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Managing Beneficiary Expectations Pertaining to Special Needs Trusts

Beneficiary Needs vs. Fiduciary Duties; Trustee Best Practices

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Presenter's bios:

- **Bryan Benbow, Special Needs Trust Officer, Denver, Colorado**

Market Coverage: Colorado

- Twelve years of practice as an attorney specializing in elder law, special needs planning, probate, guardianships and conservatorships, and Medicare set-asides
- Member of the Elder Law and Estate Planning Sections of the Colorado Bar Association

- **Brandon Maggiore, Special Needs Trust Officer, Denver, Colorado**

Market Coverage: Colorado and Arizona

- Ten years of practice as an attorney specializing in probate, guardianships and conservatorships, and estate planning in Colorado and Texas
- Member of the Elder Law and Estate Planning Sections of the Colorado Bar Association

Who needs a Special Needs Trust (SNT)?

Persons on benefits receiving funds exceeding \$2,000

- Inheritance, back-payments of Social Security, gifts
 - Settlements
 - Personal Injury
 - Worker's Compensation
 - Note need for Medicare Set-Aside Trust as applicable
 - Medical Malpractice
 - Divorce
- Liquidation of personal assets
 - Sale of home
 - Excess resources
 - Employment wages

Persons unable to personally handle sums of money or may be vulnerable to exploitation

Persons who may receive benefits in the future. If not disabled or on public benefits, a discretionary (non-SNT) trust may be appropriate.

Special Needs Trusts: Disability Trusts and Special Needs Planning

Special Needs Trust (SNT) (also called Supplemental Needs Trusts, Disability Trusts, d(4)(a) and d(4)(c) Trusts).

Types of Special Needs Trusts:

- **First Party Individual Trusts**
 - Subject to Medicaid approval
 - Can be created by a Court, parents or guardian of beneficiary, or the beneficiary himself/herself
 - Payback provisions on death or termination of trust
 - Income taxable to beneficiary
- **Third Party Individual Trusts**
 - Settlor/Creator = third party (inter vivos or testamentary)
 - No payback provisions
- **Pooled Special Needs Trusts (1st and 3rd Party)**
 - Master trust document
 - Can be self created (1st Party)
 - Income may not be taxable

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	Individual (First Party) Private Trust 42 USC § 1396p(d)(4)(A)	Pooled (First Party) Trust 42 U.S.C. §1396p(d)(4)(c)	Individual Third Party Private Trust	Pooled (Third Party) Trust
Administration	Family member, professional fiduciary, bank	Non-Profit organization	Family member, professional fiduciary, bank	Non-Profit organization
Age	Must be under 65	No age restrictions per se, but at the age of 65 and over, the Beneficiary must be reasonably able to spend down the funds in their expected lifetime.	Can be of any age	Can be of any age
Transfer Penalty	None	Maybe under some circumstances for persons over age 65. None for persons under 65.	None	None
Annuities	Must name Medicaid as a beneficiary	Trustee may be named as a beneficiary	Do not need to name Medicaid or trustee as a beneficiary	Do not need to name Medicaid or trustee as a beneficiary
Definition of Disability	Must meet definition of disabled for the purposes of the SSI program	Must meet definition of disabled for the purposes of the SSI program	ADA definition is used	ADA definition is used
Tax Status	Earnings taxable	Earnings may be tax exempt	Earnings taxable	Earnings taxable
Distributions	Supplemental Needs for the Sole Benefit of the Beneficiary	Supplemental Needs for the Sole Benefit of the Beneficiary	Supplemental Needs for the Sole Benefit of the Beneficiary	Supplemental Needs for the Sole Benefit of the Beneficiary
Costs	Set up by private attorneys, cost varies. Administration costs vary	No attorney fees. Non-profit sets fees to establish and administer	Set up by private attorneys, cost varies. Administrative cost varies	Cost to set up is \$250.00 plus 2% of amount contributed to establish trust fund. 1% annual; Case Mgmt fees
Remainder Interests (when Primary Beneficiary dies)	Medicaid must be paid first.	Will be paid back to the State Medicaid Agency to the extent it is not retained by the pooled trust.	A beneficiary can be named. (Medicaid has no claim on third-party funds)	A beneficiary can be named. (Medicaid has no claim on third-party funds)
Portability	May need to pay back Medicaid if moved out of state or terminated from Medicaid benefits.	Trust is for life. Can move to any state with similar law of pooled trusts or "ported" to new pooled trust.	Trust is for life. Can move to any state with similar law.	Trust is for life. Can move to any state with similar law of pooled trusts or "ported" to new pooled trust.
Medicaid Approval	Must be approved by Medicaid in all non-SSI cases.	Pre-approved by Medicaid, but Medicaid must be notified.	Must be approved by Medicaid in all non-SSI cases.	Pre-approved by Medicaid, but Medicaid must be notified.
Social Security	Must approve all SSI cases.	Pre-approved by SSA, but SSA must be notified.	Must approve all SSI cases.	Pre-approved by SSA, but SSA must be notified.
Flexibility	Depends on document.	Streamlined process in place.	Depends on document.	Streamlined process in place.

Know your clients' public benefits!!

- SSI (Supplemental Security Income) - \$771/month (2019)
- SSDI (Social Security Disability Income) - based on work records
- SSA (Social Security)
- Medicaid
- Medicare
- Food Stamps
- Public Housing
 - *DeCambre v Brookline Housing Authority* (D.Mass, No. 14-13425-WGY, March 25, 2015)

Benefits Comparison

SSI	SSA	SSDI
Supplemental Security Income	Social Security	Social Security Disability Income
Disability	Retirement	Disability
No work history required	Work history required	Work history required
Income Cap – \$771/month (individual) \$1,157/month (couple)	Income Cap – Depends on work record	Income Cap – Depends on work record
Resource Cap - \$2,000	No Resource Cap	No Resource Cap
Always Medicaid	Typically Medicare	Typically Medicare

Benefits Comparison

Medicaid	Medicaid Expansion	Medicare
Health Care	Health Care	Health Insurance
Individual State Administration	Individual State Administration and “Opt-In”	Federal Administration
Financial <u>&</u> Disability Qualification	Financial Qualification for Income only	Age <u>OR</u> Disability Qualification
Covers in-home care programs, skilled nursing care, long term care, prescriptions	Does NOT cover in-home care or long-term care	Covers hospitalization, 100 days max rehabilitation, prescriptions
Estate Recovery: <u>YES</u>	Estate Recovery: <u>NO</u>	Estate Recovery: <u>NO</u>

What Can an SNT Pay For?

- Recreation: vacation, companionship services, entertainment, pets, cable TV, subscriptions
- Medical Care (not covered by benefits): dental, glasses, hearing aids, massage, co-pays, vitamins/supplements, hair care, personal supplies
- Household: home purchase, maintenance, clothing, telephone, appliances, furniture, insurance, accessibility upgrades
- Transportation: public services, vehicle, auto insurance, gas, vehicle maintenance
- Education: public/private, training, computer/software, books, vocational training
- Services: attorney/accountant fees, alternative therapies, conservator/guardian fees, irrevocable pre-paid burial plan
- *Lewis v. Alexander*, 685 F.3d 325 (3rd Cir. 2012)

Realities of a SNT

- Beneficiaries and their families may struggle with loss of direct control over their funds at onset of SNT relationship
- SNT trustees sometimes have to say “no”
 - First requests from SNT beneficiaries are almost always for the purchase of a vehicle and a home. SNT trustees must weigh trust longevity before approving such purchases.
- Marijuana may be legal in your state, but a SNT may not be able to approve of distributions for the purchase of such
 - *Coats v. Dish Network, LLC, 2015 CO 44, (June 15, 2015).*
- Increased oversight and compliance requirements of SNT trustees
 - Dodd-Frank Wall Street Reform and Consumer Protection Act
- In testamentary cases, beneficiaries are often struggling or grieving over the loss of their primary care giver and financial provider and now have to deal with an unknown substitute in the SNT trustee.
 - Consider establishing relationship with SNT trustee while family members are still alive.

Acting As Trustee

Longevity of trust

- Beneficiary Expectations and Anticipations
- Anticipated Income vs. Total Return

“Jack Of All Trades” or “Master of None”?

- Counsel
- Financial Advisor
- Budget Analyst
- Public Benefits Consultant
- Family Mediator
- Psychologist

Funding?

- *Draper v. Colvin*, No. 12-4091-KES (D. S.D. July 10, 2013)

Acting As Trustee

In the Matter of the Accounting of J.P. Morgan Chase Bank, N.A., and H.J.P. as co-trustees of the Mark C.H. Discretionary Trust of 1995 v. Marie H., 956 N.Y.S.2d 856 (N.Y. Surr. Ct., 2012)

- Third party discretionary trust for the benefit a young man on the Autism Spectrum living in a group home.
- Neither co-trustee or their duly acting agents had visited beneficiary in five years.
- Court determined that Mark lacked any type of advocacy for his ongoing needs, save \$3,525 expended from the trust for a care manager. The vast majority of the distributions from Mark's trust were fees for the trustee and their counsel.
- Trustee's "excuse for inaction was its lack of institutional capacity to ascertain or meet the needs of this severely disabled...young man."
- Trustee's "failure to fulfill their obligations should result in denial or reduction of their commissions for the period of inaction."
- Highly publicized in *The Village Voice*
- **Trustee's affirmative duty to be proactive in researching, documenting and providing for SNT beneficiary's needs**

Liranzo v. LI Jewish Education/Research, N.Y. Sup. Ct., Kings Co., No. 28863/1996 (June 25, 2013)

- Trustee privately paid for caregivers and other services that may have been available to the beneficiary through different public benefits programs.
- The trust was quickly depleted and the trustee sought relief from the court when the trust became uneconomical to retain.
- The court concluded that the trustee should have sought out all available alternative avenues to pay for such services and directed the trustee itself to reimburse the trust almost \$176,000.
- **SNT trustee's duty to inquire and research all avenues of paying for such requests before approval in order to protect the trust's longevity.**

Relationship Building

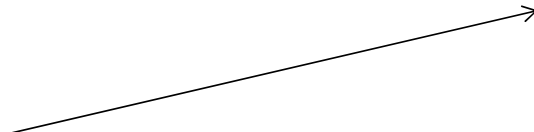
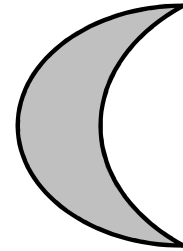
Common Ground

- Define “Income” in re: POMS vs. HUD vs. IRS
- Engage your beneficiary from the very first meeting and find common connections
 - What do you do both professionally and in your spare time?
 - What are your passions?
- Discuss immediate beneficiary needs and record for future reference
 - House? Vehicle?
 - Monthly budget
 - Trust longevity projection

Common “Enemies”

- Public benefits agencies - “red tape”
- Settlers
- State statutes and common law
- Federal vs. state vs. county regulations
 - *Coats v. Dish Network, LLC*, 350 P.3d 849, 99 (CO 2015)
- Uniform Prudent Investor Act
- TIP: Know the “how” and the “why”

Tips for Counsel / Advisors



- This is the moon. Quit promising it to clients.
- PI attorneys: review the Bipartisan Budget Act of 2013 & Tax Cuts & Jobs Act of 2017 before settlement and subrogation
- Be aware of applicable tax implications with all vehicles
- One size does not fit all. Review all options with clients.
 - Pooled SNTs vs. Standalone SNTs
 - Structured Settlements
- Know your clients' public benefits structure
 - Review Affordable Care Act assistance as necessary

Achieving A Better Life Experience (ABLE) Act

- Enacted December 19, 2014
- Amends Section 529 of the Internal Revenue Service code
- Tax-advantaged savings accounts for individuals with disabilities
 - Income earned is non-taxable
 - Contributions (up to \$14,000/year total) may be made by any person
 - Do not count as resource for public benefits determination
 - Limited eligibility - onset of disability must have occurred before age 26
 - Medicaid Estate Recovery? YES.
 - To be used for “qualified disability expenses” only.
 - Note - confirmation for paying for housing expenses (shelter) obtained!

Achieving A Better Life Experience (ABLE) Act

- Disadvantages:
 - If the amount in the ABLE account exceeds \$100,000, the excess will disqualify the beneficiary from SSI.
 - Age restrictions (must have become disabled before reaching age 26)
 - If beneficiary is not already receiving SSI or SSDI, they must obtain a doctor's certification that they have a 'severe and chronic' mental or physical impairment.
 - Liability, fraud and exploitation
 - What is a "Qualified Disability Expense"? Does your client/beneficiary know?
 - Medicaid Estate Recovery
 - State specific

Best Practices

- Don't "think outside of the box" when it comes to public benefits regulations. Instead, know the box so well that you've expanded its corners as far as possible. Loop holes always get closed - want to be the test case?
- Consider providing statements and accountings to State even if not so required
- Keep copies of all client estate planning documents
- Disclose fee schedule at onset and keep on file
- Encourage beneficiaries to exercise all power of appointments and keep copy in case of will contest
- Provide beneficiary with approved distribution list at onset of relationship
- Duty of loyalty and impartiality: a trustee/fiduciary must set aside its own personal values and bias

Case Manager, Trust Advisors/Protectors and Co-Trustees

- Case Manager
 - Knowledgeable person hired to assist trustee with services, purchases, with a knowledge of community resources and public benefits.
 - Increase the Trust's familiarity with the beneficiary and their needs
 - Identify necessary and appropriate expenditures under the trust
 - Monitor for misuse of funds of exploitation of Beneficiary
- Trust advisors can be family members, attorneys, accountants or other trusted professionals
 - Fees vary, but if there is a family member trustee, trust advisor fees may be more economical
 - Rights NOT duties
- Co-Trustee
 - Consider a family member acting as co-trustee with a professional trustee.

Disability Etiquette

- PEOPLE FIRST LANGUAGE AT ALL TIMES!!!
 - e.g. “Person With A Disability”, not “Disabled Person”
- Assume nothing - ask first
 - Assistance
 - Extent of disability
 - Companion role
 - Personal questions (especially in a public setting)
- Communicate with person with disability directly, not their caregiver/companion/etc.
- Do not disclose financial matters with caregiver/companion/etc. without permission of person with a disability
- “Non-disabled” or “typical” versus “normal”, “regular”, etc.
- Shake hands
 - Quadriplegic “hands”
 - Pats on the head, etc. can be condescending
 - Equipment = personal space
- Get these words out of your vocabulary right now: retarded, mongoloid, _____ “sufferer”, “confined” or “bound” to a wheelchair, ward (in non-legal manner), tranny, handicapped, dwarf, crippled, deaf and dumb, gimp, deformed, mentally defective, mentally deficient, schizoid, slow

A Happy/Engaged Beneficiary

Is More Likely To:

- 1) Refer your services to a friend or family member
- 2) Report back positively to the attorney who referred you
- 3) Work through issues collaboratively
- 4) Properly utilize their trust to supplement public benefits

A Disgruntled/Unengaged Beneficiary

Is More Likely To:

- 1) Speak poorly about you in the community (false or otherwise)
- 2) Contact their attorney at every discretionary distribution denial, thus driving up cost of administration
- 3) Lead with litigation
- 4) “Game the system”

The Importance of Choosing the Right Fiduciary

Ideal Trustee:

- In-depth public benefit knowledge
- Ability to stay abreast of all benefit and fiduciary law changes
- Unbiased decision making capability with beneficiary's best interests in mind in regards to discretionary distributions (i.e. beware of remainder persons)
- Advocate of the beneficiary
- Invests according to fiduciary standards (Prudent Investor Act)
- Up to date knowledge and adherence to statutory fiduciary requirements
- Expertise in tax law
- Immaculate bookkeeping abilities
- Can properly identify second rate service providers and/or beneficiary abuse or financial vulnerability
- Can appear in or petition the Court as needed
- Immortality

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