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HELLO FROM THE OTHER SIDE: SALVAGING SPECIAL NEEDS SITUATIONS

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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
- $x/\$162.41 = \text{days penalized}$

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)
- <https://secure.ssa.gov/apps10/poms.nsf/partlist>
!OpenView.

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 p/person p/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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