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SPECIAL NEEDS TRUST OUTLINE

"No Nonsense" Transition Workshop- February 4, 2017

- I. Trust basics-
 - A) A written trust agreement - with provisions in a separate trust document or in a Will (testamentary trust);
 - B) Assets for the trust to hold - now or later;
 - C) Settlor/Grantor;
 - D) Trustee; and
 - E) Beneficiary.

- II. Special Needs Trusts (SNT's) are just one type of trust. They create a pool of assets that do not count against the beneficiary but are available to supplement the basic care provided by public assistance programs. There are several types of SNT's but they all have the same two basic objectives:
 - A) Preserve SSI (Supplemental Security Income) and/or Medicaid eligibility for the beneficiary; and
 - B) Improve the beneficiary's quality of life by:
 - 1) Providing funds for items and services that the government assistance programs don't pay for; and
 - 2) providing prudent management of the funds by a carefully selected trustee.

III. Why plan using SNT's?

- A) Medicaid might and frequently will be the disabled person's only health insurance - EVER;
- B) To provide for the proper management of the disabled person's assets;
- C) The option of simply disinheriting the disabled person is usually not palatable to family members; and
- D) The option of leaving the disabled persons inheritance to another family member with an "understanding" that they will hold and use it for the disabled person is very risky:
 - 1) The "trusted" family member may misuse or misappropriate the assets;
 - 2) The family member who is "holding" the assets may pass away before the disabled person and the assets could be diverted away from the intended beneficiary;
 - 3) The family member who is "holding" the assets may get divorced and the assets could be diverted away from the intended beneficiary;
 - 4) The family member who is "holding" the assets may encounter financial difficulty and their creditors could seize the assets; or
 - 5) There could be adverse gift, estate or income tax consequences to the family member who is "holding" the assets.

IV. How the SNT preserves eligibility for government assistance programs -

Assets in traditional trusts will usually count as an available resource for the trust beneficiary when they apply for government assistance programs that have financial qualifying criteria.

SNT's are a narrow exception to this general rule, if drafted and administered correctly. Assets in a SNT should not be considered available to the beneficiary and proper distributions from the SNT will not be counted as income to the beneficiary.

A SNT is an irrevocable trust and must be drafted carefully to meet legal requirements and it must pass inspection by the Social Security Administration or the State of Florida Department of Children & Families.

If the SNT does pass inspection, the beneficiary does not have to impoverish themselves to get public assistance for their basic needs.

V. SNT's can protect assets received from-

- A) A family inheritance;
- B) Life or other insurance proceeds;
- C) Personal injury settlements or judgments; and
- D) Any other assets someone receives that jeopardize their eligibility.

VI. There are two types of SNT's-

A) Third Party SNT's-

If the assets going into the trust do not belong to the beneficiary (disabled person) it is called a third party SNT. An example of a third party SNT is when a parent of a disabled child names a SNT to receive the disabled child's inheritance after the parent passes away. This type of SNT does not need to contain a clause requiring Medicaid to be repaid upon the child's death for government assistance received by the disabled child.

B) Omnibus Budget Reconciliation Act of 1993 (OBRA '93) SNT's-

An example of the use of this type of trust is when an inheritance is received by the disabled person from a family member or a friend who did not provide for that inheritance to flow directly into a third party SNT as described above. Another example of the use of this

type of trust is when the disabled person receives a settlement or a judgment for personal injuries that would disqualify them for government assistance.

There are two basic types of OBRA '93 SNT's-

- 1) Disability Trusts- 42 U.S.C. 1396P(d)(4)(a):
 - a) The beneficiary must be under age 65 and be disabled;
 - b) The trust must be funded with the beneficiary's own assets;
 - c) The trust must be for the sole benefit of the beneficiary;
 - d) Only certain people can be the settlor/grantor to establish the trust - the disabled individual: a parent; grandparent; legal guardian or a Court; and
 - e) The trust must have a payback clause that provides for reimbursement of Medicaid up to the amount of the benefits received from government assistance at the death of the beneficiary or at the termination of the trust.

- 2) Pooled Trusts-42 U.S.C. 1396P(d)(4)(c):
 - a) The beneficiary must be disabled;
 - b) The trust must be for the sole benefit of the beneficiary;
 - c) Only certain people can be the settlor/grantor to join the trust - the disabled individual: a parent; grandparent; legal guardian or a Court.
 - d) The beneficiary does not have to be under age 65;

- e) The pooled trust must be set up and managed by a non-profit organization; and
- f) The trust is allowed to contain a "modified" payback clause providing that any assets remaining in the beneficiary's account when that beneficiary passes away can be retained in the pooled trust to help other disabled beneficiaries through the non-profit organization **or** if the assets remaining in the beneficiary's account are paid out of the pooled trust, Medicaid gets reimbursed first up to amount of benefits received from government assistance.

Pooled Trusts contain multiple accounts for the multiple beneficiaries of the trust and the trust assets are "pooled" together for investment and administrative purposes by the non-profit organization. However, separate records and accounts are kept for each individual beneficiary.

VII. How are these SNT's administered once they are established?

VERY CAREFULLY! The drafting and establishment of the trust is important but equally important is the administration of the trust-

- A) Your choice of trustee or trustees is critical;
- B) Distributions from the trust are left up to trustee's discretion and can only be made for things the beneficiary doesn't get from government assistance programs, according to each beneficiary's "special needs". The assets in the trust are for their supplemental needs and if distributions are made for improper purposes, the assets in the trust will be treated as a primary source of support and the government assistance could be lost; and
- C) The trustee must know and comply with all of the rules that apply to the specific types of assistance programs the beneficiary is either already on or needs to get on.

VIII. The trustee's duties are-

- A) To know or learn about their beneficiary and the beneficiary's needs and to balance what the beneficiary may want with what the trustee thinks is in the beneficiary's best interest;
- B) To know or learn about the government assistance programs that are available to help their beneficiary;
- C) To know or learn about appropriate investing of the trust assets to meet the beneficiary's needs and to monitor the investments and adjust the investment plan as needed;
- D) To maintain good records so the trustee can account for the management and distribution of the trust assets;
- E) To make proper distribution of the trust assets;
- F) To handle tax issues and file tax returns; and
- G) To terminate the trust at the appropriate time, wind up the trust affairs and make distribution of the remaining trust assets in accordance with the law and the terms of the trust.