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Special Needs Trusts | Elder Law | Long Term Care Planning | Medicaid | Probate | Wills & Trusts
Incapacity Planning | Guardianship | Developmental Disabilities | Veteran's Benefits

“The A, B, C’s and 1, 2, 3’s of S N T’s” (Special Needs Trusts)

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Special Needs Trusts (SNT’s) come in several varieties. The primary purpose of all SNT’s is to hold assets for a beneficiary while exempting the contents of the SNT for programs like Medicaid, Supplemental Security Income (SSI), food assistance and some other public benefits. There are d4**A**, d4**B** and d4**C** Special Needs Trusts and there are 1st Party SNT’s and 3rd Party SNT’s...so we only left out the “2.”

1. The first category of SNT’s consists of assets of the beneficiary (from lifetime earnings, an inheritance, gift or personal injury award). These are “1st party SNT’s.” These are commonly called “self-settled” SNT’s.
2. The second category of SNT’s are Trusts established by a spouse, for the benefit of his or her spouse, within a will and therefore only upon death. These are called Qualifying SNT’s.
3. The third category of SNT’s consists of assets of others (not the beneficiary or his or her spouse) set aside for a disabled person, either during life or upon death of the person setting up the Trust. These are called “3rd party” SNT’s.

Special Needs Trusts can help individuals with a disability of any age. SNT’s can help them qualify for programs to assist with **medical** and **long term care** expenses as well as possibly get a **monthly income stream** from Social Security, even when the individual may have never worked.

SNT’s are very powerful planning tools and are complex to establish and administer. There are many ways to mess up these trusts including: 1) having an improperly drafted document (faulty language used by the drafter) or 2) the trustee administers the trust improperly (making distributions or disbursements not permitted under the terms of the document or paying for things that adversely affect the beneficiary’s eligibility for programs).

Even well intentioned trustees can make mistakes in administration of a SNT and then there are the trustees that do not have good intentions. Preserving the limited funds for an individual with a disability is critical. Selection of a qualified trustee is imperative and you should hesitate before putting a family member in charge of one of these trusts.

Often times we can correct defective SNT's, when the drafter didn't get it right. Sometimes we have to go to court and convince the judge to allow the changes. When a SNT is defective some benefits may have been awarded incorrectly and the government may seek to recover the program funds expended on the beneficiary improperly. This can get very expensive for the beneficiary in lost future-benefits and for the drafting attorney in the form of malpractice.

You don't need to be an expert on SNT's, but you should be able to identify when they can help. If you have someone with medical bills that are out of control and has little or insufficient medical coverage you should think of a SNT. If you know someone who faces long term care, either in an institutional setting or out in the community, you should think of a SNT.

SNT's are tools. They will work well for some individuals with a disability and possibly not for others. An Elder Law Attorney or Special Needs Lawyer can consider all of the tools and determine whether a SNT should be part of the solution to protect resources and to supplement public assistance programs.

Here is your cheat-sheet on the types of SNT's.

<p>FIRST PARTY SNT with beneficiary's funds</p>	<p>d4A – Under age 65, Medicaid payback, works for SSI and Medicaid, works for income and assets</p>	<p>d4B – Qualified Income Trust, only income deposited, only works for some Medicaid programs, not SSI</p>	<p>d4C – Pooled Trust, works for all ages for Medicaid but under age 65 for SSI, works for income and assets</p>
<p>THIRD PARTY SNT with the funds of others</p>	<p>Spouse can set up a trust under their will (must die), no Medicaid payback</p>	<p>Anybody other than the beneficiary or spouse can set up a stand-alone SNT, establish one upon death in a will or in a trust or participate in an existing SNT. No Medicaid payback upon the death of the primary beneficiary, can go to others.</p>	

The Guardian Trusts administers both First and Third Party Special Needs Trusts. An individual can shelter excess assets in most First Party SNT's as well as deposit excess monthly income above the current \$2,199 (in 2016) to get eligibility for Florida's Medicaid Long Term Care Programs.

www.GuardianTrusts.org - 800.669.2499
www.SpecialNeedsLawyers.com – 727.443.7898

A. What is a Trust?

1. A Trust is a relationship regarding property (not necessarily real estate) where a person has a fiduciary obligation to deal with the property for the benefit of another person.
2. Basically a Trust is a fancy word for a relationship where one person is legally in charge of another person's assets.
3. A manager of a trust is a Trustee.
 - a. Trustees can be individuals or institutions (banks, trust companies or non-profit organizations).
 - b. There will likely be Successor Trustees which will step in if something happens to the first Trustee.
4. The Trustee manages the trust for the benefit of the Beneficiary.
 - a. Typically there are multiple levels of Beneficiaries.
 - b. There can be more than one current Beneficiary and other Beneficiaries to receive the funds upon some event occurring, such as the death of the current Beneficiary.
5. A trust is established by a Settlor or Grantor.
6. So the 3 basic parties in all trusts are: Settlor, Trustee and Beneficiary.
7. Trusts can be Revocable (changeable) or Irrevocable.
8. Special Needs Trusts (or sometimes referred to as Supplemental Needs Trusts) must be Irrevocable.

B. Why A Special Needs Trust?

1. Persons with disabilities have needs other than basic medical care.
2. Many individuals with disabilities cannot get or afford private health insurance and cannot work in order to be able to draw Social Security Disability Insurance benefits.
3. If there are financial resources available to help the disabled person we need to stretch them and use them wisely. They need to last for the lifetime of the disabled person.
4. Assets belonging to, or left for the benefit of, a disabled person could easily be exhausted on basic medical essentials therefore leaving no funds for other necessities of life such as housing, food, clothing, transportation, entertainment and non-essential medical care.
5. A properly drafted Special Needs Trust (SNT) can allow a disabled person to qualify for some Public Assistance Programs. These programs can provide income streams or basic medical coverage thus allowing for a "reserve" fund for all of life's other necessities and niceties.
6. But how do we know the needs of a disabled person? In the case of a guardianship, a plan must be presented to the court that should outline the needs of the disabled person. In the absence of a guardianship plan I always recommend a professional care plan prepared by a geriatric care manager. Recommendations of these trained professionals can be incorporated into the SNT and add that extra touch that could make a world of difference to the disabled beneficiary.

C. Overview of Some Public Assistance Programs

1. Incomes

- a. **SSI - Supplemental Security Income** - Maximum income is \$733/month in 2016. This is a Federal Program administered by Social Security. You must be disabled or over age 65 and you must meet financial criteria similar to Medicaid. This program is generally for disabled individuals who have not worked enough to qualify for Social Security Disability Insurance payments. It is designed to pay for food and shelter and your income cannot exceed resource limitations. Income for a beneficiary can be earned from working, unearned income like a check for retirement or disability or a distribution from a trust or gift from a friend or income can be "in-kind" if a third party pays for food or shelter expenses on behalf of a beneficiary. Generally the disabled person must have less than \$2,000 in financial resources, with some assets being excluded from this calculation (such as a house a car and personal effects). Also Social Security imposes penalties, or waiting periods, if a person gifts or transfers assets in order to qualify for SSI. We need to understand permissible transfers, in particular as they pertain to trusts.
- b. **SSDI - Social Security Disability Insurance** - This is a benefit of working and paying into the system. This is also strictly a Federal Program. There are no financial requirements for this program, only that you paid enough credits into the system based on the age you became disabled. This pays a monthly income if you become disabled. This is similar to the program that retirees draw on when they reach retirement age. A Special Needs Trust is **NOT** needed for this program.
- c. **DAC - Disabled Adult Child Benefits also called Childhood Disability Benefits**- An unmarried, disabled adult over age 18, whose disability occurred prior to age 22 can draw on a parent's work history if one of three events occurs: 1. A parent dies, 2. A parent retires and applies for Social Security, or 3. A parent becomes disabled and starts receiving Social Security Disability Insurance payments. The amount the son or daughter can be capped by maximum family allowances, but generally if the parent is still living and drawing a Social Security Check the DAC benefit is 50% of the parent's amount and if the parent has died the DAC benefit is 75% of what the parent would have been entitled to receive.

2. Medical Coverage

- a. **Medicare** - Once you qualify for SSDI or DAC you can get Medicare generally after 24 months. If you have enough work credits you get Medicare at age 65. This is strictly a Federal Program. This provides some medical coverage including hospitalization and doctor visits. There are no financial requirements for this program. A Special Needs Trust is **NOT** needed for this program.
- b. **Medicaid** - This is a combination Federal and State Program administered at the State level. This program has financial limitations similar to SSI. You must be disabled (but don't necessarily need a formal determination by Social Security).

In Florida, you can get this program by either qualifying for and receiving SSI or by applying directly through your state Medicaid Agency (in Florida eligibility for this program is determined by the Department of Children and Families). There are many forms of Medicaid programs and will vary from state to state. There are Medicaid Programs for children, adults, disabled, frail and elderly. These programs can provide such services as basic medical coverage, hospitalization, doctor visits, prescriptions or long term care expenses. Some long term care services can be provided at home or in an institutional setting such as an assisted living facility or nursing home. This program has asset limitations of generally around \$2,000 with some assets being exempt, similar to the SSI rules. All States are required by federal law to impose penalty or waiting periods for individuals who transfer or gift resources in order to qualify for Medicaid. How States impose these penalties can vary somewhat and we should understand how some trusts are excluded from this transfer penalty.

D. Self-Settled Trusts

1. These Trusts are Irrevocable when established, which means once they are established they cannot be changed. However, under Florida's new Trust Code there are ways to modify irrevocable trusts if necessary. See Florida Statutes 736.04113 and 736.04115 (2016).
2. These Trusts are established with the disabled person's personal assets (as compared with other family members' assets). There are many circumstances under which a disabled person will have money of their own.
 - a. One source of funds is a personal injury settlement where funds are directly received by the disabled person, or their guardian.
 - b. Another source of funds is an inheritance, which ideally should have been addressed originally by the family member through the use of a third party SNT. Unfortunately, sometimes a well-intentioned relative may not understand the problems they can cause by leaving assets directly to a disabled person. This happens frequently when an unexpected death occurs and there has been no estate planning or a lack of coordination with the finances and the legal estate plan.
 - c. In other situations a disabled person may earn income through wages or a salary. They may have worked their entire adult life and then suddenly became disabled or been disabled since birth but still with the ability to work. Depending on the particular government program the disabled person is receiving, earned income will likely jeopardize eligibility. For individuals only on Medicaid, income deposited into this type of SNT can assist with maintaining eligibility.
3. These trusts are **exceptions** to the transfer penalties imposed in the SSI and Medicaid rules. So transfers of assets to these types of trusts DO NOT impose waiting periods for SSI and Medicaid.
4. Ideally these trusts should be exhausted during the lifetime of the Beneficiary to enhance their quality of life.
5. **Under 65 Disabled Trust ((d)(4)(A)) - 42 USC 1396 p (d)(4)(A) -**
 - a. Must be less than 65 years of age when funded initially. The beneficiary may age past 65 and the trust is still exempted although you can't continue to contribute assets to this trust after age 65.

- b. It can be established by the disabled person's parent, grandparent, guardian or by the court.
- c. The Grantor chooses the Trustee which may be another family member or a professional (such as a bank, trust company or non-profit corporation).
 - 1. Additional concern should be given to ensure that there will be a Trustee for the lifetime of the beneficiary.
 - 2. There should be a succession of Trustees named if individuals are named. There can be difficulty with finding a Trustee (individual or corporate) experienced with administering a SNT.
 - 3. Family members may be more familiar with the needs of a disabled person, but may not be experienced with managing money or a trust.
 - 4. Corporate Trustees may be more capable of administering these trusts, but costs can be a factor unless there is a substantial fund to manage. Also corporate trustees are not providing the "hands-on" care and will likely not know the disabled person.
- d. How can funds be used? For anything but need to be careful with SSI rules regarding payments for food or shelter expenses, discussed later.
- e. Assets deposited into this Trust are exempt and the funding event is not a transfer. See Florida ESS Manual 1640.0576.09.
- f. Any income deposited into this Trust does not count toward eligibility (in the month deposit is made) for Medicaid. See Florida ESS Manual 1640.0576.09.
- g. Any distributions paid to third parties are not counted as income, unless for food and shelter and the beneficiary is on SSI.
- h. Any funds remaining on death must first **pay back** the State for medical benefits received (through Medicaid). There is no pay-back to federal agencies (Social Security, Medicare or Supplemental Security Income).
- i. This is a single trust created for each beneficiary. Although there is a "pay back" provision, there will also be other individual beneficiaries to receive any remaining funds after paying back the Medicaid program for the State of Florida. These "individual beneficiaries" need to be identifiable when the Trust is established.

6. **Pooled Trust ((d)(4)(C))- 42 USC 1396 p (d)(4)(C)**

- a. These Trusts must be established by a non-profit organization. There is one trust with multiple beneficiaries.
- b. Since the Trust is already in existence, a beneficiary "joins" the Trust, usually through a contractual arrangement called a Joinder Agreement. This contract can be signed by the disabled person's parent, grandparent, guardian or by the court or by the individual himself or herself. Since the disabled person can sign personally their agent or representative is generally permitted to sign through a power of attorney.
- c. The benefits of this trust over the (d) (4) (A) trust are that there is already a Trustee involved who should be familiar with administering these trusts and there is generally a money manager who handles the investments. Oftentimes these trusts do not have minimum fees to

administer the accounts, thus making these trusts more cost effective, particularly for smaller accounts.

1. Since the Trustee is already designated you can check out the background and experience of the Trustee and ask questions.
 2. You can also investigate the background of the investment advisor and the track record of the investments of the Trust. You have the right to ask these questions and you should be satisfied with the answers you receive. Use "BrokerCheck" at www.finra.org to check the background of the financial advisor.
 3. Sometimes the initial fees, or up-front costs, can be substantial (several thousand dollars), others charge nominal set-up fees. The costs should be considerably less than setting up your own trust from scratch.
- d. How can funds be used? For anything that benefits the individual, but again you need to be careful with SSI recipients when spending for food and shelter.
 - e. The Beneficiary can be any age, however, assets deposited into Trust are exempt and the funding event is not a transfer if the Beneficiary is under age 65. Florida presently does not differentiate if the beneficiary is under or over age 65 and does not impose a penalty.
 - f. Any income deposited into Trust does not count toward eligibility for Medicaid. See Florida ESS Manual 1640.0576.09
 - g. Any distributions paid to third parties are not counted as income, with the same limitations as the Under 65 Trust ((d) (4) (A) Trust).
 - h. Any funds remaining on death are retained by the Pooled Trust or they must pay back the Medicaid agency for medical services provided.
 1. This means that these trusts are not inheritance vehicles (similar to the (d) (4) (A) trusts).
 2. Because these trusts must be established by a non-profit organization, these "retained funds" are generally moved to the non-profit for its purposes or are retained in the Pooled Trust to assist other beneficiaries, either new or existing.
 3. A properly utilized Pooled Trust will generally not have large amounts in the beneficiary's account on death.
7. Qualified Income Trust ((d)(4)(B)) - 42 USC 1396 p (d)(4)(B)
- a. Only used to handle excess income over the Income Cap of \$2,199/month in 2016 for Medicaid long term care programs.
 - b. This does not work for SSI eligibility.
 - c. This Trust is used commonly for the frail elderly in qualifying for nursing home Medicaid programs and rarely for the developmentally disabled.
8. Here is the exact, entire language of the federal laws governing these 3 types of SNT's under 42 USC 1396 p (d) (4):

(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section [1614\(a\)\(3\)](#)) and which is established for the benefit of such individual by 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 title.

(B) A trust established in a State for the benefit of an individual if—

(i) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),

(ii) 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 title, and

(iii) the State makes medical assistance available to individuals described in section [1902\(a\)\(10\)\(A\)\(ii\)\(V\)](#), but does not make such assistance available to individuals for nursing facility services under section [1902\(a\)\(10\)\(C\)](#).

(C) A trust containing the assets of an individual who is disabled (as defined in section [1614\(a\)\(3\)](#)) that meets the following conditions:

(i) The trust is established and managed by a nonprofit association.

(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.

(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section [1614\(a\)\(3\)](#)) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.

(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this title.

E. Trusts Set up By Others - these are the majority of the Special Needs Trusts.

1. Trust by Spouse - Can only be set up in Will -Qualifying Special Needs Trust (FL STAT 732.2025(8) and 732.2045(1)(g))

2. Trust by any other Person -- These are generally referred to as Third Party Special Needs Trusts

a. These trusts may be set up by parents for children or in some cases by the children for the parents' benefit and do not consist of the beneficiary's personal assets.

b. This type of SNT can be established as a separate, stand-alone irrevocable trust, under a person's will, or within another trust such as a typical revocable living trust.

c. If the SNT is Irrevocable (or at least cannot be changed or directed by the beneficiary) the trust assets are not considered in determining eligibility for most public assistance programs.

d. Distributions to a 3rd party are permitted. A more detailed list of permissible uses follows later in this outline.

- e. Anyone can be appointed as the Trustee except the disabled person or their spouse.
- f. There will be several layers of Beneficiaries such that after the death of the disabled Beneficiary there will be other Beneficiaries named to receive any remaining funds of the trust. Since this could be very distant into the future greater care needs to be taken in the drafting of these provisions.
- g. This is not a “pay-back” type of SNT. There is no Medicaid lien and no payments are required to go back to Medicaid upon the death of the primary beneficiary.

F. Distributions from All Special Needs Trusts.

1. Handling of Distributions is crucial in preserving public benefits. Improper distributions can cause the loss of public benefits to the beneficiary of a SNT.
2. Distributions made from the Trust will be considered in 1 of 3 categories.
 - a. First is **Direct Income** to the beneficiary. **SI 01120.201 I 1. a.** Direct Income reduces SSI benefits on a dollar for dollar basis until SSI goes away entirely. Direct Income must be reported for Medicaid eligibility and can affect eligibility. Direct Income includes cash payments and anything that could be easily converted to cash. (This may be hard to accomplish, as many things are convertible to cash.) Also under the new POMS, Disbursements from the trust to third parties that result in the beneficiary receiving non-cash items (other than food or shelter), are in-kind income if the items would not be a partially or totally excluded non-liquid resource if retained into the month after the month of receipt. Very recently, (in February of 2013), Social Security has changed their policy and will now allow a Trust to reimburse a third party for items purchased for a beneficiary on SSI.
 - b. The second category is “**In-Kind Income Support and Maintenance.**” This category is defined as food or shelter received as a result of disbursements from the trust by the trustee to a third party in the form of in-kind support and maintenance and are valued under the presumed maximum value rule. **This category only applies to people on SSI and not for individuals getting Social Security Retirement, SSDI or DAC.** Generally, in SNT’s, the Trustee often purchases items for the beneficiary. Many times it is appropriate to make In Kind Support and Maintenance payments and therefore for the beneficiary to have a reduction in benefits. This is due to the fact that the SSI monthly payment may be inadequate to provide the appropriate level of food and shelter for the beneficiary. Thus, as long as the SSI payment is maintained, although at a reduced level, Medicaid eligibility is maintained. (A beneficiary may only receive \$1 of SSI a month and still be totally eligible for Medicaid benefits.)
 - c. The third category is defined as Not Income or as Distributions to Third Parties. In its Program Operations Manual System (POMS), the Social Security Administration states that disbursements from the trust that are

not cash to the individual or are third party payments that do not result in the receipt of support and maintenance are not income. Such disbursements may take the form of educational expenses, therapy, medical services not covered by Medicaid, phone bills, recreation, entertainment, etc. Thus, disbursements made by the trustee directly to a third party are not considered income to the individual. Since these distributions do not result in any reduction of SSI benefits, they are the most desirable types of distributions for a Trustee to make.

3. Types of distributions not considered food or shelter might include:
 - Services of a Geriatric Care Manager
 - Legal services
 - Professional Guardian services
 - Non-refundable airline tickets
 - Stereo system and computers
 - TV
 - Medical insurance
 - Telephone and cellular phone bills
 - Furniture
 - Vacation and Travel expenses of the disabled person
 - Movies
 - Tax payments
 - Medical treatment for which public funds are not available such as alternative health procedures or alternative medications
 - Memberships in clubs such as recreational clubs
 - Subscriptions to magazines, newspapers and book clubs
 - Adapted vehicles like a van and
 - The difference between a private and semiprivate room in an institution.
 - REMEMBER if the beneficiary is not on SSI you can also pay for food and shelter expenses.
4. Overall, distributions should be made in such a manner that they are not considered to be income to the beneficiary for public benefits purposes. The Trustee may not provide cash to the beneficiary with the hope that the beneficiary will use the money to buy certain items or use the money for certain purposes such as those listed above. Any cash paid directly to the beneficiary will be counted as income. If the Trustee provides In-Kind Support and Maintenance that is food or shelter, then SSI benefits may be reduced.
5. Trustees of Special Needs Trusts must be familiar with Deeming of Income and Resources and with In-Kind Support and Maintenance.

The Deeming law for SSI is found at 20 C.F.R. §416.1160 et. seq. and in the POMS at:

<https://secure.ssa.gov/apps10/poms.nsf/subchapterlist!openview&restricttocategory=05013>

In-Kind Support and Maintenance Law for SSI is found at 20 C.F.R. §416.1130-1157 and in the POMS at SI 00835: Living Arrangements and In-Kind Support and Maintenance:

<https://secure.ssa.gov/apps10/poms.nsf/lnx/0500835000!opendocument>

6. A Trustee generally should NOT:
 - Pay cash to the beneficiary;
 - Pay cash to family of the beneficiary under the age of eighteen;
 - Make payments of rent, mortgage, real-estate taxes, homeowners' insurance, utilities, food, clothing, and shelter (this will be counted as income) without knowing exactly how such payments might affect SSI eligibility;
 - Buy or give groceries to the beneficiary without knowing exactly how such payments might affect SSI eligibility; and

7. The Trustee should be careful not to make distributions to a beneficiary that would be considered income to the beneficiary and thus reduce or eliminate public benefits. Traditional trust standards for distributions requiring income or principal distributions do not serve the basic purposes of a SNT. Overly broad Trustee discretion jeopardizes the beneficiary's eligibility for public benefits. A highly restrictive distribution standard may be even worse by denying the beneficiary many of the goods and services that would benefit the beneficiary's quality of life.

8. Credit Card Payments and Gift Cards -If a trust pays a credit card bill for the trust beneficiary, whether the individual receives income depends on what was on the bill. If the trust pays for food or shelter items on the bill, the individual will generally be charged with in-kind support and maintenance up to the PMV. If the bill includes non-food, non-shelter items, the individual usually does not receive income as the result of the payment unless the item received would not be a totally or partially excluded non-liquid resource the following month.

Gift cards and gift certificates are considered cash equivalents. If a gift card/certificate can be used to buy food or shelter (e.g. restaurant, grocery store or VISA gift card), it is unearned income in the month of receipt. Any unspent balance on the gift card/certificate is a resource beginning the month after the month of receipt. If the store does not sell food or shelter items (e.g. bookstore or electronics store), but the card does not have a legally enforceable prohibition on the individual selling the card for cash, then it is still unearned income.