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PLANNING FOR THE FUTURE CARE OF PERSONS WITH SPECIAL NEEDS

I. WHAT ARE SPECIAL NEEDS?

Any person, regardless of age, may become temporarily or permanently incapacitated *due to a medical condition or personal injury*, resulting in that person becoming either totally or partially unable to care for his or her finances and/or personal care. Mental illness is an example of such a medical condition.

Under California's Welfare & Institutions Code § 4512, Regional Centers follow a more restrictive definition of special needs, and require the *onset of a severe developmentally disabling condition, prior to the age of 18 years, such as mental retardation, cerebral palsy, autism or any other condition necessitating services similar to those for a mentally retarded person.*

Under California's Probate Code § 3604 (b)(1) a person with a disability which substantially impairs the person's ability to provide for his or her own care or custody is a person with a substantial handicap.

2. WHAT GOVERNMENT BENEFITS ARE AVAILABLE?

Any person who has a substantial handicapping condition which will last more than 6 months or which is permanent, who cannot maintain substantial gainful employment due to such condition, and who does not have more than \$2,000.00 in non-exempt assets, is eligible to receive Supplemental Security Income, (SSI), under Title XVI, 42 USC 1381-1383; and medical insurance, (Medi-Cal) benefits, under Title XIX, 42 USC 1396-1396v, as long as he or she remains eligible for them.

Additionally, the person may be eligible to receive In Home Support Services (IHSS) from the County Department of Social Services. A separate application for those benefits is required. Los Angeles County IHSS number is (888) 944-4477.

3. WHY RELY ON GOVERNMENT BENEFITS?

People with special needs have lifetime intellectual and developmental limitations, and sometimes chronic medical conditions. They may be unemployable except in sheltered settings, and if employed, may be able to earn only limited wages, without benefit of medical insurance.

Most people with special needs must rely upon *governmental benefits* for disabled persons, such as SSI and Medi-Cal, as their *sole* means of medical insurance and financial support. In order to qualify for such benefits the Social Security Administration must first determine whether the applicant is:

- A. *indigent*, that is, they have insufficient assets, formal "Estate", or means of support in order to qualify to receive and to continue receiving such benefits, and
- B. *disabled*.

SSI provides monthly income of up to \$947.00, and Medi-Cal provides for the payment of certain categories of medical services to qualified persons. In most cases persons with disabilities cannot earn enough monthly income to support themselves, nor can they obtain medical coverage to meet either their basic health nor their special medical issues. Therefore SSI and Medi-Cal provide a safety net of income and medical insurance. Together with IHSS they provide for a person's additional direct supervision.

4. GUARDIANSHIPS:

Under California law, a guardianship is a Court proceeding to appoint a manager for a minor person; i.e. *under 18 years* of age, who is therefore *legally incompetent*, due to his or her age, to make decisions for his or her own finances and/or personal care, and who has no parent or other adult person legally authorized to do so. Therefore, *legal minority* is itself *legal incompetency*.

5. CONSERVATORSHIPS:

Under California Probate Code § 2350 et seq. , a conservatorship is a Court-ordered appoint of a third person to manage another *adult* person's finances or formal "Estate", and/or personal care. The Court may also limit a person's right to vote and the right to give medical consent.

But ***medical incapacity is not the same thing as legal incompetency***, and the purpose of any such Court-ordered protective relationship is to *promote the least restrictive alternatives* to the limitation of one's civil liberties. The Court will therefore only grant those particular powers to the Conservator as are necessary to promote the Conservatee's civil liberties, on a showing by clear and convincing evidence to the Court, that the Conservatee cannot exercise them for him or herself.

- A. **Conservatorship of the Estate:** An "Estate" consists of a person's real and personal property assets, bank and checking accounts, stocks, bonds, inheritances from friends and relatives, and contributions by family under the a Uniform Gift to Minor's Act.

For persons with mental or developmental limitations an Estate can disqualify that person from eligibility for government benefits such as SSI and Medi-Cal.

California Probate Code § 2620 provides that where an Estate exists and is under Court supervision, there must be periodic accountings to the Court, which entail recurring accounting and attorneys' fees and court costs.

However, California Probate Code § 2628(b) provides that the Court may to exclude government benefits such as SSI and Medi-Cal and to waive required biannually accountings, so long as the Estate does not exceed \$7,500.00.

For Estates greater than \$7,500.00 a properly drafted Special Needs Trust may be used to shelter such assets from SSI and Medi-Cal consideration, subject to SSI "pay-back" provisions discussed above. But the cost to establish and to file periodic accountings of a court-supervised Special Needs Trust are usually greater than \$7,500.00, so the size of the Estate to be sheltered must first be considered.

- B. Conservatorship of the Person:** Under California Probate Code § 2351, when a person is either temporarily or permanently unable to provide for one's own food, clothing, shelter and/or medical care due to physical, mental or developmental limitations, the Court can appoint a third person to make decisions on behalf of the disabled person. Without a Court Order of such appointment, there is no legal authorization to act on behalf of the disabled person.
- C. Limited Conservatorships:** Regardless of any mental or developmental limitation, all adults have specific legal and civil rights which cannot be legally be modified or denied without specific Court Order. *For persons with developmental disabilities*, a special type of Conservatorship has been created, called a "Limited Conservatorship", by which some, all or none of these powers may be taken from the disabled person, by Court Order, and granted to a third person, and with further requirement that a Regional Center first make a detailed recommendation on each of the powers sought to be obtained by the Limited Conservator. California Probate Code § 2351.5 describes these legal and civil rights or "Powers", in addition to the right to vote, as follows:
- 1.) The right to consent or withhold consent to medical treatment;
 - 2.) The right to establish one's domicile or place of residence;

- 3.) The right to enter into contracts;
- 4.) The right to privacy, confidentiality, and access to private documents;
- 5.) The right to have social and sexual relations;
- 6.) The right to make plans for one's education; and,
- 7.) The right to consent or withhold consent to marry.

D. SPECIAL EDUCATION AND INDIVIDUAL EDUCATION PLANS:

Persons with qualifying disabilities, including developmental disabilities, have a right to receive a free appropriate public education, through the student's 22nd birthday, that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living pursuant to the Individuals with Disabilities Education Act, "IDEA", 20 USCS 1400 et. seq..

These unique needs are determined from time to time in the student's Individual Education Plan, "IEP" meeting at which a team of persons, including teachers, psychologists, therapists, parents, student and advocate, determine what services are needed and the number of hours each such service is to be paid for and provided by the school district. The date and time for such meetings are proscribed by law as part of the due process related to special education services, and require timely notice to the student, his or her family and any advocate.

School districts typically include a student's birthdate on the IEP, and, regardless of the type of developmental limitation a student may have, act on the presumption that where a student has reached the age of majority, he or she is legally competent, and indicate on the face of the IEP that the "Student retains educational decision - making authority", i.e., the student is legally responsible for consent to the terms and conditions of the IEP. Therefore, it is important that PVP counsel review a prospective conservatee's IEP to determine whether the student should retain such authority.

A developmentally disabled student may have a varying range of capacities depending on the type of disability he or she has. High functioning students may be able to give consent in some but not all of the Probate Code § 2351.5 powers.

E. REGIONAL CENTER SERVICES:

California is unique within the United States to provide an "entitlement" of statewide services to developmentally disabled persons. There are 21 regional centers in the state of California, 7 within Southern California. Welfare & Institutions Code § 4648 provides that "In order to achieve the stated objectives of a consumer's individual program plan, "IPP", the regional center shall secure services and supports

that meet the needs of the consumer, as determined in the consumer's individual program plan, and within the context of the individual program plan, the planning team shall give highest preference to those services and supports which would allow minors with developmental disabilities to live with their families, adult persons with developmental disabilities to live as independently as possible in the community, and that allow all consumers to interact with persons without disabilities in positive, meaningful ways. Therefore, it is important that PVP counsel also review a prospective conservatee's IPP to determine what additional services may be required for the proposed conservatee and whether he or she should retain authority relating to regional center services.

6. IS A SPECIAL NEEDS TRUST NEEDED?

SSI & Medi-Cal benefits are conditioned in part in the recipient being "indigent"; i.e., having *no more than \$2,000.00 in exempt assets such as cash, and no formal "Estate"*. The receipt of such non-exempt assets will result in either a reduction, suspension or a termination of monthly SSI payments and likely loss of Medi-Cal benefits as well.

The most common ways these non-exempt funds arise are:

- A. UGMA payments in the name of the special needs person during his or her minority;
- B. Inheritances from well-meaning relatives;
- C. Intestate inheritances from parents; and/or,
- D. Personal injury awards to the recipient.

These types of non-exempt funds result in the recipient being no longer "indigent" for SSI purposes, and require that, in order to resume receipt of SSI benefits, the funds be ordered into a Court-supervised special needs trust pursuant to Probate Code § 3600.

BUT NOTE: On termination of a Court-supervised SNT, the trust balance is subject to a pay-back to the State Department of Health Care Services up to the entirety of the residue of the SNT account. See **1993 Omnibus Budget Reconciliation Act (OBRA 93)**, below.

7. ESTATE PLANNING TO MAXIMIZE AVAILABLE PUBLIC BENEFITS

An inheritance, personal injury award, or any other form of reportable income will result in the temporary interruption or loss of governmental benefits until the sums received is reduced to governmental eligibility levels. Parents and relatives who intend to make a gift to a family member with special needs should consider the following:

- A. NO WILL OR “INTESTACY”:** Parents or relatives who die *without a Will* may still transfer real and/or personal property to their next of kin. This is called “intestacy”. If such a beneficiary has special needs, this intestate inheritance could result in the loss of SSI and Medi-Cal eligibility, liability for overpayments of benefits received, and even the loss of the entire inheritance to liens by State and /or Federal agencies for benefits provided on the basis of financial indigence. The beneficiary is thus forced to attempt to shelter such an estate by petitioning the Court to establish a Special Needs Trust, resulting in attorney’s fees and costs, periodic future accountings, and any remaining estate is subject to SSI / Medi-Cal “pay-back” at the termination of the Special Needs Trust.
- B. TESTAMENTARY GIFTS:** The transfer of property by means of a Will usually incurs probate costs, and the payment of state and federal taxes. Gifts to a special needs beneficiary without the shelter of a properly drafted Special Needs Trust creates a formal “Estate”. The beneficiary’s remedy is to shelter such an estate by petitioning the Court to establish a Special Needs Trust, with resulting in attorney’s fees and costs, periodic future accountings all reducing the amount of that estate, and any remaining estate is subject to SSI / Medi-Cal “pay-back” at the termination of the Special Needs Trust.
- C. WILL OR LIVING TRUST WITH SPECIAL NEEDS TRUST PROVISIONS:** Depending upon the size of the estate and need for tax planning, the recommended means of leaving assets to a person with special needs is by use of a Will or a Living Trust, which includes a properly drawn “Special Needs Trust” to shelter the asset, income and resources from SSI / Medi-Cal calculations as “available income”. Special Needs Trusts are recognized and accepted by the Social Security Administration, and such a sheltered estate is *exempt* from SSI / Medi-Cal “pay-back” requirements at the termination of the Special Needs Trust.

1). 1993 OMNIBUS BUDGET RECONCILIATION ACT (OBRA 93):

Section 1917 (d) provides that States count for purposes of an individual’s Medicaid eligibility “assets” as defined in Section 1917(e)(1)(a) *to include all income or resources of the individual and spouse, including any income or resources which the individual or spouse is entitled to but does not receive because of action by the individual or by certain other designated persons or entities.*

This definition could apply to a disabled person’s settlement with or judgement against a third person, such as a casualty company, *had not the proceeds been diverted away by means of a trust.*

To be covered by the trust rules of OBRA Section 1917 (d), a trust

must have been established by an individual, ***other than by will***, with assets of the individual forming all or part of the trust corpus.

2.) Individual Trusts: Are *similarly exempted from OBRA treatment, if:*

- a. Established on or after August 11, 1993, and
- b. For the benefit of the person with a developmental disability, by a parent, grandparent, legal guardian, or the court, and,
- c. Contains the assets or property rights of the person with a developmental disability who was both:
 - 1. Under age 65 when the trust was established whether or not currently age 65 or over, and
 - 2. Who, at time trust established, was determined disabled per Title 22, Section 50167 (a) and who is currently disabled, and
- d. Provides that, upon death of the developmentally disabled person or upon termination of the trust, DHS shall receive all assets remaining in the trust up to an amount equal to the total medical assistance paid on behalf of that individual by Medi-Cal.

3.) Pooled Trusts are *also exempted from OBRA 93 treatment if the trust was:*

- a. Established on or after August 11, 1993, and
- b. Established and managed by a non-profit association, and
- c. Contains assets of the person with developmental and/or other disabilities, and
- e. maintains a separate account for each beneficiary of the trust; i.e., but for purposes of investment and management of funds, the trust pools these accounts, and
- f. Provides that DHS, upon death of the developmentally disabled person or upon earlier termination of the trust, receive all amounts remaining in that individual's account, equal to the amount of medical assistance paid on behalf of

that individual to the extent of the amounts remaining in the trust and are not retained by the trust to cover costs of the individual's remaining management and investment fees, outstanding bills within the terms of the trust, and funeral/burial expenses, and

- g.** Each account is established solely for the benefit of the person with the developmental disability by that same individual, his or her parents or grandparents, legal guardian or the court.

D. Supplemental Trust:

NOTE: Federal regulation requires that states, in making Medi-Cal resource eligibility determinations, cannot be more restrictive than the SSI regulations. To the extent that any state's regulations are more restrictive, they are unenforceable.