

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

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Presented By:
William King Self, Jr., CELA
Special Needs Planning & Elder Law Attorney
Apperson, Crump & Maxwell, PLC
Memphis, Tennessee
www.specialneedsmemphis.com
www.specialneedsalliance.org



Special needs require special attorneys.

Objectives of Special Needs Estate Planning

- ◆ Security & peace of mind – for parents and for disabled/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

- ◆ Leaving inheritance to disabled person as a Direct Beneficiary
 - Disadvantages:
 - Beneficiary may be unable to manage the assets
 - ◆ Assets rapidly depleted
 - ◆ Beneficiary is subject to exploitation
 - Inheritance likely to cause disabled beneficiary to lose
 - ◆ SSI income
 - ◆ Medicaid benefits

Estate Planning Options

Continued:

◆ Leaving disabled child out of Will

Disadvantages:

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

Estate Planning Options

Continued:

- ◆ Standard Living Trust or Testamentary Trust for benefit of Disabled Beneficiary
 - Causes loss of Medicaid & SSI:
 - ◆ Standard Trusts are treated as “available assets” for Medicaid/SSI eligibility;
 - ◆ Trust assets may be rapidly depleted paying for medical needs and living costs without Medicaid and SSI

Estate Planning Options

Continued:

- ◆ Special Needs Trust (SNT) –
 - Best Planning Option for disabled/mentally ill child
 - Can be established during Grantor's lifetime, with Grantor as initial trustee;
 - Usually funded upon death of parent/Grantor, could be funded during Grantor's lifetime;
 - Grantor can name residuary beneficiaries;
 - Trust can be named in Wills and as beneficiary of Life Insurance, Retirement Plans;
 - Other family members can also make gifts to the SNT;
 - Can be used in taxable estate planning.

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 for primary support

How Is a Special Needs Trust Different from Other Trusts?

- ◆ SNT is a Discretionary Trust – Beneficiary has no right to compel distributions for support, so
- ◆ Gifts to a Special needs Trust protect beneficiary's eligibility for government benefits.
 - Assets and income of SNT not countable by SSI or Medicaid – funds available to pay for “quality of life” expenditures
 - Trustee pays directly for beneficiary's needs – distributions don't affect Medicaid/SSI
 - Trust assets protected from creditors of the beneficiary
 - Trustee has discretion to pay for support costs (affects SSI benefits)
 - SNT Trustee must understand govt. benefits rules
 - Note: SNT for Spouse – must be funded through spouse's Will

Types of Special Needs Trusts

- ◆ “Third Party” Special Needs Trust
 - The kind used for most Estate Planning
 - Beneficiary’s assets are not put into the 3rd Party SNT
 - Funded with someone else’s money (“3rd Party”: mom, dad, grandparents, siblings, etc.)
 - ◆ Wills, Lifetime Gifts
 - ◆ Life insurance
 - ◆ Designated Beneficiary in IRAs, Retirement Plans
 - Grantor Names Remainder Beneficiaries
 - No Medicaid pay-back on beneficiary’s death

Types of Special Needs Trusts

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

- Funded with disabled beneficiary’s own money, or funds he or she has a right to receive.
 - ◆ Used for: inheritance, savings, lawsuit settlements, etc.
 - ◆ Used to protect eligibility for Medicaid &/or SSI
- Irrevocable, but some modifications are possible later
- Beneficiary must be under 65, disabled under SSI guidelines
- Must be “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
- **State must be Repaid for Medicaid benefits upon 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
- ◆ Trustee Fees lower than professional trustee of d4A

● Disadvantage: Non-Profit Trustee is Remainder Beneficiary. No distribution to family on death of disabled beneficiary.

- ◆ Statute: 42 U.S.C. Sec. 1396p(d)(4)(C)

Types of Special Needs Trusts

- ◆ **Sole Benefit Trust** - Less well-known, less well understood, but can be very useful:
 - Works like third party SNT (3rd Party's Assets)
 - Beneficiary is not disqualified from SSI/Medicaid
 - But: Beneficiary must be disabled under SSA guidelines (unlike 3pty SNT)
 - Big Advantage for parent/grandparent donors: No Medicaid transfer penalty if the Donor parent needs nursing home Medicaid.
 - **Trade-Off** for this benefit: Medicaid Pay-back to the State after the trust beneficiary dies.
 - ◆ Statutory authority: 42 U.S.C. Sec. 1396p(c)(2)(B)(iv)

Medicaid Planning for Parents through Sole Benefit Trusts

- ◆ **Gifts by Nursing Home Medicaid Applicants generally prohibited, But gifts are permitted:**
 1. To a disabled child of any age
But: receiving the Assets could disqualify the child for SSI/Medicaid
 2. to a **Sole Benefit SNT** for a child under age 65
- ◆ **Sole Benefit Trusts: a Huge Planning Opportunity**
 - For those who've heard they "can't gift within 5 years of applying for Medicaid," this is an important exception
 - Protect this option by including language in Powers of Attorney authorizing gifts to spouse, disabled child or the child's SNT
 - May be able to amend 3rd Party SNT later to get Sole Benefits Trust treatment

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** – for Medicare recipients with limited income: no deductions from SS for Medicare B Premiums, no Medicare Part B co-payments
- ◆ 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 do any substantial gainful activity (SGA)
 - Condition has lasted or will last for at least one year or until death.
- ◆ No work history required, but benefits are Means-Tested:
 - **Income: Countable** income must be less than \$674 (2009).
 - ◆ **Not all Earned Income is countable**
 - ❖ First \$65/month is exempt
 - ❖ Half of remaining earned income is not counted
 - ◆ Unearned Income (SSDI, interest, annuities) reduces SSI \$ for \$ after \$20 disregard
 - ◆ Earned and unearned income reduces SSI but might not eliminate SSI completely
 - ❖ Can earn over \$900/mo. and still receive some SSI
 - **Resources:** \$2,000 maximum (plus exempt assets)
 - ◆ Exempt: Home, a car, household goods, etc.

TennCare/Medicaid

- ◆ Availability: Means-Tested, limited categories
- ◆ Basic Medicaid Rules. Recipient must:
 - Be disabled under SSI/SSDI guidelines
 - Countable Assets less than \$2,000 (same as SSI)
 - 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**

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:** Maximum of \$902/mo. for an individual
 - **Resources:** Max. \$4,000 for an individual
- ◆ **Benefits:** Pays Medicare Part A & Part B premiums, pays Medicare A & B co-payments & deductibles
- ◆ **SLMB:** Somewhat higher income limits, get reduced Medicare premiums

Special Needs Trust Administration

*Where the rubber meets the
road*

Trustee Selection is Crucial

- ◆ Trustee has important Fiduciary Duties:
 - Administer Trust for the Sole Benefit of Beneficiary
 - ◆ Distributions for Best Interest of Beneficiary
 - ◆ Protect Beneficiary's eligibility for public benefits
 - ◆ Conflicts of Interest a problem for Trustee
 - ❖ Impartiality – difficult when Trustee is remainder beneficiary
 - Proper Management of Investment Assets
 - ◆ Appropriate Investments (“Prudent Investor Rule”)
 - ◆ Maintain good records of distributions and investments
 - ◆ Engage Professional Management if appropriate

Qualities of the Ideal Trustee:

- ◆ Uses its discretion in the best interest of the disabled beneficiary
- ◆ Limits unnecessary distributions – makes the trust fund last a long time
- ◆ 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 as Trustee or Co-Trustee:
 - Helping a difficult beneficiary can be stressful for a family member trustee – trustee burn-out
 - Professional Trustees:
 - ◆ understand proper administration and investment of the SNT,
 - ◆ are experienced in working with difficult beneficiaries,
 - ◆ should be knowledgeable about SSI and Medicaid regulations,
 - ◆ Provide Trustee continuity (“Immortal,” or nearly so),
 - ◆ BUT: Trustee fees may be prohibitive for a smaller trust.

Selecting the SNT Trustee

(Contd.)

- ◆ Non-professional/Family Trustee
 - Is likely to understand needs of the beneficiary, but:
 - ◆ Unlikely to have expertise to properly manage investment assets or have the time to do a good job
 - ◆ 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 Trustee 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

Trust-based Safeguards Protect Against Trustee Problems

◆ **Consider SNT Provisions for Trust Protector:**

- Trust Protector can remove Trustees, appoint replacements;
- Can be given authority to modify trust to adapt to changing conditions.
- Concerned family members who aren't appropriate to act as Trustees might make good Trust Protectors.

◆ **Trust Advisory Committee Option:**

- TAC directs Trustee to make appropriate distributions for the beneficiary;
- TAC could be appointed after the parents are no longer able to serve.

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 – could cause beneficiary to lose benefits
 - Trustee must understand the effect of its distributions to or for the beneficiary
 - Improper distributions can result in loss of trust's exempt status – cause beneficiary to lose government benefits
- ◆ Trust purpose is to supplement existing income/benefits.
- ◆ But: a properly drafted SNT could give Trustee authority to make support distributions if necessary

Distributions from Special Needs Trusts for “supplemental needs”

Appropriate distributions that do not affect SSI or Medicaid eligibility. The Trustee must pay for these purchases directly – not pay the beneficiary:

- ◆ Clothing
- ◆ Newspaper, cable, internet, computers
- ◆ Travel and entertainment
- ◆ Household furniture and furnishings
- ◆ Case/care management
- ◆ Therapy, medications, medical equipment, medical care, health insurance
- ◆ Income taxes, Legal and Conservatorship fees
- ◆ Purchase a Home
- ◆ Vehicle (but Trust should not own the vehicle)

Major Purchases

- ◆ SNT ownership of Home/ Apartment might be appropriate if assets are sufficient.
 - Family Home could be transferred to the Trust
 - Trust payment of mortgage, home expenses constitute ISM – affects SSI eligibility
- ◆ Vehicles = liability for lawsuits
 - SNT should never hold title – jeopardizes trust
 - Family member could own, trust hold title lien
 - Operating costs paid by SNT don't affect benefits

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

- ◆ Maximum one-third SSI benefit reduction for living in the household of another - \$224.66 in 2009 (PMV = \$244.66)
 - Alternatives to ISM
 - ◆ Beneficiary pays pro rata share of living expenses
 - ◆ Make a lease arrangement acceptable to SSA
- ◆ Danger: Receipt of ISM sometimes can cause loss of SSI and Medicaid entirely
 - If SSI benefit is only \$220/mo, ISM wipes out all of SSI – loss of SSI and Medicaid

Income Taxation of Special Needs Trusts

Income for Public Benefits Eligibility Purposes is not the same concept as Income for Tax Purposes

- ◆ For Public Benefits Purposes: All distributions to beneficiary for cash or as ISM are income, reduce SSI
- ◆ For Tax Purposes: If trust assets earn taxable income:
 - Income taxed at higher Trust Tax Rate if not distributed out (unless SNT is a grantor trust)
 - Beneficiary is taxed at lower tax rate for the distributions made for benefit of the beneficiary
 - Distributions for medical reasons usually tax deductible by the beneficiary

Other Planning Essentials: Avoid Crises with Advance Planning Documents

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

- ◆ Try to Avoid Conservatorships with POAs:
 - Mentally Ill/disabled person needs Durable Powers of Attorney – if able to execute them
 - ◆ Durable General Power of Attorney for Finances
 - ◆ Health Care POA, Living Will, other advance directives
- ◆ Parents need Durable POAs, too – consider having POA that authorizes establishment of SNT for disabled child

The End



Special needs require special attorneys.

Presented by:
William King Self, Jr., CELA
Apperson Crump PLC
6000 Poplar Avenue, Suite 400
Memphis, TN 38119
(901) 756-6300
www.elderlawmemphis.com
www.specialneedsalliance.com