

# **SPECIAL NEEDS PLANNING FOR PERSONS WITH DISABILITIES**

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## **SPECIAL NEEDS LEGAL PLANNING FOR PERSONS WITH DISABILITIES**

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According to the 2010 Americans with Disabilities: 2010 report of the U.S. Census Bureau, there were over 56.7 million persons with disabilities (18.7% of population) in the United States, of whom 38.3 million (12.6% of population) had severe disabilities.<sup>1</sup> In 2016, 16.3% of all Mississippians had disabilities, and 15.6% of persons from age 21 to 64.<sup>2</sup> 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.

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

- Access to necessary services
- Ability to afford these services
- A personally selected third party to direct how the individual with a disability should be treated and his/her affairs handled
- Possibly less restrictive alternatives to guardianship
- Alternative residential settings which may avoid unnecessary institutionalization

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<sup>1</sup> <http://www.census.gov/prod/2013pubs/p70-131.pdf>

<sup>2</sup> 2011 Disability Status Report Mississippi; [http://www.disabilitystatistics.org/StatusReports/2011-PDF/2011-StatusReport\\_MS.pdf?CFID=3457664&CFTOKEN=96275625&jsessionid=843038a7f7fce842bb127e537c3960104fe](http://www.disabilitystatistics.org/StatusReports/2011-PDF/2011-StatusReport_MS.pdf?CFID=3457664&CFTOKEN=96275625&jsessionid=843038a7f7fce842bb127e537c3960104fe)

- Family members or friends who are prepared for their roles in assisting 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

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 grandmother 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 and John's grandmother are considering several **planning options**:

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

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

- a. Parents can designate a specific amount or portion of the estate they choose to go directly to their child
- b. Satisfaction to parents in leaving sufficient funds to meet financial needs of child
- 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 make adult child ineligible for government benefits such as SSI and Medicaid.
- b. Public mental health system may claim this amount toward the cost of care. As a result, child would not benefit from gift.
- c. Child could be exploited financially by others trying to get the funds or the child could misuse funds.

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

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 mental health system

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

- a. Emotionally difficult for many 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 (or grandmother) can leave all assets to another child or individual and ask him or her to use them for John's benefit and support.

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

- a. Individual with a disability could continue receiving government benefits as funds would not be in his/her name
- 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- cannot be legally enforced to compel recipient to use funds for disabled child
- b. Sibling or other beneficiary is not legally obligated to spend money on behalf of individual with a disability
- c. Money could be considered joint property of recipient in the case of divorce of recipient -- could be claimed by estranged spouse in a settlement agreement
- d. If sibling's or other individual's own family has financial disaster, money meant for individual with a disability may go for their use
- e. Recipient may resent extra responsibilities and decision-making duties on behalf of individual with a disability
- f. Other family members may be resentful of sibling with “extra share” of inheritance
- g. Income is taxable to family member receiving bequest
- h. Morally obligated person may feel compelled to use their own funds if inheritance runs out
- i. Sibling may pass away and gift would be distributed to other individuals

**(4) Support Trust.** Mrs. Client (or grandmother) 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 trustee selected for the support and maintenance of John, with additional instructions about when and for what specific purposes distributions are to be made.

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

- a. Could provide monetary support for individual with a disability after death of parents
- b. No danger of monetary exploitation of disabled individual -- provides financial control by trustee

c. Satisfaction to parents, knowing they have made financial provisions for their son or daughter

- d. Avoids probate procedure
- e. Can be revocable or irrevocable
- f. If irrevocable, may be some tax advantages

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

- a. Will cause child to become ineligible for government benefits
- b. Public mental health system may attach these funds for past or present cost of care
- c. Requires fees to be paid to set up trust, and for trustee, if applicable
- d. Trust instrument may be somewhat inflexible in regards to distribution
- e. Some banks will not work with small trusts
- f. 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/her 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 and property (called the trust "**corpus**" or "**principal**") to a person or financial institution (called a "**trustee**"), who is legally responsible for investing, managing and distributing 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**" 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 and absolute 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 equipment), 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.

## **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 Income (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 \$1,310 (\$2,190 if blind) (2021) 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.

**Supplemental Security Income (SSI)** is a federally-administered Social Security program that provides monthly payments for food, clothing 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 \$794 for individual, \$1,191 for a couple in 2021) and limited assets (maximum \$2,000 countable assets in 2020). Since the SSI program is intended to provide a minimal level of support assistance and pays a maximum monthly payment of \$794, 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 \$794 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 following section entitled "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 \$794) or \$2,382 per month (2021), 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; 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 •

**Qualified Medicare Beneficiary.** An individual who is Medicare-eligible and whose income is below 100% of the federal poverty level + \$50 (\$1,114 individual / \$1,487 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. 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 (\$1,326 individual / \$1,774 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 (\$1,486 for an individual / \$1,990 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 \$5,383 single / \$7,249 couple and unearned income is below \$1,486 single / \$1,990 couple, and if countable assets are less than \$24,000 single / \$26,000 couple. If gross earned income is

greater than \$3,255 single / \$4,375 couple, the recipient must pay a monthly premium in the amount of five percent (5%) of “countable earnings” (1/2 gross earnings - \$32). There is no transfer penalty applied to this program and the “spousal impoverishment” rules (see Long-Term Care group below) do not apply.

In Mississippi, any SSI recipient is automatically entitled to receive Medicaid benefits. In addition, persons who do not receive SSI but meet the income and asset guidelines of other “Medicaid-only” programs can receive Medicaid benefits. Some of these Medicaid-only “coverage groups” that are affected by assets are:

**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) ***Physically Handicapped (Independent Living) Waiver***, which provides personal care attendant services to physically disabled persons; (3) ***Intellectually Disabled/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 Mentally Retarded; (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) ***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 (\$2,382 in 2021) 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 \$2,382 (2021) 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 \$3,259.50 per month (the “monthly maintenance needs allowance”) (2021) if the CS’s separate income is less than this amount. The CS may own separate countable resources of up to \$130,380 (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 \$2,382 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 (if income exceeds 6% of value of property); property used in trade or business for self-support; certain mineral and timber rights not under production; term life insurance policies; prepaid or designated funeral contracts and burial plots; and certain retirement accounts (IRA, 401k, 403B) in pay-out mode.

(2) **The "Look-back Rule":** Many people have heard: "You have to wait 3 years after giving anything away to get Medicaid." **The Truth:** 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 within **five (5) years** prior to Medicaid application, whether they were transferred to a trust or otherwise. Medicaid may refuse to pay nursing home benefits for a period of time based on the amounts and dates of such gifts made during the look-back period. (See section (3) Transfer Penalty below.) However, the rules penalizing transfers do not apply to all transfers.

(3) **Transfer Penalty.** If assets were *given* away (that is, without any value in return) to persons other than a spouse or disabled child, and if the giver applies for Medicaid within 60 months after such gift, Medicaid will impose the following penalty on such gifts: Medicaid will refuse to pay the giver's nursing home care for a number of months based on the state average nursing home cost (**\$5,700** from January 2011 – June 2014, **\$5,920** July 2014 – June 2015, **\$6,250** July 2015 – June 2016, **\$6,405** July 2016 – June 2017, **\$6,619** July 2017 – June 2020, **\$6,832** July 2018 – present). The penalty period for gifts does not begin to run until the Medicaid applicant has **both** entered a nursing home **and** is otherwise financially eligible for Medicaid. Therefore, if the applicant gave away \$68,320 on December 1, 2018 and goes into a nursing home and applies for Medicaid December 1, 2022, there would be a 10-month ineligibility period (\$68,320 divided by \$6,832 average cost in December 2018 when transfer was made) before Medicaid will begin. Even though his assets are below the Medicaid eligibility limit (\$4,000) when he applies for Medicaid, he must private pay for his nursing home for the additional 10 months of ineligibility.

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. A 2011 state court case also held that Medicaid has no claim against the Medicaid recipient's homestead property at death IF the Medicaid recipient 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), rehearing den. May 31, 2011, cert. den. Sept. 1, 2011. A 2015 Attorney General's Opinion affirmed that Medicaid will not have a recovery claim against homestead property owned by the Medicaid recipient at his/her death, and such property will descend to that person's surviving spouse, children or grandchildren. Mississippi AGO No. 2015-304 (Dec. 23, 2015)

**Medicaid Income Budgeting.** After an applicant has been determined eligible for Medicaid in a nursing facility, the individual is required to pay toward the cost of their care if income allows. This amount payable by the Medicaid recipient is referred to as "Medicaid Income." It is the individual's total gross income from all sources, less the following allowable deductions:

- A personal needs allowance (PNA) of \$44 per month. Veterans and surviving spouses who receive a \$90 VA pension get a \$90 PNA. If active in a work therapy program with earnings, the PNA may be higher.
- A monthly allowance for the community spouse, less the spouse's own income. The maximum monthly allowance for 2021 is \$3,259.50. If the at-home spouse's gross income is less than this amount, s/he will be entitled to keep as much of the Medicaid applicant's income as needed to reach this amount. If the at-home spouse's total income exceeds the maximum monthly allowance amount, s/he will not be able to keep any of the Medicaid recipient's income. The allowance is based on the nursing home spouse's actual income and s/he must make the allowance available to the community spouse.
- A monthly allowance for other dependent family members, based on the dependent's own income.
- A deduction for 1 health insurance premium that is paid by the individual in the nursing facility (such as the individual's Medicare Supplement premium). This will enable the Medicaid recipient to maintain that private medical insurance if desired.
- Certain medical expenses that would ordinarily be paid by Medicaid, but due to service limits placed on these services, the individual is charged for the expense.
- Medicaid Income is not paid by a HCBS Waiver participant.

**NOTE:** If an applicant has Medicare, his/her pharmacy benefit is through Medicare, Part D. In order to have \$0 premium, \$0 deductible, \$0 co-insurance and \$0 co-pays, the individual must enroll in a \$0 premium plan, referred to as a "benchmark" plan. If enrolled in any other plan, a premium may be charged by Medicare that is not allowed as a Medicaid deduction.

**General Planning Strategies.** There are numerous planning strategies that can be accomplished within the rules and regulations of Medicaid and can be effective in (a) passing assets to other family members, (b) creating a shorter waiting period for Medicaid eligibility, and/or (c) establishing Medicaid eligibility by converting countable assets to income or non-countable assets. The common objective of such strategies is to prevent the necessity of having to "spend down" all personal assets to the Medicaid limits before qualifying for Medicaid. Some of these techniques include:

(A) **Spending** countable assets on such things as medical expenses, personal services (lawn care, sitters, etc.), travel, entertainment, etc. or paying another family member for future personal care services. (Note: Personal care services agreements must be written and signed at the beginning of such services, not in arrears, and have specific requirements. Consult an experienced elder law attorney about this.)

(B) **Converting** countable assets to non-countable assets, such as by: purchasing household furnishings, burial plots and/or pre-paid funeral plan, life insurance; purchasing, improving or repairing residence; purchasing a “Medicaid-qualified” annuity for the community spouse; funding a self-settled special needs trust with countable resources. [Note: Annuities are complicated, have high commissions for the seller, and should NOT be purchased unless you have reviewed them with an experienced elder law attorney and understand the operation of such financial products.]

(C) **Gifting** assets to persons other than spouse, including giving to children, if properly structured so as to meet the need for funds to pay medical and nursing home costs.

**NO Medicaid planning strategies should be undertaken without full consultation and assistance by an elder law attorney familiar with the applicable laws and regulations of the Medicaid and SSI programs.**

### **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 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; federal or state disaster relief funds; and funds in an ABLE account. 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, 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. In addition, funds held in an ABLE account will not be counted as resources of the disabled account-holder.

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 \$771 in 2020. 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.**

## **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 (and grandmother) 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 with disability
- 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 can be satisfied that they have made provisions to meet financial needs of their son or daughter
- f. Assets placed in this trust, if set up outside parent’s will, can avoid probate process
- g. Can be revocable or irrevocable by the grantor while grantor living
- h. Assets in this trust will be secure 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 application of these trust rules 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 must be created (that is, the trust document signed) by the beneficiary’s parent, grandparent, legal guardian or a court unless the disabled beneficiary has legal capacity to sign a trust document to create the trust. A mentally capable individual can establish his/her own trust. 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 (food, shelter, clothing)
- b. When written correctly can preserve eligibility for government benefits for person with disability
- c. Allows beneficiary to use funds in trust over his or her lifetime 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. Family member (parents, sibling) can act as trustee

g. After the state(s) is paid back for the cost of medical care, other family members could receive a distribution from the trust

h. Other people can use this trust for their own Medicaid planning (for example, grandparents or parents could transfer their funds to this trust and qualify for Medicaid with no transfer penalty)

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

i. Fees are involved in setting up trust and administering trust  
j. Necessary to choose reliable trustee, who can work with the individual with a disability and other family members

k. Must be irrevocable  
l. May be challenged at some future date, but so far, has been upheld nationwide  
m. 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.

## 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. The Mississippi ABLE account became available in 2019.

### 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 \$15,000** (the annual gift tax exclusion amount in 2021). 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.

Contributions are not tax-deductible by the contributor for federal income tax, but a Mississippi resident may receive a state income tax deduction for such contributions. Income earned by ABLE accounts will not be taxed as part of the beneficiary’s income. Disbursements from the Account for purposes other than the approved “disability related expenses” will be subject to both partial 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.

In addition, the Tax Cuts and Jobs Act of 2017, beginning with tax year 2019 and continuing until December 31, 2025, allows an ABLE beneficiary who earns income from employment to make additional contributions not to exceed the lesser of their earned income and the Federal Poverty Level (which is currently at \$12,760), in addition to their annual contribution limit (\$15,000). However, the earnings-into-ABLE provision is unavailable if the beneficiary has actually made contributions to a defined contribution plan (e.g., a 401k, SIMPLE or SEP/IRA), a 403b or a 457 plan. That’s not the same as ineligible to contribute to one. It makes the ABLE deposit resemble an alternative choice for the disabled participant. The provision allows the beneficiary of an ABLE account to claim the saver’s credit for contributions made to his or her ABLE account.

## 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 many 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 \$15,000 (the annual gift tax exclusion amount) may be contributed during a calendar year from all sources to the one allowable ABLE account. In addition, the Tax Cuts and Jobs Act of 2017 allows an ABLE beneficiary who earns income from employment to make additional contributions not to exceed the lesser of (a) their earned income or (b) the Federal Poverty Level amount for one person (which is currently at \$12,760), in addition to the annual contribution limit. 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 2021 is \$794 a month, or \$9,528 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 illusory 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 \$4,300 income tax exemption (2020 figure, indexed for inflation). All distributions from the Trust for the benefit of the beneficiary are taxed to the beneficiary,

and the beneficiary could have his own standard deduction in 2020 of \$12,400. Therefore, use of a third party QDT special needs trust may allow a total of \$16,700 to be sheltered from income tax in 2020. An ABLE account with \$100,000 (maximum not to lose SSI) would need to earn over 16% 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 \$12,400 standard deduction. Therefore, no federal income tax until the income exceeds \$12,400, and then at the lowest tax bracket (10% on next \$9,875). 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 \$15,000 (when not left into a SNT for him);
- The individual receives a litigation settlement of less than \$15,000, or the annual amount to be received from a settlement annuity is less than \$15,000 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 \$15,000 per year).

## **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 for plaintiffs 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.

The **ABLE account** is an opportunity for a person with a disability to have a personal savings account which they control (in addition to the \$2,000 or \$4,000 countable account) while retaining eligibility for SSI and/or Medicaid benefits.

We are available to make presentations to groups and organizations to explain special needs trusts, how and when an ABLE account could be useful, and other necessary special needs planning. Call us if you need a speaker on this topic.

*Richard A. Courtney*

## APPENDIX -- ABLE PROGRAMS AVAILABLE IN 2021

Below are details on several state ABLE account programs offered as of January 2020. You can use this tool from the ABLE National Resource Center (<http://ablenrc.org/>) to find other state plans and compare the state programs' investment options, costs, tax benefits, and other perks head to head.

The **Mississippi** ABLE program launched in June 2019 and is summarized here:

### Mississippi

- Eligibility: Nationwide
- Minimum to Open: \$50 within 60 days of opening; no minimum balance required
- Monthly Fee: \$3.75 (plus additional fee for paper statements and confirmations); no monthly fee if balance >\$250 or if choose electronic statements
- Investment Options: 6 portfolio options with funds from BlackRock, Schwab, and Vanguard
- Account Access: FDIC-insured checking account option with real-time debit card
- Tax Benefits to State Residents: Mississippi income tax deduction to contributor
- Special Features: A member of the National ABLE Alliance, a group of 16 states that have pooled resources in order to offer state ABLE programs
- Maximum Account Balance: \$235,000
- **Program Website:** [www.MississippiAble.com](http://www.MississippiAble.com)
- **Phone Number:** 888-609-3469

### Alabama

- Eligibility: Nationwide
- Minimum to Open: \$25, but is waived if the account has AIP or payroll deduction
- Annual Fee: \$45 (\$11.25 quarterly); .50 - .55% investment fee
- Investment Options: 5 portfolio options
- Tax Benefits to State Residents: None
- Special Features: The Alabama ABLE account is administered by the Nebraska ABLE Act plan.
- Maximum Account Balance: \$350,000
- Program Website: <https://al.enablesavings.com/>

### 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.enable savings.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/>

### **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
- Maximum Account Balance: \$500,000
- Program Website: <https://www.able-now.com/>

## **Special Needs Trust Summary**

<b>Who's it for?</b>	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)
<b>What's it do?</b>	Makes trust assets “non-counted” resources for SSI or Medicaid eligibility
<b>When's it used?</b>	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)
<b>Who creates it?</b>	Parent, grandparent, legal guardian or court (for self-settled SNT) Parents, grandparents, anyone else for beneficiary (for third-party SNT)
<b>Why's it good?</b>	Protects SSI and Medicaid; provides trustee management of assets; provides supplemental services and benefits for beneficiary's lifetime

## APPENDIX - LAWS PROTECTING PERSONS WITH DISABILITIES

### **Protection from Domestic Abuse Law. (MCA §93-21-1 ff.)**

Defines “abuse” (between family or household members) as: attempting to cause or intentionally causing injury or serious bodily harm with or without weapon; placing (by physical threat) another in imminent fear of bodily injury; or criminal sexual conduct with minor. A petition for relief may be filed by the abused person or by any parent, adult household member or “next friend” of a minor or mentally incapacitated person. The petition must set forth the facts concerning the abuse, the relationships between the persons involved, and a request for one or more protective orders. The chancery justice, municipal or county court may issue an immediate temporary protective order lasting for no more than ten (10) days to prevent “immediate and present danger of abuse” to the petitioner, a minor or an incapacitated person. A hearing shall be set within ten (10) days after the filing of the petition, and the temporary order may be extended if such hearing is delayed. Protective orders may (a) direct the defendant to refrain from further abuse, (b) evict the defendant from the household, (c) allow the defendant to provided suitable alternate housing for the abused dependent child, or (d) prohibit the defendant from transferring any interest in jointly owned property. The court which enters any such protective orders may enforce them by up to 6 months/\$1,000 fine for violations.

### **Guardianship. (MCA §93-20-201 and -301 ff.)**

### **Conservatorship. (MCA §93-20-401 ff.)**

A “**guardian**” is a legally recognized manager of the **personal affairs** (medical and health care, living arrangements, education, recreational activities, etc.) of another with prescribed fiduciary duties and responsibilities under court authority and direction. The “ward” is determined legally disabled or mentally incapable of managing those personal affairs. [*Harvey v. Meador*, 459 So.2d 288 (Miss. 1984)]

A “**conservator**” is the legally recognized manager of the **financial and property affairs** of another with prescribed fiduciary duties and responsibilities under court authority and direction.

Natural parents are the presumed natural guardians, with “equal powers and rights.” A parent may appoint successor guardian for child in valid last will and testament, and may waive bond, inventory and accounting. “Testamentary” guardian (guardian appointed in parent’s will) shall have same rights to control child’s person and tuition, manage child’s estate, to receive profits from sale of child’s estate, and to represent the child in legal actions.

If no testamentary guardian or conservator is appointed, the chancery court may appoint a guardian of person and/or estate for child. Preference is given to next of kin. A child over age 14 may be allowed to select his/her own guardian, provided the child is not otherwise incapacitated and the guardian is a MS resident. The guardianship shall be transferred to guardian’s county of residence. Unless waived by a will, the court-appointed conservator must file an oath, an insurance bond, and an inventory of the ward’s assets with the court. However, no bond is required for assets deposited in a federally-insured bank

that has a certified copy of the court order and agrees not to release funds without a court order. If no one qualifies as guardian or conservator, the court will appoint the chancery court clerk as guardian. Conservators must file annual accountings of receipts and disbursements, except for funds in fully insured bank deposits (with court approval).

A petition for guardianship or conservatorship of an adult must include written certificates of at least two licensed physicians (or one physician and one psychologist, nurse practitioner, or physician's assistant) stating the results of their personal examination of the incapacitated person. The petition is filed, setting a hearing not less than 7 days later; a copy of the petition must be personally served on ward and at least one spouse or next of kin or caretaker.

A conservator may be removed by the court "for sufficient cause" or for refusing to post sufficient bond or file accountings. A guardian may resign in the same way as executor may resign.

Any lawsuit or administrative action for a ward under guardianship shall be brought in name of guardian for the use and benefit of the ward, only after court order based on sworn petition and oral testimony; and a certified copy of such order shall be attached to complaint commencing the action.

After a conservator qualifies, court shall decree delivery of the inheritance or property to the guardian. The conservator must file sworn inventory within three (3) months after appointment and annually; and he will be removed for failure to do so. The chancery judge may determine the amount needed for ward's "maintenance and education" and may allow sale of real or personal property to so provide. If the ward has a parent, court shall determine whether the conservator will bear costs of maintenance and education.

A conservator shall: administer the estate like executors and administrators; improve the ward's estate; apply estate for comfortable maintenance and support of ward and his/her family, after court approval; purchase a home for ward; collect and pay ward's debts, but only after a debt is "probated and registered" like in an estate probate. Guardian may get court approval to make an estate plan for a mentally incapacitated ward.

Court may authorize conservator to pay life insurance premiums for policies on ward's life. Conservator may get court approval to lease ward's real property for no longer than six (6) years or until ward's majority.

Court may authorize the conservator to: create or renew encumbrance; purchase or sell real estate; sell personalty; retain securities and investments received for ward by inheritance or bequest in same form; sell or compromise claims due the ward; move the person and/or property of the ward to another county; move the person and property of the ward out of state, by posting bond here conditioned on qualifying there.

If minor under 18 and over 10 “maliciously and willfully damages or destroys property”, owner can recover damages up to \$5,000 from parents. (This non-exclusive of other rights of recovery.)

Guardianship and conservatorship terminate at age 21 (or 18 with court order) or, by court order, when property is minimal. Court can order property of an incompetent adult ward paid to someone or bank for him.

Small Transactions without Guardianship -- Where a debt < \$25,000 owed to a ward, chancery court can order it paid to the ward or some other person for him, without a formal guardian being appointed.

### **Person in Need of Mental Treatment. (MCA §93-13-111)**

If person found “in need of mental treatment” per § 41-21-61(c), petition can be filed by relative, friend or interested person on at least 5 days service of a copy on the alleged incapacitated person. The court can appoint guardian if finds “unsound mind” and “inability to care for self or property”.

### **Mississippi Vulnerable Persons Act (MCA §43-47-1, -7)**

The Mississippi Vulnerable Persons Act requires that any person, care facility or professional employee who has knowledge of or reasonable cause to believe that a patient or resident has been the victim of abuse, neglect, or exploitation shall report the information to the Mississippi Department of Human Services (for home health agency reports) or the Mississippi Department of Health (for other care facility reports or reports by private persons). There are criminal penalties for such acts, and protective services may be obtained for adults who lack capacity to understand and consent to such services.

#### **What is a “vulnerable person”?**

- Any person (child included) whose ability to perform the normal activities of daily living or to provide for his/her own care or protection is *impaired* due to a mental, emotional, physical or developmental disability or dysfunction, or brain damage or the infirmities of aging.
- Includes all residents or patients of a care facility.

#### **How does the law protect vulnerable persons?**

- The Act defines the crime, provides for mandatory reporting, and provides for protective services

#### **What is the crime?**

It is unlawful for any person to abuse, neglect, or exploit any vulnerable person.

#### **What is abuse?**

- The willful or non-accidental infliction of physical pain, injury or mental anguish
- The unreasonable confinement of a vulnerable person, by physical or drug-induced confinement

- The willful deprivation by a caretaker of services which are necessary to maintain the mental and physical health of a vulnerable person
- Includes sexual abuse
- Does not mean conduct which is a part of the treatment and care of, and in furtherance of the health and safety of a patient or resident of a care facility.
- Includes, but is not limited to, a single incident.

### **What is neglect?**

- The inability of a vulnerable person who is living alone to provide for himself the food, clothing, shelter, health care or other services which are necessary to maintain his mental and physical health.
- The failure of a caretaker to supply the vulnerable person with the food, clothing, shelter, health care, supervision or other services which a reasonably prudent person would do to maintain the vulnerable person's mental and physical health.
- Includes a single incident.

### **What is exploitation?**

- The illegal or improper use of a vulnerable person or his resources for another's profit or advantage with or without the consent of the vulnerable person, and includes acts committed pursuant to a power of attorney.
- Includes a single incident.

### **What is the punishment?**

- Misdemeanor Abuse – (contributes to, tends to contribute to or results)
  - Fine up to \$1,000
  - Imprisonment up to 1 year in the county jail, or
  - Both fine and imprisonment
- Misdemeanor Neglect –
  - Fine up to \$1,000
  - Imprisonment up to 1 year in the county jail, or
  - Both fine and imprisonment
- Misdemeanor Exploitation – (value exploited less than \$250)
  - Fine up to \$5,000
  - Imprisonment up to 1 year in the county jail
  - Both fine and imprisonment
- Felony Abuse –
  - Imprisonment in the State Penitentiary up to 20 years
  - Fine up to \$10,000
- Felony Exploitation – (value exploited more than \$250)
  - Imprisonment in the State Penitentiary up to 10 years
- Other charges can be used as well (i.e., forgery, embezzlement, rape, etc.) depending on the facts of the case.

### **Who has to report?**

## **General Public**

- Any person who knows or suspects that a vulnerable person has been or is being abused, neglected or exploited.
- Including, but not limited to, the following:
  - Attorney, physician, medical examiner, chiropractor or nurse engaged in the admission, examination, care or treatment of a vulnerable adult;
  - Health professional or mental health professional not otherwise specified;
  - Practitioner who relies solely on spiritual means for healing;
  - Social worker or other professional adult care, residential or institutional staff;
  - State, county or municipal criminal justice employee or law enforcement officer;
  - Human rights advocacy committee or long-term care ombudsman council member; or
  - Accountant, stockbroker, financial advisor or consultant, investment advisor or consultant, insurance agent or consultant, financial planner, or any officer or employee of a bank, savings and loan, credit union or any other financial service provider.

## **Care Facilities**

- Any person who within the scope of his employment at a care facility or his professional or personal capacity who has knowledge of or a reasonable cause to believe that any patient or resident of a care facility has been the victim of abuse, neglect or exploitation.

## **What has to be reported?**

The facts of what you know or suspect.

## **Who receives the reports?**

### **In Private Homes:**

- The Department of Human Services (either hotline #800-222-8000 or county department of human services where the vulnerable adult is located)
- Local law enforcement and the Attorney General's Office (not mandatory)

### **In Care Facilities:**

- The Medicaid Fraud Control Unit of the Attorney General's Office (800-852-8341)
- The Division of Health Facilities Licensure and Certification of Department of Health (800-354-7230)

## **What is the punishment for not reporting?**

- General Public
- Misdemeanor punishable by a fine up to \$500 and/or imprisonment up to 6 months in the county jail
- Health Care Facilities
- Misdemeanor punishable by a fine up to \$500 and/or imprisonment up to 6 months in the county jail

### **What can happen to me if I make a report?**

- Nothing. If you report, investigate, testify, you are **immune from liability, civil or criminal**, that might otherwise be incurred or imposed.
- The suspect/perpetrator is not immune.
- Intentional false reporting is not protected.

### **What kind of protective services are available?**

#### **Private Homes**

- DHS investigates/makes a preliminary report to AG's Office within 48 hours
- DHS prepares a plan of services for the vulnerable adult
- DHS can ask court to order the provision of protective services
- A court can authorize an evaluation by a qualified third party upon a showing of probable cause, i.e., mental evaluation, financial records, etc.
- Local law enforcement and/or the AG's Office can take action through criminal prosecution

#### **Care Facilities**

- AG's Medicaid Fraud Unit investigates/prosecutes criminal acts
- Department of Licensure takes licensure actions

**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 the Special Needs Alliance, a national organization of special needs planning attorneys ([www.specialneedsalliance.com](http://www.specialneedsalliance.com)). 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. He testified before Congress in September 2015 in support of legislation to allow capable adults with disabilities to create special needs trusts. Rick is the author of *A Lawyer’s Guide to Working with Special Needs Clients* published by the American Bar Association in 2020.

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, health-care professionals, churches and community groups on elder law and estate planning subjects and topics of interest to senior adults, caregiver children and spouses, and families with special needs.

