability, who has the requisite capacity, may voluntarily give such authority to a parent, sibling or other person through a power of attorney or health care directive.

Durable Power of Attorney ("DPOA")

A durable power of attorney is a written document in which the "principal" with testamentary capacity appoints another as the principal's agent (or "Attorney-in-Fact") and gives that agent the authority to carry out the principal's non-medical affairs on the terms stated in the DPOA. ***Note:*** A power of attorney **must** contain a statement to the effect that "This power of attorney shall not be affected by the subsequent disability or incompetence of the Principal." If such a statement is included, then the power of attorney is considered "durable" and the Attorney-in-Fact will continue to have the power to act for the principal even after the principal becomes incapacitated. (Without such a statement, the power of attorney becomes void after the principal's incapacity.) The DPOA may give the Attorney-in-Fact all the powers over the principal's affairs and property that the principal would have (a "general" power of attorney), or it may be limited to certain powers, such as the power to sell real property or create a trust for the principal (a "limited" power of attorney). It may allow the Attorney-in-Fact to act as soon as the principal has signed the document (an "immediate" power) **or** it may state that the Attorney-in-Fact may only exercise the powers after some future event, such as one or more physicians certifying that the principal has become incapacitated (a "springing" power). An immediate DPOA does **not** take away or affect the principal's right to continue to make such decisions or control her property and affairs as long as she has capacity to do so. A DPOA should be customized for the principal's personal circumstances, and is best done by an experienced elder law attorney who understands these issues. A power of attorney that lacks important statements of intended powers or that unduly restricts certain types of powers will hamper the actions of the agent when it becomes necessary to use it. For instance, if the principal has indicated a desire to make college tuition gifts for children, language in the DPOA limiting or preventing such gifts may deny the principal's wishes. Also, a DPOA can contain requirements that other family members must give prior written consent to the sale of certain land or assets by the Attorney-in-Fact. And Mississippi law requires that someone ***other than*** the principal's spouse must be named as the agent to sell the principal's residence property.

The **primary reasons for a DPOA** are: (a) to plan for a substitute decision-

maker in the event of your incapacity; (b) to personally select the person(s) who may be appointed conservator for you if required (rather than having the Court approve someone undesirable); (c) to authorize the Attorney-in-Fact to take necessary actions to conduct your affairs and protect your assets as part of your estate plan. If you become incapacitated without a DPOA, a court will have to appoint a conservator to handle your affairs and assets. (See Conservatorship below.)

Many form books, websites and CD-ROM products encourage people to draft their own powers of attorney. **Don't!** As noted above, powers of attorney should be customized for your particular situation and should only be drafted (or at least reviewed) by a knowledgeable attorney who has discussed with you and understands your goals and objectives. Simple or "cookie cutter" power of attorney forms which do not address your specific needs can actually limit or prevent certain actions on your behalf later.

Advance Health Care Directive

The Uniform Health-Care Decisions Act of Mississippi (MCA §41-41-201, -209) prescribes the "Advance Health-Care Directive" (AHCD) as the instrument by which **a person with capacity can designate an agent** who will be able to make health-care decisions for the maker. An adult in Mississippi is entitled to make his own medical treatment and health-care decisions, and maintain the privacy of his own medical information, unless someone else has legal authority to do so. This includes the right to implement, alter and refuse medical treatment for oneself. However, one may lose this capacity through illness or disability, and medical providers will be reluctant to render non-emergency treatment without consent of someone with lawful authority to approve such measures. The AHCD allows one to control and direct personal health-care decisions after the onset of any future incapacity.

Section 1 of the AHCD is the health-care power of attorney, in which one or more persons may be listed in the maker's order of choice and designated as agents to make *medical and health-care treatment* decisions for the maker. The maker can select whether the agent may make such decisions without prior determination of the maker's incapacity, or whether one or more doctors must first determine the maker's incapacity before the agent can make decisions for her. In Section 2, the maker can state any personal health-care decisions, such as about keeping or removing life-support treatments or tube-fed food and liquids in the event of terminal illness, and other choices concerning medical treatment based on the maker's own personal choices. In the optional Section 3, the maker may list the name and contact information for her personal physician. Section 4 is an authorization for organ donation if the maker desires.

In light of the stringent privacy regulations under the Health Insurance Portability and Accountability Act (HIPAA) governing the release of personal medical information, it is wise to include specific language in the AHCD that identifies the agent as your "personal representative" who is entitled to request and receive your medical information for HIPAA purposes. An AHCD signed by a person with a disability will enable another family member named as the agent to communicate with medical providers and monitor the principal's health care needs and treatments.

HIPAA Authorization

In April 2005, the federal Health Insurance Portability and Accountability Act (HIPAA) implemented stringent privacy regulations governing the release of personal medical information by all types of health care providers. As a result of these regulations and the penalties they impose for improper release of such personal medical information, many doctors, hospitals and other health care providers are reluctant to release health care information without strict compliance with HIPAA. The HIPAA Privacy Rule regulations, in 45 CFR §164.502(a)(2), require a "covered entity" (that is, a hospital, clinic or other health-care provider covered by the Act) to disclose protected personal health information *to the individual* upon request by her. Section 164.502(g) provides that a covered entity must treat a **"personal representative"** as the individual and can therefore disclose protected health information of an adult to a person who has lawful authority to act on behalf of that adult in making health-care decisions. Such authority can be given by a **written authorization** from the individual approving certain health-care action by the representative. 45 CFR §164.508(c) sets out the requirements for such a written authorization, which should be drafted by a knowledgeable attorney. This HIPAA Authorization can authorize medical providers and insurance companies to discuss a person's health information with parents, children or other relatives of that person, even though those authorized "personal representatives" do not have the power to make health-care decisions (which may be made by the agent in the Advance Health Care Directive).

Health-care Surrogate

Section 41-41-211 of the Uniform Health-care Decisions Act of Mississippi allows a third party (known as a health-care "Surrogate") to make health-care

decisions for one who is unable to make such decisions for himself, where no health-care agent or guardian has been appointed in writing for the patient or, if appointed, is not reasonably available. The Surrogate must be within the designated classes of persons authorized to act as Surrogate, which are in order of priority: (i) spouse, unless legally separated; (ii) adult child; (iii) parent; (iv) adult brother or sister; or (v) an adult who has exhibited special care and concern for patient, who is familiar with patient's personal values, and who is reasonably available to act. A surrogate must make any health-care decision for the patient in accordance with the patient's individual instructions, if any, and other wishes to the extent known to the surrogate ("substituted judgment" test); otherwise, a surrogate will make the decision in accordance with surrogate's determination of the patient's best interest, taking into consideration the patient's personal values to the extent known to the surrogate. Since a medical provider has the right under the statute to require written evidence of such surrogate status, our firm has developed and can prepare a written Declaration of Health-Care Surrogate for such situations. The law also provides that a health care provider cannot be held liable for refusing to honor the directions of a surrogate. In light of the burdens associated with conservatorship noted below, it may be advisable to present a medical provider with such a surrogate document, in which case they may be willing to communicate with the surrogate without a conservatorship.

Guardianship or Conservatorship

If a person has no health-care directive or durable power of attorney and is unable to manage her own personal or financial affairs due to minority or lack of capacity, a family member may seek to be appointed guardian or conservator of that person. The guardianship and conservatorship statutes, found at MCA §93-13-1, -251, refer to the person with incapacity as the "**ward**." As noted above, the parent(s) or court-appointed guardian must make financial and health care decisions for a minor. If an adult is "incapable of managing his own estate" due to "advanced age, physical incapacity or mental weakness," that person, a friend or relative may file a petition in the Chancery Court to appoint a conservator of the financial estate, the person, or both. The petition must include written certificates of at least two licensed physicians (or one physician and one psychologist) stating that they have examined the ward and that, in their opinion, she is unable to manage her own affairs and is in need of a conservator. The petition is filed, a copy of the petition must be personally delivered to the ward and at least one spouse or next of kin or caretaker, and a court hearing may be set not less than 5 days later.

Once appointed, the conservator will have authority to direct the health-care of the ward as her personal representative under HIPAA. Also, the conservator must

file a petition for court permission to move the person and/or property of the ward to another county, or to move the person and property of the ward out of state, by obtaining an insurance bond conditioned on the conservator qualifying in the other state. A conservator (and a guardian) must get court permission to transact business or financial matters for the ward and must file annual accountings with the court showing all funds received and spent from the ward's assets.

The **legal standard** for appointment of a conservator is the **inability to manage** his property or person due to "advanced age, physical incapacity or mental weakness." The Mississippi case of *Harvey v. Meador*, 459 So.2d 288 (Miss. 1984) established several legal propositions pertaining to conservatorship: (i) advanced age or physical incapacity alone does not necessarily justify appointment of a conservator; (ii) mere lack of good business judgment, not amounting to some degree of wasted or dissipated property, is not sufficient basis for appointment of a conservator; and (iii) the test of "management competency" is met by assessing factors including ability to manage, improvident disposition, dissipation of property, susceptibility to undue influence or deception by others, and similar factors. In the 2003 case of *In Re Conservator for Demoville*, 856 So.2d 607, rehearing denied, cert denied 866 So.2d 473 (Miss. 2003), the court ruled that if at least one of the factors of the "management competency test" is established, appointment of a conservator may be justified. In *Demoville*, the court refused to appoint as conservator the daughter of a woman with severe dementia, where the daughter had transferred large sums of money from the mother's funds to her own benefit. The court held that a person with such a conflict of interest with the incapacitated person cannot serve as conservator.

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4400 Old Canton Road • Suite 220
Jackson, MS 39211
P: 601-987-3000 • F: 601-987-3001
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