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Special Needs Trusts: A Planning Tool with Promise

As advances in medical technology are made available to the average American, and as public benefit eligibility law becomes more complicated, it should come as no surprise that legal planning tools are evolving to enable individuals with disabilities or older individuals to more easily become eligible for public benefits, including Supplemental Security Income (SSI) and Medicaid benefits. Special Needs Trusts (SNTs) are effective legal planning tools to fill this need.

In order to gain a full appreciation of the benefits of SNTs it is necessary to have a fundamental understanding of the Medicaid eligibility rules. Although Congress establishes the criteria by which an individual may qualify for Medicaid, each state applies those criteria as it chooses. In Georgia, for example, an individual can become eligible under most Medicaid programs when he has no more than \$2,000 in assets in his own name (excluding his home place and certain other resources).

Given the limitations of these constraints, it is not unusual for an individual to have more assets than would otherwise allow him to become eligible for Medicaid benefits. Due to the high costs of health care, and the oft expressed objectives of persons with disabilities and seniors to remain independent as long as possible and to leave an inheritance to their children, individuals are frequently interested in learning about planning options which might enable them to meet those objectives while simultaneously qualifying for Medicaid.

The most common option when an individual's assets exceed those allowed for Medicaid eligibility is to spend or deplete the excess assets through the purchase of exempt assets and services and/or by making gifts of the assets. Ordinarily, however, when a gift ("transfer") is made to any third-party within the requisite look-back period (five years) before the date when a Medicaid application is filed, Medicaid imposes a "transfer" penalty period upon the donor. During this penalty period neither the donor nor his spouse can be the beneficiary of Medicaid benefits. The public policy objective of the penalty period is to discourage people from depleting *private* assets they would otherwise have had available for their care simply in order to qualify for *public* benefits.

The most recent changes to the transfer rules became effective on February 8, 2006. As such, anyone who has considered transferring assets as part of a long term

care plan should consult with a qualified Elder or Special Needs Law Attorney before making any future transfers, or before filing an application for Medicaid benefits if there is any question about the individual's eligibility for such benefits.

In response to the transfer penalties imposed for making gifts to family members, individuals have historically attempted to circumvent this restriction by instead using trusts to hold any assets in excess of Medicaid's limitation under the faulty assumption that trust assets are sheltered from Medicaid attention since they are not legally the *personal* assets of the individual who might later be filing a Medicaid application. However, because public policy dictated that discretionary trusts maintained for the benefit of the applicant were *available* to the applicant, courts have frequently determined that such trusts failed to shelter those assets.

In August 1993, Congress made significant changes to the trust rules in the OBRA 93 legislation. As a result, current law specifically provides for several types of trusts that *are* approved by the government for use by individuals who either presently are, or expect in the future to become, eligible for SSI or Medicaid benefits.

(d)(4)(A) trusts

There are two types of trusts that work particularly well when the beneficiary is an individual with a disability who is under the age of sixty-five (65). The first is popularly referred to as the (d)(4)(A) trust (named for the statute authorizing its creation). This trust can be established by an individual or by a parent, grandparent, court, or legal guardian of the beneficiary with a disability. A (d)(4)(A) trust is often used to hold the proceeds of a personal injury lawsuit so that the beneficiary can remain eligible for Medicaid benefits to pay for basic health care expenses. It can also be created to hold the proceeds of an inheritance to which the beneficiary is already entitled.

Under the terms of the Special Needs Trust, assets held in the trust can be used to provide for items and services for the beneficiary. This may sometimes include food and shelter, though doing so may result in a reduction in SSI benefits. Depending on the beneficiary's age, abilities and circumstances, trust assets could be used to pay for medical treatments, therapy and equipment not covered by Medicaid or other insurance, as well as sitters, trips, movies, computers, and other similar items and services.

Some see as a down-side to a (d)(4)(A) trust the requirement that those assets remaining in the trust upon the death of the beneficiary must first be spent to reimburse Medicaid for those health care costs which have been paid by Medicaid on the beneficiary's behalf over his lifetime. However, because the rate Medicaid patients can be charged is typically significantly less than what the same individual would have paid privately, those reimbursable expenses are generally much less than they otherwise would have been had trust assets been used to provide for the beneficiary's medical care. Further, this arrangement is a reasonable and equitable

method for providing for the beneficiary's needs during his lifetime while alleviating some of the burden on the state's Medicaid programs.

(d)(4)(C) trusts

The second type of trust that works particularly well when a beneficiary has a disability and is under the age of sixty-five (65) is popularly referred to as a (d)(4)(C) trust, or a pooled-account trust. A (d)(4)(C) trust can be created by an individual or by a parent, grandparent, court, or guardian. It is managed by a non-profit association which pools the funds of multiple beneficiaries for investment purposes, while maintaining separate accounts for each beneficiary. As with (d)(4)(A) trusts, if the individual is receiving SSI benefits there may be restrictions on using assets in the trust to provide food and shelter for the beneficiary. At the election of the individual who established the trust, any assets remaining in the trust upon the death of the beneficiary can either be retained by the non-profit entity that managed the assets for the benefit of indigent individuals with a disability, or used to reimburse Medicaid. A pooled-account trust is often a good option when the size of the trust estate is insufficient to make it economically feasible to engage a corporate trustee for purposes of managing the trust estate.

Planning for Multiple Generations

Consider the increasingly common circumstance in which elderly parents facing their own possible need for future nursing home care are simultaneously concerned about arranging for the care of their adult child with a physical or mental disability. Since the law specifically stipulates that there is *not* a penalty imposed for transferring assets into a (c)(2)(B) trust, establishing one is a good and particularly effective solution for both generations. A parent can transfer any or all of his assets to a SNT for the sole benefit of the child with a disability, without incurring a transfer penalty. Assets that may be used to fund a SNT include personal property, real property, cash, stock and investment accounts.

The result of such a transfer is this. The parent can become eligible for Medicaid benefits when he otherwise meets the eligibility criteria, without having to wait until a Medicaid penalty period has ended. Additionally, funds held in a SNT are not considered resources to the beneficiary, so the child can maintain any benefits for which he has previously been eligible (or for which he is applying) while now having the additional benefit of the assets that are held in the SNT.

Similar to the (d)(4)(A) and (d)(4)(C) trusts, this SNT must either include a pay-back provision such that, upon the death of the child the state Department of Community Health will be reimbursed for any Medicaid assistance it paid for the child's care, or the distributions from the trust must be made "on a basis that is actuarially sound based on the life expectancy of the individual involved."

Third Party Special Needs Trusts

A third planning option for which there are many opportunities involves

creating a Third Party Special Needs Trust. Third Party Special Needs Trusts are those to which assets are contributed by someone *other than* the beneficiary. Typically, a Third Party Special Needs Trust is created by family members of persons with disabilities, naming the disabled person as the beneficiary. They may be created by transfers during lifetime or in a Last Will and Testament document. So long as the beneficiary does not have the legal authority to revoke the trust or direct the use of the trust assets for his or her own support and maintenance, the trust principal is not the beneficiary's resource for SSI and Medicaid purposes.

Creating a Special Needs Trust under a Last Will and Testament is a particularly attractive planning option in circumstances where a child or a spouse has a known disability. In such cases it may be appropriate for the parent or the "healthy" spouse to prepare a new Will which establishes a SNT to provide for the individual with a disability in the event the parent or healthy spouse should die first. As it is not unusual that the person with a disability is or may become eligible for Medicaid benefits and yet would likely be unable to manage any inherited assets personally, it is not normally prudent to leave any assets to that individual outright. The SNT solves both of these problems and provides the additional benefits of no transfer penalty period and no pay-back requirement.

ABLE Accounts

Under the ABLE ("Achieving a Better Life Experience") Act of 2014 individuals who have disabilities can create tax-free savings accounts to assist them in maintaining their health and independence while remaining eligible for means-tested public benefits. An ABLE account may be useful in addition to, and generally not in lieu of, other traditional special needs planning. Georgia enacted the "Georgia Achieving a Better Life Experience (ABLE) Act," and has partnered with the Ohio ABLE program, known as STABLE.

To establish an ABLE account the onset of the individual's disability must have occurred prior to age 26. The individual must meet certain disability criteria. Funds in an ABLE account can be used for "disability-related" purposes, which is very broadly defined. An ABLE account together with a SNT can provide independence and options for a qualifying individual.

Conclusion

Congress' approval of the use of Special Needs Trusts allows for greater flexibility in planning and enables the beneficiary to become or remain eligible for SSI and Medicaid benefits while procuring supplemental assistance for which he would not otherwise be eligible. Individuals are wise to take advantage of these options which provide alternatives to many who are most in need of engaging in financial and long term care planning.

