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First-Party Special Needs Trusts

**Drafting When Federal Compliance Is Not Enough:
State-Level D4A Anomalies, Administrative Friction,
and Practical Drafting Implications**

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Overview

A first-party special needs trust under 42 U.S.C. § 1396p(d)(4)(A) is often taught as though the drafting exercise begins and ends with the federal statute: disabled beneficiary, under age sixty-five, trust established by the proper person, sole-benefit administration, and Medicaid payback. That federal baseline remains indispensable, but it is not the whole story. In a meaningful group of jurisdictions, a trust that appears facially compliant under federal law may still encounter delay, rejection, additional reporting obligations, funding obstacles, lien-clearance issues, property restrictions, or termination complications because the governing state has added its own statutory, regulatory, manual-based, or operational overlay.

That gap between federal sufficiency and state implementation matters most when the practitioner, court, or fiduciary is handling a settlement-funded trust, moving a beneficiary across state lines, or administering trusts nationally through a corporate platform. A local lawyer may know intuitively how one state behaves. A trust company officer with a 51-jurisdiction book of business cannot safely rely on intuition or on one state's habits. The relevant question is not merely whether the trust is federally compliant in the abstract, but where it will be reviewed, funded, administered, distributed from, and eventually terminated.

This paper therefore takes a deliberately blended approach. It begins with the core drafting and administration principles that still govern first-party trusts as a matter of federal law and sound practice. It then turns to the more interesting and, for many fiduciaries, more consequential subject: the jurisdictions in which compliance with the federal statute alone may be insufficient as an operational matter. The result is intended

to be useful both to lawyers drafting these instruments and to trustees and trust officers who must administer them in real files rather than in the clean hypotheticals of federal statutory text.

What a First-Party Trust Is

At its most basic, a first-party trust is a trust funded with assets that belonged to, were vested in, or became legally payable to the beneficiary whose needs the trust is designed to serve. Traditional trust law would describe the arrangement as self-settled. In the special-needs setting, that source-of-funds inquiry is often the first and most important threshold question. If the assets were the beneficiary's by right, whether because of a personal-injury recovery, an inheritance payable outright, a beneficiary designation, accumulated back benefits, or some other vested entitlement, the practitioner is in first-party trust territory rather than third-party planning.

Congress authorized self-settled special needs trusts in 1993 through the Omnibus Budget Reconciliation Act of 1993, signed into law on August 10, 1993.¹ The point was not to create a general asset-protection device for a beneficiary's own funds. The point was narrower and more humane: to permit a disabled individual to preserve eligibility for means-tested public benefits, principally Medicaid and SSI, while still using his or her own property in a structured way for supplemental benefit. If the same funds are paid directly to the disabled individual and held outright, those assets generally become countable resources. If they are transferred into a properly established and

¹Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13611, 107 Stat. 312, 622–27 (1993) (approved Aug. 10, 1993), <https://www.govinfo.gov/content/pkg/STATUTE-107/pdf/STATUTE-107-Pg312.pdf>, codified in relevant part at 42 U.S.C. § 1396p(d)(4)(A), <https://www.law.cornell.edu/uscode/text/42/1396p>.

administered first-party special needs trust, they may be disregarded for eligibility purposes, subject always to the governing federal and state rules. See 42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.203.

For SSI purposes, distribution mechanics remain critical. Payments made directly to third-party vendors for goods and services may avoid treatment as income to the beneficiary, while payments for shelter implicate the in-kind support and maintenance (ISM) rules and may reduce, though not necessarily eliminate, SSI. Effective September 30, 2024, the Social Security Administration no longer counts food in ISM calculations, so trust payments for food no longer reduce SSI as they once did.² Medicaid treatment is different; the central concern is usually whether the trust corpus remains a countable resource and whether trust administration is consistent with the governing exception. For practitioners and trustees alike, that distinction between benefit systems should be kept conceptually separate from the drafting question itself.

The Federal D4A Baseline

The classic stand-alone first-party trust is the trust described in 42 U.S.C. § 1396p(d)(4)(A), usually shortened to a “D4A” trust. The trust holds the assets of a disabled individual. The beneficiary must meet the Social Security disability standard. The trust must be established by the disabled individual if competent, or by a parent, grandparent, guardian, or court. It must be for the sole benefit of the disabled

²Social Security Administration, Emergency Message EM-24048, Omitting Food from In-Kind Support and Maintenance (ISM) Calculations (effective Sept. 30, 2024), <https://secure.ssa.gov/apps10/reference.nsf/links/09252024015358PM>; see also Social Security Administration, SSI Spotlight on Living Arrangements, <https://www.ssa.gov/ssi/text-living-ussi.htm>.

beneficiary, and the beneficiary must be under age sixty-five when the trust is established and funded.³

The trust must also contain a Medicaid payback provision. In broad terms, the state or states that furnished medical assistance are repaid at the beneficiary's death, up to the amount properly recoverable under governing law, before any remainder passes to other beneficiaries. That single sentence, however, conceals a great deal of complexity. States differ meaningfully over the exact formulation of payback, over whether and how they treat early termination, over whether they insist on all-state reimbursement language, over the order of allowable expenses at death, and over whether they impose reporting or approval conditions while the beneficiary is still alive. Those differences are part of the central thesis of this paper.

Federal law supplies the floor. It does not guarantee a frictionless path in every jurisdiction. A drafter who stops at the federal elements may produce an instrument that looks fine on first read yet performs badly in administration because a particular state has layered on requirements concerning notice, asset forms, annual accounts, court procedures, liens, death reporting, or termination mechanics.

Funding Contexts and Why They Matter

The D4A trust arises most commonly in two situations. The first is litigation, particularly personal-injury matters. A settlement or judgment may never physically pass through the beneficiary's hands, especially where structured-settlement mechanics are involved, yet it is still treated as the beneficiary's property for trust-classification

³42 U.S.C. § 1396p(d)(4)(A), <https://www.law.cornell.edu/uscode/text/42/1396p>; Soc. Sec. Admin., Program Operations Manual System (POMS) SI 01120.203, Exceptions to Counting Trusts Established on or after January 1, 2000, <https://secure.ssa.gov/poms.nsf/lnx/0501120203>.

purposes. The second is failed or incomplete family planning, usually where parents intended a third-party supplemental needs arrangement but allowed an inheritance, retirement asset, or beneficiary designation to pass outright to the disabled individual.

In both settings, the timing and mechanics of funding matter enormously. If a tort settlement is involved, some states require Medicaid lien resolution before the trust is funded. Others insist on agency review or notice before court approval. Still others focus on reporting after funding rather than before. A trust company that routinely accepts settlement assignments in one easy state can step into significant trouble if it assumes the same process works in New Jersey, Georgia, Maryland, or another high-friction jurisdiction.

That is one reason a purely forms-based approach to D4A work is dangerous. The same apparently federal-compliant instrument can succeed smoothly in one state and trigger review problems, funding delays, or post-death disputes in another.

Stand-Alone Trusts, Pooled Trusts, and Smaller Recoveries

In substantial settlement matters, especially those exceeding approximately six figures, the usual practice is to establish a stand-alone D4A trust tailored to the beneficiary and administered by a professional fiduciary or corporate trustee if one is available. That remains the gold-standard structure where the asset base can support the cost of competent administration and investment management.

For more modest recoveries, the pooled-trust alternative under 42 U.S.C. § 1396p(d)(4)(C) often becomes part of the conversation. A pooled trust combines assets for investment and administrative purposes while maintaining separate subaccounts for individual beneficiaries. It can be especially useful where the amount involved is too

large to spend down comfortably in a month but too small to justify the economics of a stand-alone professional trust administration. That remains true even though many clients dislike the charitable-retention feature and the loss of personal control that pooled structures may entail.

Age sixty-five remains a fault line in pooled-trust practice. The transfer-penalty treatment of post-age-sixty-five pooled-trust funding is jurisdiction-sensitive, and the law remains far from uniform. That issue is analytically distinct from the stand-alone D4A trust, but in practice the two subjects are constantly linked because pooled trusts are often the proposed solution when a disabled beneficiary is older, or when a smaller fund cannot support a separate professional administration. A practitioner handling a national file should never assume that pooled-trust treatment is interchangeable from one jurisdiction to another.

Where the recovery is very small, ordinary spend-down planning may still be the wiser route. Funeral and burial planning, vehicle acquisition, home-related expenditures, exempt-resource conversion, and other legitimate spend-down techniques may avoid the cost and complexity of trust administration altogether. But those choices are intensely timing-dependent, benefit-program-specific, and fact-sensitive. They should be treated as planning alternatives, not casual fallbacks.

ABLE Accounts: Fund Them First

No first-party analysis is complete without considering an ABLE account under I.R.C. § 529A. Effective January 1, 2026, the ABLE Age Adjustment Act raised the age by which disability must begin from twenty-six to forty-six, opening ABLE accounts to a

much larger group of first-party trust beneficiaries.⁴ Contributions from all sources are limited to \$20,000 for 2026. That figure is not the same as the \$19,000 gift-tax annual exclusion, because the ABLE limit is now computed from a different inflation base year.⁵ An employed beneficiary who does not participate in an employer retirement plan may contribute more under the ABLE-to-Work rule, which OBBBA made permanent.⁶ For SSI, the first \$100,000 in an ABLE account is disregarded as a resource, and distributions for qualified disability expenses are generally not income.⁷ ABLE accounts are not free of payback in most states: on the beneficiary's death, the state may claim the remaining balance for medical assistance paid, after outstanding qualified disability expenses, including funeral and burial costs. Some states have chosen not to pursue ABLE payback at all, among them Pennsylvania and North Carolina.⁸ In those states, the sequencing rule becomes absolute: whenever the beneficiary is ABLE-eligible, the ABLE account should be funded to the annual maximum first, every time, before a dollar

⁴ABLE Age Adjustment Act, enacted as part of the SECURE 2.0 Act of 2022, Pub. L. No. 117-328, div. T (amending I.R.C. § 529A(e)(1)), effective for taxable years beginning after December 31, 2025. See CalABLE, Age Adjustment, <https://calable.ca.gov/how-it-works/age-adjustment>.

⁵Soc. Sec. Admin., POMS SI 01130.740, Achieving a Better Life Experience (ABLE) Accounts (annual contribution limit chart: \$20,000 for 2026), <https://secure.ssa.gov/apps10/poms.nsf/lnx/0501130740>; Internal Revenue Serv., IRS Releases Tax Inflation Adjustments for Tax Year 2026 (gift-tax annual exclusion of \$19,000), <https://www.irs.gov/newsroom/irs-releases-tax-inflation-adjustments-for-tax-year-2026-including-amendments-from-the-one-big-beautiful-bill>; U.S. Sec. & Exch. Comm'n, An Introduction to ABLE Accounts, <https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/updated-6>.

⁶I.R.C. § 529A(b)(2)(B)(ii), as made permanent by Pub. L. No. 119-21 (2025). The companion Tax Law Update paper discusses the OBBBA ABLE provisions in more detail.

⁷Soc. Sec. Admin., POMS SI 01130.740, *supra*.

⁸I.R.C. § 529A(f). See PA ABLE, Benefits ("Account is not subject to Medical Assistance (Medicaid) repayment"), <https://www.paable.gov/benefits/>; PA ABLE, Resources (describing the federal claim as limited to medical assistance provided while the beneficiary had the ABLE account), <https://www.paable.gov/resources/>; NC ABLE, News & Media (North Carolina law prohibits Medicaid recovery from NC ABLE accounts unless required by federal law), <https://ncable.nc.gov/news-media>. State policies on ABLE payback vary and change; confirm the beneficiary's state and the state of the ABLE program.

goes into the D4A trust, and refilled from the trust every year thereafter. Note that because the payback claim belongs to the state that furnished Medicaid, the drafter should confirm the rule both in the beneficiary's Medicaid state and in the ABLE program being used, particularly when the beneficiary has moved or holds an out-of-state ABLE account.

That out-of-state point is not hypothetical. ABLE accounts are portable: a beneficiary may open an account in any state's program that accepts out-of-state enrollees, regardless of where the beneficiary lives. Many practitioners, the author included, have long placed clients in Ohio's STABLE Account program. STABLE was the first ABLE program in the country, launching on June 1, 2016, and it remains one of the most widely used.⁹ In the author's view, its design benefited from the early involvement of Steven Dale, who advised Ohio's Medicaid leadership as the program took shape. Its scale matters for a practical reason that rarely appears in the literature. ABLE programs are expensive for states to administer relative to the assets many of them hold, and the author expects some smaller state programs to close or consolidate over time. A large, well-built program is more likely to be one of the last standing. But an out-of-state program does not carry its home state's payback rules with it. Whatever the ABLE program's own state does, the Medicaid payback claim belongs to the state or states that furnished the beneficiary's medical assistance. A New Jersey Medicaid recipient with an Ohio STABLE account remains subject to New Jersey's position on

⁹Ohio Treasurer of State, Treasurer Sprague Recognizes Tenth Anniversary of STABLE Account Program, <https://tos.ohio.gov/newsroom/article/treasurer-sprague-recognizes-tenth-anniversary-of-stable-account-program/>; The Arc of Ohio, STABLE presentation (STABLE administered by the Ohio Treasurer, launched June 1, 2016, as the first ABLE plan in the nation), <https://www.thearcofohio.org/wp-content/uploads/2020/10/STABLE-Master-Presentation.pdf>. The observations about program design, administrative cost, and likely consolidation are the author's own.

ABLE payback, not Ohio's. Where the beneficiary's state requires payback from both the D4A trust and the ABLE account, moving funds from one to the other does not defeat the state's recovery rights; the choice is about administrative flexibility, which is exactly what a scrivener should be planning for. One nuance deserves mention: the federal ABLE claim reaches medical assistance paid after the ABLE account was established, which can be narrower than a state's asserted D4A payback scope, such as New Jersey's position measuring payback from birth. That difference flows from the federal statute itself, not from any maneuver by the trustee.

In New Jersey practice, the sequencing point is practical and important. When the beneficiary's disability began before age forty-six, the preferable approach is to direct the annual maximum, \$20,000 for 2026, into the beneficiary's ABLE account first and to fund the balance into the D4A trust. The ABLE account gives the beneficiary direct, flexible access for qualified disability expenses without the trust's \$5,000 and forty-five-day advance-notice regime, while the D4A trust holds the larger corpus under professional administration. The planning does not stop at initial funding, and it begins with the instrument itself. Authorizing the annual ABLE transfer should be one of the original drafting objectives of the D4A trust, not something the trustee discovers later. The trust should expressly permit the trustee to contribute to an ABLE account for the beneficiary under I.R.C. § 529A, on a recurring basis and in the trustee's discretion, as a distribution for the beneficiary's sole benefit, and it should coordinate that power with any state notice requirement. A trustee who must infer the authority from general distribution language invites questions from the agency, a court, or a corporate trustee's own compliance department. In the author's practice, the D4A trustee moves the annual

maximum from the first-party trust into the beneficiary's ABLE account every January, as a distribution for the beneficiary's sole benefit. Because a \$20,000 transfer exceeds New Jersey's \$5,000 threshold, the trustee sends DMAHS the forty-five-day advance notice in November, identifying the intended January transfer. In the author's experience, the state has not objected. The result is a deliberate annual cycle rather than a workaround to be avoided: each year, a portion of the corpus moves from an account subject to New Jersey's advance-notice regime into an account the beneficiary can use far more flexibly, consistent with federal law and the state's own rules. For a corporate trustee compensated on assets under management, the annual transfer may look counterintuitive, because it shrinks the trust each year. For many beneficiaries in a state like New Jersey, it is nonetheless among the most beneficiary-serving moves a fiduciary can make, and the duty of loyalty runs to the beneficiary, not to the fee base. The same analysis is worth running in every state: ABLE is often the most flexible dollar the beneficiary will have, so, often, it should be filled before the trust and refilled every year.

Trustee Selection and Why It Is a Drafting Question

A surprisingly large share of D4A problems that appear to be state law issues are, in practice, trustee-selection issues. A trust that is drafted perfectly but administered by the wrong fiduciary can fail operationally just as surely as a badly drafted instrument. Families often want a sibling, parent, or other relative to serve. The impulse is understandable. The practical risks are equally real. A first-party special needs trust requires discretionary judgment, benefits literacy, accounting discipline, tax competence, investment management, documentation, and an ability to keep current

with changing agency practices. Rarely does a family member bring all of that to the role.

In an ideal world, the trustee of a special needs trust uses discretion prudently for the beneficiary's supplemental benefit, understands SSI and Medicaid, keeps complete books, handles tax reporting correctly, can coordinate with care providers, withstands scrutiny from agencies and remainder beneficiaries, and is either personally durable or institutionally backed by an entity that is durable. That combination is far more likely to be found in a professional fiduciary or corporate trustee than in a loving but untrained relative.

The point is not theoretical. Trust breakdown through bad administration is painfully real. Practitioners who have cleaned up failed family-trustee matters know how much damage can be done before anyone intervenes. For that reason, the drafting conference with the family should treat trustee selection as part of the substantive planning, not as an afterthought to be filled in on the signature page.

At the same time, economics imposes limits. Many institutional trustees prefer or require substantial minimum balances. In smaller cases, the realistic options may be a professional fiduciary, an attorney-trustee, a state-licensed fiduciary where available, or a structured co-trustee/advisory arrangement. Those practical limits should be discussed candidly at the outset, because they often determine whether the planned trust can actually function well after funding.

Flexibility in Drafting

D4A drafting is unusually vulnerable to legal drift. The federal statutory framework has remained relatively stable in outline since the enactment of the Special

Needs Trust Fairness Act—enacted as § 5007, “Fairness in Medicaid Supplemental Needs Trusts,” of the 21st Century Cures Act, Pub. L. No. 114-255, § 5007, 130 Stat. 1033, 1209 (2016)—which amended 42 U.S.C. § 1396p(d)(4)(A) to permit a legally competent disabled individual to establish his or her own first-party special needs trust.¹⁰ But the interpretive ecosystem around the statute has not remained static. State regulations change. Agencies shift procedures. POMS guidance evolves. Institutional custodians change their willingness to hold certain assets. Courts differ on the effect of remainder structures, sole-benefit questions, or procedural defects. The instrument therefore should be drafted with as much lawful flexibility as possible.

That means more than adding boilerplate amendment language. It means thinking seriously about successor fiduciaries, trust protectors where permitted, decanting or modification options where appropriate, the ability to change administrative situs or governing law when that can be done consistently with the beneficiary's benefit rules, and the practical question of where a retirement asset, structured-settlement right, or real property interest can actually be held. In a world where the beneficiary may move and the fiduciary may operate across state lines, flexibility is not elegance; it is survival.

One recurring example involves retirement assets. Even where private rulings or practitioner consensus suggest that a trust structure is tax-feasible, a large custodian

¹⁰The Special Needs Trust Fairness Act was enacted as § 5007, “Fairness in Medicaid Supplemental Needs Trusts,” of the 21st Century Cures Act, Pub. L. No. 114-255, § 5007, 130 Stat. 1033, 1209 (2016), <https://www.congress.gov/bill/114th-congress/house-bill/34>. It amended 42 U.S.C. § 1396p(d)(4)(A) by inserting “the individual” among the persons permitted to establish a first-party special needs trust. Federal guidance states that the amendment applies to trusts established on or after December 13, 2016. See State Medicaid Director Letter #17-001, Implications of Section 5007 of the Cures Act for Special Needs Trusts (Aug. 1, 2017).

may decline to hold the arrangement, forcing the family and counsel to search for a workable institution. A drafter who focuses only on technical tax permission and ignores market or administrative feasibility has not truly solved the client's problem.

Estate Recovery and Death Administration

Estate recovery is often treated as a subject separate from D4A drafting, but the two are inseparable in practice. OBRA '93 requires states to pursue recovery in at least certain circumstances, yet states differ meaningfully in the breadth of their recovery statutes, in whether nonprobate assets are reached, in the threshold below which recovery is not pursued, and in how aggressively agencies enforce claims in the trust-termination setting.

That variation matters before death, not just after it. If the state takes the position that funeral expenses cannot be paid from the trust once the payback claim exceeds the remaining balance, counsel should arrange burial and funeral planning in advance through an irrevocable burial contract or other permitted device. If a state insists on a short reimbursement timetable or imposes a detailed closing-account requirement, the trustee must be prepared long before the beneficiary dies.

A well-drafted D4A trust should therefore anticipate death administration from the outset. It should not merely recite a payback clause. It should coordinate with permissible burial planning, identify post-death reporting obligations, avoid language that would delay reimbursement impermissibly, and prepare the fiduciary for the practical sequence of account closing, claim resolution, and remainder distribution under the governing state's rules.

The State-Overlay Thesis

The central proposition of this paper is straightforward: federal compliance is necessary, but in a limited and important group of jurisdictions it is not operationally sufficient. The first pass of the 51-jurisdiction survey separated true state-specific D4A additions from four things that are too often conflated in secondary sources: ordinary trust-law duties, SSI/POMS distribution rules, general Medicaid eligibility doctrines such as Miller-trust or income-cap rules, and unsupported assertions copied from one guide to another without primary-source confirmation.

That distinction matters because the paper's point is not to create an exaggerated map of difficult states. The point is to identify which jurisdictions impose genuine, additional hurdles that a lawyer or trust company should investigate before assuming that a federal-form trust can be dropped into the file and funded safely. The result is a more modest but more useful map: not every state is a trap, but the trap states matter disproportionately.

The anomaly categories that emerged most clearly include advance expenditure notice, pre-review or approval requirements, prescribed annual accountings, lien or funding gates, termination restrictions, unusual payback formulations, and age-sixty-five pooled-trust transfer-penalty differences. Those categories give practitioners and fiduciaries a usable framework for intake and administration.

Not Every State Is a New Jersey

Before turning to the friction states, it is worth saying plainly that not every jurisdiction behaves that way. Christopher Smith has observed that Michigan is, in practice, comparatively hands-off with respect to D4A trusts, while still presenting issues

concerning funding of pooled trusts after age sixty-five.¹¹ Michigan's eligibility manual applies the federal criteria rather than a separate state overlay.¹²

That point deserves emphasis because many practitioners build intuition from the state where they practice most often. If one's home state generally accepts a federally compliant D4A trust without elaborate separate process, there is a natural tendency to assume the system works that way everywhere. For the national practitioner or institutional trustee, that assumption is precisely the danger. Michigan's relative ease is not the norm in every jurisdiction; it is the contrast that proves why the difficult states must be identified and respected.

The practical lesson is therefore not that every state is burdensome. It is that no fiduciary should assume uniformity. A national trustee must be facile across jurisdictions, not merely comfortable in one state.

New Jersey: The Easy State to Bash, and for Good Reason

New Jersey remains one of the clearest examples of a jurisdiction whose operational demands go well beyond the bare federal text. Under New Jersey administrative practice, the trustee generally must provide forty-five days' advance written notice to the Division of Medical Assistance and Health Services of any expenditure exceeding \$5,000, whether per expenditure or in the aggregate during any

¹¹The author gratefully acknowledges Christopher Smith, Esq., a member of the Special Needs Alliance, for practical observations concerning Michigan's comparatively hands-off treatment of D4A trusts and its continuing post-age-sixty-five pooled-trust issues. These observations reflect practitioner experience and should be independently confirmed for a current matter. Any remaining errors are the author's alone.

¹²Mich. Dep't of Health & Human Servs., Bridges Eligibility Manual (BEM) 401, Trusts, <https://dhhs.michigan.gov/OLMWEB/EX/BP/Public/BEM/401.pdf>.

twelve-month period, or of any amount that would substantially deplete trust principal.¹³ Annual accountings go not only to the eligibility agency but also to the centralized state review unit; trustee changes and the beneficiary's death trigger notice obligations; and, in tort matters, Medicaid reimbursement relating to the tort claim must generally be addressed before the trust is funded.

New Jersey is also notable for the breadth of its asserted payback position. The state's practice has been to claim reimbursement measured from birth, not merely from trust creation. Whether every aspect of that position would survive sustained litigation is a separate question. For working lawyers and trustees, the practical point is that New Jersey is administered as a high-friction state and should be treated as such at drafting, funding, and termination.

Because New Jersey is so often the example lawyers know best, it tends to dominate the conversation. That should not obscure the broader truth that a number of other jurisdictions have their own versions of administrative friction, sometimes in forms less obvious than New Jersey's.

Nevada: The Other \$5,000 State

Nevada appears to be the other surveyed jurisdiction with a hard \$5,000 expenditure trigger. Its Medicaid materials call for notice of expenditures above that amount, annual account reconciliations with sole-benefit explanations, and death notice. It also imposes a short payback timetable: the trustee must repay the state no later than

¹³N.J.A.C. 10:71-4.11(g), <https://www.law.cornell.edu/regulations/new-jersey/N-J-A-C-10-71-4-11>; N.J. Div. of Med. Assistance & Health Servs., Special Needs Trusts, <https://www.nj.gov/humanservices/dmahs/clients/snt.html>; N.J. Div. of Med. Assistance & Health Servs., Special Needs Trusts: Frequently Asked Questions, https://www.nj.gov/humanservices/dmahs/clients/SNT_FAQs.pdf.

three months after the beneficiary's death or termination of the trust exemption.¹⁴ For an out-of-state trustee accustomed to ordinary discretionary-trust administration, that is a material operational trap.

What makes Nevada especially useful analytically is that it demonstrates the point that state-level difficulty does not always arise from an elaborate statute. A manual-based or agency-driven requirement can be just as consequential in administration as a published code provision, provided it is durable and consistently enforced.

Georgia: Pre-Review and Lien Clearance

Georgia's Medicaid Manual describes a formal, high-touch process. The drafting attorney should send the trust to the Department of Community Health (DCH) Legal Services on Form 956, the Special Needs Trust Review Routing Form, two months before execution or judicial approval. Notice of any hearing on court approval of the settlement and trust must be served on DCH at least fifteen business days in advance. DCH will not recognize the trust's validity until all liens in its favor are satisfied in full. Every trust is subject to a yearly DCH audit, the trustee must update and submit an asset schedule annually, a change of trustee requires at least thirty days' notice, and DCH must be notified within five days of the beneficiary's death.¹⁵

Whether each detail is better characterized as formal law, manual instruction, or entrenched process, the practical implication is the same: a court order does not

¹⁴Nev. Div. of Welfare & Supportive Servs., Medicaid Assistance Manual § F-500, Treatment of Trusts, https://www.dss.nv.gov/siteassets/dwss.nv.gov/content/medical/F-500 - Treatment_of_Trusts.pdf.

¹⁵Ga. Dep't of Human Servs., Div. of Family & Children Servs., Medicaid Policy Manual § 2346, Special Needs Trust, <https://pamms.dhs.ga.gov/dfcs/medicaid/2346/>.

necessarily end the inquiry. In Georgia, as in several other states, the trust may have to survive a separate state-agency gate before the resource exclusion is accepted operationally.

California, Minnesota, Iowa, Pennsylvania, Colorado, Missouri, Washington, and New York

The survey also identified several additional states whose overlays deserve focused attention in any national-practice checklist. California requires the trustee to notify the Department of Health Care Services at least fifteen days before the establishment hearing under Probate Code §§ 3600–3605 and 3610–3613, and again at termination, and requires all DHCS personal-injury liens to be satisfied before a trust is funded from a personal-injury settlement.¹⁶ Minnesota's statute expressly requires submission of the trust instrument and an inventory of trust assets to the Commissioner of Human Services at the Medical Assistance application, followed by annual accountings with prescribed content.¹⁷ Iowa's Medicaid Trust Program review, annual reporting to both the program and the district court, and a payback formulation reaching medical assistance paid generally, not merely during the trust term, likewise create meaningful administrative friction.¹⁸ Pennsylvania remains a cautionary example. Its statute directs agency review of the trust, satisfaction of agency liens and claims before

¹⁶Cal. Dep't of Health Care Servs., Special Needs Trust, <https://www.dhcs.ca.gov/services/special-needs-trust/> (citing Cal. Prob. Code §§ 3600–3605, 3604(d), 3610–3613; Cal. Code Regs. tit. 22, § 50489.9(d)(2)).

¹⁷Minn. Stat. § 501C.1205, <https://www.revisor.mn.gov/statutes/cite/501C.1205>.

¹⁸Iowa Medicaid Trust Program, Special Needs Trusts, <https://www.iowa-medicaidtrusts.com/Special.aspx>. The program's materials describe trust review, approval, or denial; annual income and expenditure reporting to the program and the district court; termination notice; and payback of medical assistance paid generally, not only during the trust term. Confirm the current language before reliance.

funding, and notice at death, but *Lewis v. Alexander*, 685 F.3d 325 (3d Cir. 2012), held several of the statute's other additions preempted, meaning practitioners must separate still-operative review and lien requirements from invalidated add-ons.¹⁹ Colorado appears to make agency validation part of trust effectiveness.²⁰ Missouri uses published agency checklists as a practical approval mechanism.²¹ Washington supplies an unusually detailed regulatory regime,²² and New York overlays the federal rules with a stand-alone SNT statute and significant court practice.²³

None of those states need be caricatured as bad jurisdictions. The point is more disciplined. Each demands independent attention because each has created some meaningful overlay beyond the federal statute itself. For a local practitioner, the overlay may be familiar. For a national fiduciary, it must be systematized.

Maryland: Regulation, Submission, and Actual Review

Maryland is one of the most instructive jurisdictions in the country because it shows the importance of separating statutory text, current regulation, agency manual

¹⁹62 P.S. § 1414(b)(4), (d), <https://casetext.com/statute/pennsylvania-statutes/statutes-unconsolidated/title-62-ps-poor-persons-and-public-welfare/chapter-1-public-welfare-code/article-xiv-fraud-and-abuse-control/section-1414-special-needs-trusts>; *Lewis v. Alexander*, 685 F.3d 325 (3d Cir. 2012), <https://law.justia.com/cases/federal/appellate-courts/ca3/11-3439/11-3439-2012-06-20.html>. The provisions the Third Circuit held preempted, as identified in the author's survey, included the statute's limit on pooled-trust retention, its definition of "special needs," its expenditure provision, and its age restriction. Practitioners should consult the opinion directly for the precise scope of the holding.

²⁰Colorado's disability-trust statute provides that a disability trust is not valid until the Department of Health Care Policy and Financing ensures that the trust complies with state law. H.B. 19-1054 (Colo. 2019) clarified that the trust must also comply with Title XIX of the Social Security Act, that the Department is reimbursed upon the beneficiary's death, and that other states' medical assistance agencies must also be fully reimbursed before any other person is paid. See <https://leg.colorado.gov/bills/hb19-1054>.

²¹Mo. Dep't of Soc. Servs., Family Support Div., Checklists for Trusts (special needs, self-settled, and pooled trusts), <https://mydss.mo.gov/legal-trust>.

²²Wash. Admin. Code ch. 182-516, <https://app.leg.wa.gov/wac/default.aspx?cite=182-516&full=true>.

²³N.Y. Est. Powers & Trusts Law § 7-1.12, <https://www.nysenate.gov/legislation/laws/EPT/7-1.12>.

language, and actual operating practice. Its D4A requirements are found principally in regulation rather than statute, and the statutory backdrop is itself instructive: Estates and Trusts Article § 14.5-1002 declares a state policy encouraging special needs trusts and directs that state agencies not adopt rules more restrictive than federal law.

Maryland's Medical Assistance program revised the regulation in 2016 expressly to conform to that mandate, yet the current text still contains one of the most detailed drafting checklists in the country.²⁴ The lesson is that an anti-restrictive statute does not mean a light regulatory touch; it means the agency believes its detailed requirements merely implement federal law. COMAR 10.09.24.08-2(C) imposes extensive requirements for stand-alone self-settled trusts and comparatively little additional content for pooled trusts beyond the federal baseline.

The Maryland regulation requires, among other things, that the trust be irrevocable, established and funded before age sixty-five, and drafted for proportional Medicaid reimbursement to all states that furnished assistance. It imposes detailed early-termination protections, bars provisions that would hinder or delay state reimbursement, prohibits post-age-sixty-five additions, requires sole-benefit language, and disqualifies the beneficiary from serving not only as trustee or co-trustee but also as trust protector, trust adviser, or other person able to influence distributions. See COMAR 10.09.24.08-2(C).

²⁴Md. Code Ann., Est. & Trusts § 14.5-1002, <https://mgaleg.maryland.gov/mgaweb/Laws/StatuteText?article=get§ion=14.5-1002>; Md. Dep't of Health & Mental Hygiene, Proposed Action on COMAR 10.09.24.08-2, 43 Md. Reg. 544 (Apr. 29, 2016) (stating that the revision would "clarify that it is no more restrictive than federal law"); COMAR 10.09.24.08-2, <https://regs.maryland.gov/us/md/exec/comar/10.09.24.08-2>. An earlier pass of the author's survey treated § 14.5-1002 as making Maryland a counter-example to the anomaly states. Colleague input and the current regulatory text show the more accurate picture described here.

Maryland goes further. The regulation includes extensive rules concerning trustee conflicts, compensation, titling of trust property, joint-ownership issues, lending and investment restrictions, annuities and structured settlements, real-property acquisition, annual accountings, and a prohibition on paying funeral expenses from the trust other than through an irrevocable burial contract. See COMAR 10.09.24.08-2(C)(10)(t). It also requires a copy of the trust and every amendment to be sent to the Maryland Medical Assistance Program, Division of Recoveries and Financial Services. See COMAR 10.09.24.08-2(C)(11). Critically, failure to comply with any provision of the section causes the full value of the trust to be treated as an available resource for Medical Assistance eligibility. See COMAR 10.09.24.08-2(C)(12).

Mary E. O'Byrne explains that the review function once sat in the Attorney General's Office but was moved back to Maryland Medicaid around 2018. Although the regulation itself speaks in terms of submission rather than explicit approval, Maryland Medicaid reportedly reviews the trust, returns a confirmatory letter, and provides a stamped copy. The Maryland Medicaid Manual used by staff likewise instructs that the trust must be approved, although the manual predates the current regulation in important respects and should not be treated as an up-to-date statement of every substantive restriction.²⁵

²⁵The author gratefully acknowledges Mary E. O'Byrne, Esq., a past president of the Special Needs Alliance, for her assistance concerning Maryland's regulatory framework, the movement of review functions from the Attorney General's Office back to Maryland Medicaid, and the current trust-submission and review practice. See COMAR 10.09.24.08-2; Maryland Medical Assistance Program, Medicaid Manual, Section 800 – Resources, at 857–60. Because the manual predates portions of the current regulatory structure, current COMAR text should control where the two diverge. Any remaining errors are the author's alone.

Morris Klein's experience is consistent: Maryland requires numerous restrictions in the instrument, the health department reviews each trust, and counsel has long used a detailed checklist cross-referencing the required provisions to the trust text.²⁶ Whether one describes that process as approval or review plus confirmatory submission, the practical conclusion is the same. Maryland is emphatically a state in which federal D4A compliance alone is not enough.

The District of Columbia: The Border Contrast

The District of Columbia provides the perfect neighboring contrast. Morris Klein reports that D.C. does not impose state-law requirements beyond the SSI/federal framework, does not require pre-approval of special needs trusts, and in his practice has treated even voluntary Attorney General review as focused on practical details such as the correct death-notice address rather than on a separate regulatory drafting regime.²⁷

That Maryland-D.C. contrast makes the central point of this paper better than any abstract statement could. Two jurisdictions may sit side by side geographically and still have dramatically different operational expectations for exactly the same kind of trust. For national planners and trust companies, that reality destroys the comforting but dangerous assumption that a trust acceptable in one local office will be acceptable everywhere.

²⁶The author gratefully acknowledges Morris Klein, Esq., a member of the Special Needs Alliance, for practical guidance concerning Maryland's review process for self-settled special needs trusts, the agency's use of a provision-location checklist, and the contrast between Maryland and the District of Columbia. These observations reflect experienced local practice and should be confirmed in a current matter. Any remaining errors are the author's alone.

²⁷*Id.*

Hawaii: Outdated Text and Difficult Practice

Scott Suzuki identifies Hawaii as another jurisdiction in which the formal rule set and actual practice require careful separate attention. Hawaii's administrative rules still appear not to reflect the SNT Fairness Act's recognition that a disabled individual may establish his or her own trust. The state's pooled-trust rule also appears to impose an age-sixty-five limitation not found in the federal text, even though Scott reports having prevailed in an unpublished matter permitting a post-sixty-five D4C transfer.²⁸

Scott also reports unusual practical difficulty in paying the state back at the beneficiary's death, including a case in which probate proceedings had to be opened merely to get the state to accept a reimbursement check from the trustee. That anecdote is more than colorful. It is a serious reminder that the hardest problem in a trust may arise not at drafting but at termination, and not because the law is clear, but because agency implementation is obscure.

A separate Hawaii point is not strictly a D4A drafting rule, but it is too revealing to ignore. Scott notes that Hawaii interprets “placed in a trust” so broadly in the home-property context that if one co-owner places a fractional interest into a trust, the entire property may be treated as countable for another co-owner's Medicaid purposes.²⁹

Even if that issue belongs analytically outside stand-alone D4A drafting, it reinforces the

²⁸The author gratefully acknowledges Scott C. Suzuki, Esq., a member and past president of the Special Needs Alliance, for practical observations concerning Hawaii's D4A and pooled-trust administration, post-age-sixty-five transfer practice, and state payback procedures. These observations reflect local practice experience and should be independently confirmed for a current matter. Any remaining errors are the author's alone.

²⁹The author also thanks Mr. Suzuki for his observations concerning Hawaii's broad interpretation of home property “placed in a trust,” a point included here because it illustrates the degree to which state Medicaid interpretation can diverge from what many practitioners might expect.

larger lesson that state Medicaid interpretation can be startlingly expansive and must be checked independently.

Massachusetts: Regulations, Historical Drafting Expectations, and Death Accountings

Massachusetts contributes two valuable insights. First, Neal Winston notes that the state now permits self-settled pooled trusts to be created after age sixty-four by virtue of 2024 legislation.³⁰³¹ That alone is a useful reminder that pooled-trust age treatment cannot be generalized nationally.

Second, Neal reports that MassHealth, for many years, communicated additional drafting expectations for self-settled D4A trusts through reviewer responses and related practice materials, with the state's specific trust regulations located at 130 CMR 515.001 et seq. He further observes that MassHealth currently seeks an accounting of distributions for the prior year when the beneficiary dies and the trust balance is insufficient to satisfy the Medicaid reimbursement claim.³² That post-death accounting focus is exactly the sort of practical detail that national fiduciaries often miss until a file is already in closing administration.

³⁰The author gratefully acknowledges Neal A. Winston, Esq., a member and Past President of the Special Needs Alliance, for his observations concerning Massachusetts' 2024 legislation permitting certain post-age-sixty-four self-settled pooled trusts.

³¹See MassHealth Eligibility Operations Memo 24-08, Eligibility Changes Concerning Transfers to Pooled Trust (Dec. 2024) (permissible transfers into valid pooled-trust accounts may be made before and after age sixty-five without a transfer penalty, for applications received on or after March 1, 2024), <https://www.mass.gov/doc/eom-24-08-eligibility-changes-concerning-transfers-to-pooled-trust-0/download>.

³²The author also thanks Mr. Winston for his practical observations concerning Massachusetts self-settled trust regulations, historical MassHealth reviewer expectations, and current death-accounting practices in underfunded reimbursement cases. These observations reflect experienced local practice and should be confirmed in a current matter. Any remaining errors are the author's alone.

What the Maryland and Hawaii Examples Teach

Maryland and Hawaii together demonstrate why state-level work cannot be reduced to a simple statute-manual binary. Maryland has a dense current regulation and a review process partly reflected in a dated manual and partly in experienced practitioner understanding of current agency operations. Hawaii presents nearly the reverse problem: outdated or incomplete regulatory text, some favorable unpublished experience, and difficult death-administration practice that appears easier to comply with than to explain.

For the drafter and fiduciary, the lesson is the same in both places. One must identify the current controlling source of law, distinguish that source from older materials and loose secondary summaries, and then learn the actual administrative pathway used in the field. A trust company officer who skips any of those steps is not really administering nationally; it is merely hoping nationally.

The Pooled-Trust Age-65 Split

Although this paper focuses on stand-alone D4A trusts, the age-sixty-five pooled-trust issue cannot be omitted because it is so often the practical alternative. The survey identified significant variation among jurisdictions on whether post-age-sixty-five transfers to pooled trusts trigger transfer penalties. Some jurisdictions or authorities have taken penalty positions, including South Dakota, the First Circuit, Illinois (subject to a narrow statutory exception), and Georgia as a matter of stated policy, while others, including Minnesota and North Carolina, have recognized no-penalty treatment.³³

³³In re Pooled Advocate Trust (S.D.), <https://ujs.sd.gov/media/vvzhu0ne/25536.pdf>; Maine Pooled Disability Trust v. Hamilton, 927 F.3d 52 (1st Cir. 2019), discussed in Brown & Peisch, Advisory 19-33, <https://brownandpeisch.com/wp-content/uploads/2019/08/Advisory-19-33-Pooled-Special-Needs->

Massachusetts and Hawaii both add nuance to the issue, and Michigan remains a reminder that even easy D4A states may be less simple once pooled trusts are involved.

No national fiduciary should assume that pooled trusts are a universal escape hatch. The right question is always state-specific: what is the transfer-penalty treatment here, what authority supports that treatment, and how stable is the current agency position?

Jurisdictions Secondary Sources Often Mischaracterize

The survey also found the reverse problem. Several jurisdictions are described in consumer-facing guides and aggregator websites as imposing special first-party trust rules when, on primary review, the material cited is something else. Virginia, on the survey's review, applies the federal floor. Connecticut's distinctive treatment reflects general Medicaid eligibility rules rather than a D4A-specific add-on. Indiana's manual implements the federal criteria. Ohio's frequently cited statute governs third-party supplemental services trusts, not first-party D4A trusts. Louisiana's differences arise from civil-law drafting conventions rather than agency rules. Oregon's frequently cited provision is a generic Uniform Trust Code duty to inform beneficiaries, not a Medicaid-agency mandate. And Michigan's manual applies the federal criteria.³⁴ For the newer

[Trust.pdf](#) (Massachusetts, although within the First Circuit, has since adopted a no-penalty rule by 2024 legislation, see note on Massachusetts *supra*); The Arc of Illinois, Pooled Trusts (SMART Act narrow exception), <https://www.thearcofil.org/wp-content/uploads/2024/03/ARC-Pooled-Trusts.pdf>; Pfoser v. Harpstead (Minn. 2021), summarized at <https://attorney.elderlawanswers.com/minnesota-high-court-rules-65-year-old-medicaid-recipient-may-transfer-assets-to-pooled-trust-without-penalty-18127>; N.C. Sess. Law 2025-24 (S. 344), <https://www.ncleg.gov/EnactedLegislation/SessionLaws/HTML/2025-2026/SL2025-24.html>. Georgia's position reflects stated agency policy as identified in the survey. Confirm full reporter citations before reliance.

³⁴Sources reviewed in the author's survey include: Conn. Dep't of Soc. Servs., Uniform Policy Manual § 4030.80, <https://portal.ct.gov/dss/-/media/departments-and-agencies/dss/upms/upm4--treatment-of->

practitioner or trust officer, the lesson runs in both directions: a state is not difficult merely because a website says so, and a state is not easy merely because a website omits it. Verify against the statute, regulation, manual, or case before adding or removing a state from the watch list.

Why This Matters Especially for Trust Companies

For the solo practitioner, a state overlay problem is serious enough. For a trust company, it is a governance problem. Institutional fiduciaries need intake systems, state matrices, funding checklists, distribution protocols, and closing procedures that recognize which jurisdictions require review, which require notice, which require annual accounts in a particular format, which restrict certain assets or fiduciary roles, and which make death administration unusually burdensome.

The audience for a conference like this one is not limited to attorneys who draft one trust at a time in one local court. It includes trust officers, settlement planners, and administrators whose mistakes are often procedural rather than doctrinal. The trust may be well written and still mishandled because the institution did not know that a particular state required pre-hearing notice, lien clearance before funding, or a very specific account-closing sequence. The reason to study these anomalies is therefore not academic completeness; it is operational competence.

[assets-standards-and-assistance/4030_80.doc](#); Ind. Family & Soc. Servs. Admin., Indiana Health Coverage Program Policy Manual § 2615.75.15, Certain Trusts Receiving Special Consideration, <https://www.in.gov/fssa/ompp/files/2615.75.15CERTAIN-TRUSTS-RECEIVING-SPECIAL-CONSIDERATION.pdf>; Ohio Rev. Code § 5815.28, <https://codes.ohio.gov/ohio-revised-code/section-5815.28>; Or. Rev. Stat. § 130.710, https://oregon.public.law/statutes/ors_130.710; Mich. BEM 401, *supra*. Characterizations of Virginia and Louisiana reflect the survey's review of secondary claims against primary sources. Each characterization should be rechecked against current authority before reliance.

A Practical D4A Intake and Administration Checklist

A lawyer or fiduciary confronting a first-party special needs trust in any jurisdiction should ask at least the following questions before funding and again before major administration steps:

- Is the state issue found in statute, regulation, manual, formal agency material, case law, or durable unwritten practice?
- Does the state require trust submission, review, approval, or pre-hearing notice?
- Are there mandatory trust provisions beyond the federal baseline, especially concerning early termination, all-state payback, beneficiary powers, or asset forms?
- Must Medicaid liens or tort claims be resolved before funding?
- Are there annual inventory, accounting, audit, or death-notice requirements?
- Does the state impose unusual rules concerning real property, annuities, structured settlements, or funeral payments?
- If pooled-trust funding is contemplated, what is the state treatment of post-age-sixty-five transfers?
- At the beneficiary's death, what sequence of accounting, reimbursement, and remainder distribution does the state expect?

That checklist is not exhaustive, but it is a safer starting point than the widespread and still too casual assumption that a federal-form D4A trust is functionally portable nationwide.

Conclusion

A first-party special needs trust is still, at one level, a federal creature. The drafter must get the federal basics right: the source of funds, the disabled beneficiary, the proper settlor, sole benefit, age, and payback structure. But modern practice has made something else equally clear. A D4A trust is not fully drafted when the federal clause set is complete. It is fully drafted only when counsel has also accounted for the law, procedure, and durable administrative practice of the state in which the trust will live.

That is why the state anomalies matter. They are not curiosities. They are the difference between a trust that works on paper and a trust that works in the real world. For the national practitioner and the trust company alike, the goal is not to memorize every state's eccentricity. It is to know that the eccentricities exist, to recognize the categories in which they arise, and to build a disciplined process for checking them before the trust is funded, administered, or terminated.

Appendix: Glossary for Newer Practitioners and Trust Officers

- **First-party (self-settled) special needs trust:** a trust holding assets that belonged to or were payable to the disabled beneficiary, such as a personal-injury recovery, an outright inheritance, or back benefits. The stand-alone version is the "D4A" trust under 42 U.S.C. § 1396p(d)(4)(A), and it requires Medicaid payback.
- **Third-party special needs trust:** a trust funded with someone else's assets, typically a parent's or grandparent's, for a disabled beneficiary. No Medicaid payback is required because the beneficiary never owned the funds.
- **Pooled trust ("D4C"):** a trust run by a nonprofit that pools investments while keeping a separate subaccount for each beneficiary, under 42 U.S.C. § 1396p(d)(4)(C). At death, the nonprofit may retain some funds, with the remainder subject to payback. Funding after age sixty-five is treated differently from state to state.
- **ABLE account:** a tax-advantaged account under I.R.C. § 529A for a person whose disability began before age forty-six (as of 2026). Contributions from all sources are limited to \$20,000 for 2026, the first \$100,000 is disregarded for SSI, and funds can be spent directly on qualified disability expenses. The state may claim the balance at death. In practice, the ABLE account is often funded first and the balance placed in the D4A trust.
- **Payback:** the requirement that, at the beneficiary's death or the trust's termination, the state or states that paid Medicaid be reimbursed from what remains before anyone else receives it.

- **Sole benefit:** the requirement that a first-party trust be administered only for the disabled beneficiary.
- **SSA disability standard:** the definition of disability in 42 U.S.C. § 1382c(a)(3), used by both SSI and the D4A exception.
- **SSI and Medicaid:** SSI is a federal cash benefit with a \$2,000 resource limit for an individual; Medicaid is the federal-state health program. They count trust assets and distributions under different rules.
- **In-kind support and maintenance (ISM):** shelter provided or paid for by others, which can reduce SSI. Since September 30, 2024, food is no longer counted.
- **Countable (available) resource:** an asset that counts against a benefit's resource limit. A properly drafted and administered D4A trust is not countable.
- **Transfer penalty:** a period of Medicaid ineligibility for long-term care triggered by giving assets away for less than fair value during the look-back period.
- **Estate recovery:** a state's claim against a deceased Medicaid recipient's estate. It is related to, but distinct from, trust payback.
- **Trust protector:** a person, other than the trustee, given limited powers such as amending administrative terms or changing situs. Some states, including Maryland, bar the beneficiary from this role.
- **Decanting:** transferring assets from one trust to a new trust with updated terms, where state law permits.
- **Situs:** the place where a trust is administered, which can affect governing law and agency oversight.