

**THE HOW-TO'S OF DRAFTING
SNTS**

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WHAT IS A SPECIAL NEEDS TRUST?

- What makes a trust a SNT?
- Why use a SNT?
- Will a SNT “work”?

WHY USE A SNT?

- Person with assets needs benefits
- Person with benefits receiving assets
- Estate planning tool for parents or other 3rd parties
- To receive and hold an income stream, such as child support, spousal support, annuity payments
- To allow the donor to get Medicaid eligibility

GOALS OF SNT

- Preserve current benefits
- Allow access to benefits without imposition of a transfer penalty
- Provide fund management for the beneficiary
- Provide a mechanism to arrange and pay for care and advocacy throughout the beneficiary's lifetime

GENERAL ISSUES FOR ALL SNTS

- Testamentary or *inter vivos*
- Irrevocable
- Third-party or self-settled
- Trigger trust
- Distribution standard
- What benefits are protected?

"SPECIAL" WORDS - OVERVIEW

- Must meet the requirements of the benefits the trust is designed to protect
- The distribution standard should be appropriate for the beneficiary and the disability
- Special provisions must be considered to meet the concerns of the settlor and the needs of the beneficiary

Determine the Benefits!

- Most individuals with disabilities depend on government benefits for income, health care coverage and residential placement
- Critical to find out what the beneficiary is receiving now
- What might they need in the future?
- Remember that benefits change over time
 - SSI -> CDB
 - Medicaid -> Medicare

Overview of Gov't Benefits

	MEANS-TESTED	INSURANCE PROGRAMS
CASH INCOME	Supplemental Security Income (SSI)	Social Security Disability (SSDI, CDB)
MEDICAL/ RESIDENTIAL	Medicaid, Home & Community Based Waivers	Medicare

SSDI/MEDICARE

- Insurance programs
- Requires payment of sufficient quarters of SS taxes by claimant, or claimant's parent if adult child disabled prior to age 22
- Disability income (SSDI and CDB) based on wage-earner's income history
- Medicare is medical insurance which begins 24 months after benefits start

SSDI/MEDICARE

- No income or resource test
- SGA rule - \$1260/month
- Disabled child can collect when parent dies, retires or is disabled if child is continuously disabled
 - Marriage terminates eligibility
 - SS often misses dependent children when parent retires or dies

SSI/MEDICAID

- Eligibility based on financial need
 - Income
 - Resources
 - Deeming
 - ISM
- SSI is an income program for persons with a disability who do not have, or have minimal, Social Security coverage
- SSI provides \$783/month in 2020

SSI/MEDICAID

- Medicaid programs vary state to state in services provided and eligibility requirements
- Medicaid covers most medical costs
- Also provides institutional care (nursing homes, ICFs/MR)
- Medicaid Waiver provides residential supports, home care to keep disabled individuals out of institutional settings and allow them to reside in the community

OTHER NEEDS-BASED BENEFITS

- Food assistance
- Housing subsidies (Section 8, HUD housing)
- Utility assistance
- Veteran benefits

INCOME V. RESOURCES

- Amounts received during the month is income
- Income held into the following month becomes a resource
- Duty to report change in income and/or resources within 10 days of receipt
- Receipt of assets while on means-tested benefits must be dealt with promptly to avoid loss of benefits
- Failure to report can result in overpayments and fraud prosecution

IMPORTANCE OF PROPER DRAFTING

- Receipt of assets by recipient of means-tested benefits can wreak havoc with benefits!
- An improperly drafted trust will count as an available resource
- Eligibility will not resume until the trust is spent down or fixed

CRITICAL PROVISIONS FOR SNTS

- General provisions
- d4A trust provisions
- Distribution standards
- Miscellaneous clauses to consider

ABILITY TO REVOKE OR TERMINATE

- Beneficiary or deemor cannot have authority to
 - Revoke or terminate
 - Direct the use of trust principal
- A 3rd party trust can be revocable by the grantor who is not the beneficiary or deemor
- Trustee may have authority to revoke, but if can use it for himself, is a resource to the trustee

ABILITY TO REMOVE/REPLACE TRUSTEE

- Beneficiary or deemor should generally not have power to remove or replace trustee
- If trustees have power to designate successors, beneficiary should be excluded as possible successor

SPENDTHRIFT PROVISION

- Prohibits involuntary and voluntary transfers of beneficiary's interest in trust income or principal
- Provision should prevent assignment of the beneficiary's interest without the trustee's prior approval in writing
- Right to assign or sell interest income in the trust causes the income interest to be a resource

SPENDTHRIFT PROVISION

- Do not use a provision with an ascertainable standard
- Check your state law

EXPRESSION OF SETTLOR'S INTENT

- Always include language reflecting the settlor's intent regarding
 - The disability of the beneficiary
 - Maintaining benefit eligibility
- Provides basis upon which the trust can be reformed or amended in the future
- Settlor's intent is paramount in interpretation and administration of trust

SETTLOR'S INTENT

- 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.

LIMITED POWER TO AMEND

- Give the trustee or a trust advisor or protector a power to amend the trust
- Avoids the need to go to court to reform the trust
- Limit the power to amend to protect the beneficiary's benefit eligibility if the law or his needs change

POISON PILL PROVISION

- Direction to the trustee to terminate the trust if counted as an available resource
- Prevents inclusion as resource in some jurisdictions
- In Ohio's Medicaid trust rules, this must be a mandatory provision, and cannot give the trustee discretion to terminate

SPECIFIC PROVISIONS FOR d4A TRUST

- Trust must be established through the actions of a proper party
- Funded by someone with the legal authority to do so
- Beneficiary under age 65, with a disability
- Sole benefit trust
- Termination language and payback clause

DISTRIBUTION STANDARDS

- Language which directs the trustee regarding distributions
- Defines the beneficiary’s legal rights to the trust property
- Determines whether the trust is a countable resource or income
- Know your state law

SUPPORT STANDARD

- Ascertainable standard
- “Care, support & maintenance”, or “support, maintenance, health and education”
- Creates legally enforceable obligation on the trustee to provide support
- Trust will be a countable resource
- Even if trustee has sole and absolute discretion, the support standard causes inclusion in most states

WHOLLY DISCRETIONARY TRUST

- Broadest distribution standard – trustee determines timing, purpose and amount of all distributions
- Beneficiary has no legally enforceable rights to distribution from the trust
- Court will likely find abuse of discretion only if trustee has not fulfilled settlor’s intentions
- Not a countable resource in most states

WHOLLY DISCRETIONARY TRUST

- Most flexible distribution standard
- Precatory language and letter of intent are important to provide guidance to trustee
 - Describes the child’s background and history
 - Explains the current status of the child
 - Expresses the parents’ future wishes for the child
 - Provides important information to future caregivers to assist in their decision-making

MANDATORY TRUST

- Requires payment of income or principal at certain times
- Mandatory income distribution without valid spendthrift clause can be resource
- Assignment of income stream to d4A trust with consent of trustee

SUPPLEMENTAL TRUST

- Limits trustee’s discretion to distributions that do not cause loss of or reduction in benefits
- Strict supplemental standard – prohibits use for food or shelter
 - Generally too restrictive unless trust is small
 - More flexibility is better

ADDITIONAL CLAUSES TO CONSIDER

- Trust Protector
- Trust Advisor
- Advocate/Care Manager
- Residential provisions
- Specific provisions regarding family members
- Sole benefit language

TRUST PROTECTOR

- Can serve many roles
 - Act as a check on the trustee
 - Review accountings
 - Remove and replace trustee
 - Direct the trustee to act
 - Amend the trust
- Can be a fiduciary or non-fiduciary role
- Important when beneficiary is not competent

TRUST ADVISOR

- Individual or committee
- Often included if trustee is corporation
 - Familiar with benefits
 - Ascertain needs of beneficiary
 - Direct or advise the trustee regarding distributions

CARE MANAGER

- Trust may require or encourage trustee to retain professional care manager
- Oversees care plan
- Access benefits
- Determine appropriate distributions to meet the needs of the beneficiary
- Regular contact with beneficiary
- Regular evaluations

RESIDENTIAL PROVISIONS

- Many clients want to ensure that the beneficiary is able to stay in the family home
- Trust should allow investment in housing for the beneficiary, but should be flexible
- Letter of intent can be more specific
- Keep in mind POMS provisions regarding residence owned by trust and ISM

RESIDENTIAL PROVISIONS

- The Trustee may acquire, hold and maintain any residence for investment or for the use and benefit of the Beneficiary
- If the Trustee determines that the residence is not appropriate for the Beneficiary, the Trustee may sell and purchase another residence or make such other arrangements as the Trustee shall deem suitable.
- Trustee may pay from income or principal all expenses of such residence, including modifications to the home 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 determines in its discretion.

"SOLE BENEFIT" LANGUAGE

- Used when the donor wants to transfer assets to obtain Medicaid eligibility for the donor
- A transfer directly to a disabled child is an exempt transfer, but may create issues for the child's benefit eligibility
- A transfer to a trust solely for the benefit of a disabled individual is also an exempt transfer, and protects the benefits of the beneficiary

"SOLE BENEFIT" TRUST

- The following qualify as sole benefit trusts:
 - d4A payback trust
 - d4C pooled trust
 - A trust which requires the trustee to expend all of the transferred resources in an actuarially sound manner for the beneficiary over the beneficiary's life expectancy. This type of trust does not require Medicaid payback and can name remainder beneficiaries in the trust

SUMMARY

- Determine benefits
- Limit powers of beneficiary and deemor
- Include appropriate spendthrift provision
- Settlor's intent
- Power to amend
- Poison pill provision
- Choose a correct distribution standard
- Trust protector/advisor

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