ADULT GUARDIANSHIP IN NEW YORK

Article 17-A of the Surrogates Court Act

and

Article 81 of the Mental Hygiene Law

FRANCES M. PANTALEO, ESQ.
BLEAKLEY PLATT & SCHMIDT LLP
ONE NORTH LEXINGTON AVENUE
WHITE PLAINS, NY 10601
914-287-6113
E-MAIL: FPANTALEO@BPSLAW.COM

Guardianship in New York State

Guardianship refers to a proceeding in which a Court declares a person to be incapacitated and appoints a Guardian to make personal needs and financial decisions for him or her. The Court which appoints the Guardian authorizes the Guardian to make a broad range of decisions for the incapacitated person, including but not limited to, medical decisions, where the incapacitated person should reside, who will provide care to the incapacitated person, and where and how the disabled person's assets should be invested. The Court may appoint a single Guardian to make these decisions, or it may divide this function among one or more Co-Guardians.

New York State law provides two vehicles through which a Court may appoint a guardian for a disabled individual. Important differences exist between these two types of guardianship.

Guardianship pursuant to Article 17-A of the Surrogate's Court Procedure Act, is available only to persons who qualify on the basis of mental retardation or developmental disability. The statute requires that the developmental disability must be attributable to cerebral palsy, epilepsy, neurological impairment, autism or traumatic brain injury or another condition which is found to be "closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of mentally retarded persons." Dyslexia may be found to be a developmental disability if it is sufficiently severe to be equivalent to mental retardation or any of the other listed developmental disabilities. Except for traumatic brain injuries, the disability must have begun before age 22.

In a 17-A proceeding, a Petition is filed in the Surrogate's Court of the county in which the incapacitated person resides. The law contains a list of individuals who may be the Petitioner, in order of priority, which is usually the parents first, then any interested person over 18 years old or a nonprofit corporation. The Petition must be supported by two affidavits. One of the affidavits must be prepared by a physician. The other must be prepared by a licensed psychologist or a physician who has professional knowledge in the care and treatment of persons with mental retardation. The court supplies standard forms for these affidavits, which must be carefully completed by the treating doctor or psychologist within six months of an examination.

The other procedure for appointment of a guardian is pursuant to Article 81 of the Mental Hygiene Law. Unlike the 17-A guardianship, this proceeding takes place in the Supreme Court in the county of the incapacitated person's residence. These proceedings also differ from 17-A proceedings in that the person can be of any age or any type of disability; the subject of the proceeding is not required to have a medical diagnosis of mental retardation or a developmental disability. There is no requirement that medical affidavits be submitted with the guardianship petition. In fact, due to concerns for protection of the privacy of medical records, inclusion of medical records in the initial guardianship petition is frowned upon. The Petitioner may be anyone, including the disabled person himself or herself. The Court must determine the 'functional limitations' of the incapacitated person and tailor the powers and duties of the Guardian to the "least restrictive" means of intervention.

An Article 81 Petitioner must show with clear and convincing evidence the incapacitated person's inability to provide for his or her personal needs and/or property management. Petitioner must list the powers he or she is seeking, which must be "tailored specifically to the particular needs" of the person with respect to personal care, property management, or both.

In a 17-A guardianship, the Petitioner must decide which powers are requested – i.e., guardian of the property, guardian of the person or guardian of the person and property. If guardianship is granted, the guardian will have all of the powers of a personal needs or property guardian, as detailed in the statute. Since 2003, the Guardian of a person who is determined to be mentally retarded may obtain permission to make end of life health care decisions, including the ability to withhold or withdraw life sustaining treatment. In December of 2007, the ability to make end of life health care decisions was extended to guardians of individuals with developmental disabilities.

In an Article 17-A proceeding, the disabled person must appear in court for the hearing unless 'medically incapable of being present to the extent that attendance is likely to result in physical harm'. However, many courts interpret this requirement very liberally and often waive the requirement of physical appearance at the hearing upon a certification by a physician of the likelihood of harm. The Court may appoint a guardian ad litem, a neutral attorney, or Mental Hygiene Legal Services to interview the disabled individual and make a recommendation to the court regarding the need for a guardian and the appropriateness of the petitioning parties to serve as guardians. The Court may

disperse with the necessity of a hearing based upon that recommendation. As a practical matter, most Article 17-A guardianship hearings require only a limited Court appearance. If a guardian of property is appointed, the assets of the disabled person must be held by the Guardian, jointly with the clerk of the Court unless the Guardian obtains a bond and files annual reports with the Court. As ownership of assets will disqualify the individual from receiving means-tested government benefits such as SSI or Medicaid, the Guardian can petition the court for permission to place the assets into a self-settled Supplemental Needs Trust.

The procedure for appointment of an Article 81 guardian is more complex. The incapacitated person is required to be present at the hearing unless the information before the court clearly establishes that the individual is "completely unable to participate in the hearing or that no meaningful participation will result from the person's presence at the hearing." If this is not established and the individual is unable or unwilling to travel to the court, the hearing must be conducted where the incapacitated person resides 'so the court can obtain its own impression of the person's capacity.' Upon the filing of the Petition, the Court is required to appoint a court evaluator who has many responsibilities, including explaining the proceeding to the alleged incapacitated person, investigating the allegations contained in the Petition and issuing a report to the Court. The incapacitated person is entitled to retain counsel of his or her own choosing and the court evaluator is authorized to make recommendations to the court as to whether counsel should be appointed, if the incapacitated person does not have an attorney. Counsel must be appointed if the alleged incapacitated person requests counsel, wishes to contest the Petition, a temporary guardian is requested, the Petition requests major medical treatment or permission to remove the alleged incapacitated person to a skilled nursing facility or another residential facility. If counsel is appointed, the court may dispense with the appointment of a court evaluator.

The appointment of an Article 81 guardian is based upon clear and convincing evidence of the disabled person's functional limitations. The guardian is only given powers that are the least restrictive form of intervention. Although a Guardian of the person may be given the authority to make major medical decisions, the Guardian will not have the authority to administer psychotropic medication without the consent of the incapacitated person. Moreover, an Article 81 guardian may not place the incapacitated person in a nursing home, residential care facility or a psychiatric hospital without a court order. While the Court is likely to appoint the Petitioner as Guardian, there are

no guarantees, especially if his or her appointment is opposed by the disabled person or other family members. There is no provision for the guardian to hold property jointly with the clerk of the court, but the Guardian must obtain a bond and file annual reports with the Court. In addition, the Guardian is generally required to attend a training course which has been certified by the Office of Court Administration.

BIOGRAPHY OF FRANCES M. PANTALEO

Frances M. Pantaleo is a partner at Bleakley Platt & Schmidt LLP, concentrating in the areas of Elder Law, Trust and Estates , Medicaid Planning, Guardianship, Special Needs Planning and legal issues affecting individuals with disabilities and their families. She is a member of the National Academy of Elder Law Attorneys and a Past Chair of the Elder Law and Special Needs Section of the New York State Bar Association and a member of its Special Needs Planning Committee. She has previously served as Chair of the Elder Law Committee of the Westchester County Bar Association and Chair of the Health and Elder Law Section of the Westchester Chapter of the Women's Bar Association.

Ms. Pantaleo has been recognized as a "Super Lawyer" in the area of Elder Law and has been named one of the top twenty-five attorneys in Westchester County . She has received an AV rating (the highest available) from Martindale-Hubbell.

BLEAKLEY PLATT

Special Needs Estate Planning

FRANCES M. PANTALEO, ESQ.
BLEAKLEY PLATT & SCHMIDT LLP
ONE NORTH LEXINGTON AVENUE
WHITE PLAINS, NY 10601
Tel: (914) 287-6113
Email: fpantaleo@bpslaw.com

Special Needs Planning

- Special Education and related services
- Life/Transition Planning
  - —job training, life skills, living arrangements
- Government Benefits
- Planning for an inheritance—estate planning
- Is Guardianship Appropriate?

  or Should Advance Directives be signed? POA,HCP, HIPAA

Government Benefits

- Supplemental Security Income (SSI) means tested. Max $881 in 2021
- Medicaid means tested
- Housing assistance means tested
- SNAP (food stamps) means tested
- Social Security disability Income (SSDI) not means tested- based upon earning record
- Medicare not means tested

Medicaid Waiver Programs

Child Waivers

Traumatic Brain Injury Waivers

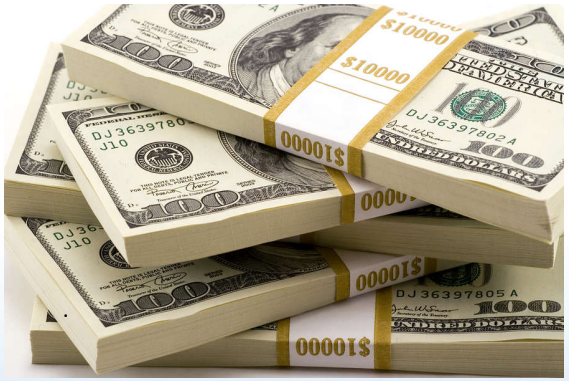
OPWDD Waivers and Service Plans

OMH Waivers

All require Medicaid eligibility!!

Estate Planning for an Inheritance

- Can the beneficiary handle the inheritance?
- Will the beneficiary be on government benefits?
- How much is enough?
- Who will manage the inheritance?



Supplemental Needs Trusts

- A form of discretionary "spendthrift" trust—Trustee decides how trust money is spent

- Basic purpose is to provide goods and services to the beneficiary which are **NOT** provided by government assistance programs

- However, trustee may use trust assets in a way which will reduce government entitlements if this is better for the beneficiary

Effect of Trust on Government Benefits

- Trust is **not** an asset
- **Cash** distributions treated as income—adverse effect on all means-tested benefits
- **Medicaid**: No reduction in benefits for "in-kind" payments for goods and services
- **SSI**: in-kind payments for **food and shelter** treated as income.
  - Reduction limited to 1/3 of the federal benefit ($264.67 in 2021)

Testamentary Trust (contained in a Will)

- Letters of trusteeship issued by Surrogate's Court
- Court may appoint guardian ad litem (delay)
- Court proceedings required for change of trustees
- Court may require judicial accountings

Intervivos Trusts (established during lifetime)

- No court proceedings to appoint successor trustees
- If funded, assets may pass more quickly to Trustee upon death of funder

Who Should be the Trustee?

TRUSTED FRIEND OR RELATIVE

Caring and personal interest

PROFESSIONAL

Time and ability to manage assets, keep records, pay bills, make distributions, prepare tax returns and assume fiduciary responsibilities

Co-Trustees?

Trust Protector

- **Trust Protector**—knowledgeable friend or family member who can provide special knowledge, assistance to the trustee, power to remove and replace trustees.

- Trust may provide for compensation and/or reimbursement of expenditures.

- Can be given right to demand records and account statements of the trust.

Letter of Intent

- Provides direction to the trustees regarding the desires of the person who created the trust
- Provides information about the needs of the beneficiary (medical, social, benefits, likes, dislikes)
- No standard form
- Not a legal document, but provides guidance to trustees

Self-Settled SNTs

- Funded with beneficiary's assets—personal injury settlement or other funds.
- Beneficiary must be "certified" as disabled.
- Beneficiary under age 65 when funded.
- "Pay Back" to State for all Medicaid provided after death of trust beneficiary

Use of Trust to reduce monthly "surplus income"

- Income in excess of Medicaid monthly threshold ($884 in 2021) must be "spent down" on paid or incurred medical expenses.
- However, surplus income can be paid to self-settled or "pooled" trust instead of being spent down on medical expenses. If over 65, sole option is use of "pooled" trust.
- Can not be used to shelter income for individuals in skilled nursing facilities

Pooled Trusts

Established and managed by non-profit agency

Separate account for each beneficiary but investments are pooled and costs are shared

At death of beneficiary, remaining funds must be either repaid to state to extent of Medicaid provided to beneficiary or remain in trust for benefit of other trust members

Sole-Benefit Trusts

Transfers to a trust established for the "sole benefit" of a disabled individual under the age of 65 are exempt from Medicaid transfer of asset penalties.

Trust must EITHER:

- Include a pay-back provision to the Medicaid program at death of the lifetime beneficiary, OR
- Direct the trustee to expend the trust corpus in an actuarially sound manner over the life expectancy of the lifetime beneficiary.

Guardianship

Two different types:

- Article 17A of the Surrogates Court Procedure Act

- Article 81 of the Mental Hygiene Law

17A Guardianship

- Persons with intellectual or developmental disabilities
- Disability must arise before age 22, except for traumatic brain injury
- Petition accompanied by 2 affidavits/affirmations by medical doctor and/or NYS licensed psychologist
- Simplified hearing in Surrogate's Court—extent of hearing will vary by county
- Guardian appointed for person/ property or both
- Annual accounting may be required—property must be held under joint control with court unless guardian is bonded.

Article 81 Guardianship

- Must prove that AIP or others will suffer substantial harm unless guardian is appointed
- Based upon functional limitations —not medical diagnoses or records
- Full evidentiary hearing in Supreme Court
- Counsel appointed for AIP
- Powers of guardian tailored to the needs of the IP
- Powers will not include ability to commit IP for psychiatric care
- Expensive and complicated consuming process

Alternatives to Guardianship

- Power of Attorney
- Health Care Proxy
- Living Will
- Medical Records authorization (HIPAA release)
- Supported decision making

ABLE ACCOUNTS

Achieving a Better Life Experience (ABLE) Act of 2014 enables individuals with disabilities to save for qualified disability expenses without jeopardizing benefits from SSI and Medicaid.

- Available in NY as of September 2017.

- Call 1-855-569-2253
- Website: www.mynyable.org

ABLE Rules

- One account per individual.
- $15,000 funding limit per year
- Disability must be established before age 26.
- Balances over $100,000 will cause beneficiary to lose SSI
- Accounts may not exceed $500,000
- Various investment options. Earnings are tax deferred and tax free if used for **qualified disability expenses.**
- Withdrawals made through checking account or debit card.

Qualified Disability Expenses

Education, Health and wellness,

Housing, Transportation,

Legal fees, Assistive technology,

Financial management,

Employment training,

Personal Support Services,

Oversight and monitoring,

Funeral and burial expenses,

Not a Substitute for a Third Party SNT

- Balance in account on death of the account owner will be paid back to Medicaid program
- Requirement that distributions are limited to “qualified disability expenses” more restrictive than standard for SNT distributions
- $500,000 account limitation, over $100,000 will cause loss of SSI
- Cannot be opened by a guardian of property under SCPA 17A without a court order

THANK YOU!

Issues in Special Needs Planning

Courtesy of ***FRANCES M. PANTALEO, ESQ.***

BLEAKLEY PLATT & SCHMIDT, LLP.
One North Lexington Avenue
White Plains, NY 10601
914-287-6113
fpantaleo@bpslaw.com

Estate Planning - Special Needs Planning- Elder Law-Guardianship-Medicaid Planning

A Plan for Special Needs

As a parent of a child living with a disability – whether it is a physical disability, intellectual disability, developmental disability, autism or mental illness – you are well aware of your loved one's extraordinary requirements. In his or her life to date, almost everything has needed more time, more attention and more care than you might reasonably have anticipated. It is no wonder, then, that you might not have completed planning for the next stages in your child's life – when you are not able to oversee your child's care.

We urge you to take time now to plan for your child's future. This will give you peace of mind and assure that your child enjoys a life that meets his or her needs and matches his or her preferences even if you are not there as an advocate. The planning process – and it is a process – is going to take some research. It is also going to require some careful consideration of your child's situation.

Since no two situations are the same, there is no pre-crafted solution that works for everyone. Still, three major underlying elements are common:

1) Lifestyle - Routine is one of the most important things in all of our lives. For individuals with special needs it is often essential, providing the stability they need to function at the highest level they can achieve. When a special needs child is under 21, he or she is typically in an educational program, which establishes the routine. But what is going to happen when the child reaches majority? Pay particular attention to:

- Social interaction: If your child does well with, or even requires, social interaction, you might consider a day program or special employment. You should also consider whether simply being with others is enough or whether your child needs a sense of accomplishment.
- Living arrangement: Even if living alone is an option, your child might do better living in a residential facility. Consider this carefully and get to know the options in your area. It is a good idea to transition your special needs child while you are still able to visit and get a sense of how well the placement is meeting his or her needs.
- Advocacy and emotional support: While it is tempting to keep the planning process to yourself – after all, you have been your child's primary advocate for all these years – there might be other members of the family or community who should be involved. This can be important from both your child's perspective and your own. For one thing, you will not have to bear the entire burden alone. For another, this will go a long way toward ensuring that the plan is followed when you are no longer there to oversee it.

2) Medical – Assuring continuous access to appropriate treatment and competent, caring medical attention is a tremendous worry for most parents of special needs children. The growing costliness and complexity of our medical system have made this an even greater concern than ever before. There are steps you can take to ensure quality care on behalf of your child. We have found these five to be essential to future care planning:

   - Determine the degree to which your child has the capacity to manage his or her own person. If your child does have this capacity, ensure that the legal documents are in place to make certain that his or her wishes are respected. These include a Power of Attorney, Health Care Proxy, HIPAA Release, and Living Will.
   - Explore whether Guardianship makes sense. If your child does not have the capacity to manage his or her person, a guardianship might be an appropriate path (*see* pages 4-5).
   - Consider appointing an advocate. Even if your child can manage his or her person, an advocate can be a welcome reinforcement. Any advocate should have a thorough knowledge of your child's medical needs, as well as complete caregiver information. This is done through a Power of Attorney or Guardianship.
   - Review insurance coverage. Finance is a critical factor in the American medical system. Many insurance policies cover children with special needs even after they reach adulthood.
   - Research government benefits. Your child might also be eligible for government benefits under Medicare, Medicaid, Social Security Disability (SSDI), Childhood Disability Benefits (CDB) and Supplemental Security Income (SSI). Medicaid and SSI will pay for placement in a group home or other facility. Many of these residences will only accept Medicaid recipients. Keep in mind, though, that navigating the application process can be quite tricky and require some technical knowledge. Many of our clients come to us for help in matters related to this.

3) Legal/Financial – Budgeting and financial planning are crucial. Without them, you and your child will have fewer options in the other areas. Although your child may be employed in a special work program or receiving SSDI or SSI benefits, these monies are seldom enough to guarantee an acceptable standard of living. You should establish a trust to provide additional monetary support, while preserving your child's eligibility for means-tested benefits. Establishing a trust requires special planning, and there are many things to consider, including how it will be funded, what assets your child will receive, and who will be the beneficiary after your child's death. A trust is a critical tool for managing assets and providing flexibility. See page 3 for more information.

As you go through this process, be sure to make an honest assessment so that lifestyle, medical, financial and legal needs are met, just as you intended. Also be sure to document your decisions in a Letter of Intent. This document, while not legally binding, can provide a roadmap for future caregivers, detailing your child's history, preferences and needs. It can also serve as a single-source reminder for you.

Our firm would be pleased to provide you with an assessment questionnaire to help you begin to organize your tasks and goals as you begin this special planning. We would also be glad to consult with you, talking you through the issues, or speak with your family or group. Contact Frances Pantaleo at (914) 287-6113

Special Needs Trusts

A Supplemental Needs Trust ("SNT"), sometimes also referred to as a Special Needs Trust, is an important and flexible tool when you are doing long-term planning for an individual with special needs. Most commonly, SNTs are used for three things:

- To guard against the beneficiary's inability to handle finances due to spendthrift propensity; lack of capacity to invest funds and pay expenses; or limited judgment.
- To create or protect a disabled individual's current eligibility for government benefits.
- To lay the groundwork for a future application for government benefits.

The properly drafted SNT is not counted as income or as a resource for government benefit eligibility purposes. The trustee retains the ability to make discretionary lifetime distributions for the benefit of the disabled person. Sometimes the trust is "turned on" when the beneficiary is functioning well and "turned off" when the beneficiary is incapacitated because of an episode. In most cases, an SNT will preserve eligibility for benefits even if that is not its primary purpose.

There are three types of SNTs:

First Party SNT

This type of SNT is funded with the beneficiary's own assets. It is created when: (1) a person receiving government benefits comes into a financial windfall through inheritance or a lawsuit settlement or (2) a person has suffered an accident or has a disability and needs to apply for government benefits. A First Party SNT can be created by the individual with disabilities (if competent to do so) or by a parent, grandparent, legal guardian or a court but the trust must be both created and funded the beneficiary reaches age 65. Upon the disabled beneficiary's death, the State will have the right to be paid back from any remaining funds for the cost of services provided to the trust beneficiary by the Medicaid program.

Third Party SNT

This type of SNT is used by parents or other family members to establish a nest egg for a person with a disability. It does not become an asset of the beneficiary, and allows him or her to receive the financial help without threatening eligibility for means-tested government benefits. Once the beneficiary dies, any funds remaining in this trust are not subject to the Medicaid payback provision, but may pass to other heirs designated by the trust's creator.

Pooled Income Trust

A Pooled Income Trust allows individuals with disabilities who do not have a family member or trusted person to manage their affairs to protect their assets by pooling them with those of others in a similar situation. The assets are placed in a trust established and managed by a nonprofit organization. Funds are pooled for purposes of investment and management, but are treated as the disabled person's separate property and held in a discrete account for his or her benefit. The funds remain available for his or her use at the discretion of the nonprofit trustee. Some Pooled Income Trusts provide special focal points, such as case management and advocacy for a fee or services for those who need special assistance. When considering this type of trust, it is essential to research the nonprofit that administers the trust to determine whether its priorities for the trust are aligned with your family member's needs. Pooled Income Trusts are available for both first party and third party SNTs.

Regardless of the type of SNT created, it will provide flexible options for safeguarding the assets of people with disabilities, both for purposes of protecting government benefits and for providing personalized financial assistance.

Guardianship FAQ

Q. *What is the difference between the two types of guardianship that New York State law provides?*

A. The first type, Article 17-A of the Surrogate's Court Procedure Act, is available only to persons who are intellectually or developmentally disabled, provided the disability began before the age of 22 (except for traumatic head injuries). A 17-A guardianship is relatively simple. An application is submitted to your county Surrogate's Court and a brief hearing may be held. This type of guardianship is not always the best choice for qualifying individuals with significant assets, as investment and distribution are controlled by the court. The second path to guardianship in New York is set forth by Article 81 of the Mental Hygiene Law. This proceeding takes place in the county Supreme Court and follows a highly structured process including a formal petition (prepared by an attorney) and a hearing at which the individual with the disability must be present. It can take longer and cost more money to institute an Article 81 guardianship, but the guardian typically has greater freedom in investments and distributions subject to an annual court review. Of course, this is also the only option for individuals who are not intellectually or developmentally disabled.

Q. *What is the difference between guardianship of the person and guardianship of the property?*

A. A guardian of someone's person makes essential basic life decisions, such as where that person will live, which doctors he or she will see, what medical treatments will be administered, and what day programs or supervised work experiences he or she may participate in. However, the guardian cannot force the individual to undergo psychiatric treatment or drug or alcohol rehabilitation. A guardian of someone's property oversees investment of all his or her assets as set out by the court that awarded the guardianship. Sometimes both of these types of guardians are the same person. When the person with a disability has substantial assets, the court may appoint a professional or corporation as guardian of the property.

Q. *My son is 17 and is developmentally disabled. Should I seek appointment of a guardian to ensure that he is taken care of?*

A. Appointing a guardian is a serious step. Fortunately, the guardianship can be custom tailored to provide your son with direction in the areas where he is unable to provide it himself. These typically include financial and serious medical decisions. You can limit the guardian's power to just these areas and allow your son to make his own decisions in other aspects of his life.

Q. *My 20 year old daughter is only physically disabled. Should I consider a guardianship?*

A. Probably not, because physical disability does not prevent her from making her own decisions about who should be her surrogate. Guardianship involves taking away rights from the affected individual, which the courts are reluctant to do. She should execute a Health Care Proxy, Power of Attorney, HIPAA Release, and Living Will so she can select trusted surrogates who can make substantial decisions about her treatment and her assets, if necessary. She might also consider placing her assets into her own Special Needs Trust (*see* "First Party SNT" on page 3).

Q. *My 35 year old sister is developmentally disabled and is employed at a special work program. Is guardianship necessary?*

A. It is a deeply personal decision in which both your sister's needs and your family's ability to advocate for her must be carefully considered. For example, changes in staffing or policy at the work program could suddenly make the situation very uncomfortable for your sister. She probably will not be able to advocate effectively for

herself and without a guardianship or some other sort of legal standing, family members may not be able to readily help her.

Q. *My daughter is 21 and has a severe eating disorder. Can I be appointed as her guardian so that I can have her hospitalized?*

A. No, except if she is a danger to herself or others. The guardianship law does not allow guardians to compel treatment. We recommend that you contact an advocacy organization for help with these issues.

Q. *Mom is getting older and is starting to show signs of dementia. She is unable to make her own medical decisions, let alone financial ones. Should I seek to be appointed as her guardian?*

A. It is possible that this approach will work for you, but many families choose a team approach which keeps the aging parent involved. This involves a Health Care Proxy, HIPAA Release and other appropriate advance directives and trusts. The directives would come into effect as soon as two doctors believe your mother is in danger. If your mother still has the capacity to issue advance directives such as these, this is probably the best route. If not, the guardianship is the secondary route.

Disability Benefits

Families typically work hard to provide for members with disabilities, but a regular income stream is vital. The government benefits profiled below are the primary sources of dependable income for persons with disabilities. All are administered by the Social Security Administration ("SSA") and all pay monthly cash benefits.

The Definition of Disability

Before we explain the programs, it is important to note that SSA defines disability in its own particular way. Unlike the Worker's Compensation program, SSA does not allow for partial disability. For adults, the definition is based strictly on the ability to work (or, in legal terms, to engage in "substantial gainful activity" for 12 continuous months), while for those disabled before the age of 22, the definition centers on the inability to engage in age-appropriate activities of daily living.

Social Security Disability Insurance (SSDI) and Childhood Disability Benefits (CDB)

Who:

- Disabled workers and their dependents or heirs
- Disabled adult children or parents either deceased or currently receiving Social Security, retirement, or disability benefits. The beneficiary's disability must have begun before age 22 (this is usually referred to as CDB benefit).

How Much:

- The monthly benefit depends on the individual's (or parent's) Primary Insurance Amount, following the same formula as Social Security retirement benefits. It is based on the length of time worked, the maximum Social Security wage base during the work history and the worker's overall income.

Means Testing:

- There is no means test for SSDI or CDB.

Supplemental Security Income (SSI)

Who:

- Individuals who are disabled or blind and have limited income and few financial resources. People who receive SSI benefits also automatically receive Medicaid.

How Much:

- The monthly payment varies and increases with annual cost of living adjustments. Each state can also add supplemental income, which varies year to year. In New York, the maximum monthly benefit is calibrated to federal and state poverty

levels. In New York, the monthly stipend for 2016 is $784 for an individual living alone. This amount may be reduced when an individual receives SSDI or CDB, or if the beneficiary receives other income or assistance with shelter.

Means Testing:

- To receive SSI, an individual must meet a rigorous means test which examines three types of income:
  - Earned (work/self-employment)
  - Unearned (annuities, interest, Social Security, alimony, rent)
  - In-Kind (food, shelter, or something used to get one those items)

  This limit is redefined each year.

Resource Levels:

- The maximum allowable asset level for individuals to qualify is $2,000.

The Application Process

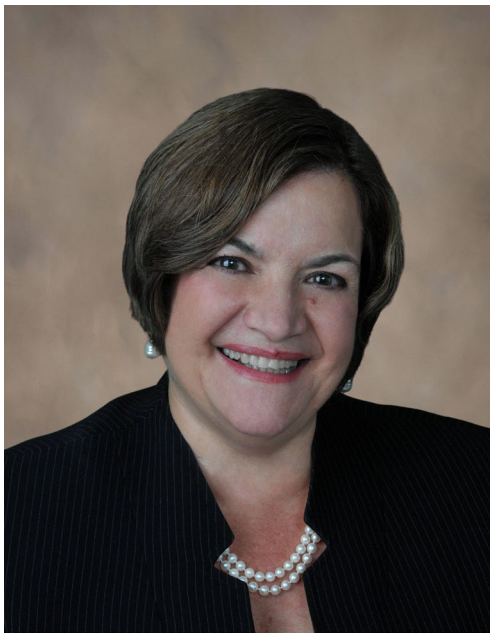
Much has been written, and many urban legends circulated, about the process of applying for SSI, SSDI and CDB. Here are some valuable tips to help you navigate the application process:

- Start off by applying. You can obtain the application forms (and more information) online at www.ssa.gov/disability. However, the forms must be filed in original hard copy.
- Prepare to demonstrate the disability. SSA is very strict about this, and there are few automatic findings of disability.
- Be ready to appeal. According to many experts, first-time applications for disability benefits are often denied. Once you receive the first denial letter, file a Request for Reconsideration immediately. This MUST be done within 60 days of the original denial using a form available from SSA. If your reconsideration is denied, you have 60 days to file a Request for Hearing. At this informal private hearing an administrative law judge will hear your case. You will want to bring new evidence or present your argument in a new way. You may even want to be represented by an attorney with experience in this area.

Conclusion

Government benefits can be important to helping your child retain a reliable income stream to meet ongoing needs and expenses. Typically, a complete financial strategy for a person with a disability should include both government benefits and a Special Needs Trust.

For assistance with exploring your family's eligibility for benefits – and with the application process – contact Frances M. Pantaleo at Bleakley Platt & Schmidt, LLP today.



Frances M. Pantaleo is a partner at Bleakley Platt & Schmidt LLP, concentrating in the areas of Elder Law, Trust and Estates , Medicaid Planning, Special Needs Planning and legal issues affecting individuals with disabilities and their families. She is a member of the National Academy of Elder Law Attorneys and a Past Chair of the Elder Law and Special Needs Section of the New York State Bar Association and a member of its Special Needs Planning Committee. She has previously served as Chair of the Elder Law Committee of the Westchester County Bar Association and Chair of the Health and Elder Law Section of the Westchester Chapter of the Women's Bar Association.

Ms. Pantaleo has been repeatedly recognized as a "Super Lawyer" and a "Best Lawyer" in the area of Elder Law and has been named one of the top twenty-five attorneys in Westchester County by the Super Lawyer publication. She has received an AV rating (the highest available) from Martindale-Hubbell.