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

## Three Hot Topics In Special Needs Trusts and then ABLE update

### Jacksonville Elder Law – April 2019

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1. New POMS adopted April 30, 2018
2. D4A's and d4C's for over income cases
3. Different ways to do third party SNT's
4. ABLE Accounts update

1. New POMS adopted April 30, 2018
  - a. The Social Security Administration adopted new Policy regarding Special Needs Trusts as of April 30, 2018. These revisions to the POMS (Program Operations Manual System) were rewrites of SI01120.200, .201, .202 and .203. These can be found at SSA.gov and searching for SSI POMS or by clicking [HERE](#).
  - b. Social Security officials said the rewrites were not implementing any new policies, but were more a clarification of existing policy. Some of the changes were more form over substance; updating definitions, removing tables of contents, etc., but there were several large nuggets that could fairly be interpreted as a change in policy. Here are a few of those nuggets.
  - c. The Administration added in a 90 day grace period to fix just about any drafting problem with a SNT, provided the Trust had been previously submitted to the Administration. Formerly this 90 day grace period was limited as to defective early termination clauses, sole benefit/travel issues, pooled trust management provisions and null and void clauses. This further supports the premise that you must submit SNT's as early in the process as possible to be covered under this

newly expanded grace period.

- d. Veteran's Survivor's Benefits Plans were added to the list of income streams that can be legally assignable to a d4A or d4C in addition to alimony and child support. This addition recognizes the Howard P. "Buck" McKeon National Defense Authorization Act for FY 2015 that amended the U.S.C. to permit the assignment of these benefit to SNT's. The Administration also clarified that they will consider any income stream assigned by court order to be irrevocable to comply with the income assignment rules.
- e. Although we have understood this, new policy specifically states that if a d4A or d4C buys a home or vehicle the asset must be titled in the beneficiary's name, unless state law prohibits such. A vehicle may need to be titled in a different driver's name but a lien should be placed on the vehicle. It is in this section that SSA recognizes that others may benefit from the home or car without contributing but there would be limits.
- f. The biggest change/clarification came with relaxed language for d4A and d4C moving from "sole-benefit" to "primary benefit" for the distribution standard. Though still calling the d4A and the d4C SNT's "sole benefit trusts" the Administration elaborated to say the trust must be for the "primary benefit" of the beneficiary and that others may also benefit from the use of the SNT funds.
- g. A few years back there was concern that SSA would require caregivers being paid from a SNT to be specially licensed or even unrelated to the beneficiary. Now the policy manual specifically contemplates paying family caregivers and says no medical training or certification is required.
- h. Travel expenses are always an issue and fall into two categories; paying for others to come to visit the beneficiary and paying for the travel of the beneficiary and those accompanying the beneficiary. Third party travel to accompany a beneficiary has been clarified to include transportation, food and lodging. Use a "reasonableness" test to determine how many accompanying individuals can be paid or reimbursed. As for visitation, the policy remains that the travel must be to ensure the well-being of the SNT beneficiary in a facility.
- i. We now have specific policy that ABLE accounts can be funded from a SNT. There was an additional update to the ABLE POMS that will be discussed in another article, but ABLE accounts are becoming more useful and should be considered for any SNT beneficiary that can qualify for one.
- j. This is only a sampling of the changes that occurred and these and other changes will be discussed more in depth at a full day Special Needs Trust CLE program scheduled for March 22, 2019 in Tampa. Special Needs Trust committee members are working on several additional articles on these SNT POMS changes, the new ABLE POMS and the new trust decanting law.

## 2. D4A's and d4C's for over income cases.

- a. I'm still surprised that many practitioners still do not know that a 4dA or a d4C (pooled) SNT can be used in lieu of a qualified income trust (QIT) for the long

term care Medicaid programs (and waivers based on the institutional programs) as well as the other SSI related Medicaid programs (which preclude the use of a QIT).

- b. There are good reasons WHY you may want to do this but first HOW it works.
- c. In both the federal CMS model Medicaid manual and the Florida Program Policy manual, it is contemplated that an individual can deposit extra income into a d4A or a d4C in order to get below the income threshold for the Medicaid programs that have an income limit.
  - i. The CMS Policy Manual:
    - 1) In 3259.7 the CMS Manual states that some trusts may be created using “income, either solely or in conjunction with resources.”
    - 2) Furthermore, 3259.7 says that “when an exempt trust for a disabled individual is established using the individual’s income (i.e., income considered to be received by the individual under the rules of the SSI program), the policies set forth in subsection C for treatment of income used to create Miller trusts apply.”
  - ii. The Florida Manual:

#### **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:

1. Do not consider the corpus of the exempt trust as an asset to the individual beginning with the month the assets are placed into an executed qualified disabled trust or pooled trust;
2. Do not consider the funding of a qualified disabled or pooled trust as a transfer of assets or income subject to imposition of a penalty period, provided the trust purchases items and services at fair market value for the sole benefit of the disabled individual (refer to 1640.0609.06);
- 3. Do not count any income deposited into the trust as income to the individual when determining the individual's eligibility;**
4. Do not consider disbursements from the trust to third parties as income to the individual;
5. Do not consider any income earned by the trust which remains in the trust as income to the individual;
6. Count any payments made directly to the individual as income to the individual;
- 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.**

Any funds paid directly to the individual from the trust must be counted as income to the individual. Disbursements not paid to the individual are not counted as income to the individual.

Fax or send a copy of the approved qualified disabled or pooled trust to:  
ACS Recovery Services  
Post Office Box 12188  
Tallahassee, Florida 32317-2188  
Fax: (866) 443-5559

When you receive inquiries regarding the settlement of remaining funds in the trust after a recipient's death, tell them to make checks payable to Agency for Health Care Administration and send to the above address. Also advise them to clearly identify the individual by including a note with the individual's full name and social security number or Medicaid number. If there are further questions, refer callers to ACS Recovery Services (866) 357-3268.

- d. Keep in mind that this works for all of the programs that fall under the MSSSI programs. Here is a full list of these 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),
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)

- e. Since there can be limitations on the use of the funds within a QIT (see [1840.0110](#)) – meaning the Policy says funds in a QIT can only be used for medical care of an individual, a 4dA or a Pooled Trust can offer more flexibility for the use of the funds. See item #9 below.

3. The different ways to do third party SNT's – let me count

- a. A stand alone irrevocable SNT

- i. This is what we likely think of when we talk about a third party SNT.
- ii. The Trust is drafted specifically for a particular beneficiary with an

- appointed trustee with guidance how to administer the trust.
- iii. It is irrevocable from day one and gets its own Tax Identification number, thus filing its own 1041 tax return every year.
  - iv. This trust allows for anyone (except the beneficiary) to put funds into this trust now or in the future.
  - v. This type of trust inherently is not very flexible so we sometimes put in roles like trust protectors or trust advisory panels to handle issues like unforeseen circumstances that may require modification of the trust or a vacancy in the trustee position.
- b. A SNT embedded within a will or within another trust (often a revocable living trust).
- i. This trust (revocable or irrevocable), embedded in a RLT, or within a will springs into life upon some even occurring: generally the death of the testator or settlor of the trust.
  - ii. If done under a will this would require the will be admitted into probate and an estate opened. If done under a RLT then probate may be avoided, but either way creditors of the settlor would still have a claim before the SNT is funded.
  - iii. This would be the preferred strategy if nobody but the settlor (or testator) will be funding the SNT at any time. There is no tax id number until the trust is established, so no reporting or tax filing until funded.
  - iv. This type of trust is no easier or more difficult than a stand alone trust but because the funding and most of the work is done later this may be more affordable.
- c. A revocable SNT that becomes irrevocable later.
- i. Technically third party SNT's don't have to be irrevocable – as long as the beneficiary cannot do the revoking or direct the use of the trust. See [1640.0576.03](#) and POM [SI 10020.200 D.1.a.](#)
  - ii. There can be creditor and tax issues for the party with the power to revoke or amend the SNT, but if this is not a problem consider setting up a revocable SNT that remains revocable until someone other than the settlor funds the trust.
  - iii. By making the trust irrevocable upon funding (probably by someone other than the Settlor) there can be creditor and tax advantages as well as encourage others to fund the SNT since then the settlor would not then later be able to change the terms of the SNT after someone else has made an irrevocable gift to the SNT.
  - iv. In short, consider a revocable SNT set up by the parents that remains revocable until funded by another party. This way during the lifetimes of the parents there is no separate tax reporting requirements, unless funded by others, and there is a clearly identifiable trust to “tell the world about” to encourage others to incorporate the SNT into their estate plans.
- d. Consider using a pooled third party SNT.
- i. If “pooling” makes sense for some first party money, why not use the

- same concept for third party money.
    - ii. Some nonprofit SNT trustees also have a “pool” for third party money that has a lot of the same advantages of the d4C pooled trusts but without the required Medicaid payback provision or sole benefit limitations of the d4C.
    - iii. Advantages can be little to no cost up front (only when the trust is funded), low fees and no minimum fees because the funds are pooled. There is a professional trustee with a professional money manager that can provide their services more cost effectively with a single, large pot of money to administer.
    - iv. The beneficiary should experience lower costs with better results because of the economies of scale.
    - v. Funds are just directed into the pooled third party SNT either by will, trust or direct beneficiary designation and the contributor also designates the residual beneficiaries to receive the remaining funds upon the death of the special needs beneficiary.
4. ABLÉ Accounts – Achieving a Better Life Experience and Special Needs Trusts
- a. On April 2, 2018 Social Security adopted a new POM on ABLÉ accounts. There have been several updates to the law and policy since original enactment of ABLÉ on December 19, 2014.
  - b. ABLÉ accounts continue to be a compliment to SNT’s and in some cases a replacement.
  - c. Specifically related to SNT’s, the new POM gives a little more insight.
    - i. Funds deposited into an ABLÉ account are not specifically income to the beneficiary because of the ABLÉ account. If “income” of the beneficiary is what is deposited into the ABLÉ account, “an individual cannot use direct deposit to avoid income counting” which makes it very clear that an ABLÉ account cannot substitute for a Qualified Income Trust or even a d4A or d4C to be used for Medicaid programs that have income limitations. [SI 01130.740 C. 1.a.](#)
    - ii. Contributions to an ABLÉ account from a SNT is considered a third party contribution and has no impact on eligibility for public benefits. [SI 01130.740 C.1.b.](#)
    - iii. Distributions from ABLÉ accounts for qualified disability expenses related to housing are not counted as income to the beneficiary for Supplemental Security Income (SSI) purposes. [SI 01130.740 C. 4.](#) This means that to get around In Kind Support and Maintenance ([ISM](#)) issues, funds from a SNT (first party or third party) can be deposited into an ABLÉ account for a qualifying individual, up to the maximum annual amount of the current annual gift tax exclusion, and then the housing or food expense can be paid from the ABLÉ account without causing a reduction in the beneficiary’s monthly SSI check due to ISM.
  - d. In Florida, our ABLÉ program, ABLÉ United, recently adopted a few new policies.

- i. A big question has always been how ABLE accounts will be treated upon the death of a beneficiary. We know the law says the ABLE account is subject to recovery by the State to the extent of Medicaid benefits received by the beneficiary, similar to first party SNT's.
- ii. The question remained whether this recovery would be treated like a SNT recovery (independent of a probate process and estate recovery under [Chapter 409.9101, Florida Statutes](#)) or some other process.
- iii. First, embedded within the 2018-19 appropriations bill passed in Florida, there is a provision for ABLE accounts, for 1 year, that states that upon the death of a beneficiary first any outstanding qualified disability expenses could still be paid (unlike first party SNT's). Chapter 2018-10 – House bill No. 5003.
- iv. Then remaining funds would be transferred to either the estate of the beneficiary or an ABLE account of another eligible individual specified by the designated beneficiary or the estate of the beneficiary.
- v. Finally, there is a prohibition against the state filing a claim for Medicaid recovery of funds in an ABLE account. It isn't exactly clear what this means, but ABLE United is stating that this would eliminate Medicaid recovery all together, but this could just mean it flips over recovery to the probate process under Chapter 409.9101.
- vi. These recent Florida changes have a 1 year sunset provision so if not renewed by new legislation before July 1, 2019 they will expire.