Preserving the Residence and Other Real Estate: Separating Fact from Fantasy

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I. Introduction

A. Real estate issues arise in every type of special needs planning context. This is particularly true when we consider estate planning, Medicaid planning and estate administration.

B. Skilled professionals will be prepared to spot these issues that relate to the ownership, transfer and sale of real estate for a beneficiary with special needs. With thoughtful work and planning unnecessary complexity and conflict down the road can be avoided.

C. Be very careful when considering the sale or transfer of real estate (particularly a primary residence) if Medicaid is involved, or may be involved in the future.

D. Much consideration should go into whether real estate will be held individually by the individually, in a self-settled special needs trust (SNT) or a third-party SNT.

E. When considering how to address real estate issues, it is imperative to gather *specific* information about the following things:

1. Who is the beneficiary and what benefits is she eligible to receive now, and/or in the future;
2. Is the beneficiary able to engage in any conversation about the real estate to be transferred, sold or purchased;
3. What assets the beneficiary and or the special needs trust owns – this includes both liquid and illiquid assets;
4. Who owns the real estate in question (do not be afraid to confirm with a title report) and who manages the real estate;
5. How is the real estate used;
6. Are there other issues, like special family considerations or tax planning matters that relate to the real estate that add context to the questions and decisions;

F. Frequently there are presumptions about property ownership, e.g. the property was always supposed to be used in a certain way, or made available for a certain person, or group of people. Or, there may be a presumption that the property is valuable now, and will grow in value in the years to come.

G. Do not make recommendations about real estate without other professionals involved. Work with a team that may include CPAs, investment advisors, guardian/conservator, trust officer/trustee and most importantly, the beneficiary.

II. Residence

A. Current living circumstances: Transferring a primary residence to an SNT takes careful thought and planning. A beneficiary may live in a family home that her parents later decide to convey to a third-party SNT that they establish through their estate plans, with the rationale that the beneficiary will benefit from remaining in a familiar place once when her parents are no longer alive.

B. When having a discussion about the transfer or purchase of a primary residence to a Special Needs Trust (SNT), it is imperative to understand the following:

   1. Where does the beneficiary currently reside and is this placement a good fit for the beneficiary now, and in the future?
   2. What are the important considerations for the beneficiary as it relates to a primary residence? For instance, is close proximity to resources like doctors, day programs, friend/family an issue?
   3. What kind of benefits does the beneficiary currently receive (or hope to receive in the future), and how will these benefits align with the beneficiary's use of the residence?
   4. Who else is living, or will be living, with the beneficiary in the residence?
   5. Is there major work needed for the beneficiary to comfortably (and safely) remain in the residence?
   6. Who is going to be paying for the monthly expenses, e.g. utilities and annual expense like property taxes and insurance?

C. Budget and Care Plan

   1. Maintaining a home is expensive and when real estate is conveyed to a SNT, funds should be allocated solely for real estate expenses. It is unadvisable to fund a SNT with real estate unless there are ample funds to maintain the property.
      1. How do budget for this? Should the budget factor in the continuing care of the beneficiary (including accommodations to the home) as more care may be needed in the future? Are there also funds available for caregiving and other needs of the SNT beneficiary? Will the beneficiary want to remain in the home when the parents pass away? Is another child in the family going to live in the home and be the caregiver? How will the other family members feel about the caregiver child having a "free place to live"?
   2. In many cases, a family will assume that transferring the family residence where the beneficiary has lived all of her life to a SNT for the benefit of a beneficiary will save the beneficiary money. This can be a false assumption and merits specific financial analysis.
   3. Involving a case manager, in addition to the trustee and any guardian/conservator is important when developing the budget. In some cases if there is court oversight related to the SNT or the estate of the beneficiary, then the Court may also need to approve the budget.

4. Is Medicaid involved? If so, does the beneficiary or the SNT own other real estate? If owned outright, and outside of the SNT, would there be benefits to the beneficiary?
5. If some of the beneficiary's resources need to be used on real estate-related expenses, the are there also funds available for caregiving services and other needs of the beneficiary?

D. Family emotions: If there is high emotional sentiment regarding the residence, will the beneficiary want to remain in the home if family members die, or remove familiar tangible personal property in the home (in the event of an estate administration).
    1. How do the rest of the family feel about giving ownership and/or use to the SNT for the benefit of the beneficiary?
    2. If things are copacetic now about the beneficiary's use of the residence, will things stay that way if the beneficiary (or trustee) what to sell the residence in the future and use the proceeds from the sale of the residence for the benefit of the beneficiary?

E. Oversight
    1. Even in cases where there are funds available to sustain real estate expenses, who is responsible for overseeing the maintenance of the property? Not everyone is cut out to be a property manager and this job can be particularly difficult for a trustee who is simultaneously balancing other duties to the beneficiary.
    2. Remember caregivers are hired to provide care, not to mow the lawn, fix a leaking toilet or install grab bars in the bathroom.

F. Funding SNT with things other than real estate
    1. Clients may benefit from a frank conversation about whether to allocate non-real estate assets to an SNT. Before diving into a complex plan to fund an SNT with real estate, consider reviewing whether there are other assets (like a retirement account) that the beneficiary with special needs could derive special benefits from, while also avoiding some of the risks that real estate can bring, especially to a SNT.

III. Rental

A. The idea of purchasing (or gifting) an income producing property for someone who is unable to earn an income through a traditional job is understandable. There are many different types of income producing property. For example, a decision about renting out a guesthouse that is located on the property where the beneficiary resides or an Airbnb will be different that a decision that may relate to a commercial building.
    1. Sometimes people think that renting out a room in the home where the beneficiary lives is a good idea because it will provide the beneficiary with companionship and income to pay household expenses. This assumption should never be made.

B. Clients need to be educated to understand the challenges of giving income producing real estate to beneficiaries who are on SSI, Medicaid and other income-tested programs.

C. If an SNT owns rental property, in addition to the normal expenses like property taxes, then there will be ongoing costs for things like extra insurance and management.
   1. Even if a property is "income producing" that may not mean that after the expenses related to the property are paid that there will be any income remaining.

D. Rental property creates an extra layer of liability for trustees of SNTs. This is particularly true when considering commercial buildings and apartment complexes. Using LLCs and other corporate entities to hold the rental real estate is important to think about. As the layers of ownership, and reporting get more complex, the administrative costs and burdens also grow.
   1. Property management companies can add cost, but they can lend helpful expertise and reduce liability.
   2. If the SNT is one of multiple owners of rental property, then things can get more complicated when it comes to decision making.

IV. Vacation Property

A. Ownership: Many families share a beloved vacation home and there is not always planning about how ownership will be shared with future generations. This creates special questions when there may be a family member with special needs.
   1. If ownership, or a partial interest, is conveyed to a SNT, what kinds of family discussions are important to have before the interest is transferred?

B. Not all real estate (especially vacation property!) is easily accessible and sometimes, without the property support, there can be safety issues for someone with special needs.
   1. How can someone determine today if a beneficiary with special needs will enjoy the use of a family vacation home in the future? What is the system to request use of the home and whose vacation takes priority? If accommodations need to be made to a vacation home so that a beneficiary with special needs can use the property, does that impact the use of the property by other owners? Who pays for these accommodations?
   2. If the SNT beneficiary requires assistance, how is the "caregiver" family member's right to the use the property separately impacted?

C. Expenses: Many vacation properties are only used part of the year and this means that unexpected maintenance issues can creep up. Some owners may want to make improvements to vacation property, while others may disagree.
   1. If a SNT holds an interest in a vacation property and expenses are shared among owners, how might considerations differ when it comes to chipping in for expected and unexpected expenses? Would these be considered acceptable distributions from the SNT?

D. Sale: Vacation homes can hold terrific sentimental value. This is one reason why emotions can run high when someone with a partial interest wants to sell her interest in a vacation property that is used by the rest of the family.

1. Family legacy, rights of first refusal, discounts, fair market values and tax issues are all important to consider when it comes to the decision of whether to sell real estate.
2. The trustee of an SNT, especially an independent trustee, may have a challenging time finding an agreeable solution for all owners. Can good planning make future conversation easier?

E. Ownership Structure: As vacation homes are passed down to various generations, ownership can become more complex as more people have an interest in the property and ideas about how it should be managed.

1. Should the vacation home be owned by an LLC or other corporate entity and then the SNT is the member?
2. Are there any benefits if the SNT is a partial owner of a vacation property, when the SNT could just pay rent when the beneficiary wants to use the property?