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Planning for A Child With Special Needs

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Lack of planning can jeopardize a special needs child's eligibility to receive means-tested government disability and health benefits. The federal government provides Supplemental Security Income (SSI) to people who are 65 or older, or who are blind or disabled, who have low incomes and minimal resources. Applicants must meet the Social Security Administration (SSA) definition of disabled², earn little or no income and have available assets of less than \$2,000 to qualify. The agency excludes the value of a primary residence, a vehicle, personal furnishings and other assets (such as a burial plan of less than \$1,500 or up to \$1,500 of cash surrender value in a permanent life insurance policy) when determining "available assets."

For 2012, the monthly federal SSI benefit is \$698 for an individual, which is meant to be used for food and shelter expenses. This benefit is indexed for inflation and can change each year. Most states provide an additional benefit, which augments the total monthly payment. However, many disabled children under age 18 who meet the government's requirements may still be disqualified from SSI benefits because of the income earned by family members residing in their households. As a result, many families with the economic means to care for their disabled children may feel that special needs planning is unnecessary. This would be shortsighted.

When the disabled child reaches age 18, the SSA views him as an adult. This is a significant milestone, because the agency then excludes the income and resources of family members when determining whether an adult meets the financial limits for SSI eligibility. In 39 states³ [**including Georgia**] and the District of Columbia, an SSI recipient is automatically eligible for Medicaid, a federal-state health insurance program for low-income adults and their children, as well as for people with certain disabilities. Medicaid offers significant health care cost savings for the disabled individual and his

¹ This article by Shomari Hearn was originally published in 2010 on the website of Palisades Hudson, a national financial consulting group: <http://www.palisadeshudson.com/2010/10/planning-for-a-child-with-special-needs/> I provide Mr. Hearn's article to my clients as the best succinct overview of planning for special needs individuals that I have found. Mr. Hearn retains all authorship rights. I have merely updated the numbers for 2012, provided citations when appropriate, and noted that Georgia is one of the states where SSI recipients are automatically eligible for Medicaid.

² The relevant SSA definition of disability is located at 42 U.S.C. 1382c, at Section 1614(a)(3)(a) of the SSA Act: "Except as provided in subparagraph (C), an individual shall be considered to be disabled for purposes of this title if he is unable to engage in any substantial gainful activity 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 twelve months."

³ The other 11 states, known as **209(b) states**, use more restrictive criteria to determine Medicaid eligibility. Those states are Connecticut, Hawaii, Illinois, Indiana, Minnesota, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma and Virginia.

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family. Therefore, it is imperative that a disabled person's SSI benefits not be reduced to zero, because one dollar of SSI benefits in these jurisdictions ensures 100 percent of Medicaid benefits.

Special Needs Planning

Outright gifts or bequests to a disabled family member are almost certain to make him ineligible for SSI and Medicaid. Disinheritance would protect the disabled individual's means-tested benefits, but would remove financial security if he later became ineligible for government assistance, or if those benefits fall short of providing for his needs. Parents could leave assets intended for their disabled child to a sibling with the intent that those assets be used for their handicapped child's benefit. However, there is no guarantee that the sibling would honor this request, and the assets would be exposed to potential claims from the sibling's creditors.

A third-party special needs trust is the most effective vehicle for transferring wealth to a disabled child or grandchild without jeopardizing his eligibility for government assistance. The purpose of the special needs trust is to supplement, not replace, SSI and Medicaid benefits. To ensure that the beneficiary's disability benefits are unaffected, the trust must possess these characteristics:

- It should be created and funded by a third party, such as a parent or grandparent. The disabled beneficiary should not create the trust or fund it with his personal assets.
- An independent trustee should be chosen to administer the trust. The beneficiary cannot have any authority or control over the administration of the trust's assets.
- The trustee should be given authority to make discretionary non-support distributions of trust income and principal for the benefit of the disabled person.
- Trust payments should be made directly to the individuals and companies that provide goods and services to the disabled individual. Distributions for basic food, shelter and medical expenses, as well as direct payment of cash to the special needs child, will reduce or eliminate the child's SSI benefits, which could also result in a loss of Medicaid benefits.
- The trust should also have spendthrift provisions, which protect trust income and assets from the claims of the trust beneficiary's creditors.

The third-party special needs trust can be revocable or irrevocable. It can be established during the grantor's lifetime or through the grantor's will or other trust documents upon her death. The third-party special needs trust can be drafted to expressly prohibit the trustee from making any distributions that would disqualify the disabled beneficiary from receiving means-tested government benefits, or drafted without placing any restrictions on the trustee's authority to distribute trust income and principal to or for the benefit of the special-needs individual. The latter structure provides more flexibility, giving the trustee discretion to make disqualifying distributions to the beneficiary if the trustee determines that such payments are in his or her best interests.

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Parents should also conduct a thorough review of their assets and beneficiary designations. This will ensure that assets are not inadvertently inherited by, or gifted directly to, a special needs child. For example, the third-party special needs trust should be listed as beneficiary for IRAs, 401(k) accounts, annuities and life insurance policies instead of the disabled child. Other assets and accounts to consider include, but are not limited to, savings bonds, Uniform Gifts/Transfers to Minors Act accounts, joint bank or investment accounts, jointly owned real estate, a final paycheck (including unused vacation and sick pay), collectibles, antiques and family heirlooms, as well as a vested remainder interest in a primary residence provided to minor children by state homestead laws.

It is also important to coordinate with grandparents, other relatives and friends to ensure that they do not give an outright gift or inheritance to the special needs child. Instead, if structured properly, the third-party special needs trust established by the parents of the disabled child will be able to accept gifts and bequests from family and friends, so that these individuals do not have to create their own special needs trusts.

First-Party Self-Settled Trusts

What if the special needs child has assets in his name that would make him ineligible to receive means-tested government benefits? Transferring the disqualifying assets to a third party (such as a non-spousal family member) for the sole purpose of qualifying for Medicaid is not advised. To be effective, such transfers must occur 60 months before the disabled individual applies for Medicaid benefits. Otherwise, the transfers will trigger a look-back penalty, delaying the receipt of benefits for a period of time that could be lengthy, depending on the size of the transfers. This strategy is feasible only if the disabled individual will require care for many years and the family or legal guardians want to place a cap on the amount of private-pay health care costs they will incur.

A better option is to transfer the disqualifying assets into a first-party self-settled special needs trust. Two types of these trusts have government approval: an irrevocable “(d)(4)(A) SNT” or “(d)(4)(A) **Medicaid Payback Trust**” and a “(d)(4)(C) **Pooled Account Trust**.” These trusts are collectively referred to as “OBRA 1993 Special Needs Trusts” in reference to the Omnibus Budget Reconciliation Act of 1993 that allowed their use to preserve Medicaid eligibility, and subsequently to preserve SSI eligibility. The government does not consider assets within a properly drafted and administered OBRA 1993 Special Needs Trust when determining a disabled individual’s ability to qualify for means-tested benefits. Trust assets must be used solely to pay for permitted supplemental requirements of the special needs beneficiary.

Unlike a third-party special needs trust, an irrevocable (d)(4)(A) **Medicaid Payback Trust**, upon the death of the disabled beneficiary, must first reimburse the government for medical benefits provided through Medicaid before any assets are distributed to remainder beneficiaries, such as the disabled beneficiary’s siblings. The trust is not required to reimburse the government for SSI benefits. Other than this major difference, the first- and third-party special needs trusts operate similarly.

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The **Pooled Account Trust** is often a good option when the disqualifying assets are limited in size, for which the cost of establishing and administering a (d)(4)(A) special needs trust is not feasible. With a (d)(4)(C) Pooled Account Trust, a nonprofit charitable organization establishes and administers a master trust. A sub-trust account is created within the master trust to hold the disabled person's disqualifying assets. The nonprofit organization serves as trustee of the sub-trust account. However, family members can advise the organization as to the disabled individual's needs. Upon the death of the disabled individual, any remaining assets in the sub-trust account can be left to the nonprofit organization, in which case the trust is not required to reimburse the government for Medicaid-covered medical costs. Alternatively, if the remaining assets are to pass to surviving family members, the trust must first repay Medicaid benefits, similar to the (d)(4)(A) trust.

Other Planning Documents And Procedures

In addition to establishing trusts, all special needs planning should include some or all of the following documents:

- **A letter of intent** — Parents of special needs children should create a letter of intent, or care plan, that provides the trustee, and any future caregivers, with valuable information about the disabled child's daily routines, unique likes and dislikes, food preferences and health care, education and social needs.
- **Legal guardianship documents** — Once a disabled child turns 18, he is legally deemed an adult in many states. As a result, parents may no longer have access to their child's medical records, or make health care or financial decisions for him. The decision to file for full or limited guardianship will depend on whether the child is capable of living on his own and is able to make his own medical and financial decisions.
- **Advance Directive/Health care power of attorney** — This document will provide parents with legal authority to make health care decisions on behalf of their disabled adult child, if necessary.
- **Durable financial power of attorney** — With a durable financial power of attorney, parents will be able to make financial decisions for their disabled adult child, if necessary.

Above all, special needs planning provides the families of disabled children and adults with peace of mind. In addition to preserving eligibility for government assistance, it also ensures that their disabled loved ones will be properly cared for after parents and current guardians are no longer able to do so.

*To schedule a free initial consultation to discuss planning for a special needs child in your life, contact us at **404.410.6820** or via email at paul@pvblack.com*