
SPECIAL NEEDS ESTATE PLANNING: WHAT DO YOU NEED TO KNOW?

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Special needs require special attorneys.

Objectives of Special Needs Estate Planning

- ◆ Security & peace of mind – for parents and for mentally ill child (or spouse)
 - Inheritance protected from dissipation
 - Financial help available to pay for child's living expenses (over and above SSI/SSDI)
- ◆ Promote child's independence and happiness
- ◆ Protect availability of SSI income and
- ◆ Protect availability of medical care (Medicaid)

Basic Estate Planning Options

- ◆ No Will, or Will naming mentally ill Child/Spouse as Direct Beneficiary
Disadvantages:
 - Beneficiary unable to manage the assets
 - ◆ Assets rapidly depleted
 - ◆ Beneficiary is subject to exploitation
 - Likely to cause disabled beneficiary to lose
 - ◆ SSI income
 - ◆ Medicaid benefits

Estate Planning Options Continued:

◆ Leaving mentally ill child out of Will Disadvantages:

- Depending on other sibling to care for her
- Likely results:
 - ◆ Resentment – by ill child , the other sibling
 - ◆ Sibling receiving the inheritance could:
 - ❖ Divorce – lose assets in settlement,
 - ❖ Bankruptcy,
 - ❖ Fail to live up to “moral obligation” to ill child

Estate Planning Options Continued:

- ◆ Standard Living Trust or Testamentary Trust – Better (but not Best for disabled)
 - Trustee able to manage and protect assets,
 - Trust can provide income to help support the beneficiary.
 - But:
 - ◆ Standard Trusts are “Support Trusts” – will cause disabled beneficiary to lose SSI/Medicaid
 - ◆ Trust assets may be rapidly depleted paying for medical needs and living costs without Medicaid and SSI

Estate Planning Options Continued:

◆ Special Needs Trust –

- Best Option for child disabled by mental illness
- Can be established during Grantor's lifetime, with Grantor as initial trustee;
- Usually funded upon death of Grantor;
- Grantor can name residuary beneficiaries;
- Can reduce estate taxes;
- Trust can be named as owner & beneficiary of Life Insurance, Retirement Plans, Wills;
- Other family members can also make gifts to SNT;

Estate Planning Options Continued:

◆ Special Needs Trusts (contd.)--

- Gifts to SNT don't cause beneficiary to lose government benefits like SSI & Medicaid;
- Funds last longer because not needed to pay for medical costs or basic support of beneficiary
- Trustee pays directly for supplemental needs expenses – distributions don't count as income to the beneficiary
- Trustee has discretion to pay for support costs (affects SSI benefits)
- SNT for Spouse must be funded through Grantor's Will

What Is a Trust?

- ◆ A written Agreement between Grantor and Trustee:
 - The **Grantor** gives property to
 - The **Trustee** who manages the property and makes distributions to or for the benefit of
 - The **Beneficiary**
 - Support Trust: provides for “health, education, maintenance and support,”
 - SNT: pays for “supplemental needs,” not support

How Is a Special Needs Trust Different from Other Trusts?

- ◆ Trust assets not countable resource of beneficiary – eligibility retained for needs-based programs like SSI/Medicaid;
- ◆ Discretionary Trust – Beneficiary has no right to compel distributions;
- ◆ For Supplemental Needs – not for primary support of beneficiary, income generally not countable for benefits purposes;
- ◆ Usually Irrevocable – but trust can be modified to protect eligibility as laws change;
- ◆ Trustee should be knowledgeable about government benefits rules – or at least be advised by someone who is.

What Will We Accomplish with a Special Needs Trust?

- ◆ Protect assets for beneficiary's benefit during lifetime;
- ◆ Protecting SSI income and protecting Medicaid benefits means:
 - Trust assets available to provide a higher quality of life for the beneficiary;
 - Effectiveness of trust is enhanced by not being needed to pay for basic medical care or support.
- ◆ Trustee provides financial management of the resources during the beneficiary's lifetime;
- ◆ Remainder beneficiaries receive assets remaining after the death of the beneficiary – No Medicaid Payback (Third Party SNTs).

Types of Special Needs Trusts

◆ Self-Settled or “First Party” SNT (“d4A”)

- Funded with the disabled beneficiary’s own money, or funds he or she has a right to receive.
 - ◆ Used to establish eligibility for Medicaid &/or SSI
 - ◆ Used for: inheritance, savings, lawsuit settlements, etc.
- Beneficiary must be Disabled under SSI guidelines
- Irrevocable, must be established and funded before age 65
- Established by “parent, grandparent, court or guardian,” but not by the beneficiary
- Trustee should be experienced in SSI/Medicaid rules to prevent beneficiary’s loss of benefits
- Medicaid pay-back to State on death of beneficiary
 - ◆ Statute: 42 U.S.C. Sec. 1396p(d)(4)(A)

Types of Special Needs Trusts

◆ Pooled Trust (“d4C” trust) -

Self-Settled Trust: Beneficiary establishes “joinder” to existing Master Pooled Trust. Trustee is a non-profit organization.

- Advantages:
 - ◆ Can be established by parent, grandparent, court, or the beneficiary
 - ◆ Professional Trustee management
 - ◆ Less expensive to establish than d4A
 - ◆ Operating expenses lower than professional trustee of d4A
- Remainder Beneficiary is non-profit trustee to extent not paid back to State for Medicaid benefits
 - ◆ Statute: 42 U.S.C. Sec. 1396p(d)(4)(C)

Types of Special Needs Trusts

◆ “Third Party” Special Needs Trust

- **The kind used for Estate Planning-**
- Funded with someone else’s money (mom, dad, grandparents, siblings, etc.).

Examples:

- ◆ Gifts
- ◆ Life insurance
- ◆ Trust can be named as beneficiary in Will, IRAs, Retirement Plans

◆ Third Party SNT (cont'd.)

- Discretionary Trust – beneficiary has no right to distributions, but terms can be very flexible:
 - ◆ Assets not countable as beneficiary's resources
 - ◆ Distributions should be for supplemental needs
 - ◆ Trustee should not distribute cash to the beneficiary
- No Medicaid pay-back required
- Grantor can name remainder beneficiaries
- Usually not supervised by a court
- Lifetime gifts may be subject to gift tax,
- Disadvantage: Lifetime gifts may affect donor's Medicaid eligibility if donor needs nursing home within five years after gift

Types of Special Needs Trusts

- ◆ **Sole Benefit Trust** - Less well-known, less well understood, but can be very useful:
 - Like a third party SNT (Donor is mom, dad, grandparents, siblings, etc.).
 - Big Advantage: No transfer penalty if the Donor parent needs Medicaid eligibility for nursing home later.
 - “Hybrid” Trust – Requires Medicaid Pay-back to the State on death of the trust beneficiary.
 - ◆ Statutory authority: 42 U.S.C. Sec. 1396p(c)(2)(B)(iv)

Sole Benefit (Third Party Pay-back) Trusts

- ◆ May be **VERY IMPORTANT** to NAMI families
- ◆ **Opportunities abound** to use **family money** for the benefit of the family member with disabilities
- ◆ **NOTE:** For all those stories you have read about “No Transfers for Nursing Home Medicaid” – **this is a critical exception**

*What
Public Benefits
Are We Trying to
Protect?*

SNTs Protect Public Benefits

—What Public Benefits?

- ◆ **SSI** – Supplemental Security Income – Federal Benefit Rate (FBR) is \$674 per month in 2009
- ◆ **TennCare/Medicaid** – SSI brings Medicaid automatically in Tennessee – in some other states separate qualification for Medicaid
- ◆ **QMB, SLMB** – for Medicare recipients with limited income: reduced or no deduction for Medicare B Premiums from SS checks
- ◆ **Section 8 Housing, other needs-based benefits**

SSI Basics

- ◆ **Must be Disabled under SSI/SSDI guidelines**
 - Suffer from a physical or mental condition that makes the individual medically unable to earn substantial gainful employment (SGA)
 - Condition has lasted or will last for at least one year or until death.
- ◆ **Income: Countable income must usually be below the FBR (\$674 in 2009). Reductions in SSI benefits:**
 - Earned Income not all countable
 - ◆ First \$65/month not counted
 - ◆ Half of remaining earned income not counted
 - Unearned Income reduces SSI \$ for \$ after \$20 disregard
 - Can receive both SSDI and SSI, so total SS check may be greater than \$674 and still receive some SSI
 - Can earn over \$900/mo. and still receive some SSI
- ◆ **Resources:** \$2,000 max. (plus exempt assets)
 - Exempt: Home, car, household goods, etc.

TennCare/Medicaid

- ◆ Basic Medicaid Rules. Recipient must:
 - Be disabled under SSI/SSDI guidelines
 - Countable Assets less than \$2,000
 - Income Limits: Varies, up to \$2,022/ mo
 - ◆ BUT – most categories of TennCare eligibility gone except SSI, so non-institutional Medicaid recipients generally must be receiving SSI
 - ◆ **Even \$1.00 of SSI benefit qualifies recipient for TennCare/Medicaid**
- ◆ Medicaid benefits subject to economy and political whim, likely to be reduced over time

Social Security Disability

- ◆ **Not Means Tested**
(No Asset or Unearned Income Limitations)
- ◆ **Eligibility**
 - Work history – required quarters of work credits based on sliding scale depending on age
 - Disability – Same as SSI--Severe physical or mental impairment
 - ◆ Inability to do any “substantial gainful activity”
 - ◆ Can have some earned income – able to earn less than \$980/ mo. (SGA for 2009)
- ◆ **Benefits under SSDI**
 - Monthly payments--amount depends on contributions while working
 - **Medicare**--usually 2 years 5 months after onset of disability
 - ◆ Eligibility for Medicaid is still useful – pays Medicare deductibles

Social Security Disability-- Disabled Adult Child

(was "DAC," now "CDB"—Child Disability Benefits)

- ◆ Eligibility based on disabled, deceased or retired parent's work history
- ◆ Limitation: Child's Disability began before age 22
- ◆ Not Means Tested
- ◆ Benefits –
 - Monthly payments – amount depends on covered worker's contributions while working
 - ◆ Child of Retired or Disabled Worker receives 50% of Worker's Benefit
 - ◆ Child of Deceased Worker receives 75% of Benefit
 - **Medicare**--usually 2 years after payments begin

Qualified Medicare Beneficiaries (QMB)

- ◆ **Eligibility Limits 2009**
 - **Income:** \$873/mo. for an individual
 - **Resources:** \$4,000 for an individual
- ◆ **Benefits:** Pays Medicare Part A & Part B premiums, pays Medicare copayments & deductibles
- ◆ **SLMB:** Somewhat higher income limits, reduced Medicare premiums

*Balancing
The Parents'
Long-Term Care Needs
With Planning for
Disabled Child*

Nursing Home Medicaid Planning for Mom and Dad – or for Others

◆ **Income:**

- Income Cap - \$2,022 individual (“Miller” trust required above income cap)

◆ **Resources:**

- \$2,000 individual, \$3,000 couple (both eligible)
- Many asset exemptions; often well spouse can keep \$100,000 or far more

Nursing Home Medicaid Planning for Mom and Dad – or for Others

- ◆ **Gifts by Nursing Home Medicaid Applicants generally prohibited, But gifts permitted:**
 - To a disabled child of any age or
 - to a **Sole Benefit SNT** for that child
- ◆ **Sole Benefit Trusts are a Huge Planning Opportunity**
 - Protect this option by including language in Powers of Attorney authorizing gifts to spouse, disabled child

Special Needs Trust Administration

*Where the rubber meets the
road*

Distributions from SNT Require an Understanding of Public Benefits

- ◆ If the beneficiary is receiving SSI/Medicaid:
 - Cash distributions to disabled beneficiary are almost always forbidden
 - Distributions for food or shelter purposes – ISM – reduces SSI by 1/3, can cause beneficiary to lose it
 - ◆ In some cases, reducing benefits by judicious distributions makes sense, but requires experienced advice
 - ◆ Credit cards can sometimes provide flexibility (but trustee must be very experienced)
- ◆ Purpose is to supplement existing income/benefits

Buying a House

- ◆ How to title the house – depends on circumstances could be owned by SNT or the beneficiary
- ◆ Paying for insurance, taxes, upkeep, and utilities – distributions affect public benefits
- ◆ Mortgages – may be easier for beneficiary to borrow than the SNT

Buying a Car

- ◆ Titling the car/van – avoid Trust liability.
Better for SNT to lend the money to purchase
- ◆ Insurance coverage and finding an insurer
- ◆ Operating costs
- ◆ Monitoring vehicle use – potential problems

Distributions from Special Needs Trusts for “supplemental needs”

- ◆ Newspaper, cable, internet, computers
- ◆ Travel and entertainment
- ◆ Household furniture and furnishings
- ◆ Durable medical equipment
- ◆ Case/care management
- ◆ Therapy, medications, medical care, health insurance
- ◆ Income taxes
- ◆ Legal and conservatorship fees

Important SSI Concept: In-Kind Support and Maintenance ("ISM")

- ◆ One-third reduction for living in the household of another - \$224.66 in 2009
 - Alternatives to ISM
 - ◆ Pay pro rata share of living expenses
 - ◆ Make a lease arrangement acceptable to SSA
- ◆ PMV – Presumed Maximum Value Reduction - \$244.66 in 2009
- ◆ Danger: ISM sometimes can cause loss of SSI and Medicaid entirely

SNT Trustee's Duties

- ◆ READ the Trust Document! (Get professional help.)
- ◆ Care in making distributions – should not disqualify beneficiary from SSI/Medicaid
- ◆ Trustee has important Fiduciary Duties:
 - Administer Trust for Sole Benefit of Beneficiary
 - ◆ Distributions for Best Interest of Beneficiary
 - ◆ No self-dealing
 - ◆ Impartiality
 - Accountings
 - Investments
 - ◆ Prudent Management of Assets
 - ◆ Engage Professional Management if appropriate

Qualities of the Ideal Trustee:

Advocate | Accountable | Financial

- ◆ Uses its discretion in the best interest of the disabled beneficiary
- ◆ Understands public benefits and keeps up with changes in the law
- ◆ Experienced in how to wisely invest and conform to all statutory fiduciary requirements
- ◆ Understands taxes
- ◆ Keeps perfect books
- ◆ Provides advocacy and prevents abuse
- ◆ Is immortal

Selecting the SNT Trustee

Consider naming a Professional Trustee or Co-Trustee:

- Helping a difficult beneficiary can be stressful for a family member trustee – trustee burn-out
- Trustee has strict statutory obligations to invest and manage assets properly, keep good books and records
- SSI and Medicaid regulations are complex and ever-changing – easy for inexperienced trustee to get in trouble
- Potential for Mismanagement: Trustee has personal liability for proper management of trust assets – inexperienced trustee can be sued, Corporate Trustees have liability insurance.

Finding the Right Trustee

- ◆ Professional/Corporate Trustee
 - Usually best at financial management
 - Unbiased, unlikely to make arbitrary decisions
 - No conflicts of interest regarding distributions
 - Continuity assured (“Immortal,” or nearly so)
 - Important: Find a trustee experienced in protecting needs-based government benefits
 - The Trust can require the Trustee to rely on advice of family, health care professionals
 - Disadvantage: Corporate Trustee fees may be prohibitive for a small SNT

Finding the Right Trustee

(Contd.)

- ◆ Non-professional/family Trustee
 - Is likely to understand needs of the beneficiary, but:
 - ◆ Unlikely to be able to devote sufficient time to manage significant investment assets
 - ◆ Unlikely to understand public benefits restrictions on distributions – can cause loss of SSI or TennCare
 - ◆ May burn out, cease to act in beneficiary's best interest
 - Potential for financial mismanagement or abuse
 - Family member may have conflicts of interest – may be a remainder beneficiary
 - Entitled to receive fees, too
 - May need to hire a financial advisor who could charge nearly as much as a professional trustee

Finding the Right Trustee

(Contd.)

- ◆ Family member may be more appropriate as a Co-Trustee with Professional/Corporate Trustee
- ◆ Consider Trust-based safeguards whether individual or corporate trustees:
 - Trust Protector
 - Trust Advisory Committee

SNT Trustee Oversight

◆ **Advantages of a Trust Protector or Trust Advisory Committee**

- Trust Protector can remove Trustees, appoint replacements;
- Trust Protector can be given authority to modify trust to adapt to changing conditions;
- Trust Advisory Committee can direct Trustee to make distributions for the beneficiary;
- Concerned family members who aren't qualified to act as Trustees might make good Trust Protectors.

Trust Accounting Obligations

- ◆ Annual accounts usually must be provided to grantor, beneficiary, or legal representative
- ◆ Income Tax reporting
- ◆ Reporting to Social Security Administration, Medicaid (if Beneficiary is receiving benefits) upon:
 - Establishment of the Trust
 - Death of Beneficiary (First Party/Sole Benefit Trusts)
 - ◆ Payback to State for Medicaid benefits during lifetime of the beneficiary
- ◆ Proper Distribution of Assets to Remainder Beneficiaries – Third Party of First Party Trusts

Income Taxation of Special Needs Trusts

- ◆ Self-settled trusts are usually “grantor” trusts for tax purposes – and that’s usually good
- ◆ Third Party SNTs usually funded upon the death of the grantor or other donor – avoids gift tax issues
- ◆ If Third Party trust treated as a Grantor Trust – income taxed to the grantor – can increase the effectiveness of lifetime gifts
- ◆ Third party trusts that are not Grantor Trusts:
 - Trust income is taxed at higher Trust tax rate if not distributed for benefit of the beneficiary
 - Taxable income usually distributed for benefit of the beneficiary and taxed at beneficiary’s tax rate
 - Distributions for medical reasons usually tax deductible

Other Planning Essentials: Avoid Crises with Advance Planning Documents

So simple and low-tech that most people miss this step:

◆ Avoid Conservatorships

- Mentally Ill/disabled person needs Durable POAs – medical, financial
- Mental Health POAs

◆ Parents need Durable POAs, too--
POA can authorize establishment of SNT for disabled child

Basic Conservatorship Avoidance Documents

- ◆ Durable Financial Powers of Attorney
- ◆ Health Care Power of Attorney
- ◆ Mental Health Power of Attorney
- ◆ Advance Directives like Living Wills for end-of-life care

The End



Special needs require special attorneys.

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