

# The How-To's of Drafting SNTs

Adapted & Updated from Janet L. Lowder, CELA "Drafting Redux"

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## I. INTRODUCTION

What is so special about a special needs trust? Generally, special needs trusts, whether a first-party Medicaid Payback Trust, a Supplemental Services Trust, or a Third Party Wholly Discretionary Trust, are specifically designed to protect the beneficiary's existing or potential governmental benefits and to allow the beneficiary to benefit from the funds in the trust. "Special Needs Trust" (SNT) is a generic term commonly used to describe trust funds created to supplement – not supplant - the government benefits received by the beneficiary. By maintaining a beneficiary's eligibility for government benefits, the pool of assets available for the care of the beneficiary becomes significantly broader and deeper and lasts for a longer period of time. Generally, if a client is asking whether an existing trust qualifies as a special needs trust, they are really asking if the trust will work to protect the beneficiary's eligibility for need-based public benefits. The answer is often dependent on state law.

A number of reasons may prompt someone to establish a SNT. These are the most common situations:

1. To hold assets belonging to a beneficiary with a disability who needs means-tested benefits, most often Medicaid;
2. To hold assets, such as an inheritance or personal injury settlement, coming into the hands of an individual with a disability already receiving means-tested benefits;
3. As an estate planning tool to hold the disabled beneficiary's share of the parents' or others' estates;
4. To receive and hold child support, alimony or a property settlement in a divorce where a child or one spouse is disabled; and
5. To receive assets from an aged or disabled individual who is trying himself to become eligible for Medicaid.

The goal of the SNT is almost always to ensure that that the beneficiary will not experience a lapse in eligibility for benefits or a reduction of benefits already being received, and to avoid the imposition of a penalty period for an improper transfer upon seeking initial eligibility for benefits. Another important purpose of the SNT, especially in an estate planning context, is to ensure a pool of funds to pay for advocacy and care management for the beneficiary over time.

There are a number of “special” words or provisions that need to be considered when drafting any type of special needs trust to ensure that the trust meets the special needs of the beneficiary. The topics covered in this outline include the following:

1. First and foremost, the trust must meet the requirements of the benefit programs upon which the beneficiary is or may be dependent so that the trust is not considered a resource to the beneficiary. Analysis of whether or not a trust will “work” to preserve government benefits must look separately at self-settled trusts and third party trusts, as each variety has its own set of rules.
2. Second, the distribution standard must be aligned with the needs of the beneficiary. How detailed or vague should you make the directions to the trustee? What should be in the trust and what should be in the letter of intent?
3. What special provisions should be included? You may want to address specific issues in the trust that are of particular concerns to the settlor of the trust, such as residential placement, travel expenses for family members, and advocacy or case management.

## **II. GOVERNMENT BENEFITS**

It is critical to determine what benefits the beneficiary is presently receiving, or likely to need in the future. If a disabled individual is not on means-tested benefits and it is not probable that he will need them in the future, a traditional special needs trust may not be necessary. If the individual is already on SSI and/or Medicaid and those benefits are an important part of his or her total care, failure to protect those benefits can be devastating. A careful analysis of the benefits the trust is intended to protect is critical to ensure an appropriately drafted trust.

### **A. Benefits in General**

Many persons with disabilities under age 65 depend on government benefit programs for income, health care coverage, and residential placement. Some programs, such as Social Security Disability Insurance (SSD or SSDI) and Medicare, may be available regardless of the recipient's income or property. SSD provides cash income to eligible individuals; Medicare is a health insurance program that covers a portion of prescriptions, hospitalization, outpatient care, and a limited number of days of nursing home care when skilled nursing care or short-term rehabilitation is needed. Whether one is eligible for SSD at all, and the amount of the monthly benefit, are determined not by financial assets, but by prior work history of the claimant or the wage-earner under whose record the claimant qualifies for benefits.

In contrast, means-tested programs, such as Supplemental Security Income (SSI) and Medicaid, have strict income and asset guidelines for eligibility. SSI provides cash income to individuals who have not accrued enough work credits to be eligible for SSD, including disabled minor children of low-income parents. Medicaid provides coverage for medical expenses, including prescription drug costs, unless the individual is also a Medicare recipient, in-home health care services, and payment for long-term nursing home care or residential placements. Another advantage of becoming Medicaid eligible is that a number of state agencies that serve people with developmental disabilities are requiring participants who are not Medicaid-eligible to privately pay a portion of the cost of the services.

Many people receive a combination of all four of these benefits (SSD, Medicare, SSI, and Medicaid), as well as additional benefits from various sources, including food stamps and housing and utility subsidies, and these additional benefits typically impose their own eligibility rules. Typically, Medicaid will only cover what Medicare does not, and Medicaid may pay the Medicare premium to make sure Medicare is available to a "dually-eligible" individual.

Receipt of assets from any source can impact one's eligibility for means-tested programs (SSI and Medicaid). An unanticipated monetary gift or an inheritance may be considered income and/or a resource, suddenly disqualifying an individual from receiving benefits from these very important programs. The recipient cannot simply give away the excess assets, or disclaim the inheritance, as this creates a period of ineligibility for SSI and may create a period of restricted eligibility for Medicaid. The length of the period of outright ineligibility or

restricted eligibility is dependent upon the value of the resources transferred; the length of the period of restricted eligibility for Medicaid is also dependent on the type of Medicaid benefits the recipient is receiving. Community Medicaid, also often referred to as Medicaid for the Disabled, generally does not restrict eligibility for transfers, while Medicaid waivers, institutional Medicaid, and SSI do impose penalty periods.

Most of the government benefits we are protecting use the Social Security definition of disability for eligibility purposes. For adults, disability is defined as a mental or physical impairment that prevents a person from engaging in substantial gainful activity (SGA) that will last at least 12 months or result in death. Earnings are considered SGA if average countable gross earnings exceed \$1,260 per month in 2020. For children, disability is based on a list of medical impairments or severe functional limitations.

#### B. SSD/Medicare

Social Security Disability Insurance (SSD or SSDI), including adult Childhood Disability Benefits (CDB) (formerly Disabled Adult Child (DAC) benefits) for an individual disabled prior to age 22, and Medicare are all insurance programs, not means-tested benefits. Eligibility depends on the wage-earner having sufficient quarters of coverage. SSD provides monthly income based on the earnings history of the qualifying wage-earner. Medicare follows two years later. There is no resource or *unearned* income test for these benefits. However, a person whose impairments allow them to engage in part-time work must report all earned income to Social Security.

An adult child disabled prior to age 22, continuously disabled, and dependent or deemed dependent on a parent, may receive benefits on the parent's earnings record once the parent is retired, disabled or deceased.<sup>1</sup> Eligibility for CDB benefits terminates if the child marries, unless they marry another individual receiving benefits. Again, Medicare benefits begin 24 months after SSD benefits begin paying.

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<sup>1</sup> The benefit is generally 50% of the parent's monthly benefit if the parent is retired or disabled; this amount increases to 75% upon the parent's death, subject to family maximums.

Regardless of the parents' or adult child's wealth, these benefits are available if sufficient Social Security taxes have been paid. Always ask disabled or retired parents about the benefits their disabled child is receiving, and ask disabled children about their parents' status and/or benefits. Sometimes families are entitled to more benefits than they are receiving.

### C. Means-Tested Benefits

Supplemental Security Income (SSI) and Medicaid are means-tested benefits. Eligibility for both programs is based on financial need, and both income and resources of the applicant are considered. These programs assist individuals who are 65 years or older, legally blind, or disabled as defined by Social Security. SSI provides a guaranteed income floor of \$783 per month for a single person in 2020. A number of states add a supplement to that amount as well.

Medicaid is usually the most critical of the benefits we are trying to protect. It provides basic health coverage, as well as residential placements in nursing homes, group homes or community settings. Other need-based benefits which may be important are subsidized housing, such as Section 8, food stamps, and Veterans' benefits.

The SSI/Medicaid recipient must be indigent, and their income must be less than certain standards. Countable resources can be no more than \$2000 for an individual. The resource limit for Medicaid is the same as SSI in most states. A resource is property which is owned by the individual, available to him or her, and not exempt.<sup>2</sup>

Amounts owned on the first of the month are resources, while amounts received during the month are income. AIncome@ retained into the next calendar month ripens into a resource. Income and resources become countable only when they are available to the recipient (or could be available upon request.) An individual has a duty to report increases in income or resources within 10 days of receipt.

If the applicant is a minor, her parents' income and resources are deemed to the minor. Medicaid Waiver programs may relieve the parental deeming requirement. Additionally, an adult

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<sup>2</sup> A non-exhaustive list of exempt resources includes a residence, one vehicle, tangible personal property, irrevocable funeral contracts, burial plots, minimal life insurance and properly drafted trusts.

child that resides in her parents' home, especially if she pays no room and board, may find her SSI reduced and a Medicaid "spend-down" assessed. Payment of food and shelter costs for an individual receiving SSI benefits (or providing a place to live and not charging for it, as is the case of many disabled individuals residing with their parents) is considered income to the individual called "in-kind support and maintenance" (ISM).

It should be clear that receipt of assets by a recipient of means-tested benefits, whether from a settlement or an inheritance, or because a trust was improperly drafted and is now funded and counts as an available resource, can wreak havoc with the person's ongoing eligibility for the benefits. As with receipt of any assets, if a trust is determined to be an available resource, means-tested benefits will be terminated until the trust is spent down or modified. We often see failure to disclose a trust at the time the trust was funded, which can lead to determination of overpayments, and can even result in a fraud investigation or referral to the county prosecutor.

### **III. CRITICAL LANGUAGE**

#### **A. Ability to Revoke or Terminate**

In order to protect benefit eligibility, the beneficiary (or a parent or spouse whose income deems to the beneficiary, hereinafter "deemor") should not have the legal authority to revoke or terminate the trust and then use the funds to meet his food or shelter needs, and may not have the ability to direct the use of the trust principal for his support and maintenance under the terms of the trust. If the beneficiary or a deemor has these powers, the trust principal **is** a resource for benefit purposes. The special needs trust must clearly state that the beneficiary or a deemor has no right to revoke the trust or direct that the trust assets be used for his support and maintenance.

#### **B. Spendthrift Provision**

The trust should contain an appropriate spendthrift clause which prevents assignment of the beneficiary's interest in the trust without the trustee's prior approval in writing. If the individual can sell his beneficial interest in the trust, such as the right to the income generated by the trust, that interest is a resource. For example, if the trust provides for payment of \$200 per month to the beneficiary for spending money, the beneficiary may be able to sell the right to

future payments for a lump-sum.<sup>3</sup> Including a valid spendthrift clause which prohibits selling or assignment of the interest in the income prevents this.

The spendthrift provision in the trust should be drafted carefully. Drafters often include a boilerplate spendthrift clause which includes a support standard that becomes effective if a creditor attempts to attach the trust property, or if a beneficiary attempts to alienate or assign his interest in the trust. This support standard could cause the trust to be considered available to the beneficiary. As mentioned above, the spendthrift clause trust should prevent the beneficiary from assigning his interest, or the trust may be countable for SSI. Even better is a provision which allows the beneficiary to assign his interest, but only with the prior written consent of the trustee. If the beneficiary has a mandatory income interest in the trust, this permits the beneficiary to irrevocably assign the income to an exempt, self-settled trust. If the trust itself is determined to be an available resource, this will also allow assignment of the beneficiary's entire rights in the trust to another trust which is exempt.

**SPENDTHRIFT PROVISION:** No interest in the principal or income of the Trust Estate shall be anticipated, assigned or encumbered without the prior written consent of the Trustee, or shall be subject to any creditor's claim or legal process, prior to its actual receipt by or for the Beneficiary hereof. Furthermore, because the Trust Estate is to be conserved and maintained for the Beneficiary's special needs throughout her lifetime, no part of the corpus hereof, neither principal nor undistributed income, shall be construed as part of the Beneficiary's estate or be subject to the claims of voluntary or involuntary creditors for the provision of goods, care and services, including without limitation residential care, by any public entity,

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<sup>3</sup> [SI 01120.200B.13](#). A **spendthrift clause** or **spendthrift trust** generally prohibits both involuntary and voluntary transfers of the trust beneficiary's interest in the trust income or principal. This means that the trust beneficiary's creditors must wait until the trust pays out money to the trust beneficiary before they can attempt to claim it to satisfy debts.

It also means that, for example, if the trust beneficiary is entitled to \$100 a month from the trust, the beneficiary cannot sell his or her right to receive the monthly payments to a third party for a lump sum. In other words, a valid spendthrift clause would make the value of the trust beneficiary's right to receive payments not countable as a resource.

However, not all States recognize spendthrift trusts, and States that do recognize spendthrift trusts often do not allow a grantor to establish a spendthrift trust for the grantor's own benefit. In those States that do not recognize spendthrift trusts (whether at all or because the trust is a grantor trust), we would count the value of the trust beneficiary's right to receive monthly payments as a resource because it may be sold for a lump sum.

We do not require trusts to include a spendthrift clause. If the trust provides for mandatory periodic payments to the beneficiary, then the trust may need a spendthrift clause for the trust not to count as a resource.

office, department or agency of the State of Ohio or any other state, or the United States. It is Settlor's intention that any trust created hereunder shall be a spendthrift trust, as contemplated by Section 5805.01 of the Ohio Revised Code, as amended, and the spendthrift provisions contained in this paragraph shall constitute a material purpose of the trust created hereunder.

### **C. Expression of Settlor's Intent**

Language which reflects the grantor's intent regarding the beneficiary's disability and benefit eligibility should always be included in a special needs trust to give guidance to the trustee and to provide a basis upon which the trust can be reformed or amended if need be in the future.

STATEMENT OF INTENT: Our son is disabled and may rely on public benefit programs for much of his life. It is our desire, but not our direction, that the Trustees, in the exercise of the Trustees' sole, absolute, and uncontrolled discretion, provide supplemental goods and services for the benefit of our son which will provide him dignity and grace, enhance his day to day existence, and allow him the highest possible development of his abilities, but in a manner that will not jeopardize benefits he may receive from public assistance programs. This paragraph shall be construed as being a precatory statement of our intent in creating this Trust, and not as providing standards to guide the Trustees in exercising their discretion to make distributions to or for the benefit of the beneficiary.

### **D. Limited Power to Amend the Trust**

Initially including an explicit power in the trustee or a trust protector to amend the trust if necessary to protect the beneficiary's eligibility for benefits, may spare the trustee having to take court action to modify the trust later. Consider defining who, if anyone, must consent or be notified of the amendment.

LIMITED POWER TO AMEND: Although this Trust is irrevocable, the Trustee shall have authority to reform this trust or amend the Agreement if such is required to ensure that it continues to serve its Purposes under the law or regulations governing public benefit programs to which Julia is or may become entitled. If necessary, any such amendment made pursuant to this authority shall apply retroactively to the inception of this Trust. Notwithstanding anything to the contrary, the Trustee shall not

participate in the exercise of a power or discretion under this paragraph that would cause the Trustee to possess a general power of appointment within the meaning of Sections 2041 and 2514 of the Internal Revenue Code of 1986. In deciding if this Trust has the effect of rendering the beneficiary ineligible for Medicaid or other benefits, the Trustee is granted full and complete discretion to initiate administrative or judicial proceedings, or both. All costs relating to those proceedings, including attorney fees, are a proper charge to the Trust.

#### **E. Poison Pill Provision**

In some jurisdictions, use of a “poison pill” provision prevents a trust from being included as a resource. This is a direction – not just a permission - to the trustee to terminate the trust if it counts as an available resource for benefit eligibility. Ohio, for example, has a specific provision in its statute excluding trusts as available resources which include a clear direction to the trustee to terminate under these circumstances. Inclusion of this termination provision often makes the grantor uncomfortable, however.

1. **EARLY TERMINATION:** This Trust shall terminate before the beneficiary’s death if it is counted as an available resource for Medicaid purposes (see R.C. 5163.21(G)(4)(d)). The Trustee shall pay the costs and expenses of winding up Trust business and any other Trust obligations. The Trustee then shall distribute the remaining Trust Property as described in Subparagraph 4 below.

#### **F. Specific Requirements for Self-Settled d4A Special Needs Trust**

The formal requirements for a d4A<sup>4</sup> trust in the federal statute are minimal. The SSI POMS are much more detailed in setting forth the Social Security Administration’s requirements when evaluating these trusts. Even adhering to the POMS does not prevent all surprises from Social Security (in the form of new and unexpected benefit denials at the sub-POMS “policy interpretation” level), but it’s all we drafters have.

The trust must be established by an individual, parent, grandparent, court, or legal guardian. SSI regulations make it clear that the trust must be established “through the actions of” rather than “by” the appropriate party. POMS SI 01120.203.B.1. & C.1. SSI policies indicate that in determining the validity of the trust, they may look at whether a parent or

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<sup>4</sup> 42 U.S.C. §1396p(d)(4)(A)

grandparent had legal authority to act on behalf of the individual. If the individual is competent, he must fund the trust himself, or someone with legal authority to act for him must do the funding. POMS SI 01120.203.B.1.9 & C.3... An additional issue SSI has raised is whether the parents must “seed” the trust to make it a valid trust at the time of creation under state law. Check your state to find out whether it recognizes “dry” trusts as valid to begin with.

If the d4A trust is established by court order, the creation of the trust must be required by court order, not simply approved by the court. Approval of the trust is not sufficient. POMS SI 01120.203.B.8. & C.7.

The beneficiary of a d4A trust must be under age 65 when the SNT is established and funded. The trust remains exempt after the beneficiary reaches the age of 65, but the beneficiary cannot add additional assets after 65 without the transfer being counted as improper and causing a period of restricted eligibility. Issues have arisen regarding structured settlement payments flowing into a trust, especially if the payments will continue to arrive after the age of 65. The revised POMS states that “If the beneficiary’s right to receive payments from an annuity, support payments, or Survivor Benefit Plan (SBP) payments (see [SI 01120.201J.1.e.](#)), is irrevocably assigned to the trust, and such assignment is made when the trust beneficiary was less than 65 years of age, treat the payments paid to a special needs trust the same as payments made before the individual attained age 65. Do not disqualify the trust from the special needs trust exception.” POMS SI 01120.203.B.3. If future payments are directed to the trust by the court order or settlement agreement at the time of settlement, they should not be considered impermissible additions to the trust as they are deposited.

For SSI purposes, the trust must be for the “sole benefit” of the disabled individual as defined at POMS SI 01120.201F. The trust will not be exempt if it allows for payments which benefit other individuals or entities, or if the trust allows for termination of the trust prior to the individual’s death and payment to any other individual or entity other than the state or other creditors. POMS SI 01120.203.B.6.

The trust must include a "payback" provision at the death of the beneficiary to reimburse the state(s) for all Medicaid benefits paid on behalf of the beneficiary during his or her lifetime.

Ensure that your payback provision is not state-specific and that it meets the SSI criteria for payment only of allowable expenses prior to repaying the state. Allowable expenses include attorney fees, administrative costs in wrapping up the trust, and certain taxes. POMS SI 01120.203.B.10 & E.1.

The trust cannot pay (1) taxes due from the estate of the beneficiary other than taxes payable as a result of the inclusion of the trust in the beneficiary's estate, (2) inheritance taxes due for residual beneficiaries, (3) third-party debts, (4) payments to residual beneficiaries, or (5) even funeral expenses prior to repaying the state. POMS SI 01120.203.E.2. An irrevocable pre-paid funeral contract may be wise unless such a purchase deprives the beneficiary of a smaller trust of something that he could really enjoy now, while he's still alive.

#### **IV. DISTRIBUTION STANDARDS**

The distribution standard in a trust is the language that directs the trustee regarding distributions to or for the benefit of the trust beneficiary. The distribution standard determines whether or not a trust is a countable resource for the beneficiary, and whether distributions from the trust may be counted as income to the beneficiary. Moreover, the distribution standard greatly impacts the flexibility of the trust and its value to the beneficiary. There are several types of distribution standards. The effectiveness of a particular distribution standard in a trust for Medicaid purposes is a matter of state law and varies widely state to state.

### **A. Support Trust**

As its name implies, a support trust requires the trustee to pay for the support of the beneficiary. It generally uses words that are considered an “ascertainable standard” such as care, support and maintenance, or support, maintenance, health care and education. These terms are normally interpreted as requiring the trustee to maintain the beneficiary at his accustomed standard of living, receiving distributions for accustomed living expenses such as rent, mortgage payments, taxes, utilities, health insurance, and health care. Including an ascertainable standard in the trust will cause the trust to be a countable resource in many states, even if the trustee has sole and absolute discretion to act within that standard. Because the trustee has a legally enforceable obligation to provide support to the beneficiary, the trust assets are considered available for benefit eligibility purposes. If the trust assets exceed the resource allowance for a benefit, the trust will disqualify the beneficiary.

### **B. Wholly Discretionary Trust**

In general, a special needs trust should be a wholly discretionary trust. A wholly discretionary trust is one in which the trustee has full discretion as to the timing, purpose and amount of all distributions. The language often refers to “sole, absolute, and uncontrolled” discretion, and the trustee may pay to or for the benefit of the beneficiary, all or none of the trust as the trustee considers appropriate. The beneficiary has no control over the trust, and the discretionary power is subject to judicial control only if the trustee abuses its discretion. When reviewing the trustee’s exercise of discretion, the court will likely find an abuse of discretion only if the trustee has not fulfilled the intent of the trust.

A fully discretionary trust with no ascertainable standard is preferred by many drafters, as it allows the trust to adapt to a variety of circumstances. Precatory language which reflects the grantor’s intent regarding the beneficiary’s disability and benefit eligibility should always be included in a fully discretionary trust to give guidance to the trustee and to provide a basis upon which the trust can be reformed or amended if need be in the future. A letter of intent is a particularly important document in the estate plan when the trust is a wholly discretionary trust.

### **C. Supplemental Trust**

A supplemental needs trust is a type of trust that limits the trustee's discretion as to the purpose of the distributions. This type of trust typically contains language that distributions should supplement, but not supplant, sources of income including SSI or other government benefits. POMS SI 01120.200 B.12. Distributions may be limited only to supplemental needs, and may prohibit under any circumstances distributions for basic support and maintenance or for health care.

A strict “supplemental” standard, which prohibits using trust assets to pay for food and shelter, is generally too restrictive a standard unless the trust corpus is small and can only provide for extras. A well-funded trust should keep open the option of providing the beneficiary a better place to live if it is in the beneficiary’s best interest, even if such a distribution were to reduce the beneficiary’s government benefits somewhat.

## **V. ADDITIONAL CLAUSES TO CONSIDER**

### **A. Trust Protector or Trust Advisor**

Naming a trust advisor or trust protector can add additional protection for the beneficiary, especially in circumstances where the beneficiary is not competent or high-functioning enough to act as a check on the trustee. The trust protector can be given powers to oversee the actions of the trustee, review accountings, remove the trustee, direct the trustee to act, and amend the trust if benefit laws change. The trust protector role can be in a fiduciary or non-fiduciary capacity.

TRUST PROTECTOR: [Name] shall serve as Trust Protector. If [name] fails or ceases to serve for any reason, [successor name] is appointed as Successor Trust Protector.

Right of Trust Protector to Resign - Trust Protector or any Successor Trust Protector shall have the right to resign, by duly acknowledged written instrument delivered to the adults who would be entitled to share in the principal of the trust if it were then to terminate.

Power of Successor Trust Protector - Any Successor Trust Protector shall have the rights, powers, privileges, discretions, and duties conferred upon or vested in Trust Protector by the provisions of this Agreement.

Nomination of Successor Trust Protector - If a vacancy occurs in the office of Trust Protector and there is no Successor

Trust Protector able to serve, [name] shall have the right, power, and authority to designate a Successor Trust Protector.

Compensation of Trust Protector - The Individual Trust Protector shall be entitled to receive reasonable compensation for services rendered and to reimbursement for all reasonable expenses.

Powers of Trust Protector - Trust Protector is authorized, in the exercise of Trust Protector's sole and absolute discretion:

1. To remove any and all Trustees acting hereunder;
2. To designate a successor Trustee or Trustees to replace removed Trustees, however, no Trust Protector may appoint as Trustee himself or herself, any beneficiary hereunder or the spouse of any beneficiary, any person who has contributed property to the Trust, or any person who is married to Trust Protector or who is related to Trust Protector or Trust Protector's spouse within the third degree of consanguinity.
3. To amend this Trust Agreement without order of any court for the sole purpose of carrying out my intention that this Trust supplement and not supplant any government benefits to which my children may be entitled as a result of a disability. If necessary, any amendment made under this Paragraph shall apply retroactively to the inception of this trust.  
Notwithstanding anything to the contrary, the Trust Protector shall not participate in the exercise of a power or discretion under this Paragraph that would cause the Trust Protector to possess a general power of appointment within the meaning of Sections 2041 and 2514 of the Code.

Exercise of Trust Protector's Powers - Any action taken pursuant to this Section shall be evidenced by an acknowledged, written instrument, delivered to Trustee then acting or so removed and/or appointed, as the case may be, and in the case of an appointment shall be effective upon acceptance thereof by execution of an acknowledged, written instrument by Trustee so appointed.

No Fiduciary Responsibility - I am not imposing any fiduciary responsibility on the Trust Protector to monitor the actions of the Trustee. Except for any matter involving the Trust

Protector's own individual willful misconduct or negligence proved by clear and convincing evidence, no Trust Protector shall incur any liability by reason of any error of judgment, mistake of law, or action of any kind taken or omitted to be taken hereunder if in good faith it is reasonably believed by such Trust Protector to be in accordance with the provisions and intent hereof. The Trust Protector shall not be liable for failure to remove any Trustee even if such Trustee may be guilty of a gross violation of his or her fiduciary duties hereunder.

Bond-Waived - Neither the original Trust Protector nor any Successor Trust Protector shall be required to give bond or furnish sureties in any jurisdiction.

Trust advisors (and sometimes trust advisory committees) are often included when a corporate trustee is serving to oversee the beneficiary's needs and direct the trustee regarding distributions for the beneficiary. Someone who is familiar with the beneficiary's needs should fill this role, and if friends or family members are not available to act as trust advisor, the trust should provide for hiring a professional care manager.

DUTIES OF TRUST ADVISOR: The Trust Advisor acting hereunder shall have the following functions, authorities, and immunities:

1. The Trust Advisor shall determine the appropriateness of accessing Social Security Disability, Supplemental Security Income, Medicaid, Medicare and any other insurance or government benefits for the Beneficiary, and shall consider the possible impact that any distribution of principal and income might have on the eligibility of the Beneficiary for such government assistance benefits.

2. The Trust Advisor may, in keeping with the intent and purposes of this Trust, remove and replace a Trustee or Co-Trustee if the Trust Advisor determines that such Trustee or Co-Trustee is not responsive to the needs of Beneficiary or has acted or threatens to act in such a way as to unreasonably jeopardize Beneficiary's public benefits. Notice of such removal and replacement shall be in writing and shall be effective immediately upon delivery to the removed Trustee and the successor Trustee, respectively.

3. The Trust Advisor may, in keeping with the intent and purposes of this Trust, modify, release or amend the following:

(a) The trust provisions relating to the identity, qualifications, succession, removal and appointment of the Trustee; provided, however, that no such amendment may provide that Beneficiary or Beneficiary's spouse or child may be a Trustee hereof;

- (b) The financial powers enumerated in this instrument;
- (c) The terms of the Trust created in this instrument with respect to the purposes for which the Trustee may distribute trust income and principal, and the circumstances and factors that Trustee may take into account in making such distributions;
- (d) The powers and discretions conferred upon the Trust Advisor under this instrument, by a written instrument delivered to the Trustee.

4. The Trustee acting hereunder shall not make any distributions of income or principal in excess of \$500.00 except at the direction of, or with the approval of one of the Trust Advisors, to be confirmed in writing. If the Trustee, after reasonable efforts, is unable to make contact with Trust Advisor for the purpose of obtaining prior consent; or if extraordinary circumstances require immediate expenditure of funds within a time period which does not permit contact to be made with a Trust Advisor, the Trustee may act without prior approval of the Trust Advisor.

5. The Trustee shall consult at least annually with the Trust Advisor to determine a general policy regarding sales, leases, exchanges and investments of trust assets, to be confirmed in writing. The Trustee shall invest the assets of the Trust in conformance with such agreed-upon general policy.

6. The Trust Advisor shall be subject to the fiduciary obligations generally imposed upon a Trustee under the laws of the State of Ohio. Notwithstanding this fiduciary relationship, any Trust Advisor for such Trust Advisor's own benefit is not prohibited from entering into any transaction with the Trustee to purchase, exchange, or otherwise deal with or dispose of the principal and/or income of the Trust Property for fair, full and adequate consideration in money or money's worth as determined by the Trustee, subject to any court approval required for such transaction by a court order or the terms of this Trust.

7. No person, firm, partnership or corporation dealing with the Trustee shall be under any obligation whatsoever to ascertain whether or not the foregoing provisions of this Article have been complied with by the Trustee.

8. The Trust Advisor shall exercise his or her powers under this provision as he or she alone shall determine, and shall not be liable to Beneficiary or in any way for the exercise or non-exercise of these powers, or for the manner in which Trust Advisor may exercise such powers, except for willful or deliberate malfeasance. In addition, Trust Advisor may rely absolutely on the opinion of counsel competent in the area of trust administration in his or her exercise of the power to amend this instrument under this provision.

PROFESSIONAL CARE MANAGER: The Trustee is encouraged to consider retaining the services of a Professional Care Manager who is experienced in overseeing the implementation of care plans for individuals such as the beneficiary, and who is familiar with governmental entitlement or assistance programs, to assist in providing the required care for the beneficiary. The Care Manager shall coordinate other agencies or professionals or home health aides or personal care providers or homemakers or any other services which the Care Manager and the Trustee believe are in the best interests of the beneficiary.

REGULAR CONTACT WITH BENEFICIARY: The Trustee shall, personally or through the Care Manager, visit or contact the Beneficiary at his residence at regular intervals to inspect his living conditions, to inquire of care providers and, to the extent possible, to inquire of the Beneficiary regarding his treatment by care providers; to let him know that he has an advocate in addition to family members, to see that he has adequate funds for items he may want (within the constraints of this Trust); to know that he is receiving any available educational and recreational programs, and to ensure that governmental assistance, private contractual benefits and trust funds are in fact being expended by or for his benefit.

ANNUAL EVALUATION: Trustee is requested (but not required) to arrange for an annual evaluation of the Beneficiary addressed to the following topics:

- (1) The Beneficiary's physical condition.
- (2) Educational, residential and vocational and training opportunities.
- (3) Recreational, leisure and social needs.
- (4) Appropriateness of existing program services.
- (5) Status of public benefit programs in which the Beneficiary is enrolled.
- (6) Legal rights, including but not limited to, treatment in accord with his needs, payment of a fair wage for work performed, and if deemed to have capacity, the right to vote and to marry.

## **B. Residential Provisions**

Families are often most concerned about providing a home for their child, and their goal is often to ensure that the family residence is kept in trust for the child. In order to make the trust as flexible as possible, these specific goals should be set out in a letter of intent,<sup>5</sup> and the provision in the trust kept more general. The POMS state that if a trust, which is not a resource to the beneficiary, owns a residence for the beneficiary, the home will not be considered a resource, whether or not the beneficiary resides in the home. If living in the home, the beneficiary is treated, under the rules covering in-kind support and maintenance (ISM) as living in his own home, and need not pay rent to the trust. If the trust is paying a mortgage payment, property taxes, utilities, or other shelter expenses, these payments will be income to the beneficiary in the form of ISM.<sup>6</sup>

**RESIDENCE:** The Trustee may acquire, hold and maintain any residence for investment or for the use and benefit of the Beneficiary as the Trustee, in the exercise of its sole and absolute discretion, shall determine. If the Trustee determines that the residence owned by Trust is not appropriate for the Beneficiary, the Trustee is authorized to sell said residence and to apply all or any part of the net proceeds of sale to the purchase of such other residence or residences or to make such other arrangements as the Trustee, in the exercise of its sole and absolute discretion, shall deem suitable for the purposes. Any proceeds of sale not needed for reinvestment in a residence as provided above are to be added to the principal of the trust and thereafter held, administered and disposed of as a part thereof. The Trustee may pay from income or principal all expenses of such residence, including but not limited to any taxes, assessments and maintenance thereon, and all expenses of the repair and operation thereof, including other expenses incident to the maintenance of a household for the benefit of the Beneficiary. The Trustee may also pay for modifications to the home in which the Beneficiary is living to the extent reasonably necessary to accommodate the needs of the Beneficiary's disability. The Trustee may allow the Beneficiary and his family members to reside in the home rent-free, or may charge rent as the Trustee

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<sup>5</sup> Although not legally binding, a letter of intent offers guidance to the trustees for interpreting care instructions and typically includes emergency contacts, medical history, preferred living arrangements, education or work arrangements, recreational preferences, behavioral challenges, and a summary of family and financial information. Drafting a letter of intent can help focus the family on the future.

<sup>6</sup> POMS SI 01120.200 F.

determines in its discretion. These powers may be exercised for the benefit of the Beneficiary, even if the Beneficiary is residing with family member(s) who also may be serving as Trustee.

### **C. Sole Benefit Language**

When drafting a third party special needs trust, you may want to take into consideration the possibility that a parent or grandparent may want to make a transfer to the trust in order for the *parent or grandparent* to access Medicaid or other means-tested benefits. A transfer directly to a disabled child is an exempt transfer for the donor and does not create a period of restricted Medicaid eligibility for the donor. 42 U.S.C. §1396p(c)(2)(A)(ii). In other words, a grandmother of a disabled grandchild can give all of her assets to that grandchild and immediately become eligible for Medicaid herself. However, if the grandchild is on means-tested benefits, or may need them in the future, receiving the grandmother's assets will destroy the eligibility of the grandchild. To avoid this problem, grandmother can transfer the assets to a trust for the "sole benefit" of the grandchild. 42 U.S.C. §1396p(c)(2)(B)(iv). Federal law defines a transfer for the "sole benefit of" a beneficiary with a disability as a transfer made so that no person except the beneficiary can benefit from the transferred property in any way from the time of the transfer and at any time in the future. HCFA Transmittal 64 §3257.

In order for a third party trust<sup>7</sup> to be considered for the sole benefit of the disabled beneficiary, the trust must have explicit terms which require the trustee to expend all of the transferred resources in an actuarially sound manner for the beneficiary during that individual's life expectancy. When the trust does not meet this requirement, the provisions governing "transfers for the sole benefit" do not apply. If the sole benefit trust contains a provision requiring the trustee to expend all of the transferred resources over the beneficiary's life expectancy, the trust may provide for remainder beneficiaries to take after the death of the disabled beneficiary. *Id.*

## **VI. CONCLUSION**

This outline is intended to provide an overview of various provisions that should be considered when drafting a special needs trust. Once a determination is made that a SNT is

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<sup>7</sup> Self settled d4A and d4C trusts are automatically considered sole benefit trusts.

needed, utilizing the correct SNT for the circumstances presented, and including language and provisions relevant to the beneficiary of the trust, can ensure that the trust assets are enjoyed by the beneficiary over the course of their life without impacting government benefit eligibility. This way, the beneficiary experiences a net gain, and the funds (whether their own or from another person) make a real difference in their life, instead of simply relieving the government of its responsibility to pay benefits.

## SUMMARY OF SPECIAL NEEDS TRUSTS

Type of Trust	Who can Establish	Disposition at death of disabled beneficiary	Age limit
<i>Self-Settled (funded by beneficiary)</i>			
d4A Special Needs Trust	Individual, Parent, grandparent, legal guardian, court	Repayment to the state	Must be created and funded prior to 65
d4C Pooled Trust	Parent, grandparent, legal guardian, court, disabled individual with capacity	Option to leave funds in trust for the non-profit or repay the state	Possible transfer penalty if funded after age 65
<i>Third- Party (funded by third party)</i>			
Discretionary Trust	Anyone other than the disabled beneficiary	Paid in accordance with trust document (no payback to state)	No limit
Pooled Master Trust	Anyone other than the disabled beneficiary	Paid in accordance with trust document (may be required to leave a portion to the non-profit)	No limit
Sole Benefit Trust	Anyone other than the disabled beneficiary	Remainder beneficiaries may be named, although trust must pay out in an actuarially sound manner	No limit