Hot Topics in Special Needs Trusts 2019

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Special Needs Trusts

➢ To benefit individuals with disabilities.
➢ Maintain eligibility for public assistance programs.
➢ Enhance quality of life.
Two Categories of SNT’s

➢ Self Settled – d4A, d4B and d4C
➢ Under age 65, QIT, Pooled Trust
➢ Third Party – set up by others
Where is the Guidance

- Federal Policy – Social Security POMS
  - SI 01120.200-203
  - CMS Medicaid Manual
  - 1640.0576.01 et. seq.
New POMS April 30, 2018

➢ Rewrite of:
  ➢ SI 01120.200 – Trusts in General
  ➢ SI 01120.201 – Self Settled Trusts
  ➢ SI 01120.202 – Development and Documentation of Trusts
  ➢ Si 01120.203 – Exceptions for Self Settled Trusts
New POMS April 30, 2018

- Definitions updated
- Removed Table of Contents
- 90 day Grace Period Expanded
- Incorporated ABLE Accounts throughout
- Veteran’s Survivor Benefit Plans (SBP) was added to list of income streams that can be assigned
• Clarified that all court ordered assignments of income will be considered irrevocable (alimony, child support, etc.)
• Remember SBP’s must be assigned to self-settled trusts (d4A or d4C)
• Discussed titling of assets purchased from self-settled SNT’s – home, vehicle
New POMS April 30, 2018

• Sole Benefit vs. Primary Benefit
  • Still calls d4A and d4C “sole benefit trusts”
  • But can be for the primary benefit
  • Others can benefit
    • Home, television, vehicle
New POMS April 30, 2018

• Paying Caregivers
  • Don’t need medical or certification
  • Can be related
  • Can’t request tax information (unless a deemor)
New POMS April 30, 2018

- Travel Expenses
  - For the Beneficiary – can pay and can cover others necessary including admissions tickets – travel, lodging and good
  - Visitation – still needs to be to ensure the wellbeing of a beneficiary in a facility
New POMS April 30, 2018

- ABLE Accounts – Updated ABLE POMS SI 10030.740 on 4/2/18
- Specifically contemplates funding ABLE accounts with SNT’s
- Transfers to ABLE not income to beneficiary
Special Needs Trust Fairness Act

➢ 21st Century Cures Act – signed December 13, 2016

➢ Amended 42 U.S.C. 1396 p (d)(4)(A)
➢ To allow individual to create own d4A
Special Needs Trust Fairness Act

To allow individual to create own d4A

Planning Tips

➢ Make sure your Power of Attorney document allows for the creation of these trusts by your Agent for your Principal
➢ Now can consider “Trigger” trusts that could convert a typical RLT into a 4dA with a Trigger. More on this later.
ABLE Accounts and SNT’s

Updated ABLE POMS SI 10030.740 on 4/2/18

Funds deposited into an ABLE account from a SNT is not income to the beneficiary

Can’t use an ABLE account in lieu of a QIT

Can roll a 529 into an ABLE (529A) account

Can also put earned income plus $15,000 annually

Favorable recovery in Florida?
Pooled Trust for over age 64

Continues to be a topic of litigation nationwide

There are various arguments and some have been successful

In Florida can use a Pooled trust over age 64 for Florida Medicaid (not for SSI)

Issue with “proving disability” for older folks
Pooled Trust for over age 64

Issue with “proving disability” for older folks

The beneficiary must be “disabled”

Can’t get Social Security to do a disability determination if elderly

Must ask State to do determination – need medical records – DMRT - RMRT
D4A’s and d4C’s for over income cases (in lieu of QIT)

We know you can use a d4A or d4C for excess assets (over the $2,000 limit)

Can also place income over the limit for all MSSI programs into a d4A or d4C like a QIT – can only use a QIT for $2313 programs
D4A’s and d4C’s for over income cases (in lieu of QIT)

Says who?

1640.0576.09 Treatment of Qualified Disabled Trusts (MSSI, SFP)

After the trust is approved by the Circuit Legal Counsel as meeting the criteria of a qualified trust for the disabled under age 65 or a pooled trust, apply the following policies to determine the individual's eligibility for Medicaid benefits:

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3. Do not count any income deposited into the trust as income to the individual when determining the individual's eligibility;

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7. Count all income placed into the trust (along with countable income outside the trust) when computing patient responsibility. Standard spousal impoverishment policies apply.

If income is deposited into the trust, the trustee must provide quarterly statements identifying the deposits (and disbursements) made to the trust for each month.

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D4A’s and d4C’s for over income cases (in lieu of QIT)

For which programs?

0240.0102 Program Overview (MSSI, SFP)

SSI-Related Medicaid provides medical assistance as defined by policy (see below) to certain groups of individuals. Although Medicaid is run by the state, the state is given federal matching funds for the program and must follow certain federal requirements in order to receive these funds.

SSI-Related Medicaid Programs include:

1. SSI Eligible Individuals (SSI-DA),
2. Institutional Care Program (ICP),
3. Eligible Individuals under SOBRA - Aged or Disabled (MEDS-AD),
4. Protected Medicaid (PM),
5. Medically Needy (MN),
6. Emergency Medicaid for Noncitizens (EMN),
D4A’s and d4C’s for over income cases (in lieu of QIT)

For which programs?

7. Hospice,
8. Home and Community Based Services (HCBS),
9. Modified Project Aids Care (MPAC),
10. SSI-Related Programs for Refugees (RAP),
11. Qualified Medicare Beneficiaries (QMB),
12. Working Disabled (WD),
13. Special Low Income Medicare Beneficiary (SLMB),
14. Qualifying Individuals I (QI1), and
15. Program of All Inclusive Care for the Elderly (PACE)
The many ways to do a 3rd Party SNT

- Stand Alone Irrevocable SNT
- A SNT embedded within a Will
- A SNT embedded within another Trust
- A Revocable SNT that becomes Irrevocable
- A Pooled Third Party SNT
Trigger Special Needs Trusts

Trusts that morph as needed

Could be third party SNT

Could be a first party SNT

Can these trusts morph back and forth?
Decanting bad or marginal SNT’s

New decanting statute – 736.04117

Much broader and more meaningful

General support trusts vs. special needs

Specific provision for a beneficiary under a disability
QIT Problems

Florida one of the few states with an income limit for our long term care programs

QIT only works for LTC programs ($2,313 monthly income limit)

Such a pain to explain, execute and administer
QIT Problems

Difficulty getting it executed properly
  Spouse can sign, POA but need power

Who will be the Trustee?
  Requires monthly work

Good luck finding a bank to open one of these accounts
  Will there be a service charge?
QIT Problems

What do you mean funding is a “Transfer?”
What do you mean funding is a “Transfer?”

Funding a QIT is a transfer that causes a penalty unless used for medical care.

1840.0110 states:
“Funds deposited into a qualified income trust are not subject to transfer penalties provided they are paid out of the trust for medical care for the individual.”
QIT Problems

What do you mean funding is a “Transfer?”

This isn’t a problem for a single person in a nursing home – all goes to patient resp.

Can you pay MMMIA out of QIT to spouse?

What if in community on Waiver? No facility
Creative uses of SNT’s

Compliment other strategies – combinations
Support/fix up an exempt home
Hold funds for Income Producing property
Pay caregivers – Personal Service Contract
Pay for Private room
Purchase a home, vehicle or exempt asset
Pay guardian’s and lawyer’s fees
Support beneficiaries in the community
SNT (Special Needs Trust) Analysis

Whose $$$$$ is it?

- Beneficiary's Money
  - 1st party SNT
    - Under age 65
      - Can do either
        - Stand-Alone d4A SNT
      - Medicaid payback trust
        - Part of 42 U.S.C. 1396 p
    - Age 65 or Over
      - Pooled SNT d4C

- Anybody else
  - No Medicaid payback
    - 3rd party SNT
      - If spouse, must do SNT under Will
      - Qualifying Special Needs Trust (QSNT)
        - See F.L.A. STAT 732,2023[8]
      - Pooled 3rd Party SNT
      - Stand-Alone 3rd Party SNT
        - Flexibility in drafting for unique aspects and assets
        - Can name own trustee
        - Not efficient for smaller dollar amounts
        - Can use outside investment advisors

“Pooled” for economy of scale
Funds will be “pooled” so no unique assets
No minimums
More economical for smaller amounts (under $250K)
Professional Trustee
No EIN to get, no bank account to open

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<thead>
<tr>
<th>Trait</th>
<th>ABLE</th>
<th>d4A</th>
<th>d4C</th>
<th>Third Party SNT</th>
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<tbody>
<tr>
<td>Can be Established by Beneficiary Directly</td>
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<tr>
<td>No Limited annual Contributions</td>
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<td>No Medicaid Payback on Death</td>
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<td>Can pay for food and shelter for SSI recipient without impacting benefits</td>
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<td>Grows Tax free</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
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<tr>
<td>No Lifetime Limits on account size</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
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<tr>
<td>Exempt from Creditors Claims</td>
<td></td>
<td>maybe not</td>
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<td>Allows for some disbursements after death</td>
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<td>yes</td>
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<td>Low fees</td>
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<td>yes</td>
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<td>Distribution standard broader than just sole benefit of beneficiary</td>
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<td>yes</td>
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<td>Can be controlled by the beneficiary directly</td>
<td>yes</td>
<td>no</td>
<td>yes</td>
<td>yes</td>
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Thank You!

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