

Understanding Special Needs Planning

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WITH PRACTICAL LAW TRUSTS & ESTATES

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A Practice Note explaining estate planning for individuals and family members with special needs. This Note addresses different planning techniques including first-party special needs trusts and third-party special needs trusts (sometimes referred to as supplemental needs trusts or SNTs), pooled trusts, and ABLE accounts, and the funding, administration, and distribution issues related to these various techniques.

Special needs trusts (SNTs) have become an increasingly common feature of an estate planning practice. Greater awareness of the presence of disabilities, both seen and unseen, in our society has resulted in an increased appreciation for the need for these trusts. SNTs are appropriate for use in a number of circumstances in many different ways, and the rules governing their use can be complex. Counsel must understand the situations in which an SNT is appropriate and the rules regarding creating and administering an SNT so that it effectively serves its purpose.

This Note provides an overview of the situations in which an SNT is appropriate and the rules governing SNTs to ensure that they work effectively to enhance a beneficiary's life while at the same time protecting the beneficiary's government benefits or potential eligibility for government benefits in the future.

SPECIAL NEEDS TRUSTS

An SNT is a property management tool that can:

- Maximize eligibility for means tested government benefits.
- Pay for essential supplemental services and supports to enhance the quality of life of the beneficiary.
- Protect trust assets from loss or exploitation.

An essential feature of an SNT is to provide for goods and services not available through government programs throughout the beneficiary's life. If properly drafted and administered, SNT assets are not considered available resources for purposes of financial eligibility for means-tested government benefits and services. However, an SNT must comply with specific state and federal requirements to accomplish these purposes.

FEDERAL AND STATE LAW SNT CONSIDERATIONS

Both federal and state law and regulation drive the specific requirements and limitations on what must be included in an SNT or provisions that should not be included in an SNT. Before drafting an SNT, counsel must understand and review the intended governing federal and state law.

The references in this Note to means-tested (also sometimes referred to as needs-based) government benefits refer to the federal component of these means-tested benefits (see Means-Tested Government Benefits). The most common federal benefit for many SNT beneficiaries is the federal Medicaid program. While Medicaid is a federal program, Medicaid programs are available in individual states and are not uniform. There are highly diverse approaches to the scope of Medicaid services and benefits in individual states, including specific income and resource limitations. Therefore, counsel should become familiar with the particular services, benefits, and eligibility requirements of the particular jurisdiction where the beneficiary is residing.

USING SNTs IN AN ESTATE PLAN

An SNT is an estate planning tool that can be used when a client or client's family member has a disability and may be entitled to government benefits. A properly drafted SNT, funded with an adequate amount of assets, and administered properly by a competent trustee can make an extraordinary difference in the life of the beneficiary. It can also allow the beneficiary to maintain a higher standard of living than that afforded solely by government benefits without disqualifying the beneficiary from receiving those benefits.

The range of appropriate uses for an SNT is as wide as the various fact patterns clients present in the estate planning intake process.

The most common reason to create an SNT is to protect means-tested government benefits for a beneficiary who is currently or may become eligible for means-tested government benefits.

Means-tested government benefits are only available if the beneficiary has below a certain level of countable resources. For example, the Supplemental Security Income (SSI) program is a federal benefit that is available to a beneficiary only if the beneficiary's countable resources are:

- \$2,000 or less for an individual.
- \$3,000 or less for a couple.

(20 C.F.R. §§ 416.1201 to 416.1266.)

In addition, the beneficiary's income is also considered when determining financial eligibility for means-tested government programs. For example, the SSI program income regulations are set out at 20 C.F.R. §§ 416.1101 to 416.1124.

For more information on government benefits and SNTs, see SNTs and Government Benefits. However, a complete analysis of federal and state means tested government benefits is beyond the scope of this Note.

WHEN TO RECOMMEND AN SNT

Some situations where an SNT is beneficial are self-evident such as a couple who has a young child with an intellectual disability. In that case, it is likely that the child may be eligible for means-tested government benefits during his life. A clear recommendation would be to create an SNT for the child to be funded either immediately or on the death of his parents to be held for his benefit during his lifetime. Doing this does not affect the beneficiary's eligibility for government benefits and provides an additional source of funds to be used for the beneficiary's benefit.

However, a family member does not have to be diagnosed with a specific disability to benefit from a third-party SNT. The use of an SNT may be a preferred option when the family member may be eligible for means-tested government benefits in the future.

Counsel may also suggest an SNT rather than a traditional spendthrift trust when a client is concerned about a family member with:

- A history of irresponsible financial management.
- A history of abuse or addiction.
- An inability to make good financial decisions.
- Lack of impulse control.
- Lack of judgment due to lack of maturity or experience.

A discretionary SNT provides the same protection as a traditional support trust with a health, education, maintenance, and support (HEMS) standard but includes added protection of present or future eligibility for needs based benefits.

Counsel's failure to recognize the need for an SNT in the development of an estate plan can lead to:

- Loss of government benefits.
- Financial exploitation and waste.
- Diminished quality of life.

CHOOSING THE RIGHT TYPE OF SNT

There are three types of SNTs (see Types of SNTs). In addition, a fourth planning option to preserve eligibility for needs based benefits is an Achieving a Better Life Experience Act (ABLE) account (see ABLE Accounts).

The type of SNT or other vehicle used to protect a beneficiary depends on the beneficiary's personal circumstances. For example, if the beneficiary:

- Will likely be gifted assets or will inherit assets, the person giving the assets to the beneficiary may need to create and fund a third-party SNT (see Third-Party SNTs). In this case, the assets in the trust are generally not counted when determining the beneficiary's eligibility for government benefits, and the SNT is not required to reimburse the states for benefits received on the beneficiary's death (see Funding Third-Party SNTs).
- Has his own assets, a beneficiary with a disability may need to transfer those assets to a first-party SNT (see First-Party SNTs). In this case, if the SNT is funded and administered properly, the assets in the trust are generally not counted when determining the beneficiary's eligibility for government benefits, but the trust must reimburse the state for Medicaid benefits received on the beneficiary's death (see Funding First-Party SNTs).
- Has a modest amount of assets that would be uneconomical to administer as a single trust, a pooled trust administered by a non-profit organization may be more appropriate (see Pooled Trusts).
- Has limited funds that could be held in a tax incentivized investment account for use on qualified disability expenses, an ABLE account may be preferable (see ABLE Accounts).

SNTs AND GOVERNMENT BENEFITS

Counsel preparing an SNT as part of an estate plan must have a basic understanding of the possible government benefits the SNT beneficiary may be eligible for currently or in the future. A beneficiary may be entitled to either or both:

- Means-tested benefits, which means a beneficiary's resources are considered when determining eligibility (see Means-Tested Government Benefits).
- Entitlement benefits which means the beneficiary's resources are not considered when determining eligibility (see Entitlement Government Benefits).

Even when a family is wealthy, the financial cost of providing lifetime care for a family member with a disability is daunting. While some families may have the resources to pay for more robust services and supports than may otherwise be provided solely by government resources, they may also want to plan a future for their family member with a disability using a combination of family money and public funds. Through the use of an SNT, trust assets are available to purchase services and supports to enhance the quality of life of the beneficiary beyond that which is otherwise provided by government agencies (see Distributions from SNTs).

MEANS-TESTED GOVERNMENT BENEFITS

One of the main purposes of an SNT is to hold trust assets in a manner that does not disqualify the SNT beneficiary from eligibility

for means-tested government benefits. The most common means-tested government benefits are SSI and Medicaid.

However, mere creation of an SNT for the beneficiary does not ensure the beneficiary will remain eligible for means-tested government benefits. Care must be taken to ensure that the terms of the SNT itself do not disqualify a beneficiary from means-tested government benefits (see Distributions from SNTs and Impermissible Beneficiary Powers).

For counsel drafting SNTs for beneficiaries who need to maintain eligibility for SSI which is administered through the Social Security Administration (SSA), knowledge and familiarity with the Program Operations Manual System (POMS) is strongly recommended.

The POMS is the primary source of information used by SSA employees to process claims for social security benefits. The public version of POMS is identical to the version used by SSA employees except for internal data entry and sensitive content instructions. For more information on POMS, see the Social Security Program Policy Information website.

SSI and Medicaid

Means-tested government benefits such as SSI and Medicaid require that the applicant or recipient meet certain financial and categorical eligibility guidelines related to income, resources, and the ability to work.

Generally, to qualify for SSI, Medicaid, or both, an applicant or recipient:

- Cannot have more than \$2,000 in resources.
- Must be found to be “disabled” by the SSA.

Generally, a person is considered disabled if they are determined to be unable to earn over an established monthly amount called the Substantial Gainful Activity (SGA) amount due to a physical or mental impairment. The 2019 SGA monthly amount per persons who are blind is \$2,040 per month. For all other disabilities, SGA is \$1,220 a month for non-blind disabled persons. The SGA amount is determined annually by SSA. (20 C.F.R. §§ 416.905 and 416.971 to 416.976.)

SNTs should always be considered when an individual is currently or may later be eligible for means-tested government benefits. For example, an adult child who has a history of sporadic employment, financial instability, or who is later diagnosed as disabled may qualify for needs based benefits for low income individuals later in life. A disability can occur quite suddenly, for example, in the case of a person who develops Huntington's chorea in his mid-40s but who was previously healthy. An SNT in this case allows the beneficiary to fund a trust himself (in the case of a first-party SNT, see First-Party SNTs) or a third party to fund a SNT on the beneficiary's behalf (see Third-Party SNTs) that can be used for specific purposes without affecting the beneficiary's eligibility for these means-tested benefits.

If properly funded and administered, the SNT assets are not counted as resources for determining the beneficiary's eligibility for the means-tested benefit.

Medicaid Reimbursement

Generally, on the termination of a trust or death of a beneficiary, all first-party SNTs and most first-party pooled trusts require the trustee to reimburse the state dollar for dollar for the cost of any and all Medicaid services the beneficiary has received over the length of their lifetime. The required payback for cost of Medicaid funded service was mandated by Congress under 42 U.S.C. § 1396p (d)(4)(a) and (c).

If properly managed, there is no Medicaid payback requirement associated with a third-party SNT. However, if the funds belonging to the beneficiary are co-mingled with the assets held in a third-party trust, this may trigger a payback requirement for a third-party SNT.

A comprehensive treatment of benefits planning and reimbursement requirements in all states is beyond the scope of this Note. There is wide variation among the states regarding the administration of the Medicaid program. Where one planning scenario may be successful in one state, the same scenario may be unsuccessful in another. To properly address all issues, counsel should become familiar with the requirements of the state agencies of their jurisdiction or consult with an experienced attorney who practices extensively in special needs planning or elder law.

ENTITLEMENT GOVERNMENT BENEFITS

A common misperception is that all disability benefits paid by SSA are means-tested.

In fact, the most common entitlement government benefits are based not on financial need, but rather on contributions paid into SSA by the individual receiving the benefit or by a parent. These benefits are:

- Social Security Disability Insurance (SSDI), which is a monthly benefit based on contributions to SSA from earnings by the person who is now unable to earn the SGA monthly amount (20 C.F.R. § 404.1505).
- Childhood Disability Benefits (CDB) (also known as Disabled Adult Child benefits), which is a monthly benefit to a son, daughter, or other family member of the covered worker meeting certain eligibility criteria who was found to have met the SSA definition of having a disability prior to attaining the age of 22 (20 C.F.R. § 404.350(a)).
- Medicare, which is a government health insurance program for people 65 years of age or older, or certain younger people with disabilities (42 C.F.R. §§ 406.10 to 406.15).

An eligible individual is therefore entitled to these benefits if the individual meets the eligibility criteria regardless of the individual's other resources, and an SNT is not necessary to preserve a beneficiary's eligibility for these benefits.

Because an eligible individual is entitled to these benefits regardless of the individual's other resources, there are no payback or reimbursement provisions applicable to the entitlement benefits.

TYPES OF SNTs

There are three main types of SNTs:

- Third-Party SNTs (see Third-Party SNTs).
- First-Party SNTs (see First-Party SNTs).
- Pooled Trusts (see Pooled Trusts).

In addition to the three types of SNTs, an alternative to an SNT is an ABLE Account, which is not a trust, but rather an account that allows funds to be invested and grow tax free for use on qualified disability expenses (see ABLE Accounts).

Considering the objectives of SNTs, there are basic guidelines applicable to all SNTs, regardless of the type of the SNT (see Drafting SNTs and Impermissible Beneficiary Powers).

THIRD-PARTY SNTs

Third-party SNTs can be created by anyone, other than the beneficiary, but must be funded with assets that the beneficiary has no legal right to. The main advantage of third-party SNTs are that a third-party SNT:

- Allows the trustee to have broad discretion to make distributions to the SNT beneficiary. With a third-party SNT, distributions may be made in the trustee's discretion which will be in the best interests of the beneficiary.
- Can have more than one beneficiary. A spray or sprinkle provision in favor of multiple beneficiaries is allowed.
- Does not have a reimbursement requirement to Medicaid as is the case in a first-party SNT (see Medicaid Reimbursement).
- Can be revocable. This is not the case in a first-party SNT which must always be irrevocable. Though third-party SNTs can be revocable, it is common to make them irrevocable, especially if the intent is for individuals to make ongoing gifts to the SNT during the settlor's lifetime.

Third-Party SNTs and State Law

In most states, third-party SNTs are based on common law. In a minority of states, third-party SNTs are created and interpreted by statute. Counsel should consult their own state law regarding SNT rules when drafting these trust instruments.

Drafting Third-Party SNTs

A third-party SNT is commonly a fundamental part of the estate plan of a client who has a child or other family member with special needs. The third-party SNT should be drafted as a separate trust instrument and not as a testamentary trust contained in a client's will. By drafting the third-party SNT as a stand-alone trust instrument, the SNT may be effective immediately. This allows family members and others to begin making gifts to the SNT immediately during the settlor's lifetime.

A stand-alone trust instrument is also preferred to:

- A sub-trust in a will because a testamentary trust may be subject to probate court supervision for the life of the trust, depending on state law.
- A sub-trust in a revocable trust instrument because in that case, an agency may demand to see the entire trust instrument and not just the section pertaining to the SNT thus jeopardizing the privacy benefit that may otherwise be afforded to the settlor's revocable trust instrument.

For more information on state law regarding will, see Wills: State Q&A Tool.

For more information on state law regarding revocable trusts, see Revocable Trusts: State Q&A Tool.

A properly drafted SNT makes clear that the settlor's intent is to supplement and not supplant government benefits. The beneficiary cannot be given any demand rights and all distributions must be in the sole discretion of the trustee. Boiler plate language must be amended so the beneficiary has no incident of ownership, including:

- The power to name a trustee.
- The right to receive funds outright if the trust terminates.
- A general power of appointment.

Funding Third-Party SNTs

Third-party SNTs are much more flexible than first-party SNTs and are intended to receive assets owned by third parties (for example parents, extended family members, friends) by *inter vivos* or testamentary transfer.

Third-party SNTs are typically funded by:

- The beneficiary's parents' estate plans.
- Testamentary or *inter vivos* gifts from other family members.
- Distributions from irrevocable life insurance trusts.

Once the third-party SNT is drafted and executed, assuming it was drafted as a stand-alone trust instrument, it can be funded by current gift to the trust or a transferor can make gifts to the trust by naming the trust in the transferor's estate planning documents.

FIRST-PARTY SNTs

First-party SNTs can be created by a parent, grandparent, legal guardian, court, or the beneficiary if competent. The Special Needs Trust Fairness Act, passed in 2016, enables a legally competent beneficiary to establish his own first-party SNT. A first-party SNT is funded with the beneficiary's own assets or assets the beneficiary has a legal right to. The main benefit of first-party SNT is that it allows the beneficiary to possibly shield the beneficiary's own assets from being countable resources with respect to means-tested government benefits.

There are limited circumstances where a first-party SNT is useful. The basic concept is that a first-party SNT can hold assets which the beneficiary has an ownership interest in and those assets are not considered resources for purposes of eligibility for SSI and Medicaid.

First-party SNTs are subject to more stringent guidelines and state laws and possibly even court supervision. Counsel must consult state specific requirements before drafting or implementing a first-party SNT.

Statutory Framework

First-party SNTs were made possible through The Omnibus Budget Reconciliation Act of 1993 (OBRA-93) (42 U.S.C. § 1396p(D)(4)(A)). A first-party SNT is used when the beneficiary's own assets need to be placed in an SNT to allow the beneficiary to become or remain eligible for government benefits.

The minimum statutory requirements for a first-party SNT are:

- The trust is established by a parent, grandparent, guardian, court, or the beneficiary with a disability.
- The beneficiary meets the federal definition of being “disabled” under the Social Security Act Section 1614(a)(3), as amended 42 U.S.C. § 1382c(a)(3)(A).
- The beneficiary is under the age of 65 years.
- The trust is irrevocable.
- The trust is administered for the sole benefit of the beneficiary. The sole benefit standard requires all distributions to be made for the primary benefit of the SNT beneficiary. Any benefit to others must be collateral. For example, if the SNT purchases a television for the beneficiary, others in the home may receive a collateral benefit of being able to watch the television. However, the initial purchase must be for the beneficiary’s benefit and not intended for the benefit of other family members or housemates. The needs of the SNT beneficiary take priority over the need to preserve the trust estate for the remainder beneficiaries. (See POMS SI 01120.201(F).)
- The trust has a provision requiring reimbursement to the states that provided medical assistance payments on behalf of the beneficiary over the beneficiary’s lifetime on the death of the beneficiary.

See, POMS SI 01120.203 for detailed instructions regarding the administration and interpretation of first-party SNTs which in the POMS are referred to as “special need trust exceptions.”

Drafting First-Party SNTs

A first-party SNT is used to obtain or maintain eligibility for means-tested benefits.

Drafting a first-party SNT requires knowledge of how income and resources are treated by various government agencies such as SSA, Medicaid, Section VIII and others. If counsel does not have this knowledge, counsel should consult or work with a special needs planner to gain better expertise in this area.

State requirements regarding first-party SNTs vary and counsel should consult state law regarding issues such as requirement provisions and the powers the trustee, beneficiary, and settlor can have.

Funding First-Party SNTs

First-party SNTs are typically established to receive:

- Unexpected gifts, excess assets, direct inheritance, or outright bequests.
- Child support payments.
- Alimony or property in divorce.
- Settlement or award in a personal injury lawsuit.
- Funds held in a Uniform Transfer to Minor’s Account (UTMA) in which the minor has attained the statutory age for distribution.

When received in the first-party SNT, those assets are not considered resources for determining eligibility for means-tested government benefits.

Exceptions to Funding First-Party SNTs

A unique scenario for the use of a first-party SNT arises when a person is:

- A parent or grandparent of a person who is under the age of 65 years.
- Meets the federal definition of having a disability.
- Needs long term Medicaid benefits.

In those limited situations, the parent and grandparent may transfer assets to a first-party SNT where their family member is the beneficiary without the transfer becoming a disqualifying transfer. (42 U.S.C. § 1396p(c)(2)(B)(iii).)

This is a unique exception to the five-year look-back rule in traditional Medicaid planning. The five-year look-back rule is the rule that generally transfers made by an individual within five years of applying for Medicaid are considered countable resources for purposes of eligibility. However, transfers by a parent or grandparent that is seeking to qualify for Medicaid and that meet these criteria are subject to an exception to the five-year look-back rule. This exception allows the parent or grandparent to preserve his assets for a family member with a disability. Rather than having to spend down the parent or grandparent’s assets to \$2,000, a parent or grandparent can transfer excess assets to a trust for the sole benefit of a disabled child or grandchild. These funds can now be used to enhance the welfare of the disabled family member.

POOLED TRUSTS

A pooled trust is a trust established and administered by a non-profit organization that pools the assets of all trust beneficiaries for investment purposes and creates subaccounts for each beneficiary representing the amount of assets being held for the beneficiary’s benefit.

Each pooled trust is actually a subaccount under the master trust and the non-profit organization administers the pooled trusts acting as the trustee and advocate for the beneficiary in making investment and distribution decisions.

A list of pooled trusts available by state can be found nationally in the Special Needs Alliance pooled trust directory. A pooled trust may be a first-party trust also referred to as a self-settled trust or a third-party trust.

First-Party Pooled Trusts

A first-party pooled trust is established under OBRA-1993 and can only be created by the individual with a disability, a parent, grandparent, guardian, or a court to hold the beneficiary’s own assets (42 U.S.C. § 1396p(d)(4)(C)).

First-party pooled trusts are often used in situations where the use of a first-party SNT under 42 U.S.C. § 1396p(d)(4)(A) may not be feasible or appropriate.

For example:

- The requirement that the trust beneficiary be under age 65 for a first-party SNT may not exist for first-party pooled trusts in some

states. In this case, a person with a disability and that is over the age of 65 and has assets over the applicable resource limit may use a first-party pooled trust (42 U.S.C. § 1396p(d)(4)(C)). State laws may vary.

- A first-party pooled trust is a good option when there is not an appropriate family member or professional trustee willing to serve as trustee of a first-party SNT.
- A first-party pooled trust may be a preferred option when the amount of the excess asset that is disqualifying the beneficiary from eligibility is modest, which may make other trustee options uneconomical.

Counsel and the client should understand that first-party pooled trusts require that any funds remaining in the subaccount of the beneficiary are subject to pay-back, on the death of the beneficiary, to the states in an amount up to the total of Medicaid provided to the beneficiary (42 U.S.C. § 1396p(d)(4)(c)).

Third-Party Pooled Trusts

Third-party pooled trusts were used and established under state common law before OBRA-93. Third-party pooled trusts can be established by family members who want to distribute gifts or leave inheritances for persons with disabilities. Because these trusts are not funded with the assets of the person with a disability, there is no Medicaid payback obligation on the death of the beneficiary. A third-party pooled trust is often used when the settlor does not have a family member or friend to serve as trustee. It may also be preferred when the trust corpus is modest and most institutional or professional trustees would not be willing to serve.

ABLE ACCOUNTS

The ABLE Act was signed in December 2014 (26 U.S.C. § 529A). An ABLE account is a good alternative to an SNT when the amount available to fund an account or trust for a beneficiary is less than \$100,000 and all distributions would be made for qualifying disability expenses.

A person can have only one ABLE account. The funds in the ABLE account can grow tax-free and distributions are also not taxable to the beneficiary as long as the distributions constitute qualified disability related expenses. In 2018, the SSA added a section in the POMS on ABLE accounts (see POMS SI 01130.740). While the ABLE Act is a federal law, the establishment and administration of ABLE accounts are state specific. Many states, however, permit out of state individuals to participate in its state plan. More information can be found at the National ABLE Resource Center website.

Funding an ABLE Account

The ABLE Act allows an eligible individual or others to transfer assets up to the applicable annual gift tax exclusion amount per year to a qualified savings plan called an ABLE account, also commonly referred to as a 529A account. For example, in 2019 this amount is \$15,000. This means that in 2019, a maximum of \$15,000 per year from all sources can be transferred to an eligible individual's ABLE account. Unlike a 529 account for education expenses where multiple gifts, each in an amount up to \$15,000 in 2019 can be received, an ABLE or 529A account can only receive a maximum of \$15,000 in 2019 regardless of the number of donors. For current figures for the

applicable annual gift tax exclusion amount, see Federal Estate, Gift, and GST Tax Chart.

Funds held in a Section 529 account can be rolled into an ABLE account but are subject to the annual gift tax exclusion amount cap per year. (26 U.S.C. § 529(c)(3)(C)(i).)

Additionally, recent changes to the Internal Revenue Code with respect to ABLE Accounts allow an eligible individual, who is employed, to transfer an additional amount of earned income to an ABLE Account. The working disabled individual can contribute his earnings up to a maximum of the federal poverty level for one (\$12,490 in 2019) per year of earned income to an ABLE Account (26 U.S.C. § 529A(b)(2)(B)). For 2019, this allows a total amount of up to \$27,490 to be transferred to an ABLE Account if an eligible individual has earned income he wants to save.

Eligible Individuals

An individual is an eligible individual for a taxable year if during that year either:

- The individual is eligible for either SSI or SSDI benefits based on blindness or disability that occurred before the individual attained age 26.
- A disability certification regarding the individual was filed for that taxable year.

(26 U.S.C. § 529A(e)(1).)

Qualified Disability Expense

A qualified disability expense is any expense related to the eligible beneficiary's disability which is paid for the benefit of the eligible beneficiary. These include expenses for:

- Education.
- Housing.
- Transportation.
- Employment training and support.
- Assistive technology and personal support services.
- Health, prevention, and wellness.
- Financial management and administrative services.
- Legal fees.
- Expenses for oversight and monitoring.
- Funeral and burial expenses.
- Other expenses, which are approved by the secretary of state under regulations and consistent with the purposes of this section.

(26 U.S.C. § 529A(e)(5).)

While distribution from an ABLE account are limited to qualified disability expenses, distributions from SNTs may be much broader. An SNT can provide recreation, leisure, clothing and other purchases that are not allowed from an ABLE account.

Reimbursement from ABLE Account

Any amounts remaining in an ABLE account on the death of the account owner, must be paid to the states to reimburse the states for Medicaid benefits provided to the account owner from the date the ABLE account was created (26 U.S.C. § 529A(f)).

ABLE Accounts and SSI

An ABLE account is useful for an individual on SSI because the individual with an ABLE account can have up to \$100,000 in the ABLE account be exempt from the SSI \$2,000 individual resource limit (see SSI and Medicaid).

An ABLE account which exceeds \$100,000 results in a suspension of the beneficiary's SSI cash benefit until the account value is reduced to below \$100,000. The suspension of SSI has no impact on the beneficiary's ability to receive Medicaid benefits.

Counsel should explain that recipients of SSDI and CDB are not subject to the resource limitations of the SSI program. Therefore, unless the recipients are also receiving SSI or are receiving Medicaid benefits which are subject to resource limitations, an ABLE account would not provide any particular advantage for them. (See Entitlement Government Benefits.)

DRAFTING SNTs

An SNT is generally more easily defined by what cannot be included in the trust instrument's terms rather than what must be included in the terms. Mainly, for an SNT to function to protect eligibility for means-tested government benefits, the terms of the SNT instrument should not:

- Direct the trustee to make mandatory distributions that would reduce or eliminate eligibility for government benefits.
- Grant the beneficiary powers over the trust administration or distributions (see Impermissible Beneficiary Powers).

In some states, a purely discretionary trust can serve as an SNT if administered as one by the trustee. For this type of trust to be administered as an SNT by the trustee, the trustee must not exercise the trustee's discretion to make distributions that affect eligibility for means-tested government benefits. A purely discretionary trust is a trust where:

- All distributions are subject only to the trustee's discretion rather than a mandatory standard such as an ascertainable standard.
- The beneficiary has no power to compel distributions, change trustees, or appoint property.

Though a trust that meets these criteria can serve as an SNT in some jurisdictions, many practitioners prefer to draft an SNT agreement more precisely so that the trustee is aware of what is and is not permissible and a court is aware of the settlor's intent that the trust be an SNT if that becomes necessary.

Whether the SNT is a first-party SNT or a third-party SNT, counsel should consider many of the same factors and provisions when drafting the trust instrument.

SPENDTHRIFT PROTECTION

In a properly drafted SNT, the beneficiary must not be granted the power to:

- Demand any portion of the income or principal.
- Assign any portion of the trust assets to a third party, including creditors.

If state law permits, a spendthrift provision should be included in the SNT. A spendthrift provision safeguards trust assets from being accessed by a beneficiary who is at risk of being financially exploited or who is incapable of managing money in a responsible fashion.

GUIDANCE FOR TRUSTEE'S EXERCISE OF DISCRETION

A beneficiary of a well-funded SNT can receive a myriad of benefits that make life enjoyable at the SNT trustee's discretion. An SNT agreement should include direction from the settlor to the trustee about the nature and scope of the range of benefits intended to be provided to the beneficiary.

Care should be taken to provide the trustee with sufficient discretion to select what the SNT should provide to the beneficiary since most SNTs are intended to last for the lifetime of the beneficiary. It is impossible to know with a reasonable amount of certainty what the beneficiary may benefit from over the course of the beneficiary's life. A broad discretionary standard is most customarily used in SNTs for this reason.

A trustee of an SNT should be proactive regarding becoming acquainted with the needs of the beneficiary. This can be done through a myriad of strategies including:

- Meeting with the beneficiary on a regular basis.
- Arranging for a qualified care manager to become familiar with services and supports the beneficiary may be receiving.
- Attending service plan meetings.
- Maintaining frequent and regular contact with individuals familiar with the beneficiary.

One valuable provision to consider including in an SNT to help ensure the trustee is acquainted with the needs of the beneficiary is one directing the trustee to consider providing for an annual comprehensive review of the services and supports provided to the beneficiary along with an assessment of the general quality of life of the beneficiary.

PROVIDE ADVOCACY SERVICES

Many SNT beneficiaries receive some form of services and supports from private or public agencies. These services and supports may include:

- Residential support.
- Job coaching.
- Day habilitation services.
- Individual counseling.
- Transportation assistance.

For most of their lives, parents with a child with a disability spend a great deal of time and effort monitoring these services and supports. When necessary, this monitoring can quickly turn to advocacy when a situation arises meriting correction or modification. When a parent dies, this monitoring and advocacy function can be arranged for and paid by the SNT.

A trustee of an SNT perpetuates the parental "eyes and ears" function when the parents are no longer able to do so themselves.

An advocacy arranged by an SNT can make an enormous impact on the quality of life of the beneficiary, particularly in situations where the beneficiary of the SNT may not have well developed verbal skills.

The SNT agreement should include language which specifically authorizes the trustee to pay for advocacy and legal representation on the beneficiary's behalf. The advocacy should include judicial and administrative proceedings on the local, state, and federal levels.

FUNDING SNTs

In addition to ensuring the appropriate source of the SNT funding (see Funding Third-Party SNTs and Funding First-Party SNTs), it is particularly important when drafting an estate plan that uses an SNT that counsel advise and assist the client with:

- Titling assets.
- Modifying beneficiary designations.

Counsel should help ensure that all assets intended to be in the SNT become seamlessly integrated into the entities created in the estate planning documents.

For example, consider the client that creates and funds an *inter vivos* SNT for the benefit of the client's disabled child. Because the client created and funded the SNT, it's a third-party SNT with substantial benefits for the disabled child, including no requirement to reimburse a state Medicaid program at the beneficiary's death. If the client fails to update his beneficiary designations and names the disabled child rather than the child's SNT as the beneficiary on a life insurance policy, on the client's death, the disabled child, rather than the SNT, receives the life insurance proceeds. Receipt of these proceeds will likely make the child ineligible for means-tested government benefits.

If instead the client's beneficiary designations had been properly drafted and updated to send those proceeds to the SNT, the disabled child's eligibility for means-tested government benefits would have been preserved. Many families will meet with an attorney to draft an SNT but forget to change beneficiary designations on life insurance policies, annuities, IRA, and other assets with a beneficiary designation. This may trigger the loss of needs-based benefits or the need to create a first party SNT. Assets which could have been passed to other family members or charity will then be subject to a payback clause.

These are considerations not just for the client, but for anyone intending to benefit the SNT beneficiary. Counsel should help the client understand that any other family members or other persons who intend the benefit the disabled child should use the planning that has been put in place by making gifts to the SNT rather than outright to the disabled beneficiary.

DISTRIBUTIONS FROM SNTs

In an SNT, as with other trusts, the trustee makes distributions for the beneficiary's benefit according to the terms of the trust instrument. Generally, an SNT supplements and does not supplant or replace government benefits by allowing very strict or limited distributions for the beneficiary's benefit.

Each state may provide detailed requirements or limitations on distributions for a trust to be considered an SNT. Counsel should

consult state law to determine specific state requirements or limitations on distributions.

In general, an SNT trustee should not:

- Distribute trust assets, particularly cash, directly to the beneficiary to make purchases, regardless of whether the purchases are exempt. If cash passes from the SNT directly to the beneficiary, that distribution is not considered exempt, but instead is countable income and reduces or eliminates the beneficiary's means-tested benefits on a dollar-for-dollar basis. (20 C.F.R. §§ 416.1123 and 416.1124, POMS SI 00810.420, and POMS SI 01120.200(E)(1)(a).) The trustee should instead make purchases on the beneficiary's behalf directly from trust assets.
- Commingle the SNT's assets with those belonging to the beneficiary, even inadvertently.
- Make distributions for the beneficiary's food or shelter if the beneficiary is receiving SSI.

Direct distributions, commingling, and distributions for food or shelter, whether directly or in-kind (known as in-kind support and maintenance or ISM), reduce government benefits (20 C.F.R. §§ 416.1102 and 416.1207(d), and POMS SI 01120.200(E)). In some cases, paying for safer and nicer living accommodations may outweigh the loss of one-third SSI. The trustee must balance the benefit lost with the value received.

To effectively administer an SNT, the trustee must understand which types of distributions reduce or eliminate public benefits and which do not. The trustee must closely observe the statutory requirements and guidelines, in addition to the SNT agreement's terms. Depending on the reason for the disbursement, the disbursed funds may be deemed "available" to the beneficiary, and this may cause the beneficiary to lose government benefits for which the beneficiary is otherwise eligible (42 U.S.C. § 1396p(d)).

DISTRIBUTIONS THAT DO NOT AFFECT ELIGIBILITY FOR MEANS-TESTED GOVERNMENT BENEFITS

Depending on whether the SNT is a first-party or third-party trust (see First-Party SNTs and Third-Party SNTs), trust funds may be able to pay for supplemental services and supports such as direct support workers, respite care, or other in-home supports such as making needed renovations to accommodate the needs of the beneficiary and subsidizing the family care providers' essential household expenses.

Additionally, an SNT can be used to pay for certain types of things that make life enjoyable beyond customary living expenses.

An SNT beneficiary's eligibility for means-tested government benefits is not affected by distributions from the SNT for:

- The purchase of a home (including maintenance expenses and insurance), if the beneficiary lives in it or intends to return to it (20 C.F.R. § 416.1212).
- Household furnishings used regularly or needed for use in the home and other personal effects, including clothing, generally worn or carried by the individual (20 C.F.R. § 416.1216 and POMS SI 01130.430).
- Household expenses including phone, cable, internet, landscaping services, cleaning services, and non-essential expenses.

- School tuition, books, and supplies (however, this cannot include a meal plan or dormitory expenses).
 - Legal and accounting fees.
 - One vehicle if used for transportation by the beneficiary or someone in the beneficiary's household (20 C.F.R. § 416.1218). Also, automobile and transportation costs, including car insurance if the beneficiary is the sole owner of the vehicle.
 - Pre-paid burial plot or space.
 - Term life insurance or life insurance with a cash surrender value (if its face value is less than \$1,500) (20 C.F.R. § 416.1230).
 - Vacation travel and entertainment expenses including sporting events, video games, movies, museums, and club dues, among others, for the beneficiary and a companion where the companion is necessary for the beneficiary to be able to travel. But, providing spending cash directly to the beneficiary while on vacation does reduce SSI. (POMS SI 00835.040(C)(2).)
 - Credit card payment if the credit card did not purchase food or shelter (POMS SI 01120.201(l)(1)(d)).
 - Dental and medical expenses not provided by government benefits.
 - Medical equipment and expenses for care not provided by government benefits.
 - Gym memberships
- (20 C.F.R. §§ 416.1102, 416.1112, and 416.1210, and 20 C.F.R. Pt. 416, Subpt. K, App.)

DISTRIBUTIONS THAT REDUCE MEANS-TESTED GOVERNMENT BENEFITS

An SNT beneficiary's eligibility for means-tested government benefits may be reduced or eliminated if distributions are made from the SNT for:

- Shelter expenses which includes mortgage payments, real estate taxes, rent, utilities, and garbage collection fees (20 C.F.R. § 416.1130(b)).
- Food (including dining out and entertainment dinners) (POMS SI 01120.201(l)(1)(b)).
- Debit cards or gift cards, unless the card can only be used at a location that does not sell food or shelter items and cannot be resold (POMS SI 00830.522).
- Cash gifts.

IMPERMISSIBLE BENEFICIARY POWERS

It is important to limit the SNT beneficiary's power over an SNT. Generally, to prevent trust assets from being considered countable resources for purposes of financial eligibility for means-tested government benefits, and to protect against financial exploitation or waste, an SNT beneficiary must not have power to:

- Demand income or principal.
- Assign any portion of the income or principal to third parties or for the benefit of the beneficiary's estate.
- Amend or terminate the trust.
- Remove and replace the trustee.

- Take any other action which could render the trust assets constructively available for the beneficiary's benefit during his lifetime.

These guidelines are not exhaustive and are intended merely for general guidance. Particularly where government benefit eligibility is sought, counsel should conduct a thorough analysis of how trust assets and income may be deemed to be available to the trust beneficiary by statute, regulation, or administrative practice.

TRUSTEE CONSIDERATIONS

SELECTING A TRUSTEE

In both third-party SNTs and first-party SNTs, counsel must be prepared to advise the client on how to select a trustee for an SNT. The client must be mindful that the administration of an SNT will continue as long as the beneficiary needs the protection of the SNT. Therefore, this is a decision that should be thoroughly discussed with the client.

The options for trustee of an SNT generally include:

- Family members or friends.
- Professionals, such as an accountant or attorney.
- Corporate fiduciaries.

Counsel should review with the client the advantages and disadvantages of each possible trustee option. Special needs planning is unique to each beneficiary's situation. Depending on the willingness of the potential trustees, counsel may explore the possibility of co-trustees. For example, when the client wants to name a family member as trustee, there may be a benefit to that family member sharing the trustee responsibilities with a professional trustee that has more experience in performing fiduciary functions. Professional trustees may be amenable to serving as co-trustee with one or more family members. This allows the trust to be managed by:

- A family trustee who may be familiar with the social-emotional needs of the beneficiary.
- A professional or corporate trustee who can provide traditional fiduciary trust management services such as investment, accounting, and bill paying.

Family Members as Trustee

Often, a client wants a family member, such as a sibling of the beneficiary, to serve as a trustee of an SNT. The advantages of having a family member serve as a trustee include:

- Familiarity with the special needs beneficiary.
- Presumably a familial affection toward the beneficiary.
- A willingness to serve with less compensation than professional or corporate trustees.

The disadvantages of having a family member serve as a trustee include:

- Unfamiliarity with the fiduciary obligations (for example accounting, investing, tax considerations, and government reporting requirements).

- Conflict of interest, particularly where the trustee is named as a remainder beneficiary.
- Limited time to devote to the duties of serving as a trustee.
- Possible geographic distance between the family member serving as trustee and the beneficiary.

Professionals as Trustees

Professionals, such as attorneys and accountants, can also be considered as trustees of SNTs. The advantages of professional trustees include:

- Expertise and experience in trust and fiduciary administration.
- Expertise in government benefits eligibility rules.
- Relieving family members of the burden of trust administration with a family member when the relationship has the potential of becoming emotionally adversarial.

The potential disadvantages of a professional trustee include:

- Possible succession issues on the professional's disability or death.
- Increased cost of trust administration.
- Lack of understanding of the inherent needs of the beneficiary due to disinterest or misunderstanding.

Corporate Trustees

Corporations such as financial institutions or the fiduciary services of financial management companies are potential trustees of special needs trusts. The advantages of this option, include:

- The expertise of the institution's resources.
- The inherent perpetual existence of the corporate entity.

The disadvantages of a corporate trustee may include:

- A complex, bureaucratic decision-making process.
- Unfamiliarity with the special needs of the beneficiary or of the resources the beneficiary could utilize.
- Lack of ability to administer the trust in a fashion that will maximize government benefits due to bureaucracy associated with corporate trustees.

TRUST PROTECTOR

In addition to selecting a trustee, counsel may consider advising the client of the potential benefits of naming a trust protector. A trust protector is a person that is:

- Not the settlor, beneficiary, or trustee of a trust.
- Appointed to exercise one or more powers affecting the trust and the interest of the beneficiaries.

A trust protector is generally included to protect beneficiaries from a rogue trustee. Naming a trust protector may bring peace of mind to a client because the trustee knows that someone other than the trustee will be watching out for the interest of the beneficiary long after the settlor dies.

TRUST ADVISOR OR ADVISORY COMMITTEE

An additional potential safeguard for an SNT is the creation of a trust advisory committee to monitor the administration of the trust to help ensure that the beneficiary's needs are being considered and met by the trustee. An advisor or advisory committee is expensive and will add administrative burden to the SNT and is therefore generally only used when there is a particular concern regarding the complexity of the trust or the needs of the beneficiary. Addressing Trustee Succession, Trust Protectors, and Advisory Committees

Counsel should carefully advise the client about the succession planning process for trustees, trust protectors, or the trust advisory committee members to ensure there is always a trustee in place. The client should consider:

- Naming specific individuals to serve as successors.
- Granting a person or corporation currently filling that roll the authority to appoint their own successors.
- Including a default method of appointment in the SNT instrument (for example, a court or a trusted law firm).

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