



Considerations for Guardians Obtaining and Protecting Means-Tested Government Benefits

BY PATRICK J. CLIFFORD, ESQ.

This article examines the challenges faced by guardians of persons with special needs, who are often family members, in obtaining and protecting means-tested government benefits for Protected Persons. This process requires an understanding not only of the guardianship system, but also of the rules of various state and federal agencies that administer these programs. Guardians may not appreciate that failure to comply with these rules may result in a significant reduction or loss of crucial benefits.

The need for guardianship and public benefits may arise from a common cause, such as when a person loses capacity and becomes disabled due to injuries sustained in an accident, or when elderly persons with progressive dementia can no longer care for themselves or make their own decisions. Many family members become guardians to act as caregivers for loved ones but find themselves overwhelmed as they attempt to navigate arcane government rules and fulfill their fiduciary duties. An experienced attorney with knowledge of the systems and rules can be invaluable in assisting a guardian in protecting these benefits.

The Players and Their Roles

The guardian of a Protected Person with special needs must be familiar with and consider the roles and perspectives of several persons and entities, including the court, and will need to act as an advocate to obtain and protect benefits.

The appointment of a guardian over another adult inevitably results in a loss of personal autonomy, so statutory and procedural safeguards have been implemented to protect the rights and well-being of the Protected Person throughout the process, including the appointment of an attorney who will advocate for the wishes of the Protected Person wherever possible and ensure that the Protected Person's due process rights are respected.¹

The court retains supervisory authority over the guardian, who acts as a fiduciary for the Protected Person, with responsibilities, including protecting and accounting for the guardianship estate, that go far beyond caregiving.

Consequently, a guardian must obtain court approval to take many of the actions that may be necessary to obtain and protect benefits, such as establishing a trust for the benefits of the Protected Person or making gifts of the Protected Person's assets in order to obtain Medicaid benefits.² The guardianship court will approve such actions only after determining that doing so is in the best interest of the Protected Person, and after hearing from the court-appointed attorney.

Beyond the court proceeding, the guardian must demonstrate to various state and federal government entities that the Protected Person qualifies for and is entitled to benefits. These entities may include the federal Social Security Administration (SSA), Centers for Medicare and Medicaid Services (CMS), the Veterans Benefits Administration (VBA), the Nevada Division of Welfare and Supported Services (DWSS), and the Aging and Disability Services Division (ADSD), among others.

Means-Tested Benefits

Some government benefits, such as regular Social Security retirement and Medicare, are available regardless of financial status, usually because recipients have already paid into these programs throughout the course of their working career. Other benefit programs are intended for persons of limited means and are often sought by persons who, because of disabilities, have not been able pay into the system. These means-tested benefits can only be obtained if the applicant meets certain income and resource limits.

Supplemental Security Income (SSI) and Medicaid are means-tested benefits frequently sought on behalf of Protected Persons to provide income and medical care. Additional benefits may also be available, such as the Supplemental Nutrition Assistance Program (SNAP), housing subsidies, home and community-based services (HCBS) waivers, VA enhanced pension ("Aid & Attendance"), and the Community Options Program

for the Elderly (COPE). Another benefit frequently needed by Protected Persons is Medical Assistance for the Aged, Blind, and Disabled (MAABD), which helps to pay for skilled nursing care in Nevada.

Each of these programs has its own financial criteria, and its own rules for determining how income and resources will be treated. For example, an applicant for MAABD benefits cannot have gross countable income exceeding \$2,742 per month or more than \$2,000 in countable assets.³ The applicant's home is not considered an available asset when applying for many benefits. An applicant for MAABD benefits can shelter excess income with a Qualified Income Trust, also known as a Miller Trust.⁴

Ensuring Eligibility

When a Protected Person needs means-tested benefits, it is incumbent on the guardian to ensure that the financial requirements are met.

A guardian may need to obtain benefits for the Protected Person at the outset of the guardianship or ensure that benefits continue if the Protected Person comes into additional resources, such as a personal injury settlement, inheritance, or proceeds from the sale of an exempt asset, like the Protected Person's home.

To avoid a loss or reduction in benefits, the guardian must find a way to shelter these assets so that they will not be counted against the Protected Person. Possible methods include "spending down" by purchasing exempt assets for the Protected Person, the establishment of a first-party or pooled special needs trust for the Protected Person⁵, the purchase of Medicaid-compliant annuities, or the establishment of an ABL Account, if applicable.⁶

A guardian cannot simply give away a Protected Person's assets in order to qualify for benefits, as doing so can result in a loss or reduction of benefits. For example, a transfer of assets for less than fair market value will result in a loss of MAABD benefits roughly equal to the number of months of nursing home care that the transferred assets would have paid for.⁷ However, some transfers of

assets will not result in a penalty period, such as transfers made more than five years before the application for benefits, transfers of exempt assets (except the home, unless certain conditions are met), or transfers to the Protected Person's spouse or disabled child.⁸ Any such transfer must be approved by the court, upon a finding that the transfer of assets would be in the Protected Person's best interest.

Avoiding Spousal Impoverishment

Married persons need not go broke to pay for their spouses' care in a skilled nursing facility (SNF). Spousal impoverishment rules have been implemented to allow the "community spouse" to retain up to \$148,620 in countable assets and keep a portion of the income of the "institutionalized spouse" to maintain a minimum income

of \$2,465 per month and up to \$3,715.50 per month (as of July 1, 2023) to cover housing and utility costs.⁹ These rules are valuable tools for sheltering assets of Protected Persons in nursing homes, and ensuring that married Protected Persons can

afford to remain at home even if their spouses are residents of SNFs.

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Professional Guidance

In my experience as an elder law attorney, family members become guardians of their loved ones in order to provide care and ensure that their wishes and best interests are met. However well meaning, family members may be ill-equipped to meet the challenges of fulfilling their fiduciary duties, especially when doing so requires knowledge of complex laws and regulations. Failure to act in accordance with these rules can cause their loved ones to lose valuable benefits.

For this reason, I recommend that guardians seek the assistance of professionals wherever possible. Before attempting to act as the trustee of a first-party special needs trust, a guardian

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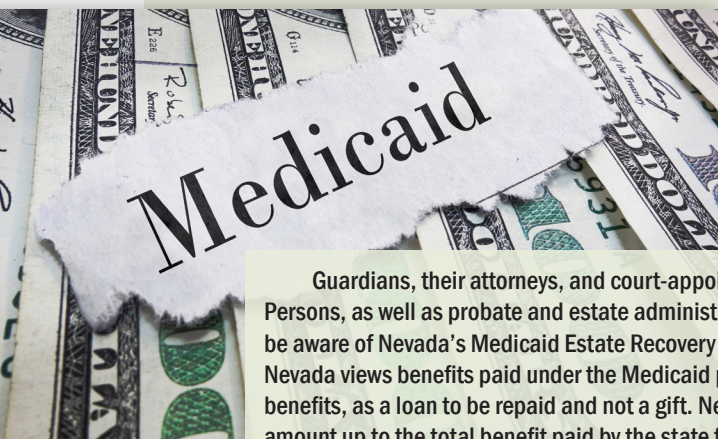
should seriously consider using a pooled special needs trust administered by a not-for-profit trustee that is well versed in permissible trust expenditures, rather than risk a reduction in benefits.

A guardian should also consider hiring a professional accountant or bookkeeper to maintain records and prepare statutorily required accountings, rather than spending hours on tasks that a professional can complete much more efficiently. The use of a professional accountant is encouraged by NRS 159.183(1)(c), which provides that a

guardian must be allowed reasonable expenses incurred in retaining accountants, attorneys, appraisers, and other professional services, subject to the discretion and approval of the court.

Finally, a guardian should seek guidance from a professional with knowledge of government benefits programs, such as an elder law attorney or Veterans Service Organization. Relying on information received from ill-informed or misguided lay persons can result in the loss of the Protected Person's benefits, which is too high a price to pay.

Medicaid Estate Recovery



Guardians, their attorneys, and court-appointed attorneys for Protected Persons, as well as probate and estate administration attorneys should all be aware of Nevada's Medicaid Estate Recovery (MER) program. The state of Nevada views benefits paid under the Medicaid program, including MAABD benefits, as a loan to be repaid and not a gift. Nevada will seek to recover an amount up to the total benefit paid by the state from the estates of persons who received benefits while over the age of 55, residents of skilled nursing homes or similar facilities, or for whom a first party or pooled special needs trust has been established.

However, both federal and state law limit the state's ability to seek recovery under certain circumstances, which can greatly benefit Protected Persons. The state cannot recover from the estate of a Medicaid recipient as long as there is a surviving spouse, surviving child under the age of 21, or surviving child of any age who is blind and/or disabled. The state may only seek recovery after all these exemptions no longer exist, pursuant to NRS 422.29302 and 42 U.S.C. 1396p(b)(2)(A).

A guardian should be prepared to challenge any claims for recovery if the Protected Person is the surviving spouse of a Medicaid recipient. Even if the Protected Person is only an heir of a Medicaid recipient, a guardian may need to object to estate recovery when the Protected Person or another heir is blind or disabled, since estate recovery would diminish the Protected Person's share of the decedent's estate.



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ENDNOTES:

1. NRS 159.0485(1).
2. NRS 159.113(1)(f), NRS 159.125.
3. <https://www.medicaidplanningassistance.org/medicaid-eligibility-nevada/> (last visited July 6, 2023).
4. DWSS Medical Assistance Manual, section F-520.6, <https://dwss.nv.gov/Medical/Medical-Manual-3-CONT/> (last visited July 6, 2023). Unfortunately, a Miller Trust cannot be used to shelter excess income to ensure eligibility for HCBS waivers. DWSS Medical Assistance Manual, section F-425, <https://dwss.nv.gov/Medical/Medical-Manual-3-CONT/> (last visited July 6, 2023).
5. For an excellent article discussing of the use of the various types of special needs trusts, see "Special Needs Trust Planning Provides Guaranteed Supplemental Relief for Individuals Receiving Government Needs-Based Assistance" by Stephanie Hartman Rojo, *Nevada Lawyer*, Volume 29, Issue 4, April 2021, https://nvbar.org/wp-content/uploads/NevadaLawyer_April2021_Special-Needs-Trust-Planning.pdf
6. An account established pursuant to the Stephen Beck Jr., Achieving a Better Life Experience (ABLE) Act, 26 USC 529a, can shelter up to \$100,000 (for SSI and Medicaid) for a person who developed a qualifying disability before age 26. The qualifying age of disability will increase to age 46 in 2026, pursuant to the 2022 ABLE Age Adjustment Act, Pub. L. 117-328, div. T, title I, §124, Dec. 29, 2022, 136 Stat. 5314.
7. The current "penalty divisor" in Nevada is \$9,059.10 per month, so an uncompensated transfer of \$90,591 would result in a penalty period of 10 months, <https://www.medicaidplanningassistance.org/penalty-period-divisor/> (last visited July 6, 2023).
8. DWSS Medical Assistance Manual, section F-440.5, <https://dwss.nv.gov/Medical/Medical-Manual-3-CONT/> (last visited July 6, 2023).
9. May 11, 2023, CMS informational Bulletin Updated 2023 SSI and Spousal Impoverishment Standards, <https://www.medicaid.gov/federal-policy-guidance/downloads/cib051123.pdf> (last visited July 6, 2023).