



Special Needs Trust Planning Provides Guaranteed Supplemental Relief for Individuals Receiving Government Needs-Based Assistance

BY STEPHANIE HARTMAN ROJO, ESQ.

Individuals receiving government needs-based assistance (benefits recipients), such as Medicaid or Supplemental Security Income, must delicately manage their exempt assets and personal asset limits (resource exclusions)¹ in order to maintain their ongoing public benefits eligibility.

A relatively small amount (\$2,000 or less)² can disqualify a benefits recipient. With this in mind, even a small settlement, damages award, inheritance or outright gift, despite the best of intentions, if not planned for properly can be detrimental, resulting in disqualification and lapse in benefits.

Lack of information in this regard may cause a benefits recipient to: 1) receive an unstructured inheritance, disqualifying them from their benefits or 2) be unnecessarily disinherited. In the first scenario, the public benefits program's purpose is undermined entirely. In the second scenario, disinheritance effectively eliminates the opportunity for supplemental support. This is why proper planning is essential.

Attorneys are uniquely situated to navigate clients, specifically those concerned with maintaining their own or someone else's ongoing needs-based benefits eligibility, toward sound and valuable resources available to help the benefits recipient.

This article highlights one particularly helpful estate planning technique: the Special Needs Trust (SNT). SNTs are used to provide financial support for a benefits recipient, without jeopardizing their public benefits eligibility. An SNT can meet a benefits recipient's needs where their current assistance programs are lacking, drastically improving the benefits recipient's quality of life.³

The three categories of SNTs are summarized below.

First Party or d(4)(A) Special Needs Trust⁴

A creation of federal law, a First Party SNT is an irrevocable, self-funded trust established by a benefits recipient (aged 65 and younger), their legal guardian or even by court order, using the benefits recipient's personal assets. Assets contributed into a First Party SNT may come from any funds directly owned or distributable to the benefits recipient as an inheritance, a personal injury award, a judgment or settlement award or even a wrongful death award after the loss of a loved one.

There are strict requirements surrounding the creation of a First Party SNT as well as the use and management of trust-owned assets. For example, a benefits recipient cannot serve as their own trustee. If the benefits recipient has

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any control over their SNT, its assets will be considered a resource to the benefits recipient and will therefore be counted against their eligibility asset limit. Further, direct cash distributions or cash equivalents (like gift cards) larger than \$20 are never allowed. There are also specific restrictions regarding how and in what manner SNT funds may be used. Primarily, no one else may directly benefit from the trust. Funds may be used for a variety of expenses, including the benefits recipient's travel, hobbies, education and other needs that current benefits do not cover.

The benefits recipient or their legal guardian must disclose and provide a copy of their First Party SNT directly to the Division of Welfare and Supportive Services (DWSS) for review and approval. If not approved, the assets will be a countable resource to the benefits recipient, causing disqualification and a lapse in benefits. Therefore, it is critical that a party to the trust, whether trustee or trust protector, have authority to amend the trust for limited compliance purposes.

Once the SNT is established, funded and approved, the trustee has ongoing responsibilities that must be strictly followed to avoid disruption to the benefits recipient's eligibility. For instance, the trustee must notify DWSS of expenditures larger than \$5,000, prepare and provide an annual accounting, and notify DWSS in the event of the benefits recipient's death.

already provided by existing benefits). Such funds are not considered a resource of the benefits recipient and therefore will not affect their ongoing eligibility requirements.

Unlike First Party SNTs, there is no age limit with respect to the benefits recipient. A payback provision is *not* required and should not be included in the terms of the trust. Instead, upon the benefits recipient's death, if assets remain in trust, property may be distributed to any combination of beneficiaries as determined by the grantor, without Medicaid Estate Recovery.

Depending on the grantor's wishes, Third Party SNTs can either be revocable or irrevocable during the grantor's lifetime. If the Third Party SNT is revocable, there is flexibility to modify the Third Party SNT provisions in the event that the grantor or benefits recipient's finances change, needs change, other opportunities arise, or the benefits recipient dies. The trust terms may also include a provision allowing for the trust to convert to a general discretionary trust if the benefits recipient's condition improves, eliminating their need for benefits.

Pooled or d(4)(C) Trust⁶

A Pooled Trust, another creation of federal law, is an option when neither a First Party nor a Third Party SNT is practical, as in situations where a benefits recipient inherits an amount exceeding the exemption limit but that is too small to warrant the cost of creation and administration of the other SNT options.

Pooled Trusts are irrevocable trusts established and administered by a non-profit organization. With a Pooled Trust, the benefits recipient or a third party enters into an agreement with the non-profit that administers the Pooled Trust, detailing what funds are to be contributed and then earmarking their use for the specific benefits recipient.

Pooled Trusts are unique in that assets of various benefits recipients are combined or pooled for investment and



The terms of the First Party SNT must also include a payback provision whereby, upon the benefits recipient's death, any assets remaining in the SNT are payable first to the state, via Medicaid Estate Recovery (with some exceptions) up to the total amount of the lifetime assistance received by the benefits recipient.⁵ If, after full repayment to the state, additional trust assets remain, then such assets are distributable to the other beneficiaries named in the trust.

Third Party Special Needs Trust or Discretionary Trust

Third Party SNTs are established with funds belonging to someone other than the benefits recipient, although typically by family member(s), such as a parent or grandparent.

Just as with First Party SNTs, the benefits recipient may not be the trustee or have control or direct access to the trust funds, and funds may only be used for supplemental purposes (not

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management efficiency, and decision-making optimization. The non-profit maintains an accounting of funds contributed and allocated for each benefits recipient in the pooled group.

Just as with the First Party SNT, the Pooled Trust formalities require the inclusion of a payback provision, meaning, once again, Medicaid Estate Recovery has priority for reimbursement. After the payback, the charity may keep the remaining

trust assets for their general charitable purposes.⁷

Keep an eye and ear open to your clients' needs and concerns when it comes to special needs trust planning. If your clients are at all concerned about maintaining their public-benefits eligibility or special-needs planning, you can steer them toward an appropriate trust and/or practicing attorney. In the process you may help save a benefits recipient from being

disinherited by a naïve family member or from faulty planning that could reduce or eliminate their current needs-based assistance. By directing your clients to appropriate resources, you can help a benefits recipient keep their benefits intact while increasing their comfort and quality of life.

	FIRST PARTY SNT	THIRD PARTY SNT	POOLED TRUST
Whose assets are used to fund the trust?	Asset(s) owned by or vested in the benefits recipient	Asset(s) owned by someone other than the benefits recipient	Asset(s) owned by the benefits recipient or someone else
Who establishes the trust?	The benefits recipient, guardian of the benefits recipient, or by court order	Someone other than the benefits recipient	A non-profit organization establishes the general Pooled Trust. An agreement with the non-profit organization may be made by the benefits recipient, parent, grandparent, legal guardian or by court order.
Is the benefits recipient eligible to serve as trustee?	No	No	No
May trust assets be paid directly to the benefits recipient?	No	No	No
In order to establish the trust, is there an age limit for the benefits recipient/trust beneficiary?	Yes, age 65 and younger	No	Generally, no; but may vary by state
Must the trust include a mandatory payback provision?	Yes	No	Yes

ENDNOTES:

1. Program Operations Manual System (POMS): SI 01130.000 Resource Exclusions, <https://secure.ssa.gov/poms.nsf/lnx/0501130000> (last visited January 14, 2021).

2. Nevada Medicaid Eligibility for Long Term Care: Income & Asset Limits American Council on Aging, <https://www.medicaidplanningassistance.org/medicaid-eligibility-nevada/> (last visited January 14, 2021).

3. More information about Nevada Special Needs Trust requirements is located in section F-500 *et al.* of the Department of Welfare and Supportive Services (DWSS) Medical Assistance Manual. See Medical Assistance Manual Department of Health and



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Human Services Division of Welfare and Supportive Services, <https://dwss.nv.gov/Medical/Medical-Manual-3-CONT/> (last visited January 21, 2021).

4. 42 U.S.C. § 1396p(d)(4)(A)

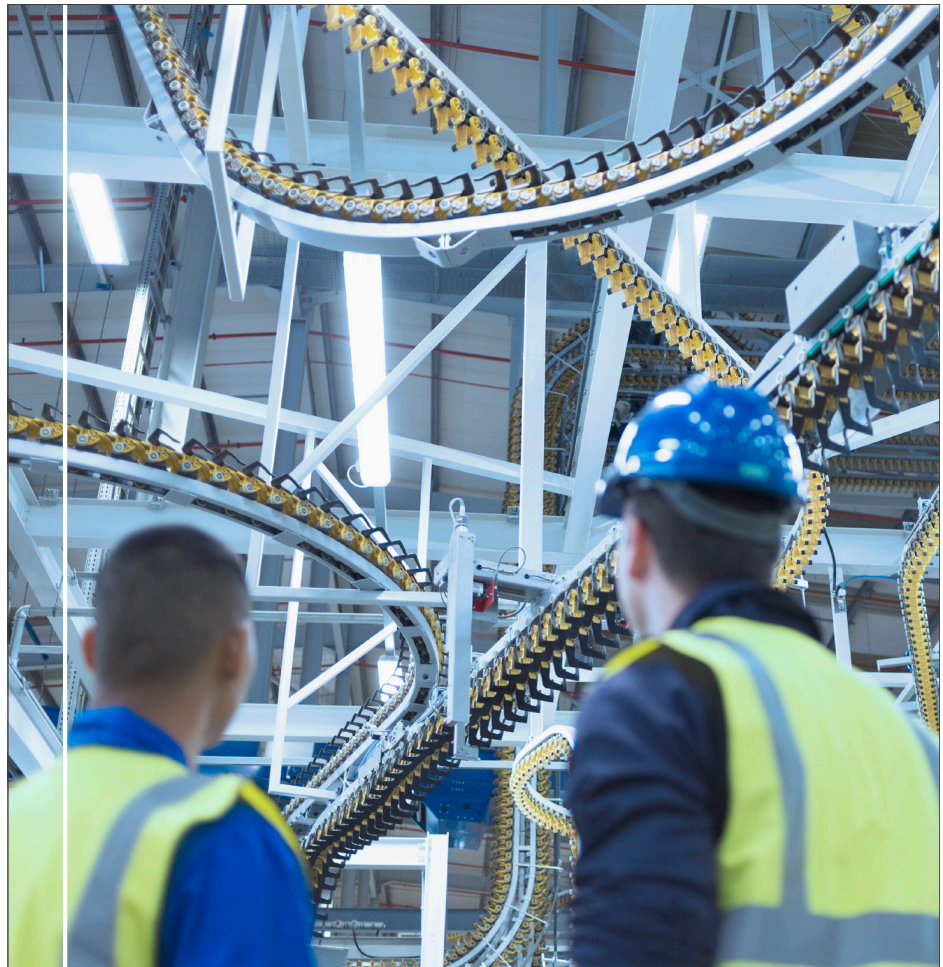
5. Medicaid Estate Recovery (MER) Nevada Department of Health and Human Services Division of Health Care Financing and Policy, <http://dhcfp.nv.gov/Pgms/CPT/xMER/> (last visited January 14, 2021).

6. 42 U.S.C. § 1396p(d)(4)(C).

7. Using Pooled Trusts in Estate Planning. Special Needs Alliance, <https://www.specialneedsalliance.org/the-voice/using-pooled-trusts-in-estate-planning-2/> (last visited January 20, 2021).

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