

Introduction to Government Benefits

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Today's cost of residential support, habilitation and vocational programs are increasing at such a rate that it is seldom possible for the average family to leave sufficient funds to care for a member with a disability's care. For most families with a family with a disability, one of the primary goals of estate planning is to assure that the family member with a disability remains qualified for the available federal and state benefit programs. Social Security Disability Income (SSDI), Medicare, Supplemental Security Income (SSI), Medicaid, and other needs based and sliding scale fee benefits are critical and often more valuable to the individual than an inheritance s/he receives from an improperly drafted estate plan. A properly drafted estate plan for a family with a member who is disabled will preserve eligibility for these critically needed benefits while preserving his/her inheritance in a which will enhance the quality of his/her life and provide funds to pay for those goods and services that are not available through governmental programs. Attorneys advising families with a member who is disabled must be knowledgeable about local, state, and federal government benefits and their respective eligibility criteria.

Government benefits generally fall within one of four categories:

- Pension type benefits
- Welfare and needs based programs
- Sliding scale fee programs
- Entitlement benefits

What follows is a brief explanation of each of the four major categories of benefits along with some common examples of each.

PENSION TYPE BENEFITS

There are two ways to qualify for pension type benefits. Either a person can receive pension type benefits from his/her own work record, or, if s/he qualifies as a Disabled Adult Child (DAC), s/he can receive pension benefits from the retired, disabled or deceased parent's work record.

If an individual is disabled and incapable of substantial gainful activity, s/he may be eligible for Social Security Disability Income (SSDI). The ability to earn \$1,040 per month or more (for 2013) from independent employment or activity is generally considered to be substantial gainful activity by the Social Security Administration. The term "disability" is defined in the Social Security regulations as the "inability to do any substantial gainful

activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." In addition to being disabled, an individual applying for SSDI must have worked and paid into Social Security for a minimum number of work quarters. The minimum number of quarters will vary according to a person's age and the number of hours per week s/he worked prior to becoming disabled.

If a person has paid into Social Security and has a child who is disabled, the child may also be eligible for SSDI or Childhood Disability Benefits (CDB), if the child was disabled prior to the age of 22, child is incapable of gainful activity, the child is single, and if the parent subsequently dies, retires, or becomes disabled. The child with a disability is eligible for CDB as a Disabled Adult Child (DAC). If the disabled adult child is determined to be eligible as a DAC, s/he will be eligible for Medicare two years following the date SSA determines s/he is eligible for SSDI.

WELFARE OR NEEDS BASED PROGRAMS

There are a number of programs available for persons who are poor and/or disabled. The two that are most critical to persons with disabilities are Medicaid (also known as MassHealth or CommonHealth) and SSI. The income test for applying for these programs is based on the federal poverty level, which is updated on a yearly basis. These two programs provide persons with disabilities with a broad range of support services, which makes it possible for persons with severe disabilities to live in the community and to avoid nursing home or institutional care. For example, Medicaid pays for prescription drug services, acute health care, a personal care attendant, respite services, rehabilitation therapies, and assistive technology devices.

Medicaid and the SSI programs deem earned income differently than unearned income. Estate planners must be careful when drafting trusts so that the income of the trust is not distributed directly to the beneficiary of the trust if the beneficiary relies on SSI or on Medicaid to provide him with needed services. Even discretionary trusts that allow the trustee to distribute "spending money" directly to the beneficiary could jeopardize one's eligibility for SSI and Medicaid. Unearned income in excess of \$20 per month will result in a dollar for dollar loss in SSI.

In addition to the income requirements, the disabled family member must also meet SSI and Medicaid's asset limit requirements. SSI sets that amount at \$2,000 for an individual and \$3,000 for a couple. However, some assets an individual owns are not deemed or counted in establishing this number. For instance, neither a home that the disabled individual lives in, nor a car used to transport the disabled individual to work or medical treatment count toward the asset limit, regardless of their value. Although a home is an exempt asset, it may not be wise to title a home in the name of a person with a disability. The pros and cons of home ownership should be fully discussed with an attorney or financial planner who has knowledge of government liens and capacity to own property issues.

SLIDING SCALE FEE BASED PROGRAMS

The third type of programs that attorneys need to be familiar with are the "fee for service" programs or so called "sliding scale fee" programs. These include outpatient psychiatric centers, vocational rehabilitation services, community outpatient services, food stamps, housing subsidies and the purchase of private health insurance under the Affordable Care Act. Fees are based upon an individual's ability to pay and are charged to the parent of a minor child or to the adult who is receiving the services.

Maintaining eligibility for sliding scale fee services has been of relative less importance since Massachusetts, like many other states, has increased its use of the Title XIX waiver program. The waiver program allows a state to allocate a portion of its federal Medicaid dollars to community based services. Congress passed the Home Community Based Services Waiver (PL97-35) in 1981, and since that time, Massachusetts has increasingly utilized the waiver program. This has meant that many of the services that were previously only available on a sliding scale fee basis are provided without assessing a person's ability to pay if s/he is eligible for Medicaid. If for some reason, an individual is not eligible for Medicaid s/he may be able to obtain some, but not all, of the services provided by Medicaid for a fee determined by her/his ability to pay. The Title XIX waiver program has made it more critical than ever that a person with disabilities retain their eligibility for Medicaid.

The Affordable Care Act (ACA) is one of the most important pieces of legislation affecting future special needs planning for persons with disabilities. This new legislation protects the rights of persons with long term physical, cognitive and mental impairments.

The ACA has a number of provisions that assist families and individuals to access affordable health care without pauperizing themselves. Two of the most important aspects of this legislation is the removal of "caps" from employer sponsored

health plans and the removal of pre-existing condition clause in private health care plans. Prior to the ACA's full implementation on January 1, 2014, even if a person with a disability was able to afford health insurance, the existence of a pre existing medical, cognitive or mental health condition was enough to be denied coverage.

Under the ACA, the financial barrier to accessing private health insurance have been removed. For persons with limited means, a new sliding scale fee Medicaid program has been put in place. Individuals with incomes up to 133% of the Federal Poverty Level (F.P.L.) (\$15,586 in 2013) will qualify for this new, expanded Medicaid program. Individuals with income as high as 400 % of the F.P.L.(\$45,960 in 2013) will qualify for subsidized health insurance premiums on a sliding scale fee basis.

If a person is only concerned about general health care and does not need custodial care or in home supports and services offered through Medicaid Waiver Programs, the ACA provides a meaningful solution to accessing quality medical care. Unfortunately the ACA is not able to provide long term supports for persons so while the ACA is one more tool for the Special Needs Planner to discuss with families, it is not a replacement for Special Needs Planning.

ENTITLEMENT BENEFITS

All children between the ages of 3 -22 are eligible for free special education services. Schools are required to screen all students for potential special needs. In addition, parents, teachers, and concerned others may refer a child for screening if one suspects that a child has a special need. If a child is identified as having a special need, the school is required to evaluate him or her on an annual basis. At this annual review, the school is also required to develop an Individual Education Plan, which maps out the type and amount of special education services the child will receive during the school year.

There are no special estate planning issues involved if the only benefit the family member requires is special education services. If no other government benefits are required beyond high school then families may not need to be concerned with special estate planning techniques other than those utilized for non-disabled children. However, the mere mention that a child is in special education should trigger the discussion of a special needs trust and whether or not the family should utilize a discretionary, supplemental needs, spendthrift trust as an interim plan. If the child graduates from high school and moves on to being independent and self-supporting, the parent can always change his/her estate plan to provide a direct inheritance at a later time if a direct inheritance is appropriate. A family with a child in special education should discuss the possible use of a discretionary supplemental needs spendthrift trust if there

is a possibility that a child may need any of the above-referenced governmental benefits. A trust should also be considered if there is a question regarding the ability of the special needs child to handle a large sum of money even if the child does not qualify for governmental benefits.

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