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## Guardianships and Special Needs Trusts

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These materials were provided as handouts in a training and are

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## **SPECIAL NEEDS TRUSTS**

As advances in medical technology are made available to the average American, and as public benefit eligibility law becomes more complicated, it should come as no surprise that legal planning tools are evolving to enable disabled or older individuals to more easily become eligible for public benefits, including Supplemental Security Income (SSI) and Medicaid benefits. Special Needs Trusts are among the most effective legal planning tools to fill this need.

A special needs trust (also called a supplemental needs trust) is a planning tool for a person ("the beneficiary") who receives government benefits that are based on financial need. The special needs trust is a separate fund that can improve the beneficiary's quality of life by paying for things that are not covered by his or her government benefits. Most special needs trusts are set up by a parent, grandparent, or other family member as part of their will or revocable living trust. Someone other than the beneficiary can create an irrevocable special needs trust to receive gifts at different times or from different people.

### **Beneficiary**

A person who is unable to work because of a physical or mental disability often qualifies for cash benefits, medical benefits, and/or other benefits paid by a government agency. Some of the programs limit the amount of money and property that the person can own and still qualify for benefits. Examples of benefit programs with financial resource limits are: Supplemental Security Income (SSI); Medicaid (also called Oregon Health Plan); and food stamps. If you leave money or property directly to a person who receives those types of benefits, the inheritance may put the person over the applicable resource limit and cause him or her to lose the benefits that pay for basic needs such as food, shelter, and medical care. However, if you leave the money or property in a special needs trust, the assets will not be counted and will not affect the person's future eligibility for government benefits.

### **Specials Needs**

Special (or supplemental) needs are items and services that add to the person's quality of life but that are not food or shelter or medical care covered by government benefits. Some examples of special needs are: Transportation; adaptive equipment; recreation; supplies for hobbies, telephone equipment and service, computer equipment, software, and internet access; television equipment and cable service; books, magazines, and newspapers; private health insurance; private case management; counseling; education and training; furniture and housewares; clothing, hair and nail care; and supplemental health care not covered by a government benefit program.

## Prohibited Distributions

Special needs trusts are written to limit distributions made by the trustee. A special needs trust with a strict distribution standard instructs the trustee not to give money to the beneficiary and not to pay for food, housing or medical costs that are covered by government benefits. That standard was designed to help the trustee avoid causing the beneficiary's government benefits to be reduced or terminated. Some government benefit programs count the value of food or shelter provided by a special needs trust or by someone other than the beneficiary as in-kind (non-cash) income to the beneficiary.

## Trustee

When you create a special needs trust in a will or a revocable living trust, it does not take effect until after you die. You can name a family member or another individual to serve as the trustee. You can also name a bank or a trust company. The trustee will have to know about the beneficiary's government benefits, income and resources, living situation, and interests. The trustee will also be responsible for learning about how payments from the trust are likely to affect the beneficiary's government benefits and for keeping good records.

## Resources of Beneficiary

A person who has been receiving government benefits and who receives cash or certain property of value (such as an inheritance or gift) will be disqualified from continuing to get benefits if the amount puts him or her over the applicable resource limit. The person will also be disqualified if selling a home or settling a personal injury case puts him or her over the resource limit. If the person will continue to need government benefits, it may be possible to protect his or her eligibility by creating a special needs trust with payback provisions for the excess resources. The payback special needs trust has to meet very specific requirements, including the following:

- The beneficiary must be under 65 years old when the trust is created;
- The beneficiary must be disabled according to the definition used to determine eligibility for Social Security disability and SSI benefits;
- When the beneficiary dies, any assets left in the trust must be used to pay back the Medicaid assistance received by the beneficiary; and
- The beneficiary cannot create the trust. In some cases, it will be necessary to have the court appoint a conservator and approve the trust. In some cases, a parent or grandparent may be able to create the trust.

The use of Special Needs Trusts allows for greater flexibility in planning and enables the beneficiary to become or remain eligible for government benefits while procuring supplemental assistance for which he or she would not otherwise be eligible. Individuals are wise to take advantage of these options which provide alternatives to many who are most in need of engaging in financial and long-term care planning.

## **DUTIES OF A GUARDIAN**

The purpose of this handout is to summarize your duties as a Guardian.

The following list describes the principal duties of a Guardian after appointment by the Court:

1. Take custody of the Protected Person, which entails an element of control over the activities of that person, including, for instance, determining where he or she lives.
2. Provide for the safety, care, comfort, maintenance, and, if necessary, the training and education of the Protected Person.
3. Take reasonable care of the Protected Person's clothing, furniture, and personal effects.
4. When appropriate, make health care decisions on behalf of the Protected Person, always seeking to carry out the known wishes of the Protected Person, or if those wishes be not known, then to act in the best interests of the Protected Person.
5. Make funeral arrangements in advance and control disposition of the remains of the Protected Person in the event of death. [Advance payment of funeral expenses is very important if the Protected Person's long term health care costs may be paid for by the Medicaid program. Alternatively, establish a savings account for an appropriate amount in the Protected Person's name and mark on the face of the account book "Dedicated to funeral services" or the like.]
6. If a conservator has been appointed for the Protected Person, work with the appointed conservator to see that the Protected Person has adequate funds to provide for his or her support, care, and education.
7. The Guardian must make an annual report to the Court, due 30 days after the anniversary of appointment as Guardian. Mark your calendar for each anniversary.
8. Pursuant to ORS 125.320(3), you must file a statement with the Court (and a copy to the Protected Person, any conservator, the Long-Term Care Ombudsman, any attorney who has represented the Protected Person during the proceedings, and anyone else entitled to notice) giving notice in advance of your intention to move the Protected Person from home to a care facility or from one care facility to another. If the Protected Person is to be placed in a mental health treatment facility, the Oregon Advocacy Center must be notified. Hospitalization for medical care does not require notice. If the placement is an emergency, give any required notice as soon as possible, but the life and safety of the Protected Person is more important than the paperwork.

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## **Guardianships**

A guardian is a person appointed by the court to make decisions about health care and personal matters for an adult who is incapacitated. The Oregon statutes define "incapacitated" as being unable to make or communicate the decisions necessary to provide for the person's basic physical health and safety. A medical diagnosis, such as Alzheimer's Disease, traumatic brain injury, bi-polar disorder, or Down's syndrome, is not the same as a finding of legal incapacity. A person who makes bad decisions or who refuses to accept medical treatment or other help may not be incapacitated. A guardian can also be appointed for a minor child (under the age of 18).

### Procedure

The process begins when an attorney representing a family member or other concerned person (called the petitioner) files a petition with the court that includes facts showing the respondent is incapacitated. In many cases, the petition asks the court to appoint both a guardian and a conservator. The respondent has to be personally served with a copy of the petition, together with a notice about his or her rights. Copies of the petition and notices about the guardianship case have to be mailed to the respondent's closest relative(s) and to other people and agencies required by the law. The respondent can object to the guardianship or to the proposed guardian. Other people can also object. Objections are only filed in a small number of cases.

The judge appoints a court visitor to interview the people involved in the case and to write a report for the court. If no objections have been made and the court visitor's report supports the guardianship, the judge will usually sign a judgment appointing the guardian. Once a guardian has been appointed, the respondent is called the protected person.

### Objections

If someone makes an objection to the petition, the judge will hold a hearing. At the hearing, the court visitor and other witnesses will testify and the parties can present additional evidence. The judge then decides whether the respondent is incapacitated, whether the appointment of a guardian is necessary, and whether the proposed guardian is qualified and suitable.

### Emergency Guardianships

The court can appoint a temporary or emergency guardian for up to 30 days if there is strong evidence of a serious and immediate danger to the respondent's life or health. In most cases involving a temporary guardian, the petitioner also asks the court to appoint a guardian for an indefinite period. Although not all courts follow the same procedures, there is usually a short hearing on the temporary guardianship and the petitioner is required to provide supporting evidence, such as a letter from the treating doctor describing the threat to the respondent's life or health. The most common

reasons for asking the court to appoint a temporary guardian is to get medical care or to arrange for placement in a care facility in a crisis situation.

### Powers and Duties

The guardian has the powers that are included in the judgment signed by the judge. Usually, the guardian will have the power to decide where the protected person lives, to make arrangements for the protected person's care and safety, and to make health care decisions. If there is no conservator, the guardian may be responsible for taking care of the protected person's belongings and a limited amount of money.

The guardian must file a report with the court every year with information about where the protected person lives, the services that the protected person receives, and his or her physical and mental condition. The guardian is required to get the court's permission before paying himself or herself for providing room and board or care to the protected person. The guardian has to give a special type of notice before placing the protected person in a care facility or moving the protected person from one care facility to another.

### Choice of Guardian

In most cases, a close relative is appointed to serve as the guardian. The same person may be both the guardian and the conservator. Although the guardian is not required to live in Oregon, it may be difficult for a guardian who lives far from the protected person to carry out his or her duties. When a close relative is not available or suitable, or when family members disagree about who should be the guardian, the court may appoint a professional fiduciary to serve as the guardian. Professional fiduciaries have training or experience in areas such as nursing, social work, case management, gerontology, long term care, banking, bookkeeping, law, and mediation and are available to act as guardians for incapacitated people who have the resources to pay for their services.

### Costs

The out-of-pocket costs to begin a guardianship in Oregon are the filing fee, which is \$111; the fee for the court visitor, which varies by county but is \$350 in Lane County; and the expenses for having the respondent personally served, getting certified copies from the court, etc., which are usually under \$100. In some cases, it is necessary to pay for a medical or psychological evaluation or other assessment of the respondent.

The attorney fees are based on the amount of time spent. The attorney fees will be higher in temporary guardianships and in contested cases because more time and work is required. If the court appoints the guardian, the attorney can submit a detailed description of the time spent on the case and the out-of-pocket expenses to the court and ask the judge to approve having those legal fees and costs paid out of the protected person's funds.