

ADVOCATE

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Planning for the disabled and elderly: Special Needs Trusts

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As the average life span of our population continues to increase, and the elderly and disabled live longer than ever before, attorneys are challenged to properly protect them. The United States government provides financial assistance through Medicaid and Supplemental Security Income (SSI) to some extent, but it is rarely sufficient to meet all the needs of the recipient. The use of a Special Needs Trust (SNT) is an excellent means to care for and protect the elderly and handicapped in addition to and in conjunction with their government benefits. Ordinarily the attorney seeks to draft a SNT that will not subject the government benefits recipient to an ineligibility period or reduce the benefits that the programs provide. In some circumstances however, the recipient's amount of government benefits will be reduced as long as essential elements of the benefits are not eliminated. For example, an SSI recipient may suffer reduced monthly SSI benefits but gain full Medicaid coverage for medical needs which is a higher financial aid. All SNTs must conform to appropriate statutory and regulatory requirements to assure the ongoing SSI/Medicaid eligibility of a disabled or elderly individual.

The Special Needs Trust may be either an inter-vivos or testamentary trust fund, and may be either self-settled or created by a third party. The type of trust depends upon whose money funds the trust and the age and circumstances of the beneficiary. There are basically three types of SNTs. One is a third party created trust for a public benefits recipient. Another is a third party created trust for a public benefits recipient wherein the third party also seeks public benefits for him or herself. The last is a first party or self-settled trust created for one's own benefit.

In the SNT created by a third person for another who is already receiving public benefits, the donor wishes to donate or bequeath assets to another individual without jeopardizing the individual's

eligibility for public benefits. In practice, this trust is used most frequently when a parent establishes a trust for a disabled child and when a spouse of a Medicaid recipient, or potential Medicaid recipient, bequeaths some or all of their estate in trust for their spouse.

The next type of SNT adds a twist onto the above. In this trust the donor wishes to donate or bequeath assets to a disabled child or individual under age 65 and additionally the donor wishes to achieve Medicaid eligibility for him or herself.

Lastly, a SNT may be established by a disabled individual seeking to save their own funds for their own benefit. This trust is typically used in conjunction with a lawsuit recovery to preserve the injured party's assets for future needs. Creating and administering this self-settled trust is extremely challenging due to the necessary correlation between trust requirements and public benefits program rules. The program rules are often inconsistent and unclear regarding self-settled trusts and the attorney must scrutinize each program's nuances in order to draft a self-settled trust which will not jeopardize the many public benefits the donor/recipient may be entitled to and will satisfy trust statutory and regulatory requirements.

The controlling Federal law regarding SNTs is entitled OBRA 93, found at 42 U.S.C. *1396p. The definition of a trust under OBRA 93 isRealizing that the SNT would be a valuable planning tool for disabled individuals, Congress specifically exempted three kinds of Special Needs Trusts from the OBRA 93 rules: d4A, d4B and d4C trusts. These trusts are named for the section of OBRA 93 that provides their exemption from OBRA's general trust rules.

42 U.S.C. *1396p(d)(4)(B) trusts are generally known as Qualified Income Trusts which are a form of Special Needs Trust used in income-cap states,

such as Florida, to allow a Medicaid applicant's income to be trusted and paid to the nursing home, thereby not disqualifying them from Medicaid. The d4B trust is relatively simple in application and because of its unique and narrow nature, this trust is not included under the umbrella of the three basic types of SNTs mentioned above.

42 U.S.C. *396p(d)(4)(C) trusts, or pooled trusts as they are commonly known, are a form of Self-Settled, Special Needs Trust for the public benefits recipient that are also exempted from general trust attribution rules. These trusts fall under the third category above. The pooled trust must meet strict criteria as set out below.

(A) The trust must contain the assets of a disabled individual (of any age);

(B) The trust must be established and managed by a nonprofit association; wherein, for the purposes of investment management, the assets are pooled but wherein a separate account is maintained for each beneficiary;

(C)The trust must pay the state up to an amount equal to the total Medicaid benefits received if the beneficiary keeps assets in an account not retained by the trust; and

(D)The trust must be established by a parent, grandparent, legal guardian, court or individual.

Pooled trusts are less commonly used and harder to administer than (d)(4)(A) trusts which are outlined in greater detail next.

42 U.S.C *1396(d)(4)(A) sets forth the most common form of special needs trust. This trust excepts from the attribution rule a SNT containing assets of a disabled beneficiary provided that:

(i) The beneficiary is under age 65 when the SNT is funded;

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(ii) The SNT is established by the parent, grandparent, legal guardian, or court, not the beneficiary.

(iii) The trust requires the trustee to reimburse Medicaid for the cost of services from any principal and income remaining in the trust at the beneficiary's death. HCFA 64

It is helpful to define and comment on some of the above (d)(4)(A) requirements mentioned above. The (d)(4)(A) trust is almost always settled with the disabled beneficiary's money and established by one of the above individuals. Thus making these trusts also fall under the third category above. The assets may include structured settlement payments and lump sum settlements. The term disabled is defined in section 1614 (a) (3) of the Social Security Act, 42 U.S.C. Section 1382 (c) (a) (3), as one who is already receiving SSI or Medicaid based upon disability because the Department will accept the previous disability determination. Alternatively, if one is not yet receiving SSI or Medicaid there will be an independent determination of disability. The disabled individual must be under 65 years of age, however the trust will continue to be exempt from the inclusion in the Medicaid eligibility determination after he or she turns 65 but the assets contributed to the trust after age 65 will not qualify for an exemption. And lastly, because of the pay-back language, all existing Medicaid liens should be paid first from the personal injury settlement prior to distribution. Other liens may be deferred until the death of the disabled beneficiary and the termina-

tion of the trust.

There are many benefits of the SNTs. Although the trustee is required to reimburse the state for past benefits upon the disabled individual's death, the heirs are benefitted by the deferral during the beneficiary's life for the following reasons:

1. Despite the fact that the beneficiary may retain other public benefits through the use of the trust, only Medicaid requires reimbursement.
2. The states do not charge interest on the deferred payments; thus one is receiving the equivalent of an interest free loan.
3. The state, as the administrator of the Medicaid program, will likely pay less for the services than the beneficiary would pay privately.
4. Some crucial Medicaid programs and services are unavailable to private citizens.
5. If there is nothing left in the trust, Medicaid goes away empty handed and they do not look further at other assets or individuals.
6. There is no period of ineligibility for Medicaid caused by the creation of the trust. The corpus is deemed unavailable to the beneficiary.
7. SNTs enable the disabled individual to have his or her financial needs met during their lifetime. The principal and income can be used for the ben-

eficiary's benefit providing the items and services purchased do not imping upon eligibility requirements for SSI and Medicaid.

8. The establishment of a (d)(4)(A) trust should not affect the beneficiary's SSDI benefits nor veteran's benefits, and it does not apply to persons on Medicare as they are at least 65 years of age.

There are many nuances and areas of special concern in the SNT drafting and implementation that are outside the scope of this article. The personal injury practitioner especially should consult with an attorney who practices in the SNT arena as soon as possible before settlement is reached.