

# Everything You Need to Know About Special Needs Trusts

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# Everything You Need to Know About Special Needs Trusts

- Differences between a first party, third party, and pooled special needs trusts
- Vocabulary: trust, trustee, guarantor, settlor, beneficiary
- How special needs trust works and how to set one up
- Essential characteristics of a special needs trust

# The Magic Document Syndrome

- **Many parents of disabled individuals go through a lifelong learning process about how to provide for the unique needs of their children.**
- **Very commonplace for parents to realize it is important to create a SNT to provide for their child's quality of life, but often the creation of the document is seen as the objective rather than a tool to meet a goal.**
- **SNT should be a document that creates:**
  - a system to provide the distributions that the beneficiary needs

AND

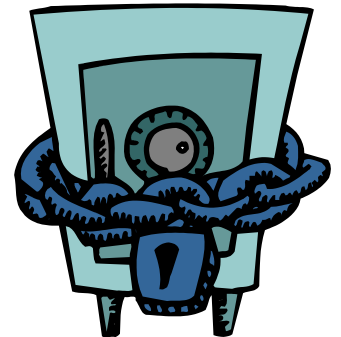
  - a check and balance system of accountability to make sure that quality of life is maintained

# Special Needs Trusts

## The Basics

# Elements of a Special Needs Trust

- A Trust is a contract to control property to meet some objective for the benefit of a beneficiary
- A special needs trust is drafted specifically so trust assets are considered to not be "available resources" in determining a disabled person's eligibility for needs based benefits.



# Elements of a Special Needs Trust

The funds in the special needs trust may be used to meet the beneficiary's needs that are **not** covered by public benefits.



# Trust Distribution Standard: Supplemental Trust

- Under a pure supplemental trust standard, trust assets may not be used to supplant or replace public assistance benefits in any way.
- A supplemental special needs trust only allows distributions that do not reduce needs-based benefits.
  - No distributions for food or shelter.



# Trust Distribution Standard: Discretionary Trust

- Under a discretionary trust standard, the Trustee is directed to consider known income or resources available to the beneficiary, including public benefits and services, but may make any distribution that is determined to be in the beneficiary's best interest.
- A discretionary special needs trust discourages, but permits, distributions which could cause a reduction or elimination of public benefits, i.e. payments for food or shelter.



# Two Basic Types of Special Needs Trusts

- First-Party Special Needs Trust
  - Trust holds property which is transferred from the beneficiary.
  - May also be referred to as a “Self-Settled”, “Medicaid Payback” or “(d)(4)(A)” trust.

# Two Basic Types of Special Needs Trusts

- Third-Party Special Needs Trust
  - Trust holds property which is transferred from someone other than the beneficiary.
  - May also be referred to as an “Estate Planning” trust.

# First-Party Special Needs Trust

42 U.S.C. § 1396p(d)(4)(A)

POMS [SI 01120.203 B1](#)

Federal law allows the property of a disabled individual to be placed in a trust and the resulting trust assets will not be considered an “available resource” for purposes of SSI and Medicaid eligibility, if certain requirements are met.

# First-Party Special Needs Trust

42 U.S.C. § 1396p(d)(4)(A)

POMS [SI 01120.203 B1](#)

The trust must:

- contain the assets of an individual **under age 65** and **disabled** ;
- be **established by the beneficiary, the beneficiary's parent, grandparent, legal guardian or a court**; and
- provide that the State will receive all amounts remaining in the trust upon termination up to an amount equal to the total **medical assistance** paid on behalf of the individual under a State Medicaid plan.

# First-Party Special Needs Trust

42 U.S.C. § 1396p(d)(4)(A)

POMS [SI 01120.203 B1](#)

The trust must also be:

- irrevocable;
- established for the **sole** benefit of the primary beneficiary;  
and
- under the complete control of someone other than the beneficiary.

# Third-Party Special Needs Trust

POMS [SI 01120.200 A 17](#)

- A **third-party** special needs trust is a trust established with property belonging to someone other than the beneficiary – a third-party.
- Social Security is always on the look-out for situations where a trust is allegedly funded by a third party, but in reality is created with the beneficiary's property.

# Third-Party Special Needs Trust

- Can be established by anyone other than the beneficiary or beneficiary's spouse;
- Can be revocable to the grantor;
- No Medicaid payback requirement, so the property can be left to anyone upon the termination of the trust.

# Third-Party Special Needs Trust

- Distributions can benefit others in addition to the primary beneficiary;
- The trust must be under the complete control of someone other than the primary beneficiary.



# Third-Party Special Needs Trust

- Can be a testamentary trust embedded within the grantor's living trust or will; or
- can be a standalone trust with a pour-over provision in the grantor's living trust/will.



# Third-Party Special Needs Trust

- The advantages of a standalone trust are:
  - allows other family members or loved ones to contribute to the trust;
  - allows you to customize the administration provisions which need to accommodate management issues that are very different from the typical living trust;
  - allows greater privacy.

	<b>1st Party Trust</b>	<b>3rd Party Trust</b>
<b>Trustmaker/ Settlor Guarantor / Trustor</b>	Beneficiary, Parent, Grandparent, Guardian, Court	Anyone other than Beneficiary or Spouse
<b>Beneficiary</b>	Disabled, Under 65	No Restriction
<b>Funding Source</b>	Beneficiary	Anyone other than Beneficiary
<b>Remainder</b>	Medicaid Payback	Designated Beneficiaries - No Medicaid Payback
<b>Distributions</b>	Sole Benefit of Benficiary	Primary & Secondary Beneficiaries
<b>Revocability</b>	Irrevocable	Revocable to Grantor
<b>Tax Treatment</b>	Grantor Trust - Taxed to Beneficiary	Grantor Trust (Taxed to Grantor) While Revocable; Complex Trust When Irrevocable

# Pooled Special Needs Trusts

## What is a Pooled SNT?

- Somewhat like a cross between a 401k and a traditional SNT
- Beneficiaries do not get their own documents, but instead join the trust and establish an account for their (sole) benefit.
- Account is then administered like any other SNT
- Often serves a specific population
- Some provide services to a wide geographic area – some are more local
- Some process distributions rapidly and others meet periodically to decide what distributions they will approve.
- 1st Party or 3rd Party

# Pooled Special Needs Trusts

## Why use a Pooled SNT?

- Good option for smaller Trust because typically no funding minimum
- Medi-Cal qualification for a client over 65
- Annual fees lower than private trustee

# Pooled Trust Limitations

- There is no one-size fits all.
  - Pooled trusts cannot accept all types of assets, i.e. real property, vehicles, business interests.
  - Pooled trust cannot provide customized investment options or opportunities.

# Factors When Choosing a Pooled Trust

- When choosing a pooled trust, there are four critical factors to consider:
  1. Stability
  2. Transparency
  3. Accountability
  4. Mobility

# Choosing the Right Management Team



# Traditional Model

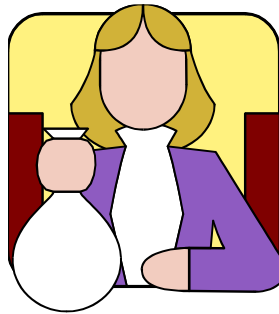
- The beneficiary's oldest sister is named as trustee.
- There are no other supports included in the trust.



# Alternate Model 1

## Trustee Directed by a Trust Advisory Committee

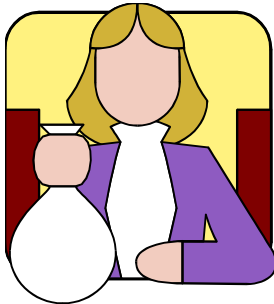
- The Trustee manages funds, makes distributions, does taxes, keeps records
- The Trustee is directed by a Trust Advisory Committee that recommends distributions, can amend the trust and replace the Trustee
- Optional Care Manager



# Alternate Model 2

## Trustee Directed by Trust Protector

- The Trustee manages the funds, makes distributions, does taxes, keeps records
- The Trustee is directed by a Trust Protector that recommends distributions, can amend the trust and replace the Trustee
- Optional Care Manager



# Alternate Model 3

## Limited Purpose Trust

Trusts for specific purposes, such as to provide only housing, can be more tightly defined and trustees can seek assistance from benefit, tax, and financial advisors.

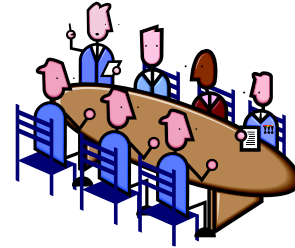


**Co-Trustees**

# Alternate Model 4

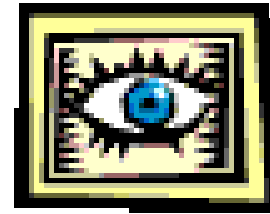
## Pooled Special Needs Trust Monitored by Trust Protector/Committee

- Pooled special needs trust manages funds, makes distributions, does taxes, keeps records
- Pooled special needs trust often have care managers or advocates on staff
- Ideally, pooled special needs trusts are accountable to a Trust Protector/Advisory Committee.



# Concept of Advisory Committee

- Advisory committees have been incorporated in special needs trusts since their earliest inception.
- The concept is to provide guidance to the trustee about the needs of the beneficiary and to ensure that the Trust is being administered in the beneficiary's best interest.



# Composition of Trust Advisory Committee

There should be an initial Chairperson designated for the Trust Advisory Committee.

- The Chairperson(s) primary duty is to ensure that the responsibilities of the Trust Advisory Committee are timely met and to call meetings of the Committee as needed, but not less than annually.

There should be a minimum of two and a maximum of four other members of the Trust Advisory Committee.

- Initial members can be named in the trust document or the Grantors can maintain a schedule of successor Trust Advisory Committee members that can be used by the Trust Advisory Committee Chairperson when selecting members for the Trust Advisory Committee.

# Keeping the Advisory Committee Relevant

- Effectiveness of the Committee depends on how relevant the Committee feels it is to the beneficiary's on-going well-being.
- If the Committee members lack relevant information and direction, the Committee will flounder, the members will lose interest and the Committee will cease to function.





# Power to Change the Trustee

- The power to replace the trustee is in most cases an essential tool to keep the Trust Advisory Committee/Trust Protector in ultimate control.
- There must always be some mechanism to remove and replace the Trustee.



# Advocate/Care Manager

- Usually a professional care manager or social worker familiar with services for persons with disabilities.
  - Not a Regional Center Case Manager
- Helps to identify unrecognized needs and secure services or supports to enhance the beneficiary's quality of life.
- Physically present to observe and assess circumstance and living environment.



# Thank You!

Questions? Please contact: [susy@dalelawfirm.com](mailto:susy@dalelawfirm.com)

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