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What the Estate Planner Needs to Know About Trusts as Beneficiaries

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Introduction. The first time you sit down with clients who are about to embark on the challenging process of estate planning that includes beneficiaries with disabilities, you may already have some basic construct in mind for the clients' situation. These constructs come to mind after we have read the intake materials, where we assess the age of the client(s), their stage of life, their natural heirs, the nature of their property, and for special needs planners, the existence and nature of disabilities of the clients and/or proposed beneficiaries. You may have reached a few conclusions about what may work for these as yet unknown individuals. As incoming clients, they are relying upon, and paying for, your knowledge and experience to guide them. (If you are a newer practitioner reading this, remember that although you don't have as many client experiences under your belt, your knowledge base already has a solid foundation, you did go to law school and pass a bar exam. You know to reach out to colleagues if you come across a situation which you feel is beyond your ken.¹) If drafting could be done with cookie cutters based on written responses, our profession would be facing a bigger challenge from AI. Because what changes everything is sitting with these clients and listening to what makes this individual or family unique. How do we apply our existing knowledge to these new circumstances and create a plan which will work for them? The premise of this paper is that creating a plan that will work now is the easy part. As our field has matured, we have matured, and now recognize that we are drafting nuanced, strictly construed trusts in what is often a fluid set of circumstances. How long will our documents serve the client well? Have we drafted in a way that allows for future changes which are almost certain to occur?

I often advise clients to approach their planning as though this is something that might be implemented within the next 3-5 years, or 5-10 years. It's typically a longer time frame with younger clients, and a shorter time frame with older ones. It's too difficult to "imagine" the future beyond a certain point, especially when health issues are involved. And there comes a point when our adult disabled client becomes our *elderly* adult disabled client – benefits change, points of service change; as the years pass, family members are born, family members die, and our society remains mobile.

So where am I going with all of this? A particular issue confronting planners for individuals with special needs is that the planning often begins when the beneficiary is very young or the injury which brought about the disability is very fresh. Access to public benefits could be

¹ Rule 1.01(a), Tex. Disciplinary R. Prof. Conduct (2021)

vital to this individual now, and special needs provisions are required to protect those benefits. What we can't always know is what the future holds: a myriad of circumstances may affect our beneficiaries over time. Here are some examples:

- Creation of a new government system which covers most costs of disability supports and services (my favorite);
- Unexpected recovery or significant improvement from a devastating injury;
- Development of more effective treatments which lead to loss of disability status;
- Increase in assets, via occurrences such as career advancement, market growth, inheritances, or gifts, which make it more attractive to pay privately for services;
- Difficulty with government agencies which persist to the degree that the beneficiary or legal representative wish to discontinue benefits and take another path;
- Change in available supports and services such that the benefits offered no longer have meaningful impact on the beneficiary's life;
- Divorce of beneficiary's parents who were previously named as Trustees, leading to infighting;
- Death of available and appropriate family member trustees who have previously served the beneficiary well, and no remaining alternatives (especially when the corpus is small);
- Change in beneficiary's needs due to aging;
- Fluctuation of beneficiary's disability status, either physical or mental; or
- Capacitated beneficiary wishes to become more independent even if the result is a loss of benefits.

We are engaged to draft documents which meet the current eligibility requirements of crucial benefit programs. We may later amend those documents if we have retained the authority to do so, but in reality, we may be long gone (literally or figuratively) when changes resulting from circumstances such as those outlined above might occur. Once our role as planner which allows our clients to access benefits has been accomplished, will a subsequent lawyer be able to take our documents and "get out of" or wiggle around the terms of the trust if necessary? If the needs which dictated the creation of the trust have since dissipated? Have we inadvertently locked generations of families into a plan which is no longer workable?

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