

SPECIAL NEEDS TRUSTS & GOVERNMENT BENEFITS: WHAT PERSONAL INJURY LAWYERS NEED TO KNOW

BY

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A person with a significant lifelong disability who receives assets either through personal injury litigation or by inheritance will lose eligibility for programs and services which employ an economic means test. Additionally, those assets will be vulnerable to state claims for reimbursement for certain services rendered. These problems can be overcome with a special needs trust.¹ Essentially, such trusts must be created by a parent, grandparent, guardian or court,² must specify that upon the beneficiary's death, government will be repaid, at least for the medical assistance (Medicaid) provided, and must be irrevocable. 42 U.S.C.A. §1396p(d)(4)(A) and 42 U.S.C.A. § 1382b(e)(5). State regulations add the requirement of an annual report and notice of an expenditure in excess of \$5000. N.J.A.C. 10:71-4.11(g).

What follows is an overview of why a special needs trust is necessary and the conditions it must meet to qualify.

¹ A second type of special needs trust is used when the assets contributed to the trust belong to a third party, such as a parent. These trusts do not require repayment to the government for services rendered when the beneficiary dies. They are described in the attached article.

² In many cases because the beneficiary is disabled by either age or disability, judicial approval will be necessary, if not to create the trust, then to deposit assets into it.

USE OF FUNDS

As will be explained below, most of the beneficiary's basic lifetime needs can be met through the education system, Medicaid, Social Security and various government programs for persons with severe disabilities. See e.g. Ira M. Fingles, "Recent Developments in Special Education Law," New Jersey Lawyer, June 2003, at 17.

Depending upon the beneficiary's condition, the cost of meeting his or her needs privately could exhaust the funds in a few years, thereby buying what would otherwise be available without cost and leaving the beneficiary with no protection for the future. Instead, the beneficiary's funds should be used for the following purposes:

1. Protection -- It should surprise no one that persons with severe disabilities have suffered all sorts of abuses over the past century, often while clients of government agencies. See e.g. N.J.S.A. 30:6D-13; Herr, Rights and Advocacy for Retarded People, passim (1983). In my own experience the best protection that can be afforded is the involvement of family. This becomes more difficult to maintain as parents age and siblings disperse geographically. Therefore, it is in the beneficiary's interest to have funds available to reimburse family for their efforts on the beneficiary's behalf. Where family involvement is not realistic, services to monitor a person's care can be purchased from private agencies called community trusts. N.J.S.A. 3B:11-17, et seq.; see Hinkle, "Community Trusts for Persons with Severe Disabilities," 119 N.J.L.J. 581 (April 9, 1987).

Another aspect of protection involves the financial ability to obtain second

professional opinions, advocacy and the like. For instance, should the guardian someday become dissatisfied with the beneficiary's progress in his or her then current program, securing an appropriate placement might require the guardian to obtain independent evaluations or legal representation. Furthermore, if someday the beneficiary's family is unable to care for him or her at home, the beneficiary might require residential services in a supervised living arrangement. It may be necessary for the guardian to travel to inspect any programs under consideration. The guardian's activities in this regard further the beneficiary's interests, and funding should be available to underwrite the costs of reasonable efforts on his or her behalf.

2. Gaps in Services -- Funds should be available for expenses for which there is no other source to pay. Such funds could be used to pay for extra therapies, elective surgery and dental care, supplemental medical insurance, transportation, recreation and specialized training not covered by other programs. The trust could even pay for residential services if the trustees conclude that programs of suitable quality are not available from government.

The point I wish to make is that in most cases, the beneficiary has many years ahead and we do not know what the future might bring. Therefore it is in the beneficiary's interest to have funds available to meet any contingency. If the beneficiary has unrestricted access to the settlement funds, even though access might be through a guardian, it will not be possible to accomplish the foregoing objectives.

LEGAL CONSIDERATIONS

Unrestricted access to the funds will cause two serious problems. It will make the beneficiary ineligible for programs like SSI and Medicaid which employ economic means tests. It will also expose the beneficiary to claims by government for reimbursement as services are rendered in the future.

1. Claims for Reimbursement -- There is a vast array of services available for people with severe disabilities. These services as available in New Jersey are outlined, along with eligibility requirements, in Hinkle, "A Brief Guide to Services," 122 N.J.L.J. 1638 (December 29, 1988). Reimbursement can be sought from the recipient of these services in some cases. For instance, many beneficiaries are potentially eligible for services from the New Jersey Division of Developmental Disabilities ("DDD"). DDD eligibility turns on clinical need rather than economic need. N.J.S.A. 30:6D-23, et seq. However, that agency has authority to seek reimbursement from the recipient for the cost of residential services provided. N.J.S.A. 30:4-66. Residential services can easily exceed \$75,000 annually, and in some cases may exceed \$200,000 annually.³

Medicaid law also has a recoupment provision. 42 U.S.C.A. §1396p(b). A number of the programs operated by state government agencies are Medicaid funded and the national trend is for states to increase reliance upon Medicaid funding. Therefore, should the beneficiary reside in a DDD or Medicaid funded facility, his/her funds could

³ The special needs trust will serve to defer repayment during life. DDD regulations require clients to secure Medicaid eligibility so that the State of New Jersey can access federal funding. N.J.A.C. 10:46D-1.1, et seq.

quickly be exhausted unless protected.

2. Economic Means Test -- SSI is available to people with disabilities originating prior to age 22 which are so severe as to bar employment, provided income is under roughly \$600 a month and countable resources do not exceed \$2000. 20 C.F.R. §416.202. Only income and resources that are generally available to the applicant for food, clothing and shelter are countable. A person who is eligible for SSI will be eligible for Medicaid. SSI pays a monthly cash benefit; Medicaid pays for unlimited medical care including nursing home care and other forms of residential services. Depending on the type of services the beneficiary requires in the future, Medicaid may be of paramount importance. Therefore eligibility should be preserved. After the beneficiary receives the settlement funds, he or she will not be eligible for SSI and Medicaid unless restrictions are placed on the use of his/her funds.

To overcome the aforementioned problems and to provide for lifelong protection most commentators on the subject of estate planning for persons with severe disabilities recommend a special needs trust which accumulates income. Under this arrangement, accumulated income and corpus can be used only to meet needs that cannot be met through government and private programs; and expenditures are permissible only if they do not negatively effect eligibility for key programs. Thus the purpose of a special needs trust is to augment but not supplant what is otherwise available. See e.g., Correira, "Disability Trusts that Allow a Client to Qualify for Medicaid," 30 Estate Planning, 233 (2003); Johns, "Preserving Eligibility with Special Needs Trusts," Trial 90 (November

1998); Turnbull, et als. Disability and the Family, A Guide to Decisions for Adulthood, 127-55 (1989); National Association for Retarded Citizens, How to Provide for Their Future (5th ed. 1984); Frolick, "Estate Planning for Parents of Mentally Disabled Children", 40 U. Pitt. L. Rev. 305 (1979); Brunetti and Yellin, "Special Trust Supplementing a Marital Trust Can Protect Handicapped Beneficiary," 11 Estate Planning 216 (1984); Hinkle, "Guardianship and Estate Planning," 115 N.J.L.J. 753 (1985).

There is no case law in New Jersey directly concerning the viability of special needs trusts, however (when properly drafted) they have without exception withstood challenges in other jurisdictions. For instance in Lang v. Commonwealth of Pennsylvania, 528 A.2d 1335 (1987), the Pennsylvania Supreme Court ruled that the Commonwealth could not invade a special needs trust to satisfy state claims for reimbursement for services rendered under the Medicaid program. The court reasoned that only trusts made generally available for support could be invaded, and that limitations imposed on the use of trust funds must be honored as a matter of law. Accord, Lewis v. Department of Social Services, 61 S.W.3d 248 (Mo. Ct. App. 2001). In Navarro v. Sullivan, 751 F. Supp. 349 (E.D.N.Y. 1990) a trust ordered by a state court imposing such limitations has been enforced against the Social Security Administration by a federal court. Accord, Miller v. Ibarra, 746 F.Supp. 19 (D.Colo. 1990); Lanoue v. Commissioner, Social Security Administration, 146 N.H. 504, 774, A.2d 1236 (2001).

Most importantly, changes in the federal Medicaid law that went into effect in

1993 as part of the Omnibus Budget Reconciliation Act of 1993 ("OBRA 1993") specifically authorize special needs trusts as a means to preserve Medicaid eligibility, provided that the funds remaining in trust are available to reimburse Medicaid at the death of the Medicaid recipient.⁴ 42 U.S.C.A. §1396p(d)(4)(A)⁵ In December 1999, Congress extended this law to specifically permit the use of such trusts to preserve eligibility for SSI. 42 U.S.C.A. §1382b(e)(5). The Health Case Finance Administration ("HCFA"), now known as the Centers for Medicare & Medicaid Services ("CMS") is the agency which implements Medicaid, and has guidelines concerning such trusts. See HCFA Transmittal 64. Likewise, the Social Security Administration maintains similar guidelines as part of the Program Operations Manual System ("POMS"). See POMS SI 01120.203. On June 18, 2001, DMAHS adopted regulations which include guidelines for such trusts.

⁴ There is a quirk under New Jersey law, N.J.S.A. 30:4D-6(f), which indicates that a trust established for the purpose of defeating Medicaid is void. In my opinion this statute has been preempted by the aforementioned 1993 change in the federal Medicaid law. Even before 1993, the statute had limited application. In my view it was limited to self-settled arrangements probably using funds which have been concealed from Medicaid. My interpretation is consistent with New Jersey Medicaid regulations generally recognizing the validity of trust arrangements. N.J.A.C. 10:71-4.4(b)6. More significantly, a broader interpretation of the law to embrace all self-settled trusts would contradict the federal law which the New Jersey law was enacted to implement. Federal Medicaid law directs states to disregard trust assets, except in the case of a self-settled or Medicaid qualifying trust. In such cases states may consider only the funds which can be made available to the settlor. Further, the states are given authority to waive the so called "Medicaid qualifying trust rules" in the case of hardship. 42 U.S.C.A. §1396p(d)(5). In this case the trust would not be self-settled, since if the Court accepts my recommendation, the trust will be established to conform with Court imposed limitations. On the issue of self-settled trusts, see, In re Lennon, 294 N.J. Super 303, (Ch. Div. 1996). In any event, this issue has been rendered moot by the August 2000 legislation discussed, infra, which specifically authorizes the judiciary to create special needs trusts. N.J.S.A. 3B:11-37.

N.J.A.C. 10:71-4.11(g).

Moreover, it is well established that federal and state public policy favors actions on behalf of an incapacitated person which would permit Medicaid eligibility. In re Keri, 181 N.J. 50 (2004); In re Labis, 314 N.J. Super. 140 (App. Div. 1998); see also, Waldman v. Candia, 317 N.J. Super. 464 (App. Div. 1999) (implicitly approving the creation of a special needs trust once Medicaid liens have been satisfied); In the Matter of Kietur, 332 N.J. Super. 18 (App. Div. 2000); Lewis v. Catastrophic Illness in Children Relief Fund Commission of the State of New Jersey, 336 N.J. Super. 361 (App. Div. 2001); but cf. In re Keri, 356 N.J. Super. 170 (App. Div. 2002), certif. granted, 175 N.J. 549 (2003) (holding as improper the transfer of assets from an incapacitated parent to an adult child, where there is no evidence of intent or showing that the incapacitated person's best interests are served).

In response to the aforementioned federal legislation and the Labis and Candia decisions, the New Jersey Legislature, in August 2000, specifically authorized the courts of this state to approve the creation of special needs trusts. N.J.S.A. 3B:11-37. This grant of authority is a logical extension of the general statutory and common law authority already vested in the judiciary. For instance, a court has "full authority" over the ward's estate and all related matters in cases where a guardian of a mentally incompetent person has been appointed. N.J.S.A. 3B:12-36. These include all powers which the mentally incompetent person could exercise if competent, with the exception of making a will. N.J.S.A. 3B:12-49. Indeed, the statute specifically includes the power "to create

revocable or irrevocable trusts of property of the estate which may extend beyond [the] disability or [the] life [of the mentally incompetent person]." Id. After notice and a hearing, the court may exercise additional powers over the ward's estate, if found to be in the ward's best interest. N.J.S.A. 3B:12-50.

Without the appointment of a guardian of the person or estate of a mentally incapacitated person, a New Jersey court may "authorize, direct or ratify any single or more than one transaction necessary or desirable to achieve any security, service, care or protective arrangement meeting the foreseeable needs of the ... mental incompetent" N.J.S.A. 3B:12-1. Such arrangements include "... addition to, or establishment of [a] suitable trust." N.J.S.A. 3B:12-2. In these cases, the court should appoint and give notice to a guardian ad litem. N.J.S.A. 3B:12-1.

In In re Trott, 118 N.J. Super. 436 (Ch. Div. 1972), the guardian and family members of a mentally incompetent adult sought the court's permission to transfer assets from the principal of the ward's estate to the family members by outright gift in order to limit the estate tax liability of the ward. Although the court found no express authority under the then existing statute to do so, it held that "the power to grant such authorization in a proper case inheres in a court of chancery by virtue of its position as protector and general guardian of all persons under disability." Id. at 440. This parens patriae power permits the court to "intervene ... in the management and administration of an incompetent's estate in a given case for the benefit of the incompetent or of his estate." Id. This power is now codified by N.J.S.A. 3B:12-50. (The decision in Trott was relied

upon by the Labis Court.) There is ample authority to use a minor's estate, derived from a personal injury award, to pay expenses generated by that injury. Schroeder v. Perkel, 87 N.J. 53 (1981).

CONCLUSION

The special needs trust must be narrow in terms of limiting expenditures to meet needs which cannot be met from other sources, and broad in terms of determining what are unmet needs. Three points should be kept in mind: (a) the cost of lifelong services made necessary by the beneficiary's disability can far outweigh the value of the funds available; (b) most of these service needs can be met through public and private programs and therefore the funds should not be used to duplicate what is otherwise available; (c) the beneficiary has other lifelong needs, such as the need for protection from harm and abuse, which cannot be met except with settlement funds.

ADDENDUM I.

SERVICES FOR PEOPLE WITH DISABILITIES BY HERBERT D. HINKLE, ESQ. and IRA M. FINGLES, ESQ.

From time to time most practitioners, whether in public or private practice, will encounter clients with disabilities. Here is a brief guide to services, cradle to grave,⁶ and a brief overview of estate planning considerations.

⁶ Anti-discrimination laws which can mandate services to eliminate discrimination are beyond the scope of this article. See 42 U.S.C.A. § 12101, *et. seq.* (Americans with Disabilities Act); 29 U.S.C.A. § 794, *et. seq.* (Section 504) and N.J.S.A. 10:5-12, *et. seq.* (New Jersey Law Against Discrimination).

EARLY INTERVENTION & SPECIAL CHILD HEALTH SERVICES

Every child with a disability from age 0 to 3 qualifies for early intervention services. This is a federally mandated program available in all states. 20 U.S.C.A. §1471, et. seq. In New Jersey, the program is administered by the Department of Health and Senior Services which, in turn, contracts with an array of local non-profit providers. N.J.A.C. § 6A:14-10.1. A typical service plan would involve an hour per week of special education and several sessions of physical therapy.

CATASTROPHIC ILLNESS & SPECIAL CHILD HEALTH

Catastrophic Illness in Children Relief Fund Program provides financial aide to families whose children suffer from a catastrophic illness. N.J.A.C. 10:155-1.1. Eligible families can receive assistance when uncompensated expenses exceed 10 percent of the first \$100,000 of annual income plus 15 percent of the excess over \$100,000. N.J.A.C. 10:155-1.2. Also, families must reimburse the fund subsequently if they recover damages or a financial award for the child's medical expenses, pursuant to N.J.A.C. 10:155-1.20.

Special Child Health Services ("SCHS") of the Department of Health serves disabled children under twenty-one years old. SCHS maintains a registry of children with disabilities and coordinates county-based care coordination services.

Children with larger needs might qualify for Medicaid (see below).

SPECIAL EDUCATION

Children between the ages of 3 and 21 with disabilities which are severe enough to negatively affect learning are entitled to special education. This is another federally mandated program available in all states. 20 U.S.C.A. §1401, et seq. Special education in New Jersey is the responsibility of local school districts, with oversight provided by the Department of Education. N.J.A.C. 6A:14-1, et seq.

School districts are responsible to identify, evaluate and then classify children as eligible for special education. State regulations set out time lines and the methods to accomplish this, along with administrative procedures to resolve disputes.

The thrust of the federal law is that each child must receive a program that meets his/her unique and individual needs. See e.g. Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982). School districts must develop annually an individual education plan (“IEP”) outlining the services to be provided with measurable goals and objectives. For some children, the IEP might involve classroom modification or a few sessions of individual instruction or therapy. Other children might require placement in a specialized class or even placement in a private school specializing in serving children with a particular type of disability, on a day or even on a residential basis. See e.g. Burlington School Comm. of Mass. v. Mass. Dept. of Ed., 471 U.S. 359 (1985). Depending on need, children might be entitled to an extended year program over the summer months. See e.g. Reusch v. Fountain, 872 F. Supp.1421 (D.Md.1994).

Children whose disabilities are not severe enough to qualify for special education

might still be entitled to a more limited array of services under a federal anti-discrimination law known as Section 504 of the Americans with Disabilities Act and 29 U.S.C.A. § 794, et. seq. The federal government has promulgated regulations that deal specifically with accommodations in schools. 34 C.F.R. § 104, et. seq.

ADULT SERVICES

Unlike special education, services for adults with disabilities are not federally mandated. They are not always free. And there is not always “one-stop shopping.” (Because of the availability of special education, the agencies described in this section mostly service adults.

The New Jersey Division of Developmental Disabilities (“DDD”) provides day and residential services to people with developmental disabilities, mental retardation, cerebral palsy, autism and others (severe, chronic impairment originating prior to age 22, usually excluding mental illness). N.J.S.A. 30:6D-1, et seq. Because of a large number of clients seeking services, DDD employs waiting lists. See e.g. N.J.A.C. 10:46-2.1; N.J.A.C. 10:46C-1.1. However, DDD cannot refuse services necessary to prevent serious harm. P.F. V. New Jersey Div. of Disab., 139 N.J. 522 (1995).

The Division of Medical Health Services (“DMHS”) provides a similar array of services to people with mental illness. Priority for community residential services is given to serving people eligible for discharge from state psychiatric hospitals (See e.g. In re J.W., 288 N.J. Super. 197 (App. Div. 1996)), but clients can go directly from home into a supervised living arrangement.

Occasionally, the New Jersey Division of Youth and Family Services (“DYFS”) provides residential placement of children with disabilities.

Both DDD and DMHS tend to focus more on adults than children. The client, but not parents of children over 18, is responsible to each agency for the cost of care.

N.J.S.A. 30:4-66 and N.J.S.A. 30:4C-29. Currently reimbursement is sought only for residential services.

VOCATIONAL REHABILITATION

The New Jersey Division of Vocational Rehabilitative Services (“DVR”) serves people with disabilities who are capable of becoming employable with proper training. Services are to be individualized and range from counseling and therapy to actual education. DVR can also pay for modifications to vehicles and other equipment necessary for employment. Clients are required to contribute financially based on their ability to pay. DVR is a state-administered federal program. 29 U.S.C.A. § 720, et seq.

GUARDIANSHIP

The age of majority in New Jersey is 18. After that, it is necessary to secure the judicial appointment of a guardian in order to make decisions about person and property for incapacitated persons. N.J.S.A. 3B:12-25. The procedure is straightforward and set out in R. 4:86-1, et seq.

A successor guardian can be appointed by court order, N.J.S.A. 3B:12-66 or, in the case of parents, under a will. N.J.S.A. 3B:12-30. Guardianship can be temporarily delegated through a power of attorney. N.J.S.A. 3B:12-3.

New Jersey recognizes limited guardianship. In re M.R., 135 N.J. 155 (1994). Sterilization requires specific judicial approval; such authority is not implicit in the appointment of a general guardian. In re Grady, 86 N.J. 235 (1981). The law is currently not clear about the circumstances under which a guardian can agree to terminate the treatment of a never-competent ward. See e.g. In re Conroy, 98 N.J. 321 (1985).

SOCIAL SECURITY AND SUPPLEMENTAL SECURITY INCOME

Supplemental Security Income (“SSI”) is available to people whose disabilities prevent gainful employment, provided countable resources are under \$2,000 (for an individual) and monthly income is less than approximately \$500 (for an individual). The standards for a family are marginally higher.⁷ People who qualify for SSI automatically receive Medicaid.

Because the income and resources of parents are counted until the child turns 18, many people with disabilities fail to qualify for SSI until then. SSI pays a maximum of approximately \$530 a month. The rules are codified at 20 C.F.R. § 416, et. seq.

Social security benefits are available to disabled dependents of a parent covered by Social Security who either dies or who collects Social Security benefits. Recipients also receive Medicare. Social Security benefits count as income for SSI purposes, and can reduce or eliminate SSI benefits. See 20 C.F.R. § 404, et. seq.

⁷ Parental income and resources are deemed available for children under 18 living with their parents. 20 C.F.R. § 416.2116. Medicaid has the authority to waive deeming of income if a child has medical needs so extraordinary that if without Medicaid, institutionalization would be necessary. 42 C.F.R. § 435.217, et seq. This is known as a community care waiver.

A final program is Social Security Disability Insurance (“SSDI”) which pays benefits to covered workers who are unable to work because of a disability. 20 C.F.R. § 404, et seq. After two years the worker qualifies for Medicare. Typically, SSDI is given to workers who sustain injuries; however, sometimes, people with lifelong disabilities qualify because of a work history and subsequent problem with continued employment.

MEDICARE AND MEDICAID

Medicare and Medicaid can be very confusing. Medicare is provided to people 65 and over and, as noted above, to SSDI recipients and permanently disabled Social Security recipients. Medicare is divided into two parts. Part A covers hospital and limited nursing care. Part B, which requires an extra premium, covers physician services and a variety of therapies and other items. Medicare also has co-payments and deductibles. Regulations can be found at 32 C.F.R. § 199.17, et. seq.

Medicaid, in theory, covers all medical expenses. There are no deductibles and co-payments, except that in practice, some physicians will not accept it. Medicaid will also pay for institutional care in nursing facilities and in some cases in non-specialized placements to people with disabilities. See 20 C.F.R. § 416.250.

Eligibility for Medicaid is similar to that of SSI. The applicant must have monthly income of approximately \$500 or less and no more than \$2,000 in countable assets. There are no income and resource tests for Medicare.

Medicaid has a recoupment provision. 42 U.S.C.A. § 1396p(b). Medicare also has a recoupment provision relating to recoveries from personal injury litigation. 42

U.S.C.A. § 1395y.

ESTATE PLANNING CONSIDERATIONS

If a person with a disability receives assets, the results can be disastrous. The person will lose Medicaid and SSI. The assets may also be subject to recoupment by Medicaid, or by the State of New Jersey if the person is receiving residential services. See e.g. Waldman v. Candia, 317 N.J. Super. 464 (App. Div. 1999).

A special needs trust (“SNT”) is often needed to protect the assets, yet make them available to protect and enrich the life of the person with a disability.

The type of SNT required depends upon the source of the assets. For instance, assets which belong to the person with a disability - - such as the proceeds of a personal injury case, can be sheltered, but the SNT must conform to the requirements of federal law. Essentially, the trust must provide for repayment to Medicaid (and presumably other government agencies) upon the death of the person with a disability. 42 U.S.C.A. § 1382(e)(5) and §1396p(d)(4)(A)⁸.

Parents and other family members can use a SNT to hold assets for a disabled person. However, so long as the assets have not vested in the person with a disability, the SNT need not contain a provision reimbursing Medicaid and other providers.

⁸ N.J.S.A. 30:4D-6(f) voids a trust established for the purpose of defeating Medicaid. The statute appears to be limited to self-settled trusts, and, if broader, then it presumably has been preempted by the aforementioned federal statutes which specifically authorize SNTs.

ADDENDUM II.

OVERVIEW OF HEALTH CARE ISSUES BY HERBERT D. HINKLE, ESQ. and VALERIE A. POWERS SMITH, ESQ.

There are many diverse and complex issues when dealing in the health care arena. This article is designed to provide a brief overview of the different forms of insurance and common issues, in our experience, have given rise to an appeal. More detailed discussions of the individual topics contained in this article and more can be found in subsequent companion articles by the authors.

There are various areas that may give rise to an appeal regarding your health care coverage. Most commonly, disputes involve denial of payment for a covered benefit, which is medically necessary; reduction, denial, or termination of a covered service (with or without notice); and denial or termination of eligibility for insurance or waivers are all issues that may give rise to an appeal. If you are covered by more than one form of insurance (e.g., private insurance and Medicaid or Medicare, or Medicaid and Medicare), coordination of benefits and billing dispute issues can also arise. If covered under Medicaid or Medicare, due process issues (notice and opportunity for a hearing), failure to continue services pending an appeal, and failure to restore services pending a timely appeal can also give rise to an appeal.

In order to correctly appeal any of the above-stated issues, you must first understand the type(s) of insurance plans under which you or your family are covered, as this will dictate eligibility, coverage, and appeal rights.

One may receive insurance coverage for health care services under: (1) private insurance; (2) public assistance (Medicaid or Medicare); (3) state-funded health benefits plans; and (4) self-funded/-insured plans.

PRIVATE INSURANCE

This is either provided by your employer or you obtained on your own. In either case, you may contribute entirely or in part for the cost of the premiums. These types of plans are governed by NJ law and are enforced, depending on the issue, by the NJ Departments of Health & Senior Services' Office of Managed Care (DOHSS/OMC) and Banking & Insurance (DOBI). Beneficiaries of private, managed care plans are afforded three levels of appeal - two internal appeals within the insurance plan and a third external review before an Independent Utilization Review Organization (IURO) contracted out of DOHSS/OMC. The IURO decision is binding on all parties. DOBI reviews billing disputes and mental health parity issues.

PUBLIC ASSISTANCE

This coverage includes Medicaid (fee-for-service, EPSDT Program, managed care, or Waiver Programs) and Medicare coverage. The various forms of Medicaid coverage and Medicare require more discussion than this article allows. In short, Medicaid is a federal-state entitlement program for low-income Americans. Medicare is a partner program to Social Security, which provides a health and financial safety net to those 65 years and older and to those declared disabled for 24 months. There are individual eligibility requirements for these public assistance programs and they all provide different

(or additional) appeal rights than the other forms of insurance discussed herein.

STATE HEALTH BENEFITS PLANS (SHBP)

These plans are provided to individuals who are employees of the state. This coverage is similar to private employer-provided plans in that it is a fringe benefit of employment; but is dissimilar in the nature of the plan. SHBP are self-administered medical plans that are not subject to the jurisdiction or control of NJ's Departments of Health & Senior Services and Banking & Insurance, nor are they subject to the jurisdiction of the U.S. Department of Labor. Therefore, SHBP have greater leniency in what they cover (or not) and in what duration because they are not similarly subject to NJ's insurance laws. Like private, managed care insurance, SHBP beneficiaries have two internal appeal levels; but the third external appeal level is before the State Health Benefits Commission (SHBC). The decision of the SHBC is final and appealable to the Office of Administrative Law (OAL).

SELF-FUNDED/-INSURED PLANS

These insurance plans are offered by a private employer; but where the employer has decided to assume the risk of insuring its employees. Under most employer-provided plans, the employer pays premiums to an insurance company, who assumes the risk of insuring the employer's employees and administers the plan (and handles all of the claims). Where the employer assumes the risk, it hires an insurance company to administer the plan and handle all of the claims (since it is the insurance company and not the employer, typically, that is in the business of administering insurance). As with the

SHBP, self-funded plans have greater latitude as to what they do and do not cover under the plan. Any appeals under such a plan must be filed with the U.S. Department of Labor - not internally with the insurance company nor externally with the NJ Department of Health & Senior Services' Office of Managed Care. It is, therefore, important to examine the cover of your member handbook to determine whether you have this type of plan.

Understanding your insurance coverage will assist you to maximize your health care benefits and understand your responsibilities and rights under the plan.

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