

## Estate Planning

Proper estate planning is important for any family, but even more so for a family of a child with special needs.

It is extremely important to first seek legal advice from an attorney who has experience in estate planning for children with special needs. The State of Texas has very specific laws that will shape the future for your child, especially if your child continues to receive publicly-funded benefits such as Medicaid.

While DSG cannot offer specific legal advice or recommendations, experts recommend that you establish a will as soon as possible that leaves NO money or property directly to your child. Instead, a Special Needs Trust should be established, and then the trust becomes the beneficiary, not the child.

It is also important that no other relative, however well-meaning, name your child as a beneficiary of any estate.

If your child with special needs receives an inheritance at any age that is outside of a Special Needs Trust, your child could be taken off of public assistance and possibly be responsible for paying the state back for prior expenses.

Some children born with Down syndrome are able to live an independent life as adults. Others, however, are unable to manage without assistance. It is impossible to predict your child's future, but with proper estate planning, you can feel comfortable that your child's future needs will be met.

Each family must choose a qualified attorney with whom they are comfortable working.

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## PLANNING FOR SPECIAL NEEDS PERSONS

### OVERVIEW

**Summarize key government programs, discuss Special Needs Trust (SNT)**

I am not a government benefit program specialist. Like anything that has to do with our government, our public benefit programs are complex and constantly changing. I can't tell you that I know this area as a government employee would and I am not an expert of what particular benefits your child may receive but I can at least summarize the basics.

What I want to do is try to summarize our major government programs as they exist today and then focus on special needs trust an over of my practice that I spend a consider time in.

### I. INTRODUCTION, SPECIAL NEEDS PERSONS.

A. **Introduction.** As parents of a special need person nobody knows better than you that many special needs persons need a considerable amount of assistance and supervision in order to meet their daily living needs. A special needs person may need (1) full or part-time assistance from an aid in their home, (2) full-time nursing home care, (3) treatment in a residential or mental health facility, (4) health care coverage to pay for extensive and ongoing medical bills, and/or (5) a source of monthly income. For many individuals, government benefit programs provide a necessary safety net, without which they could not meet the needs of their day-to-day existence and medical costs.

Eligibility for many governmental benefit programs is restricted to persons with limited resources and income. Therefore, when special needs persons directly receive assets or income (e.g., through inheritance, gift, or personal injury settlement), the recipient may become ineligible for many public benefit programs. What at first might seem like long-awaited financial relief from an otherwise severely restricted lifestyle, could easily end up being the catalyst responsible for the disruption of a very complicated system of public benefits that holds together the day-to-day support system of a disabled adult or child.

Supplemental Needs Trust (SNT) also referred to as a "Special Needs Trust," are the main planning device that can be used to hold assets which otherwise would belong to the special needs child, and thereby permit the individual to become qualified or remain eligible for various public benefit programs. Essentially, when such trust are established, maintained, and administered in a proper manner, the assets in the trust are not treated as

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disqualifying resources for the beneficiary. Further, if distributions are made properly from the trust, the amounts disbursed will not be counted as disqualifying income to the beneficiary. If we can recognize and respond to the special circumstances associated with benefit program requirements and how these issues interact with establishing and administering the trust, we can insure that our special needs child can get the benefit and use of their trust assets and still qualify for public assistance programs.

## **II. FEDERAL MEDICAL INSURANCE AND ASSISTANCE PROGRAMS.**

In order to do the simplest assessment of a person's eligibility for state and federal benefits programs, and to understand the rules of those programs, it is necessary to know about the various types of program assistance available. The following sections discuss Medicare and Medicaid, two federal and/or state programs and that provide medical care and other health-related assistance to elderly or disabled people, including minor children.

### **A. Medicare.**

Medicare is a federal health insurance program available to individuals who (1) meet either the disability or age (65 or older) requirements of the program, (2) have paid money into the program through retirement tax payments, and/or (3) have become eligible to receive Social Security Disability or Railroad Retirement Disability benefits, or (4) who have end-stage renal disease. Coverage through the Medicare program is automatic when payments have been contributed to the program from the qualifying person's own income or that of his or her spouse or parent, as is the case with dependent children or survivor coverage. Medicare is a source of health insurance coverage available to a citizen who has paid Social Security taxes and who is drawing either Social Security Retirement or Social Security Disability benefits or Railroad Retirement Disability benefits. Persons who are over age 65 but who have not paid money into the program through federal retirement tax payments or withholding, can elect to enroll in the Medicare program and can get Medicare coverage by signing up for the coverage and paying the required premiums.

In order to receive Medicare insurance coverage then: (1) a person must make an election at age 65 or older for program coverage if they have not paid into a qualifying retirement system which gives them automatic coverage, or (2) for automatic coverage, the claimant or someone whose payments can be credited to the claimant (e.g. the claimant's spouse or a dependent child), must have made countable payments into the Social Security or Railroad Retirement Systems. 42 U.S.C. §1395c; 42 C.F.R. §§406.20 through 406.26; and 42 C.F.R. §406.10(a). As with any insurance program, some medical services are covered by Medicare and some are not, and a co-payment or deductible amount is normally required for most of the covered expenses.

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Eligibility for the Medicare Program is not usually restricted by a person's access to their assets or income. In other words, when applying for Medicare coverage, it makes no difference what that person's current income is, what assets she or he may own, or, in most circumstances, whether any or all of the those assets are held in trust or restricted by some other alternative planning device. Therefore, because we typically do not need to consider special trust structures or other estate planning alternatives in order to qualify a special needs person for Medicare.

## **B. Medicaid.**

Medicaid is a term usually used to refer to government health care programs that provide medical care and services to indigent (poverty level) persons under title XIX of the Social Security Act, found at 42 U.S.C. §1396 *et. seq.* In order to be eligible for assistance through a Medicaid program, an applicant must meet **both** the (1) **income**, and (2) **resource** restrictions of the program.

Medicaid program are funded primarily with federal tax dollars that are allocated to each of the fifty states. The states are responsible for administering the allocated dollars along with some state matching funds to provide the program services to state residents. (42 U.S.C. § 1396a and 42 U.S.C. § 1396d.) Currently in Texas, the Medicaid programs are administered and controlled by the Texas Health and Human Services Commission, hereafter referred to as "the Department" or "HHSC."

The states have some latitude within the federal laws and regulations to establish their own individual guidelines regarding qualifications for program assistance. Therefore, the programs are creatures of both federal and state law, meaning that both must be considered when choosing planning devices for persons with disabilities including the use of special needs trust.

The term "Medicaid" may be used to mean one or more of several different programs administered by the Department. For example (1) "Nursing Home Medicaid," or "Long-Term Care Medicaid" covers most of the nursing home expenses for persons, including minor children, who reside in qualified nursing facilities and whose medical condition (referred to in program language as "medical necessity") requires that they receive continuous care of that kind; and (2) "Community Medicaid" refers to comprehensive medical assistance programs that can pay for doctor visits, hospital stays, prescription drugs, and adaptive aids for people not residing in nursing homes. Additionally, there are Community care programs that cover some or all of the cost associated with providing in-home daily living assistance and skilled nursing or medical care for elderly or disabled adults or children while living in their homes.

One Medicaid program that provides in-home assistance and care to disabled or elderly individuals is the Community Based Alternatives (CBA) Program. Under the CBA program, an eligible person has hospitalization, prescription medicine, and

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physician coverage and they can also receive (1) adaptive aids and medical supplies, (2) adult foster care, (3) assisted living care services, (4) emergency response services, (5)

money for minor home modifications, (6) occupational therapy, (7) personal assistance services, (8) physical therapy, (9) respite care, (10) and speech pathology services. Essentially, the services available to someone who qualifies for the CBA program are similar to those that the person would receive in a skilled nursing facility, but through the CBA program, the goods and services are made available to the recipient in their own home. The goal of the CBA program is to keep as many people in their own homes and in their communities as possible and to reduce the number of disabled or elderly people housed in nursing homes. Similar services are provided to disabled children through the such community based programs as CLASS, MDCP, and Texas Health Steps. For many disabled or incapacitated adults and children, Community Medicaid is the only alternative for health care coverage that they have. It is often the case that disabled people are considered “uninsurable” under conventional health insurance standards. Yet, individuals with debilitating physical or mental conditions are the very person who will most often need expensive medical treatment or assistance with their daily living needs.

**Medicaid Planning Practice Note** – As will be discussed in detail in Section III, eligibility for the Medicaid programs depends on a special needs person’s monthly income and countable resources. However, assets held in qualifying trusts, are exempted from calculations of available or countable assets. Having “exempt assets” or resources that are not “available” or “countable” because they are held in special trusts means that (1) the value of the assets will not count against the applicant in figuring his or her eligibility for program assistance, and (2) the assets need not be liquidated or “spent down” before programs benefits can begin. Further, while distributing cash to a Medicaid recipient will usually result in the program counting the distribution as income to the recipient in the month it is received, it is possible to avoid that result in certain situations. For example, if Medicaid services are provided to the special needs person through one of the community based programs listed above, a third-party (which includes the special needs person’s trust) can purchase goods and services directly for the special needs person and such “in-kind support and maintenance” payments will not be counted as disqualifying monthly income.

From the perspective of protecting assets in special trusts and making allowable distributions to special needs persons, while staying within the program rules, we must consider the special needs person’s needs and balance those distribution demands against the type of distributions allowed by the program’s guidelines for monthly income. Serious consideration must be given to understanding the interaction between the Department’s controlling rules regarding (1) allowable trust distributions and other payments for Medicaid recipients, on the one hand, and (2) how the Department applies those rules to distributions made from special needs trust or other third-parties, on the other.

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## **III. SUMMARY OF SELECTED MEDICAID PROGRAMS & THEIR ELIGIBILITY REQUIREMENTS.**

Although the cap on countable income does consistently change and increase slightly every year to adjust for cost of living and inflation, the asset limitation for Medicaid program qualification has remained the same since 1989. The Department publishes its rules for the Medicaid programs in the *Medicaid Eligibility handbook* (also referred to herein as the “Handbook” or the “MEH”). The MEH is available on line at the HHSC website at: <http://www.dads.state.tx.us/handbooks/meh/>.

As will be discussed here in more detail, eligibility for SSI and Medicaid may depend on the applicant’s ability to meet numerous requirements, including (1) nationality and Residence requirements, (2) Age, Blindness, or Disability requirements, (3) Medical Necessity Requirements, and (4) Income and Resource Limitations.

### **A. Nationality and Residence.**

To qualify for Medicaid, the applicant must be (a) a U.S. Citizen, or (b) an alien lawfully admitted to the U.S. for permanent residence, or (c) otherwise permanently living in the U.S. under color of law (as defined in the regulation). 40 T.A.C. §15.300(a), (b). The applicant must be a resident of Texas, which means that he or she must have established residence in Texas and intend to remain here. 40 T.A.C. § 15.301(a). No specific time period of residence in Texas is required, and travel outside Texas does not terminate residency here, so long as the applicant has an intent to return to the state.

### **B. Age, Blindness, or Disability.**

An applicant for Nursing Home Medicaid must be either age 65 or older, blind, or disabled (under the Social Security Disability definition discussed below). 40 T.A.C. § 15.305(a). In practice, the requirement of being disabled is never an issue, because the “medical necessity” requirement for receiving skilled nursing (nursing home) Medicaid benefits is more stringent than the “disability” requirement of Social Security.

### **C. “Medical Necessity” & “Disability” for Nursing Home & Community Based Alternatives (CBA) Programs.**

For some Medicaid programs an applicant must establish they have sufficient physical needs or limitations referred to in program language as “medical necessity,” to qualify for program coverage. Two such programs are (1) the Nursing Home Medicaid Program, and (2) the Community Based Alternatives, or CBA, Program 40 T.A.C. §§ 19.601-19.604. The initial assessments for medical necessity is made on form 3652-A (the CARE form) upon admission to the nursing home or program, and a follow-up is done annually thereafter in most cases.

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Essentially, someone (adult or child) meets the “medical necessity” requirement if he or she has a medical disorder or disease necessitating regular attention by registered or licensed vocation nurses. An inability to attend to the “activities of daily living,” such as bathing, grooming, and eating, is not sufficient to meet the standard of medical necessity. See 40 T.A.C. § 19.2402 et seq. for the applicable regulations.

Other Medicaid programs require proof of a “disability,” but not necessarily a “medical necessity” in order to receive program services. One class of Medicaid programs, known as “Community care” programs, provides in-home and community-based services to functionally impaired people who are elderly or have disabilities, allowing them to remain in their own homes or communities. The “disability” requirement for qualifying for most Community Care programs is less stringent than the “Medical Necessity” test required for Nursing Home Medicaid or the CBA program. The Community Care programs require that the applicant meet the definition of being “disabled” as defined by the Social Security Act for the Supplemental Security Income (“SSI”) program, which definition is that the person have the need for assistance in at least some activities of daily living as determined by the assessment interview.

Community Care programs provide assistance with bathing, dressing, toileting, food preparation, housekeeping, etc. The number of assistance hours an applicant will qualify for per week varies based on the caseworker’s determination of the applicant’s needs as gained from the assessment responses given to the caseworker by the applicant, or his or her representative. These “assistance” hours do not include any medical benefits. Medical benefits are provided by the program separately and in addition to assistance hours.

## D. Income & Resource Limitations

### 1. Nursing Home Medicaid.

As of January 2008, to qualify for Medicaid nursing home program benefits in Texas, an unmarried applicant’s monthly “countable” **income** cannot exceed \$2,128, and he or she cannot have more than \$2,000.00 in “available” or “countable” **resources** (i.e., cash or property readily convertible to cash, like stocks, bonds, etc.). If an applicant has more “countable assets” than permitted by the particular Medicaid program for which he or she is applying, the applicant generally has to “spend down” the available resources before qualifying for the program.

### 2. Community Care Programs.

For most of the Community Care programs, the **income restrictions** in year 2008 are the same as for Nursing Home Medicaid: \$2,128 per month in income for a single person. With the exception of a few programs, the **resource limits** for Community Care programs, including the CBA program,

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are also the same as the limits for Nursing Home Medicaid: \$2,000.00 for a single person. (See 40 T.A.C. §§ 481.6001-481.6020 for regulations governing the Community Based Alternatives (CBA) Program.) There are a few Community Care Medicaid programs, such as the Adult Foster Care (AFC) program, the Day Activity and Health Services program, the Emergency Response program, and the Family Care program, which have slightly less stringent resource requirements. .

## **E. Available or Countable Resources.**

Remember that for most Medicaid programs, including the Nursing Home Medicaid and CBA programs, the resource limits is \$2,000 in countable resources for an individual. “Resources are cash, other liquid assets, or any real or personal property or other non-liquid assets owned by a special needs person, his [or her] spouse, or parent, that could be converted to cash.” 40 T.A.C. §15.100, Medicaid Eligibility Handbook § 2310. Instruments that produce income, such as promissory notes and bonds, are counted as resources to the extent of their fair market value; and in addition, the payments received by the special needs person are counted as income in the month received. If there is a mortgage on real property or a security interest on personal property, only the equity value is counted.

Resources are counted only as of 12:01 A.M. on the first day of each month. Changes from that time until one month later do not affect countable resources for that month. Countable resources are reduced by the amount of funds encumbered before 12:01 A.M. of the first day of the month. That is, if a check is outstanding at that time, the bank balance at the time is reduced by the amount of the check for the purpose of determining countable resources. 40 T.A.C. §\_15.400(a), (b), 15.435(b)(2), Medicaid Eligibility Handbook § 2310.

To be counted, resources must be both owned (solely or in part) by the applicant and “accessible to” the applicant. “If a special needs person has the right, authority or power to liquidate the property or his [or her] share of it, the property is a resource. If a special needs person would be required to seek court action to access or dispose of property, that property is not considered a resource.” 40 T.A.C. § 15.415(a), (b), Medicaid Eligibility Handbook § 2313. A special needs person’s resources are considered available to him or her when they are being management by a legal guardian, agent under a power of attorney, or other fiduciary agent of the special needs person, unless a court denies the guardian or agent access to the resources. 40 T.A.C. § 15.415(e), (f) Medicaid Eligibility Handbook § 2313.4.

If a special needs person has a joint bank account and he or she can legally withdraw funds from it, all of the funds in the account are considered a resource of the special needs person. However, the rules impose only a presumption that all of the funds in a joint bank account are available to the special needs person and the special needs person must be allowed an opportunity to prove that some or all of the funds are the

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property of someone else. Any amount of funds proven to belong to someone else do not count as an available resource against the special needs person. T.A.C. § 15.43(m), Medicaid Eligibility handbook § 2331.3.

If an applicant converts one type of property to another type, the new property may or may not be counted as a “resource.” If the Department policy does not count the type of property that has been acquired by the conversion, then the new property is not a countable resource. Any cash received from the sale of a resource is considered a resource, not income. 40 T.A.C. § 15.420, 15.440(c), Medicaid Eligibility Handbook §§ 2314, 2344. By contrast, a “lump sum payment” other than from conversion of a resource is countable income in the month it is received (so it will usually result in at least one month’s disqualification) and is a countable resource thereafter. 40 T.A.C. § 15.450(b), Medicaid Eligibility Handbook § 2411. Examples of “lump sum payments” are inheritances, death benefits, personal injury awards, and payments of retroactive public benefits. Death benefits are excluded as income when they are used to pay the last illness and burial expenses of the deceased; and they are excluded as resources to the extent they have not been so used by the first day of the second calendar month after the month in which they are received. 40 T.A.C. 15.435(1), Medicaid Eligibility Handbook § 2332.5.

## **IV. FEDERAL INCOME ASSISTANCE PROGRAMS: SOCIAL SECURITY DISABILITY (SSD), AND SUPPLEMENTAL SECURITY INCOME (SSI)**

Two federally funded programs that provide income assistance are the Social Security Disability (SSD) and the Supplemental Security Income (SSI) programs, both of which are administered by the Social Security Administration. The following section provides a general overview of those two programs. The income assistance provided through SSD or SSI generally is relatively small, but it is important to remember that (1) once an individual qualifies for SSD, and receives SSD payments for 24 months, he or she is eligible for the Medicare program, and (2) qualification for the SSI program automatically qualifies an individual for the Medicaid program.

### **A. Social Security Disability (SSD).**

The SSD program is not an income or asset-restrictive program. Similar to the Medicare program in this way, Social Security Disability is paid only to disabled individuals who have made sufficient contributions to Social Security through employment taxes to become insured. An adult is considered “disabled” if he or she is unable to engage in any substantial gainful activity because of a medically determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of at least 12 months. 42 U.S.C.A. § 1382c)a)(3(A); 20 C.F.R. §416.905. A child under age 18 is considered disabled if he or she has a medically determinable physical or mental impairment that meets the adult definition and that, in addition, result in “marked and severe functional limitations.” Marked and severe function limitations exist “when several activities or functions are

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impaired, or even when one is impaired, as long as the degree of limitation is such as to interfere seriously with the ability to function (based on age-appropriate expectations) independently, appropriately, effectively, and on a sustained basis.” 42 U.S.C.A. § 1382c(a)(3)(H) and 20 C.F.R. Part 404 Subpart P, Appendix 1, Part B § 112.00C.

Each insured individual is covered by the program through a specific future date, or the “date last insured.” As the individual continues to work and pay into the system, the date last insured continues to move further ahead. When the individual stops working and paying into Social Security, the date last insured stops moving forward so that the individual eventually will pass the date last insured. In order to qualify for SSD, the individual must be declared disabled **before** the date last insured.

A person can qualify for SSD if he or she has paid into the Social Security program for at least 10 years and for at least 20 of the 40 preceding work quarters. A person can be eligible with less work history if the person is disabled and under age 31, or if he or she is disabled due to blindness. 20 C.F.R. 404.110 and 20 C.F.R.404.120.

The amount of benefits paid to a qualifying individual is based on the age of the applicant and the total amount of his or her contributed payments. This means that, like the Medicare program as discussed above, the SSD program is not an income or asset “means tested” program.

SSD benefits are monthly cash payments made to the disabled person. Significantly, after a person is determined to be eligible for SSD benefits, eligibility for the Medicare program often follows. Once an individual qualifies to receive SSD benefits, he or she is also qualified to receive health care coverage through the Medicare program, in most cases, after a term of 24 months.

An applicant must be disabled for five months before he or she will be eligible for SSD benefits, regardless of the severity of disability, except when the disability is blindness. However, SSD benefits may be paid up to one year before filing the individual’s initial application. For applicants who are age 31 or older, to be “fully insured” the applicant must be credited with 40 quarters of coverage. 20 C.F.R. 404.110. The general rule for individuals with a steady work history is that they are insured for five years after they have stopped working.

Since eligibility for SSD benefits is not based upon the resources of the applicant, persons with significant resources do not need special planning in order to qualify.

## **B. Supplemental Security Income, SSI.**

SSI is a monthly cash income assistance program intended to help pay for the applicant’s food, clothing, and shelter. 42 U.S.C. § 1381 et seq. As such, the benefits are designed to augment the income or assistance otherwise available to aged (age 65 or

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over), blind, or disabled (same definition as stated for SSD) persons, including children, who meet the asset and income restrictions of the program.

## 1. Income and Resource Limitations.

SSI monthly benefits are based on the total amount of monthly income the person receives, including but not limited to, wages earned, payments available through other government assistance programs, gifts of money or property, and the value in “in-kind” support which can be applied toward food, clothing, or shelter. Although the income guidelines for SSI vary and are more restrictive than those for the Medicaid programs, the program applies the same asset restrictions as are applied for Medicaid as outlined above. Social Security Act § 1902(a)(10)(ii)(V), 42 U.S.C. § 1396a(a)(10)(A)(ii)(V). That is, the available **resource limit** for an individual is \$2,000.00. Payments made from a trust are counted as income in the same way under the SSI rules as payments made to or for the benefit of the beneficiary from any other source.

For SSI purposes, “income” is defined at 20 C.F.R. § 416.1100-416-1182 and is generally regarded as anything the SSI recipient receives in cash, or property readily convertible to cash, or in kind support that can be used to meet his or her needs for food, clothing, and shelter. See also Social Security Administration Programs Operational Manual system (POMS) at SI101120.200J.3. Unlike SSD benefits, eligibility for SSI does not depend on contributions made by the individual in to the Social Security system through specific tax contributions or wage withholding. Significantly, since eligibility for Medicaid is “linked” to eligibility for SSI in Texas, **if you qualify for SSI payments you automatically qualify for Community Medicaid coverage.**

Income limits in year 2008 for the SSI program state that an unmarried person cannot have more than \$637.00 per month in “countable income” and married couples are restricted to a combined amount of not more than \$956.00 per month. SSI monthly payments are referred to in the program’s language as “Federal Benefit Rate” (hereinafter “FBR”). As is the case with the Medicaid programs, the amount of allowable monthly income for the SSI program is adjusted yearly in January. 20 C.F.R. § 416.1103. The program counts an individual’s “earned” and “unearned” income when assessing program eligibility. Earned income is gross wages of an employee, and net earnings from self employment (after deduction of business expenses but without allowing for deductions for taxes, or insurance, etc.). Unearned income is all income that is not earned, including without limitation annuities, pensions, alimony, child support payments (including in-kind support and maintenance), dividends, life insurance proceeds, and gifts and inheritances. 42 U.S.C.A. § 1382a(a)(2); 20 C.F.R. § 416.1102, 416.1110, 416.1112, and 416.1120.

Both categories of income, earned and unearned, have several “exclusions” applied when figuring the individual’s applied income and the list should be

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consulted when making determinations about trust distributions. 42 U.S.C.A. § 1382a(b); 20 C.F.R. § 416.1124.

## 2. Treatment of In-Kind Support & Maintenance.

As is the case with Medicaid programs, the SSI program applies specific rules for counting payments of “in-kind support and maintenance.” In-kind support and maintenance is defined by the program as food, clothing, and shelter that is furnished by or paid for by someone other than the SSI recipient and it includes distributions made from a trust. In-kind support and maintenance payments are categorized as unearned income. In the program rules, distributions from special trusts are treated basically in the same manner as payments made by third parties. In general, the value of this type of unearned income payment reduces the amount of the SSI benefit to the recipient dollar-for-dollar.

### *Alternative Planning Devices for In-Kind Support & Maintenance Rules*

– Because of the in-kind support and maintenance rules of both the SSI and the Medicaid programs, most fiduciaries believe that they cannot make distributions for these types of costs from special trust if their trust beneficiary receives benefits from the SSI and/or Medicaid programs. However, as will be discussed in more detail in the case studies below, certain SSI income reduction rules and Community Medicaid waiver rules make it possible to avoid program disqualification when in-kind support and maintenance payments are made by third-parties for the benefit of the disabled client.

Obviously in most circumstances it is not possible for a person to pay all of their food, clothing, and shelter costs with only \$637.00 per month in allowed income. The following alternative planning devices should be considered when paying for in-kind support and maintenance expenses for SSI recipients.

a. *One-Third Reduction Rule:* Instead of making a determination of the actual dollar value of in-kind support and maintenance being provided to the SSI recipient and then reducing his or her monthly payment of \$637.00 dollar-in-for dollar based on that value, if the client or trust beneficiary is living in the household of another person who is providing **both** food **and** shelter to the trust beneficiary, we can elect to apply the One-third Reduction Rule to the amount of the beneficiary’s SSI payment. This means that rather than suffering disqualification from the program, or dollar-for-dollar reduction in their monthly payments regardless of the value of the distributions made for this type of in-kind support and maintenance, the recipient will instead be allowed to receive the food and shelter provided and a reduction of only 1/3 of the monthly Federal Benefit Rate (“FBR”) will be applied against them. In year 2008, that means that the reduction amount applied is  $1/3 \times \text{the FBR of } \$637.00 = \$214.00$ . (Another way of viewing it is that \$214.00 will be counted as income, in addition to any other countable income the client may have.) As a result, the SSI recipient

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would receive a monthly payment of \$637.00 minus \$214.00, or \$377. 20 C.F.R. § 416.1131.

b. *Presumed Value Rule:* If the One-Third Reduction Rule does not apply to the beneficiary's circumstances because the beneficiary is not living in another person's household who is providing both food and shelter for them, but the client is receiving *any* food, clothing, *or* shelter from another source, (including payments made for food, clothing, or shelter by a special trust for the benefit of the beneficiary), under this rule, the agency will *presume* that the maximum value of furnished supports 1/3 of the Federal Benefit Rate plus \$20. So, in year 2008, that calculation would be 1/3 of \$637.00, which = \$214.00 plus \$20.00 which = \$234.00. This presumption of the maximum value of the provided food, clothing, or shelter is rebuttable by the beneficiary, meaning that if it can be shown that the actual value of the furnished food, clothing, or shelter is less than \$214.00, the client can elect to have his or her income reduced by that actual value rather than the "presumed value" of \$214.00.

c. *Exception to the One-Third Reduction and Presumed Value rules:* If the SSI beneficiary live sin the household with someone a part of whose income is "deemed" to the beneficiary through the SSI rules (e.g. a minor child living in the household with his or her parent(s), where part of the parents' income is attributed to the child) then the value of food, clothing, and shelter paid by the parents or anyone else on behalf of the beneficiary is *not* treated as income to the beneficiary and no reduction in the monthly SSI payment results. 20 C.F.R. § 416.1148 and 416.1160 et seq.

d. *Business Arrangement.* The SSI rules further hold that a recipient is not receiving in-kind support and maintenance in the form of room or rent if the recipient is paying the amount charged for these costs under a "business arrangement." This means that there will be no reduction in the beneficiary's monthly SSI payments if it can be shown, through proper record keeping, that the beneficiary fully pays, or pays his or her pro rata share, of the actual cost of the household expense. A pro rata share is determined by dividing the average monthly household operating expenses by the number of people living in the household, regardless of their age or disability. 20 C.F.R. § 416.1130(b), 416.1133.

e. *Rent Subsidy – Pay 1/3 FBR to the Landlord.* The rule applied in Texas is that a "business arrangement" will be deemed to exist whenever the rent paid by the SSI recipient equals or exceeds the presumed maximum value amount of \$234.00 as discussed above. Therefore, even if the fair market value of the rent is \$637.00, there will be no additional "income" attributed to a rent subsidy payment from another source if the beneficiary is paying at least \$234.00 to the landlord. This means that a third party or trust can supplement the beneficiary's rent and other costs, such as utilities and waste

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collection, etc. without the beneficiary losing any of his or her SSI payment. Further, 1) if the property being leased to the beneficiary is owned by the landlord receiving the direct rent payment, and 2) that landlord is not related to the beneficiary in any way, then no amount of rent subsidy paid by the third-party including a qualifying trust will be treated as income against the beneficiary for purpose so SSI qualification.

These considerations are of primary importance to us planners because it provides an opportunity to pay for all of the SSI recipient's beneficiary's food, clothing, and shelter, in exchange for a maximum reduction, if any, in the client's monthly SSI payment of no more than \$214.00. These food, clothing, and shelter payments can be made **in addition** to the unlimited payments the SNT can make to providers for the beneficiary's "supplemental needs." The only thing the trust cannot do for the beneficiary is to pay cash directly to the beneficiary. Further, because the beneficiary stays SSI qualified, he or she will also stay Medicaid qualified meaning that the Medicaid program pays for (usually) all of the beneficiary's medical needs. This leaves the assets of the SNT available to cover the rest of the beneficiary's needs.

## **V. USING SPECIAL TRUSTS TO QUALIFY FOR BENEFITS AND MAXIMIZE ALLOWABLE DISTRIBUTIONS.**

### **A. Defining Special or Supplemental Needs Trusts.**

As the prior discussions regarding the SSI and Medicaid programs make clear, it often is imperative that a disabled or incapacitated person be eligible for programs that will provide them with medical care and other personal assistance that they need. However, as we are all aware, a person's disabilities or incapacity most often adds to the costs of their daily lives, and the strict limitations placed on a person's available resources and income as required by SSI, Medicaid and other programs, such as those administered through the Texas Department of mental health and Mental Retardation (MHMR), can work extreme hardships on our special needs person who so desperately need the medical and/or daily living assistance offered through those programs. By sheltering a special needs person's assets that exceed those resource limits in a "special needs trust," (also referred to as "supplemental needs trust" ) or "SNT," and making proper distributions from the trust so that such distributions are not counted within the program rules as income to the beneficiary, we can ease the financial constraints of the programs and still qualify the special needs person for benefit assistance.

When an SNT is properly established, any property held in the trust, regardless of the value or type of the property, is not counted against the beneficiary during their lifetime, for purposes of qualifying the beneficiary for public benefits programs. See 42 U.S.C.A. § 1396p(d).

### **B. Consideration of Special Needs Person Circumstances.**

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There are several questions to consider in deciding which special trust structure, if any, would be best suited to a special needs person's needs. The following factors are always relevant in making trust structure determinations:

- The age of the special needs person;
- The nature of the special needs person's disability or incapacity (physical and/or mental impairment);
- Whether or not the special needs person currently owns or has a present right to receive what would be otherwise disqualifying assets;
- The character and value of all the special needs person's assets;
- The special needs person's present and future medical and life-skills assistance needs;
- Whether or not the special needs person is under guardianship or is in need of guardianship;
- Whether or not the special needs person is presently involved in a lawsuit that may result in the special needs person's receipt of money damages;
- Whether or not the special needs person has a surviving parent, grandparent, or legal guardian; and
- Whether or not the law places a primary duty of support on someone else thereby requiring that person(s) to bear the costs of the beneficiary's health, education, maintenance, and support (e.g. a parent's obligation to support and care for a child, or a spouse's obligation to support their spouse.)

These factors are always of primary importance when considering which type of special needs trust will best protect the assets of a disabled or incapacitated beneficiary and the appropriateness of trust distributions and expenditures. See the discussion below regarding parental support obligations and a trustee's considerations toward trust distributions in those circumstances.

## C. Self-Settled and Nonself-Settled Special Trusts.

There are really two types of Special Needs Trusts: (1) Self-settled, and (2) Nonself-settled, or third party settled, trusts. Both types work the same way and accomplish the same thing for the special needs person. That is, the trusts insulate the assets placed in the trust so that those *otherwise disqualifying assets are not counted as available resources* to the trust beneficiary when the beneficiary applies for, or receives, benefits from an asset and/or income-restrictive governmental program such as SSI or Medicaid.

### 1. Self-Settled Special Trusts.

A self-settled SNT is one in which the trust corpus is made up of assets that either belonged to the trust beneficiary, or that the beneficiary had a present right to receive, prior to transferring the assets into the trust. SNTs created on behalf of the

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disabled or incapacitated person, which are funded with proceeds from the disabled person's personal injury cause of action, or their savings or investments accounts for example, would be considered a self-settled SNT. Although not all self-settled trusts are statutory trusts, all statutory trusts are self-settled trusts.

## 2. Nonsel-Settled SNTs.

A nonself-settled (or third-party settled) supplemental needs trust is one in which the trust corpus is made up of assets that did not belong to the trust beneficiary and that the beneficiary never had a present right to receive prior to transferring the assets into the trust. Special needs Trusts created on behalf of the disabled or incapacitated person by a third party, and which are funded with property that passes to the trust by direction of someone's Will, by gift, or by inter-vivos transfer from the third party, for example, would be considered a non-self-settled, or third party trust. These trusts are often referred to as "common-law" supplemental needs trusts as their validity and use has been established by federal or state statute (i.e. created by the exception allowances of *OBRA '93* legislation), but through sixty-plus years of case law. Because the property in a third-party settled trust did not belong to the trust beneficiary at the time of transfer to the trust, there is no rule requirement that remaining trust assets be used to pay back the State Medicaid program for benefits received by the beneficiary during his or her lifetime as is required by the statutes for self-settled trusts.

## **VI. THE "PAYBACK PROVISION".**

Perhaps the most significant difference in the required provisions of certain statutory self-settled vs. common law nonself-settled trusts is what is referred to as "the payback provision." As recited in the trust rules above, the payback rule, found in the provisions of 42 U.S.C. § 1396p(d)(4)(A), requires that qualifying trusts created under that statute must direct that on the death of the beneficiary, the state Medicaid program is entitled to be paid back from any remaining trust assets, an amount that is equal to the cost paid by the program on behalf of the beneficiary. The statutes do not impose this payback provision to third-party settled trusts.

Clearly then, of primary importance to us when deciding which special trust structure to use for a disabled or incapacitated special needs person is the question of whether or not the special needs person already owns, or has a present right to receive, the otherwise disqualifying assets that will be placed in the special trust. If the special needs person is going to receive the asset as a gift or a bequest in a Will, for example, we would want the grantor to create the special needs trust before the property is actually received by the disabled person/beneficiary and then we could avoid having to use a trust structure with any payback provision language in it.

Conversely, if the special needs person already owns the disqualifying asset, and the special needs person meets the other requirements of the state and federal statutes for using a special trust, then we have to include the required payback language in the trust

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agreement or it will not be accepted by SSI or Medicaid as a “qualifying” trust and the assets inside the trust will be counted as an available resource to the beneficiary.

## **A. Defending the Payback Provision.**

One thing that needs to be kept in mind and understood about the payback provision required by 42 U.S.C. § 1396p(d)(4), is that the law places no obligation whatsoever on the trust(ee) to reserve or conserve any trust assets during the beneficiary’s lifetime in order to cover the payback obligation. In fact quite the opposite is true. It is the intent of the OBRA ’93 legislation that the trustee spend any and all amounts necessary from trust assets to improve the quality of life and care available to the trust beneficiary. If the trust has no money remaining in it at the beneficiary’s death, there is no obligation on the trust, the beneficiary, of his or her estate or heirs, to satisfy the payback provision. Or if the remaining assets are insufficient to cover all of the costs of the assistance provided, there is no obligation to satisfy the payback provision in full. If all of the trust assets are spent on the beneficiary’s needs during the beneficiary’s lifetime, the trust is closed when its assets are gone and the state Medicaid program receives no payment at all against the costs of the benefits provided to the beneficiary.

## **VII. THE RULES TO MAKE QUALIFIED TRUST DISTRIBUTIONS.**

### **A. Managing a Special Trust.**

The existing confusion with regard to allowable distributions from SNTs is certainly understandable when you consider all of the various government programs and all of the different program restrictions on counting a beneficiary’s income and assets for program qualification. The confusion provably arises most often because of the sort of program interdependency described above in the discussions about SSI and Medicaid, for example. As was discussed above, if we can qualify our disabled or incapacitated special needs person for SSI, the special needs person will also be qualified to receive Medicaid assistance. However, SNT trust distribution problems may arise because the SSI and Medicaid programs have different rules for counting the special needs person’s support and maintenance income when considering the special needs person’s program eligibility.

### **B. Medicaid Rules – A Closer Look.**

As we discussed above, the MEH rules for applying support and Maintenance payments to persons qualifying for Community Program eligibility state:

Support and maintenance are not counted as income if eligibility is being tested for a waiver program; for example, Community Living Assistance and Support Services (CLADD), the Community Based Alternatives (CBA), Home and Community-Based Services (HCS), and Medically Dependant Children’s Program (MDCP). 40 T.A.C., § 15.455(b)(1), Medicaid Eligibility handbook §2451.

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In addition, with regard to special trusts and the treatment of trust assets as a resource, in MEH §2313.45, the Handbook states the following:

The Omnibus Budget Reconciliation Act of 1993 identifies three types of trusts which are exceptions to the trust provisions stated in [Items 23.13.41 through 2313.44]. These exceptions apply only to trusts established on or after August 11, 1993. 40 T.A.C. §15.417(f).

40 T.A.C. §15.417(f)(1) **Special needs trust. Description:** A special needs trust is a revocable or irrevocable trust established with the assets of a person under age 65 who meets the Supplemental Security Income (SSI) program's disability criteria. The trust must be established for the special needs person's benefit by his [or her] parent, grandparent, legal guardian, or a court. The trust must include a provision that the state is designated as the residuary beneficiary to receive, at the special needs person's death, funds remaining in the trust equal to the total amount of Medicaid paid on his [or her] behalf. This trust exception continues even after a special needs person becomes age 65 if he [or she] continues to meet the disability criteria for the SSI program. However, additions or augmentations to the trust after the special needs person becomes age 65 are a transfer of assets. [See Item 2320, Transfer of Assets.]

40 T.A.C. §15.417(f)(1) – **Treatment as Resource:** The trust is not counted as a resource.

**Treatment as Income:** Any distribution to or for the benefit of the special needs person from corpus or income generated by the trust, *except payments for medical and social services*, is countable income. [See Item 2420, Income Exemptions, for an explanation of medical and social services.] A payment to or for the benefit of the special needs person *is counted under trust provisions only if such payment is ordinarily counted as income.*  
MEH §2313.45

## **VIII. TRUST DISTRIBUTIONS – APPLYING THE SSI AND MEDICAID INCOME EXCEPTIONS**

A great number of SNT trust beneficiaries receive SSI benefits and/or community Medicaid assistance. As we have seen, if the beneficiaries' assets are held in a qualifying SNT then we know that those assets will not be counted as available resources to an SSI or Medicaid recipient. 40 T.A.C. §2313.45, MEH §15.417(f)(1). Therefore, the primary

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concern of the fiduciary who is responsible for making trust distributions for the benefit of an SSI, Medicaid, or MHRM benefits recipient will be those programs' rules regarding "countable monthly income." (See discussions above.)

It is possible under both the SSI rules and the Community Medicaid rules to make trust distributions for a beneficiary's support and maintenance costs, as well as additional medical and social service costs not covered by the medical assistance programs, and still keep the beneficiary qualified for SSI and/or Medicaid assistance. The following case studies will illustrate the applications of the program rules discussed above to two different special needs persons' circumstances taken from active case files in my firm's practice.

## **A. Planning Strategy – Case Study– Trust Distributions Medicaid's CBA Program.**

### **1. Medicaid CBA Program Rules Restated.**

In the above discussions on the rules of the CBA Medicaid Program, we outlined the Medicaid SNT rules and the support and maintenance exceptions applied to a special needs person's countable monthly income.

There are two important rules that must be read together in the MEH that, when applied correctly, will allow a qualified trust beneficiary to receive distribution payments for in-kind support and maintenance expenses without counting those payments as disqualifying income to the beneficiary. Equal in importance to the support and maintenance exceptions found in the SSI rules, these Medicaid exclusions should not be overlooked by the trustee when making special trust distributions.

As the emphasized language regarding trust distributions in rules quoted above shows, in order to determine if a trust distribution would be counted as income to the beneficiary, the fiduciary must ascertain which types of payments are *ordinarily counted as income* for special needs persons of the particular Medicaid program. Therefore, the rules regarding countable income must be cross-referenced with the rules applied to specific Medicaid programs.

## **B. Case Study – Trust Distributions & the SSI Program.**

### **1. SSI Eligibility Rules Restated.**

As discussed above, SSI is available to individuals who are either disabled, blind, or over the age of 65, and who meet the program's stringent asset and resource limitations. Remember that one of the most important reasons for qualifying an individual for SSI is that an SSI recipient is **automatically qualified for Medicaid**. Therefore, even though the SSI program pays only a small amount per month in cash assistance, qualifying a disabled individual for SSI will automatically qualify that

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individual for health care coverage and other public assistance to meet the individual's daily needs. For an individual with extensive medical needs, qualification for SSI can mean access to thousands of dollars in medical and personal care assistance.

## 2. Terry's Case.

Terry is 25 years old and he has Down's Syndrome. Terry is eligible for a small amount of SSD, based on the fact that he is disabled and his deceased father worked and paid into the Social Security System for a sufficient number of quarters. The SSD benefit received by Terry is approximately \$100 per month, and since the SSD is Terry's sole source of income, he is well under the income limit of \$637.00 for a single person receiving SSI. Terry is the beneficiary of a trust, which was established by his father as part of his estate plan. Since the trust is a properly established SNT, the assets of the trust are not countable resources that would disqualify Terry from receiving SSI. Further, since the assets of the trust are inherited property and not property that ever belonged to Terry, there is no requirement that the trust contain a reimbursement payback provision to the state of Texas. Terry receives \$100 per month in SSD, plus \$537.00 from SSI which brings his total monthly income up to \$637. Because he is eligible for SSI, he is also eligible for Medicaid. The issue in Terry's case is how to make distributions from his trust to take care of his support needs, including the costs of his food, clothing and shelter either in his home or at a residential facility, without disturbing his SSI and Medicaid eligibility. (Note that the following analysis would be the same if Terry were still a minor child.)

## 3. Distributions from Terry's Trust.

As explained above, when an individual receives assistance with food, clothing, and shelter from another source, that assistance is called "in kind support and maintenance." A distribution from Terry's trust for his food, clothing, and shelter each month would ordinarily be considered as a distribution of "in kind support and maintenance." In-kind support and maintenance is treated as income for purposes of eligibility for the SSI program. However, under the following situations applying the 1/3 reduction rules, or the business arrangement rule there are different alternatives for making distributions from Terry's trust that would allow him to continue to be eligible for SSI, and consequently, receive his Medicaid coverage.

### a. Business Arrangement.

Remember that if Terry is living with a family member, so long as he pays his "pro rata share" of the actual cost of his food and shelter, as proven by household record keeping, then the receipt of the value of food and shelter is not counted as income to Terry and it, therefore, does not reduce his SSI benefit.

### b. Rent Subsidy & the One-third Reduction Rule.

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An alternative approach for Terry, if reliable records are not kept, or if the value of Terry's rent exceeds \$637.00 per month, would be for Terry to pay at least \$234.00 (1/3 of the Maximum Monthly Federal benefit Rate, plus \$20.00) towards his monthly household expenses. He would then fall within the requirements of the business arrangement rule and his SNT could pay the rest of his monthly household expenses and make distributions for any of his other supplemental needs. In this manner, Terry would continue to receive his SSI and he would remain eligible for Medicaid as well.

c. Rent Subsidy When Landlord is Not related to Beneficiary.

Now let's assume that Terry resides in a residential facility where he is charged a monthly rental amount for his room. Terry is not related in any way to people who own the facility and his SNT pays the full cost of Terry's monthly rental. Making direct payments to the facility from Terry's SNT means that no rent subsidy paid by the trust will be counted as income to reduce Terry's SSI check. Alternatively, Terry's SNT could pay all of the costs of his provided food, clothing and shelter at the facility and allow SSA to reduce his check by 1/3 of the federal benefit rate or \$214.00. Therefore, the trustee of Terry's SNT makes distributions for Terry's food, clothing, shelter and other services provided by the facility meaning he gets the benefit of payments far in excess of \$214.00 in exchange for a reduction of just \$214 in his SSI benefit. Additionally, Terry continues to remain eligible for SSI, and consequently, eligible for Medicaid.

The above scenarios change if Terry is a disabled minor child. If Terry is a minor child living in the household with his parent(s) and is subject to SSI deeming rules, his SSI benefits will not decrease if his trust payments are being made as contributions toward the actual costs of his food, clothing, and shelter.

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**“THERE ARE NO SEVEN WONDERS OF  
THE WORLD IN THE EYES OF A  
CHILD. THERE ARE SEVEN MILLION.”**

**-WALT STREIGHTIFF**

