Basics of Special Needs Trusts
Thursday, October 15, 2015
Breakout Session 2
2:30 P.M. – 3:30 P.M.

Creating the Trust: SSA Requirements to get a Self-Settled Trust Accepted and Funded
Addressing the Technicalities of Doing it Right in Light of Recent Litigation

Presenter:
Patricia Sitchler
Attorney at Law
San Antonio, TX

- Materials
- Appendix 1
- PowerPoint

Stetson University College of Law presents:
2015 SPECIAL NEEDS TRUSTS
THE NATIONAL CONFERENCE
October 14-16, 2015
The Vinoy Renaissance Resort & Golf Club
St. Petersburg, Florida
CREATING THE TRUST:
SSA REQUIREMENTS TO GET A SELF-SETTLED TRUST ACCEPTED AND FUNDED

PATRICIA FLORA SITCHLER
THE LAW OFFICE OF PATRICIA FLORA SITCHLER
P.O. BOX 999
LA VERNIA, TEXAS 78121
210.863.9470
PATRICIA.SITCHLER@GMAIL.COM

BASICS OF SPECIAL NEEDS TRUSTS
STETSON UNIVERSITY SCHOOL OF LAW
OCTOBER 15, 2015
ST. PETERSBURG, FLORIDA

COPYRIGHT 2015
EXCEPT FOR APPENDIX I
WHO WILL CREATE THE SELF-SETTLED SPECIAL NEEDS TRUST ("SNT")? Recall that a self-settled SNT created pursuant to federal and state law allows an individual’s funds to be set aside for the his/her own benefit if the beneficiary is disabled within the Social Security Administration definition of disability.\(^1\) In order to fund a self-settled SNT, one must utilize the “A” trust or the “C” trust. But who signs the trust document? The Statute of Frauds requires a written document signed by the Settlor/Grantor.\(^2\) The “A” trust statute specifically states that a self-settled SNT may be created by a parent, grandparent, guardian or court, omitting the SSI recipient from the role as grantor.\(^3\) But the creation of a SNT is not a foregone conclusion, especially a Court recreated SNT. If a Judge is creating SNT, the Judge must be convinced of the appropriateness of the SNT. In a case out of New York, the Judge refused to allow the creation of a SNT since the ward’s income exceeded her necessary expenses. The Judge noted that “this is unlike a situation in which it is demonstrated that the expenses will exhaust an incapacitated person’s funds, thus rendering them impoverished. Here it appears that there are sufficient funds to meet [her] needs and to provide ‘luxuries’ as might be supplied by a SNT.”\(^4\)

1. **SNT Created by a Parent or Grandparent.** A SNT signed by a parent or grandparent is referred to by the Social Security Administration as a “seed” trust.\(^5\) About ten years ago, if a parent or grandparent (collectively referred to as “parent”) was the settlor of a SNT and the beneficiary then transferred his/her own assets to the SNT, SSI would disqualify the SNT beneficiary because the parent did not have “apparent authority” to fund the Trust. The reference to “seed trust” probably arose from a Region 6 long-time SSI policy worker. The SSI policy worker explained in 2006 that:

   “It should be noted that at the point the parent established the seed trust that met the (d)(4)(A) criteria (e.g., Medicaid pay back provision, etc.), the trust was not a (d)(4)(A) trust because it only contained the assets (e.g., $10.00 seed money) of the parent and a (d)(4)(A) trust must contain the assets of the disabled individual under age 65. However, the (d)(4)(A) provision of the Act only says that the trust must “contain” the assets of the disabled individual—it does not say the trust must be “established with” the assets of the disabled individual. Consequently, after the disabled adult child’s assets are transferred to the seed trust, the trust “contains” the child’s funds and meets the (d)(4)(A) criteria. who understood that a parent could “seed” the SNT with a nominal amount of money complying with (d)(4)(A) requirements and then the beneficiary or the beneficiary’s agent could transfer assets into the trust.”\(^6\)

In Region 6 as far back as 2006 we were able to create a seed Trust without disqualifying a beneficiary. Subsequently, POMS was revised to refer to a seed Trust as described above.\(^7\)

---

1 42 U.S.C. §1396p(d)(4)(A) & (C) sometimes referred to as an “A” Trust or a “C” Trust.

2 Restatement of Trust (Third) §§22-23. See, e.g., Texas Property Code §112.004.

3 See Section III, supra discussing the “A” and “C” trusts.

4 In the Matter of LaBarbera (Donovan), (Sup. Ct. Suffolk N.Y. April 26, 1996) as reported in 215 NYLJ 81, p.36, col. 6.

5 POMS SI 01120.203.B.1.f.


7 POMS SI 01120.203.B.1.f.
CREATING THE TRUST: SSA REQUIREMENTS TO GET A SELF-SETTLED TRUST ACCEPTED AND FUNDED

So how could anything go wrong with a parent created SNT? In a case styled Draper v. Colvin, the lower court found that Ms. Draper’s SNT was not an exempt resource. Originally the SNT was “signed” by her parents in their individual capacity but parents were also named in her POA as her agents. While the parents did not “seed” the Trust, South Dakota allowed creation of dry trusts. Nonetheless, the Court held that effectively Ms. Draper signed the trust through her agent/parents despite the fact that the parents signed in their individual capacity. The Draper case was appealed and the Eighth Circuit Court affirmed the lower court holding.

**Potential Issue:** Before addressing the potential best practices for a parent-created SNT, the author would caution the use of a parent or grandparent to create a self-settled SNT. Conceivably, a parent could return to Court alleging that the SNT is invalid because the parent/settlor did not understand what s/he was signing. For example, an 18 year old transferred her personal injury funds into a parent created SNT. Following funding, the parents, who are caring for the 18 year old, asked for distributions that would benefit the parents and/or extended family. The distributions were denied by the Trustee and so the parents returned to court to “bust” the Trust alleging that the parent/settlor never understood what s/he signed and so the SNT was void. Thus, it would be wise to scrutinize the family dynamics when trying to determine the best method of creating the SNT.

**Good Practices (or donning a belt-and-suspenders):**

- The parent signing the SNT should not be the Agent named in a Power of Attorney, if possible.
- Even if your state allows the creation of a dry trust, seed the trust with a nominal amount of money. Proof of funding could be by opening the SNT account with the nominal funding amount or photocopying a $5 bill as an Exhibit to the SNT.
- If there is a concern that funding a seed SNT might disqualify the trust beneficiary, then seed the Trust and nominally fund it with the beneficiary’s own funds and then submit the seed trust to SSA for review. If the seed trust is found to be deficient, at least the beneficiary would not lose SSI eligibility allowing for the seed trust to be amended or re-drafted.

2. **Court Created SNT.** Federal law allows a Court to create a SNT for a person who meets the federal criteria found in 42 U.S.C. §1396p(d)(4)(A) & (C). What gives a Judge the authority to create a trust for an individual and require the individual’s assets to fund the trust? In some states judicial authority arises from Common Law and Equity. In other states there are specific statutes authoring a Judge to create a management trust for the benefit of a minor or adult person with a disability who has no guardian. For example, Texas Property Code §142.005 allows a judge in litigation to create a Trust for a minor or an incapacitated person who has no guardian. Section 142.005 fits the definition of the

---


9 779 F.3d 556 (8th Cir. 2015, no writ).

10 Title 18, United States Code, Section 504 permits black and white reproductions of currency and other obligations, provided the copies “shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated” and “the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.” 18 U.S.C. §504 (ii) & (iii). Most photocopy machines are digital scanners. The copier hard-drive will keep a copy of any scanned currency but in a high-use copier, the scans are most likely overridden within a few days of copying. If disposing of the copier or copier hard-drive, it would be wise to wipe the hard-drive before disposing of the drive.

Judge-created trust referred to in 42 U.S.C. §1396p(d)(4)(A) and (C).

There was much inconsistency nationwide when SSA reviewed Trusts. In order to address these inconsistencies, a trust review manual was published by the Social Security Administration in an effort to make the review of trusts more consistent. The “Fact Guide for National Trust Training” dated 12/16/2013 includes subsection “F” entitled “Exceptions to Counting Self-Funded Trusts as Resources” referring to who can establish a Trust. The local SSA office staff initially reviews the SNT. “If there are unresolved issues that prevent you [local staff] from determining the resource status of the trust, or there are issues that you believe need a legal opinion, follow your regional instructions or consult with your Regional Office (“RO”) program staff via vHelp. If necessary, the RO staff will seek guidance from the central office (CO) or the Regional Chief Counsel (RCC). Do not contact or refer materials to the RCC directly.”

Notwithstanding the new guidelines, the Social Security Administration has recently disqualified SSI beneficiaries in some states when the beneficiary or the beneficiary’s next friend, attorney or agent filed the Application or Motion asking a Judge to consider creating a SNT for the benefit of a beneficiary with a disability. The SSI reasoning was:

“An appointed representative may petition the court to create a trust for the beneficiary. The court will approve the request and initiate creation of the trust. While it appears that the court “established” the trust, it was the appointed representative acting as an agent of the beneficiary who actually established the trust. In this case, we would consider the beneficiary to have established the trust. For SSI purposes, in order to find that the court created the trust, the trust must be the direct result of a COURT ORDER.

Example. A beneficiary wins a lawsuit in the amount of $50,000.00. As part of the settlement the judge orders the creation of a trust in order for the beneficiary to receive the $50,000.00. As a direct result of this court order, a trust was created with the beneficiary’s settlement money. The trust document lists the $50,000.00 as the initial principal amount in Schedule A of the trust. We would consider this trust to be established by the court because the beneficiary had no power to create the trust himself/herself.”

This instruction created a dilemma. A judge does not open a drawer and pull out an order creating a SNT. All orders originate with an Application or Motion. One solution would be to have a guardian ad litem appointed to bring the Application or Motion requesting the Judge to create the SNT for the benefit of the plaintiff/disabled individual. Since a Guardian is allowed by the statute to create a SNT, then the Guardian ad Litem should not be considered an agent of the trust beneficiary and the Judge can sign the Order creating the Trust. However, in cases where the trust beneficiary suffers from a physical disability but is otherwise mentally competent, there is no basis for appointing a Guardian ad

---

11 POMS SI 01120.202A.1.d.


13 “A guardian ad litem is, in a sense, an officer of the court. ‘[He] is not simply counsel to one party in the litigation, but instead plays a hybrid role, advising one or more parties as well as the court.’ DuPont v. Southern Nat’l Bank of Houston, 771 F. 2d 874, 882 (5th Cir. 1985), cert. denied, 475 U.S. 1085 (1986).
Litem. But after communications with the Baltimore office of concerns with the Fact Guide for National Trust Training instructions, the Social Security Administration recently amended its interpretation of a Court created SNT stating:

“In the case of a special needs trust established through the actions of a court, the creation of the trust must be required by a court order for the exception in section 1917(d)(4)(A) [and presumably (d)(4)(C)] of the Act to apply. That is the special needs trust exception can be met when courts approve petitions and establish trusts by court order, so long as the creation of the trust has not been completed before, [sic] the order is issued by the court. Court approval of an already created special needs trust is not sufficient for the trust to qualify for the exception. The court must specifically either establish the trust or order the establishment of the trust.”

Again looking at the Draper case, the parents tried to rectify the SSA objections that the SNT did not comply with (d)(4)(A) requirements, so the Draper Trust was judicially amended and signed by the Judge. However, the South Dakota Court held that the SNT was not established by the South Dakota Court. It was only approved by the Court.

If an individual was erroneously disqualified by SSI because someone other than the Judge or Guardian brought a motion or application requesting the Court to create a SNT, the beneficiary/SSI recipient must immediately request SSA to re-open the case and/or the erroneous determination must be appealed. The Social Security Administration will not voluntarily reopen cases that were erroneously counted as a resource because the court was petitioned to establish the trust.

“The SSI claimant, recipient or representative payee must file an appeal or request reopening if he or she disagrees with our determination. If reopening is necessary per SI 04070.015, follow the administrative finality rules in SI 04070.010.”

**Good Practices:**
- Review POMS SI 01120.202 “Development and Documentation of Trusts created on or after 01/01/00” and POMS PS 01825.000 for your state’s specific trust rulings.
- Track the language in the SSA clarification using the phrase that the Court hereby “establishes” the SNT.
- Insert specific state statutory authority for a Court created trust in the Court Order for ease of reference for SSI review.
- Beware of denials based on the Fact Guide for National Trust Training dated 12/16/2013 that was subsequently revised by Policy Clarification for Trusts dated May 28, 2015.

3. **Created by a Guardian.** Federal also allows a Guardian to create and establish a SNT. The

---

14 SSA unpublished Policy Clarification for Trusts dated 05/28/2015; See Appendix I attached to this paper.


16 SSA unpublished Policy Clarification for Trusts dated 05/28/2015, paragraph C.3; See Appendix I attached to this paper.

17 SSA unpublished Policy Clarification for Trusts dated 05/28/2015, paragraph C.3; See Appendix I attached to this paper.
Fact Guide for National Trust Training states: “A person establishing the trust must have legal authority to act with regard to the assets of the individual. An attempt to establish a trust account by a third party with the assets of an individual WITHOUT the legal right or authority to act with respect to the assets of that individual will generally result in an invalid trust.” For example, a management trust in the form of a self-settled SNT can be signed by a Guardian pursuant to Court Order as set out in Texas Estates Code §1301 et seq.

**Good Practices:**
- Review POMS SI 01120.202 “Development and Documentation of Trusts created on or after 01/01/00” and POMS PS 01825.000 for your state’s specific trust rulings.
- Make clear in the Court’s order that the Court is ordering the Guardian to establish the SNT and fund the Trust with the Ward’s funds giving the Guardian the necessary legal authority to act.
- Insert specific state statutory authority for a Court created trust in the Court Order for ease of reference for SSI review.

4. **Pooled Trust created by the Beneficiary.** Federal law allows the SSI recipient to create and establish a Pooled SNT.

**Good Practices:**
- Review POMS SI 01120.225 “Pooled Trust Management Provisions” and SI 01120.202 “Development and Documentation of Trusts created on or after 01/01/00.”

---


19 *Johnson’s Texas Estates Code Annotated*, 2014 Edition, Commentary to §1301.051. “Amendments in 2011 extended the list of persons for whom a management trust can be created to include persons with only a physical disability. The 2013 amendments liberalized the rules applicable to such trusts. The disabled person may himself make application for establishing the trust, the court need not appoint an attorney ad litem or guardian ad litem, the trustee need not be a bank or trust company and no fiduciary bond or account are required. See §§ 1301.052, 1301.057, 1301.058, 1301.101 and 1301.154.”

20 42 U.SC §1396p(d)(4)(C).
PATRICIA (PATTY) FLORA SITCHLER, CELA*
THE LAW OFFICE OF PATRICIA FLORA SITCHLER
P.O. Box 999
La Vernia, Texas 78121
(210) 816-1761
patricia.sitchler@gmail.com

*Certified as a Elder Law Attorney by the
National Elder Law Foundation as recognized
by the Texas Board of Legal Specialization

EDUCATION
J.D. Degree (magna cum laude), St. Mary’s University School of Law, 1990
B.A. Degree (mathematics), Trinity University, 1975

PROFESSIONAL ACTIVITIES
Sole practitioner practicing throughout the state of Texas
Adjunct Professor of Law, St. Mary’s University School of Law (1998 to present)
Co-Chair, Long Term Care, Medicaid and Special Needs Trusts Committee of the Real Property, Trusts & Estates
Section of the American Bar Association (2010-2013)
Member, National Academy of Elder Law Attorneys (national and state chapters)(State Board of Directors, 2000
to 2006, 2009 through 2012, Texas Chapter President 2004-2005)
Member, Special Needs Alliance
Member of the College of the State Bar of Texas (1997 to present)
Member of the American Bar Association, State Bar of Texas, San Antonio Bar Association; Texas Trial Lawyers
Association and San Antonio Trial Lawyers Association
Planning Committee Chair, State Bar of Texas, Elder Law and Guardianship Course (2004)
Planning Committee Member, State Bar of Texas, Advanced Estate Planning Course (2008 & 2013)
Planning Committee Member, The University of Texas School of Law Estate Planning, Guardianship and Elder
Law Conference (1999 to present)
Co-Director, The University of Texas School of Law Special Needs Trust Conference (2005 to present)
Listed in the 2011 Inaugural Edition, Martindale-Hubbell Bar Register of Preeminent Women Lawyers (and in 2012-
2014)
Co-Author of Save My Home! Saving Your Home, Farm or Ranch from Medicaid Estate Recovery in Texas, Elder Law Trio
Press, Houston, 2005.
Co-Author of Elder Law, Texas Practice Series Vol. 51, Thomson-Reuters (formerly West Publishing), 2008 to present.
Named the Outstanding Attorney in San Antonio in Elder Law and Estate Planning (2013) by the San Antonio Business
Journal.

LAW-RELATED PUBLICATIONS AND PRESENTATIONS
Author, Powers of Attorney: Recent Developments, University of Texas School of Law Estate Planning, Elder Law and
Guardianship Course, Galveston, Texas, August 2015.
Co-Presenter, Alternatives to Guardianship, University of Texas School of Law Estate Planning, Elder Law and
Guardianship Course, Galveston, Texas, August, 2015.
Author, Elderly/Disability Issues and Medicaid, SSI and Social Security Disability; 2015 Graduate Texas Trust School, Wealth
Management & Trust Division of the Texas Banker’s Association, Dallas, Texas, July 2015.
Author, What Real Estate Attorneys Need to Know about Wills and Probate, State Bar of Texas Advanced Real Estate Law
Author, Creating a SNT without Creating Malpractice, State Bar of Texas Advanced Elder Law Conference, Houston,
Texas, April 9, 2015.
Author, Cracking the Entitlements Enigma Code: What Practitioners Need to Know about Medicaid, Corpus Christi Estate
Planners Counsel, Corpus Christi, Texas, November 20, 2014.
Author, Auditing the MERP Claim, Texas-NAELA Annual Fall Meeting, Fort Worth, Texas, October, 1, 2014
Author, Medicaid Do’s and Don’ts, 2014 Medico-Legal Summit, South Texas Geriatric Education Center and the VA-
GRECC, San Antonio, Texas, September 18, 2014.
Author, Elderly/Disability Issues and Medicaid, SSI and Social Security Disability; 2014 Graduate Texas Trust School, Wealth
Management & Trust Division of the Texas Banker’s Association, Dallas, Texas, July 21, 2014.


Author, And How are the Children: Planning for Children with Special Needs Trusts, University of Texas School of Law 2014, 10th Annual Changes and Trends Affecting Special Needs Trusts, February 6-7, 2014, Roundrock, Texas.


Author, The Good News/Bad News Client: Adult Protective Services issues that may arise when caring for an Elderly or Disabled individual, University of Texas Health Science Center Medico-Legal Conference, October, 10, 2013.


Panelist, Ask the Experts, Estate Planning, Guardianship & Elder Law Conference, University of Texas School of Law, Galveston, Texas, August 8-9, 2013.

Author, Elderly/Disability Issues and Medicaid, SSI and Social Security Disability; 2013 Graduate Texas Trust School, Wealth Management & Trust Division of the Texas Banker’s Association, Dallas, Texas, July 2013.


Author, Special Needs Trust: The Moving Target, University of Texas School of Law 2013, 9th Annual Changes and Trends Affecting Special Needs Trusts, February 7-8, 2013, Austin, Texas.


Numerous presentations 1996 though 2012.
A. Purpose

This administrative message provides reminders regarding our current policy on special needs trusts and clarifies our policies on court establishment of trusts and the reevaluation of previously excepted trusts.

B. Background on court ordered trusts and the reevaluation of trust resource determinations

We are clarifying our policy regarding the establishment of special needs trusts by court orders, as set out in SI 01120.203B.1.f. The special needs trust exception can be met when courts approve petitions and establish trusts by court order so long as the creation of the trust has not been completed before the order is issued by the court. [emphasis added] In addition, the reevaluation of previously excepted trusts during posteligibility (PE) events is not necessary unless there is an amendment to the trust or a clarification or change in policy that may affect the trust resource determination.

C. Policy for exception to counting trusts that meet the requirements of section 1917(d)(4)(A) of the Social Security Act

The resource counting provisions of section 1613(e) of the Act do not apply to a trust:

- which contains the assets of an individual under age 65 and who is disabled; and
- which is established for the benefit of such individual through the actions of a parent, grandparent, legal guardian or a court; and
- which provides that the State(s) will receive
all amounts remaining in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State Medicaid plan. For more information on the special needs trust exception, see SI 01120.203.

1. Who established the trust
The special needs trust exception does not apply to a trust established through the actions of the disabled individual himself or herself. To qualify for the special needs trust exception, the assets of the disabled individual must be put into a trust established through the actions of the disabled individual's:
- parent(s);
- grandparent(s);
- legal guardian(s); or
- a court.

2. Courts establishing trusts
In the case of a special needs trust established through the actions of a court, the creation of the trust must be required by a court order for the exception in section 1917(d)(4)(A) of the Act to apply. That is the special needs trust exception can be met when courts approve petitions and establish trusts by court order, so long as the creation of the trust has not been completed before, the order is issued by the court. Court approval of an already created special needs trust is not sufficient for the trust to qualify for the exception. The court must specifically either establish the trust or order the establishment of the trust.

[emphasis added]

a. Example of a court ordering establishment of a trust

John Jackson is a legally competent adult who inherited $250,000 and is an SSI recipient. His sister, Justine Jackson, petitioned the court to create and order the funding of the John Jackson Special Needs Trust. Justine also provided the court with a draft of the trust document. A month later the court approved the petition and issued an order requiring the creation and funding of the trust. This trust meets the requirement in SI
The fact that the trust beneficiary is a competent adult and could have established the trust himself is not a factor in the resource determination.

b. Example of a court-established trust
A beneficiary wins a lawsuit in the amount of $50,000. As part of the settlement, the judge orders the creation of a trust in order for the beneficiary to receive the $50,000. As a direct result of this court order, a trust was created with the beneficiary's settlement money. The trust document lists the $50,000 as the initial principal amount in Schedule A of the trust. This trust meets the requirement in SI 01120.203B.1.f.

c. Example of a court-approved trust
Jane Smith is ineligible for SSI benefits because she has a self-established special needs trust that does not meet the requirements for exception in SI 01120.203. Jane petitioned the court to establish an amended trust and to make the decision retroactive, so her original trust would become exempt from resource counting from the time of its creation. The court approved the petition and issued a nunc pro tuno order stating that the court established the trust as of the date on which Jane Smith had previously established the trust herself. The amended trust does not meet the requirement in SI 01120.203B.1.f. The court did not establish a new trust; it merely approved a modification of a previously existing trust.

d. Example of a court-approved trust
Dan Peters is the trust beneficiary of a special needs trust. His sister petitioned the court to establish the Dan Peters Special Needs Trust and submitted Dan's already created special needs trust to the court along with the petition. Although the court order states that it approves and establishes the trust, the court simply approved the existence of the already established special needs trust. This trust does not meet the requirement in SI 01120.203B.1.f.

3. Reopening of erroneous trust resource determinations
Do not voluntarily reopen cases where we erroneously determined that the trust was countable because the court was petitioned to establish the trust. The SSI claimant, recipient or representative payee must file an appeal or request reopening if he or she disagrees with our determination. If reopening is necessary per SI 04070.015, follow the administrative finality rules in SI 04070.010.

For pending claims or cases under review in the appeal process, use this policy clarification to assist you in making the trust resource determination.

D. Policy for reevaluating trust resource determinations

Evaluate all trusts where a claimant, recipient, or donee alleges ownership of a trust that needs a trust resource determination (such as a new or amended trust) in all initial claims and PE events to determine the resource status of the trust.

For PE events, do not reevaluate the trust resource determination unless there is new and material evidence, such as an amendment to the trust or a clarification or change in policy that may affect the trust resource determination. However, evaluate all trust income implications, such as trust distributions and payments, if any. For resource status changes in PE events, see SI 01120.200J.7.

E. References

SI 01120.200 Trusts - General, Including Trusts Established Prior to 1/1/00, Trusts Established with the Assets of Third Parties and Trusts Not Subject to Section 1613(e) of the Social Security Act
SI 01120.203 Exceptions to Counting Trusts Established on or after 1/1/00
EM-14026 REV Regional Centralization of SSI Trust Reviews - Business Process Using the SSI Trust Monitoring System (SSITMS)

Direct all program-related and technical questions to your RO support staff or PSC OA staff. RO support staff or PSC OA staff may refer questions or problems to their Central Office contacts

------------------------End Announcement