

Stetson's National Conference on Special Needs Planning  
and Special Needs Trusts

Using Your SNT to Access and Keep Public Benefits

MARY ALICE JACKSON  
Attorney of Counsel  
Boyer and Boyer, P.A.

OCTOBER, 2020

## **I. Introduction.**

Special needs are defined by Merriam-Webster<sup>1</sup> as any of various difficulties (e.g. physical, emotional, behavioral, or learning disability or impairment) that cause an individual to require additional or specialized services or accommodation (such as in education or recreation).

The additional or specialized services or accommodations are too expensive for most individuals and their families to access, and they then turn to government funded public benefits to fill the gap. Despite the intent of the sponsors when the programs were initially developed, public benefits are no longer only for the indigent. We don't have that luxury. Families with significant resources are applying for public benefits because the only substantive programs which are available for their loved one with special needs are provided by publicly funded programs. When a child is injured at birth or at a very young age, seemingly endless money may not be sufficient to pay for what the child needs throughout his or her lifetime. Families without significant resources need to save each available extra dollar for needs that may not arise until 30 or 40 years into the future.

Prior to OBRA '93, third party discretionary trusts could already protect resources intended to benefit a special needs individual. OBRA '93 provided the federal basis for first party individual and pooled special needs trusts. Unlike their predecessors, there would be payback provisions if money remained at the trust upon death. Exchanging the right to use money now for the possibility of later payback is not a bad trade.

Trusts allow the rules and regulations governing the special needs exceptions to be written into a guiding document. Additionally, trusts are familiar vehicles for most lawyers. We are comfortable with understanding the requirements, of protecting the beneficiary as directed in the trusts and with overseeing fiduciaries to ensure that duties are not breached. We debate but understand "who is our client" because we know that in the end, protecting a special needs beneficiary is the ultimate duty, even if our client is the Trustee.

Not all unavailable assets will be held in a special needs trust; there are other planning options. It is possible to claim that a legal instrument, device or arrangement, although not a trust, is similar to a trust in that it involved a Grantor, in the SSA definition of the word. The Grantor

---

<sup>1</sup> ©Merriam, Webster 2019

provides the assets to fund the legal instrument, device or arrangement; transfers the property to an individual or entity with fiduciary obligations; and makes the transfer with the intention that the individual or entity hold, manage, or administer the property for the benefit of the grantor or others.<sup>2</sup> Examples of legal instruments or devices similar to a trust can include but not be limited to escrow accounts, investment accounts, conservatorship accounts, pension funds, annuities, ABLE accounts and certain UTMA accounts.<sup>3</sup>

Most of the time you will use a trust document to provide for fiduciary administration. Two underlying rules are (1) any self-settled special needs trust (single document or pooled trust) requires repayment to Medicaid upon trust termination must specifically follow the individual steps laid out in the POMS when drafting the language ensuring that the government gets its money back. Of particular interest is drafting to ensure that any state which pays benefits through the Medicaid program for the beneficiary is to be paid back prior to post-payback distributions, even if that payback ends up being pro rata; and (2) All special needs trusts – first and third party – need to follow the requirements of protecting public benefits by being sole benefit trusts, providing for absolute Trustee discretion, having spendthrift language and any other trust language and protections which are fundamental to federal and state laws and regulations.

The resource limit for eligibility of a public benefits program is commonly \$2,000. By funding a special needs trust with those resources with a total value over of \$2,000, the beneficiary has chosen to protect resources against losing eligibility. Protection of resources doesn't come without costs, however. A beneficiary with mental capacity understands that he or she is permanently (except in the case of early termination) giving up the right to manage and access his or her funds. He or she has agreed to let a Trustee, the chosen fiduciary, to determine whether, and if, any monies will be distributed. There is no ability for the beneficiary to compel the Trustee to do anything. No control, ever.

Public benefits are “means-tested”; that is, applicants can only be accepted if their income and resources are within certain limits. Title XVI of the Social Security Act specifies who is eligible to receive Supplemental Security Income (SSI) benefits, the amount of cash payments, and the conditions under which payments can be made. A person who applies for SSI and meets

---

<sup>2</sup> POMS SI 01120.201(B)(4)

<sup>3</sup> Id.

the conditions in the law is eligible for benefits.<sup>4</sup> ...[I]f medical assistance is included for any group of individuals...the single standard to be employed in determining income and resource eligibility for all such groups, and the methodology to be employed in determining such eligibility, shall be no more restrictive than the methodology which would be employed under the SSI program in the case of groups consisting of aged, blind, or disabled individuals in a State in which such program is in effect, and which shall be no more restrictive than the methodology which would be employed under the appropriate State plan...”.<sup>5</sup> These provisions tell us two things: (1) Medicaid eligibility is determined under the same regulations as SSI; and (2) the state can choose to be more lenient in its eligibility requirements, but cannot be more restrictive. As an example, a state may choose to allow a Medicaid applicant to have two vehicles when the federal law permits only one; however, the state cannot restrict the applicant to having no vehicles at all, even if the applicant cannot drive.

SSA refers to special needs trusts as the “Medicaid trust exceptions”. This is not the same as a Medicaid qualifying trust, a qualified income trust or preservation settlement trust, to name a few. “We refer to the exceptions discussed in this section as **Medicaid trust exceptions** because section 1917(d)(4)(A) and (C) of the Social Security Act (Act) (42 U.S.C. § 1396p(d)(4)(A) and (C)) sets forth exceptions to the general rule of counting trusts as income and resources for the purposes of Medicaid eligibility and can be found in the Medicaid title of the Act. While these exceptions are also Supplemental Security Income (SSI) exceptions, we refer to them as Medicaid trust exceptions to distinguish them from other exceptions to counting trusts provided in the SSI program (such as undue hardship) and because the term has become a term of common usage.”<sup>6</sup>

Can a trust be a special needs trust even if the words “special needs” are nowhere to be found in the document? Yes. But the use of certain phrases which are found in the POMS<sup>7</sup> manual used by SSA caseworkers is wise. Language to consider including is the phrase “supplements and supplants”, or just “supplants”. Many state manuals and the POMS refer to the fact that the intent

---

<sup>4</sup> POMS SI 00501.001A

<sup>5</sup> 42 U.S.C. § 1396a(10)(C)(i)

<sup>6</sup> POMS SI 01120.203A

<sup>7</sup> Program Operations Manual System; <https://secure.ssa.gov/poms.nsf/home!readform> (go to “SI”, in particular but not limited to *Income and Resources*)

of a special needs trust (or a trust by any other name) is to supplement and supplant benefits which are otherwise unavailable due to cost or unavailability of private programs.

It's simple to get lost in the vernacular of the special needs trust language when writing our documents. We know that there are at least five commonly used names for first party trusts. For ease of interpretation, let the caseworker know who is establishing the trust, who is benefitting from it, whether anyone else will benefit (if so, when – making it clear when a contingent beneficiary becomes involved), and who will serve as Trustee. Perhaps you can avoid a time-consuming regional review if the language used in your trust matches that used in the caseworker's manual – in this case, the Program Operations Manual System, or POMS, or for emphasis in a possible appeal, the federal law and the Code of Federal Regulations.<sup>8</sup> For instance, my preference is to use the language in the POMS unless there's a compelling reason to do otherwise. As an example, the payback language is very straightforward: *“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(s) Medicaid plan(s).”*<sup>9</sup> This is definitely not the part that I want to mess up. Why not use the exact language that the regional office will be looking for?

## **II. ELEMENTS TO CONSIDER**

Who is the creator of a special needs trust? A Grantor, Settlor or Donor? An Establisher? While trust attorneys have typically used the word “Grantor” to describe the individual or individuals who create and sign a trust document, this is not definitive terminology in special needs trust drafting. The term “Grantor” has a very specific meaning in the POMS – the Grantor is the person who supplies (owns) the money which funds the trust. If the Grantor is the individual with a disability, then the trust is a first-party (self-settled, d(4)(A), payback, etc.) trust and the maker of the Trust has made a written contract with the federal government to re-pay any Medicaid benefits which have been paid to the Grantor during his or her lifetime. This is the quid pro quo which was created when the trust exception statutes were written in 1993.<sup>10</sup> Is there an argument that an incapacitated beneficiary who later regains capacity did not voluntarily choose the payback

---

<sup>8</sup> 42 U.S.C. § 1396p; 20 C.F.R. Section 416

<sup>9</sup> POMS SI 00120.203B(1)

<sup>10</sup> 42 U.S.C. § 1396p(d)(4)(A)

trust and had she been competent, she would not have done so? How much due diligence should third parties and attorneys do before determining that a special needs trust is the right planning choice? If the Grantors consist solely of third parties, then the Trust is a third-party trust with no pay-back obligation. In some scenarios, there will be time to transfer first party money to a third party, wait out the Medicaid look-back period and then establish a third-party, non-payback trust.

One example is to examine the ownership of funds which are inherited by a beneficiary with a disability who is already receiving SSI and Medicaid benefits but does not have a special needs trust. If the funds are devised outright, or pass through intestacy, to the beneficiary, then the beneficiary may be the owner of the funds and a first-party special needs trust will need to be established if public benefits are to be preserved. (There are some instances in which inheritances can be modified, or monies decanted, to create a third-party trust rather than a first-party trust and avoid the Medicaid payback<sup>11</sup>). If the inheritance is written in a manner that states the funds are to be distributed to the Trustee of Patches' Irrevocable Trust, then the money never passes through Patches' hands and a third-party trust has been established. State statutes regarding trust modification typically refer to determining whether the circumstances in creating the trust were such that the maker of the Trust would not have anticipated the need for a special needs trust, and that his or her wish would have been to have the money protected for the beneficiary's life, rather than to run out or be squandered. Many of these Wills were written 15 or more years ago when the laws regarding special needs trusts were in their infancy and the importance was not widely appreciated by estate planning experts. What about the Will, which was written 3 years ago, with language that indicates that there was an awareness of a beneficiary with special needs, but no effort was made to protect the funds within the Will? The beneficiary received an outright inheritance and a first-party trust was created. It would be more difficult to argue to the court that the Testator wasn't aware of the circumstances and would have acted differently had he known.

Who can create a first-party special needs trust? The individual with a disability (or his or her agent under a Durable Power of Attorney), the disabled individual's parent(s), the disabled individual's grandparent(s), the disabled individual's legal guardian(s), or a court.<sup>12</sup>

---

<sup>11</sup> Section 736.04117, Fla. Stat. (Florida decanting statute)

<sup>12</sup> POMS SI 01120.203(B)(7)

### III. WHAT MEDICAID MIGHT BE THINKING.

A first-party trust is established through the actions of a specific person, whether it is the individual with the disability, or an agent acting on his or her behalf. The current preference of SSA is that we use the words “established through the actions of”<sup>13</sup> to indicate the identity of the party who will be making the actual funding transaction. The person signing the trust might be this Establisher, or you may choose to identify him or her as the Creator, Settlor, Donor, etc. The key is not to make the caseworker guess what’s happening.

The issue of proper trust funding arose some years ago when persons with access but no legal authority to use the beneficiary’s funds were transferring monies into first party trusts. Without the legal authority to access the funds (perhaps a small settlement or a large structure, coordinated by a parent? A bank account owned by the disabled individual but accessible to the spouse whose name is not on the account?), SSA determined that the trust was not correctly funded, and the trust was rejected.

Assuming that you have proper authority to proceed with funding, SSA is looking for four provisions which would indicate that the trust is subject to being considered within the special needs trust exception. These provisions are: (1) the purpose for which the trust was established; (2) whether the Trustees have or exercise any discretion over the trust; (3) whether there are any restrictions on when or whether distributions can be made from the trust; and (4) any restrictions on the use of distributions from the trust. These four factors are *not* those which determine whether the trust meets the Medicaid exception rules, but they must be contained in the trust document so that the caseworker can conduct an evaluation.

Court-ordered trusts. In the case of a 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. The special needs trust exception can be met when a court approves a petition and establishes a trust by court order, as 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. An individual is permitted to petition a court for

---

<sup>13</sup> POMS SI 00120.203(C)(2) *see note*

the present establishment of a trust or may use an agent to do so. The court order establishes the trust, not the individual's petition. Petitioning a court to establish a trust is not establishment by an individual.<sup>14</sup> An individual may petition the court with a draft document of a trust as long as it is **unsigned** and not legally binding.<sup>15</sup> (*emphasis added*)

A first-party special needs trust is for the sole benefit of the Beneficiary; gives the Trustee absolute discretion over distributions or the lack thereof; contains a spendthrift clause to prevent the Beneficiary from selling a current or future interest; and includes a Medicaid pay-back clause *verbatim* in the words of the POMS. Merely labeling the trust as a Medicaid payback trust, an OBRA 1993 payback trust, a trust established in accordance with 42 U.S.C. § 1396p...is not sufficient to meet the requirements for this exception. The trust must contain specific payback language whose effect is consistent with the requirements.<sup>16</sup> Note that payback only includes benefits paid during the Beneficiary's lifetime from Medicaid, not SSI, Medicare or any other program. Medicaid is the only program with payback requirements.

A third-party special needs trust includes the first three items but is *not* subject to a pay-back provision. Because the third-party trust is created with assets belonging to someone other than the beneficiary, the identity and methods of the funders are not relevant, as long as there has been no convoluted straw-person trick to fund the trust with the Beneficiary's money while making it look as though the money belonged to a third party. The remainder beneficiaries of a third-party SNT are chosen by the Settlers; early termination provisions can be used for the sake of administration but are not required by law because no payback is required.

The words "resources" and "assets" are used interchangeably in most special needs trusts articles, trusts or other references, however a distinction between the two is made under the POMS.<sup>17</sup> Resources are cash or any other real or personal property an individual (1) owns; (2) has the right, authority or power to convert to cash; and (3) is not legally restricted from using for his/her support and maintenance. Conversely, an asset is defined as property an individual has an ownership interest in, but the individual is not legally able to transfer that interest to anyone else.<sup>18</sup>

---

<sup>14</sup> POMS SI 01120.203(B)(8)

<sup>15</sup> *Id.*

<sup>16</sup> POMS SI 01120.203(B)(10) *see note*

<sup>17</sup> POMS SI 01110.100

<sup>18</sup> POMS SI 01110.100(B)(3)

Some states exempt real property from being categorized as a countable asset when it is jointly owned, not permitting partition.

Because Medicaid laws parrot SSI requirements, counseling regarding special needs trusts begins with assuring that the client is aged, disabled or blind and is under the age of 65 (some states use the age of 60 for nursing home eligibility purposes). An individual attains the age of 65 on the anniversary date of his or her birth.<sup>19</sup> The Trust corpus remains a non-countable asset after age 65, but no new additions to the corpus can be made. Such additions would not be subject to the special needs trust exemption and would be considered as countable resources. This rule does not apply to interest, dividends or other earnings of the Trust.<sup>20</sup>

Sometimes the Beneficiary will have the right to receive payments from an annuity, court support proceeding, or Military Survivor Benefits. If those payments have been irrevocably assigned to the Trust, and the assignment was made prior to the age of 65, the payments are treated as though the Trust received the payments before the Beneficiary attained age 65. (Considered as neither countable income nor resources).<sup>21</sup>

The answer to the question of whether the intended Beneficiary must be disabled prior to the establishment and funding of the special needs trust is no.<sup>22</sup> Instead, the disability must exist at the time that the SSA or Medicaid office is evaluating the trust to determine whether its assets should be excluded. Leaving out any reference to the Beneficiary's disability is fine; every practitioner has his or her own preference.

We can't begin to see all of the possibilities for a beneficiary with a disability as he or she ages. It may be that a new treatment is found, or an illness goes into remission, and the use of a first party special needs trust is no longer necessary. An early termination provision or clause would allow a trust to terminate before the death of the beneficiary. Commonly, such provisions or clauses provide for termination of the trust when, for example, the beneficiary is no longer

---

<sup>19</sup> POMS SI 01120.203(B)(2)

<sup>20</sup> Id.

<sup>21</sup> POMS SI 01120.203(B)(3)

<sup>22</sup> POMS SI 01120.203(B)(4)

disabled or otherwise becomes ineligible for Supplemental Security Income (SSI) and Medicaid, or when the trust fund no longer contains enough assets to justify its continued administration.<sup>23</sup>

For successful early termination, three elements must be met:

Upon early termination the State(s), as primary assignee, would receive all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s); and

Other than payment for allowable administrative expenses found in this section, no individual or entity other than the trust beneficiary may benefit from the early termination (i.e., after reimbursement to the State(s), **all** remaining funds are disbursed to the trust beneficiary); and the early termination clause gives the power to terminate to someone other than the trust beneficiary. Spell each element out in your trust document in order to meet SSA requirements.

Pooled Trusts are also first-party trusts, and they have all of the administrative provisions of a single Special Needs Trust Agreement. However, there is only one “Master” trust agreement, and to take part as a Beneficiary, a Joinder Agreement must be completed by the applicant or his or her representative party. Hundreds of individuals can have “sub-accounts” within a pooled trust; the assets of each sub-account are pooled to get the best return on the money invested. The pooled trust administrators make distributions and keep abreast of current SSI and Medicaid regulations.

There are five requirements for a pooled trust to be considered exempt for purposes of SSA approval: (1) The pooled trust is established and managed by a nonprofit association; (2) separate accounts are maintained for each beneficiary, but assets are pooled for investing and management purposes; (3) accounts are established solely for the benefit of the disabled individuals; (4) the account in the trust is established through the actions of the individual, a parent, a grandparent, a legal guardian, or a court; and (5) the trust provides that, to the extent that any amounts remaining in the beneficiary's account, upon the death of the beneficiary, are not retained by the trust, the trust will pay to the State(s) from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under State Medicaid plan(s).<sup>24</sup>

---

<sup>23</sup> POMS SI 01120.199

<sup>24</sup> POMS SI 01120.203D

As with first-party trusts, SSA is particular about court-ordered distributions to pooled trusts. “In the case of a trust account established through the actions of a court, the creation of the trust account must be required by a court order for the exception in section 1917(d)(4)(C) of the Act to apply. That is, the pooled trust exception can be met when courts approve petitions and establish trust accounts by court order, so long as the execution of the trust account joinder agreement and funding of the trust have not been completed before the order is issued by the court. Court approval of an already executed pooled trust account joinder agreement is not sufficient for the trust account to qualify for the exception. The court must specifically either establish the trust account or order the establishment of the trust account.”<sup>25</sup>

One matter of contention which is getting more attention from SSA offices is whether the joinder into a pooled trust and establishment of a sub-account for an individual over the age of 65 is subject to a transfer penalty. There are a couple of potential explanations: first, unlike the d(4)(A) language, the d(4)(C) language doesn’t require that a beneficiary be under age 65 to participate. But does this mean that at age 65, the criteria for getting benefits (age, disability or blindness) changes from disability to age? If so, how would that trigger a change in the transfer penalty exception? The answer which seems most logical to me is that the transfer of a first-party trust into a pooled trust means the state loses its guaranteed right to recovery upon the death of the beneficiary. Pooled trusts are permitted to retain the funds in the deceased sub-account holder’s for charitable purposes<sup>26</sup>, defeating the right which the state would assert if the first-party trust was still in place. Transfers from first party to first party trusts, as was briefly discussed in modification and decanting, don’t have any impact on the payback clause and therefore are less likely to be challenged.

Is the ABLE Act a special needs trust? No, ABLE - Achieving a Better Life Experience Act of 2014 or the ABLE Act of 2014 - allows people with disabilities and their families to establish a special tax-advantaged *savings account* for disability-related expenses. Earnings on ABLE accounts are not taxed, and account funds are generally not considered as a resource for the Supplemental Security Income (SSI) program, Medicaid, and other federal means-tested benefits. An ABLE savings account is like a special-needs trust, but doesn’t require the paperwork or

---

<sup>25</sup> POMS SI 01120.203D(7)

<sup>26</sup> 42 U.S.C. §1396p(d)(4)(C)(iv)

expense of a SNT. An individual is eligible to establish an ABLÉ account if (1) he or she became disabled *before age 26*; and (2) receives Social Security Disability Insurance (SSDI) or SSI, or alternatively, files a disability certification under the IRS rules. Upon the death of the beneficiary, any remaining funds in the account are subject to pay back to the State for medical assistance paid on behalf of the beneficiary under the State plan.<sup>27</sup> The individual with the disability can open an ABLÉ account for himself or herself.

Alternatively, a person with signature authority can establish and administer an ABLÉ account for a designated beneficiary who is a minor child or is otherwise incapable of managing the account. Signature authority is not the equivalent of ownership. The person with signature authority must be the designated beneficiary's agent acting under power of attorney, or if none, a parent or legal guardian of the designated beneficiary. The designated beneficiary is<sup>28</sup> the owner of the ABLÉ account, regardless of whether someone else has signature authority over it. The beneficiary is limited to one ABLÉ account, which can be funded with either first- or third-party funds. A drawback of this merging of funders is that ABLÉ accounts are subject to Medicaid payback. If an ABLÉ account might be an option for an individual with a disability, careful consideration should be given to how much money should be accumulated in the account, risking the Medicaid payback. This is particularly true when third party funders are being considered. So, when might an ABLÉ account be considered as an alternative or a complement to a special needs trust? Wages, unearned income such as gifts, small settlements or inheritances which total less than \$15,000 (or whatever the annual tax exclusion amount might be in a particular year), can be placed into the account without the need for the expense and sometimes complicated administration of a SNT. The ABLÉ account also gives capacitated beneficiaries the right to manage their own money through the use of an administrative managed prepaid debit card, referenced above. Distributions from a prepaid debit card made for “qualified disability expenses”<sup>29</sup> (QDEs) are not considered to be income to the beneficiary<sup>30</sup>.

One more note on ABLÉ accounts. Since ABLÉ became law in 2016, special needs planners and disability organizations have been searching for the optimal situations in which

---

<sup>27</sup> 26 U.S.C. §529A; POMS SI 01130.740.

<sup>28</sup> POMS SI 01130.740(B)(6)

<sup>29</sup> POMS SI 01130.740(B)(8)

<sup>30</sup> POMS SI 00130.740(G)(2)

ABLE accounts can be used. One instance has been to use the money in an ABLE account to pay rent. When the beneficiary is paying rent from his or her funds (remember that the ABLE beneficiary is the account owner), he or she is no longer subject to the one-third reduction rule or PMV. The amount of his or her SSI benefit will increase to the maximum SSI to which he or she would be entitled without the application of those rules. Housing is a qualified disability expense.<sup>31</sup>

#### **IV. WHAT ELSE SHOULD YOU KNOW.**

There are certain terms which are helpful for special needs attorneys to know. Some assist your clients directly; others add to your own ability to under the system. Some are practice additions, others are substantive.

Aged - 65 years of age or older.<sup>32</sup> Check to see whether your state has chosen to apply a younger age. A state may not apply an older age because states cannot be more restrictive than federal law.

Alien - An individual lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions in 8 U.S.C. § 1182(d)(5)).<sup>33</sup> Many states have significant populations of qualified and non-qualified aliens. Immigration law never been seen to be a component of a special needs practice, but can you create a special needs trust for someone who doesn't meet this definition. For individuals with disabilities, alien-status will have been determined by SSA. If you are working to get benefits for a seriously compromised individual who needs SSI and/or Medicaid, consider retaining immigration counsel.

Blind - For SSI and Medicaid, an individual is considered blind if he or she has central visual acuity of 20/200 or less in the better eye with the use of a correcting lens. An eye which is accompanied by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees shall be considered as having a central visual acuity

---

<sup>31</sup> POMS SI 01130.740(B)(8)

<sup>32</sup> 42 U.S.C. §1382c(a)(1)(A).

<sup>33</sup> 42 U.S.C. §1382c(a)(1)(B)(i).

of 20/200 or less. An individual is also considered to be blind if he or she is blind as defined under the State Plan.<sup>34</sup> Unless individuals have disabilities in addition to blindness, it's not common to have blind individuals seek public benefits until they are older and no longer have the ability to live safely.

**Categorically Eligible** - Within federal guidelines, States have broad discretion in determining which groups their Medicaid programs will cover and the financial criteria for eligibility. Being categorically eligible means that they are in a category which may make them eligible to get Medicaid. States must provide coverage to mandatory categorically eligible individuals (e.g. recipients of SSI and families with dependent children receiving cash assistance, as well as other mandatory low-income groups such as pregnant women, infants, and children with incomes less than the specified percent of the FPL) and certain low-income Medicare beneficiaries. States can elect whether or not to provide coverage to optional categorically eligible individuals, such as individuals who would be eligible for SSI but do not meet the income criteria for the program.<sup>35</sup>

**CHIP** - The Children's Health Insurance Program (CHIP) is an insurance program jointly funded by the state and federal government and administered by the states. The program provides health coverage to low-income children and, in some states, to pregnant women in families who earn too much income to qualify for Medicaid but cannot afford to purchase private health insurance coverage. Eligibility for CHIP varies by state.<sup>36</sup> Assistance to CHIP clients is a sub-specialty of special needs planning.

**Commutation Riders** - A drafting provision in a self-settled special needs trust arising out of a personal injury settlement. The structured settlement annuity payments may become immediately liquid in whole or in part upon the happening of a certain event. For special needs planner, commutation clauses in the settlement documents may provide for immediately liquidity to pay Medicaid and/or the IRS upon the death of the beneficiary. Failing to have a commutation clause can create unnecessary complexities (as I learned first-hand, ouch). The parties must be aware of potential adverse tax consequences and review 26 U.S.C. §130 of the Internal Revenue

---

<sup>34</sup> 42 U.S.C. §1382c(a)(2); 42 U.S.C. § 1396d(a)(iv), (vii).

<sup>35</sup> 42 C.F.R. § 435.4.

<sup>36</sup> 42 U.S.C. Subchapter XXI.

Code.<sup>37</sup> Experienced personal injury attorneys understand this issue, but many don't understand, giving you the opportunity to step in to provide immediate Medicaid payback, and potential distribution of remainder amounts to the contingent beneficiaries.

Compassionate Allowances - The List of Compassionate Allowances (CAL) identifies diseases and other medical conditions that, by definition, meet the Social Security Administration's standards for disability benefits. The CAL helps caseworkers at the Social Security Administration quickly reach a disability determination for individuals with very serious disabilities.<sup>38</sup> If you learn that a very sick client is waiting for a disability determination, check the list of compassionate allowances.

Constructive Receipt - The Social Security Administration counts earned and unearned income in the months of actual or "constructive" receipt. Constructive receipt means that the income has been credited to the individual's account or has been set aside for his or her use, whether or not the individual has actually received the money.<sup>39</sup> Constructive receipt can become an issue in probate, trust inheritances and litigation settlement, to name a few instances.

"(d)(4)(c)" Special Needs Trusts - A pooled SNT established under 42 U.S.C. § 1396p(d)(4)(C) is managed and created by a non-profit organization, which maintains separate accounts for its beneficiaries. A sub-account in a pooled SNT is established solely for the benefit of the individual with a disability and can be established by the beneficiary or the beneficiary's parent, grand-parent, or legal guardian. A pooled trust is a first party trust with a Medicaid payback, however, pooled trusts are permitted to retain the balance of a deceased beneficiary's sub-account for charitable purposes in lieu of the payback. An account in a (d)(4)(c) SNT is treated as an exempt asset for Medicaid eligibility purposes.<sup>40</sup>

Deeming - The process of attributing another person's income and resources to be available to an individual applying for or receiving government benefits. For example, for children under the age of 18 the income of a parent or the spouse of a parent, who lives in the same household as

---

<sup>37</sup> Begley, T. and Canellos, A. *Special Needs Trust Handbook*, Aspen Publishers.

<sup>38</sup> "Compassionate Allowances." *The Social Security Administration*.  
<https://www.ssa.gov/compassionateallowances/index.htm>.

<sup>39</sup> "Supplemental Security Income, Sec. 2133.2- What Does Constructive Receipt Mean." *The Social Security Handbook*. [https://www.ssa.gov/OP\\_Home/handbook/handbook.21/handbook-2133.html](https://www.ssa.gov/OP_Home/handbook/handbook.21/handbook-2133.html).

<sup>40</sup> 42 U.S.C. § 1396p(d)(4)(C).

the child, is generally deemed to be available to the child for purposes of SSI eligibility.<sup>41</sup> When the child is medically fragile, deeming may be waived so that Medicaid services can be provided.

Definition of Disability - A person is considered disabled by the Social Security Administration if he or she is unable to engage in any substantial gainful activity (SGA) 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. A person is considered to be engaging in substantial gainful activity (SGA) if he or she earns more than \$1,260 (2020) (if the person is blind, the amount of SGA is \$2110 [2019]). Children under the age of 18 will be considered disabled if they have a medically determinable physical or mental impairment that results in *marked and severe* functional limitations, 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 12 months.<sup>42</sup>

Deficit Reduction Act of 2005 (DRA) - The (DRA) is a compilation of federal laws which made major changes in how Medicaid eligibility is calculated. Several provisions were aimed at reducing Medicaid costs and at providing states with flexibility to reform their state Medicaid programs to save costs. The legislation, among other things, extended the Medicaid “lookback” period for transfer of assets from three to five years, and changed the formula by which transfer penalties were calculated, which seriously affected the ability of elder law attorneys to protect Community Spouses. Other features permitted states to provide home and community based services as an optional benefit, established a maximum net equity value on the family home, and mandated that annuities be treated as a transfer of asset for less than fair market value unless the annuity met the requirements under 42 U.S.C. 1396p(c)(1)(F).<sup>43</sup>

Federal Benefit Rate (FBR) - The Federal Benefit Rate (FBR) is the maximum federal monthly SSI benefit and the SSI income limit. In 2020, the FBR is \$783 per month.<sup>44</sup> In 1999, the FBR was \$369.

---

<sup>41</sup> POMS SI 01320.001.

<sup>42</sup> 42 U.S.C. § 1382c(1)(a)(3)(A).

<sup>43</sup> Zimring, Morgan, Frigon, & Reaves. “Medicaid.” *Fundamentals of Special Needs Trusts* § 10.04 (2017).

<sup>44</sup> POMS SI 02001.020.

Federal Poverty Level (FPL) - The Federal Poverty Level (FPL) is an income level used to determine eligibility for certain programs and benefits. The FPL is determined annually by HHS and defines the amount of annual income which constitutes “poverty” in the United States. For 2020, the FPL (excluding Alaska and Hawaii) for individuals is \$12,760 and \$26,200 for a family of 4.<sup>45</sup>

Grantor Trust for tax purposes - First-party special needs trusts generally always receive the tax classification of a “grantor trust.” This tax classification means that all of the items of income, deduction and credit generated by the trust should be reflected on the personal income tax return of the individual with the disability, who is the trust beneficiary. In first-party special needs trusts, the grantor is actually the beneficiary because the law requires the trust be funded with the beneficiary’s own assets.<sup>46</sup> In situations where the trustee of a first-party special needs trust does not obtain a separate taxpayer identification number for the trust, the beneficiary’s social security number is reflected as the taxpayer identification number for the trust, and a separate informational Form 1041 is not generally filed.

HUD – Housing Choice Voucher Program - The Department of Housing and Urban Development (HUD) is the federal agency that administers programs with the goal of creating sustainable, inclusive communities and quality affordable homes. The housing choice voucher program Section 8 of the Housing Act of 1937 assists low income families, the elderly, and individuals with disabilities to afford housing in the private market. The housing choice voucher program is a federal program administered locally by public housing agencies (PHA)<sup>47</sup>, and distributions of income can disqualify some Beneficiaries from the voucher program.<sup>48</sup> A family that is issued a housing voucher is responsible for finding a suitable housing unit of the family's choice where the owner agrees to rent under the program. A housing subsidy is paid to the landlord directly by the PHA on behalf of the participating family. The family then pays the difference between the actual rent charged by the landlord and the amount subsidized by the program.<sup>49</sup>

---

<sup>45</sup> “Poverty Guidelines.” *U.S. Department of Health and Human Services*. <https://aspe.hhs.gov/poverty-guidelines>

<sup>46</sup> Pleat, *The Voice*, March 2014, Vol. 8, Issue 2

<sup>47</sup> “The Housing Choice Voucher Fact Sheet.” *The U.S. Department of Housing and Urban Development*. [https://www.hud.gov/topics/housingchoicevoucherprogramsection\\_8](https://www.hud.gov/topics/housingchoicevoucherprogramsection_8).

<sup>48</sup> *DeCambre v. Brookline Housing Authority*, 826 F.3d 1 (2016)

<sup>49</sup> <https://www.benefits.gov/benefit/710>

ISM - In-Kind Support and Maintenance (ISM) is unearned income in the form of food or shelter provided by a third party to an SSI recipient. When an SSI recipient receives ISM, there is a reduction in the recipient's monthly SSI benefit. The SSA uses two rules for determining the value of ISM—the one-third reduction rule (VTR) and the presumed maximum value rule (PMV).<sup>50</sup> When application of the VTR or PMV rule is necessary, review the SSI amount that will result from the reduction in the benefit. At times, the best decision may be to forego SSI and the requirements of the federally based SSA and apply only for Medicaid through state offices.

Judicial Modification - Judicial modification of an irrevocable trust refers to the petitioning of a court under a state statute to amend the terms of the trust. This typically occurs when the trust is silent on modification and there is no state statute that allows for non-judicial modification of the trust. When state law does permit non-judicial modification with the consent of the Trustee and the present and future beneficiaries, consider it a best practice to be getting a court order anyway. Court orders will often get deference by SSA or Medicaid.

Mandatorily Eligible – When state Medicaid plans were written in 1972, each State was required to identify people whom they would mandatorily cover with state services regardless of the number of persons who met the eligibility criteria. Mandatorily eligible populations are a significant problem for states which cannot predict the number of persons who will be entitled to state plan benefits in the coming fiscal year. State governments don't like budget unpredictability. Each state was free to choose which groups of individuals would receive mandatory services; common mandatorily eligible populations were low-income families, qualified pregnant women and children, and individuals receiving SSI, among others. Demographic changes and medical improvements have made many 1972 decisions about mandatorily eligible populations obsolete and some program services are ineffective as a result..

Medicaid - Established in 1965, Medicaid is a joint federal and state program administered by the states that provides health coverage to individuals with low incomes and limited resources. The program is jointly funded by the states and federal government, with the federal government paying states for a specified percentage of program expenses based on per capita income, called the Federal Medical Assistance Percentage (FMAP). In May 2020, around 73.5 million

---

<sup>50</sup> POMS SI 00835.310.

individuals in the U.S. were enrolled in a Medicaid program.<sup>51</sup> Federal law requires that State Medicaid plans cover certain mandatory populations and provide mandatory benefits. States have the flexibility in providing optional benefits and may extend coverage to other additional groups such as medically needy populations.<sup>52</sup>

Medicaid Payback - Under the congressional mandate that every state adopt a program to recover Medicaid expenditures from the estates of Medicaid recipients, states can attach liens to personal or real property to seek recovery for Medicaid expenses. States are required to seek recovery from a Medicaid recipient's estate if the recipient received nursing facility services, home and community-based services, and related hospital and prescription drug services at the age of 55 or older. States may recover payments for all other Medicaid expenses provided to all Medicaid recipients; however, states are prohibited from recovering from the estate of a Medicaid recipient who is survived by a spouse, a child under age 21, or a blind or disabled child, or when such recovery would cause an undue hardship as defined by the state Medicaid program.<sup>53</sup> *Of particular importance to the special needs practitioner is that estate recovery for beneficiaries of a self-settled special needs is **not limited** to individuals who have received long term care services after age 55.*<sup>54</sup> Medicaid payback may not be limited to any particular period of time, i.e. payback cannot be limited to the period after establishment of the trust.<sup>55</sup> All Medicaid benefits paid during the beneficiary's lifetime are subject to recovery. The impact of the amount of Medicaid payback is frequently not thoroughly considered when special needs planning is begun.

Medically Needy - States have the option to establish a "medically needy program" for individuals with significant health needs whose incomes are too high to otherwise qualify for Medicaid under other eligibility groups. The Medically Needy population falls under the "categorically eligible" standard; these individuals are not entitled to mandatory coverage absent a state waiver. Medically needy individuals can still become eligible by using medical expenses incurred to reduce or spend down their amount of income in order to qualify for Medicaid coverage. Once an individual's incurred expenses exceed the difference between the individual's

---

<sup>50</sup> <https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/report-highlights/index.html>.

<sup>52</sup> 42 U.S.C. Ch. 7, Subchapter XIX.

<sup>53</sup> 42 U.S.C. § 1396p(b)(1).

<sup>54</sup> POMS SI 1120.203B.(1)(h)

<sup>55</sup> Id.

income and the state's medically needy income level (the "spenddown" amount), the person can be eligible for Medicaid. The Medicaid program then pays the cost of services that exceed what the individual had to incur in the way of expenses in order to become eligible.<sup>56</sup> Sometimes, clients who are seeking the protection of a special needs trust may not be eligible for the program that they most want. Reviewing programs and eligibility criteria is important to providing guidance. Many clients will know more than you do about these programs but verify what they believe they understand by asking your professional colleagues.

Medicare Eligibility for ESRD and ALS - Individuals with Amyotrophic Lateral Sclerosis (ALS) and End Stage Renal Disease (ESRD) are eligible for Medicare without the 29-month waiting period. An individual with ESRD is eligible for Medicare generally three months after a course of regular dialysis or after a kidney transplant. An individual with ALS is eligible for Medicare immediately upon collecting SSD benefits, which occurs five months after receiving a disability determination by the SSA.<sup>57</sup> At times, the purpose of special needs planning is to cover that 29-month period before Medicare begins by accessing Medicaid. If that's the case, then individuals with ALS and ESRD may not need to move ahead with special needs planning.

Medicare Set-Aside - A Medicare Set-Aside is a trust arrangement established to hold settlement proceeds for future medical expenses. During litigation, an evaluation is done of the beneficiary's future medical needs, and the evaluation includes an amount that should be set aside for future medical care related to the injury upon which the settlement is based, and which Medicare would normally have covered. The calculated portion of the settlement funds are then either placed in the Medicare Set-Aside account in one lump-sum or the account is funded with an annuity. These "set-aside" funds must be spent before Medicare will step forward and cover additional expenses. The administrator of the Medicare Set-Aside trust may use the funds only to pay for medical care related to the personal injury, leaving Medicare or your private insurance to provide coverage for medical expenses that are not related to your injury. Medicare Set-Aside companies provide services specifically intended to assist with this process. The MSA may be created as a provision of a SNT.<sup>58</sup>

---

<sup>56</sup> "Eligibility." *Medicaid*. <https://www.medicaid.gov/medicaid/eligibility/>.

<sup>57</sup> 42 U.S.C. § 426(h); 42 U.S.C. § 1395rr.

<sup>58</sup> Zimring, Morgan, Frigon & Reaves. "Medicare Set-Aside." *Fundamentals of Special Needs Trusts* § 7.03 (2017)

OBRA '93 - The Omnibus Budget Reconciliation Act of 1993 (OBRA '93) mandated Medicaid estate recovery by States and authorized the creation of self-settled (d)(4)(A) SNTs, qualified income trusts<sup>59</sup> and pooled (d)(4)(C) SNTs, among other things. States must seek recovery of the cost of medical assistance paid to a Medicaid recipient who was 55 years of age or older at the time he or she received nursing home services, home and community-based services, and related hospital and prescription drug costs. States have the option to expand recovery within certain limitations.<sup>60</sup> A budget reconciliation act is a federal budget act and many provisions which don't succeed as individual bills can be amended onto the budget act as a result of compromises. OBRA '93 began the first-party trust practice as we know it today.

PMV - The Presumed Maximum Value (PMV) is the cap on the amount of In-kind Support and Maintenance (ISM) that SSA can deduct from an SSI recipient's monthly SSI benefit. PMV is used when the claimant receives ISM but does not receive *both* food and shelter from a third party. When the claimant receives both food and shelter from a third party, SSA uses the one-third reduction (VTR) rule instead of PMV. PMV is equal to one-third of the Federal Benefit Rate (FBR) plus \$20.<sup>61</sup>

POMS - The Program Operations Manual System (POMS) is the regulation manual (similar to a state Medicaid manual in some ways, but a more persuasive source of regulation) used by Social Security employees to process claims for benefits that are administered by the Social Security Administration. The POMS is available online and used by practitioners to gain information on drafting special needs trusts and to be updated on the SSA's interpretation of federal law.<sup>62</sup>

Qualified Disability Trusts - A Qualified Disability Trust is a designation for a special needs trust established for an individual with a disability that meets the requirements under 5 I.R.C. §642(b)(C). The beneficiary of a Qualified Disability Trust must be receiving SSI or SSDI and is under the age of 65 at the time the trust is established. The trust must be irrevocable and established

---

<sup>59</sup> 42 U.S.C. § 1396p(d)(4)(B)

<sup>60</sup> 42 U.S.C. § 1396p(b); 42 U.S.C. § 1396p(d)(4)(A), (C).

<sup>61</sup> POMS SI 00835.300.

<sup>62</sup> SSA Program Operations Manual System (POMS). *Social Security Administration*. <https://secure.ssa.gov/apps10/>.

for the sole benefit of the beneficiary. Qualified Disability Trusts are entitled to receive the same personal exemption allowed to individual taxpayers, which can result in significant tax savings.<sup>63</sup>

QMB, SLMD, Q1 – The Qualified Medicare Beneficiary Program, Specified Low-Income Beneficiary Program and Qualified Individual Program are among the most sought-after Medicaid benefits because applicants for these programs will receive coverage for many or all of Medicare’s non covered costs, such as deductibles, co-insurance, co-payments and Part A and B premiums. For low-income individuals, eligibility can mean avoiding poverty as well as getting proper health care.<sup>64</sup> Income limits vary by program and an increase in a pension amount or social security COLA can take a previously eligible person out of QMB (individual income maximum is \$1084 monthly; and into SLMB (individual maximum income is \$1296 monthly) or QI (individual maximum income is \$1456 monthly), where benefits are more limited. The 2020 resource limitation is \$7860.

Seed Trust - If a legally competent, disabled adult does not establish his or her own special needs trust, a parent or grandparent may establish a “seed” trust using a nominal amount of his or her own money or, if State law allows, an empty or dry trust. After the seed trust is established, the legally competent, disabled adult may transfer his or her own assets into the trust, or another individual with legal authority (such as a power of attorney) may transfer the individual's assets into the trust for a beneficiary who lacks the capacity to do so.<sup>65</sup>

Self-Settled Trust - A self-settled, first party “(d)(4)(A)” SNT is a trust that meets the statutory requirements under 42 U.S.C. § 1396p(d)(4)(A) and is funded by money owned by the beneficiary of the trust. The trust must be irrevocable, for the sole benefit of the beneficiary who is under 65 when the trust is established, and subject to a state Medicaid pay-back provision, meaning that upon the beneficiary’s death, of the remaining trust account, an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan will be paid to the State. The trust is treated as an exempt asset for Medicaid eligibility purposes, and a

---

<sup>63</sup> 5 I.R.C. §642(b)(C).

<sup>64</sup> 42 U.S.C. § 1396a(a)(10)(E).

<sup>65</sup> SI 01120.203(C)(2)(B)

transfer to the trust, by an applicant for Medicaid, is an exempt transfer. This type of trust can be established by the beneficiary, or the beneficiary's parent, grandparent, legal guardian, or a court.<sup>66</sup>

**Settlement Preservation Trust - Settlement Preservation Trusts (SPTs)** are trusts that hold settlement funds for the beneficiary and are used to preserve settlement proceeds, protecting the funds from wasteful spending and the beneficiary from exploitation. Settlement Preservation Trusts are used for beneficiaries who are not receiving public benefits but who need asset management, personal assistance and protection. A settlement preservation trust may be a good option for a client whose financial and health status is such that public benefits can be avoided.

**SNAP - Food Stamps - The Supplemental Nutrition Assistance Program (SNAP)** offers nutrition assistance to millions of eligible, low-income individuals and families and provides economic benefits to communities. The Food and Nutrition Service works with State agencies, nutrition educators, and neighborhoods to ensure that those eligible for nutrition assistance can make informed decisions about applying for the program and can access benefits.<sup>67</sup> SNAP benefits are not income for SSI eligibility purposes.<sup>68</sup>

**SNT & Retirement Accounts - A SNT** can be named as a beneficiary of an inherited retirement account without affecting the child's eligibility for public benefits. Before advising a client in naming a SNT as a beneficiary of his or her retirement accounts, there are a number of factors to consider, such as possible adverse tax consequences and whether any contingent beneficiaries of the SNT will affect the required minimum distributions (RMDs) from the account.<sup>69</sup>

**Sole Benefit Rule - Some public benefit programs** such as SSI and Medicaid, require that a special needs trust be established and administered for the sole benefit of the beneficiary, without regard to remainder beneficiaries. The POMs provide guidance, interpretation, and exceptions to the sole benefit rule such as reasonable administrative expenses associated with the trust and third-

---

<sup>66</sup> 42 U.S.C. § 1396p(d)(4)(A).

<sup>67</sup> 7 U.S. Code Chapter 51; 7 C.F.R. Chapter II, Subchapter C.

<sup>68</sup> <https://www.ssa.gov/ssi/text-income-ussi.htm>

<sup>69</sup> Hook, Andrew H., CELA. "Retirement Funds and SNTs". *Special Needs Alliance*.

<https://www.specialneedsalliance.org/retirement-funds-and-snts/>; Zimring, Morgan, Frigon, & Reaves. "Naming a SNT as a Beneficiary of a Retirement Account." *Fundamentals of Special Needs Trusts* § 12.14 (2017).

party payments for goods or services received by the trust beneficiary.<sup>70</sup> Consider a trust established for the sole benefit of an individual if 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. Do not consider a trust that allows for the trust corpus or income to be paid to, or for the benefit of, a beneficiary other than the SSI applicant or recipient as a trust established for the sole benefit of the applicant or recipient.<sup>71</sup>

Special Needs Trust Fairness Act - Signed into law on December 13, 2016, the Special Needs Trust Fairness Act authorizes individuals with disabilities to establish their own self-settled special needs trust. Before this law went into effect, self-settled SNTs could only be established by a parent, grandparent, guardian or a court.<sup>72</sup>

Spigot Trust - Spigot Trust is the context of SNT planning is a trust that contains a distribution standard permitting the trustee to make a distribution from the trust that would reduce the beneficiary's eligibility for public benefits.

SSDI - Social Security Disability Income (SSDI or SSD) is a monthly cash assistance program administered by the Social Security Administration to people who cannot work because they have a medical condition that is expected to last at least one year or result in death. To be eligible for SSDI benefits, the recipient must have paid into the Social Security system for a certain time period. Unlike SSI, there are no asset or unearned income restrictions to become eligible. SSDI recipients receive Medicare benefits, but must wait 24 months from the date of entitlement to SSDI cash income before Medicare coverage begins.<sup>73</sup>

SSI - Supplemental Security Income (SSI) is a monthly cash assistance program administered by the Social Security Administration to people with limited income and resources who are disabled, blind, or age 65 or older. In 2020, the maximum SSI benefit is \$783. Any income received by an SSI recipient will reduce his or her SSI benefit.. The receipt of in-kind support and maintenance (ISM) can reduce SSI benefit up to 1/3rd. An SSI recipient cannot own more than \$2,000 in resources; certain assets such as a homestead and vehicle are excluded as

---

<sup>70</sup> POMS SI 01120.201F.2.

<sup>71</sup> POMS SI 00120.201(F)(1)

<sup>72</sup> 21st Century Cures Act (P.L. 114-255), Section 5007.

<sup>73</sup> 42 U.S.C. Ch. 7, Subchapter II.

resources. In many states, SSI eligibility brings automatic Medicaid coverage.<sup>74</sup> While \$783 is the maximum benefit in 2020, each year the maximum benefit varies due to optional state supplementation, earnings rules, new exclusions and changes in other benefit numbers. Start from the maximum amount of the annual benefit, but don't stop there.

**Structured Settlement -** A Structured Settlement is a type of court settlement, typically from a personal injury or malpractice case, that is typically funded through the purchase of annuity, where the settlement proceeds are paid out over a period of time instead of as a lump sum. Payments can be structured to reflect the beneficiary's needs as he or she ages. A SNT can be the receptacle of a structured settlement annuity but pre-planning should be done to determine whether an annuity or lump sum might be a better choice.<sup>75</sup> This can be challenging for the attorney whose client is the structured settlement company, but solid working relationships help when doing planning at this stage.

**“True Link” and other administrator managed debit cards:** The administrator-managed prepaid cards are a type of restricted debit card that can be customized to block the cardholder's access to cash, specific merchants, or entire categories of spending. Typically, the trustee is the account owner and administrator, and the trust beneficiary is the cardholder. This may not be the case when an ABLE account is involved. To evaluate the income and resource implications of trust disbursements to administrator-managed prepaid cards, a determination must be made as to who owns the prepaid card account. If the trustee is the owner of the prepaid card account, whether the trust beneficiary receives income from trust disbursements depends on the type of purchase reflected in the card statement.<sup>76</sup>

**Trust Protectors and Trust Advisory Committees -** Trust Protectors (TPs) or Trust Advisory Committees (TACs) can be included in a SNT to ensure that a beneficiary's specific needs are met, typically when the trustee is an institutional trustee and there is concern that the trustee may not be aware of or responsive to the beneficiary's needs. A TAC is a group of individuals who are given the authority to do specific tasks such as advising the trustee, reviewing actions of the trustee, and removing and replacing the trustee. A TP has similar authority to a TAC

---

<sup>74</sup> 42 U.S.C. Ch. 7, Subchapter XVI.

<sup>75</sup> Zimring, Morgan, Frigon, & Reaves. “Structured Settlements.” *Fundamentals of Special Needs Trusts* § 4.08 (2017).

<sup>76</sup> POMS SI 00120.201(I)(1)(e)

but can also have the ability to amend the SNT so that it complies with tax and/or public benefit laws. TACs or TPs can have fiduciary responsibilities depending on the terms of the trust and case law.<sup>77</sup>

Waiver Program - States may use federally approved waivers to test new or existing ways to deliver and pay for health care services in Medicaid and CHIP. There are four primary types of waivers and demonstration projects: § 1115 Research & Demonstration Projects; § 1915(b) Managed Care Waivers; § 1915(c) Home and Community-Based Services (HCBS) Waivers; and Concurrent § 1915(b) and 1915(c) Waivers. In some states, income limits are waived, or other standard requirements are changed. States which had tightly structured state plans when they entered into a Medicaid program agreement with the federal government need waivers to meet the needs of today's populations. The term "waiver" may be used slightly differently in each state, and it's critical to know whether the income and asset limits are waived. Severely disabled children whose care can cost hundreds of thousands of dollars per year may receive care without being subject to the normal income and asset limitations.

## **V. Should I Stick to The Basics?**

Every special needs trust which you present to a client should have the basic elements discussed early in this paper. Yes, you have to stick to the basics before you can create more sophisticated elements. "Basic" trusts require broad knowledge of the field. Whether your trust agreement is short in length, or runs the length of the Constitution, your objective is to get the trust approved by SSA, ensure that the proper protections are in place for the Beneficiary and name Trustees best able to meet their fiduciary relationships. Basics are hard, and you'll learn new basics regularly. Reading the sources available to use and having colleagues to guide us provides value to our clients well beyond the concept of basic abilities.

---

<sup>77</sup> Zimring, Morgan, Frigon, & Reaves. "Trust Protector/ Trust Advisory Committees." *Fundamentals of Special Needs Trusts* § 4.09 (2017)