Special Needs Trusts for the Disabled and the Affordable Care Act

BY JAN CUMMINS, ESQ.

Many estate planning attorneys are wondering if the expanded access to MediCal benefits under the Affordable Care Act (ACA) does away with the need for a Special Needs Trust (SNT) for a disabled beneficiary. The simple answer is, "No." The more sophisticated and lawyerly answer is, "It depends," but probably still, "No."

EXPANDED MEDICAL VS. TRADITIONAL MEDICAL

With the advent of the Affordable Care Act, there are two types of MediCal. Expanded MediCal under the ACA has a no resource test, but is only available to non-disabled people under the age of 65. An individual is eligible based solely on total income being lower than 133 percent of the Federal Poverty Level (FPL) plus an automatic five percent income disregard. An individual can, therefore, have substantially more than $2,000 in total resources and still be eligible for this new type of MediCal. However, anyone who is diagnosed as disabled or who is aged 65 or older is not eligible for expanded MediCal. Only traditional MediCal is available for these people. For them, the $2,000 resource limit still applies, as well as an income limit that is more restrictive than is the case for expanded MediCal.

SSDI NO LONGER A DISQUALIFIER FOR PRIVATE MEDICAL INSURANCE

Of course, there are disabled people who are not using needs based public benefits. For example, Social Security Disability Income (SSDI) is not needs based. SSDI income is based solely on the recipient's ability to work for a living. Assets and resources are irrelevant. For disabled people receiving SSDI, the ACA is a wonderful development, because they can no longer be denied medical insurance coverage in the private system. But even for them, that may not always be the case. In the future, it may be to their benefit to be eligible for needs based public benefits.

Jan Cummins is a graduate of Santa Clara University School of Law. The author maintains an Estate Planning and Elder Law practice in Palo Alto. She particularly emphasizes estate planning, administration, mediation and litigation for families with disabled adult children. Attorney Cummins has a deep understanding of the difficulties faced by families with disabled members. She is able to resolve complexities in combining private funds with eligibility for public benefits. Website: www.jancummins.com

IN A SIMPLE SENSE, NOTHING HAS CHANGED

Needs based public benefits can be important for non-financial reasons. Many services available through the public system are simply not available in the private system. Typical are some county mental health programs only available to a restricted group of people who, as a threshold requirement, may be required to be eligible for traditional MediCal.

Therefore, in a simple sense, nothing has changed for disabled people on public benefits with the advent of the ACA. SSI and traditional MediCal are both needs based, and that has not changed for the disabled. Neither has anything changed as far as needs based public benefits are concerned under the ACA for people aged 65 and older. The resource limit for traditional MediCal qualification is still a strict $2000 for an individual and $3000 for a couple.

In a sophisticated sense, a person under the age of 65 who is receiving entitlement benefits, such as Medicare

and Social Security disability income, may find it financially feasible to forego MediCal, but only if that person possesses invested assets of many millions of dollars. For those middle class families that include disabled adults, a Special Needs Trust (SNT) is still important for maximizing the ability to maintain a customary standard of living.

THIRD PARTY SNT PREFERRED

In making a decision whether or not to establish a SNT, it is important to remember that there are three types of SNTs: First Party (commonly called d(4)(A) trusts; Pooled Trusts d(4)(c) trusts; and Third Party SNTs. The Third Party SNT is the one most commonly employed by estate planning attorneys and is the simplest and easiest to use. It is in essence a discretionary trust established by someone other than the beneficiary to hold property that does not belong to the beneficiary. It provides extra protection for the beneficiary that allows for qualification and use of government benefits, if they are needed.

It is relatively simple for parents to create a Third Party SNT as part of their own estate plan, and carries little or no risk of recovery by the State after the death of the beneficiary. Recovery is always a risk with the other two types of SNTs under current law. Often the only reason not to have a Third Party SNT is that the beneficiary might prefer to have control of his or her own property.

A Third Party SNT will probably still make it possible for a disabled person to enjoy a better standard of living than he or she could maintain using only private funds. That may be true with other types of SNTs as well, but since setting them up can be complex and recovery may apply, the situation should be analyzed more closely than for a Third Party SNT. Whichever type of SNT is appropriate in a given situation, the SNT as an asset protection tool is very much alive. Estate planning attorneys should continue to create SNTs in most situations just as they did before the advent of the ACA. □