

Presenting a live 90-minute webinar with interactive Q&A

Leveraging Special Needs Trusts to Obtain Public Benefits

Crafting First Party, Third Party, and Pooled Special Needs Trusts

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SPECIAL NEEDS TRUSTS

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Means-Tested Benefits

- Supplemental Security Income (“SSI”)
- Medicaid

Supplemental Security Income

- SSI Federal Benefit Rate (FBR) is \$698 per month in 2012 for individuals
 - Some states have state supplements in addition to the FBR that increase monthly check
 - SSI is “means tested”
 - FBR changes every year according to cost of living
 - States sometimes increase base amount (adjusted each year).

MEDICAID

- Medicaid
 - Medical insurance program
 - In many states, SSI is linked to Medicaid so that SSI beneficiaries are automatically eligible for Medicaid benefits as well
 - May pay for group homes, supported housing, assisted living facilities and nursing homes

SPECIAL NEEDS TRUSTS

A mechanism for sheltering resources to benefit individuals with disabilities.

Objectives

- Provide assets for the disabled beneficiary's special needs so that the beneficiary can live a more productive and comfortable life
- Avoid having trust assets count as a resource to the beneficiary
- Avoid having trust distributions count as income to the beneficiary

TRUSTS FOR THE BENEFIT OF A DISABLED BENEFICIARY

- Special Needs “Payback” Trust
U.S.C. 42§1396p(d)(4)(A)
- Third Party Special Needs Trust
Also known as supplemental benefits trust
- Sole Benefit Trust
Transfer of assets from person who needs Medicaid to trust for someone who needs Medicaid
- Pooled Trust
U.S.C. 42§1396p(d)(4)(C)

CONTROL OVER THE TRUST ASSETS

- The beneficiary cannot be the trustee
- The beneficiary cannot compel distributions

GENERAL TRUST REQUIREMENTS

- Supplement, not supplant, government benefits
- Definition of “special need” or “supplemental benefit”
 - No definitive explanation

What is NOT a Special Need

- Basic necessities of life
 - i.e., food, shelter, utilities
- Incidental spending money (unearned income)
- Gifts
- Insurance on life of disabled beneficiary

Special Needs “Payback” Trust

- Established with assets of disabled individual
- Individual must be under 65 at time of the establishment and funding BUT
 - SSA says payments from structured settlement beginning before age 65 and continuing thereafter are ok
- Individual must be disabled as defined in Social Security Act

SOCIAL SECURITY ACT DEFINITION OF “DISABLED”

“unable to engage in any substantial, gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months”

DEFINITION OF DISABLED FOR CHILD UNDER 18

Child “suffers from any medically determinable physical or mental impairment of comparable severity” to adult

ADDITIONAL REQUIREMENTS OF PAYBACK TRUSTS

- Trust may be established by
 - Parent or
 - Grandparent or
 - Legal Guardian or
 - Court

Medicaid “Payback” Trusts

- Certain regions require the trust of a competent beneficiary to be “seeded.”
- The parent or grandparent nominally funds the trust and the competent person then transfers his or her funds to the trust.

PAYBACK REQUIREMENTS

- Medicaid agency entitled to reimbursement from any assets remaining in trust upon death of beneficiary or trust termination for other reasons
- Reimbursement “dollar for dollar” up to amount paid by Medicaid on behalf of individual
- Irrevocable

Court-created Special Needs Trusts

- If trust is created or authorized by court may retain oversight in following areas:
 - Accountings
 - Trustee's commissions
 - Investments
 - Limitations on Purchases of Major Assets

LIENS

- Medicaid
 - Arkansas HHS v. Ahlborn, 2006 U.S. Supreme Court decision
- Medicare
 - Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA)
 - Medicare Set Aside Trusts and other Arrangements
- State Department of Human Services
- Workers Compensation
- ERISA

Structured Settlements

- Payments made directly to disabled beneficiary may render beneficiary ineligible to receive means-tested government benefits
- Trust should be payee
- Payments should “pour over” into trust
- Contingent payee of guaranteed period must be the special needs trust to preserve Medicaid’s reimbursement rights – not spouse or parents

Structured Settlements

- Consider size of settlement in determining whether to use a structure
- Factor into decision up-front cash needs, i.e., specially equipped vehicle or house

Use of special needs trusts in divorce


- SNT can be used where one of the parties is disabled, has high medical expenses, is under age 65 and is receiving or may need to receive in near future SSI and/or Medicaid
- All or part of person's share of property division and alimony payments may be ordered to be made to trustee to hold assets and use for party with disability

THIRD PARTY SUPPLEMENTAL BENEFITS TRUST

- Living trust or
- Testamentary trust created by will
- Revocable or
- Irrevocable

TRUSTS FOR THE BENEFIT OF A DISABLED BENEFICIARY

- Pooled trust
 - Separate account for each person
 - Can be established by parent, grandparent, guardian, court or individual with disabilities
 - Remaining assets in account may be subject to payback or retention
 - Deposit into trust after age 65 may or may not be uncompensated transfer



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DRAFTING THE SPECIAL NEEDS TRUST

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Questions to be Answered in Establishing a self-settled trust?

- Was the trust established with the assets of an individual under the age of 65?
- Was the trust established with the assets of an individual with disabilities?
- Is the individual with disabilities the beneficiary of the trust?
- Did a parent, grandparent, legal guardian, or court establish the trust?
- Does the trust provide specific language to reimburse the state, upon the individual's death for medical assistance paid?

Irrevocability

- ▶ A second important difference is that a first-party SNT must always be an irrevocable trust. A third-party SNT can be revocable. For example a parent establishing a third-party trust for his or her disabled child may be more comfortable with a revocable trust. The trust becomes irrevocable upon the death of the parent. But a first-party trust must always be irrevocable.

Opening provisions for a First-Party Special Needs Trust

- ▶ Declare how the trust came to be established whether by court, parent, grandparent or guardian.
- ▶ Describe the nature of the trust and that it is established in accordance with state law and 42 U.S.C. § 13969(d)(4)(A).
- ▶ Declare that the trust is irrevocable

Distribution Provisions

- ▶ The trust should not direct that distributions be made for the support, health, or maintenance of the beneficiary. Avoid any language that could interpret the trust as a support trust. Instead distributions are to be made for the beneficiary's special needs.

Give examples of special needs:

- ▶ Purchase of dental, rehabilitative or educational services.
- ▶ Items that will enrich and make the beneficiary's life more enjoyable.
- ▶ Recreational opportunities.
- ▶ Maintenance of contact with family members.
- ▶ Advocacy, including personal care consultant.

Termination Provisions

- Fees and administrative expenses may be paid during the life of the beneficiary as permitted by the trust document.
- Some expenses may be paid at the individual's death before reimbursement of medical assistance to the state.
- Payment to residual beneficiaries, debts due third parties and funeral expenses may not be permitted before reimbursement of the state for medical assistance.

Trustee Selection

- ▶ Often family members become trustees, but consider whether the family member has financial experience and understands public benefits. Consider having an experienced and independent professional or corporate fiduciary serve as trustee or co-trustee.

Prohibition of Contributions After Age 65

- If assets are added to the trust after the beneficiary with disabilities reaches age 65, the amount added will be treated as a countable resource for SSI and Medicaid. Therefore, the trust should be drafted to expressly authorize the trustee to refuse to accept additional contributions to the trust after the beneficiary attains age 65.

Other common provisions

- ▶ Spendthrift Provisions.
- ▶ Qualification & Public Accountings.
- ▶ Grantor Trust Status. Because of the compressed tax rates for trusts and the beneficiary's normally low marginal income tax rate, consider drafting the trust as an 'intentionally defective' grantor trust.

Drafting Third-party Special Needs Trusts

- Attorneys often draft third-party SNTs for parents or grandparents who have children with disabilities. They want the child to be eligible for needs-based benefits but they want to assure that resources are available to provide and protect the child upon their death. A person may also wish to establish a trust for a surviving spouse with disabilities who may be receiving needs-based benefits.

In General

- ▶ The trust should explicitly state that the grantors (parents or grandparents) intend that the trust assets are set aside for the beneficiary's special or supplemental needs. Avoid any language that enables someone to interpret the trust as a support trust or a discretionary trust with a support standard.

Purposes Clause

- ▶ Use it to state that trust assets are set aside for the beneficiary's special, supplemental, or emergency needs.
- ▶ Provide Information about the Beneficiary – date of birth; specific disability; public benefits received.
- ▶ Declare that the trust is fully discretionary.

Non-Reduction Clause

- ▶ A non-reduction clause states that the trustee should only use trust funds to provide for the beneficiary without reducing or eliminating services or financial assistance for basic maintenance, support, residential, medical or dental care that the beneficiary may receive in his or her own right from any local, state or federal government agency.

Emergency Clause

- ▶ An emergency clause permits the trustee to contravene the ‘non-reduction’ principle that trust assets should not be used if they would cause loss of public benefits. The trustee is given discretion to determine the existence of an ‘emergency’ which loosely defined would arise when available public resources were so inadequate the primary needs of the beneficiary could but be met without the intervention of the trustee.

Day-to-Day Care

- ▶ Specific authority can be given in the trust for the Trustee to engage the services of a care manager. A care manager is a licensed clinical social worker, geriatric care manager or similar professional who can be hired to prepare a care-plan and monitor the plan throughout the life of the beneficiary.

Housing

- ▶ Authority should specifically be given in the trust to allow the trustee to purchase a residence. If the beneficiary resides in the home and receives SSI he or she may face a 1/3 reduction in SSI benefits based on receipt of in-kind support and maintenance. If the beneficiary receives SSDI the 1/3 reduction does not apply.

Trustee compensation and administrative fees

- The trust should authorize the trustee to pay himself or herself reasonable compensation in accordance with express provisions in the trust or an applicable statute. The trust should contain express authority for the trustee to pay reasonable legal fees, care management fees, taxes and administrative expenses from the trust.

Retirement Plan Distributions

- Because retirement plan accounts are frequently a significant portion of the savings of parents with children having special needs, the parents will frequently designate the third-party SNT as the beneficiary of these accounts after both parents are ceased. The drafting attorney must take caution when dealing with this issue.

Conduit versus Accumulation Trusts

- A conduit trust, which simply passes the minimum distribution from the trust to the beneficiary, is not suitable if the beneficiary is on SSI or Medicaid because distribution from the trust will be income for eligibility determination.
- If the third-party SNT is the beneficiary of the retirement plan benefits, it should be drafted as an ‘accumulation trust’. An accumulation trust permits the trustee to accumulate minimum required distribution in the trust principal and make distribution for the benefit of the disabled beneficiary in the trustee’s discretion.

Planning to Obtain an Annual Exclusion for Contributions to the SNT

- Unlike conventional Crummey Power planning, the SNT beneficiary cannot be a recipient of the Crummey Power. The drafting attorney should instead name a person other than the SNT beneficiary such as a remainder beneficiary of the trust in order to qualify for the gift tax exclusion.

Remainder Beneficiaries

- ▶ Because there is no pay-back requirement include remainder provisions if trust assets remain after the death of the primary beneficiary. Even in the first-party trust remainder beneficiaries should be included.

Termination Clause

- If the law changes that would make SNT assets available resources, the trustee has the power to end the trust and distribute to the remainder beneficiaries. This power should be only in the trustee. The disabled beneficiary should not have the power.

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- Kruse, Clifton B. Jr., Third-Party and Self-Created Trusts, Planning for the Elderly or Disabled Client (ABA 3d ed. 2002).

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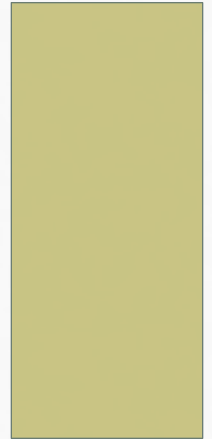
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SPECIAL NEEDS TRUSTS

BY PATRICIA E. KEFALAS DUDEK



SPECIAL NEEDS TRUST

- More than 54 million Americans have a mental or physical disability.*
- Public benefit programs are usually limited to the financially needy.
- The key component of an SNT is that the funds in the trust do not disqualify the beneficiary from public benefit programs because the funds are not considered to be “available” to the individual.

**Organization on Disability, available at www.nod.org.*

SPECIAL NEEDS TRUST

Child with a Disability
(either minor or adult)

- Preserves Medicaid and SSI eligibility
- Provides for quality of life
- Provides for trustee to act as advocate

WHY CREATE THE SPECIAL NEEDS TRUST NOW?

- Potential protection for assets from long-term care expenses via new clarified exempt transfer rule (PEM 405 and PEM 260).
- Available to receive any gifts, personal injury settlement, etc. which may come to person with disability.

TRUSTEE SELECTION

TRUSTEE REQUIREMENTS

- **Family vs. Professional vs. Counsel**
 - Complexity - SSI rules, tax reporting, investment
 - Amount under management
 - Court oversight? Bond?
 - Family relationship
 - Fees
 - Conflict of interests
 - Knowledge and experience
 - Temperament

TRUSTEE'S BALANCING ACT

- Making distributions that do not violate the “income” or resource rules of SSI, Medicaid and other needs based benefits; and
- Providing goods and services to enhance the beneficiary's quality of life
- Acting in the best interest of the beneficiary is **not** always what the beneficiary wants!!

QUESTIONS TO ASK OF A PROFESSIONAL TRUSTEE

Background

- How did you get involved in serving as a professional or private trustee?
- What is your educational background?
- Work experience before becoming professional trustee?
- How many years as a trustee?
- What kind of trusts do you manage?
- What kind of insurance do you have if your employees steal from the trust?

Materials provided with permission from Kevin Urbatsch, Myers Urbatsch, P.C., with Patricia Kefalas Dudek adding her two cents worth.

QUESTIONS TO ASK OF A PROFESSIONAL TRUSTEE

- **Current Administrative Practices**
 - How is company arranged? Staffing?
 - Who are other contact people at your company?
 - How many trusts do you currently manage?
 - Are any of these court monitored?
 - Have you filed accountings with the probate court before?
 - Is the beneficiary able to review the records?
 - How many SNT's do you have?
 - Do you have any special training as an SNT trustee?
 - What services do you provide as trustee?
 - How familiar are you with the service delivery providers?
 - Do you object to a trust protector?

QUESTIONS TO ASK OF A PROFESSIONAL TRUSTEE

- **Investment Decisions**

- How do you determine investments?
- Can the beneficiary assist in these decisions?
- Who provides the financial services? You or an outside firm?
- What are the financial person's qualifications?
- How often are investment decisions reviewed?
- Can the beneficiary review the records?
- Will the trust be able to hold real estate or a vehicle?

QUESTIONS TO ASK OF A PROFESSIONAL TRUSTEE

- **Procedure**

- As trustee, how would you begin this process?
- Is there a budget for distribution?
- How often is the budget reviewed?

- **Requesting Distributions**

- How would the beneficiary contact you for distribution?
- What is the procedure to determine if request is warranted?
- Is there a way to contact you after hours for an emergency?
- Who handles the management duties when you are unavailable?

QUESTIONS TO ASK OF A PROFESSIONAL TRUSTEE

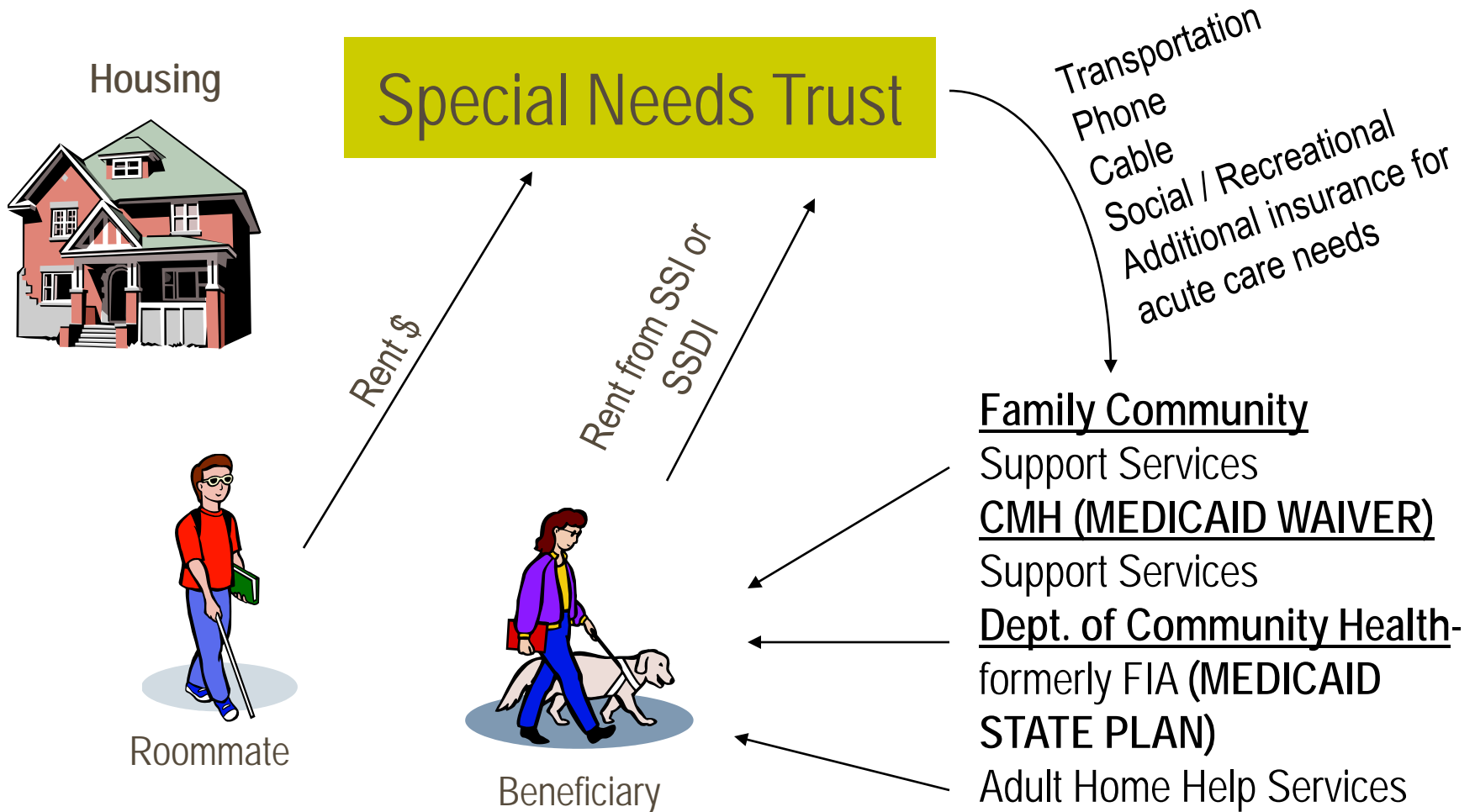
- **Requesting Distributions** (Cont.)
 - Does your business have a succession plan?
 - How do you manage real estate owned by the trust?
- **Fees**
 - What do you charge for services? What is the fee?
 - What is included in the fee?
 - Are there additional charges for investments? How much?
 - Are there additional charges for tax preparation?
 - Are there any other additional charges (i.e., legal fees)?

FUNDING THE TRUST

HOW TO FUND A SNT

- Will
- Living trust
- Gifts from grandparents and other family members
- Other
 - Beneficiary designation
 - 529 Plans
 - Surprises
 - Settlements

HOW IT WORKS



TRUSTEE DUTIES

TRUSTEE DUTIES

- Duty to carry out the terms of the Trust Agreement.
- Duty of loyalty to the beneficiary.
- Duty to act and invest prudently.
- Duty to not delegate Trustee responsibilities.
- Duty to maintain the books and records and keep the beneficiaries reasonably informed of the Trust administration.

TRUSTEE DUTIES

- **Trustee must understand:**
 - Type of distribution standard
 - Type of special needs trust and when “sole benefit” rule applies
 - Type of public benefits SNT Beneficiary receives
 - Beneficiary’s current and future needs and balancing these needs
 - Amount of assets held in the trust and investment allocation
 - What the future will hold as far as investment performance, beneficiary’s condition, public benefits funding, and tax law changes

TRUSTEE DUTIES

- Trustee has to make distributions that do not violate rules of the applicable benefit program (typically SSI and Medicaid) while providing the beneficiary with goods and services so the beneficiary is not living at the poverty level
- Payment of food or shelter is counted and will reduce SSI
 - http://www.pekdadvocacy.com/documents/estateplanning/Duties_as_Trustee_to_SNT.pdf
 - http://www.pekdadvocacy.com/wp-content/uploads/2012/03/Benefits_Checklist_3-21-12.pdf

TRUSTEE REQUIREMENTS

- **Michigan Trust Code § 700.1212**
 - Be loyal
 - Impartial
 - Use best judgment at all times
 - No commingling
 - Prudent investor rule; and
 - Keep the beneficiary's secrets

TRUSTEE REQUIREMENTS

- **General Guidelines § 700.7814**
 - Keep beneficiary informed
 - Respond promptly to beneficiary's request for information
 - Send copies of relevant terms of instrument
 - Notify beneficiary acting as trustee and provide contact information (63 days)
 - Notify beneficiary of rights
 - Notify beneficiary of fees and if they change
 - Annual accounting, inventory, receipts, deposits and distributions

TRUSTEE REQUIREMENTS

- **Judged by the Following Standards**
 - Capability and time to perform
 - Proper ongoing guidance (legal, accounting & financial)
 - Careful preparation and implementation of legal documents
 - Maintain quality records and reporting
 - Ready access and disclosure of information
 - Preparation and filing of reports

TRUST DISBURSEMENTS

SNT DISTRIBUTION STANDARDS

There are two common SNT distribution standards:

- Discretionary: This standard gives the trustee absolute discretion to make (or not to make) distributions, even those that may reduce or eliminate beneficiary's public benefits
- Supplemental: This standard gives the trustee absolute discretion to make distributions, except it does not allow distributions that cause a loss or reduction in public benefits

BEWARE THE “SUPPLEMENTAL” STANDARD

Supplemental standard is common in older SNTs

- No distributions allowed that may reduce or eliminate public benefits
- Thus, payments for food, shelter or medical expenses covered by government benefits expose trustee to potential breach of fiduciary duty claims
- Solution is to modify the existing trust standard to a discretionary distribution standard

TYPE OF SNT ALSO AFFECTS SNT DISTRIBUTIONS

First Party SNT

- Must be for the “sole benefit” of SNT beneficiary
- No payments to spouse or dependents
- Exception: child or spousal support order

Third Party SNT

- Does not have to be for “sole benefit”
- May include two or three current beneficiaries
- May allow for gifts to third parties

WHAT IS “SOLE BENEFIT” OF BENEFICIARY

POMS SI 01120.201 definition of “sole benefit” states:

- [I]f the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life.
- However, the trust may provide for reasonable compensation for a trustee(s) to manage the trust, as well as reasonable costs associated with investment, legal or other services rendered on behalf of the individual with regard to the trust.

EFFECT OF “SOLE BENEFIT” RULE

- Problematic when Beneficiary wishes to make payments to:
 - Children – especially minor children
 - Spouse
 - Parents
 - Friends
 - Significant other
- Oftentimes, the only way to make payments on behalf of children is through child support order

BUYING AN AUTOMOBILE

- Purchase of an automobile (and even distribution of the automobile to the SNT beneficiary) will not affect public benefits eligibility as long as it is the beneficiary's only automobile, because one automobile of any value is an exempt resource

HOLDING TITLE TO AUTOMOBILE

- Title should be held by someone other than SNT trustee, typically a parent/caregiver, although SNT beneficiary can also be titleholder of one car
- Trustee of the SNT should still be named as a lien holder on the automobile so that the individual with ownership cannot sell or borrow against the vehicle
- If first party SNT, it may be prudent to get a court order authorizing that title be held in the name of the individual primarily responsible for using the automobile, because the purchase may otherwise be considered a gift to the individual
- Have trustee or trust named as secondary insurer so trustee is notified if insurance lapses or is canceled

PAYING FOR VACATIONS

- Vacations can be paid for from an SNT
- Payment for hotel and restaurants is not considered ISM if person is temporarily absent from primary residence for up to 30 days
- Logistics can be difficult; pre-paid, all-inclusive vacations are easiest to manage, otherwise possible to reimburse companions, pay credit card expenses but cannot reimburse SNT beneficiary directly
- If SNT beneficiary requires assistance to travel, SNT can pay for caregiver's time and expenses

HOW ABOUT A TREADMILL?

- Exercise equipment is good, not so good if SNT beneficiary cannot use it
- One mom requested the purchase of a treadmill for her son, the SNT beneficiary. Her son used a wheelchair for mobility; she wanted reimbursement for her purchase of the treadmill because she said her son was like Christopher Reeve and it was part of his therapy. SNT trustee asked for a prescription, mother refused. SNT trustee refused. Co-trustee resigned when other co-trustee (Mom) bought it anyway.
- Remember “Sole Benefit Rule”

PURCHASING VIDEO GAMES AND CDS

- Certainly ok, but in one case:
 - SNT beneficiary kept asking to spend TONS of money on blu-ray CDs and games
 - SNT trustee was really starting to think he was selling them on the street to use the money for other items. Trustee hired a care manager to check into it. He confirmed that the beneficiary had quite an extensive collection of games and movies in his home.
 - Because of the overall value, SNT Trustee increased the coverage on renters' insurance policy to cover expense of collection replacement

PAYING FOR THE SNT BENEFICIARY'S FUNERAL

- There is potential difficulty in paying for funerals in a first party SNT when the beneficiary receives SSI
- SNT trustees may wish to explore beneficiary's thoughts on burial and end of life issues
- SNT trustee may pre-pay for funeral (burial plots or burial insurance of any amount), but if sets aside money for burial, can only add up to \$1,500 (if in beneficiary's name)
- Use irrevocable prepaid funeral trusts to get around this, but be careful; some funeral directors are going out of business, so make sure it is transferable
- Seek court order

CAN I PURCHASE ALCOHOL OR CIGARETTES?

- A common request by many SNT beneficiaries is for purchase of alcohol or cigarettes
 - The only issue is whether such distributions are considered food. Doubtful. But, even if considered food, it only applies for SNT beneficiary who is SSI recipient and then would be ISM
- Check the trust document; some Third Party SNTs specifically prohibit the purchase of such items
- Typically, advise to use SSI or SSDI money for these. Try to have SNT pay for items that beneficiary used to have to purchase for him or herself, e.g. phone, cleaning items, etc.

LIST OF PERMISSIBLE DISTRIBUTIONS

SPECIAL NEEDS TRUST LIST OF PERMISSIBLE DISTRIBUTIONS

The Trustee(s) of a Pooled Account Trust may utilize any of the foregoing listing for expenditures from the Trust. The following list of non-support items is provided for purposes of description and shall not limit the Trustee(s) in making other distributions for other items of amenities that the trustee may believe are in the best interest of the beneficiary. Those items may include, but are not limited to:

1. Automobile/Van
2. Accounting services
3. Acupuncture / Acupressure
4. Alterations or mending to clothing – shoe repairs
5. Appliances (TV, VCR, stereo, Microwave, stove, refrigerator, washer/dryer and maintenance/repairs)
6. Bottled Water or water service
7. Bus pass/public transportation costs
8. Camera, film, recorder and tapes, development of film, photo albums, scrapbooks and supplies
9. Clothing
10. Clubs and club dues (record clubs, book clubs, health clubs, service clubs, zoo, Advocacy Groups, museums)
11. Computer hardware, software, program, maintenance/service
 - a. Internet service
12. Conferences and travel related to same
13. Courses or classes (academic or recreational) including supplies
14. Curtains, blinds, drapes and the like
15. Dental work not covered by Medicaid, including anesthesia.
16. Down payment on home or security deposit on apartment.
17. Dry cleaning and/or laundry services and/or supplies
18. Elective surgery
19. Fitness equipment
20. Funeral expenses
21. Furniture, home furnishings and insurance
22. Gasoline and/or Maintenance for automobile
23. Haircuts / Salon services

LIST OF PERMISSIBLE DISTRIBUTIONS

24. Holiday Decorations, parties, dinner dances, holiday cards
25. Home alarm and/or monitoring/response system
26. Home improvements, repairs and maintenance (not covered by Medicaid), including tools to perform home improvements, repairs and maintenance by homeowner
27. Home Purchase (to the extent not covered by benefits)
28. House cleaning / maid services/lawn services/snow removal
29. Independent Care Managers/Case Managers
30. Insurance (automobile, home and/or possessions)
31. Insurance Co-Payments not covered by any other source
32. Legal Fees/Advocacy
33. Linens, towels, bedding and other household furnishings
34. Massage, facials and other similar services/treatments
35. Musical instruments (including lessons and music)
36. Non-food grocery items (laundry soap, bleach, fabric softener, deodorant, dish soap, hand and body soap, personal hygiene products, paper towels, napkins, kleenex, toilet paper, any household cleaning products)
37. Over the counter medications (including vitamins and herbs, etc.)
38. Personal Assistance Services not covered by Medicaid
39. Pet and pet's supplies, veterinary services
40. Physician specialists if not covered by Medicaid
41. Private counseling if not covered by Medicaid
42. Repair services (appliance, automobile, bicycle, household, fitness equipment)
43. Snow removal/Landscaping/Lawn Service
44. Sporting goods/equipment/uniforms/team pictures/travel to games/tournaments
45. Stationary, stamps, cards, etc.
46. Storage Units
47. Taxi cab
48. Telephone service and equipment, including cell phone, pager, etc.
49. Therapy (Physical, Occupational, Speech) not covered by Medicaid.
50. Tickets to concerts or sporting events (for beneficiary and an accompanying companion)
51. Transportation (automobile, motorcycle, bicycle, moped, gas, bus passes)
52. Utility bills (direct TV, cable TV, electric, heating)
53. Vacation (including paying for personal assistance to accompany the beneficiary)

LIST OF PERMISSIBLE DISTRIBUTIONS

54. Storage Units
55. Taxi cab
56. Telephone service and equipment, including cell phone, pager, etc.
57. Any therapy (physical, occupational, speech) not covered by Medicaid – or any other source
58. Tickets to concerts or sporting events (for beneficiary and an accompanying companion, travel)
59. Transportation (automobile, motorcycle, bicycle, moped, gas, bus passes and helmets)
60. Utility bills (direct TV, cable TV, electric, heating as long as not basic needs)
61. Vacation (including paying for personal assistance to accompany the beneficiary)

<http://www.pekdadvocacy.com/documents/estateplanning/PooledAccountTrustListofPermissibleDistributions.pdf>

IMPERMISSIBLE DISTRIBUTIONS

Examples of Trust Distributions which will Reduce SSI Benefit:

- Food
- Basic shelter related expenses (Both counted as ISM)
- Cash for any purpose (including gambling or adult entertainment)

Examples of Impermissible Disbursements from 1st Party SNT's:

- Paying for something that is not for the sole benefit of the beneficiary.
- Paying for a service already paid for by another source (duty to support is still the law)
- Distribution not in the best interest of the beneficiary.

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.
- This is not a stand-alone document; it should be incorporated into an estate planning process.
- Can be used when caring for parents or grandparents as well.

LETTER OF INTENT

- A Letter of Intent 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. It is not a legally binding document. Ideally, it should include personal information about the beneficiary that only the creator knows. It should include facts, hopes and dreams that the creator has for the trust beneficiary. There is no required format. The Letter of Intent 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.
- The Letter of Intent should be frequently updated as the beneficiary’s needs change. An updated copy should always be kept with estate planning documents.

SAMPLES OF LETTER OF INTENT

- <http://www.pekdadvocacy.com/documents/clientintake/LetterofIntent.pdf>
- http://pattidudek.typepad.com/pattis_blog/welcome.html
- <http://www.pekdadvocacy.com/documents/pattispublications/Representing/Att7.pdf>
- <http://www.pekdadvocacy.com/documents/pattispublications/Representing/Att8.pdf>

LETTER OF INTENT

- Be Specific!
 - Education
 - Housing with person-directed supports
 - Transportation
 - Medical care and equipment
 - Quality of life, social, travel, recreation, etc.
 - Real employment

LETTER OF INTENT

MEMORANDUM

It is my desire that my disabled son/daughter _____, retain residence in our present home at _____, Michigan. He/She is comfortable here and is familiar with the neighborhood/neighbors as they are with _____. Since he/she does not readily adapt to change it would be to their benefit especially upon my death.

The Special Needs Trust which I have established for _____ is intended to be used to maintain him/her in the family home.

Upon my death it is likely that _____ will need a guardian to act/advocate for him/her. I request that person be his/her brother/sister _____.

Following are notes, eccentricities about _____ which a guardian or care giver should be aware of:

- Dislikes heights
- Likes showers and swimming pools
- Dislikes underwear and any clothing which is tight around the waist due to his/her scoliosis
- Will "raid" refrigerator and cupboards
- Will go outside the house in night clothes
- Likes to go outdoors in all types of weather with or without appropriate clothing
- Moves things from place to place without remembering where they are
- After four years he/she stopped taking Prozac and Haldol in _____
- Has a burial plot next to parents at _____ Cemetery in _____
- Has savings account at _____ Bank at _____
- Dislikes confinement of any kind
- Needs much coaxing to participate in activities – prefers to be an observer
- Requires a full size bed and sturdy furniture, etc.

SNT DISTRIBUTION CONCLUSION

- **Issues that need to be considered on each distribution**
 - Does the trust document allow it?
 - Are there sufficient funds to cover it and to comply with intent of trust for the future needs of beneficiary?
 - Will it interfere with public benefits?
 - If it interferes, is it in beneficiary's best interest to pay?
 - How will distribution be made? Directly/on-line/reimbursement/other

SNT TERMINATION ISSUES

EARLY TERMINATION

- Trust ends before the death of the beneficiary.

REASONS FOR EARLY TERMINATION

- Beneficiary no longer qualifies for, needs, or wants SSI or Medicaid.
- Trust no longer contains sufficient assets to justify continued trust administration.

PROGRAM OPERATIONS MANUAL SYSTEM (POMS)

- POMS SI 01120.199
 - Exempts SNT which contains an early termination provision if certain conditions are met.
- POMS SI 01120.203(B)(3)
 - Taxes due to state and federal governments due to trust termination.
 - Reasonable fees and administrative expenses associated with final accountings and wrapping up administration.
- After payment of expenses and fees and payback to the state, remaining assets may be distributed to the beneficiary with the disability (state Medicaid agency or probate court may allow different outcomes).

MEDICAID ONLY

- Unless specifically stated otherwise, POMS' rules for SSI probably do not apply for beneficiaries receiving only Medicaid.

POMS SI 01120.199D

- When including termination provisions in a self-settled SNT, the drafter should follow the requirements under POMS SI 01120.199.

ADMINISTRATION AFTER DEATH

- Review state statutes, regulations and policies for procedures governing notification and payment to the state.
- Request a written statement from the state regarding the balance due and clarification of the formula used to ensure that the figures are correct.
- See Recent case: *Estate of Nelson v Missouri Dept. of Social Services* (Mo Ct App, W Div, No WD73957 (March 20, 2012))

ADMINISTRATION AFTER DEATH

A Missouri court of appeals rules that in a state's claim for recovery of Medicaid benefits against an estate, computerized records showing that checks were issued to the Medicaid recipient's health care providers is insufficient evidence that payment was made to the providers, so the claim must fail.

When Katherine Nelson died, the state filed a claim against her estate for reimbursement of Medicaid benefits paid on her behalf. As proof of the claim, the state provided computer records of expenditures made for Ms. Nelson's care.

The trial court denied the claim, ruling that the state did not present evidence that checks it issued to Ms. Nelson's health care providers were in fact presented and paid. The state appealed, arguing that it need only provide proof that a check was sent.

The Missouri Court of Appeals, Western Division affirms, holding that the state's evidence is insufficient because it does not establish that the checks it issued in payment of Ms. Nelson's health care services were either presented or honored. According to the court, computerized records providing the date a check was issued are not sufficient evidence of payment.

For the full text of this decision, go to <http://tinyurl.com/elr-nelson>

FOLLOWING PAYBACK

- **Trustee should:**
 - Prepare and file tax returns
 - Make tax payments
 - Do an accounting
 - Make distributions to named beneficiaries
 - Confirm parent paid child support

THIRD-PARTY SNTs

- Early termination and termination at death issues are governed by the trust document and state law.
- SI 1120.199 and SI 1120.203(b)(3) do not apply to third-party SNTs.

TRUSTEE GUIDES

- **Administering a Special Needs Trust – A Handbook for Trustees**
 - http://conferences.aicpa.org/materials/downloads/2008/03_Krooks_PCW.pdf
- **Representing and Acting as Trustee of a Special Needs Trust**
 - <http://www.pekdadvocacy.com/documents/pattispublications/Representing/Representing&ActingasTrusteeofaSNT.pdf>
- **Benefit Checklist**
 - http://www.pekdadvocacy.com/wp-content/uploads/2012/03/Benefits_Checklist_3-21-12.pdf

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