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Special Needs Trusts

February 23, 2021

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Agenda

9:00 A.M. Program Begins

10:30 A.M. Refreshment Break

12:15 P.M. Program adjourns



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Bob Fechtman is a life-long resident of Indiana. He graduated from Northwestern University with a degree in music and a major in economics, and he received his JD from Rutgers School of Law. He also attended the University of San Diego's Institute on International and Comparative Law at Magdalen College, Oxford University. In 6th and 7th grade, Mr. Fechtman went away to school to sing with the American Boychoir in Princeton, New Jersey. Mr. Fechtman focuses his practice on the problems of older and disabled persons, particularly special needs trusts, estate planning and trusts, health law, Medicaid planning, guardianships and decedents' estates. He has been certified as an elder law attorney by the National Elder Law Foundation. He is a member of the National Academy of Elder Law Attorneys, and he is the President of the Indiana Chapter of the National Academy of Elder Law Attorneys. He is a member of the Special Needs Alliance, which is a national network of lawyers dedicated to disability and public benefits law. He is also a member of the Elder Law Section and the Probate, Real Property and Trusts Section of the Indiana State Bar Association, and a member of the Indianapolis Bar Association, of the Estate Planning Council of Indianapolis, and of the Hoosier Hills Estate Planning Council. Mr. Fechtman is a sustaining member of the Indiana Trial Lawyers Association. He is a frequent writer and speaker on a variety of estate planning, disability and elder law topics. He is currently serving on the Boards of Directors of the Brain Injury Association of Indiana and of Independent Residential Living of Central Indiana, Inc.

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Elizabeth A. Homes has practiced law in Carmel, Indiana since May of 2014. Her practice at the Law Office of Elizabeth A. Homes LLC is focused on Special Needs Planning, Guardianships, Elder Law, Estate Planning, and Probate Work. This includes Wills, Powers of Attorney, Advanced Directives, Trusts, Trust Administration, Medicaid Planning, Special Needs Planning, Guardianship, and Probate. She is admitted to practice law in the State of Indiana.

In the Indianapolis, Indiana area, Elizabeth is an active member of the Indianapolis Bar Association (IBA) and participates in the Estate Planning & Administration Section. State-Wide, Elizabeth is actively involved with the Indiana State Bar Association (ISBA) participating in the Probate, Trust and Real Property Section, the Elder Law section and the Young Lawyers Section. Elizabeth is a member of the Academy of Special Needs Planners (ASNP).

Elizabeth was born and raised in Carmel, Indiana. She obtained her B.A. degree from the University of Indianapolis. She went on to also obtain her MBA with a concentration in Finance in a dual program while completing her undergraduate degree at the University of Indianapolis. She obtained her J.D. degree from the Indiana University Robert H. McKinney School of Law. She spends her spare time with her family and friends participating in a wide variety of events. Elizabeth has run in many events that supports many Special Needs causes such as Down Syndrome, Autism and many others. She attends Trader's Point Christian Church and volunteers in the Special Needs Ministry.

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SPECIAL NEEDS TRUSTS!

FEBRUARY 23, 2021

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Special Needs Trusts!
February 23, 2021
By: Robert W. Fechtman & Elizabeth A. Homes

I. Introduction

“Instead of bracing yourself for the perils of the unknown, embrace the joy that is here in your present moment.” Michelle Cruz Rosado

As Attorneys, we have the opportunity to meet our client on their best days, worst days and anywhere in between. We may get to hear about all sorts of things that were not planned.

When a child with special needs is born, a lot of the client’s initial plan goes out of the window. Our job is to meet the client where they are at, not where they expect themselves to be.

We would submit that if a client has a loved one with special needs their need for estate planning is more urgent. These clients need to make sure that they have the proper estate plan in place for their best interest and for their loved one with special needs. This is often where the subject of Special Needs Trusts, ABLE Accounts and maybe more comes up.

II. What is a Special Needs Trust (SNT) and is it the only option?

A Special Needs Trust (SNT) is essentially an investment vehicle that can hold funds for the benefit of an individual with disabilities. The Special Needs Trust can hold a huge quantity of funds and assets and the person with disabilities can remain on means tested (or other) public benefits. The Trustee can use those funds for the person with disabilities for things that would not otherwise be covered by public benefits.

There are two (2) types of special needs trusts: third-party trusts and self-settled trusts. The threshold factor to consider when determining which special needs trust is an appropriate fit is the source of the funds.

If the person with disabilities has received funds through a lawsuit settlement or a direct inheritance, for example, a self-settled special needs trust, otherwise known as a 1st Party Special Needs Trust, should be considered. This type of Special Needs Trust is designed to hold the funds of the person with disabilities.

If the parents of a loved one with disabilities want to leave some of their funds for their loved one with disabilities, then a 3rd Party Special Needs Trust, otherwise known as a Supplemental Needs Trust, should be considered. In a 3rd Party Special Needs Trust, the source of the funds must be someone other than the person who has disabilities.

A Special Needs Trust, while one of the options, is certainly not the only option. Options that every client should consider before assuming a Special Needs Trust is the right fit include the following:

- A. *They could disinherit their child with special needs.* Many clients that authors meet with do not have a lot of assets. Before the invention of a Special Needs Trust, many would exercise this option. In the authors' opinion, a little is better than nothing. Regardless of the type of 3rd Party Special Needs Trust the parents elect to use, many times the desire is there to leave something, regardless of the amount. Additionally, most of the time parents are not often aware of how little would actually disqualify their loved one with special needs from means-tested public benefits that they desperately need.
- B. *They could make a gift to a child with special needs.* There could be significant problems with this strategy, especially if the child with special needs is

receiving any means-tested public benefits. Means-tested public benefits such as Medicaid and Supplemental Security Income are affected by how many resources and how much income the person with disabilities has at the beginning of every month.

- C. *They could make a distribution to a sibling.* This was the most common strategy prior to 3rd Party Special Needs Trusts. Clients would just distribute their estate to another child, who does not have special needs. In other words, morally obligate the sibling without special needs to provide and take care of the brother or sister with special needs.

This option is fraught with risk. If a distribution is made to the sibling without special needs, there is no guarantee that life will not happen to that sibling. What if they have credit problems? What if they get divorced and the funds that were supposed to help the sibling with special needs are incorporated into that action? What if something catastrophic happens to the sibling without special needs that results in them having a disability of their own? What if the sibling without special needs lacks money management skills? What if the sibling without special needs predeceases the sibling with special needs and the funds get wrapped up in the sibling's probate estate?

- D. *They could set up an ABLE Account.* A new law entitled, "Achieving a Better Life Experience Act of 2014" passed. (26 U.S.C. § 529A.) An ABLE Account allows a person with disabilities to have more than two thousand (\$2,000) dollars in their name and still maintain their eligibility for their means-tested public benefits.

- E. *Special Needs Trust.* The parents could distribute to a 3rd Party Special Needs Trust. This is an excellent tool to use that would allow the person with special

needs to remain on any means-tested public benefit while having this supplemental source of income.

III. What is a pooled Special Needs Trust?

The pooled trust was created by the Omnibus Reconciliation Act of 1993 (OBRA '93). Transfers to pooled trusts are exempt from the transfer of assets rules and are drafted in such a manner that the assets are unavailable and, therefore, non-countable. Transfer of asset rules are only an issue if the grantor, rather than the beneficiary, is likely to apply for Supplemental Security Income (SSI) or Medicaid (MA).

A pooled special needs trust allows an individual access to financial resources to enhance their life while safeguarding public benefits that provide access to vital services. Administered by a non-profit, a pooled trust combines the assets of many individuals for investment purposes while maintaining individual accounts for beneficiary.

In Indiana, the authors continue to recommend the Arc of Indiana as a potential pooled special needs trust. <https://www.thearctrust.org/pooled-trust/>

Most Pooled Special Needs Trust have two (2) types of Special Needs Trusts within their pool.

A. 1st Party Pooled Special Needs Trusts

Pooled income trusts or D-4C Trusts, are held by a nonprofit entity as one large trust on behalf of many special needs beneficiaries (See 42 U.S.C. Section 1396p(d)(4)(c)). OBRA '93 allowed a person with special needs to create their own Special Needs Trust with their own money through joining a Pooled Special Needs Trust. This law also allowed non-profits to keep a portion of money that would otherwise go back to the state, to reimburse or payback Medicaid cost of services received by the trust beneficiary, in a Pooled 1st Party Special Needs Trust situation.

B. 3rd Party Pooled Special Needs Trusts

A 3rd Party could elect to set up a 3rd Party Special Needs Trust for their loved one with special needs through a Pooled Special Needs Trust. These trusts would be pooled just like the 1st Party Pooled Special Needs Trust, except they are funded with money not belonging to the trust beneficiary. As a result, there would not be a required Medicaid Payback Clause in it.

C. General Requirements of a Pooled Special Needs Trust

A Pooled Special Needs Trust has many requirements that must be followed.

- The trust must be for the benefit of a person with disabilities. Disability is defined by the Social Security Act § 1382c(a)(3).
- The trust must be established and managed by a non-profit association as defined under state law. (POMS SI 01120.203 D 1)
- Separate accounts must be maintained for each beneficiary of the trust. (POMS SI 01120.203 D 4)
- For purposes of investment and management of funds, the trust may pool the funds from the individual accounts.

D. 1st Party Pooled Special Needs Trust Requirements

- In addition to the general requirements, the trust account must be maintained for the sole benefit of the individual with disabilities.
- The trust may be established by a parent, grandparent, or legal guardian of such individual, or by such individual, or by a court. (POMS SI 01120.203 B 7)
- Up until recently, the fact that the individual may establish the trust him/herself is unique to pooled trusts unlike a Self-Settled Special Needs Trust under (d)(4)(A). (42 U.S.C. § 1396p(d)(4)(A)). This has changed in recent years. Please see the section entitled the Special Needs Trust Fairness Act!

- If a third party establishes a trust account on behalf of the individual, the third party must have legal authority to act with regard to the assets of the individual. (POMS SI 01120.203 B 9)
- To qualify for the pooled trust exception, the trust must contain specific language that provides that, to the extent that amounts remaining in the individual's account upon death of the individual 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 individual under the state Medicaid plan. In some states no payback is required, and this is allowed by the statute and POMS.

E. 3rd Party Pooled Special Needs Trust Requirements

- The trust must be set up for an individual with disabilities.
- It can be set up by any third party.
 - A third party, most often a parent or grandparent, can elect to sign a joinder agreement with a Pooled Special Needs Trust and have an account set up for their loved one with special needs.
- A person with special needs cannot deposit funds in this type of Special Needs Trust.
- Please note that unlike a 1st Party Pooled Special Needs Trust, there is no required payback provision in the 3rd Party Pooled Special Needs Trust.

IV. What benefits does it impact?

- A. Maintain Means-Tested Public Benefits. If the person with special needs is on or needs to qualify for means-tested public benefits, their resources and income must fall under a certain level. If the person with special needs inherits a sum that is above the threshold, they could be rendered disqualified for the means-tested

public benefits. Additionally, if a person is receiving a court settlement from a personal injury lawsuit, likely a one-time payout, the money would likely be best served if placed and invested in a Special Needs Trust.

Some may think that they should be forced to spend the additional money received down until they can re-qualify for the public benefit. The harsh reality is that public benefits do not cover everything that most would think are essential. They were never designed to replace a person's living. Items such as cell phones are not considered necessary when taking into account what the government deems essential. Most of us in this room would react very awkwardly, if we did not have an electronic device of some kind to glance at from time to time. While a cell phone is a simple example, there are countless other things that a person who is only living off of public benefits could ill afford.

Additionally, many persons with special needs who receive means-tested public benefits are not able to work at the level of a neurotypical person. They will likely have medical bills in the future that could crush any person's wallet. When factoring in an inability to work and generate a normal income, hopefully the practitioner can see the value in sheltering some assets so that the person can live a better life.

Due to the time constraints of this presentation, we will not be able to go into an extreme amount of detail about public benefit programs. However, if you are wanting to explore and dive deeper into this area of law, both of the authors would recommend that you attend the Indiana Legal Service's Senior Law Project Medicaid Day which is going to be right here at ICLEF on April 30, 2021.

Dennis Frick and Claire Lewis have and continue to do a wonderful job in updating us on the latest and greatest information with regard to public benefits.

B. Assistance with Support and Recognition of the Value of a Dollar. When some persons with special needs are on the receiving end of a lump sum settlement, they don't often recognize that this will be a one-time event. They could decide to blow the much-needed money in ways that would not help sustain a better lifestyle. They could find themselves surrounded by persons that just want to be friends so long as the money lasts. If the person with special needs had an advisor, otherwise known as a Trustee, who would help ensure that the money lasted a little longer, then this might help the person in bigger ways than they ever felt possible or knew to exist.

V. When can you set up a Special Needs Trust?

A. 1st Party Special Needs Trust

When a personal injury victim emerges from the other side of a lawsuit, they often face continued medical bills for the rest of their life. If the person with special needs does not protect this settlement, the moneys will be quickly exhausted when applied to outstanding and/or recurring medical bills.

One of the overarching goals of having a special needs trust is to help the person with special needs maintain their eligibility for public benefits such as Medicaid. Medicaid would do a lot of the heavy lifting when it comes to payment of the medical bills. Any additional moneys left in a Special Needs Trust are left in hopes that this resource will help enrich the life of the person with special needs beyond the level that the public benefit would provide.

Often, Medicaid is the only form of medical insurance that the injured party will ever be able to obtain to cover their chronic conditions requiring long term care. While the Affordable Care Act does allow persons with preexisting conditions to obtain medical insurance, oftentimes this amount of coverage is not sufficient.

The solution to the challenge of the personal injury victim is to establish a Self-Settled Special Needs Trust, otherwise known as a 1st Party Special Needs Trust.

1. Where is the law for a 1st Party Special Needs Trust?

On August 10, 1993, President Bill Clinton signed the Omnibus Budget Reconciliation Act (OBRA). This law created two exceptions to the transfer of asset rules. (see 42 U.S.C. Sec. 1396p(d)(4)). This law expanded an Attorney's ability to help persons with disabilities and their families remain qualified for Medicaid, despite having excess assets in their name. First, a person going into a nursing home, who otherwise would not qualify for Medicaid because of the value of his or her own assets, can qualify for Medicaid payment of his or her nursing home care by transferring assets to an irrevocable OBRA '93 Special Needs Trust for the benefit of a person with a disability. Second, if a person with disabilities and under age 65 has money in his or her own name (for example, because of a lawsuit settlement, direct inheritance, savings, or gift), the parent or guardian of the disabled person could create a Special Needs irrevocable trust and arrange for the transfer of the individual's assets to the trust.

2. What are the different ways of setting up a 1st Party Special Needs Trust?

A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3)) and which is established for the benefit of such individual by the individual, 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 subchapter. 42 U.S.C. § 1396p(d)(4)(A)

3. *Who can contribute to this kind of Special Needs Trust?*

A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) 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 subchapter. 42 U.S.C. § 1396p(d)(4)(A)

4. *Who can benefit from this kind of Special Needs Trust?*

Only the person with a disability can be the first and primary beneficiary of the trust.

5. *What are the requirements of this kind of Special Needs Trust?*
(42 USC 1396 p (d)(4)(A))

- It must be irrevocable.
- It must be a trust containing the assets of an individual under the age of 65.
- The beneficiary must be disabled, as defined in 42 USC §1382c(a)(3)).
- This 1st Party Special Needs Trust has to be established for the sole benefit of the individual with a disability. (POMS SI 01120.201.F.2)
- A 1st Party Special Needs Trust must be established by individual, a parent, grandparent, legal guardian of the individual, or a court
- On the death of the beneficiary, assets remaining in the trust must be used to pay back any state Medicaid agency who has provided benefits
- The 1st Party Special Needs Trust must be an inter vivos trust. It cannot be a testamentary trust.

B. 3rd Party Special Needs Trust

The most common use of a 3rd Party Special Needs Trust is when parents or loved ones want to include their loved one with special needs in their estate plan. They are not able to leave something to their loved one with special needs directly, without disqualifying them from means-tested public benefits that they may be receiving now or in the future. If the person with special needs lacks money management skills, then a 3rd Party Special Needs Trust may be a good option for that concern as well.

1. Where is the law for the 3rd Party Special Needs Trust?

There are two basic requirements for a 3rd Party Special Needs Trust. Please see those below in the requirements section. (42 USC §1382b(e)(3)(A), 20 CFR §416.1201(a)(1); POMS SI 01120.200(D)(2))

For Supplemental Security Income (SSI) purposes, the Social Security Administration defines a third-party trust as “a trust established with the assets of someone other than the beneficiary.” POMS SI 01120.200(B)(16).

2. Who can set up this kind of Special Needs Trust?

A 3rd Party, someone other than the person with special needs, may set up this kind of Special Needs Trust.

3. Who can contribute to this kind of Special Needs Trust?

Any 3rd Party can contribute to a 3rd Party Special Needs Trust.

Example: Mom and Dad set up 3rd Party Special Needs Trust for their son, who has Downs Syndrome. If Mom and Dad have parents who are still living, they can contribute to this same 3rd Party Special Needs Trust, if they wish.

4. *Who can benefit from this kind of Special Needs Trust?*

A person with special needs can benefit from a 3rd Party Special Needs Trust. If the person with special needs dies, then the remaining trust funds can benefit other people who do not have a disability.

Example: Mom and Dad set up a 3rd Party Special Needs Trust for their son with special needs. If their son dies, they can designate their other children who don't have special needs to receive what is left.

5. *What are the different ways of setting up a 3rd Party Special Needs Trust?*

Outside of a Pooled Special Needs Trust, discussed above, there are two (2) main ways to set up a 3rd Party Special Needs Trust.

a) *You can set up a 3rd Party Special Needs Trust in a Will as a Testamentary Special Needs Trust.*

This is where your Client would have a 3rd Party Special Needs Trust inside of their Will. The best analogy that I have given Clients is the description of a food truck. It does not exist until it parks and opens for business.

Much like a food truck, a testamentary Special Needs Trust does not exist until an event, their death, happens, and then it pops up into existence.

In some situations, the Client does not have a choice as to which kind of 3rd Party Special Needs Trust should be used. For example, if there is a concern that a spouse is going to develop or has special needs, then a testamentary 3rd Party Special Needs Trust is required. If you have a transfer to a testamentary trust for the benefit of the spouse, this will not be counted as an asset and will not trigger a transfer of assets

penalty for Medicaid. This is the only trust that can be used in a spousal case for Medicaid that is exempt.

b) Option 2: You can elect to have an inter vivos 3rd Party Special Needs Trust. This would be a stand-alone Trust, which could either be revocable or irrevocable.

This would be an actual separate document from your Client's Will. Your Client's (and potentially others) could have some or all of their estate pour into this Special Needs Trust that is already in existence. Indiana is a dry trust state which means that for 3rd Party Special Needs Trusts, there is no requirement that any amount of money be deposited immediately into the trust right away. Oftentimes, Clients are reassured and comforted that regardless of the dry trust status, that the trust is ready to go and exists for whenever it gets funded.

6. What are the requirements of this kind of Special Needs Trust?

First and foremost, a 3rd Party Special Needs Trust must contain assets of a third party, namely people other than the person who is intended to be the primary beneficiary of this special needs trust.

The regulations impose two requirements for third party Special Needs Trusts (42 USC §1382b(e)(3)(A), 20 CFR §416.1201(a)(1); POMS SI 01120.200(D)(2)):

- The beneficiary cannot have authority to revoke the trust.
- The beneficiary cannot direct the use of trust assets for his or her support and maintenance under the terms of the trust.

VI. Special Needs Trusts and Divorce

When two (2) people get married, they do not necessarily intend on getting a divorce from the moment they say “I do.” Unfortunately, Divorce has become a common and necessary legal tool. In families where there is a child who has special needs, divorce seems to occur a tad more often. Divorce can happen for all sorts of reasons. When two (2) people have the added stress of raising someone who has disabilities, this can intensify an already stressful situation. The authors do not want the practitioner to misunderstand these sentences. Children and adults with special needs can provide an extra sweetness to anyone’s life. They can help strengthen the people that they surround. The point that the authors are trying to make is that while there can be positive results of having a child or adult with special needs nearby, there can also be added pressures and stress which could result in divorce.

When a parent of a person with special needs comes into our offices and want to establish a Special Needs Trust, the authors will often recommend that they utilize a 3rd Party Special Needs Trust, a special needs trust where they are leaving their money for their child with special needs. This tool can be very advantageous for a number of reasons in a number of circumstances. A 3rd Party Special Needs Trust can be set up by anyone who wishes to leave money to the person with special needs. The Grantor, the person setting up the 3rd Party Special Needs Trust, can be in control of the Special Needs Trust. This type of Special Needs Trust, unlike a self-settled special needs trust, does not require the Grantor to include a Medicaid payback clause in it. A Medicaid payback clause essentially directs the Trustee to reimburse Medicaid for all of the expenses that Medicaid has paid out during the lifetime of the beneficiary (person with special needs) upon the beneficiary’s death. Since there is no required

Medicaid payback clause, the Grantor can elect to send any remaining moneys to which ever person or organization they wish to upon the beneficiary's death.

Divorced parents may have to plan a little differently than married parents. The parents may continue to get along and may agree to have a joint special needs trust established. This may not be the case though if the divorce occurred in less than amicable circumstances. Fortunately, the beneficiary can have more than one 3rd Party Special Needs Trust established for them. This can help to avoid conflict and allow the parties to retain control over their own funds. If you have parents who do not get along, you can set up two (2) 3rd Party Special Needs Trusts and have them operate independently of one another. That sounds pretty simple, right? The authors would encourage the practitioner to continue to think outside the box.

Divorce can bring up another topic, child support. How does child support affect the loved one's with special needs eligibility for means-tested public benefits and are there any "outside the box" solutions? In order to understand the impact of child support, it is important for the authors to explain several foundational components.

A. Different Types of Social Security Benefits for those with Disabilities

Under Social Security Administration (SSA), there are generally two (2) main types of benefits when it comes to people with disabilities, Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI).

Prior to considering either of these benefits, the person with disabilities has to consider whether they have a condition that has lasted or will last twelve (12) months or more.¹ If the answer to this is yes, then the next step is to consider whether the claimant (person applying for benefits) is engaging in substantially gainful activity (SGA). SGA is a term used to describe a level of work activity and earnings that is

¹ https://www.ssa.gov/OP_Home/rulings/di/01/SSR82-52-di-01.html

both substantial and gainful. If a person can make above this SGA threshold a month, then they, by definition, are not disabled. The monthly SGA amount for statutorily blind individuals for 2021 is \$2,190. For non-blind individuals, the monthly SGA amount for 2021 is \$1,310.²

SSI: This is a means-tested public benefit that provides income (a cash assistance grant) to certain aged (65 or over), blind and persons with disabilities. A means-tested public benefit essentially factors in the person's assets and income when determining whether they are an eligible candidate for this benefit. The law for this program can be found at 42 USCS § 1381 et. seq.³ Regulations can be found in Title 20 Part 416⁴ in the Code of Federal Regulations. Operating procedures can be found in the SSA Program Operations Manual System (POMS).⁵

SSDI: This is an entitlement benefit which means that the standards for technical qualification are a bit different than SSI. The law for this program can be found at 42 U.S.C. 403, 405(a), 416(j), and 902(a)(5)) and 48 U.S.C. 1801. Regulations can be found at Title 20 Part 404.1 in the Code of Federal Regulations.⁶

For SSI, the two (2) criterion to be technically eligible are whether the person with disabilities has resources and income below the means-tested benefits requirements. (\$2,000.00 for individuals and \$3,000 for a couple) and whether they are disabled. In addition to having to meet SSA's definition of disability, the person with the disability must have worked enough quarters or be dependent upon someone who did in order to receive this public benefit. There are multiple steps to go through when considering if someone is eligible for SSDI which goes beyond the scope of this presentation. The

² <https://www.ssa.gov/oact/cola/sga.html>

³ <https://www.law.cornell.edu/uscode/text/42/1381>

⁴ <https://www.law.cornell.edu/cfr/text/20/part-416>

⁵ <https://secure.ssa.gov/apps10/poms.nsf/Home?readform>

⁶ https://www.ssa.gov/OP_Home/cfr20/404/404-0001.htm

bottom line with SSDI for purposes of this presentation, as compared with SSI, is that it is not enough to simply be disabled when considering whether the person with disabilities is qualified to receive SSDI. They must have paid into the system or be dependent on someone else who has paid into the system.

B. How Does Social Security Classify Income?

In SSA, income is thought of in two (2) categories, earned and unearned income. The type of income will affect how it factors into a person's eligibility for benefits.

According to 20 CFR 416.1102⁷, income is anything you receive in cash or in kind that you can use to meet your needs for food and shelter.

According to the Social Security POMS, Income is any item an individual receives in cash or in-kind that can be used to meet his or her need for food or shelter. SI 00810.005⁸

Earned income consists of the following types of payments: wages, net earnings from self-employment, payments for services performed in a sheltered workshop or work activities center, royalties earned by an individual in connection with any publication of his or her work and any honoraria received for services rendered. SI 00820.001⁹

Unearned income is all income that is not earned income. SI 00830.001¹⁰ Some types of unearned income are: annuities, pensions, and other periodic payments, alimony and **support payments**, dividends, interest, and royalties (except for royalties mentioned in SI 00810.015A.2. in this section), rents, benefits received as the result of another's death to the extent that the total amount exceeds the expenses of the

⁷ https://www.ssa.gov/OP_Home/cfr20/416/416-1102.htm

⁸ <https://secure.ssa.gov/apps10/poms.nsf/lnx/0500810005>

⁹ <https://secure.ssa.gov/apps10/poms.nsf/lnx/0500820001>

¹⁰ <https://secure.ssa.gov/apps10/poms.nsf/lnx/0500830001>

deceased person's last illness and burial paid by the recipient, prizes and awards, in-kind support and maintenance (ISM). SI 00810.015.¹¹

In-kind income is food or shelter that you get for free or for less than its fair market value.

Deemed income is the part of the income of your spouse with whom you live, your parent(s) with whom you live if you are a minor, your sponsor (if you are an alien), which we use to compute the SSI benefit amount.

C. How Does Social Security Calculate Income?

It is great to know that there are two (2) different types of income under Social Security but why does that matter? Generally speaking, for every two (2) dollars of earned income, that the person with special needs receives, they lose one (1) dollar of SSI Benefits. For every one (1) dollar of unearned income the person with special needs earns, they lose one (1) dollar in SSI benefits. There are exceptions to this but for purposes of this presentation, the authors are speaking in generalities.

Now that we know that child support payments is unearned income, according to SSA, what does this mean and why does it matter? For every one (1) dollar of child support the person with special needs receives, they will lose one (1) dollar of SSI. Wait though! There is more! It depends! (Insert warm feelings about law school here!)

D. How Does Child Support Factor into Social Security Benefits?

At this point in the paper, it would be easy for the reader to conclude that since child support is considered unearned income and since the authors have indicated that for every one (1) dollar of unearned income, one (1) dollar of SSI is lost, that it is really that simple. However, much like a lot of real-life scenarios, it depends. Is the person receiving support a child?

¹¹ <https://secure.ssa.gov/apps10/poms.nsf/lnx/0500810015>

Who does Social Security consider a child? A child, for SSI purposes, according to the Social Security Act, is neither married, nor the head of a household and is either: under age 18, or under age 22 and a student regularly attending school, college, or training that is designed to prepare him or her for a paying job. SI 00830.420¹²

An adult child is a number holder's son or daughter who no longer meets the definition of a child (e.g., is now head of a household). For more information on SSI child status, see SI 00501.010.¹³

If the person with special needs continues to qualify under the definition of a child pursuant to SSA's definition, then one-third (1/3) of the child support will not count towards the normal unearned income calculation.

If the person with special needs does not qualify under SSA's definition of a child, then there is not one-third (1/3) exception.

The authors would propose that SSA's exception for child support is a great mechanism to utilize when appropriate. However, there could be an even better tool to use such as a special needs trust.

According to SI 01120.200G1d¹⁴; SI 01120.201C3a¹⁵, an assignment of payments to a trust under Court order is considered irrevocable. Reiterated in SI 01220.201J1d¹⁶, using child support and alimony paid to a trust or trustee because of a Court order are considered irrevocably assigned.

¹² <https://secure.ssa.gov/apps10/poms.nsf/lnx/0500830420>

¹³ <https://secure.ssa.gov/apps10/poms.nsf/lnx/0500501010>

¹⁴ <https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120200>

¹⁵ <https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120201>

¹⁶ <https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120201>

If income is irrevocably assigned to a Self-Settled Special Needs Trust, then it is not considered income to the child. This would mean that the child and/or adult could continue to receive support and potentially receive the full amount of SSI too!

Managing the logistics of a Self-Settled Special Needs Trust can be a bit cumbersome and all avenues should be considered prior to choosing to utilize a Self-Settled Party Special Needs Trust.

E. Considerations to Discuss When Considering a Self-Settled Special Needs Trust

1. *Will parent paying support allow other parent to be trustee of the Self-Settled Special Needs Trust?*
2. *Will the Court be willing to appoint parent who is receiving support as trustee? Should the Court do so?*
3. *How much child support is at hand or for how much longer will it last?*

This Child Support savings mechanism is not going to work or be a viable option in every case. It is nice that we, as a Special Needs Law Attorneys, have this additional planning tool to use when assisting our clients.

VII. Special Needs Trusts and Retirement Plans

A. The SNT as a Beneficiary of an IRA

When naming a special needs trust as the beneficiary of an IRA, which is a common issue when parents are planning for the needs of a child with disabilities, it is important to make sure that one thinks about the Applicable Distribution Period (“ADP”) for the IRA and the trust beneficiary whose life expectancy will determine the ADP. (This is now less of an issue for children without disabilities due to the SECURE Act, which requires most beneficiaries of inherited IRAs to take full distribution of all of the contents of the IRA within ten years after the year of the deceased IRA owner’s

death, while disabled beneficiaries of inherited IRAs are allowed to use the old distribution rules as described hereinafter.)

If the trust qualifies as a “see-through trust,” the IRA can be distributed in annual installments over the life expectancy of the oldest trust beneficiary. This will almost always be a longer ADP than would be the case if the trust did not qualify as a “see-through trust.”

In order for the trust to qualify as a “see-through trust,” a trust must satisfy five requirements from the regulations. These are found at Reg. §1.401(a)(9)-4, A-5(b), and they are:

1. The trust must be valid under state law;
2. The trust must be irrevocable, or it must, by its terms, become irrevocable upon the death of the retirement plan participant;
3. The beneficiaries of the trust who are beneficiaries with respect to the trust’s interest in the retirement plan must be identifiable from the trust instrument;
4. The trustee must provide certain documentation to the retirement plan administrator, and this may simply be a copy of the trust document; and,
5. All trust beneficiaries must be individuals.

A conduit trust is a trust where the trustee is required by the terms of the trust to distribute to the individual trust beneficiary or beneficiaries any distribution the trustee receives from the retirement plan. A properly drafted conduit trust would certainly qualify as a “see-through trust.” However, a conduit trust will obviously not work as a special needs trust, because it is partly the accumulation of the trust income that makes a special needs trust effective in keeping the trust beneficiary eligible for needs-based public benefits.

An accumulation trust will qualify as a “see-through trust,” as long as the trust principal will pass outright at the disabled trust beneficiary’s death to other now-living individuals, such as the trust beneficiary’s siblings. If this type of accumulation trust is used, a charity should not be named as a remainder beneficiary, since that would trigger a necessary five-year pay-out of the IRA. Also, the remainder beneficiaries of the accumulation trust should be individuals close in age to the disabled trust beneficiary, because the life expectancy of the oldest member of this group will determine the ADP. Remember that all of these remainder beneficiaries must be living at the time of the execution of the trust document. In other words, it is not enough to state that the remainder beneficiaries consist of a group, such as nieces and nephews, but those specific nieces and nephews must be listed, by name.

B. Lifetime Transfer of an IRA to an SNT

A Private Letter Ruling “PLR” from February 21, 2006, allows the lifetime transfer of an inherited IRA to a self-settled special needs trust. The PLR may be found at <ftp://ftp.irs.gov/pub/irs-wd/0620025.pdf>. There have been numerous other PLRs since 2006, but they are all quite similar and there has been no substantive change to the tax laws or regulations in this area.

A decedent, age 69, and therefore not having reached his required beginning date, was the owner of an IRA naming his four sons as beneficiaries. One of his sons is disabled and on Medicaid and other public benefits. His mother is his legal guardian. Upon the decedent’s death, the custodian of the IRA established separate shares for the four beneficiaries, and the disabled son’s guardian got permission from a state court to establish a self-settled special needs trust and to transfer the inherited IRA to the trust. The guardian, who was now also the trustee of the special needs trust, sought the PLR to indicate that the transfer to the trust would not be a taxable

event, since the trust qualified as a grantor-type trust, and to allow the required minimum distributions from the IRA to be based on the age of the disabled beneficiary of the trust.

The PLR agrees that the transfer of the inherited IRA to the trust is not a taxable event, and that the disabled beneficiary's life expectancy is the proper basis for calculating the required minimum distributions from the IRA.

The PLR discusses four points that give some direction to those trying to apply its holding to other cases. These points are:

1. The trust is a grantor-type trust due to a power, held by the grantor alone or by a non-adverse party, to distribute any portion of income to the grantor or the grantor's spouse, or to accumulate income for future distribution. Since the trustee is the beneficiary's mother and an heir at law, she had previously executed a disclaimer of any remainder interest. The PLR assumes that this disclaimer is effective.

2. The PLR assumes that the required minimum distributions for the year following the year of the decedent's death and all subsequent years have been made, and that the division of the IRA into separate shares was properly accomplished by September 30th of the year following the year of the decedent's death.

3. The special needs trust permits payment of any or all of the trust principal or income to or for the benefit of the disabled beneficiary of the trust, or accumulation of undistributed income to be added to the trust principal. In other words, the trust is not a "conduit" trust requiring distribution of at least the required minimum distribution amount.

4. The IRA held in the special needs trust will not be the actual, inherited IRA, or even the separate share established by the IRA custodian after the decedent's

death. The special needs trust will instead be funded by a trustee-to-trustee transfer of the separate share to a new IRA, naming the special needs trust as the owner.

On the negative side, it is important to remember that PLRs are only binding upon the IRS in the specific case for which they were obtained. On the positive side, though, this PLR did not make much of the fact that this was an inherited IRA, so there is some hope that these same principals may be applied to cases involving non-inherited IRAs.

VIII. Special Needs Trusts and Annuity Ownership in Structured Settlements

Lump sum cash settlements are easy to understand and provide maximum flexibility to meet the needs of the individual as they arise. The major problems with lump sum distributions are the risk of dissipation of the fund through mismanagement, potential exploitation of the disabled recipient, and disqualification from Medicaid and other means-tested public benefits programs because of the rules on excess resources. Each of these risks can be minimized by directing the lump sum into an SNT.

Structured settlements using annuities have two major features: they leverage the tax-free cash available from the settlement and they delay and/or apportion the distribution over time. Annuities provide for a leveraging of tax-free cash because amounts received by a plaintiff under an annuity contract which has been purchased to fund a defendant's obligation are not gross income to the plaintiff.¹⁷ In contrast, for a personal injury plaintiff who receives a lump sum settlement and invests the

¹⁷ Rev. Rul. 77-230, 1977-2 C.B. 214; Rev. Rul. 79-220, 1979-2 C.B. 74 and Rev. Rul. 79-313, 1979-2 C.B. 75.

proceeds in an annuity, the lump sum payment would not be gross income to the plaintiff¹⁸ but the interest portion on the annuity payments would be gross income.

For instance, in a recent case the defendant's insurer proposed that a \$1.125 million settlement fund be converted to an annuity for a 16-year-old severely disabled child. The annuity pays approximately \$4,800 as a monthly payment for life with a guaranteed minimum payment of 20 years. Over a normal life-expectancy of 60 years, the boy would receive \$3.5 million tax free.

The major disadvantages of annuity payments are that they are inflexible and therefore not responsive to changing needs. They may disqualify the individual from public benefits by causing the individual to fail the income test, or they may cause such a large income spend-down that the person receives no actual benefit from having the payment. In the foregoing example, if the child's need for care in a long-term care facility cost \$6,000 per month, all of the annuity payment would have to be applied to the cost of care before Medicaid would pay the balance. There would be nothing left over for special needs and the individual would be no better off than if he had not received the settlement.

The best features of both the lump sum distribution and the structured settlement using an annuity can often be achieved by combining the approaches and using an SNT. In the foregoing case, one-half of the settlement was paid in a lump sum to pay fees and costs and to satisfy subrogation claims, and the balance was used to fund an SNT established by a court order. The initial trust corpus gives the Trustee flexibility to respond to large periodic needs such as the purchase of a home, payment for special rehabilitation services, etc. In addition, the court ordered the

¹⁸ §104(a)(2) of the Internal Revenue Code of 1986 ("Code").

annuity payments to be paid to the Trustee. This constant infusion of tax-free income to the Trust permits the Trustee to accumulate or pay out funds according to the need. Since the Trust is Medicaid and SSI sheltered, the child can continue to qualify for Medicaid assistance for basic health benefits and to continue to receive monthly income from SSI. This is possible for both Medicaid and SSI, because the fact that the SNT is the payee of the annuity means that the annuity payments do not count as income for public benefits purposes when those payments are received by the SNT, and once that money is invested in the SNT it is exempt as an ongoing resource for public benefits purposes.

IX. Is a Prepaid Burial Necessary With an SNT?

It is a sensitive issue with SNT beneficiaries and their families, but it is important at least to consider purchasing a pre-paid funeral and burial for the SNT beneficiary. The State of Indiana changed the law in 2009 to prevent the Trustees of SNTs from paying anything out of the trust after the trust beneficiary has died and before the state is reimbursed for its Medicaid costs on behalf of the trust beneficiary, with the exception only of federal and state taxes.¹⁹ There is no exception for funeral and burial costs.

If a particular SNT beneficiary or their family are uncomfortable pre-planning the beneficiary's funeral and burial, they might want to consider a Funeral Trust. By using a Funeral Trust, they will be able to pre-pay up to \$10,000.00, without pre-planning the actual funeral or burial, and they don't even have to choose a particular funeral home.

¹⁹ Indiana Code 30-4-3-25.5

The Trustee of the SNT can pay the costs of any sort of Medicaid-compliant pre-paid funeral and burial with not impact on public benefits eligibility for the SNT beneficiary.

X. Self-Settled SNT Drafting Tips

The SSA has implemented a very extensive trust review process. In a nutshell, if an SSI applicant or recipient is the beneficiary of a trust, that trust is reviewed at the time of that individual's application for SSI, and also whenever changes are made to that trust or whenever there are changes in the SSI POMS relevant to that trust. According to the POMS, if there is a problem with the trust that is caused by a change in the SSI POMS that was implemented after the trust was submitted to the SSA and reviewed by them, then the SSA must give the SSI recipient 90 days to fix the problem with the trust. Otherwise, there is no grace period, and the individual will lose his or her SSI until the problem is fixed to the satisfaction of the SSA. The following is a list of a few of the issues that have been causing problems throughout the country.

A. The "Two Ten Buck Rule"

In the case of a self-settled special needs trust where the trust beneficiary receives SSI, it is important to understand the way the Social Security Administration ("SSA") thinks about two issues.

First, the SSA thinks that Indiana law does not allow an individual to establish a "dry" trust. So, if a parent or grandparent establishes a self-settled special needs trust for the trust beneficiary and does not "seed" the trust with a little bit of his or her own money before the trust beneficiary places his or her own funds into the trust, the SSA will determine that the trust is not a valid trust, and the trust beneficiary will therefore be disqualified from SSI. This is not an issue when the trust is established by a court.

Second, the SSA thinks that Indiana's statutory version of the Doctrine of Worthier Title indicates that a trust that purports to be irrevocable is actually revocable, if there is only one beneficiary of the trust. The SSA does not consider the state to be a trust beneficiary by way of the "pay-back" clause, and the SSA does not accept a general category of persons (such as "heirs at law") to be a trust beneficiary, so it is important to make certain in these cases that there are at least two specific, named beneficiaries of the trust. Otherwise, the SSA will determine that the trust is revocable, which would obviously disqualify the trust beneficiary from SSI

The solution to both of these problems is something that David Lillesand, a National Academy of Elder Law Attorneys ("NAELA") member from Florida, calls the "Two Ten Buck Rule." Have the parent or grandparent who establishes the trust put \$10 of his or her own money into the trust before the trust beneficiary adds his or her own funds to the trust. Then, specify that, when the trust beneficiary dies, someone else gets \$10, after the pay-back to the state but before the heirs at law get the balance, if any.

B. Early Termination Provisions

In the case of (d)(4)(A) and (d)(4)(C) trusts (i.e., those trusts that have a "payback clause"), early termination of the trust (i.e., termination prior to the death of the beneficiary of the trust) triggers the payback. This rule is delineated in the POMS at SSI 01120.199.

It certainly makes sense to say the trust has been terminated early, if, during the lifetime of the trust beneficiary, the trust is actually terminated and the money is distributed to that beneficiary. However, the SSA believes that there are other events when the trust is being terminated early, such as when a (d)(4)(A) trust distributes money out to a (d)(4)(C) trust, or the other way around.

The authors have long championed an idea that Indiana attorney Bill Holwager calls the “tandem trust.” In the case of a tandem trust, a (d)(4)(A) trust is paired with a (d)(4)(C) trust, and money is allowed to flow from the (d)(4)(A) trust to the (d)(4)(C) trust, thereby making it possible for the trustee of the (d)(4)(A) trust to concentrate on investing the trust funds while relying on the trustee of the (d)(4)(C) trust to manage the distributions of the funds without losing eligibility for needs-based public benefits.

Sad to say, the authors have had to remove these tandem trust provisions from all of their (d)(4)(A) trusts. If the reader is relying on old trust forms provided by the author, please make a note of this change!

C. Legal Authority for a Parent or Grandparent to Establish a (d)(4)(A)

As mentioned earlier in this paper, a (d)(4)(A) trust must be established by a parent, a grandparent, a guardian or a court. However, it is important to note that the Social Security Administration requires a parent or grandparent to have some sort of legal authority to establish the trust. So, in the case of a minor or an incapacitated adult, a parent or grandparent must get that legal authority from a court, through a guardianship or a protective order. In the case of a competent adult, the authors have developed a very limited power of attorney, to be signed by the intended beneficiary of the trust, that authorizes the parent or grandparent only to establish a trust as described in 42 U.S.C. §1396p(d)(4)(A).

D. The Sole Benefit Rule

As will be explained later in this paper, the SSA believes that self-settled special needs trusts must be for the sole benefit of the beneficiary, whatever that means. The authors have only had a problem with this issue one time, but perhaps that problem was a sign of larger problems to come.

The authors often have a long paragraph in each special needs trust that describes many of the ways that the trustee may use trust funds for the benefit of the disabled beneficiary of the trust, including paying family members as caregivers and making handicap modifications to a caregiver's home. In the lone case described above, the representative of the Social Security Field Office opined that a trust provision allowing family members to be paid as caregivers and allowing the trustee to use trust funds to make handicap modifications to a caregiver's home violated the supposed sole benefit rule. The path of least resistance is to make whatever changes to the trust will prevent the necessity of an appeal, so, in this case, the authors simply removed the offending paragraph.

XI. SNT Administration Tips

A. The POMS

While SSI eligibility is technically based on federal statutes (42 U.S.C. §§1381-1383f), and federal regulations (20 C.F.R. §§416.101-416.2227), the only thing that the Social Security Administration (SSA) staff are going to look at is the SSA's own Program Operations Manual System (POMS). The POMS are also the only set of detailed guidelines for you to use to draft and administer a Special Needs Trust (SNT) properly.

If it strikes you as strange, or even illegal, for an agency to rely more-or-less solely on its own manual for administering an enormous and complex program, get over it. They do it all the time! Our friend and colleague, Nell Graham Sale, calls it the "ad hococracy." Besides, in the case of *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, the United States Supreme Court held that an agency's interpretation of the applicable statutes will be given deference, absent statutory or regulatory prohibitions. More to the point, in the case of *Washington*

State Dept. of Social & Health Services v. Guardianship Estate of Keffeler, 537 U.S. 371, the U.S. Supreme Court specifically applied the Chevron holding to the SSA POMS.

You will find the POMS specific to SSI at <https://secure.ssa.gov/apps10/poms.nsf/chapterlist!openview&restricttocategory=05>.

The concepts in the SSI POMS that bear on this presentation are “income,” in-kind support and maintenance,” and “deeming.” Citations to particular SSI POMS will all start with SI, as in SI 00810.005.

B. Income

If you make a distribution from the SNT that will count as income for SSI purposes, you want to know about it, because income can cause the loss of the entire SSI benefit for the months when the income is paid.

According to SI 00810.005, income is any item an individual receives in cash or in-kind that can be used to meet his or her need for food or shelter.

Unfortunately for trustees, SI 01120.201.I.1.f, introduced in January 2009, considers gift cards and gift certificates to be cash equivalents. If a gift card can be used to buy food or shelter, it is unearned income in the month of receipt, and any unspent balance becomes a resource beginning the month after the month of receipt. Even if the gift card is for a particular store, and that store does not sell food or shelter items, SI 00830.522 indicates that it is still unearned income, unless the card has a legally enforceable prohibition on the card being sold for cash.

There is a relatively new kind of credit card that works more-or-less like a gift card and is acceptable for SSI purposes, though. If the card is owned and controlled by the trustee, and if the card is restricted so that it cannot be used to purchase food, the possession and use of the card by the trust beneficiary and the payments made to

the credit card by the trustee will not be considered to be income to or a resource of the trust beneficiary. See SI 01120.201.I.1.e. The POMS name the True Link Visa Prepaid Card as an example of this kind of “administrator-managed prepaid card.” The authors have used True Link Visa cards fairly extensively in conjunction with various SNTs, and the cards work very well and have not affected public benefits eligibility.

C. In-Kind Support and Maintenance

If you make a distribution from the SNT that will count as In-Kind Support and Maintenance (ISM), you want to know about this, too, because there will be a reduction of the SSI benefit. However, ISM is subject to the Presumed Maximum Value (PMV) rule, which is described in SI 00835.300. The PMV is a cap on the amount of the ISM that can be charged by the SSA. In other words, the PMV means that there is a maximum amount that the SSI recipient’s SSI can be reduced by ISM. In general terms, the amount of the PMV is one-third of the Federal Benefit Rate (the maximum SSI payment to an individual), plus \$20.00. So, for a trust beneficiary receiving the usual monthly SSI benefit of \$794.00 (for 2021), ISM in any given month reduces the SSI for that month to no less than \$509.00. For example, if the amount of the ISM is an electric bill in the amount of \$400.00, the trust beneficiary will still receive \$509.00 in SSI for that month.

Trust distributions to a third party for items that are for food or shelter for the SSI recipient are considered to be ISM. Shelter is defined by SI 00835.465D.1 as:

1. Mortgage payments (including property insurance required by the holder of the mortgage;
2. Real property taxes (reduced by any tax rebate or credit);
3. Rental payments;

4. Heating fuel;
5. Gas;
6. Electricity;
7. Water;
8. Sewer; and,
9. Garbage removal.

Obviously, ISM is much better for the trust beneficiary than income, and, therefore, a trustee can do much more to improve the quality of the life of the trust beneficiary with ISM than with any trust distribution that would be considered by the SSA to be income.

If a trust pays a credit card bill for the trust beneficiary, that credit card payment will count as ISM to the extent that the credit card was used to pay for food or shelter items, according to SI 01120.201.I.1.d.

D. Deeming

The definition of the “household” is essential to an understanding of the concept of “deeming.” Income and assets of all of the other members of the household will be deemed to be income and assets of the SSI recipient, and could obviously therefore affect his or her eligibility for SSI or the amount of SSI he or she is entitled to receive.

SI 01310.140 states that the household consists of a person, or group of persons sharing common living quarters and facilities, living in a residence under such domestic arrangements and circumstances as to create a single economic unit. In each case where there is a household, the household includes:

1. The eligible individual, his or her spouse, and any of the couple’s children (or any children of either member of the couple); or,

2. The eligible child, his or her parent or parents, and any children of the parents.

SI 01310.115 defines an eligible child as a natural or adopted child under age 18 who lives in a household with one or both parents, is not married, and is eligible for SSI. SI 01310.145 defines a parent whose income and resources are subject to deeming as one who lives in the same household with an eligible child and is a natural parent of the child, an adoptive parent of the child, or the spouse of the natural or adoptive parent of the child.

When a trustee is asked to make a distribution that would be considered to be income to any member of the household of the trust beneficiary, or a distribution for the purchase of something that would be considered to be a non-exempt resource of any member of the household of the trust beneficiary, the trustee will certainly want to evaluate each of these requests carefully to determine what impact there will be on the SSI payment to the trust beneficiary.

E. The Sole Benefit Rule

The so-called Sole Benefit Rule does not apply to third-party SNTs!

Not all experts agree that there is even such a thing as the Sole Benefit Rule, and these authors are among those who think that the whole thing was made up by bureaucrats who can't read or have too much time on their hands. However, the reality of the situation is that the SSA embraces this concept, and a trustee therefore violates the Sole Benefit Rule at his or her peril.

SI 01120.201.F.2 is the only POMS section that addresses the rule, and it says: "Consider a trust established for the sole benefit of an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time

for the remainder of the individual's life.” Note that the POMS section only pertains to the establishment of a trust, not the ongoing administration of the trust.

The section goes on to give exceptions to the rule when payments are made to third parties that result in the receipt of goods or services by the trust beneficiary, payment of third party travel expenses that are necessary in order for the trust beneficiary to obtain medical treatment, and payment of third party travel expenses to visit a trust beneficiary who resides in an institution, nursing home, or other long-term care facility (e.g., group homes and assisted living facilities), or other supported living arrangement in which a non-family member or entity is being paid to provide or oversee the individual's living arrangement (the travel must be for the purpose of ensuring the safety and/or medical well-being of the individual).

There is another exception to the rule for administrative expenses. It says: “The trust may also provide for reasonable compensation for a trustee(s) to manage the trust, as well as reasonable costs associated with investment, legal or other services rendered on behalf of the individual with regard to the trust. In defining what is reasonable compensation, consider the time and effort involved in providing the services involved, as well as the prevailing rate of compensation for similar services considering the size and complexity of the trust. NOTE: You should not routinely question the reasonableness of a trustee's compensation. However, you should consider whether compensation is being provided to a family member or if there is some other reason to question the reasonableness of the compensation.”

Obviously, the self-settled SNT cannot be drafted to name a specific person other than the disabled trust beneficiary who will benefit from the trust during the disabled trust beneficiary's lifetime, but the rule does not say that the trustee may not make any distributions to persons other than the disabled trust beneficiary.

There are certain debts and obligations of the trust beneficiary that it would seemingly be difficult or impossible for the trustee of an SNT to avoid paying from the SNT, even if the trustee is excessively worried about the Sole Benefit Rule. How could a trustee refuse to pay court-ordered child support or alimony, when this refusal could cause the trust beneficiary to be subject to criminal prosecution or enforceable civil judgments? Or, how could the trustee refuse to provide food, clothing and shelter to children in the care of the trust beneficiary, when that too could cause the trust beneficiary to be subject to criminal prosecution?

A trustee of a trust that holds the proceeds of a personal injury settlement or judgment should also consider the fact that the purpose of the settlement or judgment is to make the injured party whole, so that party can, among other things, support his or her family.

There is no federal law, federal regulation, or even an SSI POMS provision that addresses the use of self-settled SNT funds to support the disabled trust beneficiary's spouse or children. Self-settled trusts are generally not protected from the claims of legitimate creditors. Since there is no clear guidance in the law explaining what violates the Sole Benefit Rule, and since many of us are Sole Benefit Rule deniers, anyway, these questions all come down to judgment calls on the part of the trustee.

It probably makes the most sense to consider the underlying reasonableness of the request. If the family wants to take the disabled trust beneficiary on a vacation, obviously he or she can't go alone, so the trust will have to pay for at least one other person to go with him or her on the trip. Despite what the rule is in New Mexico (as explained above), it probably makes sense to pay mom \$12 an hour to provide necessary care to her disabled trust beneficiary son, when it would cost at least twice that to hire skilled personnel through a home health care agency.

XII. Can a Veteran Leave VA Benefits to an SNT for a Disabled Child?

Section 624 of the National Defense Authorization Act of 2015, known as the Disabled Military Child Protection Act, provides that a military Survivor Benefit Plan can name a self-settled special needs trust to receive the benefits for the veteran's child who has a disability. This is a major change to the law that allows veterans to leave money for the benefit of children who have disabilities without causing them to lose eligibility for needs-based public benefits.

XIII. Conclusion

"Success is not final; failure is not fatal: it is the courage to continue that counts."
Winston Churchill.

When assisting a family of a loved one with special needs or the loved one with special needs themselves, it is important to remember that they have a lot to think about all of the time on any given day. It is imperative that we help them put a proper plan in place so that their goals and concerns are addressed. We need to partner with our Clients and have the courage to help them protect what resources and income are available, so they can live the best quality of life possible.

SPECIAL NEEDS TRUSTS!

By: Robert W. Fechtman & Elizabeth A. Homes

ICLEF

February 23, 2021



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DISCLAIMER

- Although every effort has been made to obtain the best information available for presentation herein, the audience must recognize that many of the issues in this particular area, are part of a rapidly changing body of law and administrative interpretation.
- The presenters makes no warranties about the legal conclusions stated herein and this is not intended as legal advice to any individual. Application of the principals discussed in this presentation with regard to Special Needs Trusts! should only be taken upon the advice of knowledgeable counsel in an individual consultation.



“Instead of bracing yourself for the perils of the unknown,
embrace the joy that is here in your present moment.”

Michelle Cruz Rosado

II. WHAT IS A SPECIAL NEEDS TRUST AND IS IT THE ONLY OPTION?

WHAT IS A SPECIAL NEEDS TRUST?

- Investment tool that can hold funds for the benefit of an individual with a disability.
- 3rd Party Special Needs Trust: A Trust Established to provide supplemental income for a disabled beneficiary who is receiving or may be eligible to receive public benefits.
- Self-Settled Special Needs Trust: (1st Party Special Needs Trust) A Trust in which a settlor is also the person who is to receive the benefits from the trust.



OPTIONS FOR CLIENTS TO CONSIDER

- They could disinherit their child with special needs.
- They could make a gift to a child with special needs.
- They could make a distribution to the sibling without special needs.
- They could set up an ABLE Account.
- Special Needs Trust



III. Pooled Special Needs Trust



- Trust must be for the benefit of a person with disabilities.
- Trust must be established and managed by a non-profit association as defined under state law.
- Separate accounts must be maintained for each beneficiary of the trust.
- For purposes of investment and management of funds, the trust may pool the funds from the individual accounts.



IV.

WHAT BENEFITS DOES IT IMPACT?

- Maintain Means Tested Public Benefits



- Check out Indiana Legal Service's Senior Law Project's Medicaid Day CLE in the April 30, 2021!
- Assistance with Support and Recognition of the Value of a Dollar



V.
**When can you set up a Special Needs
Trust?**



1st Party Special Needs Trust

- Basic Requirements
 - It must be irrevocable.
 - It must be a trust containing the assets of an individual under the age of 65.
 - The beneficiary must be disabled, as defined in 42 USC §1382c(a)(3)).
 - This 1st Party Special Needs Trust has to be established for the sole benefit of the individual with a disability.
(POMS SI 01120.201.F.2)
 - A 1st Party Special Needs Trust must be established by individual, a parent, grandparent, legal guardian of the individual, or a court
 - On the death of the beneficiary, assets remaining in the trust must be used to pay back any state Medicaid agency who has provided benefits
 - The 1st Party Special Needs Trust must be an inter vivos trust. It cannot be a testamentary trust.



3rd Party Special Needs Trust

- Basic Requirements
 - Must contain assets of a third party, namely people other than the person who is intended to be the primary beneficiary of this special needs trust.
 - Beneficiary cannot have authority to revoke the trust
 - Beneficiary cannot direct the use of trust assets for his or her support and maintenance under the terms of the trust
 - POMS SI 01120.200(D)(2)



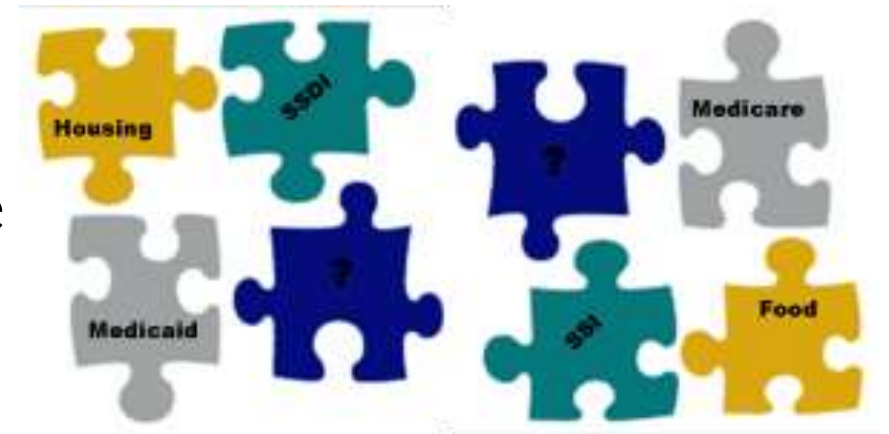
VI. SPECIAL NEEDS TRUSTS AND DIVORCE

- When “I Do!” becomes “I Don’t!”
- Many Different Planning Options
 - 3rd Party Special Needs Trust
 - More than one, maybe?!?!?!?
- What about child support?



TYPES OF PUBLIC BENEFITS

- Definition of Disability: 42 U.S.C. 1382c(a)(3)(A), (B), 416(i)(1) (Footnote 2 on page 5)
- Supplemental Security Income (SSI): 42 USC 1381 et. seq.
- Social Security Disability Insurance
 - 2019: SGA
 - 1,310.00 for non-blind individuals
 - 2,190.00 for blind individuals



TYPES OF PUBLIC BENEFITS

- Medicaid
- Indiana Legal Services Senior Law Project's Medicaid Day: ICLEF!!!!





INDIANA IS A 1634 STATE

- Section 1634 of Social Security Act (SSA)
- SSA makes the Medicaid eligibility determination for a State provided the individual is supplemental security income eligibility and meets the Medicaid eligibility factors.
- Since Medicaid and Social Security are linked, POMS matter.

Social Security's Definition of Income

- Earned Income
- Unearned Income
- In-Kind Income
- Deemed Income



ASSIGNMENT OF INCOME TO A TRUST

- Clarifying that the assignment of payments to a trust under court order is considered irrevocable.
SI 01120.200G1d; SI 01120.201C3a.
- Reiterated in SI 01220.201Jd, using child support and alimony paid to a trust or trustee because of a court order are considered irrevocably assigned.



ASSIGNMENT OF INCOME TO A TRUST

- If income is irrevocably assigned to a 1st Party Special Needs Trust, then it is not considered income to the child. Managing the logistics of a 1st Party Special Needs Trust can be a bit cumbersome and all avenues should be considered prior to choosing to utilize a 1st Party Special Needs Trust.
- Special Mention of the US Military Survivor Benefit Plan payments, which are considered to be irrevocably assigned to a trust. SI 01120.200G1d, and SI 01120.201J1d and e.
- Attempts to have SSI or Title II payments directly deposited into a trust violates federal law. SI 01120.201J1f.



COURT ORDERS ESTABLISHING A TRUST

- Clarifying that a court order to establish a 1st Party Special Needs Trust is not considered an action by the beneficiary (this issue is now largely moot due to Special Needs Trust Fairness Act.) SI 01120.203B8.
- This section also makes clear that if a trust has already been executed and funded, a court order cannot make retroactive changes curing a defective trust.



VII. SPECIAL NEEDS TRUSTS AND RETIREMENT PLANS

The SNT as a Beneficiary of an IRA

Lifetime Transfer of an IRA to an SNT

VIII.
SPECIAL NEEDS TRUSTS AND
ANNUITY OWNERSHIP IN
STRUCTURED SETTLEMENTS

IX.
**IS A PREPAID BURIAL NECESSARY
WITH A SPECIAL NEEDS TRUST?**

X. SELF-SETTLED SNT DRAFTING TIPS

XI.

SNT ADMINISTRATION TIPS

What Public Benefits May Be Needed?

- Medicaid?
- Home and Community Based Medicaid Waivers?
- Supplemental Security Income (SSI)?
- SNAP Benefits?
- Section 8 Housing?

Policies for Trust Administration

- Remember your role as Trustee
- Put Policies in Writing!
- Communicate on a regular basis.

Supplemental Security Income (SSI) Program Operations Manual System (POMS)



- POMS interpret
 - 42 U.S.C. §§
1381-1383f and
 - 20 C.F.R. §§
416.101-
416.2227

SSI POMS (continued)

- *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837
- *Washington State Dept. of Social & Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371 Self-settled SNTs

What is Income?



- SI 00810.005: Income is any item an individual receives in cash or in-kind that can be used to meet his or her need for food or shelter

Income (Continued)



SI 01120.201.I.1.e: If a gift card can be used to buy food or shelter, it is unearned income in the month of receipt, and any unspent balance becomes a resource beginning the month after the month of receipt

Income (Continued)

- SI 00830.522: Even a gift card for a particular store that does not sell food or shelter items is income, unless there is a legally enforceable prohibition against the card being sold for cash

What is “In-Kind Support and Maintenance? (ISM)”

- ISM is subject to the Presumed Maximum Value (PMV) rule, described in SI 00835.300
- The PMV is a cap on the amount of ISM that be charged by the Social Security Administration (SSA)

In Kind Support and Maintenance (Continued)

- The PMV is one-third of the Federal Benefit Rate (the maximum SSI payment to an individual), plus \$20.00
- For an individual receiving a \$794.00 monthly SSI benefit, any amount of ISM in a month reduces the SSI for that month to no less than \$509.00

In Kind Support and Maintenance (Continued)

- Trust distributions for food or shelter items for the SSI recipient are considered to be ISM
- SI 00835.465D.1 defines shelter as:
 - Mortgage and rental payments;
 - Real property taxes;
 - Heating fuel, gas and electricity; and,
 - Water, sewer and garbage removal

In-Kind Support and Maintenance (Continued)

- SI 01120.201.I.1.d: If a trust pays a credit card bill for the trust beneficiary, that payment will count as ISM to the extent that the credit card was used to pay for food or shelter items

What is “Deeming?”

- SI 01310.140: A household is a person, or group of persons, sharing common living quarters under domestic circumstances that create a single economic unit

Deeming (Continued)

- The household includes:
 - The eligible individual, his or her spouse, and any of the couple's children (or any children of either member of the couple); or
 - The eligible child, his or her parent or parents, and any children of the parents

Deeming (Continued)

- SI 01310.115: An eligible child is a natural or adopted child under age 18 who lives in a household with one or both parents, is not married, and is eligible for SSI

Deeming (Continued)

- SI 01310.145: A parent whose income and resources are subject to deeming is one who lives in the same household with the child and is:
 - A natural parent of the child;
 - An adoptive parent of the child; or,
 - The spouse of the natural or adoptive parent of the child

What is the Sole Benefit Rule?

- SI 01120.201.F.2: A trust is established for the sole benefit of an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life

Sole Benefit Rule (Continued)

- Exceptions to the rule include:
 - Payments to third parties for goods or services for the trust beneficiary;
 - Third party travel expenses to take the beneficiary to get medical treatment, or to visit a trust beneficiary who lives away from home, but only to ensure their safety and/or medical well-being

Sole Benefit Rule (Continued)

- There are also exceptions to the rule for administrative expenses, including:
 - Trustee fees (questioned for reasonableness, if the trustee is a family member);
 - Investment fees; and,
 - Legal fees

Sole Benefit Rule (Continued)

- Expenditures that seem to violate the rule, but might be difficult or impossible not to make include:
- Court-ordered child support or alimony; and,
- Food, clothing and shelter for children in the care of the trust beneficiary

Sole Benefit Rule (Continued)

- Expenditures that seem to violate the rule, but might be reasonable to make include:
 - Vacation expenses for someone other than the trust beneficiary, if the trust beneficiary can't go alone; and,
 - Payment to a family member caregiver (unless the trust beneficiary lives in New Mexico), if skilled personnel would be more expensive

XII.

**CAN A VETERAN LEAVE VA BENEFITS
TO AN SNT FOR A DISABLED CHILD?**

Military Survivor Benefit Plans

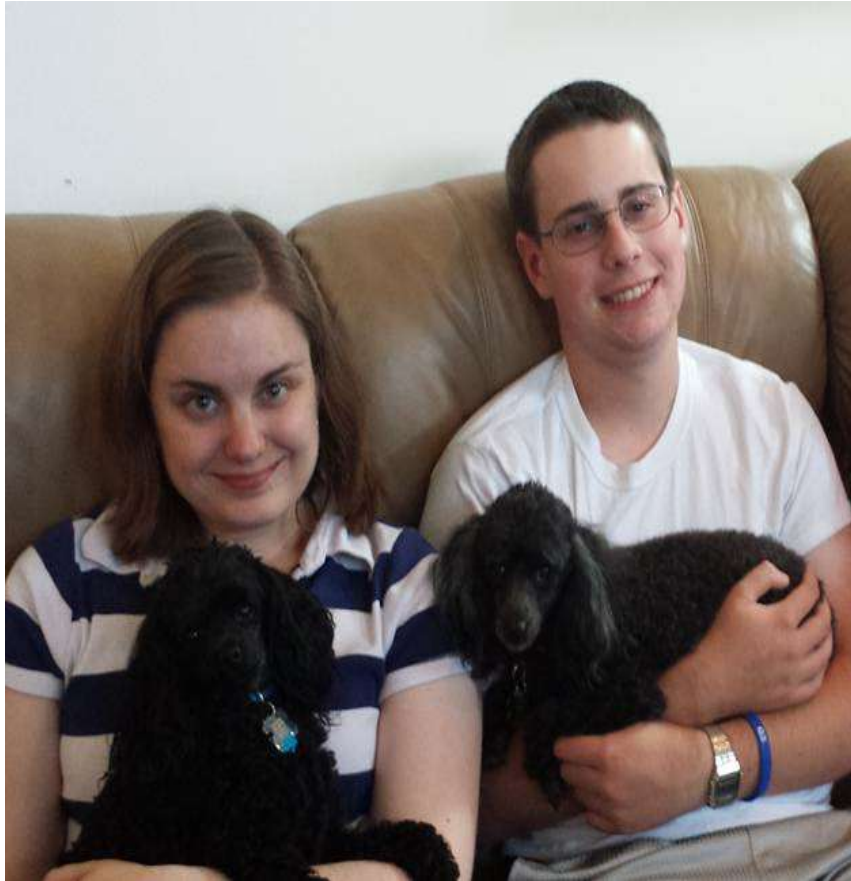


Section 624 of the National Defense
Authorization Act of 2015

- Disabled Military Child Protection Act
- A military Survivor Benefit Plan can name a self-settled special needs trust to receive the benefits for the veteran's child who has a disability.



HAVE COURAGE!



“Success is not final, failure
is not fatal: It is the courage
to continue that counts.”
Winston Churchill





QUESTIONS?



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