

LIMITED CONSERVATORSHIPS AND SPECIAL NEEDS TRUSTS

ALL YOU EVER WANTED TO KNOW BUT WERE AFRAID TO ASK

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South Pasadena High School

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Marcia, now 18, has autism and is a long-time Regional Center client. Her mother, Susan, has applied for SSI for her, has found a wonderful group home for her and wants Marcia to move next month. While the family isn't wealthy, Susan has realized that when she and her husband die, Marcia's share of their estate will be about \$250,000. Susan has heard that she should have started a conservatorship for Marcia last year, when Marcia was 17, because they take about a year to get. She has also heard that she should have a special needs trust for Marcia, but she doesn't know what that is or where she gets one.

What should Susan do?

Answer: Susan should transition Marcia to the group home now as she plans, as she and her husband are both healthy and able to provide emotional support to Marcia as she makes the transition from home into the world and able to make sure this living arrangement is a good fit for Marcia. She should petition for a limited conservatorship, and talk with an elder law attorney about a special needs trust.

Let us look at what a limited conservatorship is, how it works, how long it takes to get one, and then look at special needs trusts and how they are helpful.

Purpose of a Limited Conservatorship

A limited conservatorship allows a person appointed by the court to make decisions for an adult child with a developmental disability. A developmental disability is defined as a disability which originates before age 18, continues, or is expected to continue, indefinitely and constitutes a substantial handicap for the individual. This term includes intellectual disability, cerebral palsy, epilepsy and autism. (Probate Code section 1420). The person appointed by the court is called the conservator. The person for whom decisions are made is called the conservatee.

When a child becomes an adult at age 18, he or she is presumed to have the mental ability to give informed consent to medical treatment. If he or she cannot give informed consent, then a conservator is needed to give medical consent for the adult (the conservatee), and make other important decisions.

Generally a family member, usually a parent, petitions for and is appointed as conservator. If a parent is terminally ill, he or she can petition the court to appoint a co-conservator to serve with him or her. Then when the parent dies, the co-conservator is already in place. When there are co-conservators, a majority must agree on any decision. A person who lives outside of California can serve as conservator.

Powers of the Conservator

The court can give the limited conservator seven powers under Probate Code section 2351.5:

1. to determine where the adult conservatee lives
2. access to the confidential records and papers of the adult conservatee
3. to consent to or withhold consent to the marriage of the adult conservatee
4. the right to contract for the adult conservatee (so the adult conservatee can't enter into contracts, for example to buy a car, or sign up for a gym membership – the conservator must do this for the conservatee)
5. the power to give or withhold medical consent for the adult conservatee
6. the right to control the social and sexual contacts and relationships of the adult conservatee
7. to make decisions concerning the education of the adult conservatee.

Until age 18, the parent or parents of the adult child make medical and these other important decisions for the child. Once the child turns 18, and is an adult, then under the health privacy laws, the Health Insurance Portability and Accountability Act, the adult child must give consent for anyone to see his or her medical information and records. This medical information is private, and cannot be disclosed without the adult child's permission. If the adult child cannot give such permission, the doctor will not provide any information to the parents.

The power to determine where the conservatee lives includes the power to place the conservatee in a group home.

How to Obtain a Conservatorship

A conservatorship starts with a petition to the court. If the adult child is a Regional Center client, the Regional Center must be notified of the court proceeding. The Regional Center must provide a report to the court before the hearing with its recommendations as to what powers should be given to the conservator. The adult

child must receive a copy of the petition and information as to when and where the hearing will be held. All cases are now in the courthouse in downtown Los Angeles.

When the petition is filed, the court sets a hearing, about 5 – 7 weeks later. At the hearing, the court decides whether the adult child needs a conservator, and if so, appoints a conservator.

Once the court appoints the conservator, the conservator obtains letters of conservatorship. It is the letters that give the conservator authority to act. It takes about 2 weeks for the court to process the order and issue the letters. Thus, it is approximately 2 months between filing the petition and obtaining letters of conservatorship.

Court Costs

Currently the court filing fee for the petition is \$465. The court investigator's fee is \$607, for a total of \$1,072. This must be paid when the petition is filed. You can request that the fees be waived if you are unable to pay them and the court will decide whether it agrees. The court will appoint an attorney to represent the adult child. These fees are paid from the adult child's estate, if any, and if none, by the County of Los Angeles.

Duration of the Conservatorship

The conservatorship lasts until the adult child is able to handle his or her own decisions, or dies.

Marcia and Susan

In our example, once Susan is appointed as Marcia's conservator, she will be able to give informed consent to medical treatment for Marcia and make other important decisions for her.

Now that Susan has done that, she turns her attention to talking with an attorney about a special needs trust for Marcia, starting with the question: "What is a special needs trust and how does it help Marcia?"

Special Needs Trusts

A special needs trust will help Marcia keep her public benefits, as it is used when the beneficiary must maintain eligibility for public benefit payments. There are two types of public benefits – those that are based on disability **and** need and those that are based solely on disability. Let us look at the differences and then look at how a special needs trust helps the beneficiary keep benefits.

Needs-Based Government Benefits

When a child with a disability turns 18, he or she can be eligible for Supplemental Security Income (SSI), since the parents' income is no longer counted for the child. SSI provides income of approximately \$877 per month, AND Medi-Cal benefits AND In Home Support Services without a share of cost.

A SSI recipient can have no more than \$2,000 in resources. Resources include cash, money in bank accounts, stocks, bonds, retirement accounts, a second car (one car is exempt, meaning that it doesn't count). An inheritance can cause the recipient to lose his or her benefits, which can be devastating.

Entitlement Benefits

Entitlement benefits are those benefits paid because the recipient, or a close relative, paid into the system. These are the benefits under the Federal Insurance Contributions Act, paid for by FICA taxes (commonly referred to as Social Security taxes) deducted from a working person's paycheck with a matching contribution from the employer. The best known benefit is the Social Security retirement payment, which can start early at age 62, at full retirement age of 66 (for a Baby

Social Security Disability (SSD) is payable to a worker, or members of his or her family, if the worker is disabled or a worker's child is disabled before age 22.

This means that once a parent of a child with a disability retires or dies, the child can be eligible for Social Security Disability (SSD) based on the parent's earning record. Once the adult child has been on SSD for 24 months, he or she receives Medicare, the health insurance program that most adults are eligible for at age 65.

Once the adult child receives SSD and Medicare, there is no limit on the assets the adult child can have. However, it may be important to keep Medi-Cal eligibility, so that the adult child receives both Medicare and Medi-Cal benefits (commonly referred to as Medi/Medi), and if so, the adult child cannot have over \$2,000 in resources. Additionally, the child may not be able to manage money, so it can be helpful to have a professional trustee to do that.

So how does a special needs trust help the beneficiary?

Special Needs Trusts

Trusts commonly authorize the trustee to distribute money to a beneficiary outright, and if not outright, for the beneficiary's health, education, maintenance and support. A special needs trust will provide that distributions can only be made for the beneficiary's special needs, and that in making distributions, the trustee shall "...take into consideration the applicable resource and income limitations of the public benefit programs for which the Beneficiary is eligible..." . Oftentimes the SNT will allow the trustee to make distributions which cause a reduction in the beneficiary's benefits, after weighing the benefit of the distribution against the reduction in benefits.

The SSI payment of \$877 is for the beneficiary's food and shelter, and if the beneficiary has funds available from other sources to pay for food and shelter, his or her SSI benefit is either stopped (because the trust assets count as the beneficiary's resources, so they are over \$2,000) or reduced. Thus, a SNT will preserve those benefits and give the trustee discretion to help the beneficiary as much as possible.

Often a public benefits recipient will be named as a beneficiary on an IRA or other retirement fund. The beneficiary may withdraw all of the funds out of the account, which makes the funds immediately taxable income. The beneficiary may be unable to manage money, and lose the funds to helpful friends. A special needs trust can be named as the beneficiary on retirement funds, to avoid this result. This requires extra careful planning, as this can be quite complex to accomplish.

A special needs trust set up as part of a parent's estate plan is called a third party SNT, as the funds belonged to a third party, the parent, before transfer into the SNT. A third party SNT can be distributed to anyone at the death of the adult child, and can have additional beneficiaries, so long as the distribution standard for the adult child with a disability is a special needs standard.

Sometimes a SNT is established with funds that belong to the adult child with a disability, such as funds received in a personal injury settlement. This type of SNT is called a first party SNT, because the funds belong to the beneficiary him or herself, who is the first party. This type of SNT must contain a payback provision, providing that the State of California is repaid at the beneficiary's death for Medi-Cal benefits the beneficiary received during lifetime. There may be situations where payback is not required, but a discussion of that is beyond the scope of this presentation. This type of SNT can only be established by a parent, a grandparent, a court or a conservator, and must be for the sole benefit of the adult child with a disability.

Special needs trusts can also be named as a beneficiary on retirement accounts, such as an IRA. The trust must meet certain requirements to qualify as a designated beneficiary, and must be designed so as not to require distributions of income to the beneficiary, as distributions directly to the beneficiary would cause a reduction of the monthly SSI payment.

A special needs trust can be an integral part of an estate plan for a family with a child with a disability. It can provide financial management and a safety net for the child throughout his or her lifetime. When combined with a letter from the parents of their hopes and aspirations for their child, the parents can know they have provided a blueprint for their child's future.