Special Needs Trust Must-Haves: Maximizing Care for Disabled Family Members

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Special Needs Trusts (SNTs)

I. Most common means-tested benefits
II. Two kinds of SNTs: self-settled and third party
III. Important considerations in drafting SNTs
IV. Pitfalls to avoid in making distributions
V. ABLE account essentials
VI. Trust drafting tips
I. Most common means-tested benefits

- Rules and regulations vary among agencies and regions
- Most common benefits:
  - SSI
  - Medicaid
  - TANF
  - QMBs
  - Section 8 Housing
  - SNAP
  - CHIP
  - VA
SSI

• Cash benefit from Social Security Administration
  • 2017 - $735 (single) or $1,103 (couple)

• For people who are blind, age 65+, or have a disability according to SSA rules and meet income and asset limits

• 36-month lookback period

• Recipients automatically eligible for Medicaid in TN

• Resources:
  • 42 U.S.C. §1381 et seq. and 20 CFR §415 et seq.
  • Federal POMS (ssa.gov)
  • Regional POMS (Atlanta)
Medicaid

• Health care for people who are aged, blind, or have a disability
• Not Medicare
• Technical, medical, and financial eligibility requirements
• 60-month lookback period
• Resources:
  • 42 U.S.C. §1396 and 42 CFR §§430, 431 and 435
  • Tennessee statutes: 71-5-101 et seq., the Tennessee Secretary of State publication of rules and regulations found primarily in 1200 Chapter 13 of the Rules of the Tennessee Department of Health
  • HCFA Eligibility Policy Consolidated
  • T.C.A. 4-5-101 - APA
Other means-tested benefits

• **TANF** – Temporary Assistance to Needy Families
  - Cash assistance to parents with children who have financial need
  - Recipients automatically eligible for Medicaid
  - TN: “Families First”; lifetime benefit limit of 60 months (some exceptions)
  - Resource: Web FF Guide 809

• **QMBs** – Qualified Medicare Beneficiaries
  - State pays some or all of premium, annual deductible, copay, or co-insurance
  - Income: $1,025 (single), $1,374 (married)
  - Assets: $7,390 (single), $11,090 (married)
  - “Dual eligible”: qualified for Medicaid AND Medicare – typically does not need SSI b/c Medicaid covers out of pocket costs
  - Resource: Medicare.gov
Other means-tested benefits (cont.)

- Section 8 Housing – subsidized housing
  - Vouchers for rent or reduced rent in public housing
  - Income limit (generally 1/3 gross income/mo), no resource guidelines
  - Administered locally; regulated by HUD
  - SNTs maybe countable assets
  - Resources: 12 U.S.C. §1701; HUD Guidebook No. 7420.10G

- SNAP – Supplemental Nutrition Assistance Program
  - Food stamps
  - Administered by DHS
  - Income and resource-based eligibility: $2,250 household income; $3250 if someone in household has disability or is 60+ years old
Other means-tested benefits (cont.)

- CHIP – Children’s Health Insurance Program
  - TN: “Cover Kids”
  - Low/no-cost health insurance for children and pregnant women
  - Household income and family size guidelines for eligibility
  - Resource: Toolkit for TennCare and the ACA at tnjustice.org/trainings

- VA
  - Low Income Pension
  - Special Monthly Compensation
  - Housebound Benefits
  - Aid and Attendance
  - SNTs not helpful for these benefits
II. Two kinds of SNTs: self-settled and third party

• Distinction based on source of assets

• **Self-settled**
  • Assets funding trust belong to person with disability (even if someone else establishes the trust)
  • “Special Needs Trusts”

• **Third party**
  • Assets funding trust belong to someone else, e.g. parent or grandparent
  • “Supplemental Needs Trusts”

• Pooled trusts – may be either type
  • Allow beneficiaries to pool assets under management of one trustee
SNT law: self-settled

- 42 U.S.C. §1382b(e)(5) for SSI eligibility
- 42 U.S.C. §1396p(d) for Medicaid eligibility
  - **d4A** – established by third party or person with disability (defined by SSA) and under age 65
  - **d4C** – pooled trust established by third party or person with disability of any age
  - Irrevocable
  - Inter vivos
  - One lifetime beneficiary
  - Payback provision
SNT law: third party

- POMS SI 01120.200
- Created by third party with assets of third party for benefit of person with disability (as defined by SSA)
- No payback provision
- No liens on corpus of trust for medical assistance provided to beneficiary
- Revocable or irrevocable
- Beneficiary must have no right to compel distribution
- Wise to consider for most estate plans
III. Important considerations in drafting SNTs

- Availability of assets
- Transfer rules
- Drafting considerations
- Trustee provisions
Availability of assets

• Standards for distribution
  • Avoid HEMS (health, education, maintenance, and support) standards – may cause assets to be “countable”
  • Beneficiary must not be able to compel distribution for any purpose
  • Supplemental/discretionary

• Mandatory right to income stream and SSI
  • Value calculated by SSA and counted as asset

• Crummey Powers – NO!
  • Newly gifted assets in trust considered available income
  • Not advisable
Transfer rules (SSA and Medicaid)

- d4A or d4C: no transfer penalty
- Third party SNT: transfer rules could adversely affect grantor
- Grantor may contribute to sole-benefit SNT for disabled third party under age 65 without transfer penalty (TN)
- Section 8: d4A trust will increase rent for beneficiary b/c interest is calculated on corpus
Drafting considerations

- Prohibit court invasion
- Use spendthrift clause
- Termination provisions (must comply with POMS)
- Include residual beneficiary in self-settled SNT
- Use POMS first, then state law
- Seed money for d4A trust - $10
- Payback clauses
Trustee provisions

• Beneficiary must never be trustee
• Selection of trustee: laypeople can be problematic; consider independent co-trustee
• Appointment and removal powers
  • Consider trust advisor
  • Should beneficiary have removal power?
• Powers of trustee
• Compensation
• Letter of intent
• Correspondence to SSA and TNHC
IV. Pitfalls to avoid in making distributions

• Distributions for some purposes may count as income/assets for beneficiary of SNT - possible penalty periods or loss of benefits
• Consider True Link cards: allow trustee to monitor and control beneficiary’s purchases
• Make distributions to ABLE account; fund to permit access to cash within limits
Problematic distributions

• Direct distribution of cash to beneficiary
• Distributions to third parties for services/assets that will not be considered resources in the following month
• Distributions from self-settled SNT for someone other than beneficiary
• Distributions to pay for credit card bills
• Distributions to third parties on behalf of SSI recipient for food and shelter
V. ABLE account essentials

- For people with disability onset before age 26 – must meet SSA definition of disability and provide proof of disability
- May be able to deposit up to $14,000/year – not counted as resources for benefits
- Cannot shelter income for eligibility purposes
- State variations: some states allow non-residents to join ABLE program (TN)
ABLE account benefits

- Low-cost, tax-free investment growth
- Accumulation of assets over base resource level of $2,000 for benefits programs
- Access to cash for SSI recipients without problem of in-kind support and maintenance rules
- Tax-free withdrawals for Qualified Disability Expenses (QDEs) (10% penalty + income tax for non-QDEs)
ABLE account limits

• $350,000 in TN
  • $100,000 + $2,000 in other countable resources – SSI suspended, but Medicaid continues
  • SSI reinstated when account balance drops below $100,000

• Payback provision
  • May transfer to another ABLE designated beneficiary (sibling, step-sibling, or half-sibling)
  • Remaining funds following payback paid to estate
<table>
<thead>
<tr>
<th>Restriction</th>
<th>ABLE</th>
<th>3rd Party SNT</th>
<th>Self-Settled SNT</th>
<th>Pooled Trust</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Age</strong></td>
<td>Disabled before age 26</td>
<td>None</td>
<td>Funded before age 65</td>
<td>None</td>
</tr>
<tr>
<td><strong>Who controls</strong></td>
<td>TN Dept. of Treasury</td>
<td>Any capable person</td>
<td>Any capable person</td>
<td>Non-profit trustee</td>
</tr>
<tr>
<td><strong>Investment discretion</strong></td>
<td>14 options: growth to bank account</td>
<td>Unlimited if reasonable</td>
<td>Unlimited if reasonable</td>
<td>Somewhat limited</td>
</tr>
<tr>
<td><strong>Distributions</strong></td>
<td>QDEs w/o tax; non-QDEs, 10% penalty and income tax</td>
<td>Any want or need that will not disqualify from the benefit</td>
<td>Any want or need that will not disqualify from the benefit</td>
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</tr>
<tr>
<td><strong>Payback at death</strong></td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Transferrable</strong></td>
<td>Yes, to another family member who is disabled before age 26</td>
<td>Yes, to any other person or organization at death</td>
<td>Not until the state is reimbursed</td>
<td>State is reimbursed or non-profit retains</td>
</tr>
<tr>
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</tr>
<tr>
<td><strong>Taxes</strong></td>
<td>No taxes paid on growth if used for QDE; but non-QDE is taxed</td>
<td>Taxes must be paid on growth</td>
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<td>Taxes must be paid on growth</td>
</tr>
<tr>
<td><strong>Funeral costs</strong></td>
<td>Can pay before or after death</td>
<td>Can pay before or after death</td>
<td>Can pay before death</td>
<td>Can pay before death</td>
</tr>
<tr>
<td><strong>Total balance</strong></td>
<td>No more than $100,000 to keep SSI</td>
<td>Any size</td>
<td>Any size</td>
<td>Any size</td>
</tr>
<tr>
<td><strong>Contribution limit</strong></td>
<td>No more than $14k/year; $350k lifetime</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td><strong>ISM effect</strong></td>
<td>QDE distributions are not ISM if used in month received</td>
<td>ISM to $0, lose Medicaid</td>
<td>ISM to $0, lose Medicaid</td>
<td>ISM to $0, lose Medicaid</td>
</tr>
<tr>
<td><strong>Cash to beneficiary</strong></td>
<td>Okay; if beneficiary has a receipt for expense, will not lose SSI</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td><strong>Timing to set up</strong></td>
<td>Quick and on-line</td>
<td>Now</td>
<td>Now</td>
<td>Now</td>
</tr>
</tbody>
</table>
VI. Trust drafting tips

• Provisions requiring trustee(s) to use care manager
• Provisions for appointment of trust protector/advisor
Trusts and care managers

- Credentialed professional with experience relevant to diagnosis and needs of beneficiary
- Routine visits, recommendations, and purchases of needed items to improve quality of life
- Accounting for use of funds to meet care/quality of life needs
- Assistance to trustee for making best use of funds
Trust advisors and trust protectors

• Power to amend trust to comply with benefits programs
• Power to remove and replace trustee
• Annual accounting of trust
• Provide checks and balances