Special Needs Planning for Families with Mental Illness

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Estate Planning Goals

- Maximize quality of life
- Protect child
- Maximize independence
- Maximize public benefits
- Name “surrogate parents”
- Avoid court system
Public Benefits At a Glance

**Income Stream**

- Supplemental Security Income (SSI)

- Social Security Disability Insurance (SSDI)  
  *(includes Child Disability Benefits (CDB))*

**Health Insurance**

- Medi-Cal (Medicaid)  
  *(includes In Home Support Services (IHSS))*

- Medicare
Special Needs Trust

• Irrevocable trust
• Holds assets for disabled person’s benefit
• DOES NOT interfere with public benefits
• Like a safety net!
Which Type to Establish?

Third Party

First Party
<table>
<thead>
<tr>
<th><strong>Different Types of SNTs</strong></th>
<th><strong>Source of Funds</strong></th>
<th><strong>Who Establishes</strong></th>
<th><strong>Distribution On Death</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Third Party SNT</strong></td>
<td>Anyone except beneficiary</td>
<td>Anyone except beneficiary</td>
<td>Grantor’s wishes</td>
</tr>
<tr>
<td><strong>First Party (d)(4)(A) SNT</strong></td>
<td>Disabled beneficiary’s funds before age 65</td>
<td>Beneficiary, parent, grandparent, Guardian, Court</td>
<td>Medi-Cal payback; then remainder beneficiaries</td>
</tr>
<tr>
<td><strong>(d)(4)(C) Pooled SNT</strong></td>
<td>Disabled beneficiary’s funds</td>
<td>Beneficiary, parent, grandparent, Guardian, Court</td>
<td>Non-profit Trustee; or, Medi-Cal payback; then remainder beneficiaries</td>
</tr>
</tbody>
</table>
Choice of Trustee

- Family Member
- Friend
- Private Professional Fiduciary
- Bank
- Nonprofit
- Pooled Trust
- Combination
Oversight Available for SNT?

• Typically NO court involvement
• Trust Protector
• Co-Trustees
• Advisory Committee
Memorandum of Intent  
(separate from SNT)

Informal letter from parent:

- What makes child happy/sad?
- Food restrictions?
- Housing preferences
- Favorite Activities
Retirement Accounts and SNTs

• RECENT DEVELOPMENT: SECURE Act (effective Jan. 1, 2020) eliminated “stretch” benefits for non-spouses without beneficiaries
  – Old rule: RMD was calculated to lifespan of beneficiary
  – New rule: Most individuals must distribute IRAs within 10 years and pay all taxes.
  – BUT there are exceptions: a disabled person or SNT can still be named as a beneficiary of an IRA and receive “stretch” benefits!
Retirement Accounts and SNTs

• Result: More parents are naming disabled child’s SNT as beneficiary of retirement accounts, as opposed to naming typical child outright as beneficiary
ABLE Act Account: What Is It?

– Savings account for disabled person with Medi-Cal payback provision (but not in California...)

– Does not interfere with public benefits (with limitations)

– Income earned grows tax-free, and qualified withdrawals are tax-free
ABLE Act Account: Eligibility and Limitations

- To be eligible:
  - Beneficiary must have a “qualifying disability,”
  - Beneficiary’s disability must have started before beneficiary turned age 26

- Meant to be used only for “qualified disability expenses”

- Only one ABLE Act account can be established per disabled individual
ABLE Act Account: More Information

– Contribution limits of $15,000/year (as of 2020) from ALL sources

– SSI suspended if total amount in account exceeds $100,000

– Medi-Cal payback requirement waived in California (as of 10/4/17)
CalABLE Account

• CalABLE account now available: https://calable.ca.gov

• Need beneficiary’s SSN, authorized legal rep’s SSN, bank account info

• Reloadable, prepaid Visa debit card now available
<table>
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<tr>
<th>Issues</th>
<th>ABLE Account</th>
<th>Third Party SNT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who can use?</td>
<td>Only persons disabled before age 26</td>
<td>Any person with a disability</td>
</tr>
<tr>
<td>Who can fund?</td>
<td>Anyone, including person with a disability</td>
<td>Anyone, except person with a disability (must use first party SNT)</td>
</tr>
<tr>
<td>How many can person have?</td>
<td>One</td>
<td>Unlimited</td>
</tr>
<tr>
<td>Who can control?</td>
<td>Person with a disability and likely their legal guardian, conservator, or agent</td>
<td>Anyone except the person with a disability and their spouse</td>
</tr>
<tr>
<td>Who inherits on death of person with disability</td>
<td>Medicaid first, then can go to heirs (but exception in California)</td>
<td>Person with a disability’s heirs or whomever is named in document</td>
</tr>
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## Comparing ABLE Account with Third Party SNT

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<th>ABLE Account</th>
<th>Third Party SNT</th>
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<td>How much can fund in a year?</td>
<td>$15,000 (or annual gift exemption)</td>
<td>Unlimited</td>
</tr>
<tr>
<td>Is funding gift-tax free?</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Is there a cap on how much can be in account?</td>
<td>Yes, currently $100,000 limitation for SSI recipients and up to State 529-plan limitations</td>
<td>No</td>
</tr>
<tr>
<td>How is income taxed?</td>
<td>No income tax</td>
<td>Taxed as a non-grantor trust at highest marginal tax rate</td>
</tr>
<tr>
<td>What type of distributions can be made?</td>
<td>Only “qualified disability expenses” as defined by government</td>
<td>No limitation, except for certain disbursements may reduce or eliminate SSI or Medicaid eligibility</td>
</tr>
</tbody>
</table>
Revocable Living Trust

• Holds parents’ assets
• Can be changed
• Names beneficiaries, successor trustees
• **GOAL:** Avoid *Probate Court!*
Typical “AB” Revocable Trust before 2013

- Jones Family Trust
  - Survivor’s Trust
    - All Income
    - Principal as Needed
  - Bypass Trust
    - Low estate tax exemption
    - No portability

First Death

Second Death
Typical Revocable Trust after 2013

- Jones Family Trust
- Survivor's Trust
- Lifetime Trust for Child #1
- Lifetime Trust for Child #2
- SNT for Child #3

First Death

- Higher estate tax exemption
- Portability

Second Death
Decisions, Decisions!

• How should children receive inheritance?
  – Outright
  – At certain ages, i.e. 1/3 at ages 25, 30, 35
  – Lifetime trust
    • Can offer protection from creditors, spouses
  – Special Needs Trust

• Alternate Distribution (i.e. the Titanic)
  – Certain individuals, category of individuals (i.e. settlor’s nieces and nephews), charities
What about Conservatorships?

• Goals:
  – Protect loved one
  – Access information: medical, financial, etc.
  – Make decisions on behalf of loved one

• General Conservatorships for the elderly, those with dementia

• Limited Conservatorships for developmentally disabled individuals

• LPS Conservatorships for person who, as a result of a mental disorder and/or chronic alcoholism, is gravely disabled, i.e. unable to provide for his basic needs of food, clothing and shelter
LPS Conservatorship – Steps

• Psychiatrist authorized to do LPS evaluations determines the person is gravely disabled
• Psychiatrist makes referral to Public Guardian’s Office (“PGO”) while patient is in locked facility
• PGO files conservatorship petition
• Court gives order appointing conservator: could be relative, PGO, or private professional
• Lasts 1 year; conservator can petition to renew
Alternatives to Conservatorship

• Advance Health Care Directive (for medical decisions)
• Durable Power of Attorney (for financial decisions)
• Supported Decision Making
  – See supporteddecisionmaking.org
Thank you for your attention!
Please contact us for further information:

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