Special Needs Trusts Part I of 2

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OVERVIEW OF PUBLIC BENEFITS PROGRAMS

The programs that are not based on financial need are Social Security (old age and survivor benefits), SSD (permanently and totally disabled) and Medicare. The SSI program is needs based and is administered by the Social Security Administration (Title XVI benefits). To qualify you must be age 65, blind or totally and permanently disabled and have assets of $2000 or less. In addition, you must be a U.S. citizen or meet the alien status criteria. A disability is the inability to engage in substantial gainful activity. Whether someone is qualified for the maximum SSI payments depends on the recipient's living arrangements, marital status, and whether the recipient is elderly, disabled or blind. The maximum Federal SSI benefit is $623 (living alone). New Jersey supplements this amount so that the maximum benefit for New Jersey residents is $654.25 per month.

In determining SSI qualification, if an individual has assets in excess of $2000 it must be determined if the resources are countable or non-countable. A married couple is permitted to have $3000. The following are countable assets:

- Cash (which is not the current month's income)
- Income producing property, including real estate
- Stocks, bonds, investments
- Vehicle

The following are non-countable assets:

- Personal residence
- Automobiles that are specially equipped or used for medical appointments
- Life Insurance with cash value of less than $1,500

The three types of income considered in determining whether an individual satisfies the income requirements are earned, unearned or in-kind. Unearned income is income not received from work. An SSI recipient can earn up to $20 per month of unearned income; however, any unearned income in excess of $20 per month reduces the SSI benefit on a dollar for dollar basis. Unearned income includes: Social Security benefits, Annuities, Alimony, Child Support, Dividends, Interest, Rents, Royalties, Prizes, Awards, Gifts, Inheritance and Distributions from Special Needs Trusts. Earned income consists of earnings from wages or self-employment. The receipt of earned income over $65 per month (or $85 per month if no unearned income) will reduce the SSI benefit dollar for dollar. The following is the formula for determining the reduction if there is earned income:

- Deduct the SSI General Exclusion of $20 (if no unearned income)
- Deduct $65 per month (earned income exclusion)
- Deduct one-half of the remaining earned income
- The balance is the total countable earned income
- Deduct this from the maximum SSI benefit
- The remaining balance is the reduced SSI benefit

An SSI recipient is expected to pay for his or her own food or shelter. Receipt of food or shelter from a third party constitutes in-kind income also known as in-kind support and maintenance (ISM), which may reduce the SSI benefit. Regulations, which became effective on March 9, 2005, eliminated clothing from the definition of income and the determination of in-kind support and maintenance. There are two ways to calculate in-kind support and maintenance. The first is the one-third reduction rule, which is used in limited situations. This is applied when an SSI recipient lives for a full calendar month in the household of another person who provides both food and shelter to him or her without charge. The SSI benefit would be reduced by one-third of the federal benefit rate. The second is the presumed maximum value rule which is used when the SSI recipient has received food or shelter from an outside source and the one-third reduction rule doesn't apply. For example, it will apply if a recipient lives in his or her own home and receives outside help for expenses. Social Security presumes that the maximum value is one-third of the Federal benefit plus $20. There is no reduction if a third party pays directly to a vendor for items that are not food or shelter.

Blind or disabled children may receive SSI; however, if they are under age 18 their parent's assets and income are deemed to the child.

Many who receive Medicaid receive it based upon their SSI qualification; therefore it is imperative that the recipients not receive any funds that would disqualify them from SSI.

Social Security Disability Insurance (SSDI) consists of a monthly cash benefit paid to disabled workers and their dependents. The eligibility is not based on economic need.

The eligibility requirements are as follows. The recipient must:

(1) have sufficient quarters of covered employment and be medically disabled.

If the individual is working, earnings must be less than $900 per month ($1500 if blind). There is no asset limit and no limit on unearned income or in-kind income. A special needs trust is not necessary unless the individual receives SSI or Medicaid in addition to SSDI.

SPECIAL NEEDS TRUSTS

Assets held in a properly drafted special needs trust will not be countable for purposes of eligibility for needs based government benefits (i.e. SSI and Medicaid). Not only must the trust be properly drafted, it must also be properly administered. The types of trusts that would be created for someone with special needs would be:

1. Trust created by a third party – The trust may either be an inter-vivos or testamentary trust. Typically a parent, naming the disabled child as beneficiary, creates this trust. It can be funded with assets or often life insurance policies are purchased to fund the trust after the parent's death.

2. Self-settled Trusts (also known as pay back trusts or (d)(4)(A) Trusts) – Even though these trusts are funded with the disabled person's assets, the five year look back does not apply under OBRA '93. Requirements for a payback trust are as follows: (1) The trust must be funded with the assets of the individual, (2) The individual must be under the age of 65 at the time the trust is funded, (3) The individual must be disabled, (4) The trust must be established by a parent, grandparent or legal guardian of the individual or a court. Any state that paid for medical assistance on behalf of the individual must be reimbursed from any amounts remaining in the trust upon the death of the individual. Reimbursement must be up to an amount equal to the total medical assistance paid on behalf of the individual. Assets remaining after the "pay back" may be distributed to contingent beneficiaries. This category would include trusts established by the spouse of the disabled person. Self-settled Trusts allow an individual to

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retain funds while maintaining eligibility for public benefits programs. They are commonly used in the context of personal injury settlements and workers compensation awards. The funds may be used to pay for items not provided by Governmental programs. The Trusts are inter-vivos and irrevocable. Transfers to and from the trust are not subject to the transfer of assets rules or the income and resource rules of Medicaid.

3. Pooled Trusts ((d)(4)(C) Trusts) are authorized under OBRA '93. These trusts are funded with assets of a disabled person. The definition of "disability" is used.

THE REQUIREMENTS OF A POOLED TRUST:

- It must be established and managed by a non-profit organization
- There must be a separate account for each beneficiary
- Funds are pooled for investment and management
- The account is solely for the benefit of the disabled individual

THE ADVANTAGES OF A POOLED TRUST:

- Corpus does not constitute a countable asset
- A person can be over 65 at the time of establishment of a Trust
- A disabled person can establish his own Trust
- The Community Trust already exists and does not have to be created
- The Community Trust requires only a joinder agreement

Income tax liability is determined pursuant to the Grantor Trust Rules. The Trustee must track each sub account. If there is a pooled income fund, a remainder interest may be tax deductible. Gift tax issues must be explored as well.

The assets may be pooled for investing and management. After the beneficiary's death, amounts not retained by trust may be paid to the state to reimburse Medicaid; however, most Trusts will retain such funds.

Part 2 will appear in the March Barrister and discuss Trustees and other issues relative to Special Needs Trusts.

Association Officer and Trustee Nominations Open

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If you have an interest in helping to shape the future of your Association, and can meet the time commitments outlined above, please send a letter of interest along with a resume to Carolyn Kornas Karbasian, Esq., Chairperson, Nominating Committee, c/o Camden County Bar Association, 1040 N. Kings Highway, Suite 201, Cherry Hill, NJ 08034. Current members of the Board of Trustees whose terms expire at the end of this year, must also send a letter of interest to be considered for reappointment.

In addition, lawyers who have practiced five years or less at the Bar of New Jersey or are 35 years or younger are eligible for the position of Young Lawyer Trustee or Vice Chairperson of the Young Lawyer Committee. Again, a commitment to attend monthly Young Lawyer Committee meetings, Association Board of Trustee Monthly meetings, and Young Lawyer and Association events and programs must be made. To be considered for either position, please send a letter of interest along with a resume to Chris Bratton, Chairperson, Young Lawyers Nominating Committee, c/o Camden County Bar Association, 1040 N. Kings Highway, Suite 201, Cherry Hill, NJ 08034. Both young lawyer posts are for one-year terms beginning June 1, 2008.

For more information regarding the nominating process, please feel free to contact executive director Larry Pelletier at 856.482.0620 or via e-mail at lbp@camdencountybar.org.

The deadline for nominations is 5 p.m., Friday February 8, 2008 to be considered.

Cooking Demonstration & Dinner Party at Bacio's

Allen and Barbara Etish toast to a terrific evening of food, wine and fun at Bacio's.

(l-r) **Brian Betze, Dina Betze, Jim Hamilton, Rebecca Rokaski** and **Maureen Coghlan** were among the guests who enjoyed an evening out at Bacio's.