THE NUTS AND BOLTS
OF
FIRST PARTY SPECIAL NEEDS TRUSTS

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I. INTRODUCTION

Before we dive into the world of first party special needs trusts, it is important to understand what a special needs trust is and why we use them. A special needs trust (also known as a supplemental needs trust or SNT) is a specific type of trust designed to preserve assets for individuals with disabilities without jeopardizing their eligibility for means-tested government benefits like Medicaid, Supplemental Security Income (SSI) and federal and state subsidized housing (under the new HOTMA regulations). Special needs trusts are extremely beneficial to ensure that disabled individual may have funds available for their benefit to give them a quality of life they may not have otherwise been afforded. Public benefits such as Medicaid and SSI provide the bare essentials needed for medical care and the necessities of daily living and sometimes not even that. For example, the current maximum SSI benefit for a recipient is $943 per month, from which the recipient must pay their rent (usually subsidized), utilities, food, and other essentials of daily living. That is not a lot of money with the cost of living today. In addition, an SSI recipient cannot have more than $2,000 in countable resources or assets ($3,000 for a couple both receiving SSI). Countable resources include things like cash, bank accounts, CD's, annuities, and life insurance policies. So, when a disabled individual stands to receive a personal injury settlement (PI settlement) or an inheritance from a family member who did not set up a third party SNT, a first party SNT will allow the disabled individual to maintain their public benefits and have the funds available for their needs.

There are three types of SNT's:

1. **First Party Special Needs Trusts** (also known as self-settled or d4A Trusts):

They are called first party trusts because they are funded with the assets of the individual with disabilities who is under age 65, often from inheritances, gifts, personal injury settlements, or resources in excess of $2,000. These trusts are designed to supplement, not replace, public benefits such as Medicaid and SSI and must include a payback provision to reimburse Medicaid upon the beneficiary's death or trust termination. A First party SNT must comply with the requirements set forth in 42 U.S.C. § 1396p(d)(4)(A), which states:

"(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by the individual, a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter."

Now, thanks to Section 5007 of the 21st Century Cures Act of 2016 entitled "Fairness in Medicaid Supplemental Needs Trusts" effective December 23, 2016, a mentally capable disabled individual under age 65 may establish their own first party SNT.

2. **Third Party Special Needs Trusts**:

Established and funded by someone other than the beneficiary, typically parents or other family members and do not require a Medicaid payback provision.

3. **Pooled Trusts** (also known as d4C trusts):

These trusts are managed by nonprofit organizations. The funds of the individual beneficiaries are pooled together to maximize investment opportunities and provide management services. Although the funds are pooled, a separate account is maintained for each individual beneficiary.

These materials focus exclusively on the first party SNT.

II. CONSIDERATIONS BEFORE CREATING A FIRST PARTY SNT:

1. Be Familiar with the Laws Governing First Party SNTs:

It is critical to the success of any first party SNT (and to the success of your practice) to know and understand the relevant state and federal laws relating to first party SNT's. These laws are often subject to interpretation by the various government agencies involved with them. They are all intertwined and can be clear as mud. These are the relevant laws:

a. 42 U.S.C. § 1396p(d)(4)(A)

This statute is part of the Omnibus Budget Reconciliation Act of 1993 (a/k/a OBRA-93) and was the birth of the first party special needs trust. It originally codified the ability for a parent, grandparent, guardian (or conservator in many states), or a court to establish trusts that would not be counted as a resource for SSI and Medicaid eligibility provided the trusts met certain criteria discussed in further detail below.

b. 42 U.S.C. § 1382(b)(e)(5)

Also known as the Foster Care Independence Act of 1999 (FCIA-99), this statute outlines critical exclusions and considerations relating to an individual's resources under the SSI program. More particularly, that a transfer penalty will not apply to transfers made to a trust created under 42 U.S.C. § 1396p(d)(4)(A)**.**

c. 21st Century Cures Act of 2016

Section 5007 of this Act entitled "Fairness in Medicaid Supplemental Needs Trusts" took effect on December 23, 2016. It allows mentally capable disabled individuals under age 65 to establish their own first party SNT's.

d. Social Security Administration's Program Operations Manual System (POMS)

The POMS provide a comprehensive set of guidelines that determine how SNTs should be evaluated and managed to ensure compliance with SSI rules. But beware, the POMS are constantly changing, subject to interpretation and not always clear. It is a good practice tip to review the POMS frequently.

There are also additional SSI practices established through Social Security Rulings and Acquiescence Rulings. Although we won't focus on these today, it is important to note that SSR's set a legal precedent established by a court, usually involving a legal ambiguity. These Rulings are published in the Federal Register and become part of the SSA's procedures. Acquiescence Rulings deal with SSA changes in policy due to a ruling by a U.S. Circuit Court of Appeals. The ruling is only applicable to the circuit court setting forth the ruling. It is not applicable nationwide. Although not law, the SSA does have to follow the ruling.

e. State Law

Consult your state's laws regarding their interpretation of the federal SSI and Medicaid laws as well as their guardianship/conservatorship, power of attorney, probate and trust laws.

f. Case Law

Be aware of federal and/or state case law that may impact the preparation, execution and administration of a first party SNT.

2. Listen And Learn:

Every situation, every client is different. There is nothing cookie cutter about preparing a first party special needs trust. Potential beneficiaries and/or their families, guardians or other responsible parties, want to know they won't lose their benefits and can use the funds to give them a better quality of life. Take the time to listen to their concerns and hopes for the trust

funds. For example, could they benefit from specialized medical equipment that Medicaid does not cover, can they buy a house, or would they like to travel to New York City and see a Broadway play? Determine what the complexities of the trust administration will be so that you can advise as to whether a professional trustee may be a better option than a family member.

Knowing and understanding the rules and eligibility requirements for the various government benefits programs the disabled individual is receiving, or may become eligible for, is critical to creating the right type of special needs trust or whether certain provisions need to be modified to the circumstances. Often times the disabled individual or their families don't know exactly what programs they are in. They frequently confuse SSDI for SSI and don't know whether they are in a Medicaid waiver program. Taking the time to educate them on the distinction between the programs can help the client determine what benefits they receive. You may even need to obtain permission from the client to speak with various agencies like SSA, Medicaid or the local housing authority to get confirmation on the benefits they receive. This is time well spent to ensure your trust is properly drafted.

3. Determine Who Should Establish The Trust And How To Fund It:

POMS SI 01120.203.C.2 tells us that a first party SNT may be "established through the actions of the individual; a parent(s); a grandparent(s); a legal guardian(s); or a court." Determining which one shall establish the trust depends on the individual circumstances of each case. But establishing the trust and funding the trust are two different things. Be very careful when funding a first party SNT. This is a trap for the unwary. The person or court establishing the trust with the assets of the disabled individual must have legal authority to fund the trust. Funding the trust without the requisite legal authority will render the trust invalid under state law. (POMS SI 01120.203.C.2.c).

a. The Individual:

If the disabled individual is legally competent as determined by state law, they may establish for themselves and fund it with their own assets. If the disabled individual is not legally competent but executed a durable power of attorney (POA) before their incapacity, the attorney in fact may establish and fund the trust, provided the POA has the requisite authority.[1]

b. The Parent or Grandparent:

A parent or grandparent may establish the trust on behalf of the disabled individual, but they lack the authority to fully fund it, unless they are POA for the disabled individual. They may also provide "seed" money in a nominal amount to initially fund the trust, or may use an empty or dry trust, if state law allows. (POMS SI 01120.203.C.2a). Thereafter, the legally competent disabled individual or another party with legal authority, such as a POA or guardian/conservator, may fund the trust with the disabled individual's assets. Absent other options, consider obtaining a court order to fund the trust.

c. The Guardian:

Although POMS SI 01120.203.C.2 specifically states "a legal guardian" may establish the first party SNT, most states have expanded this definition to include a court-appointed conservator. If a guardian or conservator is establishing and funding the trust, then the disabled individual has been deemed to lack the legal capacity to do so. The guardian or conservator will typically need to seek a court order to establish ***and fund*** the trust with the disabled individual's funds. Trap for the unwary: Under state law a guardian/conservator does not automatically

[1] POMS SI 01120.203.C.2.b states: "A power of attorney (POA) can establish legal authority to act with respect to the assets of an individual. A trust established under a POA for the disabled individual will result in a trust that we consider to be established through the actions of the disabled individual themselves because the POA establishes an agency relationship."

possess the authority to fund a first party SNT. Therefore, it is critical that the guardian/conservator's court petition specifically request this authority.

d. The Court:

There are several circumstances where a court may authorize the establishment and funding of a first party SNT. The first is by the parent, grandparent, or court-appointed guardian or conservator as discussed above. This may be as the result of an inheritance received by the disabled individual, or to reduce their assets to become eligible to receive SSI or Medicaid. The second is because the disabled individual will receive a personal injury settlement (PI settlement). In this case, as part of the settlement, the disabled individual's attorney will ask the court to establish the trust and allow the funds to be paid to the trust directly. Alternatively, the judge, of their own accord, may require this as part of the settlement. The court decision to establish and fund the trust should be stated as an "Order" or "Judgment" and not an agreement between the parties.

Consult your state's laws to determine if there are other circumstances in which a court may establish and fund a first party SNT.

4. Who Are The Players In The Trust?

Clearly denote who the parties are at the beginning of the trust. This makes it easy for the government agency reviewing the trust to ascertain the establishment of the trust complies with the law. The players in a first party SNT are the Creator, the Grantor, the Trustee and the Beneficiary. Their roles are defined as follows:

a. Creator – person establishing the trust, ie. the disabled individual, parent, grandparent, guardian/conservator, or by court order.

b. Grantor – person funding the trust - always the disabled individual since trust is funded with their fund.

c. Trustee – the person or organization that holds and manages the assets in the trust for the benefit of the beneficiary. Trustees are responsible for ensuring that the assets are managed according to the terms set out in the trust and must act in the best interests of the beneficiaries.

d. Beneficiary – the person the trust is established for. This principal and income of the trust is utilized for the benefit of the Beneficiary. In a first party trust, this is always the disabled individual and they can be the only beneficiary during their lifetime.

Consider the following beginning trust provision which lists the various parties and makes it clear who the players are:

CREATOR:	John and Mary Smith, both of Stoneham, Massachusetts, as parents of the Beneficiary,
GRANTOR:	Robert Smith, of Stoneham, Massachusetts, individually as a disabled individual,
TRUSTEES:	Michelle Mulvena, Esq., of Stoneham, Massachusetts, as the independent Trustee,
BENEFICIARY:	Robert Smith, of Stoneham, Massachusetts.

> THIS TRUST AGREEMENT is made and entered into this 4th day of September, 2024, by and between **John and Mary Smith**, hereinafter referred to as Creators; **Robert Smith**, individually as a disabled individual, hereinafter referred to as Grantor; and **Michelle Mulvena, Esq**., hereinafter referred to as Trustee, regarding **Robert Smith**, hereinafter referred to as Beneficiary. At the time of its creation, **Robert Smith** is a disabled person as defined in the Social Security Act (42 USC Section 1382c(a)(3)).

III. WHAT ARE THE REQUIREMENTS OF A FIRST PARTY SNT:

1. The trust must be established for the sole benefit of the disabled individual. There can be no other beneficiaries to a first party SNT.

2. The beneficiary must be disabled as defined in 42 U.S.C. § 1382c(a)(3)(A):

> "Except as provided in subparagraph (C), an individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity 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."

3. The beneficiary must be under the age of 65 at the time the trust is established and funded. Funding of a first party SNT must be completed before the beneficiary reaches age 65. Thereafter, the trust may grow depending on its investment strategy but no further assets of the disabled beneficiary can be added. But one exception relates to structured settlements. Structured settlement payments may be made to the trust after age 65 if the trust is the beneficiary and the settlement agreement is made prior to age 65.
4. The trust must be irrevocable.
5. The trust must include a payback provision to reimburse ***any*** state Medicaid agencies upon the death of the beneficiary, or upon early termination of the trust, for benefits provided during the beneficiary's lifetime. This is a key requirement of a first party special needs trust. It is best to use the exact same language found in POMS SI 01120.203.B.8, which is:

> "Upon the death of the individual, the State(s) will receive all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s)."

It is important to reference states plural, even if the beneficiary never moved to another state. Do not just name your state or the state of the situs of the trust. It must be all inclusive to pass SSI and Medicaid muster. In addition, SSA and Medicaid will only allow for certain administrative expenses to be paid from the trust upon the beneficiary's death before reimbursement to state Medicaid is made. Under POMS SI 01120.203.E.1, the only permissible administrative expenses are:

- Taxes due from the trust to the State(s) or Federal government because of the death of the beneficiary;
- Reasonable fees for administration of the trust estate, such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust.

No other expenses are permitted prior to reimbursement to the state Medicaid agency, including the following prohibited expenses and payments pursuant to POMS SI 01120.203.E.2:

- Taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate;
- Inheritance taxes due for residual beneficiaries;
- Payment of debts owed to third parties;
- Funeral expenses; and
- Payments to residual beneficiaries.

Be sure to list both allowable and prohibited expenses/payments verbatim from this POMS in your trust to give the trustee (especially a non-professional trustee) directions on what they can and cannot pay for upon the beneficiary's death or early termination of the trust, to avoid having your trust considered a countable asset by SSA and Medicaid.

IV. OTHER COMPONENTS OF A FIRST PARTY SNT:

1. The Disabled Individual Is Always The Grantor

As stated above, the creator establishes the trust but the grantor is the person who is contributing their own assets to the trust. In a first party SNT, this will always be the disabled individual. You do not want to comingle assets of other people, such as parents or other family members, in a first party SNT because those assets would just be paid to the state upon the death of the beneficiary. Instead, family members should establish a third party SNT, which does not require a payback provision. Although not the subject of these materials, there is a presentation on third party SNT's at this and is year's Stetson conference and should be in your materials.

2. Income Tax Treatment Of The Trust

Part of preparing a first party SNT is considering the tax consequences of the trust. It is commonly thought that income from first party SNT's is not taxable, primarily when they are

funded with PI settlements. That is true to an extent. It is true that PI settlements are not taxed for income tax purposes when the settlement is first received. However, if they are invested and accrue interest or dividend income, that income has to be taxed. Uncle Sam wants his money.

A first party SNT is treated as a "grantor trust" for income tax purposes because the beneficiary funded the trust with their own assets and those assets are used exclusively for their benefit. For this reason, even though the trust is irrevocable, it will be taxed as a grantor trust. All of the income, whether distributed out or retained in the trust, will be taxed to the beneficiary as the grantor and reported on their personal return. The trust will file an informational Form 1041 with the IRS and state taxing authority to show that all income was reported on the beneficiary's return. It is beneficial to the beneficiary and the life of the trust to have the income taxes reported on the beneficiary's personal income tax return because individuals are taxed at lower income tax rates than trusts. But won't that negatively impact the beneficiary's continued eligibility for SSI or Medicaid? Not necessarily. This is another reason why it is critical to understand the eligibility requirements of the means-tested government benefits the beneficiary is receiving. The definition of "income" varies widely between various government agencies. Not all "taxable income" is "countable income" for SSI, Medicaid purposes, and federal/state housing benefits. SSI will consider shelter payments as unearned income but not other in-kind distributions such as payments for private caregivers. Whether Medicaid will consider certain taxable income as "countable income" will depend on state law.

3. Early Termination

A first party SNT may include the power to terminate the trust before the beneficiary's death in the event there is a change in circumstances such as the beneficiary is no longer disabled, or it is no longer economical to justify the continuance of the trust. Early termination

clauses have been the subject of much scrutiny by SSI. If you intend to use one, it is best practice to follow the POMS directly. POMS SI 01120.199.E sets forth the three requirements that must be met for an early termination clause to be valid, otherwise your trust will be a countable resource for SSI purposes.

> "A trust that contains an early termination provision may not be excepted from the SSI resource counting rules at section 1613(e) of the Act unless it satisfies the requirements in either section 1917(d)(4)(A) or section 1917(d)(4)(C). Additionally, the trust must satisfy the resource counting rules in SI 01120.200D and SI 01110.100B in order not to be a countable resource. To meet those requirements, all of the following criteria must be met:
>
> - Upon early termination (i.e., termination prior to the death of the trust beneficiary), 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 the administrative expenses listed in SI 01120.199E.3 in this section and in SI 01120.201F.4, 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 so as solely to benefit the trust beneficiary); and
>
> - The early termination provision gives the power to terminate to an individual or entity other than the trust beneficiary." POMS SI 01120.199.E.

Much like the payback provision, this is another instance where it is best to quote the POMS verbatim in your trust. POMS SI 01120.199.G2 gives us an example of an acceptable early termination clause.

> "upon early termination, the State(s) will first be reimbursed for the amount of medical assistance paid on behalf of the trust beneficiary, and any remaining assets will be distributed to the beneficiary."

In some cases, you may not want to include an early termination clause or you may want a clause that specifically prohibits early termination. But bear in mind this will reduce the flexibility of the trust to be able to accommodate changing circumstances of both the beneficiary and the financial health of the trust.

4. Trust Distribution Standard

A first party SNT should have a fully discretionary distribution standard as opposed to an ascertainable standard used in other types of trusts. Discretionary means that the trustee has the authority to decide when and how much to distribute from the trust for the benefit of the beneficiary. The trustee will make decisions regarding distributions in their "sole and absolute" discretion bearing in mind the means-tested government benefits the beneficiary is receiving. A discretionary distribution standard will give the trustee flexibility to make distributions in the best interest of the beneficiary, even if it results in a reduction of benefits. A discretionary distribution standard may look something like this:

> The Trustees may pay or apply for the Beneficiary's benefit during the Beneficiary's lifetime such amounts of principal or income, or both, of the Trust for the satisfaction of the Beneficiary's supplemental care, as the Trustees, in the Trustees' ***sole and absolute discretion***, may from time to time deem reasonable or necessary. (emphasis added).

Some trusts may employ a strict distribution standard. However, this is not advisable, unless required under state law. As the name implies, it can be ***too*** restrictive and may be misinterpreted by SSI as requiring payments for things that SSI or Medicaid is already paying or providing. This type of standard limits the trustee's authority and the flexibility of the trust to roll with changes in beneficiary circumstances or laws. For example, it may prohibit the trustee from making in-kind distributions of shelter, even though this will result in a reduction in SSI benefits, that will provide a substantial benefit and perhaps better, safer quality of life for the beneficiary.

5. Supplement but not Supplant Standard

Another key component of the trust distribution standard is the trustee's authority to "supplement but not supplant" (or similar language) services, benefits, and medical care available to the Beneficiary through any public benefits, such as SSI or Medicaid. This phrase, or similar wording, must be present in a first party SNT. But what does it mean to supplement but not supplant? The primary purpose of a first party SNT is to supplement public benefits. Basically, the trust funds should enhance the beneficiary's quality of life by paying for such things as travel, entertainment, private-pay medical services and other benefits not provided by government programs. The term "supplant" means that trust funds should not be utilized to replace any public benefits the beneficiary is already receiving. Instead, it should complement them. Consider the following sample provision:

> The Trustees may supplement but may not supplant services, benefits, and medical care available to the Beneficiary through any governmental sources . . . It is the intention of the Creators to create a supplemental fund for the benefit of the Beneficiary, and not to substantially displace any assistance that might otherwise be available from any public or private sources. The Trustees may supplement such sources, but the Trustees should not make distributions from the trust that supplant services, benefits or medical care that are otherwise available to the Beneficiary from any governmental resources.

6. Ability to Amend the Trust

The trust should grant the trustee the authority to amend the trust, without court authority to the extent possible and under limited circumstances such as:

- **a.** later changes, interpretations, or state variations in federal or state law involving public benefits to better effect the purposes of the trust;
- **b.** Preserve public benefits eligibility for the beneficiary;
- **c.** Administrative changes;
- **d.** Correct mistakes or ambiguities in the trust.

If the trust does not clearly set forth the trustee's authority to amend, then it will be necessary to seek court approval of any amendments. Of course, if the trust was established under court order, then the court may require that any changes be approved by the court anyway. Amending the trust via a court order should be the avenue of last resort. While going to court is neither time nor cost efficient, it is best to leave that avenue available to the trustee or to the beneficiary or their personal representative. Be sure to check state law as well because state laws may vary as to what authority the trustee may have to amend.

Consider this example of a limited power to amend:

> 13.1 TRUSTEE'S AMENDMENT. The Trustee may, in the Trustee's sole and absolute discretion, amend the trust to conform with later changes, interpretations, or state variations in federal or state law involving public benefits to better effect the purposes of the trust. A Court may require the Trustee as a condition of approval of this Trust to seek Court approval of any amendments. No amendment may change the requirement that the state medical assistance agency, or specifically the <State of _____>, shall be paid back for medical assistance paid on behalf of the beneficiary.
>
> 13.2 COURT AMENDMENT. The Trustee or an interested person may apply to a <State> Probate Court, or a court where the Beneficiary lives with jurisdiction over trust matters, or to a court where the trust has property, for authority to amend the trust to better effect the purposes of the trust, including but not limited to the reasons stated in Article 13.1 herein, except that no amendment may change the restrictions or notice requirements as stated in Article 13.1 and which also apply herein. The applicant shall give notice of the proposed amendment to other interested persons.

For a broader power to amend, consider the following;

1. **Authority to Amend**: The Trustee shall have the power to amend this Trust, in whole or in part, without court approval, as deemed necessary or advisable to:
   a. Ensure the Trust remains compliant with applicable laws and regulations.
   b. Preserve the eligibility of the Beneficiary for public benefits.
   c. Address changes in the Beneficiary's needs or circumstances.
   d. Correct any errors or ambiguities in the Trust document.

2. **Limitations on Amendments**: Any amendment made by the Trustee shall not:

a. Alter the primary purpose of the Trust, which is to provide for the Beneficiary's supplemental needs without disqualifying the Beneficiary from public benefits.
b. Change the Beneficiary of the Trust.
c. Result in the Trust's assets being used for purposes other than those intended to benefit the Beneficiary.

3. **Procedure for Amendments**: The Trustee shall:
   a. Provide written notice of any proposed amendment to the Beneficiary (or, if not competent then to the Beneficiary's legal representative) and any other interested parties as required by law.
   b. Obtain any necessary consents or approvals from the court or other relevant authorities, if required.
   c. Execute a written instrument setting forth the amendment, which shall be attached to and made a part of this Trust.

4. **Effective Date of Amendments**: Any amendment made pursuant to this Article shall become effective on the date specified in the written instrument of amendment, or if no date is specified, on the date the amendment is executed by the Trustee.

7. Trust Protector

In some situations, it may be a good idea to add a trust protector. A trust protector is an individual or entity appointed in the trust to oversee and safeguard the interests of the beneficiary. A trust protector can be an attorney, a family member, a trusted family advisor, a guardian or conservator, or an organization. It can be one person or several. For example, there can be a committee made up of a family member, guardian or conservator, and a financial advisor. They serve as an additional layer of oversight, ensuring that the trust is administered according to its primary intent and in the best interests of the beneficiaries. This can be particularly helpful in a first party SNT where a family member is serving as trustee and may not fully understand the intricacies and interplay of public benefits to the trust. A trust protector can advise a family trustee with regard to investment strategies and how and when to make appropriate distributions for the benefit of the beneficiary. The role of the trust protector can be as limited or broad as needed under the circumstances. Some duties might include the following:

a. **Oversight of the Trustee**: They may review the trustee's records and annual accountings and challenge any discrepancies.

b. **Power to Remove and Replace the Trustee**: If the trustee is not performing their duties correctly, the trust protector can remove them and appoint a new trustee.

c. **Power to Amend or Terminate**: They may have the authority to amend the trust to address changes in law or circumstances, and terminate the trust.

d. **Distribution Powers**: They may advise the trustee in making appropriate distributions or may override a trustee's decision with regard to making or not making distributions from the trust.

e. **Investment Powers**: They may have the authority to oversee the trust investments or change the investment strategy,

f. **Dispute Resolution**: They can resolve disputes between trustees and beneficiaries.

If adding a trust protector, be sure to contemplate the additional costs that may be incurred to the trust for utilizing this role. If a professional is serving in this position, they will charge for their services. It may also increase the trustee fees if the trustee has to respond to voluminous requests or interjections by a trust protector. Whether to include a trust protector in the trust takes careful thought and will depend on the circumstances.

V. TRUSTEE SELECTION

The selection of the trustee is key to the success of the trust and the protection of its assets. The wrong trustee can cause the trust to fail as a protected resource for the beneficiary, fail to make appropriate distributions, make poor investment choices, misappropriate funds, and neglect the beneficiary and their needs.

The trustee can be a trusted family member, friend, professional trustee, attorney, certified public accountant, bank, trust company, or other financial institution. The disabled individual cannot be the trustee. Serving in this role would give the disabled individual too much control over the trust and would result in the trust assets being a countable resource.

The benefit to having a family member or trusted friend serve as trustee is that they are known to the disabled beneficiary, often have their trust and confidence, are aware of their needs, and typically compensate themselves very little or not at all. The downside is that they don't know the first thing about being a fiduciary. They don't know the government benefit regulations. They don't know what they can use the trust funds for or how much they can distribution on behalf of the beneficiary (they often think they can give money directly to the beneficiary).

A professional trustee with government benefits knowledge (such as an attorney whose practice area includes disability and special needs planning) is usually the best situation if the trust has sufficient assets to cover the trustee fees. But sometimes having a family member and professional fiduciary serve as co-trustees can provide the best of both worlds. The family member can manage the care-giving services and the professional fiduciary can manage the financial side (payment for services, investments, tax returns, bookkeeping).

Regardless of who the trustee is, they have certain fiduciary duties to the beneficiary. The main ones are:

a. **Duty to Follow the Terms of the Trust** – the trustee must adhere to the specific terms of the trust. Always being cautious not to cause the trust assets to become a countable resource to the beneficiary.
b. **Duty of Loyalty** – the trustee must act solely in the best interest of the beneficiary, avoiding any conflicts of interest.
c. **Duty of Prudence** – the trustee is required to manage the trust property with reasonable care, skill and caution as a prudent person would manage their own affairs.

d. **Duty to Inform and Account** – the trustee must keep accurate records and keep the beneficiary, or their legal representative (guardian, conservator, or power of attorney) reasonably informed as to the status of the trust and its finances.

IV. CONCLUSION

First party SNT's are not fill in the blank trusts. There are many factors to consider when drafting. Keep the following helpful hints in mind when drafting:

1. To the extent possible, try to create flexibility in the trust. This trust may be around for many years and there are sure to be changes in the law and in the beneficiary's circumstances. A flexible trust will allow the trust to roll with those changes.

2. Less is more. Cover the main points discussed above in your trust. Too much information or creative language can draw the questioning eye of social security or Medicaid.

3. Be clear. State who the main players are in the trust. State that the regulations when necessary and state it is a first party payback trust up front.