Special/Supplemental Needs Trusts[1]

A Special or Supplemental Needs Trust (SNT) is a specific type of trust that can be created by a parent or guardian to benefit a person with a disability. *See* 42 U.S. C. s 1382b(e)(5); 42 USCA s 1396P(d)(4)(A) and (C). When drafted correctly, a special needs trust allows a person with a disability to benefit from funds placed in the trust while receiving public benefits.

A special needs trust may be created using assets of the beneficiary (the person with a disability) or funds from a family member.

The trust funds can be used to improve treatment, educational opportunities and quality of life for a person receiving public assistance. But certain rules and restrictions must be followed to allow the beneficiary of the trust to remain eligible for SSI and Medicaid.

A key rule is that trust funds be used to "supplement, but not supplant" public benefits including SSI and Medicaid. POMS SI 01120.200B.13. ["POMS" are written policy guidance issued by the Social Security Administration. They are available on the web.] Usually, special needs trusts contain language to this effect. That is, funds from the trust can be used to pay for services that are not already covered by public benefits.

Maintaining SSI Benefits

The trust needs to be irrevocable and the beneficiary must not have the power to direct the use of trust assets for his or her own support. (Whether a trust is considered irrevocable may depend on state law.) POMS SI 01120.200D.2

Trust funds paid directly to the beneficiary are treated as the beneficiary's income. If the beneficiary receives a direct cash payment from the trust in a given month, the SSI benefit for that month will be reduced dollar for dollar.

However, funds from the trust used to *purchase* goods and services for the beneficiary, including education, recreation, counseling and supplemental medical services, do not affect the beneficiary's SSI benefit. But the purchase of food, clothing, or shelter for the beneficiary does affect the SSI benefit (which is meant to cover these expenses).

If the trust purchases food, clothing or shelter, the SSI benefit will be reduced up to one-third of the total benefit (under a rule called the "presumed maximum value rule"). For example, if the entire SSI benefit for a given month will be $660 and the trust spends $400 on the beneficiary's housing that month, the SSI payment for that month will be reduced by $220, or one-third of the total benefit. POMS SI 01120.200E.1.

There are also specific rules about home ownership. When the trust purchases a home outright (there is no mortgage) for the beneficiary, the beneficiary's SSI is *not* reduced. This is true even if the beneficiary pays rent to the trust. (There may be a one-third reduction in the one month in which the home purchase is made). POMS SI 01120.200F.1 But if the trust purchased the home using a mortgage, and the trust makes monthly payments on the mortgage, then the SSI payments will be reduced by up to one-third (the portion of SSI associated with housing) each month. POMS SI 01120.200F.3.

Whether the home is purchased outright or using a mortgage, the SSI payment will be reduced by up to one-third each month if the trust pays for household expenses (including taxes, heat, electricity, water, sewer, trash collection). POMS SI 00835.465D.

Maintaining Medicaid Benefits

In 1993, Special Needs Trusts were given a special status for Medicaid purposes. 42 USCA s 1396P(d)(4)(A) and (C). Trust funds are not considered a "resource" of the beneficiary, provided that the trust meets a few conditions: the trust must be for the sole benefit of a person with a disability and, if the trust was established using the beneficiary's assets, any money that remains when the beneficiary dies must be paid to the state (up to the amount that was spent on health care for the beneficiary through Medicaid).

State laws and court decisions may specify particular procedures and requirements that need to be followed to ensure the trust does not affect Medicaid eligibility of beneficiaries in the state. See, e.g., Ala. Code § 19-3B-1101 (2007); Colo. Rev. Stat. Ann. § 15-14-412.8 (West 2006); 760 Ill. Comp. Stat. Ann. 5/15.1 (1996); Minn. Stat. Ann. § 501B.89 (West).

SSDI

There may be additional complications if the individual receives SSDI (social security disability insurance/income) in addition to SSI or Medicaid. This memo does not address any such complications.

Types of Special Needs Trusts

A third-party trust is one for which the assets are contributed by someone other than the beneficiary. Typically a parent or grandparent sets up this type of trust in place of a direct bequest in a will in order to preserve the beneficiary's eligibility for benefits. Usually, trust language explicitly directs the trustee not to make distributions that disqualify the beneficiary from government services. There may be more than one trustee managing a third-party trust. Often, a professional money manager will be responsible for investing and managing funds while a family member oversees the discretionary disbursements from the trust. The trust is not required to include a Medicaid pay-back provision. It can be set up to include a residual beneficiary in the event of the beneficiary's death.

A first-party trust is one in which the beneficiary's own assets are used to create the special needs trust. This will often be appropriate when the beneficiary has received a settlement or inheritance that would disqualify him or her from government benefits. The funds will not interfere with the provision of government benefits when 1) the beneficiary is a person with a disability under age 65; 2) the trust was established by a parent, guardian, grandparent or court; and 3) the state will receive all amounts remaining in the trust upon the beneficiary's death, up to the amount that was paid out in Medicaid expenses. POMS SI 01120.203B.1. The disability definition for this section is the same as that for SSI.[2] As in the case of a third-party trust, a first-party trust may have more than one trustee.

A pooled trust is established and administered by an organization to manage many individuals' special needs trusts. Each person has an individual account within the pooled trust. If an individual with a disability enters a pooled trust and uses his or her own resources to create the trust, it must meet all of the requirements of a first-party trust, including the pay-back provision. In some states the master pooled trust may be allowed to retain what remains in an individual trust account rather than paying it to Medicaid upon the beneficiary's death.[3] Pooled trusts should be irrevocable to avoid being counted as resources.

Examples of pooled trust documents can be found at:
http://www.sntcenter.org/TypesOfTrusts.htm

For additional information on Special Needs Trusts, you can visit:

The Centers for Medicare and Medicaid Services Website:
http://www.cms.hhs.gov/MedicaidEligibility/11_TreatmentofTrusts.asp#TopOfPage

The Social Security Administration's Program Operations Manual Online:
https://secure.ssa.gov/apps10/poms.nsf/chapterlist!openview&restricttocategory=05 (in particular see the chapters on resources and income)

The National Alliance on Mental Illness Guide:
http://www.nami.org/Template.cfm?Section=Special_Needs_Estate_Planning&Template=/ContentManagement/ContentDisplay.cfm&ContentID=8936

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[2] *See* 42 USCA s 1396P(d)(4)(A), indicating that qualifying special needs trusts include:

> A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent,

grandparent, legal guardian of the individual or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

[3] *See* 42 USCA s 1396P(d)(4)(C), indicating that qualifying pooled special needs trusts include:

> A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title) that meets the following conditions: (i) The trust is established and managed by a nonprofit association.(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.