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## Basics Of Special Needs Planning

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# Basics of Special Needs Planning

- Overview of Special Needs Planning
- Working with Persons with Disabilities and their Families
- Basics of Public Benefits for Persons with Disabilities  
(SSI, Medicaid, SSDI, Medicare)
- Different Primary Types of SNTs  
(Third Party SNTs, (d)(4)(A) SNT)
- Avoiding Common Mistakes During Special Needs Planning and Administration

# Benefits of Planning

1. Provide Financial Security
2. Leverage Means Tested Public Benefits
3. Select Proper Team to Provide Lifetime Management
4. Plan for Appropriate Housing
5. Provide Ongoing System for Advocacy
6. Plan for Caregiving Needs
7. Coordinate Entire Extended Family's Planning
8. Protect Beneficiary from Predators
9. Preserve Assets for other Heirs

# Do all persons with disabilities *require* special planning?

Only those individuals who meet the definition of disability and must maintain eligibility for needs-based programs require planning

Yes for SSI & Medicaid

*NOT* for SSDI & Medicare

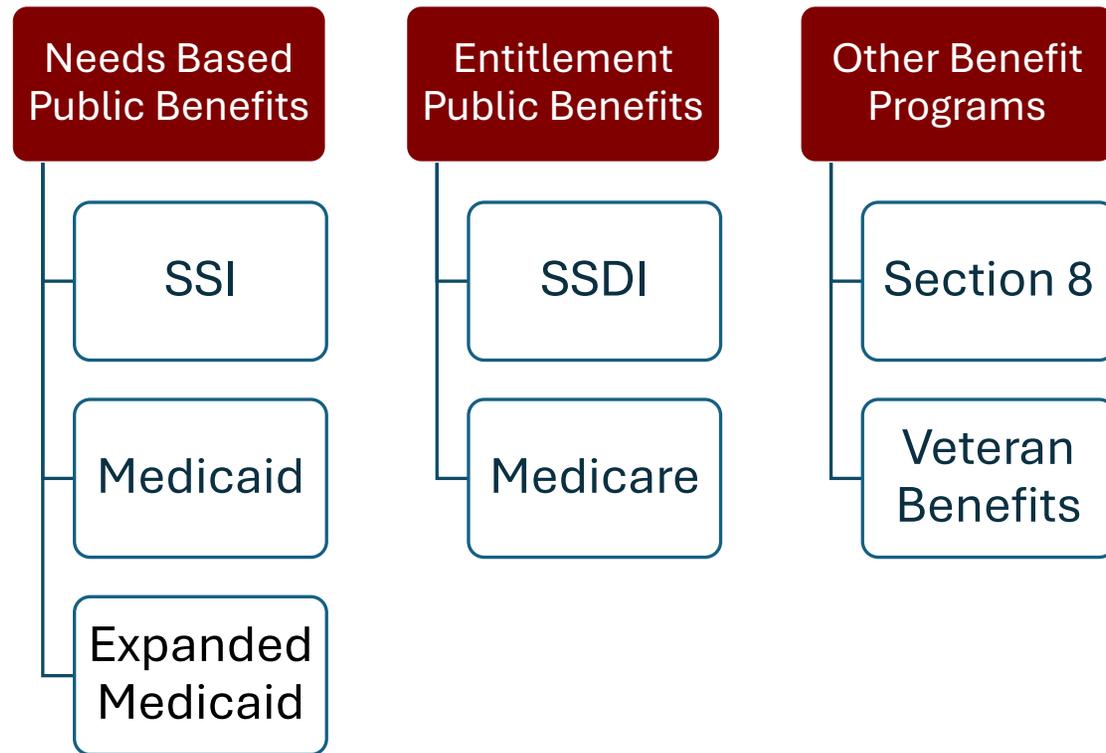
# Working with People with Disabilities

- Common Issue: not including the person with a disability in the planning
- Capacity issues
- Often relies on others (Family, Friends and Community)
- Can be difficult, especially with severe mental illness – patience and a thick skin are a must

# Working with the Family

- Research the condition so you can address the issues that arise (e.g. Prader-Willi Syndrome – Issues w/food)
- Making sure the decision-maker is in room
- Understand and be able to discuss the acronyms (IEP, SSI, SNT)
- Being able to provide referrals to applicable resources like charities or support groups

# Types of Public Benefit Programs



# What SSI Provides

SSI provides a monthly cash grant for food and shelter to disabled, blind, or the aged (65 or older)

In 2024, the SSI federal maximum payment is \$943 for an individual

# Where is SSI Law?

## Finding the Law, Regulations, and SSA Policy

- 42 U.S.C. §§1381–1383f
- 20 C.F.R. §§416.101–416.2227
- SSA's Program Operations Manual System (POMS) governs administration of SSI. POMS guidelines are available on the SSA's website at
  - <http://policy.ssa.gov/poms.nsf>

# SSI Non-Financial Requirements

- Citizen or lawful resident
- Not be a fugitive felon, in prison, violating parole
- Not be outside the U.S. for more than one month
- Must apply for all other benefits for which you are eligible
- If an alien, meet special requirements

# SSI Eligibility

Person Must Meet Two Additional Tests:

- Medically Disabled (physically or mentally) under SSI's Definition or Elderly (65+), plus
- Poor
  - Resource Test – measured only one time each month
  - Income Test – total any income received any time of the month

# Disability Defined

- “Disability” for an adult is defined as the inability to engage in any “**substantial gainful activity**” (SGA) due to any medically determinable physical or mental impairment, or combination of impairments, that has lasted or can be expected to last for a continuous period of **at least 12 months**, or result in death
- “Disability” for a minor is defined as a medically determinable physical or mental impairment or combination of impairments that causes marked and severe functional limitations, and that can be expected to cause death or that has lasted or can be expected to last for a continuous period of not less than 12 months

## SSI Resource Test

- “Countable resource” limits for SSI:
  - \$2,000 for an eligible individual
  - \$3,000 for an eligible couple
  - Measured on a month-by-month basis on first day of each month

# SSI BIG Exempt Assets

- Principal residence
  - (20 CFR §416.1212)
- Automobile (of any value)
  - (20 CFR §§416.1210(c))

# SSI Other Exempt Assets

- Household items (20 CFR §§416.1210(b), 416.1216(a));
- Personal effects (20 CFR §§416.1210(b), 416.1216(b));
- Musical instruments (20 CFR §§416.1210(b), 416.1216(b));
- Burial insurance (20 CFR §§416.1230, 416.1231(b)(8));
- Irrevocable burial trusts; burial funds (20 CFR §416.1230, 416.1231(b)(8));
- Burial plots, vaults, and crypts (20 CFR §416.1231(a)); and
- Life insurance policies with cash value less than \$1500, All term life insurance (20 CFR §416.1230)

# Types of SSI Income

## **Unearned Income**

- Includes gifts, payments from annuities, and pensions, alimony and support payments, dividends, interest, rents, awards and payments from other benefits programs.
- Reduces benefits dollar-for-dollar after the first \$20.00

## **Earned Income**

- Consists of wages, royalties, net earnings from self employment, and any honoraria received for services rendered.
- Reduces benefits one dollar for every two dollars earned after the first \$65 earned monthly.

# Other Types of SSI Income

## **In-Kind Support & Maintenance**

- Actual receipt of food, clothing, or shelter, or something that can be used to get one of these.
- Reduces benefits dollar for dollar up to a maximum of 1/3 the benefit.

## **Deemed Income**

- Someone else's income. (Same household; duty to support)
- Reduces benefits dollar-for-dollar after the first \$20.00

# SSI Exempt Income and Earned Income

- The first \$20 of any income is exempt plus the first \$65 of earned income
- Earned income after the first \$85 reduces the SSI monthly benefit:
  - \$1 for every \$2 earned
  - Example: If \$585 was earned in a month, the SSI check would be reduced by \$250
    - $(\$585 - \$85 \text{ exemptions} - 250 (50\% \text{ of remaining earned income})) = \$250$

# SSI Unearned Income

- Unearned income reduces the SSI monthly cash payment dollar-for-dollar, after taking the \$20 "any-income" exemption
- The effect of Unearned Income is much greater than Earned Income
  - Example: Parent gives child SSI recipient \$585 cash gift. Child will lose \$565 of his monthly SSI check

# SSI In-Kind Support and Maintenance (ISM)

1. Mortgage (including property ins. required by lender)
2. Real property taxes (less any tax rebate/credit)
3. Rent
4. Heating fuel
5. Gas
6. Electricity
7. Water
8. Sewer
9. Garbage removal

# SSI Penalty for Giving Away Assets

- Individuals who give away assets are ineligible for SSI for up to 36 months
- To calculate the period of ineligibility, the amount transferred is divided by the transferor's monthly SSI benefit (including state supplement), rounding the result up or down to the nearest whole number
  - Example: Eric receives \$943/month from SSI. He receives \$20,000 from his mother. He gives the entire amount to his brother. Eric loses 29 months of SSI eligibility ( $20,000 \div 943 = 21.20$  or, rounded down, 21 months).

# SSI Reporting Requirement

- Benefits recipients are under a legal obligation to notify the SSA of changed circumstances, e.g., a change in income or assets.
- The report should be in writing and mailed by certified letter within 10 calendar days of the end of the month in which the assets were received to the local SSA office. Reports should include:
  - The reporter's name;
  - The name and Social Security number (SSN) of the person the report is about;
  - Facts about the change; and
  - When the change happened

# Special Needs Trusts (SNTs)

- Trust acts as a firewall between person and \$\$\$
- Allows parents to set aside \$\$\$ for child (generally after parent is gone) without child losing government benefits (SSI, Medicaid, etc.)
- \$\$\$ can be spent on the “extras”:
  - Trips, activities, entertainment, employment training, education, vacations i.e. things that improve quality of life
- **BUT.....** \$\$\$ can only be paid out of the Trust in the **absolute discretion of the Trustee**
- Therefore, it is important to choose a Trustee carefully

# Trustee's Job

Trustee has 2 jobs:

- 1) Making \$\$\$ grow through investments
- 2) Distributing \$\$\$ based on what the Trust says

# Selecting a Trustee

- Who Can be a Trustee of a SNT?
  - Person (be cognizant of age)
  - Corporate
  - Combination of both
- Who CANNOT be a Trustee of a SNT?
  - The child with a disability

## Two Primary Types of SNTs

- **3<sup>rd</sup> Party Trust**
  - Parent/grandparent, etc.
- **1<sup>st</sup> Party Trust**
  - Person with the disability

# 3rd Party Trust

- Generally created by a family member for the benefit of person w/disability for life
- After person's death, \$\$\$ is distributed according to trust document
- **No government payback!!!!**

# 1<sup>st</sup> Party Trust

- Established using \$\$\$ of person w/disability
  - Ex: parent dies and leaves child w/disability a share of his estate or makes child a beneficiary of a life insurance policy
- It is important to make sure grandparents' documents do not leave assets directly to grandchild with disabilities!!

# Third-Party Special Needs Trust

- Third-party trust main requirements:
  - Beneficiary (or spouse) did not create the trust
  - Trust does not hold Beneficiary's (or spouse's) assets
  - Beneficiary is not Trustee
  - Trustee has sufficient discretion to withhold distributions

# Third-Party SNT Requirements

For SSI purposes, SSA defines a third party trust as

**"a trust established by someone other than the beneficiary as grantor."**

It defines a grantor as

**"the individual who provides the trust principal (or corpus)."**

# Third Party SNT Requirements

Two additional requirements:

1. Beneficiary cannot have authority to revoke the trust;  
and
2. Beneficiary cannot direct the use of trust assets for his or her support and maintenance under the terms of the trust

# Third-Party SNTs

- No payback requirements
  - Grantor can leave any remaining funds to whomever he or she wants
- Revocable during life of grantor
- If for a spouse, must be established by will (not revocable trust)
- More drafting flexibility so long as correct distribution standard is used

# First-Party Special Needs Trusts

- Disabled individual's own funds are placed into the trust.
- Established by statute:
  - (d)(4)(A) – Payback Trust

# First Party SNTs

- When are First Party SNTs used:
  - Personal Injury Award
  - Inheritance or Gift
  - Minor with a Disability Turns 18
  - Adult Recently Disabled

## (d)(4)(A) SNT Requirements

- Authorized by 42 U.S.C. §1396p(d)(4)(A) and has the following characteristics:
  - Irrevocable
  - Established by disabled person or his/her parent, grandparent, legal guardian, or court (considered “self settled”)
  - For the sole benefit of a person with a disability who is *under the age of 65*
  - Provide that on the death of the beneficiary, the **trustee must repay Medicaid for all benefits received by the beneficiary during his or her lifetime** to the extent that funds remain in the trust at the beneficiary's death

## PRO's - (d)(4)(A) SNT

- Control
  - Choice of Trustee
  - Choice of Investment Options
- More easily accepting of non-liquid assets like real estate
- More personalized attention

# CON's - (d)(4)(A) SNT

- Limited to under age 65
- Control
  - **Choice of Trustee may be inappropriate**
  - **Investments could be too aggressive; result in a loss of principal**
- Poor drafting or administration

# Avoiding Common Mistakes During Special Needs Planning and Administration

- Do Nothing
- Poor Distribution Standard
- Poor Management of SNT
- Not Preparing a Financial Plan
- Fails to Set Up Process for Distribution
- Complying with “Sole Benefit Rule”
- Distributing Cash/ Allowance/Gift Card To Beneficiary
- Refusing To Make Appropriate Distributions To A SNT Beneficiary
- Not Maintaining Good Records

# What if I don't do anything?

- Without proper planning child will likely inherit \$\$\$;
- 1<sup>st</sup> party trust will have to be established for assets or spent down;
- Child may lose government benefits and/or housing

# Poor Distribution Standard

- **Too broad** (e.g., distribution for SNT beneficiary's support, maintenance or mandatory distribution) will reduce or eliminate needs-based public benefits
- **Too narrow** will unnecessarily restrict trustee's ability to make distributions (e.g., distribution that will not reduce SNT beneficiary's public benefits in any way)

# Poor Management of SNT

- Trustee
  - Bank or Private Professional Fiduciary
- Trust Advisory Committee
  - Family members and friends, may also include professional benefits counselor to make sure distributions do not interfere with public benefits
- Trust Protector
  - Modify trust for changes in law or to remove and replace trustee for any reason

# Not Preparing a Financial Plan

## Common gaps in financial planning

- Premature death or disability of parent
- Inadequate savings to meet lifetime goals
- Not taking advantage of benefit programs
- Failing to review and monitor financial plan

# Fail to Set Up Process for Distribution

- Number One complaint is that SNT trustee fails to timely respond to distribution requests
- Best practice is to require that all disbursement requests come in writing
  - Have form that can be scanned and emailed or faxed
- Trustee needs system for accepting/denying requests

# Complying with “Sole Benefit Rule”

First party SNTs are required to be for the “sole benefit” of the SSI recipient as defined

- Consider a trust established **for the sole benefit of** an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life. POMS SI 01120.201F.2.a

# “Sole Benefit”?

Consider the following disbursements or distributions to be for the sole benefit of the trust beneficiary:

- Payments to a third party that result in the receipt of goods or services by the trust beneficiary;
- Payment of third party travel expenses which are necessary in order for the trust beneficiary to obtain medical treatment; and
- Payment of third party travel expenses to visit a trust beneficiary who resides in an institution, nursing home, or other long-term care facility (e.g., group homes and assisted living facilities) or other supported living arrangement in which a non-family member or entity is being paid to provide or oversee the individual’s living arrangement. The travel must be for the purpose of ensuring the safety and/or medical well-being of the individual.
- POMS SI 01120.201F.2.b.

# Distributing Cash/ Allowance/ Gift Card To Beneficiary

- Distributing more than \$20 cash a month directly to beneficiary  
– unearned income reduces SSI (dollar for dollar)
- Gift Cards okay but only if (True Link Card)
  1. cannot be used for shelter and
  2. legal prohibition against resaleOtherwise treated as unearned income, nearly impossible to meet

# Refusing To Make Appropriate Distributions To A SNT Beneficiary

- Purchase of Exempt Resources
- Payment of Food and Shelter
- Payment for Services
- Payment of Medical Expenses
- Vacations
- Payment of Appropriate Credit Card Charges
- Clothing
- Home Furnishings, etc. etc. etc.

# Not Maintaining Good Records

- How long?
  - One SSA Agency sought 25 years of trust records
- If records are inadequate all doubts and presumptions made that Trustee did something inappropriate

# First Party SNT Termination – Payback Provision

- May pay
  - Reasonable fees for administration of trust
  - Taxes
- Then must pay all State Medicaid agencies
- Not allowed prior to payback
  - Funeral Expenses (prepay for funeral)
  - Preexisting debts

**Questions**

