

# SPECIAL NEEDS PLANNING: AVOIDING THE PITFALLS

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Tresi Weeks  
The Weeks Law Firm, PLLC  
7600 San Jacinto Place, Suite 200  
Plano, TX 75024  
214-269-4290  
[tresi@weekslawfirm.com](mailto:tresi@weekslawfirm.com)

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# SPECIAL NEEDS PLANNING

## Special Needs Planning

- Life planning for person with disabilities
- Enhances lifelong quality of life

## Goal:

- Live a rich, satisfying life
- Ensure independent living, even after death of parents
- Keep choices open regarding gov't benefits

# NEEDS-BASED BENEFITS

## SSI

- Assistance for disabled adults and children with limited income and resources
- Food and shelter
- \$710 per month

## MEDICAID

- Health care for people with low income and limited resources
- >40 different programs

# ELIGIBILITY FOR NEEDS-BASED BENEFITS

- Monthly income:
  - < \$710 for SSI
  - < \$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
- \$1 of SSI = Medicaid eligibility

# DILEMMA

- Government benefits insufficient for quality of life.
- Person may have resources, inheritance, lawsuit settlement
- Parents, grandparents, others desire to supplement government benefits:
  - will
  - life insurance
  - retirement benefits
  - gifts
- Result: lose government benefits

# SPECIAL NEEDS TRUST

- SNT not a countable resource
  - If carefully drafted, properly distributed
- Distributions not income
- Supplement, but not supplant gov't benefits
  
- Results:
  - Maintain option of eligibility for benefits
  - Enhance quality of life
  - Safety net
  - Blue print for caring for beneficiary

# SPECIAL NEEDS TRUST

- Properly drafted:
  - Instructions to Trustee
  - Approved by SS
- Properly distributed:
  - No cash or debit cards
  - Used for things public assistance does not pay for
  - Supplement but not supplant benefits
- Properly coordinated:
  - Parents', other's wills, trusts, beneficiary designations



## TYPES OF SNT's

- 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 SNT's

- Third-party:
  - Someone else's money
  - Gift, will, life insurance, retirement benefits
  - No Medicaid payback

# TYPES OF SNT's

## Pooled Trust

- Non-profit: ARC of Texas administers
- Subaccount
- Acts as trustee
  - Invests
  - Distributes
- Master trust agreement, joinder agreement
- Professional management for small trusts
- Medicaid payback?

# TYPES OF SNT's

- Court-created
- Court modifications

# TYPES OF SNT's

- Intervivos
- Testamentary

# FUNDING

- Gifts
- Wills
- Life insurance
- Child support for adult with disability
- Personal injury settlement
- Elder qualifying for Medicaid

# SNT DISTRIBUTIONS

## Personal needs:

- Household goods and furniture
- Automobile
- Clothing
- Personal care (haircut, toiletries)
- Laundry, housekeeping

# SNT DISTRIBUTIONS

## Supplemental medical needs

- Dentist/eye doctor
- Special equipment
- Care management
- Alternate therapies
- Insurance premiums



# SNT DISTRIBUTIONS

## Social, Entertainment and Recreational Needs

- TV, cable, internet, phone, computer
- Companion or personal attendant
- Vacation, visit with relatives
- Movies, sports, recreation
- Church activities or camp

# SNT DISTRIBUTIONS

## Intellectual and Artistic Needs

- Education, classes
- Books, magazines,
- Videos, games, crafts

Result: More productive, fulfilling life

# WITHOUT SNT

## Disinheritance:

- Leave assets to another sibling, relative
- Affects relationship
- Unfair burden on sibling
- Subject to siblings' misuse, neglect, creditors, death

# WITHOUT SNT

Outright Inheritance, life insurance, retirement benefits:

- lose eligibility
- Limit choices
- reduce quality of life
- devastating, lifelong effects

# WITHOUT SNT

No inheritance:

- Poverty, destitution
- Lack of quality care

# DIRTY DOZEN POTENTIAL PITFALLS

MALPRACTICE?

# POTENTIAL PITFALL #1

FAILURE TO ASK

# POTENTIAL PITFALL #2

## FAILURE TO COORDINATE PLAN

- Separate SNT
  - others contribute during lifetime or upon death
- Parents' and grandparents' wills
  - "To the Trustee of ...'s Special Needs Trust"
- Beneficiary Designations:
  - "The Trustee of ...'s SNT"
- Unequal distribution to person with disability



# POTENTIAL PITFALL #3

## LACK OF KNOWLEDGE OF GOV'T BENEFITS

- Over 40 Medicaid programs in Texas
- What programs beneficiary will need
- SSI v. SSDI
- Medicaid v. Medicare

# POTENTIAL PITFALL #4

## MIXING 3<sup>rd</sup> PARTY AND 1<sup>st</sup> PARTY MONEY

- Medicaid Payback

# POTENTIAL PITFALL #5

## WRONG STANDARD

- HEMS = available resource
- Strict SNT – not flexible
- Discretionary – best option – distribute if in best interest (on/off or spigot)

# POTENTIAL PITFALL #6

## CHOOSING THE WRONG TRUSTEE

- Knowledgeable about:
  - Investment, Accounting, bookkeeping, taxes
  - Government benefits and law
  - Social services
  - The beneficiary's needs and how to meet them
  - Distribution rules
- Choices:
  - self, relative, friend, professional trustee

# POTENTIAL PITFALL #7

## IMPROPER DISTRIBUTIONS

- Cash
- Debit cards

# POTENTIAL PITFALL #8

## SELLING A DOCUMENT, NOT A PLAN

- Not a forms practice
- Customized plan for client

# POTENTIAL PITFALL #9

## FAILURE TO KNOW THE LAW

- Understand and keep current with:
  - State, federal statutes and regs
  - POMS used by SSA employees
  - Regional office interpretation
  - Other attorneys experience

# POTENTIAL PITFALL #10

## CHILD SUPPORT

- 1<sup>st</sup> party
- Irrevocable court order to SNT



# POTENTIAL PITFALL #11

## NAMING SNT AS RETIREMENT BENEFICIARY

- Accumulation v. conduit
- RMD's
- Resource/income
- Military pension

# POTENTIAL PITFALL #12

## CREATING SPOUSAL SNT IN RLT INSTEAD OF WILL

- Medicaid planning for elderly

# AVOIDING PITFALLS

Issue Spotting

Backup SNT

Co-counsel

Counsel trustee

Become competent in SNT's

# RESOURCES

- NAELA
- POMS: <https://secure.ssa.gov/poms.nsf/home!readform>
- Arc of Texas: <http://www.thearcoftexas.org/trust/index.php>
- Texas Medicaid Handbook:  
<http://www.dads.state.tx.us/handbooks/mepd/>
- DARS: <http://www.dars.state.tx.us/>
- SS for children with disabilities:  
<http://www.ssa.gov/pubs/EN-05-10026.pdf>

# QUESTIONS