

Service

Private Wealth

Professionals

JENNIFER C. SMITH

CHATTANOOGA:

423.755.2678

JENNI.SMITH@

HUSCHBLACKWELL.COM

NICHOLAS A. SCHOLZ

ST. LOUIS:

314.345.6277

NICHOLAS.SCHOLZ@

HUSCHBLACKWELL.COM

Understanding Key Differences Between Guardians and Special Needs Trustees

Individuals with a disability or special needs (hereafter, the “individual”) frequently have a team of people providing them the care and assistance they require. For families managing this care team, there is an understandable impulse to consolidate the team by having some people occupy multiple roles. However, in many situations, the key roles of Guardian[1] and Special Needs Trustee are best served by different individuals possessing distinct skill sets.

The individual’s care team often includes the following three roles:

Guardian of the Person

A Guardian of the Person is someone appointed by the court to make personal decisions for the individual. These decisions can include medical decisions, decisions about living arrangements, and decisions about the individual’s everyday personal care. For example, a Guardian of the Person may have to make decisions about whether to consent to or refuse medical procedures on behalf of the individual. The Guardian of the Person may also have to decide if the individual is able to live on their own or if they should be placed in a group home or assisted living situation. Guardians of the Person frequently have to make arrangements for the individual’s everyday concerns such as hygiene, nutrition, and social activities.

Guardian of the Property

A Guardian of the Property is someone appointed by the court who handles the individual’s personal assets. For example, a Guardian of the Property is charged with managing any income the individual has and using that income to pay the individual’s bills and expenses. The Guardian of the Property also functions as a steward for the individual’s assets, ensuring that the assets are

used for the individual's benefit and not spent inappropriately. Lastly, the Guardian of the Property must keep detailed records of the individual's finances and make reports to the court.

Note: The court frequently appoints the same person to be the Guardian of the Person and Guardian of the Property. For the remainder of this article, these roles will be referred to jointly as the Guardian.

Special Needs Trustee

A Special Needs Trustee (SNT Trustee) is someone who handles the assets set aside for the individual's benefit in a Special Needs Trust. An SNT Trustee manages the assets held in the Special Needs Trust and distributes those assets to the individual according to the terms of the Special Needs Trust, which frequently includes specific rules that must be followed in order to maintain the individual's eligibility for government benefits (more information on Special Needs Trusts here). Often, Special Needs Trusts contain far more assets than the individual holds in their own name, and the SNT Trustee must be able to effectively manage such assets.

While there is no prohibition on individuals acting both as Guardian and SNT Trustee in most jurisdictions, there are a few reasons to have different people occupying these roles.

Skill set

The roles of Guardian and SNT Trustee require fundamentally different skill sets. The Guardian often has a much broader set of decisions to make on behalf of the individual, such as where to live, what healthcare treatments to pursue, and even who gets to visit the individual. In addition to these decisions, the Guardian is also generally charged with representing the individual's best interests and ensuring that the individual's rights are protected. Families will likely find that having someone who is personally familiar with the individual and who can act in their best interest regarding a variety of decisions is best suited to act as Guardian.

Though Guardians may make financial decisions for the individual, those decisions only pertain to the individual's personal assets, which are frequently modest. For this reason, families may find that someone with limited financial experience is still qualified to act as Guardian. On the other hand, SNT Trustees often deal with more significant financial resources. The SNT Trustee must be able to effectively manage and invest these assets, evaluate the individual's financial needs, and make distributions from the Special Needs Trust according to those needs without disqualifying the individual from receiving government benefits. SNT Trustees must be thoroughly educated in the proper management of Special Needs Trust assets to not jeopardize the individual's qualification for government benefits. The SNT Trustee must also handle annual accountings, tax reporting, and Social Security/Medicaid compliance. For these reasons, families may wish to have someone with extensive

financial experience, such as a professional fiduciary like a bank or trust company, act as the SNT Trustee.

The main drawback of a professional fiduciary is that they charge a fee to act as the SNT Trustee. This fee could be a flat yearly fee, or it could be a percentage of the assets held in the Special Needs Trust. If the fee is a percentage of the assets held in the Special Needs Trust and the Special Needs Trust holds significant assets, the fee could be quite high. However, this higher fee is justified by the greater investment and reporting responsibilities of such a Special Needs Trust.

Succession planning

If the SNT Trustee and Guardian roles are held by the same person and that person becomes incapacitated, the individual loses two members of their care team at once. This can be particularly problematic for the Guardian role, which often requires daily decision making. A gap in the Guardian role can result in an immediate, negative impact on the individual. Fortunately, Special Needs Trusts often name successor SNT Trustees to act in the event the primary SNT Trustee cannot act. Therefore, even if there is a gap in the Guardianship role, the Special Needs Trust will at least have continuity of management. Additionally, if the SNT Trustee is a professional fiduciary like a bank or trust company, there is little risk that the SNT Trustee will become unable to act.

Accountability and oversight

Having different people act as the SNT Trustee and Guardian can provide an additional layer of accountability and oversight. This separation of powers can help ensure that decisions made for the individual's personal well-being, day-to-day life, and personal assets (Guardian) and decisions made regarding the individual's financial needs and support (SNT Trustee) are independently evaluated. However, for this separation of powers to operate smoothly, it is also imperative that the Guardian and the SNT Trustee get along and work together to achieve the best outcome for the individual and to comply with the court's orders.

Contact us

Ultimately, the makeup of the care team for an individual with a disability or special needs depends on the specific circumstances and the individual involved. Seeking legal advice from an attorney with experience in special needs planning can help ensure that the arrangement meets the legal requirements and serves the best interests of the individual. Contact a member of the Husch Blackwell Private Wealth team or your Husch Blackwell attorney today and schedule a meeting to discuss.

[1] Some states use the term Conservator in place of the term Guardian.