ISSUES WITH SPECIAL NEED TRUSTS: DRAFTING & ADMINISTERING

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I. The Goal

In Special Needs Planning, the goal is to preserve the beneficiary's eligibility for needs-based public benefits. A needs-based public benefit is one for which there are financial eligibility requirements (means-based). A correctly drafted special needs trust should protect needs-based benefits.

Caveat: There are some needs-based benefits, however, that may not be protected by a trust if the beneficiary receives a settlement.

II. What are the Benefits?

A. Identifying those benefits and possible alternative strategies to preserve eligibility is important to our clients, professional trustees, and personal injury attorneys who look to us for expertise in this area.

B. Needs-based public benefits come in many forms: cash, medical insurance, food, and housing. These programs are all government created and funded, nonetheless no two programs have the same financial eligibility rules. Therefore, before drafting a special needs trust, it is important to know what benefits the beneficiary is receiving or is likely to receive.

III. Questions for Client.

A. What public benefits the client may be receiving (or may be likely to receive).

Caveat: The client is usually incorrect on what the benefits are, so require an annual statement.

B. What are the eligibility criteria other than financial (i.e. age, citizenship, disability, work requirement, etc.)

C. Are there any categories of individuals automatically eligible because of receipt of another public benefit?

D. Assets

i. Whose assets count?

ii. Where household assets count, are any members of the household excluded?

iii. Is there a countable asset limit?

iv. What assets count?

v. What assets do not count?

vi. Is there a transfer of asset penalty?

1. Are there strategies for avoiding the penalty?

2. Are there exemptions from the transfer of asset penalty?

3. How is the penalty calculated?

E. Income

i. Is there an income limit for eligibility?

ii. Whose income counts for eligibility purposes?

iii. Is income deemed to the applicant from another person?

iv. Where household income counts, is the income of any household member excluded?

v. Is income imputed from assets or is actual income considered?

vi. If income is imputed, how is it determined?

vii. Are regular third party gifts or contributions counted as income?

viii. Is any income disregarded for eligibility or benefit determination purposes?

ix. Is there a long term disqualification if a lump sum payment is received by the recipient?

x. Are there strategies for avoiding the disqualification?

xi. Does the program reduce benefits due to receipt of in-kind income?

xii. What in-kind income results in a reduction?

xiii. What are the strategies to avoid receipt of in-kind income?

IV. Trusts

A. Under what circumstances, if any, is a trust considered a countable asset?

1. Under what circumstances is a self-settled trust countable?

a) Are there limitations on who can be the trustee?
b) Are there limitations on the trust's investments?
c) Must the trust include pay back provisions?

2. Under what circumstances is a third party trust countable?

a) Are there limitations on who can be the trustee?
b) Are there limitations on the trust's investments?
c) Must the trust include pay back provisions?

B. How do distributions from a Trust affect eligibility?

1. Third-party vendor payments
2. Credit card bills
3. Reimbursements to others

C. Reimbursement for benefits

1. Is the applicant required to assign recovery rights to the state?

2. Is there a reimbursement requirement?

3. During lifetime?

4. After death?

5. Does the program record a lien against real estate?