



## **Special Needs Trusts For The Disabled**

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## Recent statistics on persons with disabilities

- In 2010, 54 million people in the United States had some form of disability (May 26, 2010 U.S. Census Bureau Report)
- In that report, 11 million of the 54 million required personal assistance with daily activities
- The American Medical Association's estimates of persons with disabilities is even higher

# Why a Special Needs Trust?

Special needs trusts are created

- For an individual with a disability
- To allow that individual to qualify for means-tested public benefit programs
- But still have access through a trust to additional resources that can supplement those programs

Special Needs Trusts (“SNTs”) also may be known as

- Supplemental Needs Trusts
- Supplemental Benefits Trusts
- Supplemental Needs Payback Trusts
- OBRA Trusts
- Payback Trusts

## **Income Programs**

- Social Security Disability Income (SSDI)
- Supplemental Security Income (SSI)

## **Medical Programs**

- Medicare
- Medicaid

## Social Security Disability Income (SSDI)

- Not need based
- Eligibility: Individual with a qualified disability who made payments into Social Security system (or an unmarried individual with disability under the age of 22 whose retired or deceased parent made payments into the social security system)
- Title II – Social Security Act, 42 U.S.C. Section 402



## Social Security Income (SSI)

- Need based
- Low income and asset requirements must be met
- Note : It is possible for disabled person to work and still be qualified to receive SSI
- Title XVI – Social Security Act, 42 U.S.C. Section 1380

## Medicare

- Not needs based
- Health insurance for disabled persons who are eligible for SSDI
- Title XVIII-Social Security Act, 42.U.S.C. Section 1395

## Medicaid

- Needs based
- Health insurance program for low-income persons
- Title IXX- Social Security Act, 42 U.S.C. Section 1396
- Administered by the states

## Means Testing (SSI and Medicaid)

- SSI and Medicaid assistance is meant for those who are unable to pay
- Income and assets are considered
  - Income beyond a minimal amount offsets benefits or must be used to pay for care
  - Limited “exempt property” owned by the individual with a disability is not counted in determining eligibility, including
    - A \$2,000 set-aside
    - Homestead property/equity interest (with limitations)
    - Personal effects/household goods
    - Motor vehicle
    - Life insurance (with some restrictions)
    - Burial funds and space up to set limits

## Third Party Trusts

- A third party can fund an SNT for a disabled individual that can permit certain distributions for the benefit of the disabled individual while still allowing that individual to be eligible for SSI and Medicaid benefits

## Self-Settled Trusts

- SNTs also can be created for a disabled individual with his or her own assets, but must provide that Medicaid be reimbursed on the disabled individual's death

## Third Party SNT . . .

- Can be created by anyone except the individual with the disability
  - Parent or grandparent
  - Siblings/other family members
  - Friends
- Is treated as if an “exempt asset” and the disabled individual still qualifies for SSI and Medicaid
- Is not subject to the governmental reimbursement rules on death of disabled individual
- Assets remaining on death of disabled individual pass to trust settlor’s designated trust remainder beneficiaries

The Omnibus Budget Reconciliation Act of 1993\* ("OBRA") provides for two types of "self-settled" special needs trusts

- OBRA Payback Trust - "**d(4)(A) Trust**"
- Pooled Trust - "**d(4)(C)Trust**"

\* 42 U.S.C. Section 1396p(d)(4)(A) and (C)

## OBRA Payback Trust . . .

- Disabled individual must be under age 65 when the trust is created
- Trust must be created by a parent, grandparent, guardian or court
- Assets are exempt from SSI and Medicaid eligibility purposes during lifetime of the disabled individual
- On death of disabled individual, Medicaid must be reimbursed for payments made during disabled individual's lifetime before any trust assets can be distributed to the remainder beneficiaries



## Pooled Trust . . .

- No age requirement – can be created after disabled individual has attained age 65
- Funds are consolidated under a common trust agreement for management purposes
- Can be created by
  - Individual with the disability
  - His/her parent or grandparent
  - Guardian
  - Court

## Pooled Trust . . . - continued

- Pooled trust assets are treated as exempt for public benefit eligibility during beneficiary's lifetime
- If self-funded, the pooled trust must require Medicaid reimbursement at the beneficiary's death
- If third-party funded and if the funds are retained in trust for the benefit of other disabled beneficiaries on the beneficiary's death, some states require Medicaid reimbursement and some do not
- Some states impose transfer penalties on individuals over age 65 who transfer their assets to a pooled trust
- In at least one state, an exempt pooled trust can be created only with the consent of the Public Guardian

# Pooled Trust Directory

A directory of pooled trust providers by state can be found on the Academy of Special Needs Planners website:

[http://www.specialneedsanswers.com/resources/directory\\_of\\_pooled\\_trusts.asp](http://www.specialneedsanswers.com/resources/directory_of_pooled_trusts.asp)

## Distributions from an SNT

Distributions can be made to **supplement** (not supplant) governmental benefits and to enhance the disabled individual's life for many purposes, such as

- Dental, podiatry and eye care and services not otherwise covered by governmental benefits
- Clothing
- Utilities
- Companion care
- Education
- Recreation
- Travel
- Transportation
- Hobbies
- Furniture and household goods

Distributions **cannot** be made

- Directly to the beneficiary
- To an account under the beneficiary's name or social security number
- For gifts or donations to others
- To reimburse an individual who gave cash to the beneficiary or deposited cash into an account under the beneficiary's name or social security number

## SNT Planning

- Remember that Medicaid is a federal program administered by the states. Knowing and following **both** applicable federal and state law is important
- SNTs might be desirable for yet-to-be-born disabled individuals in future generations
  - Estate plans should contemplate that possibility and permit the future creation of SNTs for the benefit of persons that the trustee determines may be appropriate SNT beneficiaries
  - Some states permit decanting into SNTs
  - Judicial action (trust construction or trust reformation) may be a possibility

# Resources

## Social Security Administration (SSI)

- <http://www.ssa.gov>
- <https://secure.ssa.gov/apps10/poms.nsf/aboutpoms>  
(the Online Social Security Handbook)

## U.S. Department of Health and Human Services (Medicaid)

- <https://www.healthcare.gov/do-i-qualify-for-medicaid>

## Medicaid Reference Desk (<http://www.thedesk.info>)

## National Academy of Elder Law Attorneys (<http://naela.org>)

“Be careful out there!”

*Hill Street Blues*