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Disability and Future Planning

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We Will Discuss:

- Estate Planning
- Brief Overview of Public Benefits
- Three Types of SNTs
- ABLE Accounts



Estate Planning Basics

- Basic Estate Plan
 - Will
 - Trust for Younger Beneficiary
 - Appointment of Guardian of Minor Child
 - Durable Financial Power of Attorney
 - Durable Health Care Power of Attorney/Living Will
 - Revocable Trust
 - Special Needs Trust



Age of Majority

- Age 18 in Pennsylvania
- Benefit Eligibility Changes
 - SSI
 - Medicaid
- Options to consider
 - Representative Payee
 - Power of Attorney
- Durable Financial Power of Attorney
- Durable Health Care Power of Attorney/Living Will
- Mental Health Care Power of Attorney
 - Guardianship



Who is Considered Disabled?

- Over 18
 - Unable to engage in any substantial gainful activity (SGA) by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months
 - SGA is an economic test (\$1,350/month in 2022 for non blind persons with disabilities/ \$1470/month in 2023)
- Under 18
 - medically determinable physical or mental impairment that results in marked and severe functional limitations
- Must meet the disability criteria at the time the Trust is established



Public Benefits

- Resource-Dependent:
 - Supplemental Security Income (SSI)
 - Medicaid (Medical Assistance)
 - Medicaid Waiver Programs
 - Others (Food Stamps, Section 8 housing, etc.)
- Others:
 - Social Security Disability Insurance (SSDI)
 - Social Security Retirement Benefits
 - Medicare



Planning for People with Disabilities

- Estate planners use Special Needs Trusts to provide for the needs of a person with a disability to supplement but not supplant benefits received from various government assistance programs.
- Special Needs Trusts are designed to permit financial resources to remain available to assist a person with special needs who receives, or may receive in the future, Medicaid and/or SSI and/or Mental Health/Intellectual Disabilities benefits.
- These Trusts protect resources from immediate invasion by the state Medicaid agency.
- The trust holds the property for the benefit of the person, but the Trustee has discretion over the use of the property.
- Trust purpose is to enhance the quality of life of the beneficiary.



Why May a Person Need a SNT?

Access to the “needs-based” government benefits is crucial to persons with

- Supplemental Security Income (SSI)
 - Limited Resources (\$2,000/individual & \$3,000/couple)
 - Maximum Benefit per month (2023 to \$914/individual & \$1,371/couple)
 - In most states, SSI recipients receive an additional supplementary payment from the state, giving them a monthly benefit amount that's higher than the federal amount. Each state has its own rules about how much the monthly supplement is and who is entitled to the supplement. The amount of the state supplement generally ranges from \$10 to \$200
 - Monthly Income Exclusions (\$20 unearned and \$65 earned)



Why May a Person Need a SNT? Cont'd

- Medicaid
 - Joint State and Federal Program that, together with the Children's Health Insurance Program (CHIP), provides health coverage to over 72 million Americans, including children, pregnant women, parents, seniors, and people with disabilities. Medicaid is the single largest source of health coverage in the United States.
 - Medicaid Waiver Programs
 - Waiver programs: provide funding for supports and services to help people with disabilities live in their homes and communities, rather than in an institutional setting

*Needs-based (or “means-tested”) benefits are government benefits where the applicant has both a medical needs and a financial need. Eligibility depends on the applicant having limited income and/or resources.



Why May a Person need a SNT? Cont'd

- Some persons with disabilities do not need to access needs-based benefits. Government benefits that are not needs-based include:
 - Social Security Disability Income (SSDI)
 - Generally qualify by own work history or as Adult Disabled Child (ADC)
 - Medicare
- You need to identify what benefits your client is receiving or may receive.
- Dually Eligible
 - A client may receive SSI, SSDI, Medicare, Medicaid and Medicaid Waiver



Excludable Resources

- A person can only have limited income and liquid assets (i.e., cash, stocks, bank accounts, CDs, etc.) and still qualify for public benefits
- Generally, a person may retain certain tangible resources that will not disqualify them for purposes of public benefits
- Excludable Resource examples
 - Principal Residence
 - One Vehicle
 - Pre-paid funeral and burial plot
 - Term life insurance
 - Tangible items such as clothing, jewelry, furniture, personal effects
 - Life insurance with a cash surrender value of \$1,500 or less



Three Types of Special Needs Trusts

- Third-Party Funded Special Needs Trusts
- Self-Funded Special Needs Trusts
- Pooled Trusts



Trust Legal Terms

- **Settlor\Grantor:** Person who establishes the Trust
- **Trustee:** Person who manages and invests money that is held in Trust for a beneficiary
- **Beneficiary:** A person who receives assets from a trust



Third-Party Funded Special Needs Trusts

- No Federal Statute allowing these
 - Generally allowed by State case law
- Person with a disability is the beneficiary
- Funded with monies not owned by the person with disabilities
- Created via Will or inter vivos trust of family member
 - Inter vivos allows gifting into SNT
- No payback to State Medicaid Agency



Third-Party Funded Special Needs Trusts

- Trust is to supplement and not supplant public benefits
- Public benefits are to be considered prior to any distribution
- Trust to be used for Beneficiary's special needs
- Trustee has total, absolute discretion to make or withhold payments
 - No periodic (monthly, quarterly) payments
 - Cannot pay out all income to beneficiary



Third-Party Funded Special Needs Trust Elements

- Can have multiple beneficiaries
 - Including both persons who are and are not disabled
- SNTs can include terms such as:
 - Trust Advisory Board
 - Trust Protector



Testamentary vs Inter Vivos Special Needs Trust

- Testamentary – only created under a Will
 - SNT does not exist until Testator passes away
- Inter vivos – created during the Grantor’s lifetime
 - SNT exists as a separate document from the Will and exists from the moment it is signed by the Grantor
 - Benefits:
 - Opportunity for lifetime gifting into SNT
 - Persons other than Grantor/Testator may name SNT in their wills, life insurance, etc.
 - Possibility that established SNT will be valid if laws change
 - Opportunity for future Trustees to manage SNT



TPF SNT Funding

- Lifetime gifting
- By Will
- By Life insurance
 - Second to die policies
- Community fund-raised monies
- Other assets that pass by beneficiary designation



Coordinate Entire Estate Plan with the Special Needs Trust

- Assets that Pass Under Will
- Assets that Pass Outside of Will
 - Beneficiary designations may be changed to SNT
 - Use of an ILIT with an SNT
 - No withdrawal rights for Beneficiary with Special Needs



Coordinate Entire Estate Plan with the Special Needs Trust Cont'd

- Watch for accounts already in child's name
 - Should be spent down or put into Self-Funded SNT
- UGMA/UTMA accounts, 529 Plans, IRAs and other qualified retirement plans etc.
- Consider PA Inheritance Tax and Federal Estate Tax (unified credit for estate and gift tax is \$12.92 million per individual in 2023)



Two Types of Self-Funded Special Needs Trusts

- Individual Self-Funded Special Needs Trusts
- Pooled Trusts



Self-Funded Special Needs Trusts (a.k.a. “Payback Trusts”)

42 U.S.C. § 1396p(d)(4)(A)

- Beneficiary who is disabled (only one)
 - Sole benefit
- Under 65
- Established by parent, grandparent, guardian, the court or the beneficiary with special needs (if competent)



Self-Funded Special Needs Trusts (a.k.a. “Payback Trusts”)

42 U.S.C. § 1396p(d)(4)(A)

- Payback to state for Medicaid
 - SNT cannot limit payback to term of Trust
 - Must be for lifetime of beneficiary
- Total discretion of Trustee
- Irrevocable
- Supplement not supplant, for special needs



Who can be Trustee of a Trust?

- **Corporate Trustee**

- Bonded, insured
- Experience with SNTs, public benefits, and what expenditures may affect benefits
- Good record keeping
- Good Trust investments

- **Individual Trustee**

- Often preferable as many banks will not be Trustee of Trusts less than a certain amount
- More affordable (may not take fees)
- State Medicaid Agency may require bond if large amount in Trust (self-funded SNT)



Trustee Responsibilities

- Open Account in Name of Trust
 - No commingling of funds
 - Obtain Tax ID Number for Trust (EIN)
- Invest funds in Prudent Manner
- Maintain complete and accurate records of all income, trust additions and trust expenditures
- Fiduciary Responsibility to Beneficiary
 - Distribute funds on behalf of Beneficiary, for Beneficiary's best interest, after considering what public benefits are available
- File annual tax returns



Pooled Trust

42 U.S.C. § 1396p(d)(4)(C)

- Permitted under federal law since 1993 via OBRA-93 to receive funds of a person with a disability and still allow person to receive resource dependent public benefits
- Non-profit Fiduciary must be the Trustee
- Like a “mutual fund” of SNTs
 - Individual accounts maintained for each person participating in Pool during life, but accounts are collectively invested



Pooled Trust

42 U.S.C. § 1396p(d)(4)(C)

Cont'd

- Anyone can create an account in a Pooled Trust on behalf of beneficiary with special needs
- Residue often remains in Trust for other persons with special needs upon death of beneficiary
 - Some pooled Trusts allow for the residue to be paid to family members, but if this is the case, then any remaining monies must first be made available for reimbursement to State for Medicaid provided to Beneficiary



Achieving a Better Life Experience Act (**ABLE**) Act

- Federal law passed by Congress in December 2014
- Allows states to enact legislation that allows individuals with disabilities to fund an account which is not countable for SSI or Medicaid eligibility
- Modeled on state 529 Plans (IRC§ 529A)
 - Administered by state agencies



Achieving a Better Life Experience Act (**ABLE**)

- Establish savings account similar to 529 for individuals with disabilities that will not be available resource
 - Contributions grow income tax free
 - Use for “Qualified Disability Expenses”
 - Education, housing, transportation, wellness, legal fees, administrative fees, financial planning, funeral
 - Withdrawals beyond qualified expenses are subject to income tax and 10% penalty



ABLE Basics

- Beneficiary must be determined to be disabled prior to attaining age 26 (in 2026 it will be prior to age 46)
- One beneficiary = one account
 - A beneficiary from a state that does not currently have an ABLE Account program may open an account in another state's program
 - But may not have multiple accounts in different states



ABLE Contributions

- Total yearly contributions from all sources are limited to that year's federal gift tax exclusion
 - 2023: \$17,000.00
 - up to \$17,000 (in 2023) of a 529 plan may be rolled over into ABLE account
 - SSA said money transferred from a Trust to ABLE account not income to beneficiary
 - Dec. 22, 2017 tax law allowed a person with a disability who works to contribute such person's earnings into their ABLE account in excess of the maximum funding limit (\$17,000 per year). The worker may contribute monies up to the lesser of the amount of the worker's earnings or the federal poverty limit, which is currently \$14,580 (2023).
 - Cannot be contributing to 401k



ABLE Contributions Cont'd

- Maximum value of ABLE Account limited to the state's 529 Program limit
- The balance of ABLE Account over \$100,000.00 countable as a resource for SSI eligibility
 - No effect on Medical Assistance eligibility



ABLE Contributions

- Contributions are not tax-deductible for federal income taxes
- Pennsylvania – contributions can be tax-deductible for PA state income taxes
 - But no state tax deduction if a PA resident uses another state’s ABLE program



Qualified Disability Expenses (QDEs)

- Expenses related to the eligible individual's blindness or disability which are made for the benefit of the designated beneficiary, including:
 - Housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses approved by IRS regulations



Qualified Disability Expenses (QDEs) Cont'd

- The Treasury Department and IRS recognize this term should be broadly construed to include basic living expenses and not be limited to expenses for items for which there is a medical necessity or which provide no benefit to others in addition to the benefit to the eligible individual.



Distributions and Income Taxes

- No income tax on distributions if total distributions do not exceed beneficiary's "Qualified Disability Expenses" (QDEs) for the year
- Income tax on distributions that exceed QDEs for the year, plus a 10% penalty



Distributions and SSI Eligibility

- SSA Program Operations Manual System (POMS)
- Distributions are not income to SSI beneficiary
- Distributions for housing expenses are not in-kind support and maintenance (ISM)
 - No reduction of SSI
 - Big difference from SNTs



Medical Assistance Payback

- Federal Law – ABLE Accounts may have payback for Medical Assistance provided to beneficiary after establishment of ABLE Account
 - SNTs – Self-Funded SNTs have payback for Medical Assistance provided during beneficiary’s lifetime
 - Also may be subject to State’s Estate Recovery Act



ABLE Act Recap

- Limitations
 - Total annual contribution limited to \$17,000 per year (unless beneficiary working)
 - If total contributions exceed \$100,000, lose SSI
 - Potential payback to the State Medicaid Agency
 - Reporting requirement to SSA
 - Only eligible if disability manifested before age 26
 - In 2026 individual who manifested a disability before age 46 will be eligible



PA ABLE

- Pennsylvania signed enabling ABLE legislation into law on April 18, 2016.
- To open a PA account you will go through the Pennsylvania Treasury Department.
- To obtain information and open the account go to www.paable.gov.



ABLE Act

- Useful when:
 - SSI recipient who maintains some modest employment could save beyond the \$2,000 limit
 - Person with small settlement or inheritance
 - Person over 65 who was disabled before age 26 (in 2026 before age 46)
 - Fund to give person more control over funds
 - First \$17,000 of lawsuit settlement
- Likely not best vehicle for:
 - Larger settlements (except for first \$17,000)
 - Most parents to save for children/inheritances
- Clients may choose to have both a Trust and an ABLE account for maximum flexibility and savings benefit.



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