



THE LAW OFFICES OF  
**GKH**  
ESTD 1977  
**GIBBEL KRAYBILL & HESS LLP**  
ATTORNEYS & COUNSELORS AT LAW

# Planning for Individuals with Disabilities and Their Families

The Arc of PA  
Advocacy and Policy  
Conference  
June 5, 2017

Attorneys  
Marci S. Miller  
and  
Ann L. Martin

## **Disclaimer:**

-This presentation is for educational purposes only. It is not intended as legal advice. Individual situations must be evaluated before legal advice can be provided.

Provided by Gibbel Kraybill & Hess LLP.

# Special Needs Planning requires asking (among other things):

- What public benefits does the individual with disabilities receive now, and what public benefits is he or she likely eligible for in the future?
- Are such benefits tied to a resource limit?
- What resources and income does the disabled individual have?
- Do family members or others plan to give assets to the disabled individual during their lifetimes or via their estate plans?
- Does the disabled individual have any fiduciaries in place? (e.g. court-appointed guardian, Agent under a Financial or Health Care Power of Attorney?)
- Does the disabled individual have any estate planning documents in place? If not, does he or she have the capacity to execute such documents?

Provided by Gibbel Kraybill & Hess LLP.

## Tip: Gathering Information

- Before meeting with a special needs or estate planning attorney, gather:
- Correspondence or Benefit Statements from the Social Security Administration, BHDS (Behavioral Health and Disability Services), the County Assistance Office as well as bank statements and other statements showing resources owned and income received by the individual with a disability.
- Relevant estate planning documents

Provided by Gibbel Kraybill & Hess LLP.

# POWER OF ATTORNEY

## DEFINITION:

A legal document assigning rights and powers to another person(s) or institution, e.g.: bank or agency. The rights and powers may be limited or unlimited, i.e.: limited power to sell a home, unlimited powers regarding finances.

# POWER OF ATTORNEY

- Power of Attorney ("POA") – an instrument granting someone authority to act as Agent for the Principal
- Principal – one who authorizes another to act on his or her behalf as an Agent
- Agent – the person named in the Power of Attorney document to act for the Principal

# REASONS FOR POWERS OF ATTORNEY

- Handling Financial Matters
- Handling Healthcare Matters
- Professional Management of Matters
- Usually eliminates need for guardianship proceedings

# TYPES OF POWERS OF ATTORNEY

- Financial POA
- Health Care POA



# 'Durable' Powers Of Attorney

- Durable – The authority provided to the Agent under the POA remains in effect despite any future mental or physical incapacity of the Principal
- A Power of Attorney is presumed to be Durable unless the POA document specifically states otherwise

# Capacity to Execute a POA

- Principal must have adequate intellectual capacity when POA is executed
- No statutory or case law definition of “capacity”
- PA case law seems to support a lenient “general understanding” standard of capacity for POAs in PA
- Varies on a case-by-case basis

# Requirements for executing a POA

- Ability to physically sign – NOT REQUIRED
  - May be signed by “mark” or by another at Principal’s direction
- Signature of Agent REQUIRED before Agent can act
- Mental capacity of Principal - REQUIRED

# Who Should be the Agent?

- Eligible persons include family members and friends, and certain institutions, such as bank trust departments, brokerage firms, etc.
  - Check before appointing a financial institution. Some have policies prohibiting them from serving as Agent under a Financial Power of Attorney.
- Watch potential conflicts of interest or other conflicts
  - Appointing multiple Agents to serve together
  - Agent has “fiduciary duty” to act in Principal’s best interests

## Examples of Agent's Powers

- Create Trusts
- Engage in real property transactions
- Engage in banking transactions
- Enter safe deposit boxes
- Receive government benefits
- Pursue tax matters
- Handle interests in estates and trusts
- Provision nominating the Agent as Guardian if a guardianship becomes necessary

# GUARDIANSHIP

## DEFINITION:

*A legal proceeding to determine the capacity of an individual, and if the person is deemed **incapacitated**, then to determine the capacity of the person proposed to be appointed as Guardian.*

## LEGAL DEFINITION OF "INCAPACITATED PERSON":

*An adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety.*

# GUARDIANSHIP: 3-PRONG TEST

## **PRONG #1:**

Does the alleged incapacitated person meet the legal standard of incapacity?

## **PRONG #2:**

Is there a less restrictive alternative to guardianship? (e.g. is there a valid Financial Power of Attorney in place?)

## **PRONG #3:**

Who should be appointed as Guardian?

# TYPES OF GUARDIANSHIPS

## Guardianship of the Estate:

Guardian of the Estate oversees the management of the incapacitated person's financial resources.

## Guardianship of the Person:

Guardian of the Person oversees the health, safety, and physical well-being of the incapacitated person.



## WHO CAN PETITION THE COURT?

- Any person interested in the alleged incapacitated person's welfare
- Can be a spouse, children, family members, clergy, nursing home, or the Commonwealth
- In crisis situations, the County Office of Aging for individuals over age sixty (60)

# WHO MAY BE APPOINTED AS GUARDIAN?

- Any qualified individual, including spouse, family member, clergy, attorney, corporate fiduciary, non-profit corporation, or a county agency;
- Court shall not appoint any entity providing residential services or any other services for a fee, unless no alternative exists
- No party with an adverse interest
- Co-Guardians are possible
- Court will strongly consider the individual nominated as guardian in a POA

## Defining Disability for public benefits purposes

- Adults:

- Unable to do any *substantial gainful activity* by reason of a severe physical or mental impairment or combination of impairments that can have lasted or can be expected to last at least 12 months, or result in death.
- The Social Security Administration has established certain earnings levels tests as reasonable signs that a person can perform substantial gainful employment. For **2017**, that level is \$1,190/month for a non-blind individual. If a person can potentially earn \$1,190 per month or more, Social Security presumes that the individual is able to be self-supporting.

## Defining Disability for public benefits purposes

- Different disability rules apply for children under age 18 because a work test does not make sense:
- In general, Social Security looks for a mental or physical impairment, or combination of impairments, that substantially affect the child's ability to reach age appropriate developmental milestones or engage in age appropriate activities of daily living. The child's functioning is compared to same-age children without disabilities.
- A portion of the parents' income and resources is attributed to ("deemed") to the child for eligibility purposes.

# Federal Disability Programs

- Social Security Disability Insurance (SSDI)
- Supplemental Security Income (SSI)
- Medicaid (aka Medical Assistance)
- Medicaid Waiver Program

# Social Security Disability Insurance

- Benefit program for workers who paid into the Social Security system and certain of their dependents
- Not based on financial need
- No asset limit. SSDI recipients can own an unlimited amount of assets and still qualify for benefits; BUT
- Some SSDI recipients also receive SSI, which does have an asset limit.

# Social Security Disability Insurance

- Monthly payment from SSA paid to wage earner
- Benefit amount is based on worker's taxed Social Security income over working career
- Under certain circumstances, SSDI can also be paid to spouse and child of wage earner

# Social Security Disability Insurance

- SSDI recipients will be eligible for Medicare after they have received SSDI benefits for 24 months.
- Receiving SSDI creates no automatic eligibility for Medicaid (Medical Assistance) – must apply separately.
- SSDI benefits terminate when no longer disabled or reach full retirement age, when SSDI benefits convert to Social Security retirement benefits



## SSDI and Work

- SSDI benefits remain constant so long as the disabled individual earns less than \$1,190/month.
- No partial reduction of SSDI benefits as with SSI.
- If an individual earns more than \$1,190/month, their SSDI benefits may end altogether.
- There are some “work-incentive” programs allowing a person to earn more than \$1,190/month and still receive SSDI.

# Supplemental Security Income (SSI)

- Cash assistance grant to certain aged, blind or disabled persons
- Maximum Federal benefit for a single eligible individual is **\$735/month**
- Plus Pennsylvania State Supplement of **\$22.10/month.**
- ***Countable resources*** of single person cannot exceed \$2,000 (\$3,000 for married couple)

# Countable Resources

- A resource or item or value that is included when determining whether an individual qualifies for a public benefit program like SSI and Medicaid/Medical Assistance.
- Generally defined as cash or other liquid assets or property that the person owns and could convert to cash.
- Examples: bank account, rental property, stocks, bonds, life insurance policy with a cash value exceeding \$1,500.

# Non-Countable Resources

- Personal residence
- Automobile, regardless of value
- Personal property (e.g. furniture, home furnishings, computer) regardless of value
- Burial insurance
- Life insurance with a cash value of less than \$1,500.00
- Assets held in a properly drafted special needs trust
- Assets held in an ABLÉ account

## Supplemental Security Income (SSI)- cont'd

- In general, the monthly SSI benefit amount is reduced by any countable income paid to the recipient.
- Social Security considers three kinds of income: unearned, earned, and "in-kind."
- Any money distributed directly to the beneficiary is considered unearned.
- SSI recipients may not receive more than \$20/month unearned income without penalty. Any dollar above that will be deducted from their SSI benefit on a dollar-for-dollar basis.

# Supplemental Security Income (SSI)

- Intended to cover food and shelter, so any cash distributed for food and shelter will reduce SSI income.
- Important: Any food or shelter item that an SSI recipient receives for free or at a reduced cost from a third party (including from a Special Needs Trust), will reduce the SSI benefit. The maximum reduction will be the lesser of the item's actual value or one-third of the individual's monthly SSI benefit.

## Medical Assistance (aka "Medicaid")

- Pays for a broad spectrum of medical services for the aged, blind and disabled
- Provides access to, among other things, long-term skilled nursing care
- If you receive even one dollar of SSI, you will also receive Medical Assistance.
- The Trustee of a Special Needs Trust beneficiary who receives SSI should avoid paying for food or shelter items lest the recipient's SSI benefit be reduced to \$0 and potentially trigger Medicaid termination.

Provided by Gibbel Kraybill & Hess LLP.

# Medicaid Waiver Programs

- In Pennsylvania, Medicaid Waiver programs support persons with disabilities to live in the community vs. a skilled nursing facility. Each waiver program has its own requirements.
- Sometimes, family members are advised to do special needs trust planning so that their loved one with a disability who has excess countable resources will become financially eligible for a Medicaid Waiver program.



## Some Special Needs Trust Vocabulary

- **Settlor/Grantor:** The individual who creates or establishes a Trust.
- **Beneficiary:** The individual for whose benefit the Trust is established, and on whose behalf trust distributions are made.
- **Trustee:** The individual, non-profit or corporate organization that manages the Trust.
- **Trust Principal:** Funds or other assets deposited into the Trust.
- **Trust Income:** Money earned by the trust once it is up and running.
- **Trust Distributions:** Money the trustee distributes from the Trust either directly to the Beneficiary or on his/her behalf (e.g. to a landlord, vendor etc.)
- **First-Party (aka “Payback Trust” or “Self-Settled”) Trust:** A Trust funded with the disabled individual’s own money.
- **Third-Party (aka “Supplemental”) Trust:** A Trust funded with assets that do not belong to the disabled individual.
- **Pooled Trust:** A First or Third Party Trust administered by a nonprofit organization.

## What drives the creation of a Special Needs Trust?

- **First-Party Trust:** A disabled individual who has received assets via inheritance, lawsuit settlement or life insurance proceeds wants to apply for or continue receiving Medical Assistance or SSI. Due to resource limits, the assets of the disabled individual can only be transferred to a First-Party Trust.
- **Third-Party Trust:** Parents or other family members doing estate planning want to avoid a disqualifying outright gift of assets to their disabled child or relative.

## Third-Party Trust Features:

- Funded with assets that belong to someone other than the disabled individual.
- Can be created via Will (“testamentary trust”) or during the lifetime of the Settlor and outside the Will (“inter vivos trust”).
- For the benefit of the disabled individual, but other remainder or contingent beneficiaries can be named.
- **KEY FEATURE: No Medicaid payback to the Department of Human Services at the death of the disabled individual.**

## Third-Party Trust Features (cont'd):

- Should contain “supplement but not supplant” public benefits language.
- Should give total discretion to trustee to pay or refuse to make distributions on behalf of disabled individual.
- Should state that the beneficiary has no right to compel distributions from the Trust and will not receive Trust funds if Trust is terminated during his or her lifetime.

## First-Party Trust Features

- Contains only the disabled individual's own assets.
- Irrevocable (cannot be undone)
- Created by a disabled individual under 65 years of age.

## First-Party Trust Features (cont'd)

- Trust must be for the **sole benefit of** the disabled individual
- Trust must be created by the beneficiary, or his parent, grandparent, guardian or the Court.
- Must contain **payback provision** up to the amount of Medical Assistance spent on the disabled individual (but no payback of SSI and Medicare funds is required)

# Self-Funded Pooled Trust Features

- Funded with assets of the disabled person age under age 65, often as a result of an inheritance, Social Security back payment or personal injury settlement.
- Assets are pooled with the assets of other disabled beneficiaries and managed by a non-profit organization
- Management fees can be less than one percent on an annual basis (lower than many for-profit businesses offering trust services)
- At death of beneficiary, funds are retained in the pool for the benefit of other disabled individuals

Provided by Gibbel Kraybill & Hess LLP.

# Self-Funded Pooled Trust Features

- Good option if smaller resource amounts are involved
- *Example: A 40-year-old single disabled individual receiving SSI and Medicaid is named as beneficiary under grandmother's Will. Inheritance will be \$10,000, but her asset limit is \$2,000.00. This amount is likely too small to justify the expense of establishing a First-Party Special Needs Trust. Transfer the inheritance to a pooled trust in order to allow public benefits to continue and pay lower trust administration fees so the principal lasts longer.*

Provided by Gibbel Kraybill & Hess LLP.



# SNT Reporting Requirements

- The existence of a Special Needs Trust must be disclosed to the Social Security Administration if the beneficiary receives SSI, but not if the beneficiary receives only SSDI.
- The existence of a Special Needs Trust must be disclosed to the Pennsylvania Department of Human Services if the beneficiary receives Medical Assistance.
- Social Security shares information with other government agencies (e.g. Medicaid, Medicare and the Internal Revenue Service)

# Examples of Allowable SNT Disbursements

- New car or handicap-accessible van
- Public transportation costs
- Home modifications
- Attendant care
- Counseling
- Recreation and travel
- Entertainment
- Rehab therapies
- Behavioral therapy
- Dental work not covered by Medicaid
- Funeral expenses
- Payments to someone other than the disabled person (e.g. pay bills for them)

Provided by Gibbel Kraybill & Hess LLP.

## Examples of SNT Disbursements that could jeopardize public benefits

- Money given directly to the disabled individual reduces his or her SSI benefit on a dollar-for-dollar basis
- Disbursements from the SNT should not be made for food or shelter of an SSI beneficiary because SSI is intended to cover food and shelter.

# If you are named as Trustee of an SNT

- Read the Trust document!
- Learn whose money funded the Trust. The disabled individual's money cannot be mingled in a Trust together with money from other individuals.
- Find out what public benefits, if any, the disabled individual receives or is likely to apply for.
- Know what assets have been or should be titled in the name of the Trust. If you are taking over an already-funded Trust (e.g. as successor trustee), request and review a complete list of assets held by the Trust.

Provided by Gibbel Kraybill & Hess LLP.

## If you are named as Trustee of an SNT

- Work with an accountant to file annual trust income tax returns. Be aware that the income tax rates for trusts are quite different from income tax rates for individuals.
- Find out what kinds of disbursements are permitted from the Trust to the disabled beneficiary
- For a First-Party (payback trust), know when/whether to ask permission from or give notice to the Pennsylvania Department of Human Services for large or unusual expenditures

## If you are named as Trustee of an SNT

- Know when you need to file a trust accounting (e.g. when the Trust dissolves or terminates).
- Certain types of trust assets (e.g. a house or vehicle) may need to be insured.
- If the trust has investments, seek professional help to make sure trust assets earn a reasonable rate of return. For example, don't let a large trust simply sit in a checking account without earning interest.

Provided by Gibbel Kraybill & Hess LLP.

# ABLE Act of 2014

- “Achieving a Better Life Experience Act” signed into law by President Obama on December 19, 2014
- Pennsylvania ABLE Act signed by Governor Wolf April 18, 2016; Program launched in PA on April 3, 2017
- Disbursements from the ABLE account can pay certain “qualified disability expenses” (QDEs). Note: QDEs must be “related to the beneficiary’s disability,” whereas disbursements from a special needs trust can be to enrich the beneficiary’s quality of life (broader)

# What are ABLE Act Accounts?

- Loosely based on 529 college savings account program
- Tax-advantaged account for saving funds to be used for disability-related expenses for the account's beneficiary
  - No federal income tax deduction on contributions
  - Account grows tax-free
  - Withdrawals from an ABLE account for "qualified disability expenses" (QDEs) will be exempt from federal and state income tax.



# ABLE Act Accounts

- Only one account per beneficiary
- Beneficiary: age of onset of blindness or disability must be prior to age 26
- MAXIMUM annual contributions cannot exceed annual federal gift tax exclusion (\$14,000 in 2017).
- TOTAL contributions over time limited to state's maximum 529 Plan contribution
- BUT: If account balance exceeds \$100,000, beneficiary's SSI benefits are suspended.
- ABLE account balance not countable for Medical Assistance (Medicaid) purposes. Provided by Gibbel Kraybill & Hess LLP.

# ABLE Act Account Distributions

- Distributions from ABLE accounts are not income for MA or SSI purposes
- A distribution is, however, a resource if not expended in the same month it is distributed.
  - Example: Disabled SSI recipient living in a personal care home receives a \$1000/month distribution from an ABLE account for which he is beneficiary. Before month's end, the disabled beneficiary's Agent or Guardian applies that \$1000 to the disabled individual's room and board costs. Because the distribution was from an ABLE account, and the funds were expended the same month they were received, the disabled individual's SSI benefits are not reduced.

# ABLE Act Accounts: Proceed with Caution

- Medicaid Payback: at beneficiary's death, the state *may* file a claim against funds remaining in the account
  - --recoverable only for Medicaid received from the time the ABLE account was established
  - --payback includes third-party account contributions and first-party contributions

# ABLE Accounts: Proceed with Caution

- Over-funding issues
- Timing of distributions and payments for “qualified disability expenses”
- Medicaid payback
- Third-party funds exposed to payback

# Estate Planning Considerations

- Outright gifts or bequests by Will
- Morally obligated gift to another
- Disinheritance
- Inheritances from others
- Beneficiary Designations on Life Insurance and Retirement Accounts

# Estate Planning Considerations (cont'd)

**Outright gifts or bequests by Will** are desirable only when the disabled individual is able to manage his or her financial affairs and when government benefits will not be jeopardized by, or are far outweighed by, the bequest

## Estate Planning Considerations (cont'd)

**A bequest** can be made directly to an existing **(inter vivos)** Third Party Trust or, if no Trust for the disabled individual exists, a Trust can be created by your Will **(testamentary trust)**.

# Estate Planning Considerations (cont'd)

## Morally Obligated Gift

- Leave a gift to someone (e.g. a relative) other than the disabled individual with instructions that it be used for the disabled person.
- No enforceable duty
- Could create tax liability for the recipient
- Available to the relative's creditors, if any
- Become parts of relative's estate when s/he dies
- Despite these drawbacks, can be uncomplicated and poses little risk to government benefits. Entails no ongoing administrative fees.



# Estate Planning Considerations (cont'd)

## Disinheritance

- Public benefits eligibility is uninterrupted
- However, opportunity to provide for supplemental needs is lost
- Should be clearly stated in Will that disinheritance was deliberate, and was done in consideration of your relative's best interests, in light of government benefits s/he receives.

# Estate Planning Considerations (cont'd)

## Inheritances from others

- If an inter vivos Supplemental Needs Trust exists, bequests can be made directly to that Trust by naming the Trust in another individual's Will.

# Estate Planning Considerations (cont'd)

## Beneficiary Designations (i.e.: life insurance, annuities, retirement accounts)

- One of the most commonly overlooked parts of estate planning.
- Assets with beneficiary designations generally do not pass by Will
- A Special Needs Trust can be named as a beneficiary.

# Scenario #1

- 40 year old single disabled individual receiving SSI and Medicaid was named a beneficiary in her grandmother's Will
  - Inheritance will be \$100,000
- Issues:
  - Her assets must be below \$2,000
  - Can she disclaim?
  - Can she accept the inheritance and give it away?

# Scenario #1

- The inheritance can be transferred to a Self-Settled Special Needs Trust for her benefit
  - No transfer penalty
  - Eligibility for public benefits should continue
  - The Special Needs Trust is not a “countable asset” for SSI and Medicaid purposes
  - The inheritance is protected to be used for her supplemental needs
  - When she dies, the remaining funds in the trust will go back to Medicaid to the extent it was paid during her lifetime; any funds thereafter remaining can go to other family members

# Scenario #2

- 40 year old single disabled individual receiving SSI and Medicaid was named a beneficiary in her grandmother's Will
  - Inheritance will be \$1,000,000
- Issues:
  - Asset limit of \$2,000
  - Is she insurable?
  - Can she manage her finances?

# Scenario #2

- Disabled individual receives the inheritance
  - Can afford all living expenses
  - Can manage her own finances
  - Is insurable, so she can purchase private health insurance and pay the premiums
  - Loses SSI and Medicaid eligibility

# Scenario #3

- 70 year old disabled individual receiving SSI and Medicaid. His older brother wants to give him some money to make sure he is taken care of.
- Issues:
  - Asset limit of \$2,000
  - Is not able to manage the money himself
  - Cannot establish self-settled trust
    - Assets don't belong to the disabled individual
    - Disabled individual is over the age of 65
    - No appropriate family members to "hold" the money for brother's benefit



# Scenario #3

- Establish Third-Party Special Needs Trust for the disabled brother's benefit
  - Trust will not be a "countable asset" for SSI and Medicaid purposes
  - The money is protected to be used for his supplemental needs
  - When he dies, the remaining funds in the trust can go to other family members; No Medicaid payback required

# Scenario #4

- Mother and father want to have Wills that leave their estate equally to their 3 children. One child is disabled and receives Medicaid and SSI
- Issues:
  - Are SSI and MA for disabled child in jeopardy when she receives her inheritance?
  - Should her parents disinherit her?
  - Should her parents leave a “moral bequest” in their Wills for another child to “hold” the inheritance for disabled child’s benefit?

# Scenario #4

- Mother and father can leave their estate in 3 equal shares to their 3 children, with the disabled child's share to be held in a Third Party Special Needs Trust
- Other 2 children can be named the trustees to manage and oversee the trust for their sister

**Timing is Imperative!  
Plan Ahead!**



**GIBBEL KRAYBILL & HESS<sup>LLP</sup>**

**ATTORNEYS AT LAW**

[www.gkh.com](http://www.gkh.com)

**(717)-291-1700**

Provided by Gibbel Kraybill & Hess LLP.