



## Recharged and Ready to Go

*By Diane B. Weinberg*

As I type, I am sitting in the New Orleans airport waiting for my flight home. I have just attended the 11th Annual Conference of the Academy of Special Needs Planners, and my brain is spinning with new information and new ideas as to how I can apply those ideas to my clients. I feel charged with energy, enthusiasm and renewed purpose and vision.

Special needs planning law is unlike other legal fields. Our clients are vulnerable and often lack the ability to communicate, much less the ability to prepare for their futures. When our clients can communicate, they may lack the capacity to make informed decisions or to understand the nuances of the world around them. If they have the capacity to make decisions, then they have physical disabilities that limit their ability to perform the most basic tasks. At some point, they will rely on their family, friends, or even complete strangers to assist them with the most intimate activities. As a special needs planning attorney, I am tasked with coming up with a plan for this individual's long term care and, oftentimes, survival.

In addition to the challenges and responsibilities of representing clients with disabilities, special needs planning law is also unique because it is a field of shifting sand. There is the perception that most people receiving public benefits are abusing the system. And if the individuals with disabilities are not abusing the system, they are being bamboozled by attorneys and other organizations who charge fees to help the individuals with disabilities to access the public benefits they are already entitled to receive. To curb this perceived widespread abuse (and while there is abuse, it probably is not as widespread as imagined), Congress and the regulatory branches are constantly changing the laws in this area to more narrowly define who is entitled to public benefits. I find that the conferences sponsored by the ASNP and similar organizations are one of a few ways I can stay on top of the constant movement in the special needs planning field.

My three big takeaways from this year's ASNP conference reflect the shifting-sand nature of this field.

**1. Anticipated Changes to Social Security Rules Concerning Special Needs Trusts.** Currently, Social Security is revising its guidance on its statutes and regulations with respect to special needs trusts. The revisions are due any day now, and could significantly change how trusts are drafted and administered. These guidance provisions are rules promulgated by Social Security to be used by Social Security employees to interpret federal law and regulations. These provisions are not regulations and, thus, can be implemented without opportunity for public review or comment; they simply appear and become part of the law. Since they are not subject to review before publication, we really don't know what aspects of the current special needs trust law may be changed by these new rules. TAKEAWAY: We will post an alert if and when these changes are published. Once the



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changes are made, SSA and/or Medicaid should allow the trust up to 90 days to implement the changes. In the meantime, anyone with a special needs trust that I've drafted (or that someone else may have drafted for you) should locate the trust document and review the trust to determine what the procedure is to modify the trust in the event the modifications are needed.

**2. The ABLE Act Provides an Unexpected Housing Benefit to SSI Recipients.** When I first reviewed the ABLE Act and its regulations, I was underwhelmed by the legislation. ABLE Accounts seemed to be a good vehicle for holding small amounts of money that would disqualify an individual for public benefits. They also seemed to provide a competent beneficiary with a physical disability the ability to accumulate money and have access to that money without having the hassle of creating a trust and going through a trustee to get approval for expenses. These accounts had a purpose, but only a limited one. I did an extensive analysis when the ABLE Act first became law, and the links to the videos are [here](#).

The ABLE Act account has one other significant benefit that I overlooked - funds distributed from the account to pay for shelter expenses for a SSI beneficiary do not count as In-kind Support and Maintenance (ISM). An individual who receives monthly SSI (Supplemental Security Income) is supposed to use that income for housing and food. If someone else pays for housing or food, whether it be a family member or a trust, the amount of that individual's SSI benefit can be reduced up to one-third. Thus an adult who receives the maximum of \$735 in SSI per month risks having his benefit reduced to \$490 per month simply by living at home without paying rent. This reduction is called ISM. However, if rent is paid from an ABLE Act account, there is no ISM, and the individual receives the full \$735 benefit. TAKEAWAY: Special needs trusts have the ability to fund ABLE Act accounts for eligible individuals and give the individual flexibility to pay for their rent from ABLE Act accounts. Social Security or the IRS may close this gap at some point, but we should take advantage of this benefit while it's here.

**3. The Benefits of a One-Page Special Needs Trust.** Trusts are simple vehicles by which one party, A, holds some sort of asset or income given to the trust by B for the benefit of C. Sometimes A, B & C are different people or entities, and sometimes they are the same.

While the concept of a trust is simple, the trust documents themselves have grown in size and complexity over the years. First, as attorneys read other trusts or attend seminars, we find language that we like and incorporate that language into our trusts. In addition, new law is created by statutes, regulations, administrative tribunals and the courts, and we include language in our trusts to address those new laws as well.

Where the trust addresses a complex term, we may add language to the trust to provide guidance to the trustee as to that issue. For example, in special needs trusts, trustees are supposed to spend money for the "sole benefit" of the beneficiary. But what does "sole benefit" mean? To answer that



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question, we can add a page or two of examples so that the Trustee doesn't have to call us for guidance with respect to each expenditure.

After we've added the cleaner language, provisions for new laws, and guidance to the trustees, we then present our clients with lengthy 40+ page trusts to digest and administer. The reality is that these trusts only make sense to other trust-drafting attorneys. Special needs trusts are so specialized that they only make sense to other public benefits attorneys who draft special needs trusts. (In fact, Loraine has informed me on more than one occasion that the Medicaid and VA Planning trusts that I draft are backwards and weird from an estate planning perspective.)

The current debate among elder law attorneys is whether our clients actually benefit from a shorter special needs trust. David Lillesand, a well-respected Florida Social Security attorney, presented the conference with a bare-bones one-page special needs trust. The font is very small, and it does not include certain language that Georgia Medicaid requires, but it is a valid special needs trust that would comply with the standards of many states.

As the debate currently stands, attorneys have three drafting options. First, we can continue to draft complex detailed trusts with examples that are long but comprehensive. It is one document for the client to manage. A second option involves drafting a more bare-bones trust and providing our clients with supplementary materials. I envision this trust as mirroring the regulations closely and including the interpretative materials in a supplemental document. The supplemental materials could change without requiring any modification of the trust itself. Finally, is there an advantage to offering a trust that is very inexpensive to draft knowing that an experienced trust administrator or attorney will have to be involved to make sure that the trust is properly administered? TAKEAWAY: While the drafting debate continues, I am leaning toward the second option simply because I think it may best accommodate the rapid changes that occur in this field. I don't think I'm going to draft anything that is one-page, but I may be able to find some wiggle-room between creating a one-page and a 40-page document. My clients won't see any fewer pages of material, however, since a smaller trust document means that they will receive a larger amount of supplementary material. My goal would be for the supplementary material to be "user-friendly" and not nearly as intimidating as the trust document.

I want to share one last thought from the ASNP conference. In my previous life in which I was a litigator for large corporations, I spent a lot of my time with attorneys who were burning out. They spent their lives arguing with other attorneys about whether documents were responsive to requests or whether the opposing side's legal theories pushed the boundary a little too hard. Litigation also is a "jealous mistress" that steals free time from your family, your friends, and your hobbies; it has a way of taking over your life. The constant fighting with the inability to take a break and enjoy life really takes an emotional toll on some very talented attorneys.



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By contrast, special needs planning attorneys universally love going to work every day. We love our clients and that we have the ability to help improve their quality of life. We love that our clients give us hugs. We spend hours talking about not only the legal side of the work, but also about our clients themselves. We discuss topics from how to modify our offices to make our clients comfortable to the types of benefits are available to our client outside of Medicaid and the VA. Even the long-time litigators feel charged by the litigation because they have the ability to make someone's life better with a good outcome. We are part-attorneys, part-social workers, part-eternal optimists, and sometimes part-knights in shining armor charging a windmill.

Now I'm off to charge my next windmill.