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Planning for a Special Needs Individual

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> A basic insight of the requirements to plan for a special needs individual

Planning for a special needs individual (SNI) is perhaps the most challenging case that an advisor will confront. The planners will have to deal with an uncertain future with respect to the potential personal and financial needs of the SNI and a myriad of complex issues. In many instances, the future needs of the SNI are unknown but have the potential to be extraordinary. Medical or other expenses for the SNI will require specialized tax planning. However, the income, gift and estate tax laws are relatively simple to deal with in comparison to the various types of public assistance programs that might come into play. Particularly, Medicaid and Supplemental Security Income (SSI) have both federal and state law implications and are administered differently state to state. Finally, the planner must clearly identify his or her client—the one to whom the planner owes the primary duty. The client may be the SNI or the parent (or other family member) who has responsibility for the SNI. For some members of the planning team, joint representation may be impossible due to ethical constraints or conflicts of interest.

GETTING ORGANIZED

The planner must help the family organize data so a comprehensive life plan can be established and implemented. Determining the personal requirements of the SNI, such as housing choices and required personal assistance, is essential. It is necessary to estimate the financial needs as accurately as possible. A number of questions can be placed in a checklist to gather data for this purpose.

DEVELOPING A LIFE PLAN

A life plan is a roadmap of how the needs and wishes of the SNI and his or her parents will be carried out. It is a statement of the SNI’s or the parents’ future intentions that can be communicated to other family members and successor caregivers. The plan will be prepared by the SNI and the parents. The SNI’s level of input will depend upon his or her capacity. The life plan will address where and how the SNI will reside, the education or other specialized care that will be desired or required, the possible employment of the SNI and the source of funds for needs in support of the SNI.

THE TEAM PLAYERS

There are many potential participants in the planning team for an SNI. The number involved in each specific instance will depend upon the circumstances of the case. Following is a list of possible participants and the roles that will be played by each.

• **Family Advocate.** The SNI may need a family advocate to represent his or her interests when dealing with caregivers, public assistance employees and other members of the planning team. The family advocate should be identified in the life plan and there should be a succession plan to replace the family advocate if necessary.

• **Guardian.** A guardian will be needed if the SNI does not have capacity or has the potential to lose capacity in the future. The guardian has the power to legally represent the SNI in all possible transactions. Where possible, the SNI should state a preference for a future guardian.
The care of the SNI is the most important part of the planning process.

- **Attorney-in-Fact.** To the extent possible considering the capacity of the SNI, he or she should have a power of attorney for asset management and health care decisions. The attorney-in-fact will have the power to handle all transactions that are permitted based on the terms of the document.

- **Attorney(s).** Legal representation may be required for the SNI and the parents in several different areas of expertise. An attorney specializing in special-needs planning will be required to assist the SNI and family members with respect to receiving specialized care and financial benefits that might be available from public sources. There will be a need for an estate-planning attorney for both the parents and the SNI. If trusts are created to benefit the SNI, an attorney also will be needed to represent the trustee. Finally, in many instances, the SNI might be represented by a personal injury attorney if the disability was caused by an accident or other negligent act that caused the disability.

- **Trustee(s).** Several trusts might be created in a case involving an SNI. Specialized special needs trusts (SNTs) may be necessary to preserve the SNI’s assets. It is often recommended, even essential, that the SNT have a professional or corporate trustee. Family members who wish to provide financial benefits to the SNI will need to create trusts to manage and preserve the assets. These trusts are more likely to have individual trustees. In either event, the trustee must be cognizant of the rules related to disqualifying the SNI from certain public assistance benefits if inappropriate or excessive distributions are made to the SNI from the trust.

- **Trust Protector(s).** If trusts are created for the SNI, it is recommended that a trust protector be added to the terminology of the document. The trust protector is uniquely important in this case because of the possibility that the rules related to public assistance programs could change by statute or by case law in the jurisdiction of the SNI. The trust protector could be empowered to amend or terminate the trust as appropriate under changed cir-

- **CPAs.** Tax preparation will be required for the SNI, the parents and the trustees of any trusts benefiting the SNI. There will potentially be significant medical and special therapeutical expenses incurred and significant tax planning may be required.

- **CLU®, ChFC® or CFP®.** There may be significant investment or insurance planning necessary in the case involving an SNI. Often, the parents or grandparents of the SNI will create a supplemental needs trust funded by life insurance. It is more important in this circumstance than others to preserve the assets of the parents, and long-term care insurance should be acquired by the parents in many instances. If significant funds are held in trust for the SNI, investment planning with the appropriate time horizon is essential.

**CARING FOR THE PERSON**

The care of the SNI is the most important part of the planning process. Will the SNI reside in the family home? Will the SNI ever reside in his or her own residence? Will a group home or institutional care be the choice? The financial costs of some of these choices may be extraordinary. If food and shelter will be provided for the SNI by other family members, there will be gift tax issues for the provider and potential adverse consequences for the SNI with respect to public assistance.
It will be necessary to determine who will be making decisions for the SNI if he or she does not have the capacity for making and implementing decisions. Will a family advocate or guardian be necessary? If the SNI’s parents are currently taking charge of this responsibility, a successor should be considered in the event the SNI outlives his or her parents.

THE ESTATE PLAN FOR THE SNI
If the SNI has the capacity to do so, his or her estate planning documents should be executed as soon as he or she reaches the age of majority. All the normal documents should be executed. A will should be executed along with a living will (Advance Medical Directive). A Durable Power of Attorney should be created for managing the SNI’s assets. Very careful drafting of this document is essential and should provide for asset transfers and Medicaid planning. A Healthcare Power of Attorney should be granted to provide a family member with the power to make medical decisions. Finally, the SNI should make a statement of preference for a guardian in the event one will be required in the future.

PUBLIC ASSISTANCE PROGRAMS
The SNI may be eligible to receive public benefits in the form of income, special education, medical care and institutional care. These benefits may be provided locally, by the state, by the federal government or by combined state and federal programs in some instances. Some benefits are available automatically for a qualified individual, and others are based on categorical or financial need. These programs are often complex and it is essential for the SNI to have specialized counsel to assist in (and maintain) qualification for public benefits.

- **Social Security Disability Insurance (SSDI).** Disability benefits may be available through the Social Security system. If the SNI was employed prior to the disability, the benefits may be available if the SNI worked for the requisite number of quarters. SSDI also may be available for the SNI under the parents’ benefits. Generally speaking, the parent would have to be retired or disabled for the SNI to receive benefits in this manner. An SNI receiving SSDI for two years will be eligible for Medicare benefits.

- **Supplemental Security Income (SSI).** Benefits under SSI are available for individuals who are elderly, blind or meet the test for impoverishment. The test for impoverishment is complex and will differ from state to state. There are both income
and asset tests. The income test is applied first and will be satisfied if the SNI has unearned (assume SNI is not employed and unmarried) income of less than $694 per month. (Some de minimis income items can be ignored for this test.) The resource limitation is $2,000 (again, an unmarried SNI) of countable assets. Some assets are exempt from the resource test, such as the SNI’s residence, automobile and a $1,500 life insurance policy. Some assets, such as qualifying annuity policies or income-producing property, are not counted in the asset test, but the income from the assets count in the asset test. Due to deeming rules, an SNI who is a minor living with parents may be disqualified if the parents’ income and/or resources are too high.

SSI benefits are indexed for inflation and some additional benefits may be available in specific states. In 2010, the benefits fall in the range of $674 to $1,011 per month. The benefit is reduced for a SNI who receives too much income from other sources. Included in income is the provision of food and shelter to the SNI from other individuals or sources. Hence, the receipt of cash or in-kind food and shelter benefits from the SNI’s family members will cause a reduction in his or her SSI benefit. Although this benefit is limited, in many states the qualification for even one dollar of SSI will permit the SNI to be qualified for Medicaid.

**Medicaid.** Medicaid is a federal and state program with joint funding, but the administration is at the state level. States will administer the rules differently and competent local counsel is necessary. Medicaid provides much broader coverage for health, therapeutic and institutional care than provided under any other public or private insurance program. The qualification for Medicaid is generally essential for the SNI.

Some states have automatic eligibility for individuals who qualify for SSI. Hence, the same income and asset tests are relevant for Medicaid qualification. The majority of states are spenddown states; eligibility for Medicaid is established if an individual with excess income spends down to the threshold level of income by paying for his or her care out of pocket until the income threshold is reached. Other states, known as income-cap states, have more restrictive entrance requirements, but will sometimes have a special financial needy eligibility threshold.

**EFFICIENT USE OF FINANCIAL ASSETS**

The SNI’s medical, therapeutic, custodial, and other long-term expenses have the potential to be catastrophic. It is important to most efficiently use any assets held by the SNI and any that might be provided by members of his or her family. To use the private assets most efficiently, it may be necessary to take advantage of any public benefits that are available. The qualification rules previously discussed and the estate recovery rules provided under Medicaid will make preserving the private assets that may be available to the SNI increasingly difficult. These rules were made more restrictive by the Deficit Reduction Act (DRA) of 2005, and more cost savings were included in the recent Health Care Reform. The Health Care Reform also included the Community Living Assistance Services and Support (CLASS) Act, which takes effect in 2011. For those who enroll (they must be working at the time) in the program, a cash benefit will be available for an enrollee who suffers a physical or cognitive impairment and needs assistance in the activities of daily living (ADLs). It is too early to determine the impact of this program, but it would appear to be unhelpful to an SNI who is not working. In light of the growing federal and state budget deficits, it seems likely that future legislative or administrative developments will attempt to further restrict public benefits.

**THE SNI’S ASSETS**

The SNI may have assets at his or her disposal from several sources:

- The heir may have resources from employment or prior gifts or inheritances.
- The heir may have received or will receive payments from a personal injury/medical malpractice settlement or judgment.
- The heir may have received or will receive funds from his or her family.

The assets held by the SNI will be difficult to protect. If he or she has not yet made an application for Medicaid, there is the possibility to engage in a Medicaid spenddown, but transfers would have to be made five years prior to the Medicaid application. The SNI also could convert countable assets into exempt assets.
Absent this type of planning, the SNI would generally have to spend down his or her income and assets to get below the aforementioned thresholds before any benefits would be available from Medicaid. Unfortunately, this use of funds is inefficient because these expenditures would generally be made at the private pay rate and would greatly exceed the Medicaid reimbursement rate. Fortunately, there are some alternatives.

Several types of trusts may be useful in this circumstance. First, a Special Needs Trust (SNT) can be created for the SNI and his or her assets could be contributed to this trust. The SNT must:

- Be for a beneficiary under 65 years of age
- Provide for a "disabled" beneficiary
- Be established by the SNI’s parents, grandparents, guardian or a court
- Provide for the recovery by the state for Medicaid benefits received by the beneficiary

Before the trust terminates, the benefits are provided to (or for the use of) the SNI at the discretion of the trustee. The main goal of the SNT is to provide for the SNI’s luxuries and not for food or shelter, because distributions of cash, or for food and shelter, would reduce the SNI’s SSI benefit and potentially disqualify the SNI for Medicaid. But the SNT has significant potential to provide for the SNI.

Any assets remaining in the SNT at the time of the SNI’s death will first be recovered by the state to the extent of the Medicaid benefits provided to the SNI. The excess assets can pass to designated family beneficiaries. Note that the recovery of assets by the state is based on the Medicaid reimbursement rate for any care provided for the SNI. This is often far less than one-half of the private-pay rates. Hence the SNT provides for efficient use of the SNI’s assets despite Medicaid recovery provisions.

A second form of SNT is a pooled trust for the benefit of SNIs. This type of SNT must be established and maintained by a non-profit association and maintain a separate account for each SNI beneficiary of the pooled trust. Again, the Trustee should limit distributions to the SNI for luxury items. The assets remain in the trust for the other beneficiaries at the time the SNI dies, although some states require some payback from the pooled trust.

A third form of SNT is the Miller Trust. This trust is specific to the income cap states previously mentioned. The trust is designed to hold excess income above the SSI limit to permit the SNI to qualify for long-term care and medical benefits under Medicaid.

Due to the complexities of the SNT, it is unlikely that an individual family member will be able to serve as sole trustee in most circumstances.

OTHER PEOPLE’S MONEY (OPM)

Although the Medicaid qualification rules provide significant roadblocks to the efficient use of the SNI’s funds for his or her needs, proper planning can preserve the family assets that might be made available to him or her. Some basic tenets must be considered. First, providing cash or food and shelter for the SNI will either reduce the SSI benefit or disqualify the SNI from receiving Medicaid benefits. Hence, gifts or inheritances from any family member who might be inclined to provide for the SNI should be planned carefully.

Providing for the SNI through a third-party Supplemental Needs Trust gives the best benefit. This type of trust is designed similar to the self-settled SNT previously discussed but is funded with OPM. The trustee should be directed to provide for the needs of the SNI, other than food or shelter. Cash distributions will generally be avoided. Because the trust is funded with OPM, no Medicaid recovery is required and other family heirs will be the remainder persons of the trust. The third-party Supplemental Needs Trust can be created by a parent, grandparent or other benefactor member, and can be a living or testamentary trust.

The third-party Supplemental Needs Trust is often funded with life insurance covering the life (or lives) of the SNI’s parent(s). Because the SNI’s financial needs might be significant, in most instances, the parents will not have sufficient assets to both fund a trust for the SNI and provide bequests for other heirs. Whether or not this trust is irrevocable depends upon the estate tax planning requirements for the SNI’s parents.

In conclusion, be aware that planning for an SNI will require the use of a highly qualified team cognizant of the relevant federal and state laws applicable to a special needs planning case. The goal here was simply to provide a basic primer for such planning, but a great deal of detail was excluded, for which extra help is a must.