HELLO FROM THE OTHER SIDE:
SALVAGING SPECIAL NEEDS SITUATIONS

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January 8, 2016
LEARNING OBJECTIVES

• Identify Problem
• Benefits and SNT basics
• Salvage outright inheritance or gift
• Salvage non-SNT trust
• Dangerous Language
• Helpful Language
PROBLEMS:

• Hello from the other side—client has passed

• SNT not drafted

• Parents leave assets to disabled child outright or in regular trust

• Crummy powers to SN person

• Leave retirement to SNT or disabled child
BENEFITS AND SNT BASICS

• Government benefits basics

• SNT basics
GOVERNMENT BENEFITS BASICS

• SSI
  – $733 p/mo for food and shelter
  – Disabled/limited income and resources

• Medicaid
  – Health care
  – Low income/limited resources
ELIGIBILITY FOR NEEDS-BASED BENEFITS

• Monthly income:
  
  – < $2K for Medicaid

• Income = food and shelter, cash, asset that can be converted to food and shelter

• Deeming

• In-kind support and maintenance (1/3)
ELIGIBILITY FOR NEEDS-BASED BENEFITS

• Resources, assets:
  • < $2,000 countable resources
    – Excluded: home, car, personal items
  • $1 of SSI = Medicaid eligibility
BENEFITS BASICS

- Penalty period
- Transfer for less than market value
- \( \frac{x}{\$162.41} = \text{days penalized} \)
BENEFITS BASICS

• 40 Medicaid programs
• Different eligibility requirements
• Provide different services
SPECIAL NEEDS TRUST

- SNT not countable resource
  - Properly drafted, distributed
- Supplement, not supplant
- Result
TYPES OF SNTs

• First-party (self-settled):
  – Money that belongs to beneficiary
  – Bank account, child support, inheritance, gift, PI settlement
  – Irrevocable, sole benefit, under 65
  – Medicaid payback
TYPES OF SNTs

• Third-party:
  
  – Someone else’s money
  
  – Gift, will, life insurance, retirement benefits
  
  – No Medicaid payback
BASICS OF SNTs: DISTRIBUTIONS

- No cash/debit cards
- Nothing paid by gov’t benefits
- Can be converted to food and shelter
- Unless best interest, ISM
BASICS OF SNTs: DISTRIBUTIONS

- Distributions:
  - Dental/medical
  - Therapies/rehab
  - Equipment
  - Education/recreation
  - Attendant/companion care
SALVAGE OUTRIGHT INHERITANCE

• Income month received
• Resource if kept next month
• First party money
SALVAGE OUTRIGHT
INHERITANCE/GIFT

• Spend-down-exempt resources
• Distributions that are not income
• Arc of Texas Pooled Trust
• ABLE Account
• First Party SNT
• §1301 Management Trust
SALVAGE OUTRIGHT INHERITANCE

- Spend-down—non-countable resources:
  - Home
  - Car
  - Household goods, personal effects
  - Pay off debt/prepay
  - Pre-need funeral plan
SALVAGE OUTRIGHT INHERITANCE

• Distributions not considered income
  – Dental/medical
  – Therapies/rehab
  – Equipment
  – Education/recreation
  – Attendant/companion care
SALVAGE OUTRIGHT INHERITANCE

• Social Security administrative interpretations & procedures: Program Operations Manual System (POMS)

SALVAGE OUTRIGHT INHERITANCE

- Arc of Texas Pooled Trust
  - First party trust
  - Payback to Arc instead of Medicaid
  - Arc is trustee
  - http://www.thearcoftexas.org/trust
SALVAGE OUTRIGHT INHERITANCE

• ABLE Account
  – Up to $100,000 not resource
  – Appropriate distributions not income
  – Contributions up to $14,000 per person per year
  – Medicaid payback
  – 26 U.S.C. 529A
SALVAGE OUTRIGHT INHERITANCE

- First-party SNT
  - Under 65
  - SSA must review and approve
  - Proper language/distributions
  - Medicaid payback
  - 42 USC 1396p(d)(4)(a)
SALVAGE OTHER OUTRIGHT GIFTS

• §1301 Management Trust
  – Created by court
  – First party
  – Competent disabled person can apply
  – PI lawsuit
SALVAGE NON-SNT TRUSTS

• Trust principal might be a resource

• Trust distributions counted as income
SALVAGE NON-SNT TRUSTS

• Decanting
• Judicial Modification
• Annual Exclusion Gifts
• Retirement Accounts
SALVAGE NON-SNT TRUSTS

• Decanting
  – Move property from one trust to another
  – Pour into new SNT
  – If provided in trust
  – Transfer resulting in penalty? Not if spendthrift
SALVAGE NON-SNT TRUSTS

- Decanting Statute
  - Texas Trust Code 112.071-112.-087
  - If not prohibited in trust
  - Full discretionary v. limited discretionary
  - Limited discretionary-to same ben’ys
SALVAGE NON-SNT TRUSTS

• Judicial modification
  – Tex. Property Code 112.054
  – SNT provisions
  – Circumstances not anticipated
  – Conform to intent of settlor (provide for child/not affect benefits)
SALVAGE NON-SNT TRUSTS

• Judicial Modification
  – Change trustee
SALVAGE NON-SNT TRUSTS

• Annual Exclusion Gifts to Trusts
  – Crummy withdrawal rights (present interest)
  – Right disqualifies for benefits
  – Cristofani rights-vest in non-disabled beneficiaries
  – ILITs
INHERITED IRAs

• RMD’s could disqualify

• Retirement Plan Trust

• Accumulation v. conduit
DANGEROUS LANGUAGE

• Trust language can render trust as non-exempt
• Beneficiary loses benefits
• Third-party v. First-Party
• See POMS
DANGEROUS LANGUAGE

• Third-Party exempt if:
  – Ben’y has no authority to revoke trust
  – No authority to direct use of trust for own support
  – Can’t sell beneficial interest
DANGEROUS LANGUAGE

• Support trust may not be resource
  – But distributions could disqualify
DANGEROUS LANGUAGE

• First-party trust killers:

• Distribution language

• HEMS

• Specific dollar distribution

• Ben’y can direct distributions, use for support
DANGEROUS LANGUAGE

• First-party trust killers:
  – Ben’y can revoke
  – General power of appointment
  – Ben’y can serve as trustee/hire or fire
  – Early termination
HELPFUL LANGUAGE

• Distribution standard
  – Fully discretionary w/ precatory language
  – Supplement, not supplant benefits
  – Authorize in-kind distribution if better serves
HELPFUL LANGUAGE

• Spendthrift-labeled
• Ben’y no authority to revoke or direct
• Ben’y cannot be/hire/fire trustee
• No early termination
• Draft with SSA in mind
HELPFUL LANGUAGE

• Trust Protector or Trust Advisory Committee
  – Hire/fire trustee
  – Amend trust to comply w/laws and regs concerning SNTs

• Power to convert to pooled trust
CONCLUSION

• Some problems can be salvaged
• Proper planning/drafting is best
• Third-party better than first-party
• Back-up SNT in every will/trust
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