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Special Needs Trusts for Persons With Disabilities to Protect Government Benefits and the Individual

Administering First- and Third-Party Trusts; Addressing the Interplay Between SNTs, Guardianships, and Conservatorships

THURSDAY, OCTOBER 20, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Special Needs Trusts for Persons With Disabilities

Protecting Government Benefits and the Individual

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History of Trust

Crusades

- The Knight answers the call to go and fight
- But he still has responsibilities to the king and to everyone who lives on his lands

What Could the Knight Do?

- The Pope wanted the knight to fight
- The Knight did his duty
- Now the Knight is unable to regain the property?

True Owner

Courts of Chancery (courts of equity) would set things right and find that the Crusader was the "true" owner of the property. Therefore, the crusaders could get their land back.

What are Trusts?

It is a contract with three key roles.

1. Trust maker
2. Trustee
3. Beneficiary

Trust Maker – Creator of the Trust

Trust makers are also the settlors of the Trust

What Can Go In Your Trust

Who Can be a Trustee?

- Legally competent
- An adult
- Able to carry out the terms of the trust

Fiduciary Responsibilities of Trustees and Personal Representatives

- Comply with terms of the trust of will
- Comply with terms of the law relating to trusts or will
- Be fair in dealing with beneficiaries
- Comply with tax requirements
- Segregate, preserve and invest estate or trust assets
- Keep and render a full and accurate record and accounting of estate planning
- Keeping Contingent Beneficiaries reasonably informed

SNT vs SNT: Same Thing

- Special Needs Trust
- Supplemental Needs Trust
- Amenities Trust

Government Benefits

At a Glance

Money	Medical	Housing
SSI	Medicaid	Dept of Developmental Disabilities/DMH
SSDI	Medicare	Section 8 State vouchers Project based
AFC/PCA ABLE Account	Private Insurance	Food Stamps Utility subsidy Subsidized transport

Who Gets Supplemental Security Income?

- Over 65, blind or disabled
- US citizen or lawful resident
- Very limited income and resources

What is Limited?

- Earn less than $1350/month in 2022 and $1,470/month in 2023 (Substantial Gainful Activities)

- Countable Resources must be under $2,000 for 1 person or $3,000 for 2 people

SSI – Money to Live

In 2022, Federal Benefit Rate is $841/month and $914/month in 2023, plus state supplement if any

If living at home, or having your housing paid for: one-third reduction for Income, Support and Maintenance

SSI – Medicaid

In 35 states, Medicaid coverage is granted to SSI recipients automatically. This can be more important than the cash payments.

Assets that Count

-Bank Accounts

-Savings Bonds

-UTMA Account at age 21 (custodian account) or 18 depending on worker and state

-Before Age 18, parents' assets count

Assets that Don't Count

-529 Plan

-ABLE Account

-Special Needs Trust (if properly written and managed) (either third-party or first-party)

SSI Definition of Disability

- "Disability" for an adult is defined as the inability to engage in any "substantial gainful activity" (SGA) due to any medically determinable physical or mental impairment, or combination of impairments, that has lasted or can be expected to last for a continuous period of at least 12 months, or result in death.

- No disability determination if you are over age 65

Translation

-SSI uses a work test. Maximum earnings from competitive employment is $1350/month in 2022 and $1470 in 2023.

-If not actually earning (yet), test is whether they can earn $1350/month in 2022 or $1470 in 2023 or more in competitive employment

SSDI?

For “insured” workers and can extend to some family members

SSDI for Disabled Adult Child (DAC)

- Social Security Disability Insurance payments based on the parent's earnings, if the child is:
  - —Disabled before age 22 and
  - —Has parents who are drawing benefits based on their work record who are retired, disabled or deceased
    - 50% of parent's SS check while living
    - 75% of parent's SS check after death
- No resource test
- Medicare after 24 months of cash benefit or eligibility

Medicaid v. Medicare

- Medicaid is comes with SSI in the majority of states, but not all. Usually assets be less than $2,000.
- Medicaid is the largest payer for long-term care (41%), and also pays for residential and day programs for the intellectually disabled, under waiver programs

- Medicare comes with SSDI/DAC(cash benefits) after 24 months
- Medicare pays for health care, but not long-term care

Section 8 Vouchers

- Portable Voucher: renter pays 30% of their income toward rent, HUD pays the rest
- Project-based low income apartments

Based on low income, not assets

ABLE ACCOUNT

- Achieving a Better Life Experience (ABLE) Act of 2014
- IRS: Able "allows states to create tax-advantaged savings programs for eligible people with disabilities (designated beneficiaries)."
- Considered to be a type of 529 plan
- Only $16,000 per year for 2022 or $17,000 for 2023 per beneficiary (or gift tax exclusion)

ABLE ACCOUNT Vary by State

Even if your state has not enacted ABLE you can still have open an ABLE Account in another state

There is Help

ABLE National Resource Center

Https://www.ablenrc.org

Types of SNT Trusts

Names

- 1st Party (also known as (d)(4)(A) trusts) or (d)(4)(c)
- 3rd Party
- Pooled (same as (d)(4)(c)) Trusts

3RD Party Trust

Grandma **Grandpa** **Me**

3RD Party Trust

Anyone except the beneficiary's money or assets

Grantors

Funding

3RD Party Trust Advantages

- No limit on the # of assets or types (if Trustee agrees)
- No Medicaid recovery
- As long as they are not commingled with beneficiary's funds = not countable
- Funds can be used for anything the beneficiary needs which is not available through public benefits, charitable programs, etc.

1ST Party Trust

- 42 USC § 1396(p)(d)(4)(A)
- Allows a beneficiary to protect assets from being "countable" for means – tested government benefits
- Medicaid Payback at death
- Sole Benefit Rule applies

Pooled Trusts

- There will be a fee for the Administration of the Trust
- Cannot be managed by family member or trusted friend

- 42 USC § 1396(d)(4)(C)
- Individual Accounts in the pool Payment Required
- Normally start ≤ 65
- Not for Profit Management
- Reduction in Administrative $
- $ is pooled for investment purposes, so shared risk and benefits

Payment Required

Disadvantages Pooled Trusts

- Limited Options --- State specific
- May require Medicaid payback or the law allows it to go to the Trust to assist other beneficiaries with Disabilities
- May have a transfer penalty if the Trust is for the individual over 65

See: SpecialNeedsAnswers.com

Kicks the Bucket?

At Death

- Medicaid Recovery
- Then it could go to anywhere it says in the Trust
- Heirs at Law or via Last Will and Testament

1ST Party Trust

- Depends on the State but the law allows it to remain in the Trust to help other beneficiaries with disabilities (They can be over 65)
- Michigan has 100% Retention as an option

Pooled Trust

Drafting the Trust:

Trust Income and Principal are Countable Assets If:

-Distributed; or

-The beneficiary has the right to require the funds be distributed to him or her

E.g. right to income

Drafting the Trust

In general, to ensure that the trust is not countable, the trust need only provide the trustee with total, unfettered discretion over distributions to or on behalf of the disabled beneficiary.

But in case of a challenge to the trust, it is important to make it clear that the grantor intends to create a supplemental trust so neither a court nor public services agency can interpret the trust as requiring payments to the disabled beneficiary.

Drafting the Trust

The trustee may pay to _____ or may pay on [his/her] behalf as much of the income or principal of the trust as it shall determine in its sole and nonreviewable discretion to be necessary for [his/her] care and well-being. The trustee may make the payments at any time, in any amounts and proportions, and for any purposes as the trustee considers advisable.

Drafting the Trust

The purpose of this trust is to supplement, but not to supplant, whatever benefits and services _____ may from time to time be eligible to receive by reason of age, disability, or other factors, from federal, state, and local governmental and charitable sources.

Self-Settled Trusts

Often known as a "(d)(4)(A)" trust, referring to the enabling statute, 42 U.S.C. § 1396p(d)(4)(A), or as a "payback" trust.

The trust must provide that, at the death of the beneficiary, the remaining trust funds reimburse Medicaid for its expenses on behalf of the disabled beneficiary before any remaining funds may be distributed to remainder beneficiaries.

Trust must be created and funded before age 65, for the sole purpose of the beneficiary.

Every Trust?

Should every Revocable Living Trust have SNT clauses?

Or an optional provision for SNT or ABLE Act Account?

Yes!!

Provision for Individual under Age 65

- **Individual Under Age 65.** [BENEFICIARY'S NAME] is a resident of [CITY], Michigan, who was born on [DATE OF BIRTH] and is therefore, under the age of 65 in accordance with Section 1917(d)(4)(A) of the Social Security Act (42 U.S.C. § 1396p(d)(4)(A)).
- **Individual With a Disability.** [BENEFICIARY'S NAME] is a person with a disability as defined by the Section 1614(a)(3) of the Social Security Act (42 U.S.C. 1382c(a)(3)).
- **Sole Beneficiary of a Self-Settled Trust.** [BENEFICIARY'S NAME] (hereinafter referred to as "[BENEFICIARY'S FIRST NAME]") is the sole beneficiary of this Trust while [BENEFICIARY'S FIRST NAME] is living. This Trust shall be funded with [BENEFICIARY'S FIRST NAME]'s assets and funds, including any monies received or to be received by [BENEFICIARY'S FIRST NAME] from any litigation or insurance settlement or other property now or hereafter owned or held by or for [BENEFICIARY'S FIRST NAME]. Other property, real or personal, may be transferred to the Trustee by anyone with the written consent of the Trustee or by court order; provided all property held by the Trustee at any time shall constitute the "Trust Estate". **No public assistance benefits received by or for [BENEFICIARY'S FIRST NAME] shall be commingled with or become part of the Trust Estate!**

Provisions for making Payments to a Person Under Age Twenty-Five, Incompetent, Incapacitated, or Person With a Disability.

- **Trustee's Discretion in Making Payments to a Person Under Age Twenty-Five, Incompetent, Incapacitated, or Person With a Disability**. If any share hereunder becomes distributable to a beneficiary who has not attained the age of twenty-five (25), such share shall immediately vest in the beneficiary, but notwithstanding the provisions herein, the Trustee shall retain possession of the share in Trust for the beneficiary until the beneficiary attains the age of twenty-five (25) using so much of the net income and principal of the share as the Trustee deems appropriate, in the Trustee's sole discretion, taking into consideration to the extent the Trustee deems advisable any other income or resources of the beneficiary or his or her parents known to the Trustee.
- The Trustee is authorized to accumulate the net income or to pay so much of the net income or principal from the Trust as deemed appropriate for the beneficiaries. This Trust shall not be construed as a support Trust and is established as a pure discretionary Trust. Under no circumstances shall the beneficiaries, or their lineal descendants, have the power or authority to demand any distribution from the Trustee who is under no obligation, implied or otherwise, to make any distributions to them. Further, the Trustee may withhold distributions to them if, in its sole discretion, the distributions would not be consistent with the Grantor's intentions as expressed in this Agreement.
- In the event that the Trustee is requested by any creditor of the beneficiaries, or their lineal descendants', to petition a court of competent jurisdiction or for the release of principal or income from the Trust Estate, the Trustee is authorized to deny such request and authorized to defend at the expense of the Trust Estate any contest or other attack of any nature on the provisions of this Trust.
- The Trustee is granted with the continuing, absolute and discretionary power to deal with the funds of this Trust, with those powers to be exercised independently and without any prior or subsequent approval of any court or judicial authority. No person dealing with the Trustee shall be required to inquire into the propriety of the Trustee's actions
- D. In case the income or principal payment under any Trust created hereunder or any share thereof shall become payable to a person over the age of twenty-five (25), but who is a person under legal disability, or to a person not adjudicated incompetent, but who, by reason of illness or mental or physical disability, or substance abuse, is, in the opinion of the Trustee unable properly to administer such amounts, then such amounts shall be paid out by the Trustee in such of the following ways as the Trustee deems best: (1) directly to the beneficiary; (2) to the legally appointed guardian of the beneficiary; (3) to some relative or friend for the medical care, education, support and maintenance in reasonable comfort of the beneficiary; (4) by the Trustee using such amounts directly for the beneficiary's care, support and education; (5) to a custodian for the beneficiary under the Uniform Gifts or Transfers to Minors Act. My Trustee may establish an ABLE Account under the Achieving a Better Life Experience Act (IRC Section 529A and MCL 206.987(3)) for the benefit of myself, [PERSON'S NAME], provided it does not disqualify [PERSON'S NAME] from receiving any public benefits for which [PERSON'S NAME] may be eligible.
- E. The Trustee may, in its discretion, create, fund or contribute to any qualified State Tuition Program under Section 529 of the Internal Revenue Code for the benefit of the beneficiary under any jurisdiction. The Trustee is specifically authorized to select any options, including but not limited to the establishment of the owner and contingent beneficiary or person in the event of the death of the beneficiary, in the best interest of the beneficiary and consistent with the Internal Revenue Code. This Article is to be effective only, and is limited in duration, to the extent that it does not result in any violation of any applicable rule against perpetuities or similar law. If the beneficiary dies before reaching the age of twenty-five (25), the remaining Trust fund is to be distributed to that beneficiary's then living lineal descendants per stirpes, or if that beneficiary leaves no lineal descendant then living, to the heirs at law of that beneficiary, as determined as of that time under the laws of Michigan in effect at the execution of this Agreement.
- F. If a beneficiary becomes engaged to be married, the Trustee shall have the power to withhold distributions until the execution of a Prenuptial Agreement. The Trustee shall have the power to secure legal counsel for the drafting of any Prenuptial Agreements and shall expend funds from the Trust corpus to pay any associated legal fees.
- G. The Trustee may, in its discretion, apply all or any portion of the property directly for the beneficiary's benefit, and for the benefit of anyone dependent upon such beneficiary, in such manner, as the Trustee, its absolute discretion, considers appropriate and in the best interest of the person. No distribution under this instrument to or for the benefit of a minor beneficiary shall discharge the legal obligation of the beneficiary's parents to support him or her in accordance with the laws of the parents domicile.
- H. Any income not so paid or applied shall be accumulated and added to principal. The beneficiary's share shall be paid over and distributed to the beneficiary upon attaining age twenty-five (25), or if he or she shall sooner die, to his or her personal representatives. The Trustee shall have with respect to each share so retained all the powers and discretions it had with respect to the Trusts created herein generally. The Trustee may act as Conservator for our minor children if one is required.
- **THE ABOVE ARTICLE SHALL NOT APPLY TO [BENEFICIARY'S NAME].**

Key Provisions

- Trustee is in charge; Must use sole discretion
- Must not give cash to the beneficiary!
- If funds include any money of the beneficiary then Medicaid payback
- Taxed as Trust Rates on Income unless income is distributed to beneficiary (then they get K-1 and pay at their lower rate) for Third-Party Trust
- First-Party Trust = Grantor Trust

Designations

- Trustees
- Beneficiary
- 2nd Beneficiaries

Who Can Be a Trustee?

- Legally competent
- An adult
- Able to carry out the terms of the trust

Trustee's Duties: Administering the Trust

Factors for Trustees to Consider

- Purpose of the trust
- Goal of the grantor
- Economy
- Resources of beneficiaries
- Possible government benefits
- When will trust end – i.e. will it run out of money?

Fiduciary Responsibilities of Trustees

- Comply with terms of the trust, and the law
- Comply with tax requirements
- Segregate, preserve and invest trust assets
- Keep and render a full and accurate record and accounting

Financial Responsibilities

- Prepare taxes
- Accounting to the beneficiary
- Pay Appropriate Bills
- Keep Contingent Beneficiaries "reasonably informed"

Taxes

- 1st Party Trust: Grantor trust, so beneficiary will pay the taxes. Good. Although there are times it can be treated as a complex trust.

- 3rd Party Trust: Income is taxable to the trust. Not good. Subtract distributions and administrative costs from income. Qualified Disability Trust Credit can be used.

Possible Loss of SSI or Reduction in Amount

- Housing
- Food
- Cash for any purpose
- Utilities
- This may be avoided if beneficiary qualifies and uses for an ABLE Act Account

How to Distribute to SSI Recipient

- No cash. Cash reduces SSI dollar-for-dollar after first $20.
- Pay venders, not the beneficiary
- Don't pay for housing and food if you can help it/Use Able Act Account if possible.

Managing the Assets

- Trustee has duty to maximize the assets by buying, selling, renting, or investing or to act as prudent investor
- Also has duty to provide for the beneficiary according to the purpose of the trust

Balancing these two is key

Warning

- Trustees with special skills (i.e. attorneys) have a duty to use those skills – but not charge the same legal rate?

- SIGH!!

Train the Trustees

- Lay people are often trustees and are operating without guidance
- When drafting trust, provide explicit directions and training for the trustee (or that trust funds can be used to train the trustee)
- Trustee Workshops

Powers

What does the Trust say?

In special needs trust, trustee has sole discretion

Letter of Intent

Letter of Intent

- A **Letter of Intent** is one of the most important documents a parent can complete for the child's future care-givers.
  Can be used when caring for parents or grandparents as well.
  Should provide the trustee with guidance as to what "special needs" the beneficiary has or will have and define the quality of life, as quality means different things to different people.
- Should be updated as the beneficiary's needs change.
- Is a method for the settlor/grantor of the trust to communicate intentions regarding the trust beneficiary to the trustee, successor trustees, or a court.

- Not legally binding, but grantor's intent will guide the judges.

Sample Letters of Intent

- http://www.pekdadvocacy.com/wp-content/uploads/2010/10/Memo-sample-of-Ltr-of-Intent-Attachment-7.pdf
- http://www.pekdadvocacy.com/documents/pattispublications/Representing/Att8.pdf
- http://www.pekdadvocacy.com/wp-content/uploads/2010/10/Letter-of-Intent-Information-Misc.pdf

Housing

Basic Housing

Down Payment or Deposit

Moving Costs

Mortgage loan

Can be done directly or indirectly via ABLE Act Account

Vehicle or Public Transportation

Lien on vehicle if title is in the name of the parent/driver or beneficiary; use other Benefits for accessibility modifications if they are available

Accounting

Funeral and Burial Expenses

Prior to death is always easier for loved ones

Vacation / Travel

Clothing

Basic clothing

Specialty clothing

Utilities

- Cell phone
- Internet
- TV services
- Water
- Power
- Heat
- Moving Costs
- Down Payment
- Renters Insurance

Medical Not Covered by Medicaid

- Glasses
- Chiropractic
- Dental
- Hearing Aids
- Acupuncture

Non-permissible Distributions

- Paying for anything that is not in the best interest of the beneficiary
- Paying for a service already paid for by another service – so trustee and beneficiary both need to know exactly what public assistance is available and the rules for each agency administering the benefits

WARNING

QUESTIONS?

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