

# PLANNING FOR DISABLED CLIENTS AND LITIGATION PROCEEDS

Dana M. Breslin, Esquire, CELA  
Pappano & Breslin  
3305 Edgmont Avenue  
Brookhaven, PA 19015  
610.876.2529

<http://www.pappanoandbreslin.com/>

December 10, 2009

# Initial Considerations

- Law suits for “wrongs” or “losses”
- Plaintiff or spouse receiving public benefits?
- Are benefits “means tested?”
- Time period to establish Special Needs Trust (“SNT”)

# What Benefits are Involved?

- SSI
- SSDI
- Medicaid or Medical Assistance
- Medicare and extra help
- Housing Assistance
- Veterans Benefits

# How important is the current public benefit?

- Amount of SSI
- Loss of SSI and MA
- Where does client reside?
- Health Insurance Portability Act
- Mental Health Services
- Disruption of institutional care

# Is there a way around a SNT?

- Exempt asset expenditures
- Examples: home, car, debt repayment, irrevocable burial accounts
- Timing of purchase-30 days
- Report award to agency paying benefits; termination notice must be appealed.
- Caution: gifts
- Client ability to carry out plan

# Trustees

- No limitations in Federal or Pennsylvania law.
- Bonds for individual family member
- Consider disinterested Co-Trustee where both signatures are required

# What is a Self Settled Special Needs Trust?

- Established with the assets of disabled person (usually litigation proceeds)
- By parent, grandparent, guardian or court
- Only disabled person can be beneficiary
- Must be established before age 65 and no additions after turn 65
- Payback provision for state Medicaid agency required.

# Additional characteristics and requirements

- Should not provide for food and shelter (in kind support and maintenance), but rather for clothing, durable items, car insurance and gas, medical needs not otherwise provided
- Irrevocable
- "Get out of jail free card"

# Who qualifies? (i.e. What is Disability?)

- Same definition as Social Security Disability for SSI or SSDI
  - Inability to engage in substantial gainful activity as a result of a disability that is expected to last at least one year or result in death.
  - Does not have to be receiving SSI or SSDI

# Who do you need to notify?

- SSA if SSI, Dept. of Public Welfare if MA
- Letters of approval from Office of Legal Counsel and SSA for court approval.
- Third party liability will send annual statements of MA claim and DPW may required informal accounting
- Office of Legal Counsel approval of principal payments over certain amount

# POMS Section on Special Needs Trusts and Disbursements

- Periodic accountings by SSA may notify beneficiary of deemed in kind income or other income and a termination of SSI.
- Trustee should follow POMS to avoid potential pitfalls.
- See Appendix.

# Social Security/SSI Review

- Region III:

- Mandy Stokes, Social Security Administration,  
SSI Program Support Team, P.O. Box 8788,  
Philadelphia, PA 19101

# Medical Assistance Contacts

- Eastern PA: Mark Newell or Anthony Marone, Assistant Counsel, Governor's Office of General Counsel, Commonwealth of Pennsylvania, 801 Market Street, Philadelphia, PA 19101; 215.560.2192
- Central PA: Lisa B. Dees, Assistant Counsel, Office of Chief Counsel, Department of Public Welfare, 3<sup>rd</sup> Floor West, Health and Welfare Building, 7<sup>th</sup> and Forster Streets, Harrisburg, PA 17120; 717.783.2800
- Western PA: Jason Manne, Assistant Senior Counsel, Department of Public Welfare, 302 State Office Building, 300 Liberty Avenue, Pittsburgh, PA 15222; 412.565.2557

# Third Party Liability

- For after death of beneficiary statement of Medicaid Claim:
  - Department of Public Welfare, Third Party Liability, Estate Recovery Program, P.O. Box 8486, Harrisburg, PA 17105-8486

# Conflict between State and Federal Interpretation

- 62 P.S. § 1414 for PA
- POMS SI 01120.200; .201 (Assets of Beneficiary); .203 (Medicaid Exceptions)
- Selected provisions in Appendix

# POMS vs. Common Law Trust Rules

- Grantor/Fiduciary/Trustee/Trust Beneficiary
- Grantor Trust
- Discretionary Trust
- Residual Beneficiary and Pennsylvania UTA

# Can Trust be terminated before death of beneficiary?

- "Sole benefit" requirement would be violated.

# Qualifying distributions

- Never distribute cash directly to either SSI recipient or Medicaid recipient.
- In-Kind Support and Maintenance
  - Maximum value rule
  - 1/3 loss of SSI may be worth payment from Trust
- Payments should be made directly to vendors (no Trustee reimbursements)
- PA reasonable relationship test

# Some of the Traps

- Sole Benefit
- Created by the Courts
- Payback
- Administrative Costs and Taxes Due
  - “Stinking Dead Body Rule” by David Lillesand

# What happens if beneficiary is no longer disabled?

- Under PA UTA, beneficiary and remainder beneficiaries can request termination by Orphans Court
- Discuss with client advantages and disadvantages to termination

# Pooled Trusts

- 42 USC § 1396 p(d)(4)(c); 62 P.S. § 51965.1 et seq.; PAUTA at 20 PA CSA § 7799.3
- “Mutual Funds of SNTs”
- Trust is non-profit fiduciary
- Anyone can create
- Residue after death remains in trust for others that are disabled
- Litigation in PA regarding PA’s 50% payback rule  
Lewis v. Rendell, 501 F.Supp 22 § 61 (ED PA 2007)

# Structured Settlements

- Create SNT and fund with minimal amount
- Choose corporate trustee
- Before funding, plan for immediate needs of beneficiary
- Provide trustee with sufficient assets for payback and closing costs of Trust at death
- Commutation clause effective upon death
- DPW must be residuary beneficiary

# Reference Sources

- The Special Needs Trust Handbook by Thomas D. Begley, Jr. and Angela E. Camellos, Aspen Publishing Company
- Prior PBI Materials by Dennis McAndrews and Thomas Begley
- David Lillesand, Esq. and FloridaSpecialNeedsLaw.com
- [www.socialsecurity.gov/ssi/spotlights/spot-trusts.htm](http://www.socialsecurity.gov/ssi/spotlights/spot-trusts.htm) or the SSI POMS site

Questions?