

Starting Soon:



# Special Needs Planning: New Approaches to Protect a Child or Adult with a Disability

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# WELCOME!

- Please note your lines are **muted**
- Interactive Program: have your mouse ready to participate
- Type questions in the Q&A pod at the bottom of your screen
- Presentation and materials to be posted at <https://www.pierrolaw.com/the-firm/resources/>



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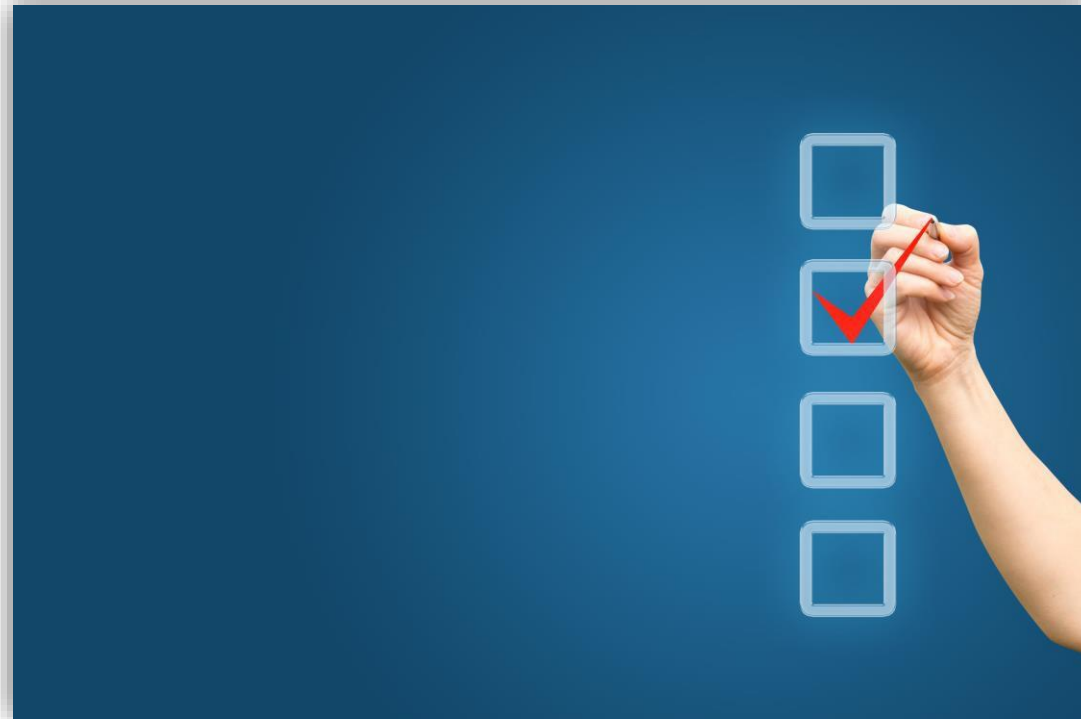
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# AGENDA

- Special Needs Basics
- Planning Techniques
- Federal Benefits
- New York Medicaid Rule Changes
- IRA's under The SECURE Act
- Next steps



# A BRIEF POLL



# WHAT IS SPECIAL NEEDS PLANNING?



- Creating and implementing a plan for an individual with a disability to address personal, legal and financial issues
- Considers individual abilities and needs of each person and involves her or him to the maximum extent possible as well the family
- Building a team and coordinating with other members of support system

# GOALS OF SPECIAL NEEDS PLANNING

- Create and implement personal care, financial and legal plans for people with disabilities
- Balance the future needs of the individual with the needs of the family
- Communicate the plan to all relevant persons
- Review and revise plans as circumstances change
- Provide peace of mind and family harmony



# CONSEQUENCES OF NOT PLANNING AHEAD

- With no planning, certain decisions will need to be made by a Court Appointed Guardian under Art. 17A or 81
- Upon death of parent or family member, assets may pass outright to an individual with a disability and disrupt benefits
- Assets may not be immediately available for an individual with disabilities to pay for needed care
- **The money might run out**

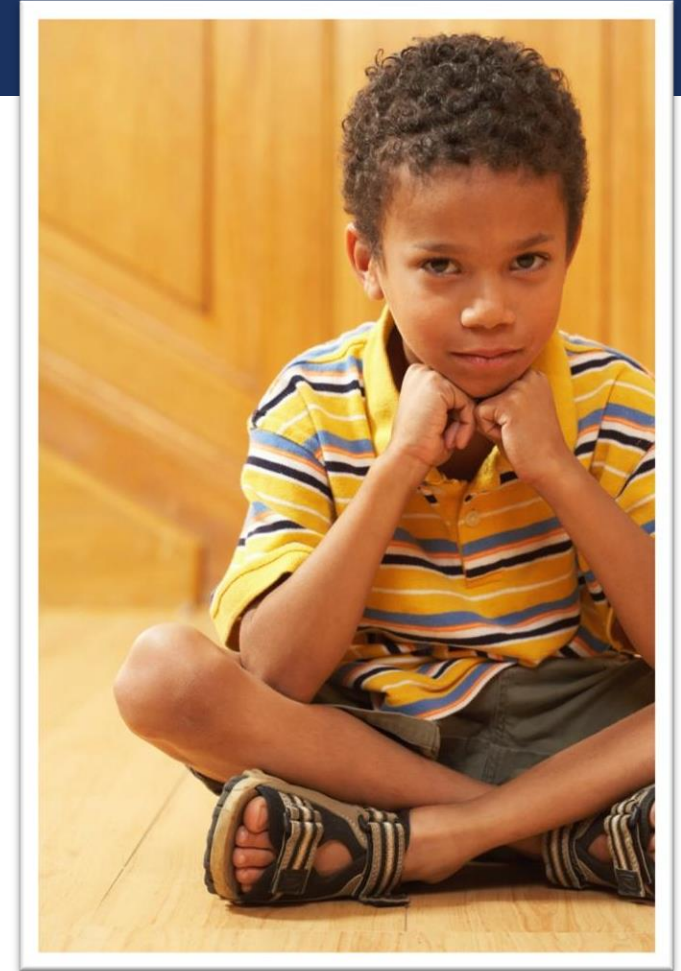




# PLANNING STEPS

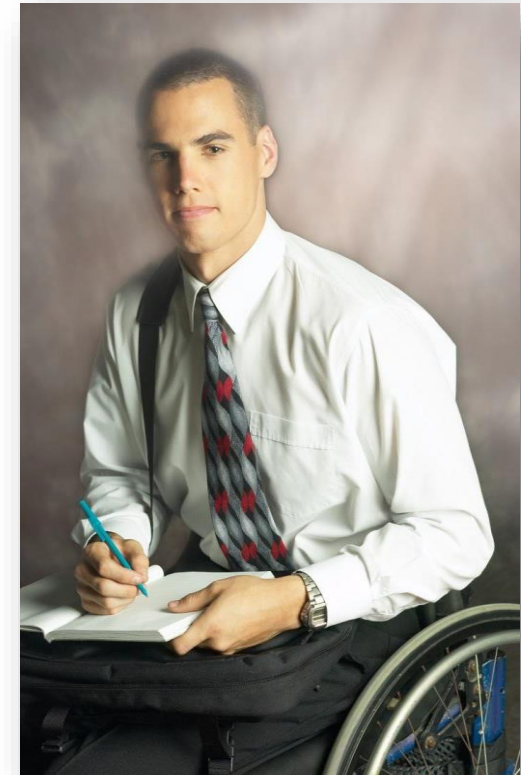
## **You need to:**

- Create a "Personal Care Plan" for present and future needs as circumstances change
- Design an estate plan that provides for the person with a disability
- Consider an estate plan for yourself that protects assets which will be available to provide for your child's needs after death.
- Create a financial plan
- Choose appropriate people to take responsibility for managing the care plan when you cannot



# FUNDAMENTALS OF SPECIAL NEEDS PLANNING

- **Techniques are permitted** by federal and state law to maximize available resources
- **Government benefits are available** to all families regardless of their means
- Family's personal resources serve as a **secondary source of support**
- Federal and NY State law requires support and services by persons with disabilities in the community rather than in facilities
  - Olmstead vs. L.C., 527 U.S. 581 (1999)
  - Matter of Shah, 95 N.Y. 2d 148 (2000)



# FEDERAL BENEFITS NOT BASED ON FINANCIAL NEED

- SSDI (Social Security Disability Insurance)
  - For adults with work history
  - Benefits based on parents' work history
- Medicare (Disability + 2 years)
- Disabled Adult Child or “DAC” benefits
- Other benefits
  - e.g. special education, housing, real estate tax abatement



# FEDERAL BENEFITS: NEED-BASED

- **Supplemental Security Income (SSI)**
  - Provides monthly income to the aged (over 65), blind or persons with disabilities, and who have limited income and financial resources
  - Income \$794/month Resources \$2,000
- **Medicaid**
  - Joint federal and state program that helps with medical costs for some people with low incomes and limited resources
  - Income \$904/month (New York)
  - Resources \$15,900 individual + certain exempt assets

# DRASTIC CHANGES TO COMMUNITY MEDICAID RULES

- Activities of Daily Living (ADLs) – more restrictive – Effective November 8, 2021
- Independent Assessment team to replace your physician to assess needs for care - Effective November 8, 2021
- Requirements will add even more delays
- 30-month lookback for asset transfers for Home Care to be phased in starting April 1, 2022



**\*Guidance still needed from the NYS Department of Health**

**\*Refer to webinars on the Medicaid Updates at [pierrolaw.com/videos](http://pierrolaw.com/videos)**

# GIFTING ASSETS DIRECTLY TO PERSON WITH A DISABILITY – DISASTER

What if you.... Gift or Bequeath

Assets to another family member (usually a sibling) to hold for the benefit of the individual with a disability?

**DON'T DO IT!**

Instead...

Provide the benefit via a Supplemental Needs Trust





# SUPPLEMENTAL NEED TRUSTS

- Purpose: to support and enhance the quality of life of the person with the disability by providing a supplemental source of funds.
- Because of certain legal benefits of these trusts, persons in need can remain eligible for government benefits that have income and resource tests, such as SSI and Medicaid





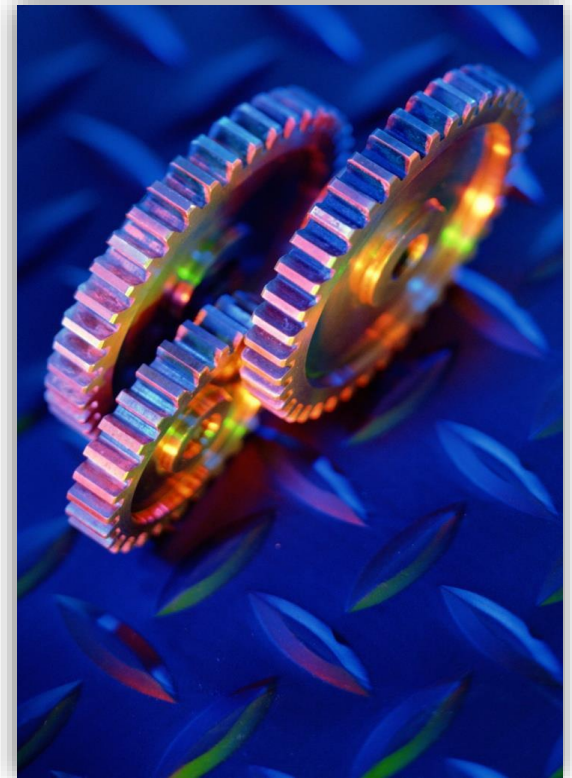
# DESIGNING THE TRUST



- The beneficiary's physical and cognitive abilities are key
- They are not “disabled persons.” They are “persons with a disability”
- Allow for the participation of the person with the disability to the maximum extent possible

# TYPES OF SPECIAL NEEDS TRUSTS

- Self-settled or "First-Party" SNT
- Third-party SNT – the Best!!
- Pooled SNT



# SNTS, SSI AND MEDICAID

- Trust distributions are made at the sole discretion of the trustee
- Distributions must be made directly to providers of goods and services to the beneficiary
- Any money paid directly to the beneficiary will be counted for purposes of eligibility for SSI and will be considered by Medicaid in determining the recipient's required contribution to his or her case
- The Trust must be solely discretionary, not a support trust

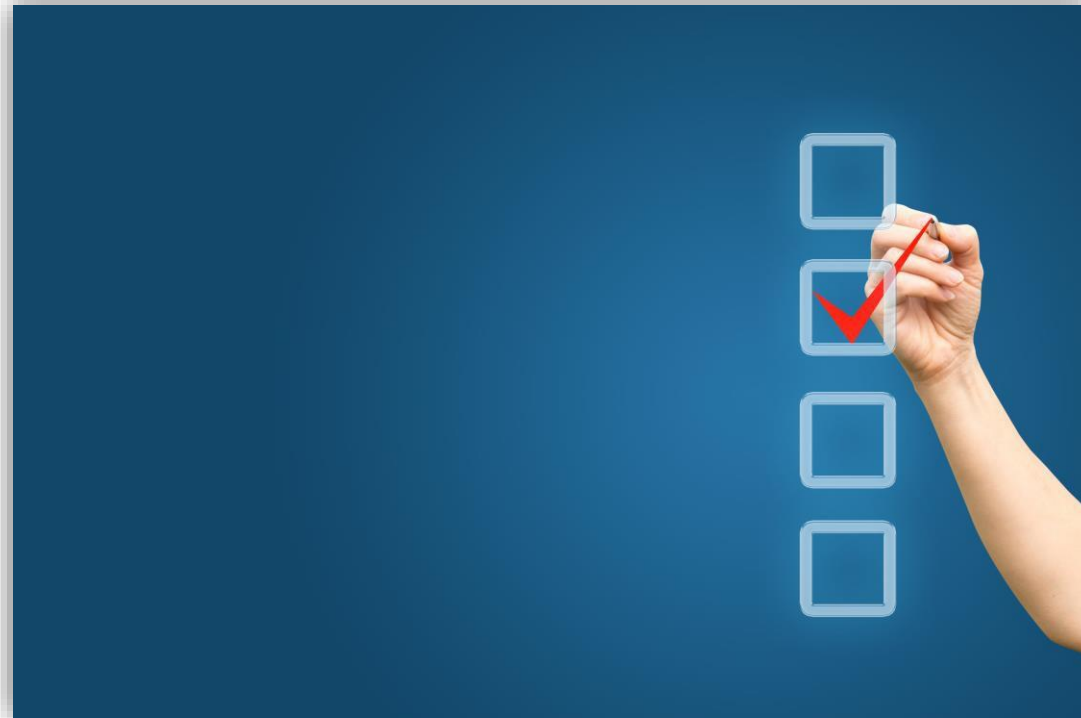


# PARTIES TO THE SNT



- Settlor/Grantor - creates the Trust
- Beneficiary - receives the benefit of the Trust
- Trustee - Controls the Trust
  - Trustee is a Fiduciary responsible for financial decisions and the type and amount of distributions
- Possible additional parties
  - Advocate or Care Manager
  - Trust Protector

# A BRIEF POLL



# SELF-SETTLED OR “FIRST-PARTY” SNT

- Created for sole benefit of individual with a disability under age 65 **with his or her own funds**
- Must be Irrevocable
- May be created by the individual with a disability or by a parent, grandparent, guardian, or by a court
- The individual who is disabled can fund the trust and only that individual's assets go into this trust
- Typically set up when an individual receives a lump sum, including an inheritance or the proceeds from a lawsuit or settlement

# SELF-SETTLED OR “FIRST-PARTY” SNT

- Assets in trust are not counted as resources for eligibility purposes
- Upon death, any money or assets remaining in the trust must be used to **reimburse the government** for Medicaid benefits paid during his/her lifetime
- Most states require notice to local Medicaid offices when the SNT is created or funded and when the beneficiary dies
- Some types of distributions have been limited by recent changes in rules that have been liberalized by modification of federal P.O.M.S.



# THIRD-PARTY SNT

- Created by a third-party (not the individual with the disability) and funded with that person's money
  - Typically, a parent, grandparent, sibling or child of individual with a disability
- Beneficiary does not need to be under age 65
- Trust assets may be used as the Trust directs at the discretion of the Trustee – flexible, easy to administer
- Should also be a discretionary trust, not a support trust



# ADVANTAGES OF THIRD-PARTY SNT

- NO PAYBACK REQUIREMENT
- Less stringent distribution rules than First-Party SNT's
- Can be incorporated easily into existing planning
- Other relatives or friends may also want to contribute to the trust
  - In such case, the creator may wish to establish SNT during her or his lifetime
  - It may be wise for divorced parents to set up the SNT during lifetime



# TRUST VS. WILL

## Trust

- No Probate
- Manages assets during the creator's life and over the lifetime of the person with special needs
- Provides for successor trustee upon death or incapacity
- Financial affairs remain private
- No need for court approval for distributions

## Will

- Probate: cost & delays
- Court supervision and often need for court order allowing distributions
- Takes effect only after death
  - not part of a lifetime care plan
- No provision for caregiver incapacity
  - May need a guardian or other planning
- No privacy – court papers filed in probate are public record

# SPECIAL NEEDS PERSONS AND SIBLINGS

- Future needs may be unclear
- Determine what percentage each beneficiary will receive
- Flexibility is necessary
  - Who makes the decision?
  - How is the decision made (guidelines)?
- Consider purchasing life insurance



# EMPOWERING A CHILD



- Parents of children with mental illness want their child to function at the highest level possible
- People with Bi-polar, schizophrenia, OCD, etc. have ‘fluctuating’ capabilities
- SNT should be designed to encourage the development and independence of the child, but protect eligibility for benefits

# EMPOWERMENT TRUST

- Give the child the broadest decision-making powers consistent with capacity
- Appoint fiduciaries in the trust who can modify those powers as circumstances change
  - Trustee
  - Trust Protector
  - Distribution Committee





# SELECTING A TRUSTEE

Judgement, Experience, Relationship with Beneficiary and Integrity are key.

1. Family Member
2. Third Party
  - Financial Advisor
  - Attorney
  - Advocate
  - Other Trusted Individual
3. Corporate / Professional Trustee
  - Long-term need for trustee based on individual's life expectancy



# POOLED TRUSTS

- Statutory trust established by and managed by a nonprofit organization
- Can be created by the individual with disability for himself/herself
- Typically used for an individual to deposit excess income or “spend-down” amount when receiving Medicaid benefits
- No "payback provision", but the beneficiary's remaining assets in the pooled trust stay in the pooled trust after the beneficiary dies



# BENEFITS OF NAMING A CORPORATE TRUSTEE

- Professional Management
  - Expertise in trust administration
  - Professional experience as a trustee
  - Access to other professionals
- Familiarity with Benefit Programs
- Less Family Stress
  - Independent, no family ties,  
mitigates conflict between family members
- Liability
- Continuity



# BENEFICIARY DESIGNATIONS FOR NON-TRUST ASSETS



- Parents and other family members often named the child with disability as beneficiary of bank accounts, investment accounts, life insurance or retirement plans
- As a result of such designations, child's SSI and Medicaid will be terminated
- Advisors must be sure beneficiary designations are properly prepared to avoid this problem

# FUNDING THE TRUST WITH LIFE INSURANCE

- Provides a relatively low-cost option for funding
  - Can be used with a variety of policy types (term, whole life, etc.)
  - For parents of individuals with disabilities, survivorship policies are a good option
- Provides assets to the trust after the caregiver/provider has died and the beneficiary is most in need
- Immediately available to pay for the individual's cost of care
- Life insurance planning can be tailored to work with the donor's estate plan (e.g. estate tax planning)
- Provides a non-controversial way to provide a greater benefaction for child with disabilities

# THE SECURE ACT: 10 YEAR RULE

- Significant changes in Tax law for retirement funds effective Jan. 1, 2020
- Ten Year Rule
  - Exceptions for certain beneficiaries
    - \* **Persons with disabilities**
      - Chronically ill
      - Surviving Spouse
      - Children under the age of majority (not grandchildren or any other children)
      - Individual not more than ten years younger than employee

10 YEARS

# FUNDING A TRUST WITH RETIREMENT FUNDS

- SNT can be beneficiary of a IRA or other retirement funds
- SNT should be an accumulations trust
- Preserves the “stretch”
- Preserves eligibility for benefits



# ABLE ACCOUNTS

- Achieve a Better Life Experience (ABLE) Act (2014)
  - Federal act authorized 529A accounts for individuals with disabilities to cover disability related expenses
- ABLE plans do not replace traditional trust planning, but provide a useful supplement to prudent planning





# ABLE ACCOUNTS-RULES

- For individuals who had a disability before age 26
- Earnings in account are not taxed
- May receive up to annual gift tax exclusion (\$15,000) per beneficiary for their care
- First \$100,000 is excluded for SSI eligibility purposes
- In some states, the Medicaid resource limit in the plan matches the state's 529 Plan (\$520,000 in New York)
- Can now roll over 529 Plan assets into ABLE Plan accounts, subject to annual contribution limit
- Disadvantage- has payback provision for Medicaid (not the case with custodian accounts)

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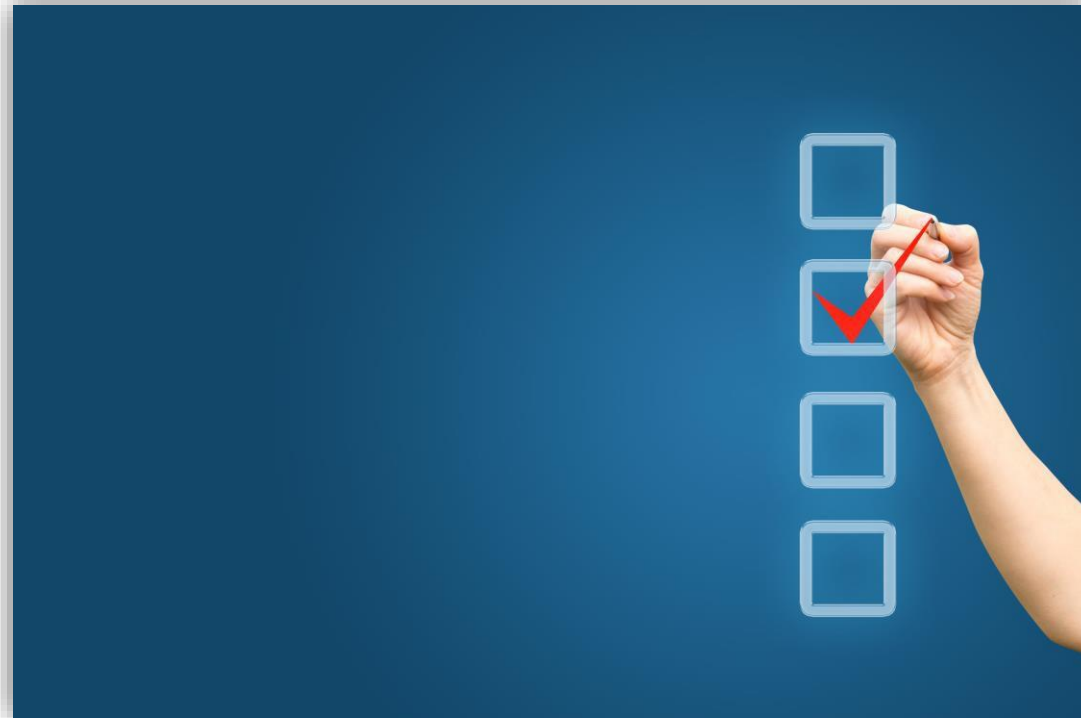
# NEXT STEPS – ASSEMBLE THE TEAM

**If you have a disability or have a loved one who has special needs:**

- Schedule a consultation with a qualified special needs planning attorney
- Consult with a financial advisor familiar with benefits planning
- Identify or hire a care manager who can coordinate care and available benefit programs
- Develop a comprehensive future care plan
- Implement the plan



# A BRIEF POLL



# THANK YOU!



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