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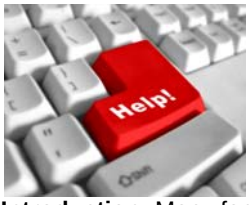
You are reading *The Voice*, a newsletter published by The Special Needs Alliance. Our purpose is to provide information--and answers--about special needs planning for family members and professionals. We hope this newsletter helps you. We invite your questions, suggestions and comments (please understand that we can not give individualized legal advice on the basis of an e-mail inquiry). We also encourage you to forward our newsletter to others who might benefit from the information here, or who might have similar questions.

Fixing a Flawed Special Needs Estate Plan



Introduction: Many families have learned to include an individual with special needs in the estate plan by leaving a bequest to a "special needs trust" (sometimes called a "supplemental benefits trust") that will supplement the recipient's government benefits without eliminating eligibility. But what if planning has not been done and funds pass to the disabled individual outright? Or what if Great-Grandma left a trust years ago, long before anybody knew that one of her descendants might need government benefits, and the trust is about to terminate? Will the state take everything? Will the disabled individual lose benefits? All is not lost -- with careful planning, a knowledgeable special needs attorney can "save the day" by fixing up this estate plan gone wrong.

More good news: That's good news, and there is more. Federal law prohibits states from requiring a living beneficiary to repay Medicaid received during the individual's lifetime (except where the individual is receiving proceeds of litigation arising from medical injuries that caused Medicare or Medicaid to provide benefits), and there is no repayment requirement for SSI, Social Security Disability, or Medicare. In other words, the beneficiary should not have to repay the government for benefits properly received *before* the inheritance.

Note, however, that not all benefits are controlled by federal rules. In some states and with some benefits, there may be a repayment requirement even though benefits were properly provided and the inheritance is unrelated. The amount of any state reimbursement requirement may be substantial, and a lawyer's familiarity with the state's practices and procedures is essential.

Whether or when the inheritance will affect the individual's government benefits will depend on the type of benefits and the state's laws. Social Security Disability and Medicare are not "needs-based"; the individual will not lose these benefits upon receipt of an inheritance. Of course,

while a recipient might not lose benefits, the fact of his or her disability may mean that he or she is unable to manage the inheritance or is open to possible financial exploitation.

With respect to "needs-based" benefits like Medicaid, most states allow benefits to continue uninterrupted until the estate has settled and the beneficiary has a legal right to receive the inheritance. This provides some time to plan and make alternative arrangements. Once the inheritance has been received, however, the law will usually require the beneficiary to notify the State within a few days or months -- ten days in most circumstances. The beneficiary's assets may then exceed required limits, resulting in a termination of benefits. Sometimes the receipt of an inheritance may be considered "income" and affect benefits for a period of time. In other words -- no need to panic, but act quickly!

What are the options? When faced with an ineffective estate plan or no plan at all, the beneficiary with a disability may have to consider the following options: (1) Keep the inheritance; (2) Spend the inheritance; (3) Disclaim; (4) Establish a Self-Settled Trust; or, in some limited circumstances, (5) Reform the decedent's trust or estate plan in court. In most cases, the fourth option, establishing a self-settled "D4A" Trust (also known as an "OBRA '93" Trust or "Payback" Trust) will be the best choice, though when it is possible the fifth option (seeking court approval to modify the estate plan) should be explored.

Give up government benefits? First, some inheritances may be so large, and some government benefits so modest, that it will be acceptable to simply forego needs-based benefits. As noted above, an individual receiving Social Security Disability and Medicare will not lose these benefits upon receipt of an inheritance. If the inheritance permits the individual to purchase supplemental insurance and pay for Medicare Part D drug coverage, it may not matter that Medicaid is lost -- at least for the time being. Some services may be provided free of charge to all, or with only modest charge. Suppose the individual has few additional needs and is living in the community. He or she may prefer the money to the state interference and legal fees that may come with a self-settled trust. Planning is still necessary to prevent a gap in coverage and to monitor whether later changes in circumstances will require a change in plans and a second look at a D4A trust.

Spend down? Second, it's important to keep a sense of proportion. If the inheritance is $5,000, it may be possible to spend it quickly on goods and services. Even a larger inheritance may be used to purchase a home, such as a condominium, which is exempt under benefit laws. The individual's case worker may be able to advise whether this approach will work, or whether even a spent-down inheritance will cause a temporary loss of benefits.

Disclaim? If government benefits are indispensable and "spending down" is not the answer, the family's immediate thought may be to suggest that the individual "disclaim" or renounce the inheritance so that it passes instead to other family members. This approach is dangerous. State law may prohibit such a renunciation. Where it is even legally possible, doing so is often considered a "transfer of assets" that can result in loss of SSI or Medicaid coverage for long-term care needs. It is essential to consult first with an attorney knowledgeable about the laws of the beneficiary's home state regarding the legal consequences of such an action. Perhaps more importantly, renunciation may not be the best option even if it is possible. Most

recipients of government benefits could improve their quality of life with additional funds.

Self-settled (D4A) trust? Often the best option is the self-settled "D4A" Trust (also known as an "OBRA '93" Trust or "Payback" Trust) or the "D4C" Pooled Trust account. These trusts can preserve the remaining inheritance in a trust for the individual's supplemental needs during lifetime without further affecting Medicaid benefits or SSI (the rules for other benefits may vary, and benefits provided by state agencies may differ significantly from one jurisdiction to another).

What is a D4A trust? It is a trust described in federal law, at section 1396p(d)(4)(A) of Title 42 of the U.S. Code -- hence the name "D4A." This law describes a trust that is established for the lifetime benefit of one individual under age 65 who is either blind, or disabled as defined by the Social Security laws, and which requires that upon the beneficiary's death, the state will be repaid for all Medicaid the beneficiary received during his or her lifetime. The trust may only be established by parents, grandparents, courts, or "guardians" (construed to include conservators), not by the disabled individual directly. The "D4C" pooled trust is very similar, but may be established directly by the individual, and in many states is available to individuals of any age, even over 65. The D4C pooled trust account may pay any remaining funds to the nonprofit organization that holds the trust, rather than (or as well as) to the State, but no funds may pass to other beneficiaries. Typically, the D4C will be a better choice for a modest inheritance when a D4A trust would be uneconomical, and it is the only choice for an individual 65 or over without a living parent. Be careful about generalities here -- larger amounts can sometimes be transferred to pooled trusts with very positive results. The best approach, of course, is to look for competent legal advice.

Reformation? Finally, it makes sense to explore the possibility of getting court approval to modify or reform the decedent's estate plan. If a trust was established without the precise language required, but there is evidence the decedent had attempted to make the trust into a "special needs" trust, it may be possible to persuade the court that the decedent's intent should be carried out. This approach will be very fact-specific, and even the same set of facts may be treated very differently in different states and localities, so it is crucial to consult with an attorney who is familiar with special needs trusts and planning in the state in which the estate is being settled. It may be advisable for that attorney to consult with another experienced attorney in the state where the beneficiary resides, so it is also useful to seek out an attorney with ties to other practitioners across the country.

The rules affecting entitlement benefits for disabled individuals are complex. Attorneys who handle estate planning or probate are not always familiar with these rules. While the D4A trust or D4C pooled account -- and even, in some cases, an appropriate reformation of the estate plan -- can provide a significant benefit when effective planning was not done, it is essential to obtain both good estate and tax planning and good entitlement planning when trying to salvage the inheritance of an individual receiving government benefits.

About the Author: Lisa Nachmias Davis is an attorney practicing in New Haven, Connecticut. She is a member of the Special Needs Alliance, and her practice includes special needs and estate planning, elder law, probate and advising non-profit organizations. She is co-author of *The Elder Law Answer Book*, published by Aspen Publishers,

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