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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 among the most 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

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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 imposted 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 section in the statute authorizing its creation). This trust can be established 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 Special Needs Trust language, assets held in the trust can be used to provide for items and services for the beneficiary. This may sometimes include food

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and shelter, though including such goods 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.

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 statute that provides for the creation of a (d)(4)(A) trust specifically stipulates that there is *not* a penalty imposed for transferring assets into such a trust, establishing one is a good and particularly effective solution for both generations. By enabling the parent to ensure that sufficient assets are available to provide for the care of such a child who presently or in the future may require public assistance, the (d)(4)(A) trust is an excellent and unique planning tool.

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. 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 a parent, grandparent, court, guardian, or by the individual himself. It is managed by a non-profit association (in Georgia the primary pooled trust is the Georgia Community Trust, www.GeorgiaCommunityTrust.com) which pools the funds of multiple beneficiaries for investment purposes, while maintaining separate accounts for each beneficiary. As with (d)(4)(A) trusts, there may be restrictions on using assets in the trust to provide food and shelter for the beneficiary. At the election of the individual

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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.

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.

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 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.