

Special Needs Trusts: The Trustee's Perspective

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Introduction

A fair and equitable settlement aims to provide for an injured client throughout the entirety of their life. Although it is often evident that a client will require ongoing medical care, in some cases, the full extent of the injury is unknown and identifying future medical needs is difficult. In both examples, providing for forthcoming medical needs--whether known or uncertain--is of paramount importance. The Special Needs Trust ("SNT") can be an effective financial planning tool to ensure that a disabled individual's future medical expenses are covered. The SNT allows a disabled Beneficiary to remain eligible for Social Security Income ("SSI"), Medicaid, and other government programs while still maintaining private funds to supplement care and enhance the individual's quality of life.

While the advantages of a SNT are numerous, the ongoing administration of this type of trust presents unique challenges. The efficacy of the trust depends upon the appropriate distribution of funds and the adherence to ever-changing public benefit programs and laws. The trustee must ensure that distributions cannot be considered *income* to the Beneficiary and that government benefits are supplemented rather than supplanted. Therefore, the proper administration of a SNT requires an intimate understanding of the nature of the Beneficiary's disability, the needs of the Beneficiary, the family relationship, and the family's expectations toward distributions.

Special Needs Trust Basics

A Special Needs Trust ("SNT") is unique in that it is supplemental rather than supportive. The SNT offers the Beneficiary many advantages including the continual eligibility for public benefits as well as asset protection and flexibility. While there are many attractive reasons to

draft and fund a SNT, an individual can only benefit from a SNT if they meet certain requirements.

The fundamental benefit of the SNT is that it allows for a disabled individual to remain eligible for government assistance programs such as SSI, Medicaid, Food Stamps, Legal Aid, Utility Assistance, Section 8 Housing, In-Home Support Services, and other state benefits such as Group Homes, etc. Even if a disabled individual is not currently utilizing government assistance programs, there are a variety of other benefits that a SNT offers. Notably, the SNT protects and shelters settlement funds from the control of the Beneficiary and/or family members. It allows for fiduciary oversight and appropriate management of funds over the investment time horizon which is often long term. Additionally, a SNT offers flexibility. When properly drafted, the SNT author tailors the trust toward the Beneficiary's needs and changing circumstances. Amendments can be made to meet changes in public benefit rules as well.

The requirements for a self-settled, first party SNT codified under 42 USC §1396p(d)(4)(A) are straightforward. SNTs are only applicable to individuals who are disabled as defined under 20 C.F.R. 416.905. The Beneficiary must be under 65 years of age or younger at the time of the funding and cannot be the trustee. Established by the individual, parent, grandparent, guardian, or court, until recently when federal statute was amended effective December 13, 2016 to allow a competent adult to create their own first party SNT (some state legislatures have yet to amend their statutes at the state level). Trust assets may only be dispersed for *the sole benefit* of the disabled Beneficiary. Furthermore, the Beneficiary cannot compel distributions. When applicable, a Medicaid lien must be paid prior to funding. Upon death, Medicaid must be notified first and paid back for the amount paid over the Beneficiary's lifetime.

Social Security Income & Resources

Social Security Income ("SSI") is a government benefit used for housing, housing-related expenses, and food for an individual. SSI is a monthly cash payment paid out to the Beneficiary or (in the case of a minor or court protected individual) the designated payee.

SSI and Medicaid have income and resource rules. In 2017, total countable resources (i.e. a bank account) may never exceed \$2,000. Other excluded assets include a homeowner's primary residence, one vehicle, household goods such as furniture and household equipment, life insurance with a cash value if the face value does not exceed \$1,500 and all term life insurance, a burial plot, or a revocable burial fund worth up to \$1,500.

Income from a trust can be classified in three different ways in regards to SSI eligibility: unearned income, in-kind income, and In-Kind Support and Maintenance ("ISM"). Unearned income (or direct income) is money paid directly to the Beneficiary. This type of income reduces the SSI benefit dollar-for-dollar. For this reason, the trustee of a Special Needs Trust will rarely make disbursements directly to the Beneficiary.

In-kind income allows for the trust to purchase goods and services other than food and shelter without affecting SSI eligibility. If the SNT purchases an asset that is consumed in the month received, it is considered in-kind income so long as the trustee makes the distribution in the appropriate manner. For instance, if the SNT is to purchase a couch, the safest way for the trustee to distribute the good is to purchase the piece of furniture directly and deliver it personally. In cases where this is not feasible, the trustee may make a direct payment to a provider (i.e. the furniture store) and pay to have the item delivered directly. Finally, the trustee

may give the Beneficiary a credit card to buy the good and have the SNT directly pay the credit card bill.

If the SNT makes disbursements for food or shelter, SSI labels the transaction “in-kind support and maintenance” (“ISM”). ISM reduces the Beneficiary’s SSI benefit by either one-third or one-third plus \$20, depending on the Beneficiary’s living arrangement. Imagine that a Beneficiary received the maximum \$733 SSI monthly payment and the SNT buys the Beneficiary \$800 in groceries monthly. The benefit would not be reduced by \$800.00, but by \$264.33 (based on the federal SSI amount in 2017). Now imagine that the SNT paid not only for groceries but the Beneficiary’s \$1,250 monthly rent bill. *The SSI payment would still only be reduced \$264.33 and the Beneficiary would remain eligible for SSI.* Although a reduction in SSI benefits may seem disagreeable, it is often necessary for the SNT to provide food and shelter particularly where the cost of shelter is high. Furthermore, providing safe and reliable shelter is vital in providing for the Beneficiary’s quality of life.

Administering a Special Needs Trust

With all the rules and restrictions that accompany SNTs and government benefits, a common misconception is that the Beneficiary is severely limited in what is available to them, regardless of what is outlined in the trust document. This could not be further from the truth. Direct bill payments, credit cards, True Link debit cards, and budgets are all tools used to ensure a Beneficiary has exactly what they need. To forge a successful relationship, the trustee and the Beneficiary and/or guardian should set out early to develop a distribution plan and educate all

parties involved in order to properly manage expectations. From the trustee's perspective, here are several requirements that should be understood by the Beneficiary.

- The trustee of a SNT generally can make distributions only if they will not jeopardize an individual's SSI and Medicaid benefits. It is the responsibility of the Beneficiary or their guardian to cooperate with the trustee and report the public benefits that the Beneficiary may be receiving. Trustees often have Benefit Summary forms or request a copy of the Beneficiary's latest Benefits Letter issued from the Social Security Administration. In this way, the trustee can see exactly what the Beneficiary is qualifying for and how in order to make distributions that preserve SSI linked Medicaid eligibility.
- All distributions must be for the sole benefit of the disabled Beneficiary, no gifts may be made from a SNT. Consider the following example of furnishing a home for an adult Beneficiary versus a minor Beneficiary. With an adult Beneficiary, the Trust might be able to purchase more household items whereas in the case of a minor, the Trust would be limited to purchasing furnishings for the bedroom and/or playroom.
- It is often difficult for parents of a SNT Beneficiary who have also suffered alongside their child to not view the settlement or trust as family money. This area is often a trustee's biggest hurdle in delicately managing the line between a parent's legal obligation of support and insufficient income coming into the household. For example, a trustee might consider paying part or all of an electric bill due to a minor Beneficiary's requirement of medical equipment that attributes to a substantial amount of the monthly charge.
- If a trust makes distributions that benefit others, a pro rata share must be contributed. For example, in a situation where there is trust owned real estate and other family members live in the home, persons other than the Beneficiary would be asked to pay rent or an offset for rent (caregiving services in lieu of rent) and their share of the costs in maintaining the home.
- Trustees might find it in the Beneficiary's best interest to make payments for in-kind support and maintenance (ISM); food and shelter. Items may include: mortgage, rent, property insurance & taxes, gas, electricity, water/sewer, and garbage. Payments under this standard will never reduce SSI by more than 1/3 of the SSI benefit being received and will only affect SSI for the month in which the payment is received. When a SNT pays for shelter related expenses, the advantage outweighs the reduction in SSI. The 1/3 reduction amount in 2017 is \$264.30 (the PMV reduction amount plus \$20).

Example: A 35-year-old Beneficiary receiving rent assistance prior to incapacity now has a trust with substantial assets that would allow them to move closer to medical services. However, rent and monthly utility expenses are higher than the amount received from

SSI. Because of the ISM rules, a trustee can review the monthly cost versus the amount of benefits lost (1/3) and determine the amount the trust can pay out for the benefit of the Beneficiary without major reduction of SSI benefits or loss of Medicaid.

In the above example, the trustee would make direct payments for the rent and monthly utilities and, as the ISM does not 'stack', the amount of benefits lost for the month would only total one third.

- The simplest way to make distributions is to pay the Beneficiary's bills directly. Some examples of ways a trustee may do so are:
 - Change some monthly bills to mail directly to the trustee's address, such as a cell phone bill
 - A Beneficiary or guardian could keep a credit card that is only used for the Beneficiary's expenses and the trust pays the credit card bill each month
 - Some trustees offer debit cards that can be loaded with the Beneficiary's funds based on a budget each month. This also gives the Beneficiary some independence in being able to use the card for monthly personal items such as haircuts and personal grooming.
 - Gift cards can be purchased from vendors for use (as long as they cannot be converted to cash)

- In some states, an annual accounting may be required to the State Medicaid Agency and Social Security. In court supervised trusts, an accounting may also be required to the court. A trustee must keep good records of all distributions to be able to explain the reason behind the request and how it is in to the Beneficiary's sole benefit. A Trust Officer will want to discuss a distribution plan with the Beneficiary and the best way to gather receipts, credit card statements, invoices, and budgets in order to create an audit trail for each distribution.

- In return for continued Medicaid eligibility, the trustee is required to reimburse the state(s) for Medicaid payments made for the Beneficiary during their life. In short, upon the Beneficiary's death, Medicaid is paid first. This could mean that if a pre-paid burial or a final expense trust isn't purchased during the life of the Beneficiary, some families might find themselves unable to pay for their loved one's funeral while a Medicaid lien is being parsed out. Most individuals do not like to think about their death or that of a family member. As a Trustee, the most difficult discussion to have with a Beneficiary or their family revolves around final plans related to funeral expenses. Special Needs Trusts have Medicaid payback provisions and Medicaid restricts disbursements after the death of the Beneficiary. Therefore, the conversation regarding plans after death must be held as soon as possible. Fortunately, there are options that allow for the necessary allocations including pre-paid burials and funeral trusts.

No matter how well devised a SNT is, there will be situations where the SSI/Medicaid restrictions make permissible disbursements more difficult. In these situations, a trustee must provide creative solutions that provide the Beneficiary with the goods or services they want in such a way that benefits are not jeopardized.

Conclusion

There are many benefits that a SNT provides for a disabled individual, but perhaps the most important and advantageous element of establishing a SNT for a client involves the selection of a knowledgeable trustee. The proper administration of a SNT requires an in-depth understanding of SSI rules and regulations. Public benefit program rules and laws are constantly changing. The day-to-day administrative tasks of bill pay, review, court accountings, and other trust-related duties are extensive. Notably, effective administration of a SNT requires an intimate understanding of the nature of the Beneficiary's disability, the needs of the Beneficiary, the family relationship, and the family's expectations toward distributions. From the trustee's perspective, a proactive approach to communication and education will result in better SNT administration and management of Beneficiary expectations. Ultimately, proper administration of a SNT enhances the disabled Beneficiary's quality of life.