

THE NUTS AND BOLTS OF FIRST PARTY SPECIAL NEEDS TRUSTS

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THREE TYPES OF SNT'S

- First Party SNT (a/k/a self-settled or d4A trusts):
 - Established by disabled individual, parent, grandparent, guardian/conservator, or court
 - Funded with assets of disabled individual
 - Under age 65
 - Supplement not supplant
 - Must include a payback provision to reimburse Medicaid

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THREE TYPES OF SNT'S

- Third Party SNT:
 - Established and funded by someone other than the disabled person
 - Does not require a Medicaid payback provision
- Pooled Trusts:
 - Managed by nonprofit organizations
 - Beneficiary funds are pooled to maximize investment options

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CONSIDERATIONS BEFORE
CREATING A FIRST PARTY SNT

- Be familiar with the laws governing first party SNT's:
 - 42 U.S.C. § 1396p(d)(4)(A)
 - 42 U.S.C. § 1382(b)(e)(5)
 - 21st Century Cures Act of 2016
 - Social Security Administration's Program Operations Manual System (POMS)
 - State Law
 - Case Law

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CONSIDERATIONS BEFORE
CREATING A FIRST PARTY SNT

- Listen and learn
 - Take the time to listen to the beneficiary and their family
 - Take the time to learn exactly what public benefits they receive or maybe eligible for
 - Every situation/client is different
 - Nothing cookie cutter about preparing a first party SNT
 - Educate
 - Set expectations with beneficiary and their family

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CONSIDERATIONS BEFORE
CREATING A FIRST PARTY SNT

- Determine who should establish and fund the trust
 - Trap for the unwary – establishing and funding the trust are two different things. Make sure creator has authority to fund.
 - The Individual – must be legally competent or POA can create and fund
 - The Parent or Grandparent – can create but can't fund without a court order or POA can fund, if applicable
 - The Guardian or Conservator – can create and fund with a court order
 - The Court – Upon petition by any of the above, the court can order the creation and funding of the trust

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CONSIDERATIONS BEFORE CREATING A FIRST PARTY SNT

- Who are the players:
 - Creator – person establishing the trust, ie. the disabled individual, parent, grandparent, guardian/conservator, or by court order
 - Grantor – person funding the trust - always the disabled individual since trust is funded with their funds
 - Trustee – holds and manages the trust assets for benefit of the beneficiary
 - Beneficiary – person the trust is established for
- Clearly denote who the players are at beginning of the trust

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REQUIREMENTS OF A FIRST PARTY SNT

- Established for the sole benefit of the disabled individual
- Beneficiary must be disabled as defined in 42 U.S.C. § 1382c(a)(3)(A)
- Beneficiary must be under age 65 at time the trust is established and funded
 - Trust fund may increase but no further assets added
 - Structured settlement exception – payments after age 65 ok as long as trust is the beneficiary and settlement agreement is executed prior to age 65

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REQUIREMENTS OF A FIRST PARTY SNT

- The trust must be irrevocable
- The trust must include a payback provision to reimburse any state Medicaid agencies upon death of the beneficiary or upon early termination of the trust, for benefits provided during the beneficiary's lifetime:
 - Key requirement
 - Use exact language from the POMS
 - Important to reference state(s) in plural, even if the beneficiary never moved to another state


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REQUIREMENTS OF A FIRST PARTY SNT



- Include permissible administrative expenses upon death or early termination, prior to reimbursement to the state Medicaid agency, per POMS 01120.203.E.1
 - Taxes due from the trust to the state or federal gov't due to the death of the beneficiary
 - Reasonable trust administration fees
 - That's it!


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REQUIREMENTS OF A FIRST PARTY SNT




- Include prohibited expenses/payments upon death or early termination, prior to reimbursement to the state Medicaid agency, per POMS 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 from residual beneficiaries
 - Payment of debts owed to third parties
 - Funeral expenses
 - Payments to residual beneficiaries

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OTHER COMPONENTS OF A FIRST PARTY SNT



- The disabled individual is always the Grantor because they contribute their own assets to the trust
- Consider the income tax treatment of the trust on the beneficiary's government benefits
 - Grantor trust tax status
 - Not all "taxable income" is "countable income"
- Early termination clause
 - Subject of much scrutiny by Social Security
 - Must meet 3 requirements per POMS SI 01120.199.E
 - State Medicaid agency is paid back first
 - After allowable administrative expenses, only the trust beneficiary maybe benefit from early termination
 - Power to terminate must be exercised by someone other than the beneficiary

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OTHER COMPONENTS OF A FIRST PARTY SNT

- Fully discretionary distribution standard
 - The trustee, in their “sole and absolute discretion” decides when and how much to distribute from the trust
 - Gives the trustee flexibility
 - Trustee takes into consideration the affect of distributions on the means-tested benefits the beneficiary is receiving
- Supplement but not supplant standard
 - Key component of the trust
 - The trust funds should be used to enhance the beneficiary’s quality of life but should not be used to replace any resources being provided by means-tested government programs

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OTHER COMPONENTS OF A FIRST PARTY SNT

- Ability to amend the trust
 - Trust should grant the trustee the authority to amend the trust under limited circumstances without court authority
 - Comply with later changes in the law that impact the trust
 - Preserve beneficiary’s public benefits eligibility
 - Administrative changes
 - Correct mistakes or ambiguities in the trust
- Trust Protector
 - An optional provision – depending on circumstances
 - An individual or entity appointed in the trust to oversee and safeguard the interests of a beneficiary
 - Creates an additional layer of oversight
 - Their role can be limited or broad

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TRUSTEE SELECTION

- Key to the success of the trust
- The beneficiary cannot be the trustee
- Can be a family member, trusted friend, attorney, trust company, financial institution
- Determine whether having co-trustees is appropriate

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TRUSTEE SELECTION

- Trustee fiduciary duties
 - Duty to follow the terms of the trust
 - Duty of loyalty
 - Duty of prudence
 - Duty to inform and account

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CONCLUSION

- First party SNT's are not cookie cutter
- Many factors to consider when drafting
- Try to create flexibility – roll with the changes
- Less is more
- Be clear and concise

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