Special Needs Planning Workshop

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The Law of Estates and Trusts
Planning · Administration · Litigation

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ARTICLES/PUBLICATIONS BY FRANKE, SESSIONS & BECKETT LLC

Lawyers of the firm have published articles on tax and other topics related to their professional interests, including: "*Medicaid Planning for Maryland Family Lawyers*," MARYLAND BAR JOURNAL, Vol. 49, No. 2 March/April 2016 (Co-Author with Phyllis J. Erlich); "*Self-Settled Asset Protection Trusts for Married Couples in Maryland*," Steve Leimberg's Asset Protection Planning Newsletter (April 2015); "*The Terms of the Trust: Extrinsic Evidence of Settlor Intent"* ACTEC JOURNAL, Spring 2014 (Co-author with Anna Katherine Moody); *"Benevolent Benefactors Be Aware: Changes in Medicaid Policy Result in Fairer Treatment of Gifts,"* MARYLAND BAR JOURNAL, Vol. 47, No. 3, May/June 2014 (Co-author with Laurie S. Frank); *"Is this the Death of Ahlborn? The Self-Defeating Expansion of States, Authority to Seek Reimbursement Under the Medicaid Secondary Payer Act,"* NAELA NEWS, February/March 2014 (Co-author with Jason A. Frank). *Resisting the Contractarian Insurgency: The Uniform Trust Code, Fiduciary Duty, and Good Faith in Contract,"* ACTEC JOURNAL, Winter 2010; *"Asset Protection and Tenancy by the Entirety,"* ACTEC JOURNAL, Spring 2009; *"Perfect Ambiguity: The Role of the Attorney in Maryland Guardianships,"* MARYLAND JOURNAL OF CONTEMPORARY LEGAL ISSUES, 1996.

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Lawyers of the firm participated as a lecturers in various continuing education programs for lawyers, including: *"Transmittal of Issues from Orphans' Court to Circuit Court"* (Judicial College of Maryland 2016); *"ABA Section of Real Property, Trust & Estate Law Domestic Asset Protection Trust Planning: Jurisdiction Selection Series"* (eCLE, ABA 2015); *"Document Drafting for the Elder Law Practitioner"* (MSBA 2015); *"Orphans' Court Judges' Orientation,"* (Judicial Institute of Maryland 2015); *"Maryland Trust Act,"* (MSBA 2014); *"Heirs, Legatees and Related Issues,"* (Judicial Institute of Maryland 2013); *"Estate/Tax Implications of DOMA after the Windsor Case"* (MSBA 2013); *"Asset Protection, An Overview for Maryland Estate and Trust Lawyers,"* (MSBA 2013)*; A Beneficiary's Right to Information,"* (MSBA 2012); *"Trust Litigation: The Enforcement of Beneficiary Rights,"* (MSBA 2011); *"Asset Protection: An Overview for Maryland Estate and Trust Lawyers,"* (MSBA 2010); *"Back to the Future, Schoukroun and the Spousal Election,"* Hot Topics in Elder Law, (MICPEL 2009); *"A Match Made In Heaven – Using Tenancy by the Entirety for Creditor Protection Without Sacrificing Estate Planning,"* (MSBA 2009); *"Asset Protection – A Guide for Maryland Estate and Trust Lawyers,"* (MICPEL Advance Estate Planning Institute 2006); *"Revocable Inter Vivos Trusts,"* (MICPEL 2004 and 2006); *"Valuation Discounting,"* (MICPEL 2003; MSBA 2002 and 2003); *"Business Valuation,"* (MICPEL 1998); *"Family Partnerships,"* (MICPEL 1996); *"Avoiding Probate - Will Substitutes,"* 1996; *"Basic Estate Planning,"* (MICPEL 1993).

SPECIAL NEEDS ESTATE PLANNING FOR FEDERAL EMPLOYEES

Families with special needs individuals should take special precautions to ensure that in the event of death or disability of the parents or custodians of the individual, proper financial and care arrangements are in place to ensure the individual continues receiving necessary care and supports. There are several aspects to this: First, depending on the nature of the individual's disability, he or she may not have the legal capacity, even upon reaching the age of 18, to manage his or her own finances. Second, many special needs individuals receive means-tested public supports, such as Medical Assistance (Medicaid), Developmental Disabilities Administration (DDA) benefits, Supplemental Security Income (SSI), Supplemental Nutrition Assistance Program (SNAP) vouchers, and/or low-income housing subsidies administered by the FHA. To qualify for these benefits, an individual has to meet income and/or resource standards. The receipt or accumulation of excess financial resources can cause the special needs individual to lose access to valuable services, so special precautions must be taken to ensure that assets are properly structured.

Estate planning for a special needs individual is an exercise in setting goals and objectives, then implementing a plan to meet those goals and objectives. To do it correctly, a plan must be fashioned to each individual situation rather than force the situation into a predetermined "solution." Nevertheless, there are common parameters to all planning. This outline is intended to give you an introduction to some of these parameters.[*]

A. Asset Management Considerations

An individual with a disability that does not affect his or her mental function may be fully capable of managing his or her own assets. The law presumes every person to be competent to manage his or her own affairs. Moreover, children under the age of 18 lack the capacity to enter into contracts. Broadly speaking, the parents of a child under the age of 18 are considered to be the child's "natural guardians" with support obligations and supervisory authority. However, if the parents become disabled or die before the child reaches age 18, or when the child reaches age 18, alternative arrangements must be made.

i. Guardianship

A court may appoint a guardian of the person or property for a minor or for a person with a disability. In Maryland, this authority lies with the Circuit Courts (the courts of general jurisdiction) and, for minors, the Orphans' Courts (the probate courts). The appointment of a

[*] This presentation is not intended serve as legal advice. Every situation is different and this presentation is intended to provide a general overview of applicable Maryland and federal laws relating to certain special needs and estate planning issues, not advice or guidance as to any specific situation. Additionally, Franke, Sessions & Beckett LLC is a Maryland law firm and the attorneys do not practice in other jurisdictions, such as Virginia or D.C. Laws in those jurisdictions may differ substantially from the law of Maryland.

guardian is (usually, with one notable exception) a court proceeding in which the person asserting the need for the appointment of a guardian (the "Petitioner") bears the burden of proving the need for a guardian. A court-appointed guardian of the person has the authority to make decisions about the ward's living and care arrangements, and may (if authorized by the Court) make a decision about the application of life-sustaining treatment. A court-appointed guardian of the property has the authority to manage and make decisions regarding the ward's property.

For guardianship of the property of a minor, the Petitioner must prove that the minor owns or is entitled to property that requires management or protection, or that funds are needed for the minor's support, care, welfare, and education and that protection is necessary or desirable to obtain or provide funds. In Maryland, if there are no surviving parents of the minor, the guardian nominated in the Last Will & Testament of the minor's parent is deemed to be the guardian of the person of the minor, and no Court approval is required (this is the exception mentioned above). If there is no testamentary appointment, then the Court may appoint a guardian, but if the minor is 14 years of age or older, he or she may nominate the guardian.

For guardianship of the property of a "disabled person" (the term used by the Maryland Code), the Petitioner must prove that the person is unable to manage his property and affairs effectively because of physical or mental disability, disease, habitual drunkenness, addiction to drugs, imprisonment, compulsory hospitalization, detention by foreign power, or disappearance. The Petitioner must further prove that the person has or may be entitled to property or benefits which require proper management.

The standard for appointment of a guardian of the person of a disabled adult is slightly different. The Petitioner must prove that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person, including provisions for health care, food, clothing, and shelter. The Petitioner further most prove that no less restrictive alternatives are available. Proof must be made by the heightened clear and convincing evidentiary standard.

Guardianship of a disabled adult requires the Court to appoint an attorney to represent the interests of the allegedly disabled person in the court proceeding. Once a guardian is appointed, he or she must file annual accountings (for a guardianship of the property) and reports (for guardianship of the person) with the Court. The Court takes an ongoing, supervisory role. Under longstanding law dating back to feudal England, the Court IS the guardian, with the court-appointed guardian serving as the agent of the Court in overseeing the estate and person of the ward.

Generally speaking, establishment of a guardianship does not help a special needs individual qualify for means-tested benefits. Most public benefits programs would deem any assets held by the guardian for the ward to "belong" to the ward.

ii. <u>Trusts</u>

A trust is an arrangement where legal ownership vests in a trustee and equitable ownership vests in a beneficiary. Trusts are legal entities—fictitious "persons" created and recognized as entities separate from the trust beneficiaries (similar to corporations which are fictitious "persons" separate from its shareholders). Trusts may be created for many purposes, including use for estate planning.

Generally, trusts are catalogued as inter vivos (created while living) and testamentary (created by a will). Inter vivos trusts may be revocable or irrevocable. Testamentary trusts only come into being at death so they are usually irrevocable at death but, like all wills, changeable by a competent person until death.

One type of inter vivos trusts is the "living" trust. It is a funded revocable trust. Generally, the creator (the "grantor") of the trust is the initial trustee and beneficiary. The trust provides for a successor trustee if the grantor/trustee becomes incompetent and upon the grantor/trustee's death. Because most living trusts provide for a successor beneficiary at the grantor's death, the living trust avoids probate. The testamentary trust is created by the language of the will and becomes effective after the death of the decedent.

For many years, trusts were viewed primarily as a “tax dodge” tool in estate planning. Trusts can be used to leverage the federal estate and gift tax credits and the state estate tax exemption amount to minimize or avoid taxation as wealth passes from person to person and generation to generation. This remains an important use of trusts.

However, inter vivos and/or testamentary trusts can be used to provide for beneficiaries with special needs. Many special needs beneficiaries are dependent on means-tested government benefits programs such as SSI and Medicaid. Leaving an inheritance to such a beneficiary outright will often both cause that beneficiary to be ineligible for his or her benefits and subject the inheritance to the beneficiary’s high costs of care. The inheritance should instead be left in a discretionary “special needs” or “supplemental needs” trust that would not offset or render the beneficiary eligible for public benefits.

Additionally, in certain instances, a beneficiary may transfer his or her own assets into a “first-party” special needs trust (the so-called “(d)(4)(A)” individual trust or “(d)(4)(C)” pooled trust, named after the provision of the Social Security Act providing for them) while still remaining eligible for public benefits. However, these first-party trusts are required to pay any funds remaining in the trust at the beneficiary’s death to reimburse the state for its care expenditures.

Trusts have a wide variety of uses. For example, another major use of trusts is to protect minors and/or young adults from taking outright ownership of their inheritances. They are extremely useful tools to accomplish both financial and non-financial objectives. The different types of special needs trusts are discussed in greater detail below.

iii. <u>Powers of Attorney</u>

A power of attorney is a document that creates an "agency" relationship. The person executing the power of attorney—i.e, the "principal"—designates someone else, an "agent," to act on his or her behalf with respect to financial matters. The power of attorney must specifically state the powers and authority of the agent. If the document is silent on a particular type of power, then the agent does not have that power. A power of attorney can be "durable," meaning that the authority of the agent exists even when the principal is incapacitated. However, when the principal dies, the agent no longer has authority to act. In 2010, the Maryland General Assembly passed a law that standardized powers of attorney by creating a statutory form document. The principal must possess the legal capacity to understand and execute the power of attorney for it to be valid. Unlike a guardianship or a trust, the power of attorney does not affect the titling of the principal's assets, and like a guardianship, any assets controlled by the agent will generally be considered "available" for public benefits purposes.

iv. Uniform Transfers to Minors Act

When a minor becomes entitled to property and no alternative arrangement for managing the property (e.g., a guardianship or trust) exists, many states (including Maryland) have created a statutory safeguard to authorize a third-party, called a custodian, to hold assets for the benefit of the minor until he or she reaches the age of 21 (or in certain cases, 18). While holding the property, the custodian may exercise all rights of control and management that he or she would have if he or she owned the property outright, except that the property must be managed for the benefit of the minor. The custodian may make distributions from the property to or for the benefit of the minor without obtaining court order. Property held in a custodial account is not generally considered a resource of the minor's under the SSI rules, but once the minor reaches the age of majority funds in the account would be deemed a resource belonging to the minor. Under Maryland law, many use the property to fund a special needs trust or ABLE account.

v. Representative Payee

In the rare circumstance in which the sole asset or income available to a special needs individual is benefits paid by the Social Security Administration (SSA), a Representative Payee appointed by the SSA may be sufficient to protect and manage the individual's benefits. A Representative Payee is akin to a guardian of the property for a very limited purpose—managing and expending Social Security benefits for a beneficiary who is incapable of managing his or her own finances. The SSA conducts its own evaluation of the need for a Representative Payee and selects the Representative Payee. The SSA does not recognize state law arrangements such as powers of attorney or guardianships. However, if a state law guardian is appointed, he or she may have priority over other individuals in being named Representative Payee.

B. Public Benefits Eligibility Considerations

Maintaining eligibility for means-tested public benefits or supports is a major concern with any special needs individual. There is a plethora of benefits programs for which an individual with a disability may be eligible. Each has its own eligibility criteria. Many are means-tested, meaning that the individual must fall within certain specified income and resource limits to qualify. Two of the major programs are the SSI program administered by the SSA and the Medicaid program, which is a joint federal-state entitlements program that provides health insurance and other supports services to the aged, blind, and disabled population.

It would be impossible to succinctly summarize how the financial eligibility rules for every major public benefits program operate in the estate and special needs planning context. Consequently, the rules discussed in this section will be those set forth in the Program Operations Manual System (POMS) for the SSI program. The POMS establish a fairly comprehensive and restrictive policy with respect to income and resources, and the POMS rules also provide many of the financial eligibility criteria for the Medicaid program.

i. Basic Income and Resource Eligibility

SSI and Medicaid impose an asset or resource test. For the SSI program, an adult individual's "countable resources" may not exceed $2,000.00 in any given month. Generally speaking, a resource is anything that the individual can convert to cash to be used for his or her support or maintenance. Countable resources generally include all of the individual's assets other than those specifically carved out as "excluded." Exclusions include the individual's principal residence, one vehicle used for transportation, certain types of prepaid burial contracts, and personal and household effects. Certain types of trusts and accounts (discussed below) are either excluded or not deemed to belong to the individual for the purpose of determining SSI and Medicaid eligibility.

SSI and Medicaid also impose an income test. In 2018, SSI limits an individual's monthly income to $770/month, with the first $20 of any "unearned" income (i.e. not wages or earnings from work) disregarded. Medicaid programs do not always follow the SSI limit, and some permit the individual to "spend down" to the income limit by using his or her excess income on medical bills. (Keep in mind that this is a VERY general description; different standards apply for married individuals, and the individual needs to look at the income limit specific to the program for which he or she is applying). Any funds are considered to be "income" in the month they are received; any funds retained beyond the end of that month are deemed to be "resources."

For children under the age of 18, the income and resources of parents with whom the child is living are "deemed" to belong to the child (since the parents generally have a legal obligation to support the child). However, this deeming generally ends once the child turns 18.

Both the SSI and Medicaid programs impose penalties on individuals who transfer resources for less than fair market value to become eligible for benefits. The penalties take the form of a period of ineligibility to receive benefits. For SSI, the period of ineligibility is calculated by dividing the amount transferred for less than fair market value by the monthly benefit rate, and the maximum penalty period is 36 months. Certain transfers (such as to qualifying types of special needs trusts) are not penalized, however.

ii. First-Party Special Needs Trusts

There are a number of ways for an individual with excess resources or income to bring him or herself back within program limits without incurring a penalty. The funds can be spent on the individual or used to purchase excluded resources such as personal effects and clothing. However, the individual or his or her family or guardians may wish to preserve income or resources to pay for things like private caregivers, travel or other enrichment experiences, or other items not covered by public benefits programs. In that case, it may be appropriate to establish a first-party special needs trust.

First-party special needs trusts, sometimes referred to as (d)(4) trusts, for the section of the Social Security Act authorizing their use, are special types of trusts that may be established with the resources or income of a disabled individual. Once established, resources or income used to fund the trust are not considered to be countable, and the transfer of resources or income to the trusts is not penalized (this is the general rule, but there are restrictions). These types of trusts are often called “self-settled” special needs trusts.

An individual first-party special needs trust, or a (d)(4)(A) trust (again, named after the statutory provision authorizing its creation) can be established and funded for a disabled individual under the age of 65. The disabled individual must meet the Social Security definition of disability. The disabled individual must be the sole beneficiary of the trust, and the trust must be administered for the sole benefit of the beneficiary (i.e., there can be no other trust beneficiaries). The trust must be irrevocable, and must be established by the individual, the individual’s parents, grandparents, guardian, or a court. The individual trust document must be approved by the state of Maryland, and annual accountings must be submitted to the Department of Health and Mental Hygiene.

A pooled first-party special needs trust, or a (d)(4)(C) trust, is similar to a (d)(4)(A) trust with a couple major distinguishing features. Instead of having a stand-alone individual trust, the individual beneficiary opens and funds an account in a larger trust that serves multiple beneficiaries. Funds are combined for investment purposes, but each beneficiary retains his or her own account. This type of trust must also be approved by the State of Maryland and must be administered by a non-profit corporation. Funds remaining in the beneficiary’s account at his or her death must either be contributed to the trust or used to pay back the state for Medicaid expenditures made on the beneficiary’s behalf. Another important distinction from (d)(4)(A) trusts is that individuals over the age of 65 may establish an account in a pooled special needs trust. SSI and some state Medicaid programs will penalize the transfer of assets into a pooled trust account for an over-65 individual.

iii. <u>ABLE Accounts</u>

In some situations, another type of account—so called ABLE accounts—serve as viable alternative to first-party special needs trusts. In 2014, Congress enacted the Stephen Beck, Jr. Achieving a Better Life Experience Act (a/k/a the “ABLE Act”) that authorized individuals receiving certain means-tested benefits to create certain types of savings accounts that are excluded for the purpose of determining SSI eligibility. To establish an ABLE account, the individual must have developed a qualifying disability before the age of 26 and must meet the Social Security definition of disability.

ABLE accounts have several unique advantages. Funds can be placed in the account by the special needs individual, within certain limits, and no transfer penalty will be incurred. Funds in the account can grow tax-free. Funds in the account can be used for the individual's health, education, housing, transportation, training, assistive technology, and personal support. "Distributions" from the account are not considered to be income, and distributions for qualified disability expenses are not considered to be countable resources (with some exceptions for housing-related expenses).

There are several significant drawbacks to ABLE accounts, however. The accounts are not available for an individual with a disability onset date after age 26. The total annual funding of the account cannot exceed the federal gift tax exclusion (currently $15,000/year). The total balance in the account cannot exceed $350,000/year. Any funds in the ABLE account in excess of $100,000 will be considered countable for SSI purposes, causing SSI payments to be suspended. Funds remaining in an ABLE account after the beneficiary dies must first be used to repay Medicaid for all services provided during the beneficiary's lifetime before the funds can be distributed to any other party.

iv. Third-Party Special Needs Trusts

Generally speaking, a trust established by someone other than the disabled person (or for non-testamentary trusts, the disabled person's spouse) established by parents, grandparents, or other family members, which are funded wholly with assets that did not belong to the disabled person (or his or her spouse) are not automatically deemed to be a resource of the disabled person. Instead, in evaluating whether the trust should be considered a resource, the agency evaluating whether it is a "resource" looks at the trust terms themselves.

In evaluating these types of trusts—often called "third-party" trusts, because they are created and funded by someone other than the disabled individual—the relevant state agency evaluates whether the disabled individual, as a beneficiary, has the ability to revoke or terminate the trust, sell his or her interest in the trust, or otherwise direct the trustee to make a distribution from the trust. If the beneficiary has the power to do any of those things, the trust would be considered a resource. However, a properly drafted special needs trust would limit distributions to the sole and absolute discretion of the Trustee with a direction that distributions generally should not be made in a way that would supplant or reduce government benefits eligibility, and would contain a spendthrift clause and other restrictions on the ability of the beneficiary to exercise any sort of influence over the trust.

A properly drafted third-party special needs trust is not considered a countable resource for the beneficiary. However, distributions from the trust directly to the beneficiary may be considered income, and distributions by the trustee to pay for the beneficiary's food and shelter needs would be considered in-kind support.

The third-party special needs trust is the primary vehicle in estate planning for special needs individuals. This is because there are fewer restrictions on the use of funds from a third-party special needs trust relative to first-party special needs trusts or ABLE accounts. Additionally, there is no requirement that a third-party special needs trust pay back Medicaid at the death of the beneficiary. However, the beneficiary's own resources cannot be placed into a third-party special needs trust without causing major public benefits eligibility problems.

C. Special Considerations for Federal Employees, Department of Defense Employees, and Ex-Military Members

In addition to the general concerns listed above, there are some specific planning issues relating directly to federal employees, and particularly ex-military Department of Defense employees, due to the unique employment benefits available to them. Many federal employees will accumulate significant savings in their Thrift Savings Plan (TSP) accounts. Furthermore, many ex-military members will have access to a Survivor Benefit Plan (SBP) pension benefit. Both of these present unique planning challenges and opportunities for special needs families

i. Thrift Savings Plan (TSP)

One of the most important assets available to federal employees is the Thrift Savings Plan (TSP) retirement account. For a long-time federal employee, this may be the most significant asset outside of a home. A major advantage of the TSP is that it defers taxation on income, permitting assets to grow tax-free within the account. (There are, in fact, two kinds of TSPs—the traditional TSP and the Roth. This handout focuses on the more common traditional TSP.)

At death, assets remaining in a traditional TSP do not pass according to the terms of your will (or a revocable trust, or other estate planning documents). They may only pass as a non-probate asset via beneficiary designation. This requires the account holder to complete form TSP-3, "Designation of Beneficiary." The beneficiary designations listed on this form are generally revocable and changeable. A participant in the TSP may name anyone as a plan beneficiary without first obtaining consent from the spouse. (However, a spouse's consent is required to opt out of the default spousal survivor annuity under FERS and CSRS.)

There are several tax considerations at play. First, it is almost always preferable to designate an individual (or trust—more on this below) as the beneficiary of your TSP. Absent such a beneficiary designation, the TSP will pass by a "default" order that goes to a surviving spouse, or if none, to the account holder's children, or if none, to surviving parents. If none of those individuals are alive, the TSP will be paid to your estate. Under IRS rules, the estate would have to withdraw the entire amount of the TSP within five years of your death. Since the traditional TSP is taxed as it is withdrawn, this usually has the effect of increasing the average rate at which the TSP is taxed (as opposed to drawing the TSP out over a longer period at lower marginal rates).

In naming an individual as a beneficiary, there are different rules depending on the identity of the individual. If a surviving spouse is the beneficiary, the TSP can be converted into a beneficiary participant account (BPA) in the spouse's own name or rolled into the spouse's own retirement account. The BPA will begin making required minimum distributions based on the date that the employee would have turned 70 ½, but are calculated based on the participant's age.

If the beneficiary is someone other than a surviving spouse, the funds cannot be retained in the TSP or converted to a BPA. Instead, the payments must be made directly to the beneficiary or to an inherited individual retirement account (IRA). The funds cannot be "rolled over" into the beneficiary's regular IRA or other retirement plan. However, transferring the funds to an inherited IRA still provides tax-preferred treatment, as the inherited funds can be drawn down (and taxed) over a "stretched" period—over the course of the beneficiary's life expectancy. A trust may be the beneficiary of a TSP. A properly drafted trust can combine the tax advantages of an inherited IRA (namely, the "stretch" treatment for taxable distributions) with the creditor protection provided by spendthrift provisions.

Like other retirement accounts, the TSP is not an ideal asset to leave to a disabled individual receiving means-tested public benefits due to the tax planning concerns. Nonetheless, since the TSP may end up holding the bulk of a federal employee's retirement savings, there may be no other option. A TSP should not be left outright to a special needs individual, because he or she will typically either lose public benefits eligibility for a period of time or will have to withdraw the entire account balance and pay a significant amount of taxes. A better option is to leave the account to a properly-drafted special needs trust, which takes into account the specific concerns present with retirement accounts. A properly drafted trust will allow the required minimum distributions to accumulate in the trust for the special needs individual without causing a loss of public benefits eligibility.

ii. Survivor Benefit Plan (SBP) Dependent Disabled Child Benefit

Military retirees may elect the SBP retirement option. This is a lifetime pension benefit (up to 55% of the military member's retirement pay) payable to the surviving spouse and/or dependent child upon the death of the retiree. A disabled child may be considered a "dependent child" eligible to receive the benefit.

One issue with the SBP survivor benefit is that federal law requires the benefit to be paid to an "individual." The receipt and accumulation of SBP income, however, can cause the disabled dependent child to lose eligibility for SSI, Medicaid, and other benefits. In 2014, the Disabled Military Child Protection Act made a critical exception to the "individual" payee requirement by permitting SBP benefits to be assigned to a (d)(4)(A) or (d)(4)(C) trust established for the benefit of the disabled dependent child. If the retiree is still alive, he or she may make an irrevocable election to have the benefit paid to the special needs trust in lieu of the child. If the retiree dies before switching the election to the special needs trust, the disabled dependent child's surviving parent, grandparent, or court-appointed legal guardian may make the irrevocable election to have the benefit paid to the trust.