PLANNING FOR BENEFICIARIES WITH DISABILITIES

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PLANNING FOR BENEFICIARIES WITH DISABILITIES

I. INTRODUCTION: THE FOCUS OF THIS PAPER.

Since passage of the Omnibus Budget Reconciliation Act of 1993,[1] the use of Supplemental Needs Trusts (also known as Special Needs Trusts or "SNT") has grown to such proportions that just about every practitioner has heard of the trust but there is still much confusion about the terms and reasoning behind a SNT. The intent of this author is to discuss basic elder and disability law and guardianship concepts and to define a SNT, set out when it is generally used for the benefit of the elderly and those with disabilities, list some strategies for creating the trust and a brief discussion of the tax implications of the trust.

II. THE SUPPLEMENTAL NEEDS TRUST

A supplemental needs trust is a broad term encompassing self-settled and third-party created trusts. It is a trust created for an individual with the intent of allowing distributions from the trust to the beneficiary while the beneficiary has the option of maintaining eligibility for government "needs based" benefits.

The operative words describing this trust are "supplemental needs" thereby distinguishing this trust from a "support" or other type of trust. Other words used to describe the supplemental needs trust are instructional such as a limitation that trust distributions should "supplement and not supplant government benefits." SNTs may have very strict distributions restrictions prohibiting certain distributions. More broadly, SNTs may give the trustee full discretion to make distributions even to the extent of causing the beneficiary to forfeit some but not all government benefits.

III. GOVERNMENT BENEFITS THAT ARE SUSTAINABLE WITH A SUPPLEMENTAL NEEDS TRUST. In order to properly draft a SNT that will maximize the client's government benefits, counsel must understand the criteria for those government programs that one is attempting to protect. Clearly, a SNT is meant to protect eligibility for various Medicaid program benefits and Supplemental Security Income (SSI). Medicaid benefits and SSI are "need based" programs generally base eligibility on a finding of disability, low income and low assets. Other programs such as Social Security Disability Insurance ("SSDI") consider only disability and earned income for eligibility considerations and would not be affected if the disabled beneficiary owned considerable assets. Other need-based government benefits such as HUD Housing are not protected by placing assets in one of the self-settled exception trusts. Therefore, the drafter must verify the benefits intended to protect before drafting a SNT and customize the Trust document to the specific needs of the beneficiary.[2] The following three benefit types provide the majority of need based benefits to Texas residents.

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1 42 U.S.C. §1396p.

2 See a related article by Terry M. Magady, *The Use of Standardized Forms when Drafting Special Needs Trusts is not always the Best Means of Addressing the Particular Needs of the Disabled,* Los Angeles Lawyer, February 2002.

A. MEDICAID ASSISTANCE PROGRAMS. There are over 40 Medicaid programs available in Texas assisting with nursing home costs, caretaker expenses, medical costs, rehabilitation, and durable goods. And it seems like each program has unique criteria for eligibility. It is not within the scope of this paper to set out eligibility requirements for every Medicaid program but will be limited to Long Term Care Nursing Home benefit and Waiver programs that provide attendant care in a residential setting. All of the noted programs include cost-free health insurance.

1. Defining the program. Medicaid Assistance Program and Medicaid assistance waiver programs are government programs that can provide housing and medical care for those persons who meet certain physical and financial guidelines. When a person with disabilities has few resources (assets), a small monthly income and a medical need, the individual may be eligible for financial assistance for the nursing home costs or financial assistance with the cost of in-home caretakers along with cost-free health insurance. Medicaid should not be confused with Medicare Part A and Part B. Medicare does not pay for long term nursing home care benefits or in-home caretakers.[3] If an individual needs long term care and meets certain criteria, the Medicaid program may provide the necessary funding for care.[4]

Author's Comment: The following are interesting statistics that reflect the need for some kind of medical assistance for the elderly. As of 2013, the United States median household income was $51,939, which was 8% lower than 2007 (http://www.census.gov/content/dam/Censu/library/publications/201/demo/p60-249.pdf). The Texas median household income was $53,027 in 2013 (http://www.advisorperspectives.com/dshort/updates/Household-Incomes-by-State.php). Bexar County's median household income was $49,655 (http://www.txcip.org/tac/census/profile.php?FIPS=48029) and Zapata County's median income was $34,506 (http://www.txcip.org/tac/census/profile.php?FIPS=48505).

The benefit programs that will be addressed in this paper are as follows:

a. Nursing Home Long Term Care benefits will assist with the cost of nursing home care as well as medical expenses. Regulations are found in the Medicaid Eligibility for the Elderly & People with Disabilities Handbook ("MEPD").[5]

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3 Medicare Part A pays for up to 100 days of nursing home care provided the care is for skilled services. 42 U.S.C. §1395x. The patient is entitled to the skilled nursing or skilled rehabilitative benefits in a skilled nursing facility (SNF) following a 3 day stay in the hospital. 42 C.F.R. §409.31 *et seq.* Part A will pay the costs of the first 20 days in the SNF provided they are pursuant to a physician's order, the patient requires professional or technical personnel, and the care is under the supervision of such personnel and the patient must require rehabilitative and/or skilled services on a daily basis. *Id.* Beginning day 21 through 100, the patient must pay $176 per day (for 2020).

4 "In 2012, Medicaid outlays for institutional and community-based LTSS totaled almost $148 billion, accounting for 30 percent of total Medicaid expenditures that year." http://kff.org/medicaid/report/medicaid-and-long-term-services-and-supports-a-primer/ .

5 www.dads.state.tx.us/handbooks/mepd.

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