

Drafting SNT's

Travis Finchum
Special Needs Lawyers, PA



Special Needs Lawyers, PA

The Resources – The Law

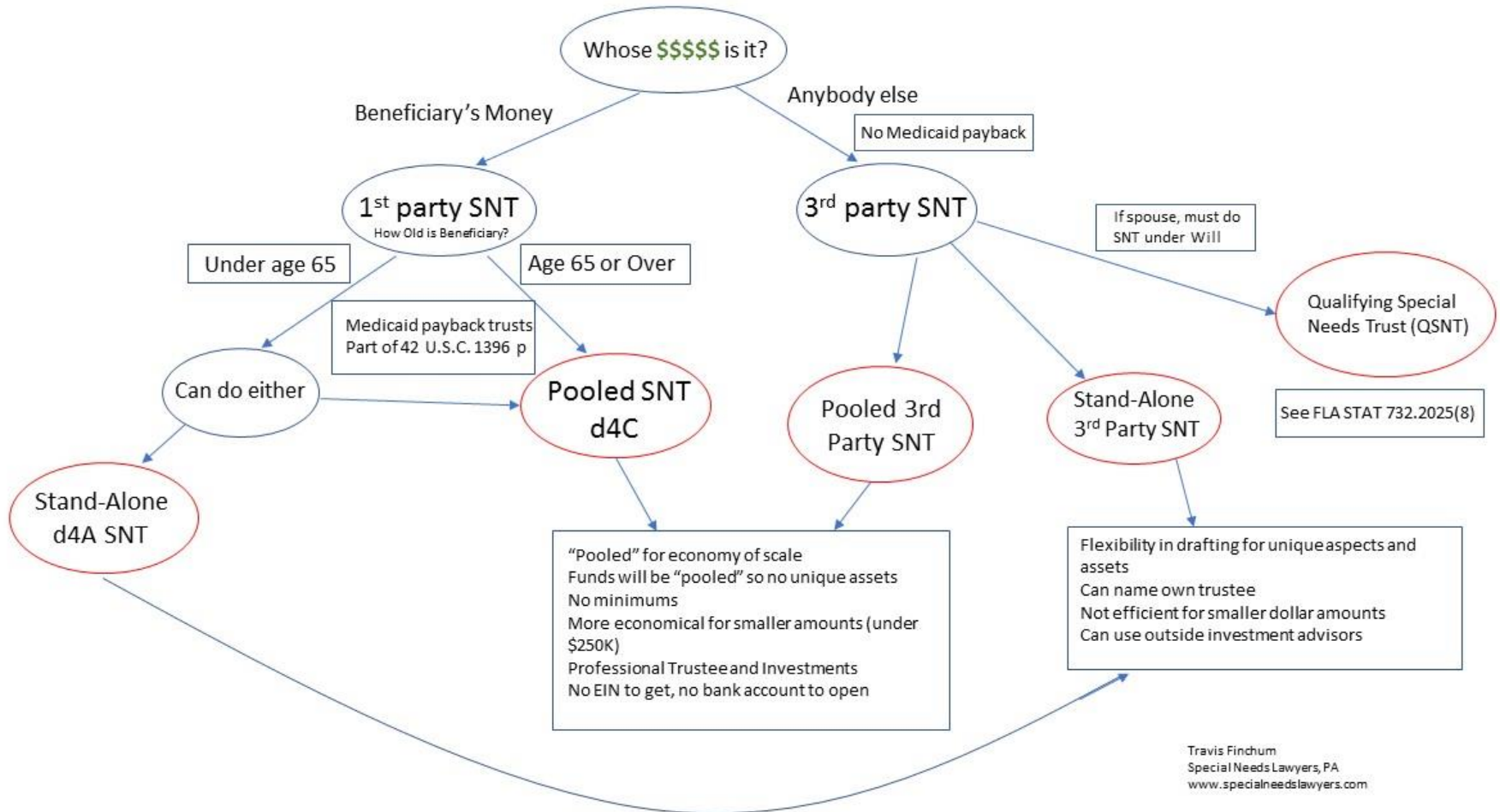
- Federal Statutes - Social Security Act
- Federal Regulations - None
- Federal Policy – POMS, CMS Medicaid Manual
- State Statutes – Florida Statutes - §409
- State Regulations – Florida Administrative Code – 65A-1.702 (15)
- State Policy – Access Florida Program Policy Manual and Memorandums

Special Needs Trusts

- Self-Settled – with beneficiary's own funds
- Third Party – someone other than the beneficiary or spouse

Special Needs Trusts

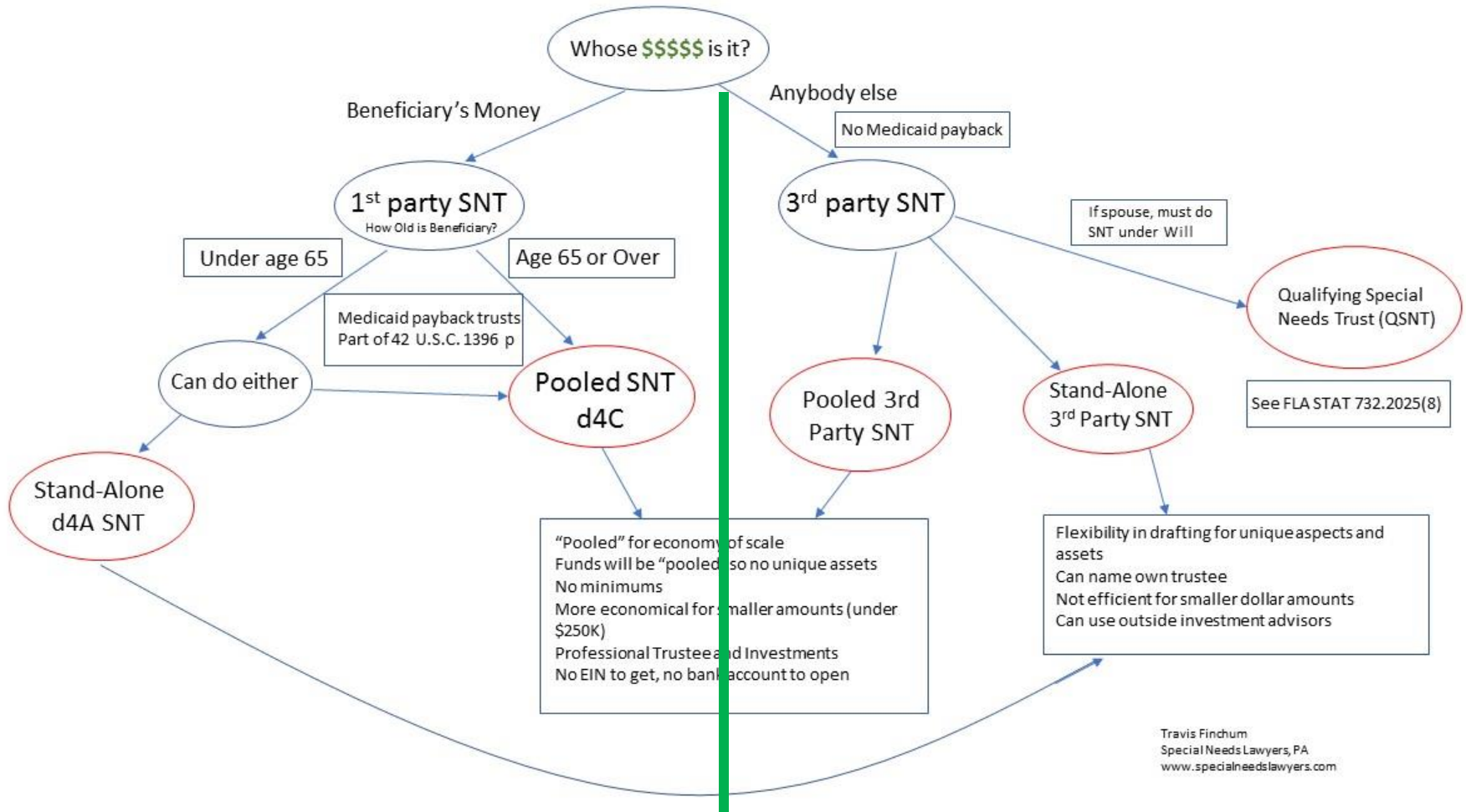
SNT (Special Needs Trust) Analysis



Travis Finchum
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www.specialneedslawyers.com

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Trusts

Two Types of Trusts:

- Revocable – Changeable by the Settlor or someone else
- Irrevocable – Cannot be Revoked, but what about changed?

Trusts

Basic Parties in all Trusts:

- Settlor (Grantor)
- Trustee (manager)
- Beneficiary

Third Party Special Needs Trusts

- **Set up by a family member or friend for a person with disabilities**
- **Can be done by a spouse if done in a Will (only after death)**
- **Generally a specific trust for each beneficiary**
- **No Medicaid pay-back – can go to other family members**

Third Party Special Needs Trusts

- **Can set up the trust and fund it now or later**
- **Can write SNT within Will or it can be within a Revocable Living Trust**

Third Party Special Needs Trusts

1640.0576.03 Trusts Set Up By Others (MSSI, SFP)

For trusts that are established by someone other than the individual, the individual's spouse or representative, the trust must be evaluated according to these SSI policies:

1. If the individual does not have **authority to revoke or direct use of the trust**, it is not considered an asset to him. Conversely, if the individual has the authority to revoke or direct use of the trust, the corpus of the trust is considered an asset to him.
2. **Cash paid directly from the trust to the individual is unearned income.**
3. **Disbursements** made by the trustee **directly to a third party** are **not** considered **income** to the individual.

The above policies also apply to trusts established by a will, regardless of the relationship of the now deceased grantor to the individual.

Self Settled Special Needs Trusts

Must be Irrevocable

Must be the funds of the person
with a disability

- Inheritance
- Personal Injury Award
- Earnings and Savings

Self Settled Special Needs Trusts

42 U.S.C. §1396 p(d)(4) (Social Security Act)

(d)(4)(A) – Under Age 65 Disability SNT

(d)(4)(B) – Qualified Income SNT

(d)(4)(C) – Pooled SNT

Under age 65 – d4A SNT

- Must be under Age 65 when funded
- Stand alone Trust
- Trustee works for one beneficiary
- Established by individual, parent, grandparent, guardian or by court order
- Medicaid pay-back Trust

Under age 65 – d4A SNT

A) 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 the **individual**, 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

Under age 65 – d4A SNT

DATE: _____ FLORIDA CASE #: _____ RE: TRUSTS FOR THE DISABLED TO: District _____ Legal Counsel THRU: Region _____ or Circuit _____ (ACCESS) FROM: Unit _____, ESS Name: _____	DATE: _____ AFTER DLC REVIEW, RETURN TO REGION OR CIRCUIT PROGRAM OFFICE (ACCESS)
1. Name of Individual: _____ First MI Last ___ Under age 65 ___ Disabled per SSA criteria	The written legal opinion of District Legal Counsel shown in this memorandum is subject to the "OBRA 93 Medicaid Trust Opinion Statement." This opinion is furnished solely to advise Department staff of legal issues related to certain trusts in connection with an individual's application for or receipt of benefits under the Medicaid Program in Florida. It may not be relied upon by any other person(s) without the prior written consent of the District Legal Counsel.
2. Name, address and telephone number of attorney or other individual who prepared the trust: _____ _____ _____ The trust was established by: ___ Individual (on or after 12/13/16) ___ Parent ___ Grandparent ___ Individual's legal guardian (Attach documentation) ___ Court or administrative body with legal authority to act on behalf of the individual (Attach documentation) ___ yes ___ no	1. District Legal Counsel: ___ Concur ___ Do not concur
3. The trust is comprised of: ___ The individual's income (and accumulated income) ___ Assets (Specify) _____ _____ _____	2. District Legal Counsel: ___ Concur ___ Do not concur
4. Is the trust for the sole benefit of the individual? ___ yes ___ no	3. District Legal Counsel: ___ Concur ___ Do not concur
5. Is the trust irrevocable? ___ yes ___ no	4. District Legal Counsel: ___ Concur ___ Do not concur
6. Will the state receive all of the funds remaining in the trust at the time of the individual's death (up to the amount of Medicaid benefits paid on behalf of the individual)? ___ yes ___ no	5. District Legal Counsel: ___ Concur ___ Do not concur _____ District Legal Counsel Signature Date

September 2018

Income Trust – d4B SNT

- **Only works for Medicaid long term care programs (and Waivers)**
- **Only used when income exceeds program limits (\$2,742 in 2023)**
- **Does not work for SSI or other programs**
- **Established by parent, grandparent, guardian, court, individual personally, power of attorney for individual or spouse**

Income Trust – d4B SNT

- (B) A trust established in a State for the benefit of an individual if –
- (i) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),
 - (ii) 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; and
 - (iii) the State makes medical assistance available to individuals described in section 1396a(a)(10)(A)(ii)(V) of this title, but does not make such assistance available to individuals for nursing facility services under section 1396a(a)(10)(C) of this title.

Income Trust – d4B SNT

1840.0110 Income Trusts (MSSI)

The following policy applies only to the Institutionalized Care Program (ICP), institutionalized MEDS-AD, institutionalized Hospice, Home and Community Based Services (HCBS) and PACE. It does not apply to Community Hospice.

1. it is established on or after 10/01/93 for the benefit of the individual;
2. it is irrevocable;
3. it is composed only of the individual's income (Social Security, pensions, or other income sources); and
4. the trust stipulates the state will receive the balance in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on their behalf.

Income Trust – d4B SNT

1840.0110 Income Trusts (MSSI)

1. **do not consider the corpus of the trust an asset** to the individual for any month the qualified income trust exists and eligibility is requested;
2. **do not apply penalties for transfers** of income placed in a qualified income trust account provided the individual receives fair compensation;
3. **do not count income deposited** into the trust account as income when determining if the individual's income is less than the program income standard;
4. **do not consider disbursements** from the trust account **to third parties as income** to the individual;
5. **do not count income generated by the trust** account which remains in the trust as income to the individual;
6. **count any payments made directly to the individual as their income**; and
7. **count all income going into the trust** (plus any not going into the trust) in determining **patient responsibility**, unless protection of income for the month of admission or discharge policies apply (refer to Chapter 2600).

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Income Trust – d4B SNT

DATE: _____ RE: INCOME TRUSTS TO: District _____ Legal Counsel THRU: Region _____ or Circuit _____ (ACCESS) FROM: Unit _____, ES Name: _____	DATE: _____ After DLC review, return to ACCESS Region or Circuit Program Office.
1. Name of Individual: _____ First M.I. Last	The written legal opinion of District Legal Counsel shown in this memorandum is subject to the "OBRA 93 Medicaid Trust Opinion Statement." This opinion is furnished solely to advise Department staff of legal issues related to certain trusts in connection with an individual's application for or receipt of benefits under the Medicaid Program in Florida. It may not be relied upon by any other person(s) without the prior written consent of the District Legal Counsel.
2. Name, address and telephone number of attorney or other individual who prepared the trust: The trust was executed by: <input type="checkbox"/> Individual <input type="checkbox"/> Individual's spouse* <input type="checkbox"/> A person, including court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse. Specify and attach copy of documentation: _____ <input type="checkbox"/> Individual's legal representative. Specify and attach copy of documentation: _____ *No power of attorney is needed if executed by spouse.	District Legal Counsel: 2. <input type="checkbox"/> Concur <input type="checkbox"/> Do not concur
3. The trust is comprised of: <input type="checkbox"/> The individual's income (and accumulated income) only <input type="checkbox"/> Other (specify): _____	3. <input type="checkbox"/> Concur <input type="checkbox"/> Do not concur
4. Is the trust irrevocable? <input type="checkbox"/> yes <input type="checkbox"/> no	4. <input type="checkbox"/> Concur <input type="checkbox"/> Do not concur
5. Will the state receive all of the funds remaining in the trust at the time of the individual's death (up to the amount of Medicaid benefits paid on behalf of the individual)? <input type="checkbox"/> yes <input type="checkbox"/> no	5. <input type="checkbox"/> Concur <input type="checkbox"/> Do not concur
	_____ District Legal Counsel Signature Date

Special

Pooled Trusts

- **By combining funds with others similarly situated (pooling), costs can be lowered and “minimum fees” can be avoided**
- **Some pooled trusts have one-time enrollment fees as low as \$500**
- **Many pooled trusts do not have minimum monthly or annual fees**
- **Non-profit organizations also administer trusts**

Pooled Trusts

(C) A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title) that meets the following conditions:

(i) The trust is established and managed by a non-profit association.

(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.

(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.

(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary 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 beneficiary under the State plan under this subchapter.

Pooled Trusts

DATE: _____ RE: POOLED TRUSTS FOR DISABLED TO: District _____ Legal Counsel THRU: Region _____ or Circuit _____ (ACCESS) FROM: Unit _____, ES Name: _____	DATE: _____ AFTER DLC REVIEW, RETURN TO REGION OR CIRCUIT PROGRAM OFFICE (ACCESS)
1. Name of disabled individual: _____ First M.I. Last	The written legal opinion of District Legal Counsel shown in this memorandum is subject to the "OBRA 93 Medicaid Trust Opinion Statement." This opinion is furnished solely to advise Department staff of legal issues related to certain trusts in connection with an individual's application for or receipt of benefits under the Medicaid Program in Florida. It may not be relied upon by any other person(s) without the prior written consent of the District Legal Counsel.
2. Name, address and telephone number of non-profit association that established the pooled trust: _____ _____ _____	District Legal Counsel: 2. _____ Concur (non-profit status) _____ Do not concur Review: Master Declaration of Trust
3. The account in the trust was established by the ___ Individual ___ Individual's parent ___ Individual's guardian ___ Individual's grandparent ___ Court	3. _____ Concur _____ Do not concur Review: Pooled Trust Joinder Agreement
4. Will the individual's assets be maintained in a separate account, although the funds are pooled for investment and management? ___yes ___no	4. _____ Concur _____ Do not concur Review: Pooled Trust Joinder Agreement Master Declaration of Trust
5. Does the trust account contain the assets and/or income of only the disabled individual? ___yes ___no	5. _____ Concur _____ Do not concur Review: Pooled Trust Joinder Agreement
6. Was the account established solely for the benefit of the disabled individual? ___yes ___no	6. _____ Concur _____ Do not concur Review: Pooled Trust Joinder Agreement
7. Are both the trust and the document establishing the individual's account irrevocable? ___yes ___no	7. _____ Concur _____ Do not concur Review: Pooled Trust Joinder Agreement Master Declaration of Trust
8. Will the state receive all of the funds not retained by the trust and remaining in the trust at the time of the Individual's death (up to the amount of Medicaid benefits paid on behalf of the individual)? ___yes ___no	8. _____ Concur _____ Do not concur Review: Pooled Trust Joinder Agreement Master Declaration of Trust
	District Legal Counsel Signature Date

August 2001

SNT established under a Will

The POMS discusses this exemption in SI 01120.201 C. 2. a. (as well as several other sections):

2. Applicability

a. Trusts to which this provision applies

Except as provided in [SI 01120.203A](#), this section applies to trusts “established with the assets of an individual.” A trust is considered to have been established with the assets of an individual if any assets of the individual (**or spouse**) (regardless of how little) were transferred to a trust other **than by a will**. (For a definition of an asset, see [SI 01120.201B.2.](#) in this section).

Qualifying Special Needs Trust

Florida Statute 732.2035(8):

(8) "Qualifying special needs trust" or "supplemental needs trust" means a trust established for an ill or disabled surviving spouse with court approval before or after a decedent's death, if, commencing on the decedent's death:

(a) The income and principal are distributable to or for the benefit of the spouse for life in the discretion of one or more trustees less than half of whom are ineligible family trustees. For purposes of this paragraph, ineligible family trustees include the decedent's grandparents and any descendants of the decedent's grandparents who are not also descendants of the surviving spouse; and

(b) During the spouse's life, no person other than the spouse has the power to distribute income or principal to anyone other than the spouse.

The requirement for court approval shall not apply if the aggregate value of all property in all qualifying special needs trusts for the spouse is less than \$100,000. For purposes of this subsection, value is determined on the "applicable valuation date" as defined in s. 732.2095(1)(a).

Special Needs Trust under a Will

So SNT's established by will are treated like third party SNT's and do not require a Medicaid payback to the State and should always have remainder beneficiaries.

Special Needs Trusts: Advantages and Disadvantages of Self-Settled SNT's

- **Advantages**
 - **Maintain governmental benefits**
 - **Keep your money**
 - **Provide for supplemental needs**
- **Disadvantages**
 - **Trust assets may be restricted**
 - **Challenges related to selecting a trustee**
 - **Trust assets subject to state claim on death**

Special Needs Trusts: Some Do's and Don'ts

- **Less is Better**
- **Follow the appropriate checklist**
- **Report the Trust to SSA or DCF**
- **Know the Program(s) your beneficiary is on**
- **Know the source of the money**
- **Know the differences between SSI and Medicaid**

What Must be in your SNT (d4A)

1. A Settlor or Grantor that is allowable – Individual, Parent, Grandparent, Guardian or Court
2. Statement the trust is irrevocable
3. A disabled beneficiary
4. Statement that the trust is for the sole benefit of the disabled beneficiary
5. Statement that the trust contains only the assets of the disabled beneficiary
6. A required Medicaid payback to all states

What Should be in your SNT (d4A)

1. Ability to amend SNT if there is a problem or change in the law (not by beneficiary)
2. Trustee powers to administer the trust according to Florida (or any state) law
3. A defined remainder beneficiary after Medicaid payback
4. A provision for “seeding” the trust with some money – other states may require this
5. Ability to pay for food and shelter, in the trustee’s sole discretion
6. Ability to pay for medical insurance or medical expenses
7. Ability to fund an ABLE account, if beneficiary qualifies

What Should Not be in your SNT (d4A)

1. An early termination clause providing for how to terminate the trust during the lifetime of the beneficiary
2. Mandatory payments of income or principal including an ascertainable standard like HEMS
3. Ability of beneficiary to remove the trustee
4. A prohibition from paying for food and shelter – this limits the SNT's flexibility

What Must Not be in your SNT (d4A)

1. Payback only Florida Medicaid
2. Ability of beneficiary to direct payments from trust
3. Ability of beneficiary to terminate the trust
4. Beneficiary named as trustee
5. Ability to use any funds in trust for any person's benefit other than the beneficiary, during the beneficiary's lifetime (sole benefit issue)

Distributions from all Trusts

- Direct income – if paid to beneficiary
- In-Kind Support and Maintenance if on SSI – if used for food or certain shelter expenses
- Distributions to third parties for the beneficiary

Distributions from all Trusts - General Rules

- Do not pay income directly to a beneficiary or a parent if the beneficiary is under age 18
- If pay for food or shelter understand the effect on SSI (In-Kind Support and Maintenance)
- Pay for goods and services directly!

Thank You!

Travis Finchum
Special Needs Lawyers, P.A.

Travis@SpecialNeedsLawyers.com

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