

# Special Needs Planning: A Multidisciplinary Update and Overview

Prepared & Presented by:

Scott C. Suzuki, J.D., M.P.H.

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**Scott C. Suzuki, Attorney at Law**

**Estate Planning for Everyone.**

# What We Will Cover

- What is Special Needs Planning?
  - Multidisciplinary approach
    - Legal - Estate Planning; Family Law, Public Benefits; Special Education,
    - Taxes
    - Financial Planning
    - Social Work
    - Medical
- Update on Public Benefit Programs
- Updates on Special Needs Trusts
  - Self-Settled
  - Third-Party

# Special Needs Planning

- Continues to be an emerging area of the Law
- Emphasis on assisting families and individuals with special needs by:
  - Providing a voice (Guardianship & Alternatives)
  - Preserving Public Benefits
  - Enhancing quality of life beyond what Public Benefits can provide
- Planning & Prevention
- This Practice has become extremely multidisciplinary

# On-Line Resources

- Special Needs Alliance – legal resources for families with special needs. [www.specialneedsalliance.org](http://www.specialneedsalliance.org)



*Special needs require special attorneys.*

- Family Voices – Provides family-to-family networking and information for families with children who have special health care needs. [www.familyvoices.org](http://www.familyvoices.org)
- [www.suzukiaal.com](http://www.suzukiaal.com) – updates and articles from time to time.

# Common Scenarios for Special Needs Planning

- Parents who have a child with disabilities.
  - What happens when my child turns 18?
  - Who takes care of my child when I die?
  - Divorce situations
- Personal Injury Cases
- Long-Term Care Planning
- Self-Advocacy

# Some Planning is about Self-Advocacy

- At age 18, we are considered “emancipated adults”
  - May need Guardianship (Makes personal/medical decisions)
  - May need Conservatorship (Manages finances)
  - Alternatives may work – Power of Attorney, Healthcare Directives, Trusts, etc.
- May need to understand what programs are available after Special Education benefits are no longer available

# Other planning is to qualify for or preserve Public Benefit Programs

- A major part of Special Needs Planning involves maximizing public benefits.
  - Medicare
  - Medicaid
  - SSI
  - Social Security (CDB/DAC or retirement)
  - SSDI
  - TANF
  - Food Stamps (SNAP)
  - Housing Assistance
  - Etc...

# Multidisciplinary in Nature

- Legal Aspects
- Taxes
- Financial Planning
- Social Work
- Medical

# Legal Aspects of Special Needs Planning

- Traditionally arises from the Estate Planning Field
  - Drafting Trusts and Wills
- Family Law – Emerging Practices
  - Guardianship
  - Child Custody and Support for children with Disabilities
  - Alimony to/from spouse with disabilities
  - Division of assets to/from spouse with disabilities
- Public Benefits – another traditional approach
- Special Education – a specialty in its own right, but now a critical element of Special Needs Planning
- Personal Injury – Structured Settlements, preservation

# Tax Aspects of Special Needs Planning

- Finding Exemptions
- First Party Trusts
- Third Party Trusts
- Pooled Trusts
- Qualified Disability Trusts
- Gift Taxes to/from the trusts
- Estate Taxation – whose estate is it?

Remember, if it is not “countable” for public benefits, who counts it for tax purposes?

# Financial Planning Aspects of Special Needs Planning

- How much do I need?
- What types of assets to use to fund a SNT?
- How about life insurance?
- How about IRAs?
- Buying a home, an accessible van, a funeral plan?

# Social Work Aspects of Special Needs Planning

- Care managers can be essential
  - Placement
  - Services
  - Respite
  - “Running Around”
  - Wealth of Knowledge

# Medical Aspects of Special Needs Planning

- Children with special health care needs need family-centered care – [www.familyvoices.org](http://www.familyvoices.org)
- Pediatrics – do we stop at 18, 21, later?
  - Board Certified in Pediatrics and Internal Adult Medicine
- Specialists
- Funding

# But this is PBOT!

- Let's focus on Public Benefits
- Two primary types
  - Entitlement Programs
  - Means-Tested Programs

# Entitlement Programs

- Medicare & Social Security
  - Based on Work History – either your own or the history of another (Parent/Spouse)
  - A person can qualify regardless of a person's resources.
  - Income from Employment can impact the benefit amount.

# Means-Tested Programs (ABD)

- Medicaid
  - Provides assistance in paying for medically necessary care
- SSI
  - Provides a cash benefit to assist with an individual's needs for food and shelter
- In order to qualify:
  - Meet the definition of Disability:
  - Income Limits
  - Asset Limits

# Disability Defined

- Unable to do any substantial gainful activity (“SGA”) due to severe physical or mental impairments that will result in death or will continue for not less than one year.
- “SGA” is \$980/month, \$1,640 if blind for 2010

# Income Eligibility

- Medicaid Eligible if Medical Bills  $>$  Income
- SSI Eligible if Income  $<$  Monthly Benefit Amount (\$674/month)

<b>Unearned Income</b>	<b>Earned Income</b>	<b>In-Kind Support &amp; Maintenance</b>
Includes gifts, payments from annuities and pensions, alimony & support payments, dividends, interest, rents, awards and payment from other benefit programs.	Consists of wages, royalties, net earnings from self-employment, and any honoraria received for services rendered.	Actual receipt of food, or shelter, or something that can be used to get one of these.
Reduces benefits dollar for dollar after the first \$20	Reduces benefits one dollar for every two dollars after the first \$65 earned monthly	If BOTH food and shelter = VTR If food OR shelter = PMV reduction (which is 1/3 of FBR +\$20)

# Asset Eligibility

- Anything that can be converted to cash for support is a resource
- Resources cannot exceed \$2,000 as of the first day of a calendar month.

# “Exempt Assets”

- Certain Assets do not count against the \$2,000 limit.
  - A home, if the beneficiary has an ownership interest and it serves as his/her principal residence.
  - Household goods (not collectibles)
  - Vehicle
  - Burial Plot/Plan
  - Assets in a “Special Needs Trust” (we will cover this later)

# Comparison of Three Social Security Programs

<b>SSI</b>	<b>SS</b>	<b>SSDI</b>
<u>Supplemental Security Income</u>	<u>Social Security</u>	<u>Social Security Disability Income</u>
Disability	Retirement	Disability
Cash + Medicaid	Cash	Cash + Medicare (After 2 years)
No work history	Work History	Work History
Income Cap - \$674/month in 2010	Income Cap - \$1,180/mo in 2010, if under full retirement age	Income Cap - \$980/month in 2010
Earned & unearned income & ISM	Earned income	Earned income
Resource cap - \$2000.00	No resource cap	No resource cap
Minimum cash benefit	Insurance	Insurance
Food and shelter	Unrestricted	Unrestricted
State supplements	Uniform in all states	Uniform in all states
US citizens only	All workers	All workers
May also have SSDI	May not have SSI or SSDI	May also have SSI
No dependent coverage	Covers dependents	Covers dependents

# Comparison of Medicaid and Medicare

	Medicaid	Medicare
<b>Program:</b>	Health Care	Health Insurance
<b>Administered by:</b>	States	Federal
<b>Eligibility:</b>	Must Qualify	Entitlement
<b>Qualifications:</b>	Financial <u>&amp;</u> Disability	Age <u>or</u> Disability
<b>Covers:</b>	Skilled nursing care; Intermediate nursing care; Long Term care; Prescriptions	Hospitalization; 100 days maximum rehabilitation; Prescriptions
<b>Contribution:</b>	Reimbursement required; may have a cost share	Premiums and co-pay
<b>Estate Recovery:</b>	Yes	No

# Pause...

- Is this Over Kill on the information?
- NO! Even trusts that are drafted properly might cause ineligibility if the trustee does not administer the trust correctly.
- Case law continues to emerge and change how and why we do things.

# Let's focus on Trusts

- Settlor/Grantor = Person who owns property and makes instructions for its management
- Trustee = Manager of the property for the benefit of the Beneficiaries
- Beneficiaries = end-users. Could be the Settlor during life
- Manage assets during life and distributes them after death
- Avoids Probate
- Can also “exempt” income/assets from means-testing

# Common Mistakes in Trusts

- Outright gifts/Inheritance – may require Conservatorship, loss of public benefits
- Disinheritance – unstructured and unpredictable
- No planning at all
- The solution = Special Needs Planning through Special Needs Trusts

# Special Needs Trusts

- Type of trust designed to preserve a beneficiary's Public Benefits and improve quality of life.
  - Assets owned by the trust do not count against a beneficiary's eligibility (if administered properly)
  - The ability to shelter resources to benefit a family member with disabilities
  - The ability to help the beneficiary live more comfortably and productively than is usually possible on public benefits
  - The ability to provide financial management

# Finding the Law

- Originating with the Omnibus Budget Reconciliation Act of 1993 (“OBRA ‘93). 42 USC 1396p
- Social Security Act – 42 USC Chapter 7, Titles I-XXI.
- Title II, Old Age, Survivors & Disability Benefits (OASDI), 42 USC Sec. 401
- Title XVI Supplemental Security Income for the Aged, Blind and Disabled (SSI), 42 USC Sec. 1381 et seq., 20 CFR Sec. 416 et seq.
- POMS

# Two Types of SNTs

- Two types
  - First- Party (Self-Settled)
  - Third-Party (Created by someone else)
  - “Pooled Trusts” could be either Self-Settled or Third Party;  
currently none in Hawaii

# Self-Settled vs. Third-Party

Self-Settled	Third-Party
<ul style="list-style-type: none"><li>-Funded with Beneficiary's OWN assets</li><li>-Must be created by Parent, Grandparent, Guardian or Court</li><li>-Must be funded by age 65</li><li>-Pay-Back Provision</li></ul>	<ul style="list-style-type: none"><li>-Funded with any property not owned by beneficiary</li><li>-No pay-back provision</li><li>-More flexible, but fewer statutory protections</li></ul>

# What are the Updates?

- Case Law
  - *Brown v. Day* – 555 F.3d 882 (10<sup>th</sup> Cir. 2009 Kansas). Benefits denied due to statute requiring that every trust in which trustee has discretion will be deemed exerciseable unless it has specific statutory language. It's a Sec. 1983 civil rights case. Probably of no effect in Hawaii.
  - *White v. Kansas* – 198 P.3d 172 (2008). Judicial modification of trust that predates statutory language is appropriate remedy. Permit some method of amending an irrevocable trust?
  - *Pack v. Osborn* – 2009-Ohio 5956. Apply law in effect at time of application, not at time of trust creation.
  - *McClean v. Davis* – 283 S.W. 3d 786 (Mo.App. 2009) – Trust Protector may have fiduciary duty.

# Big Issues from case Law

- Hobbs v. Zenderman – 2009 WL 2750707 (2009). Sole Benefit Rule strictly enforced. No 1983 cause of action against State for denial of Medicaid benefits.
- Personal Injury Cases?
  - Medicare Set Aside Arrangements?
  - Apportionment of damages (Ahlborn) – the 1/3 rule

# Medicare Set Aside Arrangements

- Settlements for worker's compensation claims have been doing this for years
- Settlement must consider Medicare's interest
  - Future medical payments by Medicare?
  - Set aside amount of settlement allocated to future medicals
  - Available asset?
    - Nest this inside of an SNT?
  - Unsettled area of law!

# Essential Steps of Special Needs Planning

- Establish Networks -
  - Family Members
  - Family-to-Family groups
  - Professionals – Lawyers, accountants, social workers, medical
  - Individual
- Prepare for Transitions
  - Individual Advocacy; Guardian; Conservatorship
  - Special Education; Vocational Rehab; Independent Living; Other
- Maximize Independence and Public Benefits
  - Special Needs Trusts – either 1<sup>st</sup> Party or 3<sup>rd</sup> Party

# Questions?



**Scott C. Suzuki, Attorney at Law**

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(808) 983-3850 \* 1110 University Avenue, Suite 309, Honolulu, Hawaii 96826

Scott@suzukiaal.com \* www.suzukiaal.com