

Guardianship
and
Special Needs Trusts:
**What Every Parent
Needs to Know**

Presented by David Slonim, Esq.
of the Slonim Law Firm



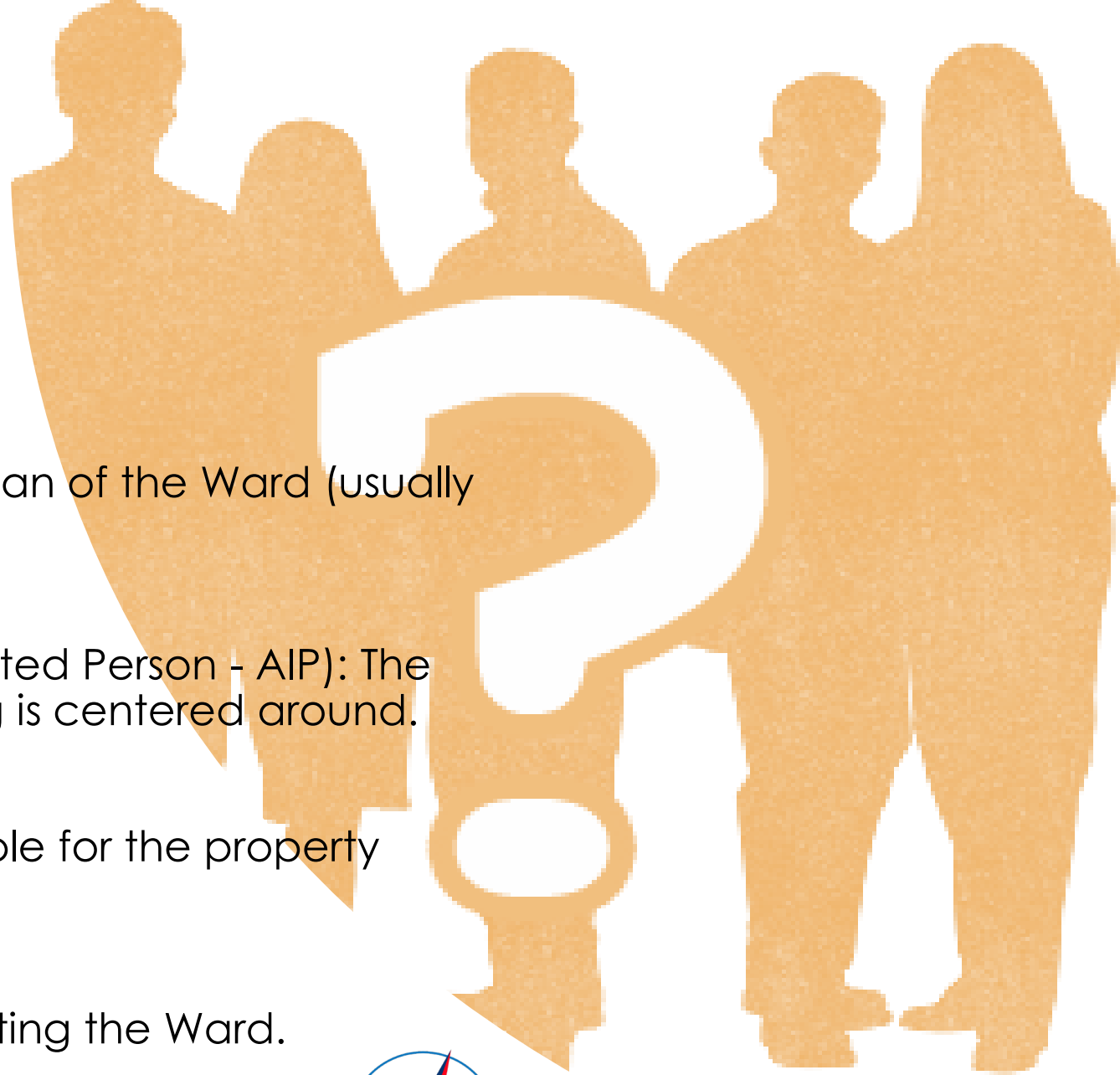
What is a Guardianship?

- A guardian is someone appointed by the court to oversee a person's legal, financial, and/or medical affairs.
- A guardian is usually appointed because the Ward is incapable of managing themselves, either through incapacity or age (minors).



Who's Who?

- Petitioner: person requesting to be guardian of the Ward (usually proposed guardian)
- Ward (sometimes the Alleged Incapacitated Person - AIP): The person who the guardianship proceeding is centered around.
- Guardian: court order person to responsible for the property and/person of the Ward
- Elisor: Court appointed attorney representing the Ward.



Why a Guardianship?

- Without a guardianship, once a person reaches the age of majority (18), then they are the only ones who can legally make legal, financial, and medical decisions for themselves. YOU CANNOT do so on their behalf.
- Not the same as a Durable Power of Attorney.
- Without a guardianship in place, your child is subject to possible exploitation, abuse, or neglect.
- Only a judge can create a guardianship.



Guardianship Advocate Basics

Guardian Advocate (F.S. 744.3085 & 393.12)

- ❖ Courts are encouraged to consider appointing a guardian advocate, when appropriate, as a less restrictive form of guardianship.
- ❖ Doesn't require an attorney to represent the proposed guardian.

If a Guardian Advocate is inappropriate or ineligible, then:

- ❖ Emergency Temporary Guardian (F.S. 744.3031) (Immediate danger of abuse, exploitation or neglect)
- ❖ Plenary Guardian (F.S. 744) (of the Person and Property)
- ❖ Standby Guardian (F.S. 744.304)

Guardian Advocate Details

- The court may appoint a guardian advocate, without an adjudication of incapacity, for a person with developmental disabilities if the person lacks the capacity to do some, but not all, of the tasks necessary to care for his or her person, property, or estate.
- Must meet F.S. §393.063(12): (i) a person with a developmental disability & an Intellectual Disability - including, but not limited to Cerebral Palsy, Autism, Spina Bifida, Downs Syndrome, **that manifested before the age of 18**, (ii) constitutes a substantial handicap for the rest of the person's life, and (iii) substantially impairs the person's ability to appropriately perform activities of daily living.
- Need to provide IEP or similar document to the court.



A Ward's Rights, Removed

1. To marry. If the right to enter into a contract has been removed, the right to marry is subject to court approval.
2. To vote.
3. To personally apply for government benefits.
4. To have a driver's license.
5. To travel.
6. To seek or retain employment.
- 7. To contract.**
8. To sue and defend lawsuits.
9. To apply for government benefits.
10. To manage property or to make any gift or disposition of property.
- 11. To determine his or her residence.**
- 12. To consent to medical and mental health treatment.**
- 13. To make decisions about his or her social environment or other social aspects of his or her life.**



The Standby Guardian

Who takes over if we're not around?

- Upon petition of a currently serving guardian, a standby guardian of the person or property of an incapacitated person may be appointed by the court.
- The standby guardian shall be empowered to assume the duties of guardianship immediately on the death, removal, or resignation of the guardian of a minor, or on the death, removal, or resignation of the guardian.

Guardian Requirements

- 18 years or older & a Florida resident, unless non-resident is related to the ward or a legally adopted child or adoptive parent of the ward.
- Unable to serve as Guardian if: Convicted felon (ever) or impairment making you incapable of guardian duties, a creditor, or serve in a health care or business capacity.
- A person MUST APPLY (petition) to the court to become someone's guardian (includes completing an application to the court)
- May require a background check, credit investigation & education course

When To Initiate a Guardianship

- Guardian Advocate
 - **File when the Ward is between 17 and 18, or**
 - Anytime after 18 & meets requirements
- Standby Guardian
 - On or around the same time you are appointed Guardian of person
- ETG & Plenary Guardian
 - Immediate danger to person's health or assets
 - Times of incapacity & no advanced directives

ready.
set.
go!



What's The Cost?

▶ Filing Costs

- \$400 - Plenary Guardianship
- \$231 - Petition to Determine Incapacity (Plenary only)
- \$1,200 - Examining Committee (Plenary Only)

▶ Attorney's Fees

- Elisor- Uncontested typically ranges from \$900 to \$1,500
- Attorney for Petitioner
 - Approximately \$3,500.00 for Guardian Advocate
 - Approximately \$5,000.00 for Plenary Guardian

▶ Annual Costs

- Audit Fees by Brevard Clerk of Court range from \$20-\$250
- Attorney Fees- typically can range from \$200-\$400 for typical annual plan

- **Indigent - Court Costs and Elisor costs are waived and paid by the State of Florida**

What's Next?

- **Annual Requirements**

- Annual Plan
 - Each year physician's report required
 - Cannot be waived by the court
- Annual Accounting
 - Must provide accounting to the court for all monies of the Ward expended by Guardian
 - May be waived by the court if insufficient income/assets
- 8 Hour Educational Course (sometimes waived)

Self Settled SNT- d(4) (a)- First Party

- Must be disabled (not required before creation)
- Must be under the age of 65 @time of creation/funding
- Must be created by disabled person, parent, grandparent, guardian or court and funded with **assets of the disabled individual**
- Disabled person cannot have control or direct the assets of the trust
- Needs an Independent Trustee
- Used to supplement, **NOT** supplant public benefits
- Must have a Medicaid payback provision



Drawback of a Self-Settled Trust

- Require Medicaid payback at the death of the disabled individual – State receive all funds in trust or up to amount equal to total assistance paid by the state
- Distributions to the disabled person for food and shelter result in reduction of SSI benefits
- Payments from the trust must always be for the sole benefit of the disabled person (trustee's fees, legal fees considered beneficial)
- Transfers after age 65 not sheltered & considered asset for SSI/Medicaid

Pooled SNT d(4)(c)

- Created and managed by non-profit association
- Irrevocable
- Parent, grandparent, legal guardian or court executes joinder agreement to establish account
- Assets pooled for investment but each participant has individual account
- Non-profit is trustee
- Disable person cannot control/direct assets
- Supplement **NOT** supplant government benefits
- Medicaid payback of charity gift
- Typically used for smaller gifts, inheritance, settlements



Drawback of a Pooled trust

- Upon the death of the disabled person the funds in the pooled trust are paid to the states that provided medical assistance or remain with the non-profit association
- Cannot go to contingent beneficiaries of the disabled person

3rd Party SNT

- Must be created by anyone OTHER THAN the disabled person, such as parent, grandparent, guardian or court and funded with **assets of the donor**.
- Disabled person cannot terminate/revoke trust
- Must have independent trustee
- Disabled person cannot control/direct the assets
- Supplement **NOT** supplant the disabled persons benefits
- No Medicaid payback required remainder of funds can go to contingent beneficiaries

Drawback of a 3rd Party Trust

- Absolute inability to hold funds belonging to the disabled person.
- If disabled person receives an inheritance that wasn't directed into the SNT to begin with the funds have to be placed in either a 1st party trust or a pooled trust.
- Can be expensive to create/manage

ABLE Account

- Federal Statute “Achieving better life experience act of 2014”
Florida ABLE Program (F.S. 1009.986)
- Alternative/Supplemental to SNT
- Who is eligible?
 - SSI disability or blindness prior to age 26, or entitled to Disability Insurance Benefits (DIB), Childhood Disability Benefits (CDB) that started prior to 26;
 - 1. Has a medically determinable impairment meeting certain statutorily specified criteria; or 2. Is blind; and 3. A disability or blindness, **which condition was present before age 26**
- Individuals over 26 who were in payment status prior to 26 or can prove condition present prior to 26
- No upper age limit - may deposit funds after 65
- Annual deposit limit **\$17,000** (2023); accumulation limited is \$100,000 for SSI and Medicaid
 - PLUS In addition, an ABLE Account Owner who resides in the continental U.S. and who works and does NOT participate in an employer sponsored retirement plan – within that calendar year – may contribute up to an additional **\$13,590** from their earnings into their ABLE account.
- Up to a maximum balance of \$418,000
- Disabled person or parent, guardian, POA have signature authority

ABLE Account (continued)

- Tax Free for future expenses
- Qualified Disability Expenses-
 - education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, funeral and burial expenses
- Sign up @ <http://www.ableunited.com/>
- Cost: Free (mostly)
 - Free to setup and maintain, but there is a fee associated with the investment choices, ranging from 0.035% to 0.29%.



Drawback of ABLE Accounts

- Condition must have presented itself prior to age 26
- Disabled Person could have control of their own funds (Misuse & exploitation)
- Medicaid Repayment Requirement (however Qualified Disability Expenses can be paid first)
- Contribution/accumulation limits

Wrapping Up...

- If your child is close to reaching the age of 18 and you haven't gotten a guardianship in place yet, now's the time
- Don't forget to have your own estate planning done
- Check with an Elder Law attorney to see what sort of additional planning needs are appropriate for your family



Questions?

Thank you for listening!

