



Using Pooled Special Needs Trusts As a Safety Net

Presented by Rachel Baer, Esq.

October 18, 2024

www.trustCCT.org

1




Rachel Baer, Esq.

Rachel Baer, Esq. is Counsel and Director of New Client Services at Commonwealth Community Trust, a non-profit pooled trust administrator serving beneficiaries across the United States who are injured, vulnerable, or have special needs.

Prior to joining CCT, Ms. Baer was a partner at Family First Law Group, PLLC, in Alexandria, Virginia, and her practice focused on estate planning, estate and trust administration, and guardianship and conservatorship.

rbaer@trustCCT.org


2



Purpose of Presentation:


The information provided in this presentation does not, and is not intended to, constitute legal advice; instead, all information available in this presentation is for educational purposes only. Sample language should be modified by any estate planning attorney to reflect their clients' circumstances and the state and federal laws in effect at that time.

3



Part I:

Overview



4

4

Special Needs Trusts: Two Types


A special needs trust is a trust arrangement for disabled individuals – often receiving means-tested benefits – that provides trust administration and preserves eligibility for means-tested government benefits.

Standalone Special Needs Trust

1 Trust Agreement + 1 beneficiary

Pooled Special Needs Trust

1 Trust Agreement + Multiple beneficiaries/ Joinder Agreements



5

5

Disability

Disability as defined by the Social Security Administration (SSA)
42 U.S.C. 1382c(3)(A), (C)

Adult


To be disabled within the meaning of the Social Security Act:

- the individual must have a medically determinable physical or mental impairment; and
- the impairment has lasted or is expected to last for at least one year, or to result in death; and
- the impairment must make the individual unable to engage in "substantial gainful activity."

Minor (under 18)

To be disabled within the meaning of the Social Security Act:

- The child must have a physical or mental condition(s) that very seriously limits his or her activities; and
- the condition(s) must have lasted, or be expected to last, at least one year or result in death.

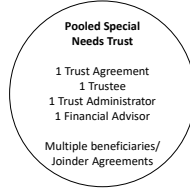


6

6

What is a Pooled Special Needs Trust (PSNT)?

- A PSNT is a type of special needs trust
- A non-profit organization establishes the Master Trust Agreement and administers the sub-accounts.
- Clients "join" by signing a Joinder Agreement.
 1. Who is the Beneficiary?
 - What is their disability?
 - What benefits do they receive?
 2. Who is setting up the sub-account?
 3. Who are the remainder beneficiaries?



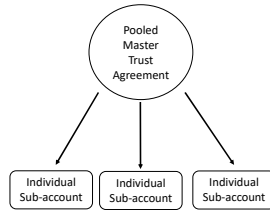
CCT

7

7

What is a Pooled Special Needs Trust (PSNT)?, cont.

- Separate accounts are maintained for each beneficiary, but assets are pooled for investing and management purposes
- Lower fees and lower minimum funding requirements than many financial institutions and professional fiduciary options.



CCT

8

8

Client Checklist

- | |
|---|
| ✓ Is the Beneficiary disabled as defined by the Social Security Administration? |
| ✓ Does the Beneficiary currently receive means-tested benefits such as Supplemental Security Income (SSI) and/or Medicaid or might he/she apply in the future? |
| ✓ Will these assets jeopardize his/her benefit eligibility ? |
| ✓ Is the Beneficiary vulnerable or not able to manage his/her own finances ? |

CCT

9

9

Paul

Paul is 12 years old. His disability is a result of a birth injury. He is receiving services under a Medicaid waiver. His parents, Jim and Carolyn, plan to apply for SSI when he turns 18 years old.

His parents meet with an estate planning attorney to set up their estate plan. Their goal is to ensure that Paul is provided for after their passing.



10

David

David is 30 years old and lives in a community-based group home. He has Down's Syndrome and cannot live independently or support himself. David receives SSI and Medicaid.

David's grandmother, Joan, wants to ensure that David is provided for and leaves him a \$50,000 specific bequest in her will. David's grandmother has just died.



11

Part II: Government Benefits



12

12


Categories of Benefits:

Means-tested:

Earned/Entitled:

- Supplemental Security Income (SSI)
- Medicaid

- Social Security Disability Insurance (SSDI)
- Medicare




13

13


Supplemental Security Income (SSI)
Means-Tested Benefit

Monthly monetary allowance that is intended to pay for food & shelter.



Adults are eligible if they are:

- Disabled, blind, or aged
- AND
- Have limited countable resources
- AND
- Have limited countable income



14

14

Social Security Disability Insurance (SSDI)
Entitlement Benefit

- SSDI is a monthly benefit from SSA for people with a disability (the government version of disability insurance).
- Who may be eligible:
 - Worker** (if disabled)
 - Worker's adult disabled child**
 - Child was disabled before 22 years of age
 - Worker is disabled, retired, or has passed away
 - Worker's disabled spouse or former spouse**
 - Worker has passed away
 - Spouse or former spouse is between 50-60 years of age and was disabled starting at least 7 years before the worker passed away
- Benefit amount is based on the work record and withholdings of the worker or, under specific circumstances, the work record of their parent or spouse.



15

15

Medicaid Means-Tested Benefit

- A means-tested federal health insurance program for aged, blind, disabled and impoverished people.
- There are different programs, including long-term care (LTC) Medicaid.
- When determining eligibility, some programs consider income and assets, and some consider only income.
- Administered by the States – some states have different eligibility requirements.
- Administered through the local Department of Social Services.



16

16

Medicare Entitlement Benefit



Federal health insurance program for:

- People who are 65+
AND
- People who have received SSDI for the past 24 months and are continuing to receive it
(there are some additional groups as well!)



17

17

Dual Eligibility

- **SSDI** benefit is below Federal Benefit Rate, so **SSI** makes up the difference
 - Example: Adult disabled child receives \$500 in SSDI, then SSI will pay the remaining funds
- **Medicaid** covers costs of medical care for non-**Medicare** expenses (long-term care, waived services)
 - Example: Adult disabled child who is receiving Medicare and also Medicaid waiver services



18

18



Part III:

In Depth Review of Pooled Special Needs Trusts

Comparison of 1st and 3rd Party Special Needs Trusts:

Third-Party	First-Party
Grantor can be any third-party individual, such as a parent, family member or friend.	Federal law requires it must be established by the Beneficiary; the Beneficiary's legal guardian, parent, grandparent; or Court. The Beneficiary's Agent under a power of attorney can sign if the Agent has proper authority.
Funded by anyone other than the Beneficiary; family estate plans, life insurance, investments, retirement accounts or other assets.	Funds belong to the Beneficiary, usually from a personal injury or workers' compensation award, direct inheritance, the Beneficiary's own funds, Social Security back payment, alimony, child support.
Revocable or Irrevocable prior to Grantor's death	Irrevocable
NOT subject to Medicaid payback	Subject to Medicaid payback
No age limitation for Beneficiary	A transfer of assets penalty may apply if the Beneficiary is 65 years old or older (varies by state and by benefit received).

Power of Attorney Checklist

✓ Is the POA valid under state law? (ie: notarized, signed, etc.)
✓ If multiple agents, do they have separate authority or will they both sign?
✓ Is the POA currently in effect? If the authority is "springing", then has the "springing event" been documented?
✓ Does the POA grant the authority to establish a pooled special needs trust sub-account or an irrevocable trust?
✓ Does the POA grant the authority to transfer assets into an irrevocable trust set up by the POA agent?
✓ Does the POA allow or place any limitations on the authority to establish beneficiaries?
✓ Has the POA agent signed an Agent Certification affidavit?

Maria

Maria is 64 years old and has Parkinson's disease. She is receiving long-term care Medicaid and residing in a skilled nursing facility. In addition, she has been receiving SSDI and Medicare. As her daughter is driving Maria to a doctor's appointment, their car is struck by another driver, who is at fault and properly insured. Maria is injured and hospitalized for several days.

Maria and her daughter engage a personal injury attorney to assist them in filing a claim against the other driver's insurance company. The insurance company offers a settlement.



22

Establishing and Funding 1st Party PSNT for Principal Using a Power of Attorney

POMS SI 01120.203(D)(6) allows an Agent under a valid power of attorney to establish a first-party pooled special needs trust for the Principal.

Example: My Agent is authorized to (1) execute a pooled trust sub-account joinder agreement with Commonwealth Community Trust or another pooled special needs trust on my behalf, pursuant to 42 U.S.C. 1396p(d)(4)(c); (2) assign, transfer, deliver, and convey any and all of my assets, including any rights to receive income or assets from any source, to the Trustee of the pooled special needs trust sub-account for my sole benefit; (3) designate the remainder beneficiaries for the sub-account [or specify remainder beneficiaries]; and (4) make requests for disbursements and receive and use the disbursements on my behalf.



23

23

Types of Special Needs Trusts

Standalone Special Needs Trust	Pooled Special Needs Trust
Trustee can be an individual, like a family member or attorney, or a corporate trustee.	Established and managed by a non-profit organization.
Individual trustees may not be able to serve for the duration of the Beneficiary's life.	Pooled trust administrator provides stability, even if client services staff change.
Corporate and professional trustees usually have a minimum balance above \$100,000 or higher.	Low minimum balance requirements.
Investment assets are invested alone.	Assets in sub-accounts are pooled for investment purposes.
If Beneficiary is 65 or over, cannot establish 1 st party trust.	Can establish 1 st party trust sub-account for beneficiaries 65 or over, but there may be a penalty on a state-by-state basis for Medicaid Long Term Care recipients.
Can hold any type of assets, subject to trustee terms.	May not accept assets that cannot be liquidated and pooled.

24

24

Transfer from SNT to PSNT



Drafters should include language that gives the trustee of a special needs trust the discretion to transfer assets from an individual special needs trust to a pooled trust. After a transfer, the funds will be governed by the terms of the pooled trust master trust agreement.

Example: My Trustee may at any time, exercising sole discretion, distribute any income or principal held in [name of special needs trust], up to the entire value of the trust corpus, to the Trustee of the Commonwealth Community Trust [Third-Party OR First-Party] Pooled Special Needs Trust for the benefit of [insert Beneficiary name] or a similar pooled special needs trust. I authorize my Trustee to sign all joinders and other documents and take all steps necessary to establish the sub-account and to facilitate the transfer of the trust assets to the [third-party OR first-party] sub-account for the benefit of [insert Beneficiary name].

***Note:** Pooled trusts usually cannot make any distributions after the death of the Beneficiary, not even distributions to pay for the funeral, burial, or cremation of the Beneficiary.

25

25

Transfers to PSNT from Wills or Trusts

Drafters should give fiduciaries the authority and discretion to make distributions to a PSNT sub-account in lieu of an outright distribution to a beneficiary.

Example: At any time that my Executor / Trustee is directed or authorized to make a distribution of interest or principal to a beneficiary, my Executor / Trustee may, exercising sole discretion and without the necessity of a court order, pay such income or principal to Trustee of the Commonwealth Community Trust Pooled Special Needs Trust for the benefit of the beneficiary, or a similar pooled special needs trust sub-account, in lieu of making a distribution to the beneficiary.

***Note:** The attorney should determine whether the distribution should be made to a first-party or third-party trust based on state law



26

Third-Party PSNT

SSA Program Operation Manual System (POMS) SI01120.200(D)(2)

A pooled third-party trust is NOT a countable resource if:

1. It is funded by the assets of a third-party (anyone besides the Beneficiary);
2. It does not grant the Beneficiary the ability to revoke or terminate it under state law; AND
3. It does not grant the Beneficiary the authority to direct distributions. This power lies with the trust administrator.



27

27

Establishing and Funding 3rd Party PSNT For Loved One Using A Power of Attorney



Drafters can give agents under the power of attorney the authority to set up and fund third-party pooled special needs trust sub-accounts.

Example: My Agent is authorized to (1) execute a pooled third-party trust sub-account joinder agreement with Commonwealth Community Trust or another pooled special needs trust for [insert names or class description]; (2) designate the remainder beneficiaries for the sub-account [or specify remainder beneficiaries]; (3) assign, transfer, deliver, and convey any and all of my assets, including any rights to receive income or assets from any source, in keeping with my Agent's authority to make gifts to the Beneficiary of the sub-account, to the Trustee of the pooled special needs trust sub-account; (4) update pay on death, transfer on death, and other beneficiary designations that listed the Beneficiary of the sub-account to list the Trustee of the pooled special needs trust sub-account; (5) amend any trusts that I might have to update any bequests to the beneficiary of the sub-account to list the Trustee of the pooled special needs trust sub-account and (6) make requests for disbursements from the sub-account and receive and use the disbursements on the Beneficiary's behalf.

28

28

Third-Party PSNT Remainder Policies

- Every pooled trust has a different policy on whether they retain third-party remainders after the passing of the Beneficiary.
- If allowed, remainder beneficiaries can be named on the Joinder Agreement when setting up the sub-account.

*Pre-need burial and funeral expenses should be paid during the Beneficiary's lifetime.



29

29

First-Party PSNT

SSA Program Operation Manual System (POMS) SI 01120.203(D)

- Omnibus Reconciliation Act of 1993, 42 U.S.C. §1396p(d)(4)(C)
- SSA-POMS-Program Operations Manual System SI 01120.203(D)
- State Laws and Regulations for Medicaid recipients

CCT

30

30

First-Party PSNT, Continued

SSA Program Operation Manual System (POMS) SI 01120.203(D)(1)

A pooled first-party trust is NOT a countable resource if:

1. The pooled trust is established and managed by a nonprofit;
2. Separate accounts are maintained, but are pooled for investment;
3. Accounts are solely for the benefit of disabled beneficiaries;
4. Account is established by the Beneficiary, parent, grandparent, legal guardian, or a court (or agent under POA with authority); AND
5. There is a Medicaid payback provision.



31

31

Establishing and Funding 1st Party PSNT for Child or Grandchild Using a Power of Attorney

POMS SI 01120.203(D)(6) allows an agent under a valid power of attorney to establish a first-party pooled special needs trust for the Principal's child or grandchild.

Example: My Agent is authorized to (1) execute a 42 U.S.C. 1396p(d)(4)(c) pooled trust sub-account joinder agreement with Commonwealth Community Trust or another pooled special needs trust on behalf of my child or grandchild [or insert names], (2) designate the remainder beneficiaries for the sub-account, and (3) make requests for disbursements and receive and use the disbursements for the Beneficiary.



32

32

Establishing and Funding 1st Party PSNT for Another Loved One

If it is needed to create a first-party pooled special needs trust account for a loved one who is not listed in the POMS, a power of attorney can give the Agent the authority to act for the Principal.

Example: My Agent is authorized to use my funds to petition a court to create and fund a 42 U.S.C. 1396p(d)(4)(c) pooled trust sub-account with Commonwealth Community Trust or another pooled special needs trust on behalf of [insert names or class description].



33

33

65 and Over: Transfer of Assets Penalty

Those who are 65 years or older AND receiving or applying for Long-Term Care Medicaid or some other Medicaid programs may face a **transfer of assets penalty** if they transfer assets to a first-party PSNT within the lookback period.

The issues surrounding transfer penalties are complex and vary from state to state. Each situation is different, and it is recommended to be evaluated on a case-by-case basis by an attorney knowledgeable in this area.



34

34

First-Party PSNT Remainder Policies: *Medicaid Recipient Beneficiaries*

Medicaid



- Federal statute allows the non-profit trust administrator to retain the remaining funds in lieu of repaying Medicaid.
- Every state has different rules stating what percentage (if any) of funds the PSNT can retain.
- Within the regulations of the individual states, PSNTs may retain the entire balance, a percentage, or only when there is less remaining than Medicaid is owed.
- **IMPORTANT TO NOTE:** Pre-need burial and funeral expenses should be paid during Beneficiary's lifetime; they are not allowed prior to Medicaid repayment.



35

35








Part IV:

Pooled Special Needs Trust Administration

36

36

Roles & Responsibilities of the Pooled Trust

-  Disburse the funds prudently and for the sole benefit of the Trust Beneficiary.
-  Avoid potential loss of government benefits by inappropriate distributions.
-  Maintain accurate accounting.
-  Absolute discretion over distributions.
-  Invest trust assets prudently.

37

How to Evaluate a Pooled Trust

- Review the Joinder Agreement and Master Trust Agreement
- What are the fees?
 - Enrollment fees
 - Ongoing fees
- What is the remainder policy after the Beneficiary passes away?
- Who manages the investments?
 - Is the Investment Policy Statement readily available?
- Is the pooled trust regularly audited by an independent auditor?
 - Financial
 - Internal controls

38


How to Evaluate a Pooled Trust

- How long has the organization served as a pooled trust administrator?
- Does the non-profit have managerial control over the pooled trust?
- How many beneficiaries does the organization serve?
- Who is on the Board of Directors?
 - Are they independent?
 - Do they provide active oversight?
- Who are the staff?
- Is the client assigned to a coordinator/trust officer?
- Are phones answered by staff during business hours?
 - Is there a policy on how quickly client calls will be returned?

39

How to Evaluate a Pooled Trust

- Can the Beneficiary maintain their sub-account if they move to another state?
 - If not, does the pooled trust's master trust agreement permit transfer to another pooled trust?
- What are their policies for disbursements?
 - Is there a disbursement manual readily available?
 - Are preloaded cards available for making purchases?
- Is there a secure portal or mobile app to access account information, transactions, and statements?
 - Can you easily submit disbursement requests online?
- Is the website easy to navigate and the policies and procedures easily available?




40

Guidelines for Disbursements

When considering whether to approve a disbursement request, the following best practices can be used as a guide for decision-making:

Is the request prudent?	Are there adequate funds in the trust to cover the request?	Is the request for the [sole] benefit of the Beneficiary?
Is the request consistent with the Beneficiary's budget and objectives?	For a Third-Party Trust, is the request consistent with the intent of the Grantor(s)?	For a Beneficiary receiving SSI and/or Medicaid, will the request jeopardize benefits?




41

41

"Sole Benefit Rule" Explained

- First-party SNT funds must be used for the **sole benefit** of the Beneficiary. *42 U.S.C. § 1396p(d)(4), POMS SI 01120.203(D)(5)*
- Collateral benefit to a third-party is acceptable. *POMS SI 01120.201(F)(3)*
- For example:
 - Household purchases such as furniture that others in the home will benefit from are allowable
 - Beneficiary travel and companion travel expenses are allowable if the Beneficiary requires assistance
 - Travel for third party to visit beneficiary allowed if checking on the Beneficiary's well-being
- Items which can be titled should be titled in the Beneficiary's name to avoid benefiting a third party. *POMS SI 01120.201(F)(3)*



42

42

Examples of How Funds Can Be Spent

✓ **Medication and Medical Services** - Medication and services that are not paid for by Medicaid, Medicare, or other insurance or government programs.


✓ **Daily Living**- Food, toiletries, clothing, furniture, cell phones, cell phone bills, and internet bills.


✓ **Devices and Assistive Technology** - Technology such as tablets, computers, and Text-to-Speech (TTS), eyeglasses, hearing aids, prosthetic devices, and expenses for maintenance of these devices.

✓ **Transportation** - Purchase of a car titled in the name of the Beneficiary or alternative transportation expenses. A lien is required for vehicles at the time of purchase.

✓ **Home modifications** - Home modifications such as ramps and rails to accommodate the Beneficiary.

✓ **Travel** - Vacations for the beneficiary and, if needed, a travel companion.







43

43


Funds Can Be Disbursed to the Following:




Directly to retail merchant or service provider




A pre-loaded debit card linked to the sub-account for the purchase of goods and services for the Beneficiary



An Advocate who has purchased goods and services on behalf of the Beneficiary



A credit card company for goods and services purchased for the Beneficiary



44

44

For Beneficiaries Who Receive SSI and/or Medicaid


• Distributing cash to a Beneficiary can impact their SSI and Medicaid benefits, including:

◦ Transfer of trust funds to the Beneficiary's bank account or allowing them to withdraw cash from the trust

◦ Reimbursing Beneficiaries, even for allowable purchases

◦ Disbursements for gift cards or gift certificates


Source: POMS SI 00835.310; 01120.200(E)(1)(a)-(b)



45

45

15




Part V:

ABLE Accounts

46

ABLE Accounts - 26 U.S. Code § 529A


- Participants qualify if onset of disability was prior to age 26. This will increase to age 46 on 1/1/2026.
- Can be established by the Beneficiary; their agent under a power of attorney; their guardian or conservator; their spouse, parent, sibling, or grandparent; or their SSA rep payee.
- Can only have one account per Beneficiary.
- Limited to \$18,000 in contributions in 2024, with a limited exception for Beneficiaries who are working.
- Subject to Medicaid payback in many states.
- Not a countable resource for the first \$100,000. Once the balance goes over \$100,000, any SSI cash benefit is suspended until the balance drops below \$100,000.



47

**ABLE Account -
Qualified Disability Expenses**

- Payments from an ABLE account for Qualified Disability Expenses (QDE) do not cause a reduction in benefits or tax consequences.
- Shelter Expenses are considered QDEs. Depending on state rules, this can be coordinated with PSNT.



48



Transfers to ABLE Account From Special Needs Trusts

Drafters can give the Trustee of a special needs trust the authority and discretion to make distributions to an ABLE account for the Beneficiary.

Example: *The Trustee may, exercising sole discretion, transfer funds to an ABLE account established for the Beneficiary, up to the annual ABLE contribution limit.*

**Note: Confirm this type of transfer is permitted in your state*

49

Establishing and Funding an ABLE Account for Principal Using a Power of Attorney



Example: *My Agent shall have the power to: (1) open an ABLE account for me; (2) transfer and deposit any of my assets into my ABLE account; (3) withdraw, now or in the future, any funds from my ABLE account; (4) select the investment option(s) in accordance with the terms provided by the ABLE account; (5) change the beneficiary of my ABLE account in accordance with Section 529A of the Internal Revenue Code; (6) transfer funds from a 529 college savings plan to my ABLE account, as permitted by federal and state law; and (7) make representations and certifications on my behalf and to otherwise manage and enter into all other lawful transactions with respect to my ABLE account that I could perform if present.*

**adapted from Virginia ABLENow Power of Attorney form*

50

Transfers to ABLE Accounts from Wills or Trusts

Drafters should give the fiduciaries (whether Executors or Trustees) the authority and discretion to make distributions to an ABLE account in lieu of an outright distribution to the Beneficiary.

Example: *At any time that my [Executor / Trustee] is directed or authorized to make a distribution of interest or principal to a beneficiary, my [Executor / Trustee] may, exercising sole discretion and without the necessity of a court order, pay such income or principal to an ABLE account established for the Beneficiary.*



51

Establishing and Funding ABLE Accounts Using a Power of Attorney

Example: My Agent is authorized to open an ABLE account and designate my spouse, my descendants, or my siblings as the beneficiary.

Example: My Agent is authorized to contribute my funds, up to the annual ABLE contribution limit, to any ABLE account for any person to whom my Agent is authorized to make gifts. Further, my Agent is authorized to transfer funds from a 529 college savings plan to an ABLE account, as permitted by federal and state law.



52

Questions?

If you have general questions after today's presentation, please stop by our table or reach out to us by phone or email.

For more information, visit trustCCT.org.



Rachel Baer, Esq.
Counsel & Director of
New Client Services
rbaer@trustCCT.org
(804) 740-6930



53

53
