



South Carolina Bar

Continuing Legal Education Division

2019 SC BAR CONVENTION

Elder Law Committee

“Settlements, Inheritances, and Support
for People with Special Needs”

Friday, January 18

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**Part One: Medicaid, SSI, and Special Needs
Trusts**

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**SETTLEMENTS, INHERITANCES,
SUPPORT:
WHY SPECIAL NEEDS PLANNING
SHOULD BE IMPORTANT TO EVERY
LAWYER**

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THE BASICS OF NEED-BASED GOVERNMENT BENEFITS

Presented by Chadwicke L. Groover

With the aging of society and the rising costs for long term care, it is helpful for non-elder law attorneys to have a basic understanding of the public benefits programs that are available to seniors and the disabled. This is particularly true with regard to the Medicaid program and its many components.

But before we delve into Medicaid, let's distinguish between several different government-sponsored programs for which a person with disabilities might be eligible.

Social Security Retirement Benefits

Social Security Disability (SSDI)

Supplemental Security Income (SSI)

Medicare

Medicaid

Social Security Retirement and Social Security Disability benefits are paid to workers who have earned enough quarters of coverage to qualify. **These benefits are not needs-based.** Spouses, minor children, and adult disabled children may be eligible for benefits of a retired worker, a deceased worker, or a disabled worker. Eligibility for these benefits also makes one eligible for Medicare, although it may be two years between the commencement of disability payments and the date the person becomes eligible for Medicare. **Medicare is not needs-based.** The exception to this is that some premiums are higher for high income beneficiaries.

Supplemental Security Income is a federal program administered by Social Security to supplement the income of a person who is over 65, blind or disabled and has monthly income of less than \$771.00 or \$1,157.00 for a married couple. This is the amount for 2019 and changes

every year. **This program is needs-based.** Not only is there an income limit, but there is also a limit on the assets that the person may own and still be eligible. The limit for countable assets is \$2,000.00 for an individual and \$3,000.00 for a couple. This excludes the residence and one car and other miscellaneous assets. Information regarding eligibility for SSI can be found in Social Security’s Program Operations Manual System (POMS).

<https://secure.ssa.gov/apps10/poms.nsf/Home?readform>

For South Carolina residents who receive at least \$1 per month in SSI benefits, there is automatic eligibility for basic Medicaid coverage. Basic Medicaid coverage is similar to traditional health insurance. It helps pay for hospital visits, doctors’ visits, and prescription coverage.

Basic Medicaid is just one of many coverages available under the Medicaid umbrella. Medicaid is a federal-state partnership. The federal government sets the basic rules and the states each have their own variations. **All Medicaid eligibility is needs-based**, but coverage provided depends on the specific program. South Carolina has not expanded its coverage pursuant to the Affordable Care Act, so an adult under 65 who is not disabled and who does not have at least one child cannot qualify for Medicaid. The ACA did eliminate resource limits for some programs for low income children and families. The income and resource limits are different depending on the Medicaid program for which the person is seeking eligibility.

PROGRAM	Monthly Income Limit	Individual Resource Limit	Couple Resource Limit
MEDICAID CARD ONLY			
Supplemental Security Income (SSI)	\$771 for individual \$1,157 for couple <i>1/1/19</i>	\$2,000	\$3,000
Pregnant Women and Infants (PW)	\$1,962.63	N/A	N/A

	Increases with family size 3/1/18		
Partners for Healthy Children	\$2,104.26 Increases with family size 3/1/18	N/A	N/A
Parent/Caregiver Relative (PCR) Formerly Low Income Family	627.23 Increased with family size 3/1/18		
Regular Foster Care (RFC)	\$677.81 3/1/18	N/A	N/A
Working Disabled (WD)	\$2,530 Increases with family size 3/1/18	\$7,560	N/A
Breast and Cervical Cancer Program (BCCP)	\$2,024 Increases with family size 3/1/18		
Aged, Blind, or Disabled (ABD)	\$1,012 for individual \$1,372 for couple 3/1/18	\$7,560	\$11,340
MEDICAID CARD PLUS LONG TERM CARE SERVICES			
Home and Community-Based Services (HCBS) Includes: <ul style="list-style-type: none"> • COMMUNITY CHOICES • HIV/AIDS • VENT 	\$2,313 1/1/19	\$2,000	\$66,480 Refer to MPPM 304.14

<ul style="list-style-type: none"> • HASCI • ID/RD • PACE • PRTF 			
General Hospital	\$2,313 <i>1/1/19</i>	\$2,000	\$66,480 Refer to MPPM 304.14
Nursing Home	\$2,313 <i>1/1/19</i>	\$2,000	\$66,480 Refer to MPPM 304.14
Katie Beckett (TEFRA)	\$2,313 <i>1/1/19</i>	\$2,000	N/A
MEDICAID CARD AND FINANCIAL AID TO HELP PAY FOR ASSISTED LIVING			
Optional State Supplementation (OSS)	\$1,435 <i>1/1/18</i>	\$2,000	N/A
OTHER ASSISTANCE			
Qualifying Individual (QI) (Payment of Medicare B premium only)	\$1,366 Increases w/ family size <i>3/1/18</i>	\$7,560	\$11,340
Qualified Disabled Working Individual (QDWI) (Payment of Medicare A premium only for disabled person losing Medicare because of earnings)	\$2,024 Increases w/family size <i>3/1/18</i>	\$4,000	\$6,000

For those severely disabled persons who require nursing care either in the home or in a facility there are special programs under the Medicaid umbrella. These programs fall under the Home and Community-Based Services (HCBS) waivers, hospital coverage and nursing home coverage. To qualify, a single person must have income below \$2,313 per month (or establish an

income trust) and must have countable resources of \$2,000 or less. If there is a spouse, the spouse's income does not count, but the spouse's assets are considered. The community spouse may retain up to \$66,480 in countable resources.

TEFRA is somewhat unique in that it is strictly for children under age 19 who are severely disabled and it is the only Medicaid coverage for children that does not consider family income. Even if the family is wealthy, their severely disabled child may qualify under this program.

INCOME

Income includes any regularly received payments including social security and tax exempt interest.

RESOURCES

Not everything is a resource and not all resources are countable in determining eligibility for those Medicaid programs that have resource limits.

There are a number of exempt resources, including:

- Primary residence. The home and all contiguous property (with an equity value of up to \$572,000 in 2018) will not disqualify someone from receiving Medicaid. However, the home may be subject to estate recovery at the death of the owner. A life estate in the residence is exempt for Medicaid eligibility purposes and is, under current law, protected from estate recovery.
- One vehicle, regardless of value, is an exempt resource for Medicaid purposes.
- Irrevocable pre-need funeral contracts are exempt resources for Burial spaces (including vaults, caskets, headstones, opening and closing the gravesite) for the applicant, his or her spouse, or any other immediate family member are excluded. Immediate family member includes parents, children, siblings, and spouses of these relations.

- First party Special Needs Trust are exempt from consideration as a resource for Medicaid eligibility purposes so long as they meet the requirements set forth in 42 USC 1396p(d)(4)(A).
- Pooled Trust. A subaccount in a pooled trust is exempt from consideration as a resource for Medicaid purposes so long as they meet the requirements set forth in 42 USC 1396p(d)(4)(C).
- Certain annuities may be excluded. See MPPM 304.12 for explanation of policy. The annuity must be irrevocable, non-assignable, actuarially sound, and provide for payments in equal amounts during the term. There can be no deferral and no balloon payment. SCDHHS must be named as the primary remainder beneficiary (or secondary after the community spouse or a minor or disabled child) up to the total amount paid by Medicaid for long term care services.

South Carolina has some additional exemptions, including:

- The value of life estate interests in real property are excluded.
 - The cash value of life insurance is excluded, if the combined face value of all policies is \$10,000 or less for each insured. Term life insurance is excluded because it has no cash value.
 - The qualified retirement funds of the community spouse are excluded.
 - The value of a non-negotiable, non-assignable, actuarially sound promissory note is excluded. The monthly payments are income to the person to whom the note is owed.
 - Real property may be excluded if there is a bona fide effort to sell.

Just having this basic familiarity with the various programs and their specific requirements will help you determine when you need to be concerned about maintaining or qualifying for certain benefits and when it is not an issue.

THE BASICS OF SPECIAL NEEDS TRUSTS AND POOLED TRUSTS

presented by Andrew J. Atkins

What is a Special Needs Trust?

Many people in South Carolina rely on public benefits such as Medicaid or SSI to meet their needs. The receipt of a lump sum of money, such as an inheritance or a settlement, can jeopardize a person's eligibility for public benefits. Regardless of the source of the excess funds, a planning mechanism exists which, if certain criteria are met, can be utilized to preserve a person's eligibility for these vital public benefits: the special needs trust.

A special needs trust is a trust intended to provide for the "special needs" of a person with disabilities without negatively affecting his or her eligibility for government benefits. These trusts are intended to *supplement*, but not *supplant*, the beneficiary's public benefits. "Special needs" covers a wide array of goods and services, such as special equipment, computers, travel, entertainment, caregivers, and medical, dental and vision care not covered by Medicaid.

Types of Special Needs Trusts

There are three types of special needs trusts:

1. First party special needs trusts
2. Third party special needs trusts, also known as supplemental needs trusts
3. Pooled Trusts, which can be either third party or first party

First Party Special Needs Trusts

Statutory authority for first party special needs trusts is derived from 42 U.S.C. § 1396p(d)(4)(A) and (d)(4)(C) (pooled trusts, discussed below). A first party trust is sometimes referred to as an OBRA '93 trust (after the Omnibus Budget Reconciliation Act of 1993, which

led to the creation of the trusts), a payback trust (after an essential piece of language in the trust, discussed below), or simply a d4A trust. These are the most common form of trusts used when a person with disabilities is due to receive a lump sum. The defining feature of the first party trust is that it is funded with the assets of the person with a disability. Certain elements must be met to create a first party trust:

1. The trust must be established by a parent, grandparent, legal guardian, a court, or the disabled beneficiary, if he or she is competent to do so.
2. The beneficiary must be disabled.
3. The beneficiary must be under age 65.
4. Only assets belonging to the disabled beneficiary are used to fund the trust.
5. The trust must contain a payback provision allowing SC DHHS and any other state Medicaid agency which has provided services for the beneficiary to be reimbursed from the balance remaining at death for any amounts paid out for the person during his or her lifetime.

The sole beneficiary of the first party trust is the disabled beneficiary during his or her lifetime. It must be irrevocable and it cannot be a testamentary trust.

Third Party Special Needs Trusts a/k/a Supplemental Needs Trusts

As the name implies, these trusts are funded with the assets of a third party. Unlike first party trusts, there is no federal statutory authority regarding third party trusts. The Social Security Administration has policies regarding these trusts in Program Operations Manual System, also known as the POMS. Often, third party trusts are established by a parent or grandparent for the benefit of a disabled child or grandchild.

These trusts differ from first party trusts in several critical ways, aside from the funding source. Unlike first party trusts, there is no payback requirement for a third party trust. There are also no age limits for the beneficiary of a third party trust. Third party trusts can be inter vivos or testamentary.

Care must be taken to ensure that the assets in the trust are not considered available to the beneficiary. For Medicaid eligibility purposes, a third party trust may be excluded as a resource as long as the beneficiary has no authority to revoke the trust and no authority to direct the use of the funds for his or her own support and maintenance.

Pooled Trusts

Pooled trusts can be either first party or third party trusts, depending on the source of the assets used to fund the trust. In a pooled trust, multiple trusts are combined for investment purposes, but each one is managed independently for distribution purposes. A separate account is maintained for each beneficiary and a separate accounting must be available for each subaccount. The sub-account can be established by a parent, grandparent, legal guardian, a court, or the individual with disabilities.

These trusts are potentially useful to protect modest assets. While a person over 65 may participate in a pooled trust, assets transferred to the sub-account after age 65 are subject to transfer of asset penalties.

The balance of the funds remaining in the account at the death of the beneficiary is paid to the state up to the amount paid on behalf of the individual, except to the extent the funds are retained in the trust.

The requirements for a pooled trust are:

1. Must be established and managed for disabled beneficiaries by a non-profit organization.
2. A separate sub-account must be maintained for each beneficiary.
3. The sub-account must be established by the disabled beneficiary, a parent, a grandparent, a guardian, or a Court.
4. Any balance in the sub-account at the death of the beneficiary must be used to reimburse Medicaid to the extent it is not retained in the Trust.

Creating the First Party Special Needs Trust

If a first party special needs trust is needed to preserve a beneficiary's eligibility for public benefits, several factors must be considered.

I. Who establishes the first party trust?

For 22 years prior to the passage of the Special Needs Trust Fairness Act of 2015, a first party trust could only be established by:

1. A parent of the disabled beneficiary
2. A grandparent of the disabled beneficiary
3. A legal guardian of the beneficiary
4. A court.

At the time when the OBRA'93 legislation was passed, Congress apparently never considered the possibility that a disabled person could be perfectly competent to establish his or her own trust. Fortunately, the Special Needs Trust Fairness Act of 2015 finally allowed competent adults with disabilities to establish their own trusts, which is far more convenient than going through a court process or having a parent or grandparent create the trust.

II. Who will serve as trustee?

When establishing a Special Needs Trust, it is important to choose the right trustee for the difficult task of managing the trust. The practitioner has two options in making that choice: an individual (usually a family member of the beneficiary) or a corporate trustee. A variety of factors can impact the selection of the trustee.

A. Family Member as Trustee

Selecting a family member of the beneficiary to serve as trustee carries significant risks:

1. Little investment expertise: More than likely, the family member will have little to no investment expertise.
2. Poor reporting.
3. Difficulty following SSI rules: An unsophisticated trustee can easily run afoul of the SSI rules, thus jeopardizing the eligibility of the person who depends on benefits. For instance, the family members may not fully understand the sole benefit rule. In the worst case scenario, they view the Special Needs Trust as a bank account for the benefit of the whole family.

Nevertheless, the family member as beneficiary can have a few positive aspects:

1. Knowing the beneficiary's needs: The family member will usually have a good idea of what the beneficiary needs because they have a personal relationship with the beneficiary.
2. Care and concern for the beneficiary: A family member may be the only one willing to "step up to the plate" for a disabled beneficiary.
3. If trust assets are modest, the individual trustee may not need much investment experience to manage the Special Needs Trust.

B. Corporate Trustee

Selecting a professional or corporate trustee can be highly beneficial for a number of reasons:

1. Investment expertise: This is a critical factor if the trust assets are great enough to require management. Having a professional manage the trust can alleviate a great deal of burden for the family of a disabled beneficiary.
2. Ability to say “no” when necessary: Being able to say “no” to the beneficiary or his or her family members is necessary at times, and may be difficult for an individual trustee.
3. Proper tax filing: A corporate trustee has the expertise to ensure that proper income tax returns for the trust are filed. If there are employees of the trust the trustee will be more familiar with the requirements of an employer such as withholding, payroll taxes and filing the correct returns.
4. Proper accounting: The corporate trustee is accountable to the beneficiary and can provide statements as needed on a regular basis.
5. No conflict of interest
6. Family members may not be willing or able to serve as trustee or, if court approval is necessary, the court may not find a family member acceptable.

There are a few drawbacks to the corporate trustee however:

1. Impersonal relationship to the beneficiary: The corporate trustee may not have the close personal relationship to the beneficiary that a family member would have. This can be at least partially overcome by meeting with the beneficiary and becoming familiar with the family dynamics, allowing the corporate trustee to better serve the beneficiary. Many trust officers do become very close to the beneficiaries and their families.
2. May or may not know needs-based benefit rules
3. May be arbitrary

4. Trust officers can change
5. Ownership of the bank can change
6. Some trust officers may have difficulty communicating with disabled beneficiary or family members

Despite the handful of drawbacks, choosing a corporate trustee is preferable in most cases. Occasionally, the client may balk at the notion of handing responsibility of the management of their loved ones funds to a corporate trustee. One way to help the client “buy in” to having a corporate trustee is to present him or her with several different options. Encourage the client to be involved in the selection process by contacting the various trust companies to become more familiar with their personnel and policies.

Also consider naming a corporate trustee along with a special trustee or trust advisory committee. The special trustee or trust advisory committee would have the ability to request and advocate for distributions from the special needs trust, although the final decision on distributions remains with the corporate trustee. The special trustee or trust advisory committee can also determine which programs the beneficiary is eligible for and keep the trustee up to date. Naming a family member as special trustee can overcome some of the perceived drawbacks of having a corporate trustee, specifically the impersonal relationship between corporate trustee and beneficiary. As noted, the family member is more likely to have intimate knowledge of the beneficiary’s needs. The special trustee can facilitate communication between the beneficiary and corporate trustee, and help to relay the beneficiary’s needs to the corporate trustee.

If a trust advisory committee is used, the members of the committee should include non-family members so as to have some objectivity. A risk of having a special trustee or trust advisory

committee is the possibility of a conflict of interest, if the special trustee or committee members were to request distributions that provide some benefit to them instead of to the beneficiary.

III. What initial purchases are contemplated from the trust?

Possibilities include a house or a vehicle. If a house is purchased by the trust, be sure there are sufficient assets in the trust to pay for property taxes, insurance, and upkeep. Otherwise, the trustee will find it difficult to manage a trust that is “land rich and money poor.” If a bank or trust company is serving as trustee of such a trust, they may be forced to resign if there are insufficient assets to take care of the house and pay their fee.

Another important consideration is how to title the house. Should the house be titled in the name of the beneficiary or in the name of the trust? Should the trust purchase a life estate in the property for the life of the beneficiary? If so, who gets the remainder interest?

Vehicles have similar titling considerations. To insure the vehicle, a licensed driver will need to be on the title. If there is a corporate trustee, the trustee may want to have a lien against the vehicle to protect the trust’s interest.

IV. What expenditures are contemplated over time?

Examples include a paid caregiver, respite care, housing needs, paying for a private room in a facility, and modifications to existing housing.

V. Who will receive any amounts remaining in the trust at the death of the beneficiary and after Medicaid payback?

If the beneficiary lacks capacity and cannot make a will, this would normally be the intestate heirs, but to meet Social Security trust requirements, it is advisable to state that the *issue of the beneficiary* are the remainder beneficiaries and then have an alternate. If the person is competent, you could also include a testamentary power of appointment in the trust, so that he or

she can make a will designating who will assets any assets remaining in the trust after Medicaid payback.

Joining a Pooled Trust

If it is determined that a pooled trust more closely meets the needs of your client, you should contact one of the non-profit organizations which provides these trusts in South Carolina. If your client can be served by one of these trusts, then you will need to complete the Joinder Agreement for that trust. Subaccounts in a pooled trust must be created by a parent, grandparent, legal guardian, a court, or by a competent adult beneficiary.

If the client is a minor or is not competent, and the Joinder Agreement is executed by a parent, grandparent, or legal guardian, you will still need court approval to place the funds in the pooled trust, unless the incompetent adult beneficiary has a durable power of attorney authorizing his or her agent to fund the subaccount.

Funding a First Party Special Needs Trust or Pooled Trust

While the first party trust may be established by a parent, grandparent, legal guardian, a court, or a competent adult beneficiary, it is designed to contain funds belonging to the disabled beneficiary. Therefore, the actual funding of the trust must be done by the disabled beneficiary or by someone having the legal authority to act on behalf of the disabled beneficiary. If the disabled beneficiary is a competent adult, he or she may direct the assets to the trust. If the disabled beneficiary is not competent and has a durable power of attorney authorizing such action, the agent may direct the assets to the trust. If the disabled beneficiary is not competent and has no authorized agent, or if the disabled beneficiary is a minor, only a court may direct the funds to the trust.

Funding a Third Party Trust

The amount of funds designated to a third party trust is dependent on the wishes and ability of the Settlor and others to contribute to the trust. One of the most common concerns for parents of children with special needs is how much should go into the trust in order to assure that the child is provided for during his or her lifetime. Some parents choose to treat all children equally. Others decide to leave a lesser share to the disabled child who is living in a residential care facility and whose basic needs are being met through government assistance. Other parents decide to leave a greater share to the child with disabilities, on the premise that the needs of the child with disabilities will be greater than those of able siblings. Often, a life insurance policy on the life of one or both parents may be used to fund the trust. This is because the parents feel they can provide for the child while they are living, but they want a fund established at their deaths to provide for the needs of the child. Be careful if retirement funds are going to go into the trust. Depending on the structure of the trust, there could be negative income tax implications.¹

Settlements for Minors and Incapacitated Persons

The probate court is granted exclusive jurisdiction over the protection of minors and incapacitated persons, except: a) care, custody, and control of the persons of minors is under the Family Court and b) the Circuit Court has exclusive or concurrent jurisdiction as set forth in South Carolina Code Section 62-5-433 relating to claims in favor of or against a minor or incapacitated person.

¹ For a good reference regarding estate planning with retirement benefits, see Natalie B. Choate's book, *Life and Death Planning for Retirement Benefits*, the eighth edition of which should be published in 2019.

The probate court is also granted exclusive jurisdiction of trusts, but actions involving trusts are removable to the circuit court on the motion of a party or on the court's own motion.

South Carolina Code Section 62-5-433 contains two important definitions²:

- (A)(1) **Court**

For a claim *exceeding* \$25,000, the court is the *circuit court*.

For a claim *not exceeding* \$25,000, the court is the *probate court*.

- (A)(2) A **Claim** is defined as the net or actual amount accruing to or paid by the minor or incapacitated person.

For claims over \$25,000, the circuit court has *exclusive* jurisdiction over the settlement and the appointment of a conservator is required.

For claims not exceeding \$25,000, the circuit courts and probate courts have *concurrent* jurisdiction.

If there is a conservator, the conservator may settle without court authorization.

If there is no conservator, the guardian or guardian *ad litem* will seek court approval of the settlement.

If the claim does not exceed \$15,000, then it can be paid out under the facility of payment provisions of South Carolina Code Section 62-5-103 or, if a conservatorship is requested, then to the conservator.

If the claim is more than \$25,000, then it can only be paid to the conservator.

For claims under \$2,500, no court approval is required, no conservatorship is required, and payment may be made under facility of payment provisions.

² Although Article 5 of the Probate Code underwent a major overhaul, effective January 1, 2019, §62-5-433 saw no substantive changes, other than updating terminology to match the rest of the statute.

South Carolina Code Section 62-5-433 requires a conservator to receive sums over \$25,000. If these sums are instead directed to a special needs trust or pooled trust, is there a need for a conservator?

Can the circuit court create a special needs trust? While this has been done by circuit courts and federal courts and other administrative bodies in the past, it seems that only the probate court should have this authority based on the exclusive jurisdiction granted in South Carolina Code Section 62-1-302. If the circuit court cannot create a special needs trust, can the circuit court nevertheless direct the settlement proceeds to a special needs trust? An administrative order issued by the South Carolina Supreme Court on July 26, 2011 addresses these questions:

Notwithstanding the provision under South Carolina Code Section 62-5-433 (that provides that jurisdiction for approval of settlement of claims in favor of or against minors or incapacitated persons may be in the Circuit Court), the Probate Courts of this state have exclusive original jurisdiction under South Carolina Code Section 62-1-302(a)(2) over all subject matter related to the protection of minors' property and incapacitated persons' property, which includes the creation and establishment of a SNT and the approval of the transfer of a minor or incapacitated person's property, i.e. funds and/or other assets, to a SNT.

If a settlement is to be approved in circuit court and a special needs trust is required, the trust may be created by a parent, grandparent, legal guardian, the probate court or a competent adult beneficiary. The funds of the minor or incapacitated person may only be directed to the special needs trust by the probate court.

REPORTING TO SOCIAL SECURITY/MEDICAID

The Social Security Administration requires an SSI recipient or the representative payee to report changes that can affect SSI benefits. A report is due 10 calendar days after the month in which the change occurred. Reports may be made in writing, by telephone, or in person. POMS

Written reports are preferable so that the reporting recipient has a copy of the documentation provided. Best practice is to send all correspondence to Social Security by certified mail, return receipt requested, so that there is evidence that the report was timely made.

The South Carolina Department of Health and Human Services (SCDHHS) requires the beneficiary to report any change in circumstances that may affect eligibility within ten days of the change.

When reporting the creation and funding of a special needs trust or pooled trust it is important to go through the steps that the caseworker will use to determine the effect on eligibility. When writing to Social Security, refer to the POMS. When writing to SCDHHS, refer to the Medicaid Policy and Procedures Manual or to the POMS. The procedure for developing Medicaid trust exceptions for a first party special needs trust or for a pooled trust is included in the Appendix. POMS SI01120.203.C.1. (for first party trusts) and POMS SI01120.203.D.1. (for pooled trusts).

When reporting that the recipient has become the beneficiary of a third party trust, the steps to determine eligibility are not set out quite as neatly in the POMS. You will need to review POMS SI01120.200 and explain why the trust is not a resource.

In addition to your cover letter, you should provide a copy of the special needs trust or a copy of the pooled trust and the Joinder Agreement. If you are reporting creation and funding of a first party special needs trust or a pooled trust, you will also need to provide evidence of the amount and source of the funds received by the beneficiary, the date the funds were received, the date the trust was funded, and the amount placed into the trust. If a parent or grandparent created the trust, they must “seed” the trust with \$10.00 and the deposit should show up as the first deposit in the trust account.

WHEN IS A SPECIAL NEEDS TRUST APPROPRIATE? ADVISABLE?

presented by Franchelle C. Millender

THIRD PARTY SPECIAL NEEDS TRUSTS

Third party special needs trusts are designed to preserve needs-based government benefits for the primary beneficiary and to supplement those benefits in such ways as the Settlor or Testator directs. Since there is no payback requirement, the balance remaining in the trust at the death of the primary beneficiary can pass according to the Settlor's stated wishes. These trusts can be very useful in the estate planning arena and elder law attorneys and estate planners should be very familiar with these trusts and when to utilize them.

For most other practitioners, the issues that arise will have more to do with funds that belong to or are going to belong to the person who is receiving or needs to receive needs based benefits. In those situations we are focusing on first party special needs trusts and pooled trusts.

FIRST PARTY SPECIAL NEEDS TRUSTS AND POOLED TRUSTS

Unlike third party trusts, trusts funded with the assets or income of the individual receiving or trying to qualify for needs-based benefits are controlled by statute and must comply with the terms of the law. If a person has assets which exceed the applicable limit for a particular Medicaid program, a special needs trust or a pooled trust may be an effective way of preserving those assets. If a disabled person under age sixty-five needs to qualify for a Medicaid program, such as the Aged, Blind, and Disabled (ABD) program or the Optional State Supplement (OSS), but is over the applicable income limit, South Carolina allows income to be placed in a special needs trust or a pooled trust.

What questions need to be asked to determine if a first party special needs trust or pooled trust is appropriate?

How old is the person?

If the person is over age 65, a special needs trust is not an option. In South Carolina, pooled trusts are generally not a good idea for someone aged 65 or older as DHHS treats the funding of the trust as a transfer of assets for eligibility purposes. However, there could be instances where this is viable. Perhaps a client with high medical expenses but little likelihood of needing nursing home level of care within the next five years could place funds in a pooled trust in order to maintain eligibility for basic Medicaid under the ABD program and have the funds available to pay for supplemental needs.

Is the person disabled?

Special needs trusts and pooled fund trusts are only available for persons who meet the Social Security definition of disability. A person, particularly a child, may be on Medicaid simply because the family meets the low income thresholds, not because of a disability.

If the person is an adult, is he/she competent to make decisions?

If the person is competent, he or she may establish a first party special needs trust or execute a joinder agreement for a pooled trust and court action is not required. If the person is not competent, court approval of the funding of such a trust is required.

If the person is not competent, but there is a current, valid durable power of attorney, the agent may be able to establish and fund the trust. This depends on the authority granted. If the person is not competent and there is no durable power of attorney in place, the person cannot direct the payment of his or her funds to a trust, so court action will be required.

How much is the person going to receive? Lump sum? Structure?

It is necessary to know the amount that will be available to fund a trust in order to make appropriate recommendations.

A million dollar settlement can quickly dwindle with deductions for attorney's fees and costs, Medicaid liens and Medicare liens, and there may not be sufficient funds remaining to justify a trust.

If some or all of a settlement is to be structured, before deciding on a structured amount, it is necessary to be sure that there are sufficient funds to satisfy the liens, pay the attorneys and meet the immediate needs of the disabled person (housing, van, etc.). If providing for

a corporate trustee, you should also need to be sure there are sufficient funds in the trust to justify the trustee's minimum fees.

Has the person received Medicaid in the past?

If a person has received Medicaid benefits related to an injury, Medicaid will claim a right to reimbursement from the proceeds of any settlement for payments made for treatment of the injury.

There is a requirement to notify DHHS within ten days of a change of circumstances. The receipt of funds through an inheritance, a personal injury action, or any other payment to the Medicaid recipient should be reported immediately.

Is there a need for future Medicaid eligibility?

If an inheritance is large and the medical needs of the beneficiary are small, you will need to evaluate whether eligibility for Medicaid is a concern or not. Is there private insurance or Medicare available? Does the person need personal assistance or a special living environment?

In personal injury cases, depending on the extent of the injury and the projected recovery, there may or may not be a need to qualify for Medicaid or to maintain existing eligibility. If there are medical needs that are not being met through health insurance or Medicare, there may be a need to qualify or remain qualified for Medicaid assistance.

Under which Medicaid program is the person receiving benefits?

Each program has its own rules regarding eligibility. Some programs look at household income and resources; others look only at the income and resources of the individual. Some programs have a transfer of asset penalty, others do not. The needs of the individual may be better met by shifting from one program to another.

You have to determine what program the person is on in order to know how much income is allowed and what the resource limits are.

For example, a child or young adult who is disabled, but who has health coverage under a parent's policy and has no significant ongoing need for care or treatment may not need to retain Medicaid benefits.

The Medicaid eligibility category can also affect how much or whether the trust can make any cash distribution to the individual without disqualification. For example, an individual living at home who receives coverage under the Community Long Term Care (CLTC) waiver and receives Social Security Disability of \$1,200.00 per month could be given another \$1113.00 per month by the trust without losing Medicaid, but a person receiving SSI of \$771.00 could not get any cash distribution from the trust without affecting eligibility.

Does the person receive SSI?

A person receiving SSI is automatically eligible for Medicaid, but SSI rules are more restrictive than many other Medicaid programs. Depending on the amount of the settlement, it may be preferable to forego SSI and qualify under a different program so as to have more flexibility in future expenditures.

Is the person covered under Medicare?

If a person is eligible for Medicare, there may not be the same impetus for maintaining Medicaid eligibility, depending on the needs of the disabled person.

In certain cases (e.g. worker's compensation) a Medicare set-aside arrangement may be required. There is discussion of the need for Medicare set-aside arrangements in personal injury cases. The law requires that Medicare's interest be considered.

Is there other health insurance in place? Available in the future?

The availability of health insurance coverage may minimize the need for Medicaid eligibility. With the elimination of pre-existing conditions as an impediment to obtaining health insurance in 2014, there may well be situations where Medicaid is not necessary.

Where does the person live?

The living arrangements of the disabled person may impact eligibility for benefits as well as the need for eligibility. Is the person living at home alone? Married or single? In the home of another? In a group home or assisted living facility or nursing home?

What are the needs of the disabled person?

Are there specific purchases that need to be made from the settlement proceeds, such as a home, a van, special equipment, or additional caregiver time? It is important to understand what expenditures may be anticipated immediately and in the future in order to advise the person on options.

FACTORS IN DECIDING BETWEEN A SPECIAL NEEDS TRUST AND A POOLED TRUST

Amount of funds. How much is the inheritance or settlement going to be? What expenses will need to be paid before the trust is funded? Are any major purchases planned? Special needs trusts are typically more expensive to establish. If a corporate trustee is used, there are minimum fee requirements. For a \$75,000 trust, a minimum fee of \$3,000 equates to 4% of the principal balance of the trust and as the trust assets are depleted, the effective percentage paid to the trustee increases. A pooled trust may charge 2% of the principal balance of the trust, but as the assets are depleted the percentage remains the same.

Assets to be held by the trust. Most pooled trusts will not accept real estate into the trust, so if the purchase of a house is contemplated, the person may need a special needs trust.

WHAT ARE THE ALTERNATIVES TO A SPECIAL NEEDS TRUST OR POOLED TRUST?

Outright distribution. If funds are distributed outright to the beneficiary, he or she will lose needs-based benefits until the funds have been spent down to the applicable limits. Depending on the benefits being received, this may be an acceptable solution for the beneficiary.

Purchase of Exempt Resources. If the beneficiary has specific expenditures in mind and these are exempt resources for eligibility purposes, it is possible to receive and spend down the funds in the month of receipt, report to Medicaid or Social Security, and never lose eligibility or lose eligibility for just the month of receipt. Such exempt items might include a home, a car, furniture, or a pre-need funeral contract.

Structured settlement. A structured settlement is an arrangement by the defendant in a personal injury case, usually through an insurance company, to pay out settlement proceeds

over time. Payments are usually tax free, whereas dividends and interest paid on assets in a special needs trust are generally taxable.

Does a structured settlement take the place of a special needs trust?

In some circumstances, it might not be necessary to have a special needs trust. For instance, a minor child may just need to have the funds structured to pay out after age 18, if there is no immediate need for access to the funds.

In other cases, it may be beneficial to have some of the settlement proceeds go into a structure to get the benefit of the tax exempt growth, but to pay it into a special needs trust so that Medicaid eligibility is retained.

Determining whether and how much of the settlement should be structured is complex and requires looking closely at the anticipated needs of the beneficiary.

Conservatorship. The general rule is that funds held in a conservatorship are considered available resources for purposes of determining eligibility for Medicaid or SSI.

For a minor beneficiary, since parents have the obligation to provide support and maintenance, language can be inserted in the conservatorship order prohibiting the use of the funds for support and maintenance. This will allow the assets in the conservatorship to be excluded from consideration as a resource for Medicaid purposes. POMS SI 01140.215

Gifting. There may be circumstances where a competent adult beneficiary decides to give away some or all of the funds. An agent under a durable power of attorney may also take this action if specifically authorized in the power of attorney. For a minor or an incapacitated person with no valid durable power of attorney, this would require court action. Some gifts may be exempt (for example, gifts to a spouse or disabled child). Other transfers may result in the imposition of a penalty period for SSI or Medicaid, depending on the specific program.

ESTATE PLANNING ATTORNEYS

Third party trusts are not useful in protecting funds belonging to the beneficiary, but can be a very flexible tool for parents or grandparents to set aside their own funds for a disabled child or grandchild. Because these trusts are not funded with assets belonging to the person

with disabilities, these trusts do not have to comply with the rigid requirements of a (d)(4)A trust. Third party trusts generally fall into three categories: supplemental needs trusts, discretionary trusts, or trusts that disqualify the beneficiary from needs-based benefits. These trusts can be testamentary or inter vivos. If inter vivos, they can be revocable or irrevocable.

1. Supplemental Needs Trusts are designed to preserve needs-based government benefits for the primary beneficiary and to supplement those benefits in such ways as the Settlor directs. Since there is no payback requirement, the balance remaining in the trust at the death of the primary beneficiary can pass according to the Settlor's stated wishes.

2. Discretionary trusts set aside funds with a Trustee to use in its discretion for the beneficiary. Such trusts do not necessarily reference the disability status of the beneficiary and can be utilized for both disabled and non-disabled beneficiaries. . Currently both SSI and Medicaid will exempt from consideration a third party trust as long as no funds of the beneficiary go into the trust and the beneficiary has no power to revoke the trust or to require a distribution from the trust. If there is a current need for Medicaid a third party supplemental needs trust, either in the parent's will or revocable trust or a self-standing inter vivos trust may be the safest route. If the parents are the only ones who will be funding the trust, creation of the trust in the will or revocable trust should be quite sufficient. If you want to establish a vehicle which other family members can designate as beneficiary of funds now or in the future, a separate third party supplemental needs trust may be preferable

3. Disqualifying trusts can be intentional or unintentional. At the time of the drafting, the beneficiary may not have been disabled, or the Settlor may not have been aware of the need for special provisions, or a decision may have been made to forego benefits in exchange for being able to provide broader benefits. If the beneficiary of a disqualifying trust needs to obtain Medicaid benefits, there are potential solutions even if the trust is irrevocable. Some trusts authorize the Trustee or a Trust Protector to amend the trust to carry out the intent of the Settlor. If that option is not available, an action can be brought under South Carolina Trust Code

provisions to amend or modify the trust, or, in some cases, to terminate the trust. If the trust terms allow, another possible resolution is for the beneficiary of the trust to assign his or her right to receive distributions from the trust to a separate first party special needs trust.

Consider including standby special needs trust language in wills.

Special needs trusts can also be useful tools in planning for a disabled spouse. Receipt of an inheritance by a spouse who is on Medicaid or who needs to qualify for Medicaid may mean that those funds have to be spent down. Some clients elect to omit the disabled spouse, but Medicaid eligibility can be lost in these cases unless the omitted spouse exercises his or her right to claim an elective share. A better option is to set up a testamentary QTIP trust for the spouse with mandatory payment of income to satisfy the elective share issue and then to set up a testamentary special needs trust to provide for extras for the spouse without those funds being considered available for Medicaid purposes.

PROBATE ATTORNEYS

If you are representing a personal representative of an estate, it is important to ascertain whether any beneficiary is receiving needs-based government benefits. If the beneficiary wishes to retain the benefits, action may need to be taken before distributions are made to the disabled beneficiary.

If you are representing a beneficiary be aware of both probate and non-probate assets passing to the beneficiary. While there is time to address protection of benefits during the probate process, some assets may pass outside of probate directly to the disabled beneficiary and create a situation where there is a loss of eligibility.

Typically, a solution to preserving needs based benefits will be a first party special needs trust or joining a pooled trust. However, if the beneficiary is 65 or older, other options will need to be explored.

Medicaid treats a disclaimer as a transfer of assets and this could result in the imposition of a lengthy period of ineligibility for some Medicaid programs.

FAMILY LAW ATTORNEYS

Why should family law attorneys be familiar with SSI, Medicaid, and Special Needs trusts? If there is a disabled spouse or a disabled child, eligibility for government benefits may be critical.

THE DISABLED SPOUSE

If a couple is divorcing and one spouse is disabled, it is important to understand options that may be available. Is the disabled spouse going to lose health insurance? Can other coverage be obtained at a reasonable cost? Is there a need to establish or retain eligibility for SSI and/or Medicaid? If needs-based benefits are important, then one must carefully consider how to divide marital property and how to address support. If the spouse is under 65 a special needs trust or pooled trust may solve the problem. Non-exempt resources could be put into the trust and spousal support could be irrevocably assigned to the trust so that it would not count for SSI and Medicaid purposes.

THE DISABLED CHILD

For a child with a disability, child support orders can have a negative impact on the eligibility for public benefits. The impact is different depending on whether the child has reached the age of 18. The two most important benefits are Supplemental Security Income (SSI) and Medicaid. If there is a child support order for the disabled minor child, the support is countable income for determining an SSI payment. Social security will subtract and disregard the first one third of the child support and the remaining two thirds of the support will be countable as income and reduce the SSI payment dollar for dollar.

For a child over the age of 18, all of the child support is countable income to the child for the purpose of establishing an SSI payment. To protect the child's benefits, it is usually

desirable to have the Family Court order that the child support be irrevocably assigned to a special needs trust for the benefit of the child.

PERSONAL INJURY, MEDICAL MALPRACTICE AND WORKER'S COMPENSATION ATTORNEYS

Whenever a person is going to receive a lump sum distribution or a structured settlement, it is important to know whether that person is receiving or needs to receive SSI or Medicaid. If needs-based benefits are important, then the settlement needs to be set up in such a way as to not disqualify the beneficiary from those benefits. Again, the simplest solution for someone under 65 may well be to have the settlement go into a special needs trust or a pooled trust. If the person is 65 or older or there has not yet been a disability determination, it will be necessary to consider some of the other alternatives that have been discussed.

**PLEASE MIND THE GAP. PRACTICAL GUIDANCE FOR ALL
PRACTITIONERS TO AVOID A FALL**

Hypotheticals

presented by Andrew J. Atkins, Chadwicke L. Groover and Franchelle C. Millender

1. You have been asked to prepare a deed from father to daughter.
2. Your client says her mom has just had a stroke and her best friend said to get everything out of mom's name right away.
3. Your clients are an older couple. He has had a stroke but is competent. Nursing home is a likely event for him in the next couple of years. They want to put all of their assets into a trust so that the state will not get everything.
4. You are closing on the sale of a house. Your title search reveals the house was a gift to the current owner by his mother. The gift occurred more than three years ago. You note the house was transferred to the son using mom's power of attorney. Mom is incompetent and in a nursing home. Can you close?
5. A member of your church just placed her mother in a nursing home and has been told that she needs a power of attorney. She heard that you were a lawyer and asks if you will just give her the form and she'll get it signed so you don't have to bother.
6. Wife comes in with husband who lacks capacity and shows lawyer their Durable Powers and Wills prepared a few years ago, asking if there's something that can be done to protect their assets.
7. John is a World War II veteran. He is in an assisted living facility. He is married. His income is \$2,000 per month and his wife, Mary, has income of \$1,000 per month. They own a home. The value is \$250,000. They have a \$40,000 credit line on the house. They have bank and investment accounts totaling \$120,000. John's assisted living bill is \$3,700 per month. Is there help available?
8. You represent a minor child in a personal injury settlement and there is an offer on the table, what do you need to consider before you settle?
9. You are settling a mass tort action and each participant is to receive about \$5000.
10. Your client is 50 years old and has never worked. She suffers from MS, is totally disabled, and Nursing Home care in the future is very likely. She is divorcing her spouse of 30 years. His income is \$120,000 per year.

Assets are:	Marital Home	\$275,000	no mortgage
	401k (his)	\$200,000	
	Bank Accts	\$25,000	
	Stocks and Bonds	\$250,000	

She is on his group health insurance. They have two children ages 22 and 25, both of whom are very close to their mother. What should you ask for?

11. Your client and his wife are divorcing. The total marital assets are approximately \$500,000, including a house with a value of 200,000 and a mortgage of \$100,000. They have a 15 year old special needs child. The wife will retain custody of the child, and as a result will be unable to work full time. . Husband's income is \$7,000 per month.
12. You are completing the administration of an estate and you hear that one of the beneficiaries is now in a nursing home, do you just send the money?
13. Elderly gentleman comes to you for a simple will that leaves all his assets equally to his three children. Daughter lives close by while the two sons live out of state. When asking about his assets you find out that he has Daughter's name on all his accounts and CD's so that Daughter can help pay the bills should "something happen." What do you advise?
14. You have a client who is receiving a settlement of \$50,000 and is on Social Security?
15. Your client comes in and tells you her son has been on SSI and Medicaid for 5 years and she just found out his grandfather was holding 100 shares of Amazon stock in the son's name.
16. Your client is going to receive a settlement of \$100,000, is there a way to save it?
17. You receive a call from a personal injury attorney who says he needs you to set up a special needs trust for a minor child who was in an accident.
18. Your client's father just died and client's disabled sister is going to start receiving dad's military retirement benefits because she is disabled, but that will make her income too high to stay on Medicaid.
19. Your client is on SSI and Medicaid and is going to receive a \$10 million settlement, what should you advise?
20. Your client tells you that her child is disabled and on Medicaid, so she is going to leave her out of the will and rely on her siblings to take care of her.
21. You are handling a case for a 12 year old boy who lost an eye in an accident and is on Medicaid. He is receiving a settlement. Does he need a special needs trust? Wife is on her 24th day of rehabilitation and has plateaued. She will not be coming home. The

skilled nursing facility she is in accepts Medicaid after three months of private pay. Husband comes to see you to see how he can pay for her care but not lose his house and life savings. They have a house worth \$180,000 in both their names as tenants in common, an IRA in his name worth \$500,000, 2 cars, a \$100,000 life insurance policy on his life, a \$10,000 life insurance policy on her life, and \$64,000 in their joint checking and saving.

22. Husband (82) has been in nursing home on Medicaid for 3 years. He is about to receive a \$150,000 settlement from a nursing home neglect settlement. His wife (79) is lives at home and is not on a waiver program... Their personal injury attorney comes to see you to see if it is possible to protect the \$150,000 settlement. Can the money be protected and Husband retain Medicaid eligibility?
23. Young man on SSI comes to see you because on his 30th birthday he will receive a \$15,000 distribution from his grandfather's testamentary trust. He will receive a \$75,000 distribution and a 1/8 interest in a mountain cabin (worth \$20,000) when he is 35. He doesn't want to lose his SSI because it is his only income and can't lose his Medicaid coverage because he needs it to cover his prescription drugs needed to treat his mental illness. What can you do to help him?
24. Severely disabled minor is receiving a large settlement which is going into a special needs trust. Family needs a home designed to accommodate child's needs. The trustee is ready to purchase the home in the name of the trust. Are there options?



South Carolina Bar

Continuing Legal Education Division

2019 SC BAR CONVENTION

Elder Law Committee

Friday, January 18

Part Two: Special Needs and Estate Planning,
Family Law, Personal Injury, and Workers'
Compensation

Andrew J. Atkins
Chadwicke L. Groover
Franchelle C. Millender

Settlements, Inheritances, Support: Why Special Needs Planning should be important to every lawyer

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BASICS OF GOVERNMENT BENEFITS

CHAD GROOVER

With the aging of society and the rising costs for long term care, it is helpful for non-elder law attorneys to have a basic understanding of the public benefits programs that are available to seniors and the disabled. This is particularly true with regard to the Medicaid program and its many components. Lawyers working with clients receiving funds from a settlement or inheritance need to understand the benefits and what they provide for the client.

BASICS OF GOVERNMENT BENEFITS

- Social Security Retirement Benefits
- Social Security Disability (SSDI)
- Supplemental Security Income (SSI)
- Medicare
- Medicaid

BASICS OF GOVERNMENT BENEFITS

Social Security Retirement and Social Security Disability benefits are paid to workers who have earned enough quarters of coverage to qualify. There may also be benefits to a spouse, minor child or adult disabled child of the worker. These benefits consist of a payment to the recipient. **These benefits are not needs-based.**

BASICS OF NEED-BASED GOVERNMENT BENEFITS

Medicare is health insurance and those who qualify are workers who reach age 65 or who are disabled prior to age 65 if they have sufficient work history. Disabled adult children of an insured worker may also be eligible. **Medicare is not needs-based.** The exception to this is that some premiums are higher for high income beneficiaries.

BASICS OF GOVERNMENT BENEFITS

Supplemental Security Income is a federal program administered by Social Security to supplement the income of a person who is over 65, blind or disabled and has monthly income of less than \$771.00 for an individual or \$1,157.00 for a married couple. **This program is needs-based.**

BASICS OF GOVERNMENT BENEFITS

For South Carolina residents who receive at least \$1 per month in SSI benefits, there is automatic eligibility for basic Medicaid coverage.

BASICS OF GOVERNMENT BENEFITS

Medicaid is a federal-state partnership program. The federal government sets the basic rules and the states each have their own variations. **All Medicaid eligibility is needs-based**, but coverage provided depends on the specific program and eligibility rules vary according to the program. There is a list of the various programs, their coverage, and financial eligibility criteria in the materials.

MEDICAID FOR LONG TERM CARE

For those severely disabled persons who require nursing care either in the home or in a facility there are special programs under the Medicaid umbrella. These programs fall under the Home and Community-Based Services (HCBS) waivers, hospital coverage and nursing home coverage.

MEDICAID

TEFRA is somewhat unique in that it is strictly for children under age 19 who are severely disabled and it is the only Medicaid coverage for children that does not consider family income.

MEDICAID

INCOME- anything an individual receives that can be used to meet the needs for food and shelter. Includes any regularly received payment even when not taxable.

RESOURCE- all assets, including real and personal property, which the person owns and can be used for food and shelter (directly or by conversion). Not everything is a resource and not all resources are countable in determining eligibility for those Medicaid programs that have resource limits.

MEDICAID

Exempt resources:

- Primary residence
- One vehicle
- Irrevocable pre-need funeral contract
- First party Special Needs Trust
- Pooled Trust
- Certain annuities

MEDICAID

SC additional exemptions:

- Life estate interest in real property
- Cash value of life insurance (if total face value 10,000 or less)
- Retirement funds of the spouse
- Promissory Note if compliant with Medicaid rules
- Real property for sale

SPECIAL NEEDS TRUSTS AND POOLED TRUSTS

ANDREW ATKINS

What is a Special Needs Trust?

A special needs trust is a trust intended to provide for the “special needs” of a person with disabilities without negatively affecting his or her eligibility for government benefits.

SPECIAL NEEDS TRUSTS AND POOLED TRUSTS

- First party special needs trust
- Third party special needs trust (supplemental needs trust)
- Pooled trust

SPECIAL NEEDS TRUSTS AND POOLED TRUSTS

First Party Special Needs Trusts

A first party trust is sometimes referred to as an OBRA '93 trust (after the Omnibus Budget Reconciliation Act of 1993, which led to the creation of the trusts), a **payback** trust, or simply a d4A trust.

SPECIAL NEEDS TRUSTS AND POOLED TRUSTS

Third Party Special Needs Trusts a/k/a Supplemental Needs Trusts

As the name implies, these trusts are funded with the assets of a third party. Unlike first party trusts, there is no federal statutory authority regarding third party trusts.

SPECIAL NEEDS TRUSTS AND POOLED TRUSTS

Unlike first party trusts, there is no payback requirement for a third party trust. There are also no age limits for the beneficiary of a third party trust. Third party trusts can be inter vivos or testamentary.

SPECIAL NEEDS TRUSTS AND POOLED TRUSTS

Pooled Trusts

Pooled trusts can be either first party or third party trusts, depending on the source of the assets used to fund the trust. In a pooled trust, multiple trusts are combined for investment purposes, but each one is managed independently for distribution purposes.

FIRST PARTY SNT

Creating the First Party Special Needs Trust

If a first party special needs trust is needed to preserve a beneficiary's eligibility for public benefits, several factors must be considered.

FIRST PARTY SNT

Established by:

- A parent
- A grandparent
- A legal guardian
- A court
- The beneficiary – added by the Special Needs Fairness Act 12/13/16

FIRST PARTY SNT

Who will serve as Trustee? Consider the pros and cons.

An individual (usually a family member)

A corporate trustee

FIRST PARTY SNT

Consider naming a corporate trustee along with a special trustee or trust advisory committee.

FIRST PARTY SNT

What initial purchases are contemplated from the trust?

The amount of the trust will impact trustee selection, particularly if the trust is going to be significantly depleted early on with the purchase of a house and van.

FIRST PARTY SNT

What expenditures are contemplated over time?

FIRST PARTY SNT

Who will receive any amounts remaining in the trust at the death of the beneficiary and after Medicaid payback?

POOLED TRUST

Joining a Pooled Trust

If it is determined that a pooled trust more closely meets the needs of your client, you should contact one of the non-profit organizations which provides these trusts in South Carolina. There are also national pooled trusts which are available to SC residents.

SPECIAL NEEDS TRUSTS AND POOLED TRUSTS

Funding a First Party Special Needs Trust or Pooled Trust

While the first party trust or a subaccount in a pooled trust may be established by a parent, grandparent, legal guardian, a court, or a competent adult beneficiary, it is designed to contain funds belonging to the disabled beneficiary. Therefore, the actual funding of the trust must be done by the disabled beneficiary or by someone having the legal authority to act on behalf of the disabled beneficiary.

SPECIAL NEEDS TRUSTS AND POOLED TRUSTS

Funding a Third Party Trust

The amount of funds designated to a third party trust is dependent on the wishes and ability of the Settlor and others to contribute to the trust.

SPECIAL NEEDS TRUSTS AND POOLED TRUSTS

Settlements for Minors and Incapacitated Persons

The probate court is granted exclusive jurisdiction over the protection of minors and incapacitated persons, except: a) care, custody, and control of the persons of minors is under the Family Court and b) the Circuit Court has exclusive or concurrent jurisdiction as set forth in South Carolina Code Section 62-5-433 relating to claims in favor of or against a minor or incapacitated person.

SPECIAL NEEDS TRUSTS AND POOLED TRUSTS

Reporting to Social Security/Medicaid.

If you are involved in the creation and funding of a trust for someone receiving SSI or Medicaid, it is important to make sure that someone is responsible for reporting the creation and funding to the Social Security Administration (if SSI) or to SCDHHS (if Medicaid without SSI). If the person is receiving SSI and is also receiving Medicaid assistance for long term care services, reporting should be done to both agencies.

SPECIAL NEEDS TRUSTS AND POOLED TRUSTS

When reporting the creation and funding of a special needs trust or pooled trust it is important to go through the steps that the caseworker will use to determine the effect on eligibility.

WHEN IS A SPECIAL NEEDS TRUST APPROPRIATE?

FRANCHELLE MILLENDER

Third party special needs trusts are designed to preserve needs-based government benefits for the primary beneficiary and to supplement those benefits in such ways as the Settlor or Testator directs.

No payback, so settlor or testator can name remainder beneficiary

WHEN IS A SPECIAL NEEDS TRUST APPROPRIATE?

Unlike third party trusts, trusts funded with the assets or income of the individual receiving or trying to qualify for needs-based benefits are controlled by statute and must comply with the terms of the law.

WHEN IS A SPECIAL NEEDS TRUST APPROPRIATE?

- How old is the person?
- Is the person disabled?
- If the person is an adult, is he/she competent to make decisions?
- How much is the person going to receive?

WHEN IS A SPECIAL NEEDS TRUST APPROPRIATE?

- Has the person received Medicaid in the past?
- Is there a need for future Medicaid eligibility?
- Under which Medicaid program is the person receiving benefits?
- Does the person receive SSI?

WHEN IS A SPECIAL NEEDS TRUST APPROPRIATE?

- Is the person covered under Medicare?
- Is there other health insurance in place? Available in the future?
- Where does the person live?
- What are the needs of the disabled person?

WHEN IS A SPECIAL NEEDS TRUST APPROPRIATE?

FACTORS IN DECIDING BETWEEN A SPECIAL NEEDS TRUST AND A POOLED TRUST

Amount of the funds

Type of assets used to fund

Availability of an acceptable trustee

WHEN IS A SPECIAL NEEDS TRUST APPROPRIATE?

WHAT ARE THE ALTERNATIVES TO A SPECIAL NEEDS TRUST OR POOLED TRUST?

Outright distribution with loss of benefits until spent down

Purchase of exempt resources

Structured settlement

Conservatorship

Gifting

ABLE account

ESTATE PLANNING

ESTATE PLANNING ATTORNEYS

Third party trusts are not useful in protecting funds belonging to the beneficiary, but can be a very flexible tool for parents or grandparents to set aside their own funds for a disabled child or grandchild.

ESTATE PLANNING

- Supplemental Needs Trusts
- Discretionary Trusts
- Disqualifying Trusts

ESTATE PLANNING

Consider including standby special needs trust language in wills

PROBATE

PROBATE ATTORNEYS

If you are representing a personal representative of an estate, it is important to ascertain whether any beneficiary is receiving needs-based government benefits. If so, how can distribution be made without jeopardizing benefits.

FAMILY LAW

FAMILY LAW ATTORNEYS

Why should family law attorneys be familiar with SSI, Medicaid, and Special Needs trusts?

Protecting a disabled spouse

Protecting a disabled child

LITIGATION

PERSONAL INJURY, MEDICAL MALPRACTICE AND WORKER'S COMPENSATION ATTORNEYS

Whenever a person is going to receive a lump sum distribution or a structured settlement, it is important to know whether that person is receiving or needs to receive SSI or Medicaid. If so, then the possibility of a special needs trust or pooled trust should be explored.



**PLEASE MIND THE GAP. PRACTICAL GUIDANCE FOR ALL
PRACTITIONERS TO AVOID A FALL**

Hypotheticals

HYPOTHETICALS

You have been asked to prepare a deed from father to daughter.

Who asked you?

Who is the client?

What is the purpose?

Retain life estate? What about rental income?

Medicaid considerations?

Property, Gift, and Capital Gains tax considerations?

How to handle future sale of property?

HYPOTHETICALS

- Your client says her mom has just had a stroke and her best friend said to get everything out of mom's name right away.

Does mom have capacity?

Should you wait to see extent of recovery?

Is there a durable power? Is daughter you client individually or as agent for mom?

Does daughter have authority to make gifts?

What assets does mom have?

Can mom get through a five year look back period?

What gifting strategies are possible?

HYPOTHETICALS

- Your clients are an older couple. He has had a stroke but is competent. Nursing home is a likely event for him in the next couple of years. They want to put all of their assets into a trust so that the state will not get everything.

Do they really know what they want?

What are their assets? Income?

Do they have long term care insurance?

What are their options?

What kind of trust should they choose?

How much of their assets should go into trust?

What can the community spouse keep?

HYPOTHETICALS

- You are closing on the sale of a house. Your title search reveals the house was a gift to the current owner by his mother. The gift occurred more than three years ago. You note the house was transferred to the son using mom's power of attorney. Mom is incompetent and in a nursing home. Can you close?

Was the Power of Attorney validly executed?

Did Power of Attorney have gifting powers?

Did it allow self-dealing?

Is there a look back problem for mom?

Will she need Medicaid?

HYPOTHETICALS

- An acquaintance of yours just placed her mother in a nursing home and has been told that she needs a power of attorney. She heard that you were a lawyer and asks if you will just give her the form and she'll get it signed so you don't have to bother.

Why not do it?

How to respond?

HYPOTHETICALS

- Wife comes in with husband who lacks capacity and shows lawyer their Durable Powers and Wills prepared a few years ago, asking if there's something that can be done to protect their assets.

Who is your client?

What powers are in husband's Durable Power of Attorney?

How long can husband be cared for at home?

What assets can Wife keep as the community spouse and still qualify Husband for Medicaid?

HYPOTHETICALS

- John is a World War II veteran. He is in an assisted living facility. He is married. His income is \$2,000 per month and his wife, Mary, has income of \$1,000 per month. They own a home. The value is \$250,000. They have a \$40,000 credit line on the house. They have bank and investment accounts totaling \$120,000. John's assisted living bill is \$3,700 per month. Is there help available?

Do they qualify for VA Aid and Attendance?

Military Service?

Income?

Resources?

HYPOTHETICALS

- You represent a minor child in a personal injury settlement and there is an offer on the table, what do you need to consider before you settle?

What is the amount of the settlement?

Who could serve as conservator?

Is the child disabled?

Does the child receive public benefits?

What are the immediate and long term needs of the child?

Is a Special Needs Trust necessary?

Are there other options? Conservatorship? Structured settlement?

HYPOTHETICALS

- You are settling a mass tort action and each participant is to receive about \$5,000.

Do you have an obligation to inquire into whether any participants receive needs based benefits?

Should you inform the participants that the settlement may negatively impact any needs-based benefits they receive?

Are there ways to avoid loss of benefits?

HYPOTHETICALS

- Your client is 50 years old and has never worked. She suffers from MS, is totally disabled, and Nursing Home care in the future is very likely. She is divorcing her spouse of 30 years. His income is \$120,000 per year. Assets are:

Marital Home	\$275,000	no mortgage
401k (his)	\$200,000	
Bank Accts.	\$25,000	
Stocks and Bonds	\$250,000	

She is on his group health insurance. They have two children ages 22 and 25, both of whom are very close to their mother. What should you ask for?

Health Insurance? Medicare? Medicaid?

What assets would be exempt resources for Medicaid purposes?

If the home is allocated to wife, could a remainder be allocated to the children to avoid estate recovery and provide a home for

How can you protect any alimony she receives from putting her over Medicaid income limits?

Should you fund a special needs trust?

HYPOTHETICALS

- Your client and his wife are divorcing. The total marital assets are approximately \$500,000, including a house with a value of 200,000 and a mortgage of \$100,000. They have a 15 year old special needs child. The wife will retain custody of the child, and as a result will be unable to work full time. Husband's income is \$7,000 per month.

How can assets and income be best utilized to keep everyone afloat?

Is child on Medicaid? What program?

Can child support be paid into an SNT? How about a pooled trust?

Can child support be used for support of child without having an impact on the child's benefits?

Can any of the support be used to pay mom for caring for child? Is it better to benefit her in another way such as putting the house in her name and husband paying the mortgage?

HYPOTHETICALS

- You are completing the administration of an estate and you hear that one of the beneficiaries is now in a nursing home, do you just send the money?

Is she competent to receive the funds or is a Conservatorship necessary?

Is she on Medicaid?

If so, how can you protect her Medicaid benefit?

HYPOTHETICALS

- Elderly gentleman comes to you for a simple will that leaves all his assets equally to his three children. Daughter lives close by while the two sons live out of state. When asking about his assets you find out that he has Daughter's name on all his accounts and CD's so that Daughter can help pay the bills should "something happen." What do you advise?

Remove daughter from accounts as joint owner?

Make her POA and add her to his accounts in that capacity?

Leave as is and trust daughter to split money between children after his passing?

Is there some portion of this that he really wants daughter to receive off the top?

HYPOTHETICALS

- You have a client who is receiving a settlement of \$50,000 and is on Social Security?

What type of Social Security?

How old is client?

If disabled is she on SSDI or SSI? Does it matter?

Is long term care in the client's near future?

HYPOTHETICALS

- You receive a call from a personal injury attorney who says he needs you to set up a special needs trust for a minor child who was in an accident.

What amount will child receive?

Is the child disabled?

First party or Third party?

Who can set up the SNT?

What are special concerns with a first party SNT?

Are there any alternatives to an SNT?

HYPOTHETICALS

- Your client's father just died and client's disabled sister is going to start receiving dad's military retirement benefits because she is disabled, but that will make her income too high to stay on Medicaid.

Is an SNT an option?

Is a pooled trust an option?

Can a SC ABLE account be of use?

HYPOTHETICALS

- Your client is on SSI and Medicaid and is going to receive a \$10 million settlement, what should you advise?

Is there really a need for SSI at this point?

Is there a need for Medicaid?

What are client's needs?

Does client have capacity?

Would this be a proper case for asset protection planning?

HYPOTHETICALS

- Your client tells you that her child is disabled and on Medicaid, so she is going to leave her out of the will and rely on her siblings to take care of her.

What are the potential pitfalls to this strategy?

Would a testamentary Third Party SNT be a better choice?

Who would be trustee?

HYPOTHETICALS

- You are handling a case for a 12 year old boy who lost an eye in an accident and is on Medicaid. He is receiving a settlement. Does he need a special needs trust?

What type of Medicaid is he receiving?

Is he disabled?

How large is the settlement?

Are there options other than a special needs trust?

HYPOTHETICALS

- Wife is on her 24th day of rehabilitation and has plateaued. She will not be coming home. The skilled nursing facility she is in accepts Medicaid after three months of private pay. Husband comes to see you to see how he can pay for her care but not lose his house and life savings. They have a house worth \$180,000 in both their names as tenants in common, an IRA in his name worth \$500,000, 2 cars, a \$100,000 life insurance policy on his life, a \$10,000 life insurance policy on her life, and \$64,000 in their joint checking and saving.

What are rules for Community Spouse and Institutional Spouse?

What resources are exempt from consideration?

How is the life insurance counted?

Can assets be transferred from wife to husband?

What must be done with excess resources?

How will their income be treated?

HYPOTHETICALS

- Husband (82) has been in nursing home on Medicaid for 3 years. He is about to receive a \$150,000 settlement from a nursing home neglect settlement. His wife (79) lives at home and is not on a waiver program. Their personal injury attorney comes to see you to see if it is possible to protect the \$150,000 settlement. Can the money be protected and Husband retain Medicaid eligibility?

May husband transfer settlement proceeds to wife?

If so, will husband lose his Medicaid benefits?

Are there any time considerations for this transfer?

Does he have to inform Medicaid of the settlement or the transfer?

HYPOTHETICALS

- Young man on SSI comes to see you because on his 30th birthday he will receive a \$15,000 distribution from his grandfather's testamentary trust. He will receive a \$75,000 distribution and a 1/8 interest in a mountain cabin (worth \$20,000) when he is 35. He doesn't want to lose his SSI because it is his only income and can't lose his Medicaid coverage because he needs it to cover his prescription drugs needed to treat his mental illness. What can you do to help him?

What can be done with the \$15,000 distribution? Spend down? SC ABLE account?

Can the \$75,000 distribution be put into a pooled trust or SNT? If so, is there a deadline?

Is there a way to keep the 1/8 interest in the cabin while staying on Medicaid?

HYPOTHETICALS

- Severely disabled minor is receiving a large settlement which is going into a special needs trust. Family needs a home designed to accommodate child's needs. The trustee is ready to purchase the home in the name of the trust. Are there options?

Could trust purchase life estate or percentage of home?

Can the parent's benefit from trust?

What happens if child passes away?



South Carolina Bar

Continuing Legal Education Division

2019 SC BAR CONVENTION

Elder Law Committee

Friday, January 18

Part Three: Highlights of the New Guardianship/
Conservatorship Statute

Sarah G. St. Onge

S 415 & Art V Crosswalk by Sarah St. Onge

Old Section Number	New Section Number	Purpose/Description	Substantive Changes	Notes
Misc Changes				For this Crosswalk: PC = Probate Court; SNT = Special Needs Trust; GAL = Guardian ad Litem
N/A	62-1-112	Clarify Probate Court's (PC) Power to impose penalties for contempt and grant motion to proceed in forma pauperis	New	Currently, PCs are split on whether they have the authority to waive fees for indigents.
8-21-800	8-21-800	Limits PC's ability to relieve a party from court costs and filing fees	Allows PC to waive fees for indigents and notaries	George Cauthren's Catch/I think Jennifer Rainville w/ SCLS drafted this for us
62-1-302	62-1-302	PC Jurisdiction	Added that PC can establish a special needs trust	Prior to the passage of the 21st Century Cures Act in 12/2016, special needs trust (SNT) couldn't be self-settled. The PC could create a special needs trust for someone who is incapacitated but did not have jurisdiction to create a SNT for someone who has capacity but needs a SNT due to disability. Addresses the gap in the law that has now been corrected with the 21st Century Cures Act. However, because there may be some circumstances where the court may need to still create a SNT, we have not attempted to make a full last minute change and have kept the SNT language in the bill. This will provide jurisdiction if federal law changes again or if there are circumstances where the court needs to have this authority.
62-1-401	62-1-401	Notice section	Allow for commercial delivery service	Creates uniformity

Part 1 - General Provisions (New Sections under general provisions were designed to promote some best practices and uniformity between guardianship and conservatorship)				
Old Section Number	New Section Number	Purpose/Description	Substantive Changes	Notes
62-5-101; 62-5-106(A)	62-5-101	Definitions	From 5 definitions to 24 definitions. Highlights: Counsel is to work for what the Respondent wishes not best interest. GAL does not have to be an attorney. Emergency means emergency (not something vague). Incapacity means you cannot evaluate info to make decisions EVEN WITH supports or assistance. Supports and assistance is a system already in place that addresses the needs (like POA or AHCCA) and having access to natural supports and services that allow you to make decisions. Least restrictive alternative means supports and assistance options.	The new definitions address some of the goals of the project including increasing consistency between counties; consistency with guardianship and conservatorship; and due process protections. Also, the GAL does not have to be an attorney (can be licensed in social work, nursing, medicine, or psychology, or someone who has completed training to the satisfaction of the court).
62-5-102(b)	62-5-102	Consolidation	No substantive change	Previous 102(a) moved to 201
62-5-103	62-5-103	Facility of Payment or Delivery	From 10K to 15K. For "net aggregate amount" see definition section. Employer provision. Clarifies that this section can't be used if person to make the payment has knowledge of conservatorship or pending conservator action.	
62-5-105	62-5-104	Department of Mental Health (DMH) collections	From 10K to 15K.	Raised the amount to be consistent with proposed 103.
62-5-414	62-5-105	PC can award costs of the proceedings, including attorney fees. Court appointed participants (like the GAL) are entitled to reasonable compensation. Petitioners pay their own fees unless PC orders otherwise.	New section, but reflects current practice for most (maybe all) PCs.	To codify the court's authority to award costs. Some petitioners assume they will be paid from the respondent's funds. Hopefully this section will clarify that the petitioners should not make that assumption.
n/a	62-5-106	Responsibilities and Duties of the GAL	New section. Consider "best practice" and current practice for some GALs.	This section involved compromise to require a basic set of best practices that are comprehensive but not onerous. The GAL
62-5-408	62-5-107	testamentary capacity	new - codifies and clarifies case law	

Old Section Number	New Section Number	Purpose/Description	Substantive Changes	Notes
62-5-310; 62-5-408	62-5-108	emergency orders & temporary orders	Mainly clarifies the process. Same process to be used for gaurdianship and conservatorship. Requires summons, motion, affidavits, verified pleading, and notice. MD affidavit must be from an exam w/in the last 30 days. Any adverse party affected by an ex parte order can move to have the order dissolved or modified. For protective orders, there must be surety. Temporary orders require notice and a hearing (distinguished from emergencies).	Emergency is defined in 62-5-101.
Part 2 - Jurisdiction				
62-5-201; 62-5-402;	62-5-201	Jurisdiction	Just clarifies/no substantive change	
Part 3 - Guardians				
62-5-301	62-5-301	Testamentary nominations	Went from testamentary appointments to just nominees. However, someone who is nominated has priority under the Adult Health Care Consent Act, as noted. The nominee also gets priority under 5-308. Over wills drafted prior to the effective date of the bill, the PC has discretion to follow the previous appointment process or the new nomination process.	This section involved compromise to come to this solution.
62-5-302	62-5-302	Venue	No substantive changes	
62-5-303	62-5-303	Summons and Petition	Specifies what must be in the Petition	No visitor
62-5-303; 62-5-309(A)	62-5-303A	Personal service on Respondent ASAP. Service of Notice of Right to Counsel.	Counsel does not serve as the GAL. Counsel chosen by Respondent has 15 days to appear prior to appointment of counsel by the PC.	Separating the role of the attorney and the role of the GAL was an important goal of the Art. V Task Force and was supported by public input on the goals and initial draft on which the public was allowed to comment.
62-5-303	62-5-303B	Appointments	Mostly New. Only 1 physician DE is required. May have a second appointment. GAL has duties in 5-106.	Counsel cannot serve as GAL. However, counsel may file a motion to be relieved as counsel in rare circumstances where the Respondent cannot communicate. If the motion is granted, the attorney can ask to be appointed as GAL. This should be very rare and is one example of ballancing costs with due process rights.

Old Section Number	New Section Number	Purpose/Description	Substantive Changes	Notes
62-5-303; 62-5-309(B)	62-5-303C	Hearings	Similar rights for the Respondent. Respondent may waive the right to a hearing.	Respondent's counsel's ability to be relieved and the option that the hearing may be waived are part of the legislation's attempt to balance due process protections with costs of the proceedings. These were major areas of compromise.
62-5-303	62-5-303D	Examiner Details	New	Statute sets out details on what must be contained in the report, when it must be filed, etc.
62-5-304	62-5-304	Details on Determination of Incapacity and appointment of a guardian	Clarifies that the evidentiary standard is clear and convincing; Adds instructions if co-guardians are being considered; clarifies apt of guardian terminates agent's powers under a HCPOA; clarifies guardian must act consistently w/ advance directives executed prior to incapacity	Continues w/ current law that emphasizes limiting guardianship authority to maximize independence and self-reliance
n/a	62-5-304A	Rights Removed/Rights Vested in guardian. Any right not specifically removed is retained.	New	The list of rights that may be removed is not identical to the list of rights that may be vested in the guardian. The rights that may be removed from the ward but cannot be vested in the guardian are 1. right to marry 2. right to vote 3. right to participate in social, religious, or political activity 4. operate a vehicle. Powers relating to money may be removed from a ward, but can only be vested in a conservator.
62-5-305	62-5-305	Acceptance of appointment and consent to Jurisdiction	Adopted notice and waiver requirements from 62-1-401 and 402	
62-5-306; 62-5-106(B)	62-5-306	Termination upon death of ward	Added section to specify what happens to any funds of the ward upon the ward's death (if no conservatorship). Specifies that termination of appointment does not affect any liability of the guardian for acts prior to the termination. Language dealing with testamentary appointment under an informally probated will is removed since that process is no longer an option.	
62-5-307; 62-5-106(B)	62-5-307	Options for post-appointment informal actions.	Codifies the practice of some PCs that allow someone interested in the welfare of the ward (including the ward) to ask the court for relief.	The person asking for relief submits to the jurisdiction of the court.

Old Section Number	New Section Number	Purpose/Description	Substantive Changes	Notes
62-5-307	62-5-307A	Options for post-appointment formal actions.	A ward can file an informal (letter) requesting readjudication under 307, but the court does not have to accept that request. This would force the ward to file a formal request for relief under 307A. The organization is different but most of this section is similar to the current 307. One other change is that an attorney can file a motion with the court for permission to represent the ward in an action under 307A.	Preponderance of the evidence is the evidentiary standard necessary for a determination the ward is no longer incapacitated (in contrast to clear and convincing evidence to determine that a Respondent is incapacitated).
62-5-308	n/a	Visitors	Removed	While the visitor position is incorporated into the duties and responsibilities of a GAL for the initial determination of incapacity and apt of a guardian, the court has tremendous flexibility under 307 and 307A to make any appointments that are needed to protect the ward or investigate whether the ward has regained capacity.
62-5-311 (also part of 62-5-410)	62-5-308	Priorities	PC may ignore the priorities if it is in the best interest of the Respondent. The changes in the list of priorities are not dramatic: a currently serving guardian is listed first and a catch all is added. The list also distinguishes between someone caring for the person outside a facility (higher priority) and someone nominated by a facility.	For consistency, language from 410 about the judge and court employees being guardians for their family members was added to 308.
62-5-104; 62-5-312; 62-5-104.	62-5-309	Duties, Rights, Powers of Guardian	Expands upon the duties outlined in previous sections. Adds provisions requiring the guardian to take steps toward assisting the ward in becoming more independent and self-reliant. Adds a requirement to file a plan of care, including steps being taken to develop or recover independent decision making. Clarifies that a guardian does not have to provide funds for the ward's care. Increased a period of delegation of the guardian's duties by a Power of Attorney to 60 days.	Much of the limits on liability, etc. are still in this section. It is mostly reorganized w/ the additions noted in the reporters comments.

Old Section Number	New Section Number	Purpose/Description	Substantive Changes	Notes
62-5-313	62-5-310	PC maintains Jurisdiction/Venue may be transferred	Amended for better/clearer organization and for consistency w/ Part 7 (SCAGAPPJA)	
Part 4 - Protective Proceedings				
62-5-403	62-5-401	Venue	For a Respondent who doesn't live in SC, venue may be in any county where the Respondent has property or has a right to take legal action (a little broader than current)	
62-5-401(1); 62-5-407(a)	62-5-402	Protective orders relating to the estate and affairs of minors	Sets out an informal proceeding for protective orders relating to the estate and affairs of Minors. (A) explains when a protective order is needed. (B) explains the informal process. (C) gives the court authority to require a formal process. (D) deals w/ the requirement for a bond and/or restricted account. (E) allows limits of distributions to keep minor from being disqualified from receiving public benefits. (F) allows the PC to appoint a GAL.	
62-5-401(2); 62-5-404	62-5-403	Protective orders relating to the estate and affairs of individuals who are alleged to be incapacitated.	(A) notes when a protective order should be sought. (Using a counterclaim to request appointment is not sufficient to effectuate appointment. Counter parties must file counter summons and petitions to be appointed.) (B) sets out what must be in the Petition for a Protective Order. (C) notes that an individual may file a petition on their own behalf. (D) allows consolidation.	The bill does not include an informal process for protective proceedings involving adults. All cases must be formal.
62-5-405	62-5-403A	Notice and Service	Notice of right to counsel must be served along w/ the summons and petition and affidavits. Like with the guardianship process, notice of appearance by counsel needs to happen in 15 days from the filing of the proof of service or the court will appoint counsel for that Respondent.	Counsel does not serve as the GAL. Counsel chosen by Respondent has 15 days to appear prior to appointment of counsel by the PC.

Old Section Number	New Section Number	Purpose/Description	Substantive Changes	Notes
62-5-407(b)	62-5-403B	Appointments	Mostly New. Only 1 physician DE is required. May have a second appointment. GAL has duties in 5-106.	Mirrors Guardianship. Counsel cannot serve as GAL. However, counsel may file a motion to be relieved as counsel in rare circumstances where the Respondent cannot communicate. If the motion is granted, the attorney can ask to be appointed as GAL. This should be very rare is one example of ballancing costs with due process rights. This section (and others) refers to the different procedure related to VA benefits (see 431 which replaces Part 6 formerly the Uniform Veterans' Guardianship Act).
62-5-405; 62-5-406; 62-5-407(b)	62-5-403C	Hearings	Similar rights for the Respondent. Respondent may waive the right to a hearing.	
62-5-407(b)	62-5-403D	Examiner Details	New	Statute sets out details on what must be contained in the report, when it must be filed, etc.
62-5-408; 62-5-426	62-5-404	Details on Determination of Incapacity and issuing protective orders (for minors and adults).	Specifies clear and convincing standard applies for protective orders over adults. Notes that a conservatorship may be limited (like a limited guardianship).	
62-5-408; 62-5-409	62-5-405	PC's authority over issuing Protective Orders	Adds some clarity to the protective orders that can be issued and upon what decisions may be made (like wishes of the Respondent, etc.).	
n/a	62-5-406	RESERVED		
n/a	62-5-407	Rights removed/Affect on POAs	New (a mirror for 304 and 304A) - (A) - maximum self-reliance; (B) rights removed noted; (C) if the right to bring or defend a lawsuit is removed from the Respondent, he can still bring an action to modify a protective order under 428; (D) conservatorship terminates POAs	
62-5-410	62-5-408	Priorities and standards by which the PC may want to skip someone w/ priority.	Like in the guardianship section, a person providing care outside a healthcare facility has priority over someone nominated by a healthcare facility. Also a catchall is added.	See definition of "person" in 101 which is where the part from current 410 discusses who can be a conservator.
62-5-411	62-5-409	Bond	Added language that authorizes use of a restricted account. (Current practice in some PCs). Modifications can be made upon application to the PC.	Not significant change to practice, just change in how it is organized and spelled out.
62-5-412	62-5-410	Terms of Bonds	No substantive changes	

Old Section Number	New Section Number	Purpose/Description	Substantive Changes	Notes
62-5-413	62-5-411	PC has Personal Jurisdiction over the conservator	Just reworded for clarity	
62-5-414	62-5-412	compensation	No substantive changes	See also new 62-5-105
n/a	62-5-413	Post-appointment informal action options	Codifies the practice of some PCs that allow someone interested in the welfare of the protected person (including the protected person) to ask the court for relief.	See new 62-5-307. The person asking for relief submits to the jurisdiction of the court.
62-5-417; 62-5-408	62-5-414	Conservator is a fiduciary/allows for a financial plan	(B) through (D) are new. They allow the PC to require the conservator to submit a financial plan (like the care plan in a g'ship). (C) Sets out what needs to be in the plan. (D) deals with the interaction of estate plans established by the protected person and the conservatorship.	The financial plans may help with the court's monitoring of a conservatorship. Also, a financial plan must note any options for restoring the protected person's ability to manage his own money.
62-5-418	62-5-415	Inventory	Copy to be provided to guardian and to anyone the PC directs it to be given.	
62-5-419	62-5-416	Reporting requirements	Clarifies requirements and gives PC more flexibility (reports can be required more often than 1x per year). Clarifies what should be in the report. Clarifies the process (formal) for dealing w/ any unsettled liabilities relating to the conservatorship.	
62-5-420	62-5-417	Title to property	No substantive changes	
62-5-421	62-5-418	Fiduciary letters	Added reference to filing fiduciary letters with credit reporting agencies.	
62-5-422	62-5-419	Sales and purchases of property	PC must approve transaction that is affected by a conflict of interest.	
62-5-423	62-5-420	Dealings with Conservator	Adds protection to bona fide purchasers of protected property.	
n/a	62-5-421	Protected person cannot transfer or assign property in the conservatorship. Protections for 3rd parties dealing in good faith with the protected person.	New. Third parties who deal with a protected person in good faith may have some protections if they are a bona fide purchaser.	

Old Section Number	New Section Number	Purpose/Description	Substantive Changes	Notes
62-5-421; 62-5-408	62-5-422	Authority of Conservator	(A) Sets out what action a conservator may take without prior approval. (B) Sets out when the conservator should file an application prior to acting. (C) Conservator may seek instructions from the court (or ratification). (D) Appointment of a conservator does not terminate attorney client privilege.	
62-5-425; 62-5-408	62-5-423	Authorization of Conservator to expend funds and guidance on spending funds	Deals with payments to dependents. Allows distributions for child and spousal support payments. Refers to financial plan. Sets out methods for applying funds to the protected person. References net aggregate amount (defined).	
n/a	62-5-424	RESERVED		
62-5-427	62-5-425	Estate plan must be considered by the court/conservator in investing and distributed estate assets.	From "should consider" to "must consider" estate plan. Adds language requiring PC/conservator to consider other arrangements originated by the protected person that provides a benefit at death.	
62-5-428; 62-5-402	62-5-426	Claims	(A) deals with "internal" matters of the conservatorship. (B) deals with "external" matters of the conservatorship -- things outside the day to day administration of the conservatorship. (C) Deals with a preference for claims for care, maintenance, and education of the protected person or dependents and claims of administration.	
62-5-429	62-5-427	Liability of Conservator	n/a	
62-5-430; 62-5-426; 62-5-415; 62-5-416; 62-5-106(B)	62-5-428	Post-appointment options	Some actions may be made upon application and some require summons and petition. For anything in the "application" list, the PC can require the filing of a summons and petition. An attorney can request permission to represent the protected person.	

Old Section Number	New Section Number	Purpose/Description	Substantive Changes	Notes
62-5-431	62-5-429	Payment of debt or delivery of property	n/a	
62-5-432	62-5-430	Foreign Conservators	Modified to be consistent with 5-716.	
62-5-436	62-5-431	VA Section	Previous legislation amended. Nothing substantive.	This section was adopted in 2016 as Section 62-5-436 and was renumbered in the 2017 version. This section is a distillation of provisions of the Uniform Veterans' Guardianship Act, which was formerly Part 6 of Title 62.
n/a	62-5-432	Special Needs Trust	Allows court to create a special needs trust (even if beneficiary is not incapacitated but beneficiary must be disabled).	21st Century Cures Act/SNT Fairness Act may have made this a bit redundant, but that was passed in late 2016. Best to keep because of future applications or changes in the law.
62-5-433	62-5-433	Settlement of Claims	No substantive changes	The Art. V committee felt like any substantive change to this section needed to be a separate bill and involve input from Circuit Court judges and attorneys working on personal injury cases, etc.

Part 7 - SC Adult Guardianship and Protective Proceedings Jurisdiction Act

No significant/substantive changes. Sarah St. Onge or Katherine Wells can provide a redline version.

Guardianship Process

Old	New	Extra Info on New (Including Timeframes)
Filing Summons and Petition	File Summons and Petition	Multiple Petitions may be consolidated
	Petition must contain info in 303 (B)	
Apt Visitor	NO Visitor	
Set Date for Hearing	NOT YET - Service and Appointments first	New version sets out the process in a step by step way to clarify the process.
	Service of Notice of Right to Counsel	Of course the notice of right to counsel can be served on Respondent at the same time as Summons and Petition.
	Possibly Receive Notice of appearance of counsel for Respondent.	15 days
Appoint Atty w/ Powers and Duties of a GAL (if Respondent does not have an attorney)	Appoint counsel if no notice of appearance of counsel for Respondent is received in 15 days.	15 days. Appointed counsel who cannot communicate with Respondent in any way may file a motion to be relieved.
	Apt. GAL	30 days; duties and responsibilities listed in 5-106.
	Apt. 1 physician examiner (can be the physician who wrote affidavit to go w/ the petition; may have a second DE appointed)	30 days
Examined by 2 DEs (one must be physician)		
Receive DEs	Examiner Reports must be notarized; filed when PC orders but no less than 48 hours prior to hearing; must contain specific information stated in 303D(A) 1 - 7; examine must have happened w/in 90 day period prior to filing petition; immune from civil liability	
Hearing - Respondent entitled to be present and hear all evidence; represented by counsel; present evidence; cross examine; hearing may be closed	Hearing Date Set	ASAP but after time for filing response has elapsed
	Notice to parties (and anyone filing demand for notice)	
	Hearing - Respondent entitled to be present, to conduct discover, review evidence	
	Hearing may be closed	
	Respondent may waive right to a hearing but only if GAL's report indicates a hearing would not further justice.	
	If hearing is waived PC may 1. require formal hearing 2. require informal proceeding 3. proceed w/o a hearing	If no formal hearing, then PC issues a 30 day temporary order to give the Respondent 30 days to change his mind about the need for a hearing.

Order Details

	No order for g'ship unless evidence is clear and convincing	
Maximum self-reliance and independence	Same	
	co-guardians an option	
Limited	Same	
	Unless order specifies otherwise, apt terminates authority under at HCPOA but guardian must act consistently w/ most recent advance directive executed prior to incapacity	
	Rights Removed/Any right not specifically removed is retained.	
	Rights Vested in Guardian	Not all rights that can be removed to the ward can be vested in the guardian
	No removal of rights guaranteed by the Bill of Rights for Residents of LTC	
	Attorney/Client privilege not removed	

Information Gathering Under Article 5 Petitioner's Attorney and Respondent's Attorney

By

Sarah Garland St. Onge

Personal Information:

- Name
- Address
- Contact Information
- Date of Birth
- US Citizen
- Marital Status
- Children

Information Needed Regarding the Petitioner/Proposed Fiduciary

- Who is going to be the Petitioner and who will be the Proposed Fiduciary, if different
- Criminal History (Proposed Fiduciary)
- Credit History (Proposed Fiduciary)
- Proposed Fiduciary's knowledge of Respondent and Duties involved
- Steps taken or intended to take if appointed
- If Protective Order – financial capabilities
 - Experience managing assets
 - Plans for managing Respondent's assets
 - Borrowed anything from the Respondent or received any financial assistance
 - Proposed Fiduciaries financial integrity

Information Needed Regarding the Respondent

- Name
- Address/residence (currently safe?)
- US Citizen
- Date of Birth
- Description
- Relatives
 - Married
 - Children
 - Other relatives
 - Close friends who are like relatives
- Any guardianship/conservatorship already in place

- Care Takers/Others with a “significant interest” in Respondent’s welfare
- Medical condition/diagnosis
 - Nature
 - Cause
 - Degree of incapacity
- Care and treatment needs of Respondent
- Services being received
 - What is currently in place
 - Medicaid status
 - Type
 - On a Medicaid Waiver
 - Could Qualify for a Medicaid Waiver
 - Any Level of Care Determinations
- Services Needed
- APS involvement, if any
- Financial, if known
 - Income
 - Salary/wages
 - Retirement
 - Rental
 - Other
 - Assets
 - Bank accounts
 - IRA/Annuities
 - Stocks
 - Bonds
 - Real Estate
 - Mutual Funds
 - Brokerage Account
 - Retirement/401K
 - Life Insurance
 - Personal Property (Autos, boats, etc)
 - Business Interests
 - Debts Owed to Respondent (owed by Petitioner)
 - Debts Owed by Respondent
 - Any Public Benefits
 - SSI
 - SSDI
 - VA
- Any advance directives

- Healthcare POA
- Financial POA
- Living Will/Declaration of Desire for Nature Death
- Any will/trust
- Methods by which Respondent Communicates
 - Describe ability and method of communications
 - Speech difficulties
 - Can respond to questions
 - Focus concerns
 - Memory concerns
 - Need ASL
 - Language(s) spoken
 - Need/Use a communication device
 - Can only be understood by some
- Medical Professionals
 - Primary Care
 - Other MDs and/or Nurse Practitioners
 - Pharmacy
 - Other medical
 - Mental Health Practitioners
 - Others?
- Educational Professionals (if school age)
 - School
 - Teachers
 - Program
 - Accommodations Made for Student (particularly regarding communication)
- Concerns of Petitioner
 - Healthcare concerns
 - Financial concerns
 - Educational concerns
 - Other
- Needs of Respondent
 - Unmet healthcare needs
 - Unmet financial needs
 - Unmet education needs
 - Other
- Anticipated wishes of the Respondent

Attempts to Meet the Needs of Respondent/Concerns of Petitioner

- What interventions have been attempted

- Prior systems (if any) used for the Respondent or by the Respondent to make decisions or for a surrogate to make decisions
- Healthcare Concerns
 - Accessing services
 - HIPAA release
 - Using POA
 - APS
 - Supported Decision Making – (more info at www.scsupporteddecisionmaking.org)
 - Adult Health Care Consent Act
 - Case or Care Management
- Financial Concerns
 - Financial/Money Management
 - POA
 - APS
 - Supported Decision Making
 - Trusts
 - Representative Payee (social security)
 - Joint Ownership
- Education Concerns (Adult Students with Disabilities Educational Rights Consent Act Provides several alternatives to allow a parent to be involved in IEP process without becoming a guardian)
 - Transition Planning
 - POA for education
 - Surrogate Decision Maker under the Adult Students with Disabilities Educational Rights Consent Act
 - Supported Decision Making
- Communication Concerns
 - Accessing speech therapy
 - Using speech devices
 - HIPAA release for assistance
 - Using a recording device
 - Extra Time for Communication
 - Materials presented in easy to read and understand language

Rights

- Rights (each of these rights may be removed from or retained by the Respondent)
 - Marry/divorce
 - Where to reside
 - Where to travel

- Medical care
- End of life decisions (“Do Not Resuscitate” Order)
- Hospitalization/discharge/transfers
- Disclose confidential information
- Operate a vehicle
- Vote
- Employment
- Education
- Participate in social, religious, or political activities
- Buy, sell, or transfer real or personal property/conduct business
- Contracts
- Lawsuits
- Anything else?
- Rights which can be vested in a guardian
 - Decide residence
 - Travel
 - Consent or refuse to consent to visitation with family, friends, and others
 - Medical
 - End-of-life decisions
 - Hospitalization/discharge/transfer
 - Disclose confidential information
 - Education
 - Employment
 - Contracts
 - Lawsuits
 - Anything else?

Information Regarding Whether there is an Emergency

- Information regarding any safety issues
- Food/Shelter/Healthcare (namely basic needs being met)
- Concerns regarding financial issues

Documentation Needed, if possible

- Respondent
 - Power of Attorney/Advance Directives/Living Will
 - Will, codicil, trust
 - Life Insurance and annuity policies
 - Bank/Brokerage account statements
 - Benefits statement
 - Medicaid Information

- Info on any previous guardianship/conservatorship
- Any current plans of care or education plans (guardians and conservators will be required to develop a plan of care and/or financial plan for the ward)
 - If in school, IEP or 504 plan
 - Nursing home plan of care
 - Medicaid waiver support plan (or similar document)
 - Medication Lists (MAR)
 - Behavior Support Plans
 - Any master treatment plan
 - Any recent discharge plans
 - Any financial plans
 - Estate plans
 - Budgets
- Petitioner
 - Credit Report
 - Criminal background check

Information to Consider for a Care Plan (Not Exhaustive)

- Rights Retained by Individual
- Rights/Powers Vested in the Guardian
- Goals (to extent possible include ward/protected person)
 - Educational
 - Improvement/Maintenance Health
 - Behavior
 - Employment
 - Independence
 - Entity/Person Responsible
- Services Being Received/or needed (include provider, description and any responsible party)
 - At Home
 - Personal Care/Attendant Care
 - Nursing
 - Respite
 - Meal services (meals on wheels)
 - Assistive Technology
 - Medical Equipment
 - Medical Supplies
 - Medications
 - Case/care management (or in an office)
 - In offices

- OT, PT, Speech
 - Psychological services (psycho-social therapy, etc)
 - Medical
 - Behavioral
 - Substance Abuse
 - Employment Services
 - Other
- In facilities
 - Adult Day
 - Other Day
 - Residential
 - Assisted Living/CRCF
 - Nursing
 - DDSN facilities
 - ICF/IID
 - CTH 2
 - CTH 1
 - SLP 2
 - SLP 1
 - CRCF
 - Psychiatric
 - PRTF
 - Hospital
 - Other
 - Substance Abuse
- Living Arrangements (if not included in services being received)
- How will activities of daily living be met (if not already covered)
 - Food
 - Cleaning
 - Personal needs
 - Clothing
 - Supervision
 - Plans for increasing independence/restoration
- Financial
 - Accounts
 - Bills
 - Income
 - Budget
 - Who responsible
 - Plans for increasing independence/restoration

- Attachments
 - NF Care Plan
 - Behavioral Support Plan
 - Medicaid HCBS Case Plan
 - Treatment Plan

7. What medical or other professional care or treatment, housing, education, therapy, social, or training needs do you foresee the ward needing during the upcoming year?

8. Are there other needs the ward has of which you are aware? NO YES
(If yes, please describe.)

9. Describe the ward's current abilities to make some decisions with support, training and/or education; to offer input into decisions about his or her life; and to develop the ability to exercise independent decision making.

10. Describe the specific steps you plan to take in the upcoming year to assist the ward in recovering and/or developing the capacity to exercise independent decision making.

Executed this _____ day of _____, 20____.

SWORN to before me this _____ day of _____, 20____.

Guardian Signature: _____
Print Name: _____
Address: _____

Print Name: _____
Notary Public for: _____
(State)

Preferred Telephone: _____
Secondary Telephone: _____
Email: _____

My Commission Expires: _____
(Date)

Executed this _____ day of _____, 20____.

SWORN to before me this _____ day of _____, 20____.

Co-Guardian Signature: _____
Print Name: _____
Address: _____

Print Name: _____
Notary Public for: _____
(State)

Preferred Telephone: _____
Secondary Telephone: _____
Email: _____

My Commission Expires: _____
(Date)

ROBERT M. WILCOX

ATTORNEY AT LAW
2810 WHEAT STREET
COLUMBIA, SOUTH CAROLINA 29205

January 4, 2011

Franchelle C. Millender, Esquire
Sherrill Roof Millender LLP
PO Box 11497
Columbia, SC 29211-1497

Dear Franchelle,

On behalf of the S.C. Chapter of the National Academy of Elder Law Attorneys, you have requested that I provide an opinion as to the ethical implications of a lawyer serving both as legal counselor and advocate for a client and as the guardian ad litem for that same individual in a Probate Court proceeding.. The question is when, if ever, the lawyer's responsibilities as a legal counselor and advocate for the ward may conflict with the lawyer's duties as guardian for the ward. This opinion addresses only the general situation described and is not intended to address the ethical propriety of any specific representation.

South Carolina Code Ann. § 62-5-303(b) provides that, prior to a hearing on a petition for appointment of a guardian, if the allegedly incapacitated person does not already have counsel, the court shall appoint an attorney "to represent" the allegedly incapacitated person in the proceedings. At the hearing, the lawyer serves in the traditional role of a lawyer-advocate, including conducting direct- and cross-examination of witnesses and presenting other relevant evidence on behalf of the client. *Id.* The statute, however, goes further and provides that a lawyer so appointed "shall have the powers and duties of a guardian ad litem" for the same individual.

South Carolina statutory and case law contains little express guidance as to a guardian's specific "powers and duties" in a Probate Court matter involving the appointment of a guardian or conservator. A guardian ad litem's duty has been broadly defined, however, to function "as a representative of the court which appointed her to assist the court in properly protecting the interests of an incompetent person." *Fleming v. Asbill*, 483 S.E.2d 751, 753 (S.C. 1997).

Although not directly applicable to Probate Court matters, a South Carolina statute, now codified as S.C. Code Ann. § 63-3-830, instructs that a GAL in a Family Court custody matter shall "[represent]the best interest of the child;... [and present] to the court and all parties clear and comprehensive written reports including, but not limited to, a final written report regarding the child's best interest." The report must not include a recommendation concerning which party should be awarded custody, nor may the guardian ad litem make a recommendation as to the issue of custody at the merits hearing unless requested by the court for reasons specifically set forth on the record. The statute was adopted after the Supreme Court had noted that a GAL in a

Franchelle C. Millender, Esquire
January 4, 2011
Page Two

custody matter assists the court "by advocating for the best interest of the children and providing the court with an objective view." *Patel v. Patel*, 555 S.E.2d 386, 389 (S.C. 2001).

A guardian ad litem appointed to assist the Probate Court in a competency hearing is similarly expected to provide objective information to the court relevant to the court's determination of how best to protect the ward. In fulfilling that role, the GAL must serve as a witness and be able to testify objectively as to his or her findings regarding the ward's situation. The GAL must do so even if the conclusions of the GAL differ from the ward's own wishes as to what should occur.

A 1994 New Jersey opinion summarized the generally recognized distinction in the roles of an appointed lawyer and of an appointed GAL:

A court-appointed counsel's services are to the child. Counsel acts as an independent legal advocate for the best interests of the child and takes an active part in the hearing, ranging from subpoenaing and cross-examining witnesses to appealing the decision, if warranted. If the purpose of the appointment is for legal advocacy, then counsel would be appointed.

A court-appointed guardian ad litem's services are to the court on behalf of the child. The GAL acts as an independent fact finder, investigator and evaluator as to what furthers the best interests of the child. The GAL submits a written report to the court and is available to testify. If the purpose of the appointment is for independent investigation and fact finding, then a GAL would be appointed.

In the Matter of M.R., 638 A.2d 1274, 1283 (N.J. 1994).

A lawyer undertaking both roles, therefore, must recognize that he or she has dual responsibilities, one to the client and another to the court. The objective function of the GAL to assist the court may be at odds with the lawyer's responsibility to serve as advocate for a client in presenting evidence and examining witnesses. The guardian's duty to testify creates also a potential conflict with Rule of Professional Conduct 3.7 which bars a lawyer from serving as advocate at trial in which the lawyer is also a "necessary witness." Finally, the dual roles may result in a tension between the lawyer's duty of confidentiality to a client and the lawyer's responsibility as GAL to inform the court fully as to any information relevant to its determination of the appropriate action to be taken to protect the ward.

The South Carolina Bar ethics advisory committee has addressed the ethical propriety of a lawyer serving in both capacities as legal counsel and GAL. Most recently in Ethics Advisory Opinion 08-04, the Committee made clear that it does not believe a lawyer can serve as counsel for the ward in Family Court abuse and neglect proceedings while also serving in the capacity of GAL:

Ethics Advisory Opinion 98-02 states that a guardian ad litem assists the court in protecting the interest of an incompetent person and may reveal confidences as a guardian

ad litem. This lawyer can not serve the additional role of representing the child. The statute authorizes the guardian ad litem to make motions and petition the court for relief. One of the required actions may be the request for counsel to be appointed for a child to advocate the child's position which is in conflict with the guardian ad litem's view of the best interests of the child. The appointment of a guardian ad litem is not a substitute for appointment of counsel for a child in these circumstances, as one lawyer can not advocate for both positions.

In Ethics Advisory Committee 91-26, the Committee had separately opined as to the Rule 3.7 issue in a probate court proceeding and concluded that "[i]f the attorney will likely be a witness as to his findings while serving as Guardian ad Litem, he is disqualified to serve as counsel of a minor during judicial or emergency commitment proceedings." In Opinion 98-02, dealing with the duties of a Family Court GAL, the Committee did not address directly the question of when a conflict would arise, but cited approvingly its earlier opinion in 91-26.

Three situations illustrate potential ethical concerns. First, the allegedly incapacitated person may believe that she does not need protection and may wish to oppose any effort to create a guardianship or conservatorship. In the lawyer's capacity of serving as the attorney at law for the allegedly incapacitated person, the lawyer would have a duty to advocate the client's position. However, that same lawyer might believe that, despite the client's own wishes, the allegedly incapacitated person is in need of protection. In her separate capacity as GAL, the lawyer then would have a duty to advise the court fully of the circumstances that have led to a conclusion that is at odds with the client's wishes. In that circumstance, the lawyer would be in violation of Rule 1.7(a), which bars a lawyer from undertaking a representation if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to ... a third person." In this case the other person to whom the lawyer owes a duty is the court. Comment [9] to Rule 1.7 notes that "a lawyer's duties of loyalty and independence" may be impermissibly limited by "the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director." Conflicts arising from a lawyer's duties to a court as GAL should be similarly treated.¹

A second ethical concern arises whenever the lawyer for an allegedly incapacitated person must take the witness stand as GAL. Rule 3.7 is intended to prevent the confusion that may arise when a lawyer serves in both capacities of advocate and witness, even when the testimony would not conflict with the client's position. As noted in Comment [2] to Rule 3.7, "the tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness....A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others." The rule makes

¹ Rule 1.8(l) also includes language that a lawyer may not serve as an advocate and as an advisor to the trier of fact. Although that prohibition could perhaps be construed to apply to an advocate simultaneously serving the court as a GAL, it was drafted for a much-different situation in which a lawyer for an administrative agency simultaneously appeared before a commission and advised the commission as to the hearing.

Franchelle C. Millender, Esquire
January 4, 2011
Page Four

no distinction between bench and jury trials. Nor does the rule make a distinction between oral testimony and written reports that are provided to the court as evidence. Even in the latter case in which the lawyer-GAL submits only a written report, the content of that report provides information that is the equivalent of information provided on direct examination and, thus, causes the same concerns for purposes of Rule 3.7. When the oral testimony or written report of the lawyer as GAL would undermine the client's testimony that no protection is needed, a conflict also exists. "[I]f there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest" to be resolved under Rule 1.7. Rule 3.7, Comment [6].

A final scenario is one in which the lawyer, during his or her investigation of the client's case, learns information that is relevant to the court's decision, but adverse to the client's desired outcome. As information relating to the representation, the information is generally protected from disclosure under Rule 1.6. The only possible exception to the lawyer's duty of confidentiality that might be construed to allow the lawyer (acting as GAL) to reveal the information to the court over the client's objection is Rule 1.6(b)(7), which allows disclosure when necessary to "comply with other law or a court order." I have found no precedent addressing whether this exception includes a lawyer's compliance with separate duties imposed under a court order appointing the lawyer as GAL. While it would be a thin reed upon which to support an exception to the lawyer's duty of confidentiality, I cannot opine definitively that the court would not adopt such a position.

Given the scenarios described above, it is my opinion that the South Carolina Bar Ethics Advisory Committee correctly concluded in Opinion 08-04 that a lawyer may not always be able to serve simultaneously as both GAL and as lawyer for the allegedly incapacitated person and that the logic of that opinion applies equally in protection proceedings in Probate Court as to proceedings in Family Court. The conflicts in the first and third scenarios will not always arise, but the second scenario will arise whenever a lawyer must serve both as advocate and as a GAL witness. If a GAL is appointed and advises the court that the interests of the allegedly incapacitated person would be best served by appointment of counsel, it is my opinion that another lawyer should be appointed to serve as the attorney for the ward in that situation.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert M. Wilcox". The signature is fluid and cursive, with a large, sweeping initial "R" that loops back under the name.

Robert M. Wilcox

Supported Decision Making—An Alternative to Surrogate Decision Making¹

By

Sarah Garland St. Onge

A large part of the practice of Elder Law is helping clients prepare in advance for a day when they will not be able to make decisions for themselves. Elder Lawyers also frequently help families identify someone to make decisions for a loved one who is no longer able to make his own decisions. In the Elder Lawyer's tool belt are various forms of surrogate decision making—one person making a decision for another. Surrogate decision making is either based upon a best interest standard or a substituted judgment standard. Under a best interest standard, the designated decision maker makes choices based upon what will be in the best interest of the person who is incapable of making a decision. Under a substituted judgment standard, the designated decision maker makes choices based upon the values or expressed wishes of the person who cannot make the decision herself. The tools for identifying and authorizing a surrogate decision maker include durable powers of attorney, health care powers of attorney, living wills, protective proceedings, and guardianship. The Adult Healthcare Consent Act can be used by medical professionals to allow a surrogate decision maker for healthcare if a patient is not competent to make healthcare decisions. S.C. Code § 44-66-10. Finally, the Adult Students with Disabilities Educational Rights Consent Act can be used by a school to allow a surrogate decision maker make educational decisions for a student who cannot communicate. S.C. Code § 59-33-310.

Inevitably, the challenge for Elder Law Attorneys, their clients, and medical professionals is identifying when a person has a disability to the point that she is unable to make her own decisions. Some of the relevant legal definitions are contained in Article V of the S.C. Probate Code, and in the Adult Health Care Consent Act. The Adult Health Care Consent Act defines "Unable to consent" as meaning "unable to appreciate the nature and implications of the patient's condition and proposed health care, to make a reasoned decision concerning the proposed health care, or to communicate that decision in an unambiguous manner." S.C. Code § 44-66-20 (8). This definition implies that the individual alleged to be unable to consent is tested based upon the resources and abilities they carry with them, independent of any supports or assistance they may be able to access to help them make a decision. The new version of Article V in the Probate Code takes a different approach.

"Incapacity" means the inability to effectively receive, evaluate, and respond to information or make or communicate decisions such that a person, even with appropriate, reasonably available support and assistance cannot:

(a) meet the essential requirements for his physical health, safety, or self-care, necessitating the need for a guardian; or

¹ This article first appeared as a part of an Elder Law Month promotion for the Elder Law Committee in May of 2016. It was published on line and distributed by email to individuals interested in Elder Law issues. The article has been updated from the original version to reflect the change in the law in 2019.

(b) manage his property or financial affairs or provide for his support or for the support of his legal dependents, necessitating the need for a protective order.

S.C. Code § 62-5-101 (13). The new definition of incapacity incorporates the concept that there may be resources the individual can access which will mitigate the need for a guardian or protective proceeding.

“Supports and assistance” includes:

(a) systems in place for the alleged incapacitated individual to make decisions in advance or to have another person to act on his behalf, including, but not limited to, having an agent under a durable power of attorney, a health care power of attorney, a trustee under a trust, a representative payee to manage social security funds, a Declaration of Desire for Natural Death (living will), a designated health care decision maker under Section 44-66-30, or an educational representative designated under Section 59-33-310 to Section 59-33-370; and

(b) reasonable accommodations that enable the alleged incapacitated individual to act as the principal decision-maker, including, but not limited to, using technology and devices; receiving assistance with communication; having additional time and focused discussion to process information; providing tailored information oriented to the comprehension level of the alleged incapacitated individual; and accessing services from community organizations and governmental agencies.

The new definition incorporates in section (b) the concept that if an individual can make a decision with support, namely supported decision making and other processes, then that individual is not incapacitated under the new Article V definition.

Understanding supported decision making, and the new definition of “supports and assistance” requires an understanding of how decisions are made. Whether the decision is being made by a person with a disability or not, decisions are rarely made independently.

For most people, big decisions call for big conversations. High School seniors seek advice from family, friends, and guidance counselors about plans for their future. Seniors, as in those over 60, seek advice from experts about how to plan and manage retirement. Everyone seeks advice from doctors before they make a major medical decision. In making decisions, humans rely upon others, including experts like attorneys, doctors, and accountants and non-experts like family and friends. Even small decisions sometimes require consultation. How many people consult the internet before going to a movie or trying a new restaurant? In short, people seek information they do not have prior to making a decision.

Supported Decision Making is a way to acknowledge that decisions are not made in a vacuum. One definition of Supported Decision Making is “a series of relationships, practices, arrangements, and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual’s life.” Robert D. Dinerstein,

Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making, 19 Hum. Rts Brief 8, 10 (2012). For example, hiring an accountant to prepare tax returns is a form of supported decision making. Asking a family member to attend a doctor’s appointment is a form of supported decision making. Having extra time to make a decision (just like to take a test) is a form of supported decision making. These “relationships, practices, arrangements, and agreements” may also be reasonable accommodations that will allow a person with a disability to function independently.

Utilizing supports and assistance to help a person with a disability to make decisions can be used as an alternative to surrogate decision making. Also, supported decision making can be used in conjunction with forms of surrogate decision making. For example, an individual who struggles to manage money may have a Social Security Representative Payee handle his finances but may make other decisions independently. An individual diagnosed with Alzheimer’s may ask a relative to help or support her decisions and ask the relative to be an agent under a durable power of attorney when supported decision making is no longer feasible. Finally, a guardian may use supported decision making to encourage a ward to develop the skills necessary to make independent decisions—serving as a “back-up” decision maker only until the ward is ready to act independently. In one New York case, after full guardianship was awarded for a woman who has an intellectual disability, decision making skills were taught while a guardian was in place until a successful transition could be made to the ward making decisions with supports. Eventually the guardianship was removed because “there is now a system of supported decision making in place that constitutes a less restrictive alternative to the Draconian loss of liberty entailed by a [full] guardianship.” *In re Dameris L.*, 38 Misc.3d 570, 576, 956 N.Y.S.2d 848 (N.Y. Co. Surrogate Ct. 2012).

If you would like to learn more about Supported Decision Making or alternatives to guardianship, below are additional resources:

The South Carolina Supported Decision Making Project:

<http://scsupporteddecisionmaking.org/>

The National Legal Resource Center’s Library on Supported Decision Making:

http://nlrc.acl.gov/Legal_Issues/Guardianship/Decision.aspx

The American Bar Association’s resources on Supported Decision Making:

<http://www.americanbar.org/groups/disabilityrights/resources/article12.html>

Information on the Supported Decision-Making Pilot Project—A Joint Initiative of the Center for Public Representation and Nonotuck Resource Associates: <http://supporteddecisions.org/>

Information on Guardianships and Alternatives to Guardianship in South Carolina:

<http://www.judicial.state.sc.us/selfHelp/index.cfm>

Information on Able South Carolina, an Independent Living Center, a consumer-controlled, community-based, cross-disability nonprofit that provides an array of independent living services to people of all ages with all types of disabilities: <http://www.able-sc.org/>

Information on the rights of people with disabilities: <http://pandasc.org/>

An in depth article on Supported Decision Making:

[http://www.pennstatelawreview.org/117/4%20Final/4-Kohn%20et%20al.%20\(final\)%20\(rev2\).pdf](http://www.pennstatelawreview.org/117/4%20Final/4-Kohn%20et%20al.%20(final)%20(rev2).pdf)