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What Every Estate Planner Needs to Know About Pooled Special Needs Trusts

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NOTE

Content throughout this paper is based on federal law and where applicable notes that some state law may differ.

Some terminology may not conform to the laws, regulations, and practices of Texas.

Public Benefits for Financially Eligible Aged, Blind and Disabled. In addition to a plethora of other government benefits, the United States and its agencies, along with the agencies of the states and territories, offer medical assistance and income assistance to the Aged, Blind and Disabled, who also meet income and resource tests for financial eligibility. These materials discuss the Medically Needy and Categorically Eligible. Planning for these two categories is often referred to as Elder Law and Special Needs Planning, respectively.

I. Elder Law: *The Aged who are Medically Needy Requiring Medicaid Long Term Care.*

Aged. The public benefits that are most often associated with Elder Law are for those who are 65 and older or “Aged” (i.e. the elderly) and the benefit most often sought is Institutional Long-Term Care Medicaid (Nursing Home Medicaid).

Income and Resource Limits. The elderly frequently receive Old Age Retirement Income, pensions, Veteran’s Affairs benefits, distributions from qualified plans, and payments from annuities. Many have substantial assets, dependent spouses and complicated estate plans. As a result, these individuals rarely qualify as “Categorically Eligible” for Medicaid because

they do not meet the income or resource criteria for that program. Moreover, the means-tested income benefit (Supplemental Security Income) is not utilized by the elderly population as frequently as it is by disabled individuals.

Medically Needy. Those who do not meet the income criteria for categorical eligibility may still qualify for medical assistance if they are “Medically Needy.” The elderly requiring institutional care (along with other categories) may be determined to be Medically Needy if, by deducting medical expenses and health care costs from income, the income is below the eligibility threshold. *See 42 C.F.R. §435.831.* The income limit for the Medically Needy is generally higher (may be 300% of Federal Poverty Limit) than that of the Categorically Eligible (as low as the Federal Benefit Rate – currently \$794 for individuals). This is determined by the states. The complexity of the income limits for Medically Needy and Medicaid Long Term Care, especially for those who are married, is beyond the scope of these materials. However, for those needing institutional care, the Medicaid spend-down program (also called Medicaid Excess Income Program or Medically Needy program) is the most traveled pathway to Medicaid Long Term Care eligibility. Planning opportunities exist to maximize the Minimum Monthly Maintenance Allowance for the Community Spouse, but generally some income is paid to the institution providing the long-term care as a patient pay amount.

The resource limit must still be met for the Medically Needy which is wherein most of the planning opportunities exist for Elder Law Attorneys, especially with regard to Spousal Impoverishment.

II. Special Needs Planning: *The Aged, Blind and Disabled who are Categorically Eligible for Medicaid and Supplemental Security Income.*

Aged, Blind and Disabled. Categorical Eligibility for Medicaid is utilized by those who are Aged, Blind and Disabled.

Disability. The public benefits that are most often associated with special needs planning are all predicated on disability as defined in 42 U.S.C. § 1382c(a)(3). *See also 20 C.F.R. § 416.* Disability is defined in Subparagraph (A) as “...unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental

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