SPECIAL NEEDS TRUSTS:
Basics and Beyond

(Tennessee Version)

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Chapter 1. Introduction

A special needs trust or supplemental needs trust ("SNT") is one component of a lifelong support plan for a disabled individual.[1] The purpose of a SNT is to improve and enhance the beneficiary's quality of life.[2] An SNT accomplishes its purpose by protecting liquid assets, which are usually limited. Liquid assets can be used to enhance a beneficiary's quality of life. In some instances, the SNT will lift a special needs individual out of poverty.[3]

The reasoning behind SNTs is simple. Goods and services cost money. Typically, individuals with special needs have limited income and resources. Accordingly, if the individual with special needs must "spend down" limited income and resources to become eligible for public benefits, access to quality of life goods and services will be impaired. A properly structured SNT protects liquidity because resources inside an SNT are exempt when applying for certain public benefits. The end result is limited family

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1 Other components of the planning process include, but are not limited to, determining whether a guardianship or conservatorship is necessary, developing a continuity of care plan, applying for disability or SSI benefits, educational planning and advocacy, employment planning, responding to discrimination, family estate and financial planning, and planning for social and spiritual support.

2 In the Americans with Disabilities Act, Congress found that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency of such individuals." 42 U.S.C. § 12101(a)(7). SNTs preserve resources necessary to accomplish that purpose.

3 Without good planning, there is nothing magic about the document itself. Craig Reeves, CELA, says "[a] special needs trust is nothing more than a traditional trust that directs the trustee to only distribute from the trust for the beneficiary's "special needs", preferably in a way that does not cause the beneficiary to lose or suffer a reduction in needs-based public benefits." C. Reaves, *How to Make a Trust a "Special Needs Trust"* (Stetson SNT Basics 2015).

resources may be preserved to provide goods and services not covered by public benefits.

Good planning should consider the beneficiary's lifetime needs. Even if an SNT is initially unnecessary, circumstances may change. For example, a family caregiver could die or become disabled. Family members frequently donate services, but private care providers charge a fee. The death of a family caregiver could create a future cash flow crisis analogous to family business succession planning. Families often rely on income from small business to pay bills, but when the business owner dies, those funds are diverted to compensate the business owner's replacement. Also, special needs individuals may find themselves in a cash flow crisis after a caregiver dies because donated care disappears. By protecting a cash reserve, a special needs trust safeguards the beneficiary's future access to necessary services not covered by public benefits.[4]

The SSI and Medicaid programs disfavor trusts, at least to the extent individuals seek to create discretionary trusts that qualify them for means-tested benefits.[5] Prior to 1986, asset protection planners established Medicaid Qualifying Trusts (MQT) with varied success. In 1986, Congress passed legislation to limit the effectiveness of MQTs.[6] A "Medicaid qualifying trust" is a trust . . . established (other than by will) by an individual . . . under which the individual may be the beneficiary of all or part of the payments from the trust and the distribution of such payments is determined by one or

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4 If resources are limited, a trust can be funded with term life coverage on the life of the caregiver.

5 *See* C. Kruse, *Third-Party and Self-Created Trusts: Planning for the Elderly and Disabled Children 3rd* (ABA Section of Real Property, Probate and Trust Law 2002), at 3-4. *See also Ramey v. Reinertson*, 268 F.3d 955 (10th Cir. 2001) ("Congress responded to the use of [irrevocable trusts] with condemnation.").

6 *See* H.R. Rep. No. 99-265, pt. 1, pp. 71-72 (1985).

more trustees who are permitted to exercise any discretion with respect to the distribution to the individual. *See Skindzier v. Comm'r of Soc. Services*, 258 Conn. 642 (2001).[7]

In 1993, in the Omnibus Budget Reconciliation Act of 1993 ("OBRA 93"), Congress fine-tuned the trust rules, replacing the MQT rule with 42 U.S.C. § 1396p(d); the intention was to tighten perceived "loopholes."[8] Special needs trusts are an exception to the general rule that trusts are disfavored, and are addressed at subsection (d)(4).[9]

Special Needs Trusts (SNTs) are asset protection trusts. They are used to protect and support disabled individuals by protecting resources, while accelerating eligibility for means-tested public benefits such as Supplemental Security Income (SSI) and/or Medicaid. SNTs supplement, but do not replace, benefits that a beneficiary may receive. If an SNT is properly established, assets transferred to the SNT will not create a period of ineligibility (due to a transfer penalty) and will not an available resource for public benefit eligibility purposes.[10]

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7 Provisions relating to Medicaid Qualifying Trusts were originally codified at 42 U.S.C. § 1396a(k). In 1993, that provision was repealed and replaced with the trust provisions at 42 U.S.C. § 1396p(d).

8 The OBRA 93 provisions apply to trusts created on or after August 11, 1993. The 1993 act did not relax any of the 1986 requirements and is viewed as being more restrictive. *Ramey v. Reinertson*, 268 F.3d 955 (10th Cir. 2001). The Foster Care Independence Act of 1999 (Public Law 106-169), incorporated most of the OBRA 1993 transfer-of-asset and trust provisions into the SSI cash assistance program, effective January 1, 2000. *See* POMS SI 01120.201.A.1. Thus, the Medicaid rules discussed in this document generally apply to SSI eligibility as well.

9 Circuit Court decisions are not always consistent, but in *Lewis v. Alexander*, 685 F.3d 325 (3rd Cir. 2012) the Third Circuit held "States are required to exempt any trust meeting the provisions of 42 U.S.C. § 1396p(d)(4)."

10 42 U.S.C. § 1396p(c)(2)(B)(iv). Unfortunately, this exception to the transfer penalty rules includes an age limitation (under 65) which does not track with Section 1396p(d)(4)(C). The result is that some State Medicaid agencies, including Georgia's Department of Community Health, impose a transfer of resources penalty when an individual 65 or older establishes a pooled trust subaccount. Thus far, Tennessee has grudgingly allowed individuals over 65 to fund a pooled trust account.

The Medicaid Trust "Rules" are often irrational, and change frequently; advocates must know them.[11] The most frequently cites statutes and rules relating to SNTs are:

(d)(4)(A)	42 U.S.C. § 1396p(d)(4)(A) (individual SNTs)
(d)(4)(C)	42 U.S.C. § 1396p(d)(4)(C) (pooled SNTs)
SSI Exclusions	42 U.S.C. § 1382b(e) (excluded and countable trusts)
1396p(c)(2)	42 U.S.C. § 1396p(c)(2) (exclusions from transfer penalty rules)
Sole Benefit	42 U.S.C. § 1396p(c)(2)(B)(iii) or (iv) (sole benefit trusts)
POMS SI 01120.199[12]	Early Termination Provisions and Trusts
POMS SI 01120.200	Trusts - General, Including Trusts Established Prior to 1/1/00, Trusts Established with the Assets of Third Parties and Trusts Not Subject to Section 1613(e) of the Social Security Act
POMS SI 01120.201	Trusts established with the assets of an individual on

[11] The POMS, which seem to be the primary source for new SNT rules, change regularly, State rules change, and new cases are decided regularly. Attorneys must stay abreast of these developments. Generally, though, the federal and state Medicaid statutes have been described as the regulatory equivalent of the "Serbonian bog." *See* John Milton, Paradise Lost, bk. 2, 1.592 ("A gulf profound, as that Serbonian bog Betwixt Damiata and Mount Casius old, Where armies whole have been sunk."). These regulations have also been characterized as "almost unintelligible to the uninitiated," *Friedman v. Berger*, 547 F.2d 724, 727 n.7 (2nd Cir. 1976) (Friendly, J.), *cert denied*, 430 U.S. 984, 52 L. Ed. 2d 378, 97 S. Ct. 1681 (1977); as an "aggravated assault on the English language, resistance to attempts to understand it"; *Friedman v. Berger*, 409 F. Supp. 1225, 1225-26 (S.D.N.Y. 1976); and by this circuit as "labyrinthinan." *Roloff v. Sullivan*, 975 F.2d 333, 340, n. 12 (7th Cir. 1992).

[12] "In the absence of federal regulations, under a 2003 decision of the United States Supreme Court applying the *Skidmore* Doctrine, the POMS is elevated to the force of law. [Tennessee] must apply the POMS provisions as controlling law in each case review." *See* W. Overman, *Once You Have Drafted It, What Do You Do With It?: DCH and Special Needs Trust Processing*, p.6-7 (2012), *citing Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003). The Court in Keffeler referred to the POMS to determine whether the State of Washington violated Section 407(a) of the Social Security act by using payments it received as representative payee for foster children to pay a portion of the foster care costs. The Court looked to the POMS in determining no violation occurred. "While these administrative interpretations are not products of formal rulemaking, they nevertheless warrant respect in closing the door on any suggestion that the usual rules of statutory construction should get short shrift for the sake of reading 'other legal process' in abstract breadth." *Keffeler*, 385, *citing Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944); and *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).

	or after 1/1/00
POMS SI 01120.202	Development and Documentation of Trusts Established on or After 01/01/00
POMS SI 01120.203	Exceptions to Counting Trusts Established on or after 1/1/00
POMS SI 01120.225	Pooled Trusts Management Provisions
POMS SI 01120.227	Null and Void Clauses in Trust Documents
Tenncare	Policy Manual 110.055

In this paper, we distinguish between self-settled trusts, which are referred to as special needs trusts, and third party trusts, which are referred to as supplemental needs trusts. The initial distinction is that a special needs trust is funded with the beneficiary's own money, while a supplemental needs trust is funded with someone else's money. Other distinctions are discussed elsewhere in this paper.

1.1. Disabled means…

Only disabled individuals need a special needs trust (and you must be disabled to establish an exempt self-settled trust). 42 U.S.C. § 1382c(a)(3)(A) provides: "an individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months."[13] The "physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." 42 U.S.C. § 1382c(a)(3)(B).[14]

What is the disability prevalence? In 2012, Ruthann Lacey and Heather Nadler, relying on Census Bureau data, wrote that one in every twenty-six American families reported raising a child with a disability.[15] A Census Bureau report issued in July 2012 found "[a]pproximately 56.7 million people (18.7 percent) of the 303.9 million in the civilian noninstitutionalized population had a disability in 2010. About 38.3 million people (12.6 percent) had a severe disability. About 12.3 million people aged 6 years and older (4.4 percent) needed assistance with one or more activities of daily living (ADLs) or instrumental activities of daily living (IADLs)."[16] Special needs trusts are a critical planning tool for this population because earnings and income are lower for individuals with disabilities, and poverty rates are higher. "Approximately 28.6 percent of people

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13 Public benefits are frequently linked to the Social Security Act definition of disability, but there are other definitions in federal law. For example, the American's with Disabilities Act defines disability as "a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102(1). Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. 42 U.S.C. § 12102(2)(A).

14 "Disabilities are non-discriminatory, can occur at birth or any time thereafter, and are found in all nationalities, race and economic categories." M. Meek, *Advising Military Families with Special Needs Children: A Legal Primer*, 2012 Army Law. 36 (2012).

15 R. Lacey & H. Nadler, *Symposium on Special Needs and Disability in Family Law: Special Needs Trusts*, 46 Fam. L. Q. 247 (2012), *citing Disability and American Families*, 2000 U.S. Census Bureau, July 2005 Report.

16 M. Brault, *Americans with Disabilities: 2010*, pages 4-5 (U.S. Census Bureau, July 2012), available at: http://www.census.gov/prod/2012pubs/p70-131.pdf.

aged 15 to 64 with severe disabilities were in poverty while 17.9 percent of adults with non-severe disabilities, and 14.3 percent of people with no disability were in poverty."[17]

1.2. Means-tested benefits.

Means tested benefits include Supplemental Security Income (SSI), Medicaid, housing assistance,[18] food stamps and certain Veteran's benefits e.g., Aid and Attendance).

Medicare, SSDI, and service connected Veterans benefits are not means-tested. An SNT is not required to become eligible for non-means tested benefits.

	Cash Payments	**Medical coverage**
Non-Means Tested	**Social Security Disability**	**Medicare**
Means-Tested	**SSI**	**Medicaid**

1.2.1. What is Supplemental Security Income?

In general terms, Supplemental Security Income (SSI) is a means-tested income maintenance program for the aged, blind and disabled.[19] It is administered by the Social

17 *Id*., at page 12.
18 Although HUD benefits are not the focus of this paper, *DeCambre v. Brookline Hous. Auth*., 95 F. Supp. 3d 35 (D. Mass. 2015), is worth mentioning. A local housing authority counted distributions from a special needs trust as income in determining eligibility for federal housing vouchers. DeCambre filed a Section 1983 action, requesting a preliminary injunction to prevent such action. The district court dismissed the Section 1983 action, and denied the injunction, finding that housing authority's interpretation of 24 C.F.R. §§ 5.609 and 5.603 were reasonable and that they permitted inclusion of SNT distributions as income. A case note updating *DeCambre* appears in the Spring 2017 NAELA Journal. *See* R. Landsman, *DeCambre v. Brookline Housing Authority: Special Needs Trusts Come to Federal Housing Supports for the Needy*, 13 NAELA Journal 55 (2017).
19 Title XVI of the Social Security Act, 42 U.S.C. § 1381-1383f. The Foster Care Independence Act of 1999 (Public Law 106-169), incorporated most of the OBRA 1993 transfer-of-asset and trust provisions into the SSI cash assistance program, effective January 1, 2000. Thus, the special needs trust rules described in this document apply to SSI as well as Medicaid. Interestingly, there is not a single SSI

Security Administration. Eligibility is limited to citizens, legally admitted refugees, and qualified aliens. The purpose of the SSI program is to provide income to pay for food and shelter for qualifying individuals.[20] The amount paid each month, known as the Federal Benefit Rate (FBR), is indexed to provide beneficiaries with seventy-five percent (75%) of the federal poverty rate.

The aged are defined as persons 65 years and older. The blind are individuals with 20/200 vision or less with the use of a correcting lens in the person's better eye, or those with tunnel vision of 20 degrees or less. Disabled individuals are those unable to engage in any substantial gainful activity by reason of a medically determined physical or mental impairment expected to result in death or that has lasted, or can be expected to last, for a continuous period of at least 12 months.[21] "Substantial gainful activity" generally refers to work activity that is "both substantial and gainful."[22] In calendar year 2017 earnings are deemed substantial and gainful once they reach $1,170 in monthly income, with impairment-related expenses subtracted from earnings.[23] Generally, a disabled individual must be unable to do any kind of work that exists in the national economy, taking into account age, education, and work experience.

Children may qualify for SSI if they are under age 18 (or under age 22 if a full-time student), unmarried, and meet the applicable SSI criteria for disability or

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regulation addressing special needs trusts; they are covered under the general resource rules that apply to other assets found in Subpart L, 20 C.F.R. § 416.1201 – 416.1266. *See* D. Lillesand, *Special Needs Trusts – 2005*, at p. 9.4

[20] In very general terms, financial eligibility for SSI means income below the benefit rate ($733 per month for an individual in 2016), and countable resources below $2,000. Formerly, SSI was said to provide food, clothing and shelter. Clothing was removed in final regulations published on February 7, 2005 as a way of simplifying the calculation of in-kind maintenance and support.

[21] 42 U.S.C. § 1382c(a)(3)(A).

[22] 20 C.F.R. § 220.141(a).

[23] The annual SGA level is indexed for inflation. http://www.ssa.gov/oact/cola/sga.html.

blindness, income, and resources.[24] Public Law 104-193, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, established a new disability definition for children under age 18 which requires a child to have "a medically determinable physical or mental impairment which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.[25]

Individuals and couples are "income eligible" for SSI if their income falls below the Federal maximum monthly SSI benefit, $735 (2017) for an individual and $1,103 (2017) for a couple.[26] If only one member of a couple qualifies for SSI, part of the ineligible spouse's income is considered available to the eligible spouse (this is called "deeming").[27] If a couple separates, each person is treated as an individual in the month following the month of separation, and deeming terminates.[28] If an unmarried child living at home is under 18 years of age, then a portion of the parent's income is deemed to that child.[29]

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24 https://www.ssa.gov/ssi/text-child-ussi.htm.

25 42 U.S.C. § 1382c(a)(3)(C)(i). *See also* House Ways and Means Committee Prints: 108-6, 2004 Green Book, at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_green_book&docid=f:wm006_03.wais.

26 Income includes cash, checks, and items received "in kind" such as food and shelter. Wages, net earnings from self-employment, and income from sheltered workshops are considered earned income. Social Security benefits, workers or Veteran's compensation, annuities, rent, and interest are counted as unearned income.

27 POMS SI 01310.001 explains the role of deeming. The concept recognizes some measure of family responsibility between spouses and between parents and children. When they apply, the deeming rules attribute income and resources to the eligible individual whether or not they are actually available. The term "Deemor" is defined in POMS SI 01310.127. In most cases, for purposes of public benefits planning, it means ineligible parents and spouses. Not all income is deemed. For example, POMS SI 01320.400 described how to calculate deemed income between spouses.

28 POMS SI 01310.160 provides that an ineligible spouse whose income and resources are subject to deeming must live with the eligible individual, eligible child or the sponsor. Deeming only applies in a household setting. POMS SI 01310.140.B.1. Deeming does not apply when an individual and ineligible spouse are living in an institution, even if they are sharing a room. POMS SI 01310.140.B.2.

29 *See* POMS SI 01320.500.

Resource eligibility must also be considered. Since 1974 SSI eligibility has been restricted to qualified persons who have resources of not more than $2,000, or $3,000 in the case of a couple. The resource limit for a couple applies even if only one member of a couple is eligible.[30] If the couple separates, the person seeking SSI is treated as an individual in the following month. If an unmarried child living at home is under age 18, the parent's assets are considered to be the child's (i.e., deemed to the child).[31] In determining countable resources, a number of items are not included, such as the individual's home, and, within reasonable limits set by SSA, household goods, personal effects, an automobile, and a burial space for the individual, spouse, and members of the immediate family. Regulations place a limit of $2,000 in equity value on excluded household goods and personal effects. One vehicle is excluded. The value of property which is used in a person's trade, or business, or by the person as an employee also is excluded. The value of certain other property that produces income, goods, or services essential to a person's self-support may be excluded within limits set by SSA in regulations. SSI and Social Security retroactive benefit payments may not be considered as a resource for a period of 6 months after the month in which the retroactive benefit is received. Resources set aside under a PASS also are excluded.[32]

SSI is often most significant because Tennessee is an SSI State. If a Tennessee SSI applicant receives at least $1 of SSI, then he or she is eligible for Medicaid.[33]

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30 There are exclusions. For example, pension funds, including IRAs, held in an account for the ineligible spouse are excluded. POMS SI 01330.120.A.1.b. The same applies with parent-to-child deeming. POMS SI 01330.220.

31 See Social Security Administration, *Spotlight on Deeming Parental Income and Resources*, at https://www.ssa.gov/ssi/spotlights/spot-deeming.htm.

32 A PASS is a Plan to Achieve Self-Support.

33 42 U.S.C. § 1396a(a)(10)(A); 42 C.F.R. § 435.120; Ga. ABD Manual § 2111.

1.2.2. What is Medicaid?

"Medicaid was established by Title XIX of the Social Security Act of 1965, 79 Stat. 343, as amended, 42 U.S.C. § 1396 et seq. Medicaid is a joint state-federal funding program for medical assistance in which the Federal Government approves a state plan for the funding of medical services for the needy and then subsidizes a significant portion of the financial obligations the State has agreed to assume. Once a State voluntarily chooses to participate in Medicaid, the State must comply with the requirements of Title XIX and applicable regulations."[34]

Medicaid is means-tested health coverage for certain individuals who are aged, blind or disabled.[35] It is jointly funded federal-State program, administered by the States.[36] It does not pay cash to a beneficiary. Instead, it pays medical providers for services rendered to eligible participants. Medicaid does not help everyone who needs assistance paying for healthcare. Coverage is limited to individuals who meet the eligibility criteria for specific classes of assistance. The classes of assistance most often sought by individuals creating trusts relate to long-term care (e.g., assistance with activities of daily living).

To many, Medicaid is an enigma.[37] The program's complexity surrounding who is eligible, what services are paid for, and how those services are reimbursed and delivered is one source of this confusion. Variability across State Medicaid programs is the rule,

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34 *Alexander v. Choate*, 469 U.S. 287 (1985), *citing Harris v. McRae*, 448 U.S. 297 (1980).

35 Medicaid was created in the same legislation creating the Medicare program, P.L. 89-97. The meaning of aged, blind and disabled is discussed above.

36 *Moore v. Reece*, 637 F.3d 1220, 1232 (11th Cir. 2011).

37 "The Medicaid Act is an enormously complicated program. The system is a web; a tug at one strand pulls on every other. Given this complexity, there are untold ways in which a state plan might fail to comply with the Act and the governing regulations." *Lewis v. Rendell*, 501 F. Supp.2d 671 (E.D. Pa. 2007). The same, unfortunately, applies to Medicaid planning, balancing estate planning, retirement planning, tax planning and other goals, is an exercise in risk management, not risk avoidance.

not the exception. In recent years, more and more States have implemented a variety of major program changes using special waiver authority. Income eligibility levels, services covered, and the method for and amount of reimbursement for services differ from State to State. Furthermore, Medicaid is a program that is targeted at individuals with low-income, but not all of the poor are eligible, and not all those covered are poor. For populations like children and families, primary and acute care often are delivered through managed care, while the elderly and disabled typically obtain such care on a fee-for-service basis. Nationwide, Medicaid finances the majority of long-term care services.[38] Such services include, for example, nursing home care and community-based services designed to support the elderly and disabled in their homes. Recently, some States have begun to integrate Medicare and Medicaid financing and/or coordinate acute and long-term care services for these populations.[39]

Like SSI, to gain or maintain eligibility for Medicaid, an applicant must be poor enough under the program eligibility rules. An applicants' income and resources must be within certain limits. The specific income and resource limitations that apply to each eligibility group are set through a combination of Federal parameters and State definitions. Consequently, those standards vary considerably among States, and different standards apply to different population groups within a State. For many of those groups, States have permission under a special provision, Section 1902(r)(2), to use more liberal standards for computing income and resources than are specified

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[38] Long-term care refers to a wide range of supportive sand health services for persons who have lost the capacity for self-care due to illness, frailty, or a disabling condition. It differs from acute care in that the goal of long-term care is not to cure an illness that is generally of short duration, but to allow an individual to attain and maintain an optimal level of functioning over the long-term.

[39] House Ways and Means Committee Prints, 108-6, 2004 Green Book, Chapter 15, at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_green_book&docid=f:wm006_15.wais.

within each of the groups' definitions. Most States use Section 1902(r)(2) to ignore or disregard certain types or amounts of income or assets, thereby extending Medicaid to individuals with earnings or assets too high to otherwise qualify under the specified rules for that eligibility pathway.

Tennessee Medicaid may apply a more liberal eligibility standard, but cannot be more restrictive than the SSI program.[40] First, the SSI rules apply to SSI beneficiaries; if SSI is approved, then Medicaid must be provided. Second, 42 U.S.C. § 1396a(r)(2)(A) generally prohibits the State from applying an income or resource standard more restrictive than the SSI rules. *See, generally*, T. Begley & A. Canellos, *Special Needs Trusts* § 4.06 (Aspen/Wolters Kluwer).[41]

Medicaid is divided into various classes of assistance (COAs) described in the Tenncare Manual.[42] Each COA is designed to help a category of individuals with specific needs. The eligibility criteria for COAs varies. Some of the more important COAs are:

1.2.2.1. SSI Medicaid

Tennessee's Medicaid program is linked to the SSI program. Tennessee SSI recipients are automatically eligible for Medicaid for any month in which they receive a check unless they have refused to assign third party resources. Eligibility criteria appear in Section 115.025 of the Tenncare Manual.

1.2.2.2. Nursing Home Medicaid

40 Theoretically, it cannot be more restrictive than SSI; however, practitioners should remember that the entire Tenncare program is a waiver program.

41 At section 4.06 of their book, Begley & Canellos compare 42 U.S.C. § 1396a(r)(2)(A) with 42 U.S.C. § 1396a(a)(10)(C)(i)(III). Subsection (r)(2)(A) applies broadly to optionally categorically needy, the medically needy, waiver participants, ABD individuals in 209(b) states as well as qualified Medicare beneficiaries, pregnant mothers and infants. Subsection (a)(10)(C)(i)(III) applies only to medically needy individuals who are not SSI recipients and who qualify for spenddown Medicaid or who qualify with a Miller trust. Both subsections prohibit eligibility standards more restrictive than those used in the SSI program.

42 https://www.tn.gov/tenncare/article/aged-blind-and-disabled-manual.

Nursing home Medicaid pays the cost of nursing home care for eligible individuals. Eligibility is currently subject to an income cap, as well as a resource limit. Eligibility criteria appear in Section 115.015 of the Tenncare Manual.

1.2.2.3. Home and Community Based Services (CHOICES)[43]

Choices provides home and community-based services to people who have a functional impairment or who have a disability. The program helps people remain in their own home, the home of a caregiver, or in other community settings as long as possible. Eligibility criteria appear in Section 130.005 of the Tenncare Manual.

1.3. When should a SNT be considered?

A special needs trust should be considered when the individual is disabled, needs long-term care (or has no access to health insurance), and has significant liquid assets that would prevent him or her from qualifying for health benefits. If the assets are insignificant, then the individual might consider spending down on exempt assets such as a home, a vehicle or on exempt personal property.

The Affordable Care Act[44] eliminated medical underwriting,[45] eliminated lifetime limits on the dollar value of coverage, requires guaranteed issue and renewability of policies, and requires extended dependent coverage for children through age 26. This means insurance is now a consideration if the special needs individual's family, or the

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43 https://www.tn.gov/assets/entities/tenncare/attachments/CHOICES.pdf.

44 The Patient Protection and Affordable Care Act of 2010, HR3590 (signed March 23, 2010) ("ACA" or "Obamacare"). Republicans have voted to repeal, modify or tweak the ACA at least 54 times since the ACA was signed into law.

45 Initially, insurers were prohibited from denying coverage for children with pre-existing conditions. Effective 2014, no one can be denied coverage due to a pre-existing condition. However, in 2017, the Republican Congress is intent on repealing the ACA which makes the future uncertain.

trust, can afford premiums for private health insurance. Insurance might minimize a potential payback claim following a beneficiary's death.[46]

Prior to vesting, parents and grandparents (or other relatives) have four options when planning for a special needs loved one. First, they can give assets directly to the special needs individual. Second, they can disinherit the special needs individual. Third, they can distribute property to a relative or friend with the understanding that the property will be used for the special needs individual. Unless the amount being set aside is insubstantial, none of these options effectively protect the special needs individual because they leave him or her open to the whim and whimsy of the person vested with property rights, or to the claims of their creditors. A special needs trust is a better planning devise.

After property rights vest, the alternatives to an SNT include (1) spend-down; (2) transferring assets and accepting any penalty; and (3) accepting the disqualifying funds with the loss of eligibility for means-tested benefits.[47] With regard to the second alternative, Thomas Begley, CELA, notes that "SSA does not follow the step transaction rules followed by the IRS," so the transferee could establish a support trust for the beneficiary.[48]

1.3.1. The ABLE Act. Tennessee implemented the ABLE Act in 2015.[49] The ABLE Act amended Section 529, creating new Section 529A.[50] The ABLE Act

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46 Avoiding payback claims is not the only consideration. Others include access to physicians who do not accept Medicaid, and avoidance of trust administration costs.

47 T. Begley, *Four Alternatives to Self-Settled Special Needs Trusts*, available at: http://www.begleylawyer.com/2010/07/four-alternatives-to-self-settled-special-needs-trusts/.

48 *Id*.

49 T.C.A. § 71-4-801 et seq. *See also* http://abletn.gov/index.html.

50 This summary of the ABLE Act is based on a review of Section 529A and on a paper presented by Mary E.O'Bryne, *The Planner's Evolving Tool Box: Part One*, presented at the 2015 Stetson SNT Basics

exempts a limited pool of funds from being counted toward an individual's eligibility for SSI or Medicaid. An ABLE beneficiary, known as a "designated beneficiary," can only have one ABLE account.[51] The designated beneficiary is eligible to participate in ABLE during a tax year when the individual is entitled to benefits based on blindness or disability under title II or XVI of the Social Security Act, and such blindness or disability occurred before the date on which the individual attained age 26, or a disability certification with respect to such individual is filed with the Secretary for such taxable year.[52]

The account must be opened in the beneficiary's state of residence or in a state his or her home state contracts with to provide an ABLE program.[53] Contributions to ABLE accounts may be made by the beneficiary or by third parties. Contributions must be in cash.[54] Proposed regulations[55] provide that cash contributions may be made in the form of a check, money order, credit card, electronic transfer or similar method. Contributions to an account from someone other than the designated beneficiary are treated as a completed gift.[56] Contributions are not tax-deductible. The total annual contributions to the ABLE account from all sources may not exceed the annual gift tax exclusion amount, currently $14,000.[57] A 6% excise tax will apply to excess

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Conference. *See also*, The Arc, *Achieving a Better Life Experience (ABLE) Act, Division B of Public Law 113-295, December 9, 2014*, available at http://www.thearc.org/document.doc?id=5008.

[51] 26 U.S.C. § 529A(b)(1)(B).

[52] 26 U.S.C. § 529A(e)(1).

[53] 26 U.S.C. § 529A(b)(1)(C).

[54] 26 U.S.C. § 529A(b)(2).

[55] https://www.irs.gov/irb/2015-27_IRB/ar09.html.

[56] 26 U.S.C. § 529A(c)(2)(A). By way of contrast, a contribution to a non-Crummey trust is usually an incomplete gift and does not qualify for the annual exclusion.

[57] 26 U.S.C. § 529A(b)(2)(B), incorporating 26 U.S.C. § 2503(b) by reference. The one exception to this limit comes in the case of a rollover from another ABLE account. An individual may rollover his or her ABLE account to another ABLE account for himself or herself, or for an eligible individual who is a

contributions to an ABLE account. The maximum aggregate contribution to an ABLE account is capped at the same amount of each State's college savings plan program. If the designated beneficiary is an SSI recipient and the balance in the ABLE account exceeds One Hundred Thousand Dollars ($100,000), the account balance in excess of this amount is countable resource for SSI purposes. The designated beneficiary's SSI eligibility will be suspended; Medicaid eligibility will not be affected.

ABLE Accounts may be used, tax-free,[58] to fund qualified disability expenses. The proposed regulations define qualified disability expenses as expenses incurred that relate to the blindness or disability of the designated beneficiary of the ABLE account and are for the benefit of that designated beneficiary in maintaining or improving his or her health, independence, or quality of life. Such expenses include, but are not limited to, expenses related to the designated beneficiary's education, housing, transportation, employment training and support, assistive technology and related services, personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, and funeral and burial expenses, as well as other expenses that may be identified from time to time in future guidance published in the Internal Revenue Bulletin. Qualified disability expenses include basic living expenses and are not limited to items for which there is a medical necessity or which solely benefit a disabled individual.

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family member under certain circumstances, and as long as the rollover is completed within sixty (60) days. Such a rollover may only be done once in any twelve month period.

[58] 26 U.S.C. § 529A(c)(1)(A) and (B).

1.4. How does a SNT help?

A properly structured special needs trust immediately accelerates eligibility for means-tested benefits. It does so because assets and income streams inside the trust are exempt when determining eligibility.[59] Other trusts (non-SNTs) used to achieve asset protection goals generally require significant advance planning.[60] Placing income streams and resources inside the SNT also maintains a liquid source of funds to meet future needs, such as a new roof, new automobile, new dentures and the like.[61] SNTs are not subject to the limitations placed on ABLE accounts, so they are generally more effective tools when planning over a beneficiary's lifetime.

Chapter 2. Self-settled trusts vs. Third party Trusts, generally

2.1. What is a self-settled trust?

Any trust created by or funded by the Medicaid applicant or by his or her spouse is a self-settled trust. Since 1993, federal Medicaid law 42 U.S.C. § 1396p(d)(2)(A) creates a two-part test for determining which trusts are covered by the rule. True third-

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59 Distributions from the SNT may, or may not, be considered income depending on the method of distribution and what is provided.

60 As discussed below, self-settled Medicaid trusts which are not special needs trusts do not facilitate eligibility unless the trust is irrevocable and there is no circumstance under which payment from the trust could be made to or for the benefit of the applicant. 42 U.S.C. § 1396p(d)(3)(B). A transfer of resources penalty is applied to any transfer to trust within the 60 month look-back period.

61 Medicaid coverage is notoriously fickle. In Idaho, budget cuts and austerity measures lead to the following crisis: "Many of the services that were cut or eliminated prevented more serious – and expensive - conditions. The changes to dental care, for example, mean that Medicaid now will cover the pulling of teeth but not the care needed to prevent tooth problems." See Medicaid Matters in Idaho: Real Stories, Real Impacts, Real Communities, p. 5 (2012), at http://allianceforajustsociety.org/wp-content/uploads/2013/01/Medicaid-Matters-to-Idaho-2013.pdf. A prior report, mentioned in T. Takacs and D. McGuffey, *Medicaid Planning: Can it Be Justified*, 29 W. Mitchell L. R. 111 (2002), indicated nursing homes should grind food for residents who lost their dentures because they would not be replaced. In Georgia, waiting lists have been imposed for home and community based services due to under-funding.

party trusts, those created by other individuals and funded entirely with money that does not belong to the benefits applicant, are not covered by this rule.

If assets belonging to the individual (or the individual's spouse) are placed in the trust, then it is a self-settled trust. *James v. Richman*, 465 F. Supp. 2d 395, 403 (M.D. Pa. 2006).[62] A self-settled trust must also be formed by one of the following persons: (i) the benefit applicant or his or her spouse; (ii) any person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; or (iii) any person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse. *Johnson v. Guhl*, 91 F. Supp. 2d 754, 763 (D. N.J. 2000). Interestingly, 42 U.S.C. § 1396p(d) expressly excludes any testamentary trust created by these persons.[63] *See Skindzier, supra*; *Hazelton v. Wilson-Coker*, 2003 Conn. Super. LEXIS 2665 (9/19/2003).

The text of 1396p(d) does not address step-transactions; currently the step transaction rules applied by the IRS are not applied to SNTs.[64] Also, the statute does not

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62 Similar language appears in the order granting a temporary restraining order. *See James v. Richman*, 2006 U.S. Dist. LEXIS 28384 (M.D. Pa. 3/20/2006). In *Strand v. Rasmussen*, 648 N.W.2d 95 (2002), the Court succinctly states the person who furnished the consideration is deemed to have established the trust, even if the trust was actually created, in form, by someone else. *See also* POMS SI 01120.199.E.2. The POMS indicate that the Medicaid Trust rules apply if any assets of the applicant, "regardless of how little, were transferred to a trust other than by a will." POMS SI 01120.201.B.7. The portion of the trust funded with the applicant's assets is the portion subject to the rules. POMS SI 01120.201.C.2.c. This is also consistent with the UTC definition of settlor. UTC, § 103(15).

63 This apparent exception for testamentary trusts was not so apparent in *Fisher v. Colo. Dep't of Health & Fin.*, 66 P.3d 114 (Col. App. 2002).

64 *See* T. Begley, *Four Alternatives to Self-Settled Special Needs Trusts*, available at: http://www.begleylawyer.com/2010/07/four-alternatives-to-self-settled-special-needs-trusts/. Although not styled as a step-transaction *per se*, the following illustration appears in the Restatement: "In consideration of the payment of $10,000 by A to B, B transfers Blackacre to C in trust to pay the rents and profits to A during his lifetime, and to convey Blackacre to D on A's death. At A's request, B inserts a provision in the trust deed to the effect that A's interest should not be transferable by him or subject to the claims of his creditors. A can transfer his interest; his creditors can reach his interest." *Restatement (Second) of Trusts*, § 156, Illustration 2. In the Medicaid planning context, the concern would be whether

parse the extent of its application when someone other than the applicant creates the trust; what is meant by the phrase "at the direction or upon the request of" the individual.[65] We do know, however, that if assets are commingled, the rules only apply to assets of the benefits applicant.[66] *See* 42 U.S.C. § 1396p(d)(2)(B). Subsection 1396p(d)(2)(C) does make it clear, however, that the rules apply without regard to— (i) the purposes for which a trust is established, (ii) whether the trustees have or exercise any discretion under the trust, (iii) any restrictions on when or whether distributions may be made from the trust, or (iv) any restrictions on the use of distributions from the trust. *Johnson v. Guhl*, 91 F. Supp. 2d at 763; *Vardion v. Commissioner*, 1999 Conn. Super. LEXIS 1759 (6/3/1999).[67]

Trusts and trust like devices[68] subject to the Medicaid rules are treated differently depending on whether the trust is revocable or not. It may also depend on whether the asset placed in the trust is exempt.[69]

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a transaction might be similarly collapsed where assets are transferred to an adult child who then uses those assets to form a trust. In *Hedlund v. Wisconsin Dep't of Health Services*, 2011 WL 4835721 (Wis. App. 10/13/2011), the court collapsed a transaction of this type after inferring that Mrs. Hedlund transferred assets to her children for the purpose of establishing a trust for herself and her husband.

[65] Court decisions and the POMS limit application of this rule to that portion of the trust funded with the applicant's assets. See *Sai Kawn Wong v. Daines*, 582 F.Supp. 2d 475 (S.D. N.Y. 2008); POMS SI 01120.201.C.2.

[66] POMS SI 01120.201.J.4.

[67] POMS SI 01120.201.C.2.d.

[68] The rule governing trust-like devices is designed to reach the substance of the transaction and capture disguised trusts. A trust-like device is any legal instrument or device similar to a trust, except that annuities are excluded only to the extent specified by the Secretary. *James v. Richman*, 465 F. Supp. 2d at 403; POMS SI 01120.201.B.5; POMS 01120.201.G. Transmittal 64 provides that the annuity is not abusive (and not subject to the trust rules) if the expected return on the annuity is commensurate with a reasonable estimate of the life expectancy of the beneficiary. Transmittal 64, § 3258.9B. In *Pfeffer v. Ariz. Health Care Cost Containment Sys. Admin.*, 2011 U.S. Dist. LEXIS 113072 (D. Ariz. 9/30/2011), the Department took the position that funds gifted to an adult child and held by that child to pay through a penalty period, part of a reverse-half-loaf gifting plan, were a trust like device.

[69] "If an individual placed an excluded resource in a trust and the trust is countable, the resource exclusion can still be applied to that resource. For example, if an individual transfers ownership of his/her home to a trust and the trust is a countable resource, the home is still subject to the section under SI 01130.100." POMS SI 01120.201.D.4.

A revocable trust is disregarded by Medicaid; assets within it are fully counted when determining eligibility. *Johnson v. Guhl*, at 763. The corpus is not protected from spend-down or from estate recovery. *See* 42 U.S.C. § 1396p(d)(3)(A)(i).[70] Payments from the trust to the benefits applicant are treated as income, which means that income cap and cost share rules apply. *See* 42 U.S.C. § 1396p(d)(3)(A)(ii). Payments to any other person are treated as a transfer of resources and a penalty is assessed. *See* 42 U.S.C. § 1396p(d)(3)(A)(iii).

Assets inside an irrevocable trust may or may not be countable (or unprotected) depending on the interest retained by the benefits applicant. If there is <u>any circumstance</u> under which payment from the trust <u>could be</u> made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual.[71] *See James v. Richman, supra*, at 403; *Vincent v. Dep't of Human Servs.*, 392 Ill. App. 3d 88, 96 (2009); *Gayan v. Ill. Dep't of Human Servs.*, 342 Ill. App.

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70 Arguably this oversimplifies the estate recovery argument. If estate recovery is limited to the probate estate, and if a trust (presumably holding exempt assets) was disregarded during the eligibility process, then a probate only state would not reach assets inside the trust unless the trust code or probate code permits creditors of the estate to reach those assets.

71 It does not matter whether the contingency is probable or improbable. Any circumstance includes events that would only occur "no matter how unlikely or distant in the future." POMS SI 01120.201.D.2.b. It also includes indirect payments to another person or entity where the applicant derives some benefit. POMS SI 01120.201.F.1. This was described as the peppercorn test in *Varidion v. Commissioner*, 1999 Conn. Super. LEXIS 1759 (1999). "If there is a peppercorn of discretion, then whatever is the most the beneficiary might under any state of affairs receive in the full exercise of that discretion is the amount that is counted as available for Medicaid eligibility." In *Johnson v. Guhl*, 357 F.3d 403, 409 (3rd Cir. 2004), the Court of Appeals held that an irrevocable annuity trust for a community spouse was countable because she might share it with the institutionalized spouse after receipt. Events under the control of other third parties, however, appear to be too speculative to trigger the any circumstances test. For example, in *Verdow v. Sutkowy*, 209 F.R.D. 309 (N.D. N.Y. 2002), the Department argued that New York law permits the revocation of a trust when there is unanimous consent to do so and, therefore, retention of a power to change beneficiaries arguably makes the trust revocable because the grantor could name different beneficiaries who would revoke the trust. The court rejected this argument as too speculative.

3d 1035 (2003). 42 U.S.C. § 1396p(d)(3)(i).[72] Under this circumstance, any payment of corpus or income to or for the benefit of the individual is treated as income and any payment to someone else is a transfer of resources subject to the penalty rules. To the extent that no payment could be made to the benefits applicant under any circumstances, then a transfer of resources for less than fair market value occurred as of the later of the date the trust was established, or the date on which payment was foreclosed. 42 U.S.C. § 1396p(d)(3)(ii). Certain transfers from one spouse into a sole benefits trust for the other spouse avoid imposition of the transfer penalty rules.[73]

The bottom line is (d)(3) does not allow a grantor to form an exempt trust and benefit from it unless the exception in (d)(4) applies. Under (d)(3), it's either/or.[74] When (d)(4) is followed, the grantor can benefit from an exempt trust.

2.2. What is a third-party trust?

A third party trust is a trust established entirely with assets that belong to someone other than the Medicaid or SSI applicant.[75] If the applicant has legal authority to revoke or terminate the trust and then use funds to meet his or her own needs, or if the applicant can direct the use of the trust principal for his/her support or maintenance

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72 It is worth noting that this is consistent with non-Medicaid law. The Georgia Trust Code provides that a settlor's creditors may reach assets within an irrevocable trust up to the "maximum amount that can be distributed to or for the settlor's benefit during the settlor's life or that could have been distributed to or for the settlor's benefit immediately prior to the settlor's death." O.C.G.A. § 53-12-82(2).

73 A sole benefits trust is one where no individual or entity except the spouse can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future. Transmittal 64, § 3257(b)(6). A case recently reported in the NAELA e-Bulletin took a different direction, finding that a spousal sole benefit trust was countable because the resources in the trust exceeded the eligibility limit. *See Hegadorn v. Dept. of Human Servs.*, No. 329508 (Livingston Cir. Ct. Mich. June 1, 2017), at http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20170601_C329508_63_329508.OPN.PDF.

74 Keeping in mind that a transfer penalty applies if the trust does not count and it was funded within 60 months prior to application.

75 POMS SI 01120.200.B.17.

under the terms of the trust, then the trust is a countable resource;[76] conversely, if the applicant does not have legal authority to revoke or terminate the trust, or to direct the use of trust assets for his/her own support and maintenance, then the trust is not countable.[77] If the beneficiary can sell his or her interest in the trust (e.g., there is no valid spendthrift clause), then the trust is countable.[78]

A more esoteric issue is whether a decanted or reformed trust is a third-party trust. In other words, is a payback provision necessary? Georgia policy "is that if the trust being reformed or modified [or from which it is decanted] does not clearly demonstrate within the four corners of the document that the settler contemplated the beneficiary's special needs and protection of the beneficiary's eligibility for assistance, then the reformation or modification must include a payback provision as being a court ordered SNT."[79]

2.3. SSA Review of Trusts.

Trusts are generally reviewed under POMS SI 01120.202.B.1, using the seven-step process described below. The most recent change in the POMS relating to trusts is in step 2. If the trust contains no assets of the individual, the casework "stops" and follows the instructions in POMS SI 01120.200 (which are viewed in Section 2.2 above).

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[76] POMS SI 01120.200.D.1.a.

[77] POMS SI 01120.200.D.2. Whether the trust is revocable, as well as the beneficiary's ability to direct the use of trust principal, depends on the trust instrument and on State law. If the trust is irrevocable by its terms and under State law, and its use cannot be directed by the beneficiary due to a valid spendthrift clause, then it is not a countable asset. *Id*.

[78] POMS SI 01120.200.D.1.a.

[79] W. Overman & L. Peters, *The DCH Trust Unit: Review of Special Needs Trusts and SNT Accountings*, in Special Needs Trusts (ICLE of Georgia 2014). In *Simonsen v. Bremby*, 2015 U.S. Dist. LEXIS 171099, Case No. 15-cv-1399 (D. Conn. December 23, 2015), the State claimed that two decanted trusts were available. The Court granted a preliminary injunction prohibiting the termination of Medicaid benefits after finding that the Plaintiff would likely succeed on the merits because the original trusts were discretionary and included spendthrift clauses.

POMS SI 01120.202: Eight Step SSI Initial Review of All Trusts

<table>
<tr><th>STEP</th><th>ACTION</th></tr>
<tr><td>1</td><td>Obtain and review a copy of the trust and all related documents.</td></tr>
<tr><td>2</td><td>Does the trust contain any assets of the individual?
If no, follow instructions in SI 01120.200. STOP.
NOTE: If the individual adds any of his or her assets to a third party trust on or after 01/01/00, redevelop the trust per SI 01120.201 through SI 01120.204.
If yes, go to Step 3.</td></tr>
<tr><td>3</td><td>Determine the date the individual transferred his or her assets to the trust. To know which instruction to follow, see SI 01120.201C.1 and SI 01120.202A.1.b.
If the individual transferred any of his or her assets prior to 01/01/00, follow instructions in SI 01120.200. STOP.
If the individual transferred all of his or her assets in the trust on or after 01/01/00, go to Step 4.</td></tr>
<tr><td>4</td><td>Consult national and regional instructions to determine if the trust is revocable or irrevocable (for determining revocability of the trust, see SI 01120.202A.3):
If you are unable to make a determination, consult with your RO programs staff.
If the trust is revocable, go to Step 5.
If the trust is irrevocable, go to Step 6 (SI 01120.201D.2).</td></tr>
<tr><td>5</td><td>The trust is a resource unless an exception applies. To see if an exception applies, go to SI 01120.203A. For treatment of revocable trusts, see SI 01120.201D.1.</td></tr>
<tr><td>6</td><td>For the policy on irrevocable trusts see SI 01120.201D.2.
Does the trust also contain assets of a third party?
If yes, determine the amounts in the trust attributable to the individual and the third party. Develop resource treatment of the portion attributable to the third party under SI 01120.200. Go to Step</td></tr>
</table>

STEP	ACTION
	7 for the portion of the trust attributable to the individual. • If **no**, go to **Step 7**.
7	Are there **any** circumstances that would allow payment from the trust to or for the benefit of the individual? • If **no**, the trust is not a resource, refer to SI 01150.100 to see if a transfer penalty is applicable. • If **yes**, the trust is a resource in the amount that the trust can pay out from the portion attributable to the individual unless an exception applies; go to SI 01120.203 to see if an exception applies.

2.4. The Five-Step Trust Process.

The remainder of this paper generally follows the "five-step trust process" described by Timothy L. Takacs in *Elder Law Practice in Tennessee*, § 14.06 (LexisNexis). The five steps are: (1) creation of the trust; (2) tax recognition of the trust; (3) funding the trust; (4) administration of the trust; and (5) distributions from the trust.

Chapter 3. Creation of the Trust: Formation and Structure

3.1. Summary of SNT Structure and Attributes

There are four basic trust structures. SNTs (self-settled trusts) must comply with 42 U.S.C. § 1396p(d)(4)(A) (individual trusts) or (d)(4)(C) (pooled trusts). Supplemental needs trusts vary greatly since the only limitations on their structure are found in the POMS. A hybrid trust structure, the sole benefit trust, is used by a settlor to protect a disabled family member as part of the settlor's Medicaid spend-down. Basic attributes are as follows:[80]

Type	**Statutory Auth.**	**Who Establishes?**	**Whose Funds?**	**Payback Provision?**	**Age Limit**	**Frequently Used For**
d4A Disability Trust	42 U.S.C. § 1396p(d)(4)(A)	Parent Grandparent Legal Guardian Court[81]	Individual with Disability	Yes	Funded by 65	Personal injury settlement, or unexpected inheritance, or assets owned by recently disabled adult
Third Party SNT	Not Specifically Authorized	Third Party (not the beneficiary)	Third Party (not individual)	No	No	Parent planning for child Testamentary gift to disabled individual; Coordinate testamentary gifts
d4C Pooled Trust	42 U.S.C. § 1396p(d)(4)(C)	Parent Grandparent Legal Guardian Court Individual	Individual with Disability	Depends on Joinder Agreement	No, but penalty period if 65 or older in some states	Smaller amounts of personal injury settlements or inheritance
Sole Benefit Trust	42 U.S.C. § 1396p(c)(2)(B)(iii) or (iv)	Third party (not the beneficiary)	Third party	Yes, unless actuarially sound	Yes, unless beneficiary is settlor's child	As part of settlor's spend-down when qualifying for Medicaid

3.2. The d4A Trust

A d4A trust, also known as a "self-settled trust" or a "d4A disability trust" is an individual (non-pooled) trust that must comply with 42 U.S.C. § 1396p(d)(4)(A). The text of the stature is as follows:

> 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 a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the

80 The table is based on a table that appears in B. Frigon & W. Kuhn, *Which SNT, When and Why?*, 5 NAELA Journal 1 (2009). It has been modified for this paper.

81 The Special Needs Trust Fairness Act (S.349, 114th Congress) was introduced to allow the beneficiary to establish his or her own trust. The Senate Committee on Finance reported favorably and recommended passage. S. Rep. 114-99, at https://www.naela.org/NAELADocs/CRPT-114srpt99.pdf. As of the time this paper was prepared, the bill was in the House Energy & Commerce Committee.

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.

Noting the brevity of d4A, Attorney Timothy L. Takacs observed that a one-page special needs trust technically complies with the statute. Takacs distributed the following form during a program hosted by Robert Fleming (author of Elder Law Answers) and Julie Osterhout:

Form: One Page Special Needs Trust

Special Needs Trust under Section 1917(d)(4)(A) of the Act

This trust is established under Section 1917(d)(4)(A) of the Social Security Act (42 U.S.C. section 1396p(d)(4)(A)).

1. This trust is established with the assets of an individual (Charlotte D. Jones) under age 65. Her date of birth is October 26, 1962.

2. Charlotte D. Jones is disabled as defined in 42 U.S.C. section 1382c(a)(3).

3. Charlotte D. Jones is the sole Beneficiary of the trust.

4. The trust is established by [choose one] ~~a parent, grandparent, legal guardian or~~ a court under an order in the case of *In re the Conservatorship of Charlotte D. Jones,* Probate Court of Davidson County, Tennessee, Case No. 2017P-12345. A. B. Jones is the legal guardian of Charlotte D. Jones and is the Trustee of the trust.

5. On the death of the Beneficiary the trust shall terminate. Upon termination, the Trustee shall distribute the assets of the trust as follows:

First, taxes due from the trust to the State or Federal government because of the death of the Beneficiary; and reasonable fees for administration of the trust estate such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust.

Next, all proper state claims for reimbursement for Medical Assistance paid on behalf of the Beneficiary under a State Medicaid plan, up to an amount equal to the total Medical Assistance paid on behalf of the Beneficiary under a State Medicaid Plan.

Next, unless other provisions have been made, last-illness and funeral expenses.

Last, of the remaining trust estate, in equal shares to John Jones and Jane Jones.

6. None of the Beneficiary's assets were transferred to the trust after the Beneficiary attained age 65.

7. The trust is irrevocable.

8. The Trustee is authorized, but not required, to make distributions from the trust to or for the benefit of the Beneficiary, in the Trustee's sole, absolute, and uncontrolled discretion. The Trustee shall make no distributions that would result in a loss or reduction of public benefits (such as Medicaid or SSI), unless the Trustee

believes that the advantage of making such distributions outweighs the loss of such benefits.

9. The assets of the trust shall be free from the claims of any creditors of the Beneficiary and may not be anticipated or assigned.

10. The Trustee shall have those powers set forth in T.C.A. § 35-50-110 and § 35-15-816, which are incorporated herein by reference.

In addition to these powers, the Trustee may hold real estate as an asset of the trust, even if unproductive, including a residence for the Beneficiary, and may make payments from the trust for taxes, insurance, upkeep, and the like on the real estate.

The Trustee may use trust assets to employ agents and advisers, including care managers, investment and trust accounting services, administrative expenses, and reasonable compensation to the Trustee for his services.

The Trustee may designate a successor Trustee, effective upon the resignation, incapacity, or death of the Trustee.

(Signatures)

Other requirements relating to trust structure appear in the Social Security Administration's (SSA) Program Operations Manual System (POMS). POMS SI 011201.D provides that the trust must be irrevocable. After the individual attains the age of 65, no additional funds can be placed in the trust. If the trust is terminated prior to the beneficiary's death, funds cannot be distributed to the beneficiary until Medicaid is reimbursed for any medical assistance provided.[82]

SSA formerly took the position that funding the trust is an integral element when establishing a trust. Since the beneficiary could not establish his or her own trust prior to 2016, improper funding was a trap for the uninitiated.[83] In *Draper v. Colvin*, 779 F.3d

82 If the Trustee has power to terminate a trust prior to the beneficiary's death, the trust must comply with POMS SI 01120.199. Subsection F.1 provides, if a trust is terminated prior to the beneficiary's death, the trust must name the State as primary assignee, to receive all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary; other than pay of expenses authorized in SI 01120.199F.3 and F.2.c, no one other than the beneficiary may benefit from early termination; and someone other than the beneficiary must hold the power to terminate the trust. In *Austin v. Capital City Bank*, 2015 Kan. App. Unpub. LEXIS 532 (June 26, 2015), the sole issue on appeal was whether *Ahlborn* limited the state's right of recovery to the portion of trust funds related to medical expenses. The court found it did not.

83 *See* example at POMS SI 01120.200(L)(3).

556 (8th Cir. 2015),[84] attorneys settled a personal injury case for Stephany Draper. Her parents then signed documents creating the Stephany Ann Draper Special Needs Trust. Her parents intended to comply with d4A. The trust listed the sole initial funding source as "proceeds from the settlement of a liability claim." The trust was funded with a single deposit from the settlement the same day the trust agreement was signed. SSA later notified the Drapers that Stephany was over resourced, including the funds in the trust when determining she had more than $2,000. An ALJ upheld SSA's determination, finding that her parents must act as third-party creators when establishing the trust. According to SSA, Stephany's parents could not have acted as third parties because the initial funding was entirely with Stephany's assets. On appeal, the Eighth Circuit upheld the Commissioner and the District Court, finding d4A sufficiently ambiguous for agency interpretations to apply. POMS SI 01120.203 indicates assets of the disabled individual must be put into a trust established

> through the actions of the disabled individual's: parent(s); grandparent(s); legal guardian(s); or a court. POMS SI 01120.203B(1)(f). When a parent seeks to establish a trust for a legally competent adult, the POMS states that the parent "may establish a 'seed' trust using a nominal amount of his or her own money, or if State law allows, an empty or dry trust." *Id.* After a seed trust or an "empty" or "dry" trust is established, "the legally competent disabled adult may transfer his or her own assets to the trust or another individual with legal authority (e.g., power of attorney) may transfer the individual's assets into the trust." *Id.*

The Draper's argued they complied with the POMS by establishing a dry trust, which was permitted under South Dakota law. That argument was rejected because the trust was not designed as a dry trust. It had an initial *res* – the

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[84] http://media.ca8.uscourts.gov/opndir/15/03/132757P.pdf. Other cases supporting the same result reached in *Draper* are cited in R. Lacey, *The Special Needs Trust Decision Tree*, p. 12, in Special Needs Trusts (ICLE in Georgia 2014).

proceeds from the personal injury settlement. Since the trust was not designed as a dry trust, the Court looked to *Restatement (Third) of Trusts* § 2, finding that an agreement or trust instrument does not create a trust because of the absence of trust property. Both the POMS and traditional trust law hold that someone with a legal interest in the entire res must be involved in the trust's creation, otherwise the trust is invalid.[85] Because Draper's parent's had no interest in the settlement proceeds, they necessarily acted as Stephany's agent under the power of attorney when they funded the trust. When they took that action "the POMS considered the trust to be established through the actions of" Stephany herself.[86]

Adherence to the two-ten buck rule would have kept the Drapers safe, preventing protracted litigation. As Robert Fechtman explains in How to Draft and Administer the Perfect Special Needs Trust (February 2015), the settlor contributes $10 of his or her own money as initial funding, to ensure the trust is "established" by someone other than the beneficiary. The beneficiary's funds are then contributed. The second ten bucks would fix problems associated with the doctrine of worthier title if it was still the law in Tennessee.[87] It does so by naming a specific individual to receive $10 following the death of the beneficiary.

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[85] *Citing Restatement (Third) of Trusts* § 41 cmt. B (2003).

[86] The Court rejected the Draper's attempt to use a State court order to establish the trust nunc pro tunc. The State court did not establish the trust; instead, it assigned itself a retroactive role in an already established trust. By way of dicta, the Court did offer advice to future planners. The court noted the Drapers could have dissolved and recreated the trust.

[87] Many States, including Tennessee, have eliminated the doctrine of worthier title. *See* T.C.A. § 66-1-111. Georgia similarly eliminated the doctrine of worthier title by statute in 1973 at G.C.A. § 108.111-1. It was re-codified in 1981 as O.C.G.A. § 53-12-3. The 1991 revision of the trust code expressly provided that a settlor shall have no power to modify or revoke a trust in the absence of an express reservation of that right. The 2010 trust code revision resolved all uncertainty by providing in O.C.G.A. § 53-12-44 that a trust is not revocable mere because the life beneficiary has a reversion in the assets, has a power of appointment over the assets, or because the life beneficiary's heirs or estate have a remainder interest. *See* M. Radford, Georgia Trusts and Trustees § 3.2.

Query, whether a pre-2016 court established trust falls under the rule in *Draper*. In Georgia, it should not. In *Hayes v. Clark*, 242 Ga. App. 411 (2000), the Court of Appeals found that a court with power to transfer legal title to property can be the settlor of a trust. The issue, however was resolved with passage of the Special Needs Trust Fairness Act, signed by President Obama on December 13, 2016.[88]

A special needs trust must be for the "sole benefit" of the benefits applicant. In *Stahl v. Commissioner*, 2015 U.S. Dist. LEXIS 119965 (S.D. Ohio 2015), SSA found that an alleged special needs trust did not meet the requirements of (d)(4)(A) and denied SSI eligibility because a provision in the trust permitted termination of the trust, and distribution to other beneficiaries, if the purpose of the trust was frustrated. Specifically, the trust provided:

> If a beneficiary alienates or attempts to alienate any interest or right to receive payments under any trust created by this document, or if, by any reason the payments or any part thereof would but for this Item become payable to or pass to for the benefit of any person, corporation or governmental agency other than the beneficiary, then the interest in and the right of the beneficiary to receive the payments will cease and terminate and thereafter the payments, or any part thereof forfeited by the beneficiary, will be applied as determined by the Trustee in the Trustee's uncontrolled discretion <u>to the use of any other beneficiary or beneficiaries</u> in the manner and portions as the Trustee determines. (Emphasis added).

[88] Section 5007 of H.R. 34, titled Fairness in Medicaid Supplemental Needs Trust. Background for the Act is discussed in B. Krooks and A. O'Hara, *Special Needs Trust Fairness Act Becomes Law*, Wealth Management (12/16/2016), at http://www.wealthmanagement.com/estate-planning/special-needs-trust-fairness-act-becomes-law.

Stahl argued this language did not prevent the trust from complying with (d)(4)(A). The ALJ, relying on the POMS, found otherwise. On review, the district court, citing *Draper*, upheld the ALJ's decision based on the POMS.[89]

If a trust is established through the actions of a court, the creation of the trust must be required by the Court.[90] Approval of the trust is not sufficient. POMS SI 01120.203(B)(1)(f).

POMS SI 01120.203(D) includes the following eight-point checklist for reviewing d4A trusts:

POMS SI 01120.203(D): Eight Step SSI Review of (d)(4)(A) Trusts

STEP	ACTION
1	Does the trust contain the assets of an individual who was under age 65 when the trust was established? (SI 01120.203B.1.b. in this section). • If **yes**, go to **Step 2**. • If **no**, go to **Step 8**.
2	Does the trust contain the assets of a disabled individual? (SI 011203B.1.d.) • If **yes**, go to **Step 3**. • If **no**, go to **Step 8**.
3	Is the disabled individual the sole beneficiary of the trust? (SI 01120.203B.1.e.) • If **yes**, go to **Step 4.** • If **no**, go to **Step 8.**
4	Did a parent, grandparent, legal guardian or a court establish the trust? (SI 01120.203B.1.f. in this section). • If **yes**, go to **Step 5**. • If **no**, go to **Step 8.**

89 *See also Ham v. Colvin*, 2015 U.S. Dist. LEXIS 50805 (D. Neb. 2015) (finding that an early termination provision entitled "Shielding trust from third parties" included language violated POMS).
90 This should no longer be an issue after passage of the Special Needs Trust Fairness Act.

5	Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death as required in SI 01120.203B.1.h. in this section? • If **yes**, go to **Step 6**. • If **no**, go to **Step 8**.
6	The trust meets the special needs trust exception to the extent that the assets of the individual were put in trust prior to the individual attaining age 65. Any assets placed in the trust after the individual attained age 65 are not subject to this exception, except as provided in SI 01120.203B.1.c. in this section. Go to **Step 7** for treatment of assets placed in trust prior to age 65. Go to **Step 8** for treatment of assets placed in trust after attaining age 65.
7	Evaluate the trust under SI 01120.200D.1.a. to determine if it is a countable resource.
8	The trust (or portion thereof) does not meet the requirements for the special needs trust exception. Determine whether the pooled trust exception in SI 01120.203B.2. applies.

3.3. The d4C Trust

Pooled Trusts, also known as d4C trusts, are governed by 42 U.S.C. § 1396p(d)(4)(C). The text of the statute is as follows:

> 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.

A pooled trust is established by and managed by a charity.[91] Individual beneficiaries join a master trust, usually by executing a joinder agreement. This management structure creates an arm's length appearance which some beneficiaries dislike. There are, however, advantages. Pooled trusts typically pool and therefore, minimize expenses. The charity invests the pool, usually, under the direction of a professional investment advisor. Subaccounts are kept separate for purposes of distributions and for allocating income.

Unlike (d)(4)(A) trusts, any disabled individual of any age may establish a pooled trust subaccount. However, some states such as Georgia take the view that transfers to a pooled trust subaccount after age 65 are subject to a transfer of resources penalty. Georgia's view stems from an apparently typo (an omission) in Section 1396p(c)(2)(B)(iv). That subsection expressly exempts transfers to a (d)(4) trust for the benefit of an individual under 65 years of age, but says nothing about (d)(4)(C) trusts for individuals over 65. Georgia appears to be misreading the subsection, since the effect is to graft a non-existent age limitation on (d)(4)(C) trusts.

Transmittal 64 takes a different view in analyzing this issue, which appears to be Tennessee's current position.[92] It adopts a "wait and see" approach, analyzing how

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91 If a non-profit employs the services of a for-profit entity, the non-profit must maintain ultimate management control. *See* POMS SI 01120.225.D.

92 Rather than disallowing a pooled trust established after age 65, Section 110.055 of the Tenncare manual cross-references the transfer of assets provisions in Section 125.010. Section 125.010 instructs caseworkers to contact the policy unit when a pooled trust is funded for someone over 65. Presumably eligibility decisions are made on a case-by-case basis.

distributions are used and applying a “for fair market value” approach. Section 3259.7B(2) provides:

> Resources placed in an exempt trust for a disabled individual are subject to imposition of a penalty under the transfer of assets provisions unless the transfer is specifically exempt from penalty as explained in §3258.10 or unless the resources placed in the trust are used to benefit the individual, and the trust purchases items and services for the individual at fair market value. See subsection C for the rules concerning application of the transfer of assets provisions to assets placed in an exempt trust. These rules apply to both income and resources placed in the exempt trusts discussed in this section.[93]

Thus far, the application of a transfer penalty on transfer to subaccounts for individuals over 65 has not been tested at the appellate level, but various practitioners, including Timothy Takacs and Amelia Crotwell, have had them approved at the trial court or administrative level.

Section (d)(4)(C) also permits the trust to avoid payback by allowing the charity to retain funds. Some states, such as Georgia, refuse to recognize the charity’s right to retain funds instead of payback. Tennessee appears to let pooled trusts retain funds.[94]

POMS SI 01120.203.D.2 provides the following eight-point checklist for evaluating a pooled trust:

POMS SI 01120.203: Eight Step SSI Review of (d)(4)(C) Trusts

STEP	ACTION
1	Does the trust account contain the assets of a disabled individual? (See SI 01120.203B.2.b. in this section) . • If **yes**, go to **Step 2**. • If **no**, go to **Step 8**.

[93] *See* D. Fitch, *Pooled Trust*, at https://www.elderlawminnesota.com/pooled-trust.
[94] *See*, e.g., page two of the Vista Points Joinder Agreement, at http://www.vistapoints.org/Forms/PooledJoinderAgreement-VistaPoints.pdf.

2	Was the pooled trust established and maintained by a nonprofit association? (See SI 01120.203B.2.a., SI 01120.203B.2.c. and development instructions in SI 01120.203F in this section). • If **yes**, go to **Step 3**. • If **no**, go to **Step 8**.
3	Does the trust pool the funds, yet maintain an individual account for each beneficiary, and can it provide an individual accounting? (SI 01120.203B.2.d. in this section). • If **yes**, go to **Step 4**. • If **no**, go to **Step 8**.
4	Is the disabled individual the sole beneficiary of the trust account? (SI 01120.203B.2.e. in this section). • If **yes**, go to **Step 5**. • If **no**, go to **Step 8**.
5	Did the individual, parent(s), grandparent(s), legal guardian(s) or a court establish the trust account? (SI 01120.203B.2.a. and SI 01120.203B.2.f. in this section). • If **yes**, go to **Step 6**. • If **no**, go to **Step 8**.
6	Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death from funds not retained by the trust as required in SI 01120.203B.2.g. in this section? • If **yes**, go to **Step 7**. • If **no**, go to **Step 8**.
7	The trust meets the Medicaid pooled trust exception, however, the trust still should be evaluated under SI 01120.200D.1.a. to determine if it is a countable resource.
8	The trust does not meet the requirements for the Medicaid pooled trust exception. Determine if the undue hardship waiver applies under SI 01120.203E in this section.

As of June 2017, the following pooled trusts were identified as operating in Tennessee:

List of Pooled Trusts in Tennessee

Organization	**Contact**	**Location**	**Contact number**
FOSC Tennessee Pooled Trust	531 Broad Street Chattanooga, TN 37402	Chattanooga	423.668.3073
Vista Points	1550 N. Mt. Juliet Road, Suite 203 Mt. Juliet, TN 37122	Mt. Juliet	615.758.4660
Commonwealth Community Trust	P.O. Box 29408 Richmond, VA 23242	Virginia	804-740-6930
Guardian Trust	901 Chestnut Street, Suite C Clearwater, FL 33756	Florida	(727) 210-1185
Special Needs Integrity, Inc.	9785 Crosspoint Blvd. Suite #116 Indianapolis, IN 46256	Indiana	(317) 841-8795
Secured Futures	4747 E. Elliot Rd., Suite 29-217 Phoenix, AZ 85044	Arizona and Pennsylvania	602-635-6674
Shared Horizons	4301 Connecticut Ave., NW Suite 310 Washington, DC 20008	WDC	(202) 448 - 1460

3.4. Third Party Trusts

A third party, usually called a supplemental needs trust, is established by someone other than the person with disabilities. Usually, but not always, it is established by a parent.[95] These trusts are funded with assets that never belonged to the beneficiary. They are often used, when proper planning is done for a disabled person's

95 If the person creating the trust fails to establish the trust correctly, a petition for reformation might be a remedy. Tennessee permits reformation under T.C.A. § 35-15-415. Georgia law permits reformation of the trust if it is proved by clear and convincing evidence that the trust provisions were affected by a mistake of fact or law. O.C.G.A. § 53-12-60.

family, to hold an inheritance or gift. Without planning, a well-meaning family member might simply leave an inheritance to an individual with a disability; the Medicaid beneficiary frequently loses Medicaid while spending down the inheritance, going back on Medicaid when the resources are exhausted. Even though it may be possible to set up a trust after the fact, a poorly planned gift often vests in the beneficiary. Any trust formed after property rights vest in the beneficiary must be a "self-settled" special needs trust, rather than a third party trust.

Parents, grandparents and others with the foresight to leave funds in a third party special needs trust will provide significantly better benefits to the applicant.[96] This type of trust will not need a "payback" provision for Medicaid benefits upon the applicant's death. During the beneficiary's life, distributions are often more generous and flexible.

Third Party Trusts are not subject to 42 U.S.C. § 1396p(d) **if** they are properly drafted and funded. Instead, the issue with third party trusts is whether the beneficiary has control over income and/or principal. "If an individual (claimant, recipient, or deemor) has legal authority to revoke or terminate the trust and then use the funds to meet his food or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance under the terms of the trust, the trust principal **is** a resource for SSI purposes." Social Security Administration's Program Operation Manual System ("POMS") SI 01120.200 D.1.a. Conversely, if "an individual does not have the legal authority to revoke or terminate the trust or to direct the use of

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96 L. Hanson, *Developing an Estate Plan for Parents of Children with Disabilities: A 15 Step Approach* (The Voice, May 2013), available at: http://www.specialneedsalliance.org/the-voice/developing-an-estate-plan-for-parents-of-children-with-disabilities-a-15step-approach-2/.

the trust assets for his/her own support and maintenance, the trust principal **is not** the individual's resource for SSI purposes." POMS SI 01120.200 D.2. The same analysis should apply to Medicaid eligibility in SSI states.

3.5. Sole Benefit Trusts

Most special needs trust are "self-settled" or "third party" trusts as described above. There is, however, a hybrid variety used when the grantor is the person seeking Medicaid eligibility and wants to establish a trust for someone else.[97] This hybrid trust is known as a sole benefit trust. *See* 42 U.S.C. § 1396p(c)(2)(B)(i)[98] and (c)(2)(B)(iv). The Medicaid rules permit applicants to make unlimited gifts to or "for the sole benefit of" disabled children or spouses.[99] Therefore, some individuals with assets choose to establish a sole benefit trust for a child (or other family member) with disabilities while, at the same time, securing Medicaid eligibility for the grantor.[100] Some states are restrictive in their interpretation of the "sole benefit" requirement. In many ways they look like a hybrid of the two other trust types; they may be taxed and treated as third-party trusts, but require a payback provision like a self-settled trust (at least in some

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97 R. Mason, *Sole Benefit Trusts Are Not Solely One Kind of Trust* (2011) (to be published in the Voice, a publication of the Special Needs Alliance). *See also* R. Mason, *Drafting a Sole Benefit Trust for an SSI Beneficiary* (reprint from July/August/September issue of the NAELA News), available at: https://trustchimp.com/drafting-sole-benefit-trust-ssi-beneficiary/.

98 Some States take the position that spousal transfers, whether they are direct or in a sole benefit trust, cannot exceed the Community Spouse Resource Allowance. *See, e.g.*, *Burkholder v. Lumpkin*, 2010 U.S. Dist. LEXIS 11308 (N.D. Ohio 2010), where Ohio successfully penalized a transfer beyond the CSRA to a spouse who then paid down her home mortgage. *Burkholder* is a result oriented misreading of Section 1396r-5. A more principled reading of that section would recognize that transfers between spouses are exempt and any asset limitation imposed through 42 U.S.C. § 1396r-5 relates to a Community Spouse's ability to retain countable assets exceeding the CSRA; in other words, while Section 1396r-5 may or may not limit the CSRA, it does not re-write the clear text of section 1396p(c)(2)(B) which expressly exempts spousal transfers from the penalty rules.

99 Property can be gifted directly to a spouse or a disabled child, but a Medicaid applicant may establish a sole benefit trust for any disabled person under 65 without the imposition of a transfer penalty.

100 *See* POMS SI 01120.201.F.2 (describing a "Trust Established for the Sole benefit of an Individual").

states). A CMS letter dated June 27, 2006, indicates that inclusion of a pay-back clause is not the test for these trusts; the proper inquiry is whether the trust is structured so that all trust income and principal is paid to the beneficiary during the beneficiary's actuarial lifetime. In Georgia, although the Department takes the view that a sole benefit trust must be actuarially sound, it recognizes that trusts meeting the criteria in 42 U.S.C. § 1396p(d)(4) are a "sub-set of sole benefit transfers to trust" *See* CMS Letter from Ginna Hain to Mary O'Byrne, dated June 27, 2005.[101] Trusts meeting the criteria in Section 1396p(d)(4) need not be actuarially sound.[102]

In most cases, it should not matter whether the sole benefit trust is making actuarially sound payments because the focus is on the grantor's eligibility rather than that of the beneficiary. Still, where the beneficiary is on SSI, actuarially sound distributions could cause a loss of (or reduction in) SSI benefits. To prevent that from happening, the trust can be drafted to comply with the (d)(4)(A) rules as mentioned above, or it can be drafted to require distributions to a third party that result in the receipt of goods or services by the beneficiary and could further provide that distributions should only be made for goods and services other than food and shelter.[103] Alternatively, distribution language such as the following may be included: in considering distributions, the trust should make required distributions (i) first with distributions that do not constitute income to the beneficiary under SSI rules, (ii) and if the MRD has not been satisfied under the preceding, then with distributions that

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101 http://www.georgiamedicaidlaw.net/trusts/resources/CMS%20advice%20letter%20re%20sole%20benefit%20trusts%2006_27_06.pdf.

102 This issue is most critical when the beneficiary is receiving SSI because actuarially sound distributions could create an income stream that would render the beneficiary ineligible. Under those circumstances, it is preferable to retain funds inside the trust.

103 *See* POMS SI 01120.201.F.2.

constitute types and amounts of ISM that will not eliminate SSI, and (iii) only then consider making other distributions that could jeopardize SSI.[104]

3.6. Attorney's Fees

Attorney's fees were the subject of a recent presentation by David Lillesand. Lillesand argues that preparing a d4A, d4C or sole benefits trust for someone who intends to apply for SSI requires SSA approval of the planner's fee agreement, unless the fee is approved by a court.[105] Lillesand's concerns about having SSA approval of fee agreements appear to be unfounded. When the question of fee approval was posted to a contact with the SSA Regional Office, this was the response:

> I ran this issue past the other analysts who deal with attorney issues. None had heard of such a position from the Dallas region. We all agreed that SSA does not have any jurisdiction with regard to fees related to the establishment of trusts. We review trusts but do not have a say in how trusts are drawn up, executed, etc. Our authorized representative policy involves representation of a claimant before the agency on SSA issues. The establishment of the trust is not an action pending before the agency, therefore the agency does not have jurisdiction.[106]

Although the email quoted from above seems to resolve the issue, at this time there is no official guidance. Lillesand's concern may be a tempest in a teapot. On the other hand, if Lillesand is correct, then regardless of whether the Special Needs Trust Fairness Act is passed, it is likely attorneys will still go to have their fees approved.

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104 This distribution language appears in an article by Robert Mason, CELA, *Drafting a Sole Benefit Trust for an SSI Beneficiary*, at https://trustchimp.com/drafting-sole-benefit-trust-ssi-beneficiary/.

105 D. Lillesand, *Getting Properly and Legally Paid when Establishing or Defending a Special Needs Trust that Affects SSI Disability Benefits*, presented at 2015 Special Needs Trust National Conference (October 16, 2015), citing 20 C.F.R. § 416.1520(e)(2); POMS GN 03920.010.E for the proposition that court approval of fees obviates the need to submit a fee request to SSA.

106 Email exchange between William H. Overman and SSA Regional Office (July 2, 2015).

3.7. Providing Notice

If the trust beneficiary is receiving SSI, then a copy of the trust and all related documents should be sent to the local Social Security Office.[107]

If the trust beneficiary is receiving Tennessee Medicaid, then the trust should be sent to the appropriate local eligibility office.

Chapter 4. Tax Recognition of the Trust

Trust funds are held or invested under an individual's social security number or under an employer identification number (EIN).[108] Robert Fleming, a Certified Elder Law Attorney,[109] states that most grantor trusts do not require a separate EIN number. Fleming states the three most common situations where a separate EIN is required are:

- Life insurance trusts, or so-called "Crummey" trusts. Just because your trust owns life insurance it does not automatically follow that this special rule applies, but if it was set up precisely to own life insurance, and you are not the trustee, it likely needs its own number.
- A trust that became irrevocable because of the death of the person setting the trust up in the first place. This can happen when one spouse dies and a trust becomes partly irrevocable, too.
- A special needs trusts you set up (with your money) for the benefit of someone else, but which does not revert to you if the beneficiary dies before you — especially if you are not even the trustee.[110]

See also Fleming & Curti, *Income Taxation of the Self-Settled Special Needs Trust* (March 16, 2015);[111] *and see* Robert Mason, CELA, *Medicaid and VA Benefits Planning*

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107 *See* T. Begley & A. Canellos, *Special Needs Trusts Handbook* § 6.06, Appendix 6-10 (Aspen/Wolters Kluwer). Find local SSA offices at: https://secure.ssa.gov/ICON/main.jsp. The June 2017 issue of SNA's the Voice discusses the SSA review process. *See* http://www.specialneedsalliance.org/the-voice/the-social-security-administrations-special-needs-trusts-review-process/.

108 https://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Apply-for-an-Employer-Identification-Number-(EIN)-Online.

109 Mr. Fleming is co-author of the Elder Law Answer Book 3rd Edition.

110 Fleming & Curti, *Do you need a new tax ID number for your living trust?*, available at: http://issues.flemingandcurti.com/2009/08/17/do-you-need-a-new-tax-id-number-for-your-living-trust/.

with Irrevocable Trusts (updated regularly; available free at www.trustchimp.com after signing up for free newsletter).

If a separate EIN is required, trust income is reported on Form 1041.[112]

No attempt is made to address tax treatment (e.g., grantor trust status, etc.) in this paper, but tax treatment is addressed in the papers cited in this section.

Chapter 5. Funding the Trust

One of the basic questions is how much money (or other value) should be placed in the trust. With small estates, the answer may be easy: everything. With larger estates, the funding question is more complicated. The following seven variables should be considered: (1) Amount and timing of future contributions; (2) Trust distributions by year; (3) The number of years until the beneficiary's death; (4) Investment returns; (5) Trust expenses; (6) Remainder value at beneficiary's death; and (7) Present value of trust assets.[113] Two common assumptions planners make lead to flawed calculations. First, planners often assume a constant rate of inflation for expenses. "In real life, expenses will probably increase over time at a rate greater than inflation and will take step increases at major life transitions."[114] Second, planners often assume funding occurs once: "Big bang funding." Trusts may be funded in increments, over time, which requires an adjustment in the calculated investment return. Wright states: "For each year I calculate the net present value for trust income less distributions for all future years. The result in any given year is the dollar amount required to complete funding of

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111 http://issues.flemingandcurti.com/tag/ein/.

112 https://www.irs.gov/pub/irs-pdf/f1041.pdf .

113 H. Wright, *The Complete Guide to Creating a Special Needs Life Plan*, at 196-198 (Jessica Kingsley Publishers 2013).

114 *Id.*, at 197.

the trust. A negative number in a year indicates how much must be contributed in that year to complete the funding. A zero or positive [net present value] means the trust has been adequately funded; no further contributions are needed."[115]

Funding a special needs trust can be problematic. In *Harris v. Astrue*, 2012 U.S. Dist. LEXIS 138866 (W.D. Va.), the Commissioner counted worker's compensation payments as income even though they were being placed in a special needs trust. The reason for the Commissioner's position was that the payment could not be irrevocably assigned to the trust. Therefore, it was income prior to the time it arrived in the trust. This decision was premised on the Commissioner's interpretation of POMS SI 01120.200G, which the District Court sustained. A similar result was reached regarding Social Security payments in *Wong v. Daines*, 582 F. Supp. 2d 475 (S.D. N.Y. 2008).[116]

An asset is not subject to the trust's terms and conditions (or protected by them) until it is transferred to the trust; funding is critical.[117] Property is not effectively transferred to a trust until legal title is transferred to the trustee.[118] The transfer of real property requires recording in the appropriate property records.[119] Trust law provides that property may be added to an existing trust from any source in any manner that is not prohibited by the trust instrument so long as the trustee accepts the property.[120]

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115 *Id.*, at 198. Wright notes that special needs planning is a lifelong process, not a one-time event. The funding plan should be reviewed regularly by a financial processional adept at planning for special needs individuals.

116 *See also*, discussion of *Wong v. Doar*, 571 F.3d 247 (2nd Cir. 2009), *infra*.

117 This is the rule when an asset is transferred during the transferor's life. O.C.G.A. § 53-12-400(b). If the transfer is by will, then the asset is subject to the trust on the date of the testator's death. *See* T.C.A. § 35-15-401 and § 35-15-402(d) (effective July 1, 2017).

118 O.C.G.A. § 53-12-25(a).

119 *Id*. *See* T.C.A. § 35-15-401 and § 35-15-402(d) (effective July 1, 2017).

120 O.C.G.A. § 53-12-26. Additions to trust principal made directly to an exempt trust are not income to the grantor, trustee or beneficiary for SSI purposes. POMS SI 01120.200.G.1.b; POMS 01120.201.J.1.b. Additions to a countable trust are either income or a conversion of resources, depending on the source. POMS SI 01120.200.G.2.b and G.1.d.

However, if the applicant's funds were used to form all or part of the trust corpus, then Medicaid will treat the trust as a self-funded trust, meaning the age limitations and payback provisions of (d)(4) apply.[121]

A trust may be established by Will and funded through probate if the trust is in the Will, or if it is identified in the Will and its provisions are set forth in a written trust instrument. The trust may be executed with the Will or may be one previously established, including one created in the Will of someone who predeceased the testator. A device or bequest to a trust is not invalid because the trust is amendable or revocable, or because the trust was amended after the execution of the Will or the testator's death.[122] However, unless the Will provides otherwise, a devise or bequest to a trust lapses if the trust is revoked.[123] It should be noted, however, that testamentary funding of a trust that is not established by Will does not meet the exception 42 U.S.C. § 1396p(d)(2)(A).[124]

A trust established by Will may be named as beneficiary of a qualified retirement account, an individual retirement account or a life insurance policy so long as the Will is admitted for probate in solemn form.[125] Designation of a trust under a Will does not (necessarily) cause the testator's estate to be treated as the designated beneficiary and

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121 42 U.S.C. § 1396p(d)(2)(A). Subsection 1396p(d)(2)(B) limits application of the Medicaid trust rules to the portion of the trust attributable to the applicant's assets.

122 O.C.G.A. § 53-12-101(a).

123 O.C.G.A. § 53-12-101(c).

124 Section 1396p(d) applies to self-settled trusts established "other than by will." *See also* POMS SI 01120.201.B.6.

125 O.C.G.A. § 53-12-120.

does not cause the assets to be treated as part of the testator's estate for non-tax purposes.[126]

Although assets within a special needs trust are exempt, they are countable until transferred to the trust. The effect of this rule was visible in *Wong v. Doar*, 571 F.3d 247 (2nd Cir. 2009), where Wong attempted to transfer his Social Security Disability Income to a special needs trust. Because Social Security payments are not assignable,[127] they were paid to Wong each month before he could transfer the income to the trust. Upon receipt, the income counted in determining Wong's patient liability before they were transferred to the trust; transfer to the trust did not alter this result.[128] A similar result was reached in *Reames v. Oklahoma Health Care Auth.*, 411 F.3d 1164 (10th Cir. 2005).

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126 For a simple discussion of conduit vs. accumulation trusts, see L. Davis, Naming a Special Needs Trust as Beneficiary of your IRA or Retirement Plan (The Voice, August 2014), available at: https://www.specialneedsalliance.org/the-voice/naming-a-special-needs-trust-as-beneficiary-of-your-ira-or-retirement-plan/. For a more in-depth discussion, *see* R. Keebler, *New Ruling Validates the IRA Inheritance Trust*, available at: http://ultimateestateplanner.com/wp-content/uploads/2014/07/IRSRulingValidatesIRAInheritanceTrust_Keebler2005.pdf; and B. Frigon, *IRAs, Qualified Plans, Pensions, etc. with the SNT Named as Beneficiary* (Stetson Special needs Trusts National Conference: Pre-Conference Tax Intensive, October 14, 2015), available at: http://www.stetson.edu/law/academics/elder/home/media/5.a%202-3%20p.m.%20Frigon.pdf.

127 A non-assignable income stream cannot be paid directly to the trust; accordingly, it is subject to the SSI and Medicaid income rules. POMS SI 01120.200.G.1.c; POMS SI 01120.201.J.1.c. If income can be assigned, and if the assignment is irrevocable, then the income is not subject to the SSI and Medicaid income rules. POMS SI 01120.200.G.1.d; POMS SI 01120.201.J.1.d.

128 The *Wong* decision is poorly worded, reaching the correct conclusion for the wrong reason. The District court appears to have reached the correct result, since it found that nothing prevents the Department from counting SSDI income before it is placed in the trust. The appellant decision focuses on Transmittal 64, § 3259.7 of the State Medicaid Manual without acknowledging the specific language applicable to Wong's situation: "Funds entering and leaving these trusts are generally treated according to the rules of the cash assistance programs, [and the Medicaid program] as appropriate." That provision goes on to distinguish income received and then placed into the trust from income irrevocably assigned to the trust. "When the right to income placed in the trust actually belongs to the trust[, not the individual,] the income does not count under SSI rules as income received by the individual." Footnote 13 to the appellate decision acknowledges the anti-alienation provisions of the Social Security Act, but reaches the remarkable conclusion that they are not relevant because Wong failed to invoke them. The court then appears to drop the ball by concluding "we have no difficulty concluding that SMM 3259.7 is persuasive in its post-eligibility treatment of SSDI income placed in § 1396p(d)(4)(A) Special Needs Trusts." As the language quoted above points out, it is incorrect to say that income can be counted when it is inside the trust; the correct analysis is that it is counted before it goes into the trust and that placing it inside the trust changes nothing.

If there is a Medicaid lien, it must be repaid before a special needs trust is funded. In *Sullivan v. County of Suffolk*, 174 F.3d 282 (2nd Cir. 1999), the Court held that a State's right to reimbursement is not altered by the payback provisions within 42 U.S.C. § 1396p(d)(4).[129] This result is consistent with *Wong* and *Reames* to the extent the holding suggests that transferring of funds into a special needs trust does not alter any claim or property rights attached to the resources when (or before) they are conveyed to the trust. Section (d)(4) does not divest the State of its reimbursement right in a third party recovery.

Another issue practitioners should watch for are cases where funds are from the National Vaccine Injury Compensation Program (VICP) or a settlement under the Federal Tort Claims Act (FTCA). Generally speaking, VICP funds cannot be placed in an SNT, and the federal government has refused to allow FTCA funds to be placed into an SNT.[130]

Finally, if a trust is funded with a settlement for a minor, and if the value of the gross settlement is less than $10,000, then the court approving the settlement based on affidavits from the legal guardian. If the settlement exceeds $10,000, then a hearing is required consistent with T.C.A. § 29-34-105.

Chapter 6. Administration of the Trust

Trust administration is complex, particularly with special needs trusts and supplemental needs trusts. Improper administration may result in a loss of, or reduction

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129 This result was modified somewhat by *Ark. Dep't of Human Servs. v. Ahlborn*, 547 U.S. 268 (2006), where the Supreme Court interpreted the anti-lien provisions to prohibit collection against that portion of a recovery unrelated to medical expenses.

130 W. Overman & L. Peters, *The DCH Trust Unit: Review of Special Needs Trusts and SNT Accountings*, in Special Needs Trusts (ICLE of Georgia 2014).

in, benefits. Prior to funding, a counseling session is appropriate with the beneficiary, interested family members, the trustee and others who will be involved.[131] Purposes for this meeting include identifying and articulating expectations, establishing a budget,[132] and educating participants concerning appropriate distributions in light of the public benefits rules.

6.1. Administration and Investments

A trustee is required to administer the trust in good faith, in accordance with the trust's provisions and purposes,[133] and solely in the interests of the beneficiaries.[134] This includes keeping trust property separate from other property.[135] The trustee must use such care and skill as a man of ordinary prudence would exercise in dealing with his own property.[136] The trustee has a duty to take and keep control of the trust property,[137] to preserve trust property,[138] and to make it productive.[139] Where there is a claim for or against the trust, the trustee has a duty to take reasonable steps to enforce or defend

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131 T. Begley & K. Behrens, *Allowable Distributions for Special Needs Trusts*, Presented at 2012 National Aging & Law Institute (November 8-10, 2012), p. 2 (hereinafter "Begley & Behrens, Allowable Distributions").

132 Considerations in developing a budget include the size of the trust and anticipated income, beneficiary living expenses and needs, life expectancy, anticipated extraordinary exepenses, an emergency fund, and reinvestment of income. Begley & Behrens, *Allowable Distributions*, *supra*, at 5.

133 O.C.G.A. § 53-12-240(b). A trustee shall exercise the judgment and care of a prudent person acting in a like capacity and familiar with such matters, considering the purposes, provisions, distribution requirements and other circumstances of the trust. O.C.G.A. § 53-12-241. Some commentators have questioned whether this standard means the trustee must also be faster than a speeding bullet and able to leap over tall buildings in a single bound.

134 Restatement (Second) of Trusts, § 170. The Restatement describes this as a duty of loyalty, as opposed to a sole benefit rule, indicating that the trustee has a duty not to profit at the expense of the beneficiary or to compete with him without consent. In fact, even where there is no breach of trust, the trustee is still accountable to the beneficiary for all profits. Restatement (Second) of Trusts, § 203.

135 Restatement (Second) of Trusts, § 179.

136 Restatement (Second) of Trusts, § 174.

137 Restatement (Second) of Trusts, § 175.

138 Restatement (Second) of Trusts, § 176.

139 Restatement (Second) of Trusts, § 181. Even so, the trustee is not liable for loss or depreciation in value of trust property, or for failure to make a profit, not resulting from a breach of trust. Restatement (Second) of Trusts, § 204.

those claims.[140] If a person (such as the settlor or a trust protector) has power to control the actions of the trustee, the trustee has a duty to act in accordance with the exercise of such power unless doing so would violate the terms of the trust or is a violation of a fiduciary duty.[141]

Unless a testator's Will provides otherwise, property devised or bequeathed to an existing trust is not deemed held under a testamentary trust; instead it is administered in accordance with the terms and conditions of the trust to which it is devised.[142]

Trustees are authorized to incur necessary and appropriate expenses.[143] If expenses are properly incurred in the administration of the trust, the Trustee is entitled to reimbursement.[144]

6.2. Investment decision-making process

Within a reasonable time after accepting the office of trustee, a trustee is required to review the trust assets and to make and implement decisions concerning the trust portfolio that bring it into compliance with the Trust Code.[145]

Investment and management decisions require that the trustee "exercise the judgment and care under the circumstances then prevailing of a prudent person acting

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140 Restatement (Second) of Trusts, § 177 (enforce claims); Restatement (Second) of Trusts, § 178 (defend actions). The trustee may also compromise, arbitrate or abandon claims if he does so with reasonable prudence. Restatement (Second) of Trusts, § 192.

141 Restatement (Second) of Trusts, § 185. This begs the question, under what circumstances might a Trustee refuse to follow direction from a Trust Protector? Frequently, Trust Protectors are appointed to either regulate the Trustee (or the Trust), or to make decisions that a fiduciary might be uncomfortable making. If the Trustee can reject that direction, then is the truly Trustee shielded when difficult decisions are delegated to a Trust Protector and, to what extent can a Trustee be regulated?

142 O.C.G.A. § 53-12-101(b). This is consistent with POMS SI 01120.201.B.6.

143 Restatement (Second) of Trusts, § 188. On November 17, 2015, the IndyStar (part of the USA TODAY Network) reported a dispute regarding expenses. A beneficiary claimed the National Foundation for Special Needs Integrity improperly paid millions of dollars in excessive trustee fees, and "various legal services." *See* M. Kwiatkowski, *Special Needs Integrity accused of having none*, available at: http://www.indystar.com/story/news/2015/11/16/nonprofit-accused-taking-millions/75886746/.

144 O.C.G.A. § 53-12-213.

145 O.C.G.A. § 53-12-342.

in a like capacity and familiar with such matters, considering the purposes, provisions, and distribution requirements of the trust."[146] Investment in any kind of property is authorized[147] as long as the trustee considers: (1) General economic conditions; (2) The possible effect of inflation or deflation; (3) Anticipated tax consequences; (4) The attributes of the portfolio, (5) The expected return from income and appreciation; (6) Needs for liquidity, regularity of income, and preservation or appreciation of capital; (7) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries or to the settlor; (8) The anticipated duration of the trust; and (9) Any special circumstances.[148] A trustee who has special skills (or who has represented that he or she has special skills) is obliged to use those skills.[149] Trustees may delegate investment and management functions to an agent if doing so would be prudent. The trustee must exercise reasonable care in selecting the agent, establishing the scope of any delegated powers and in periodically reviewing the agent's conduct.[150]

"Any determination of liability for investment performance shall consider not only the performance of a particular investment but also the performance of the portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust."[151] In reviewing compliance with the

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146 O.C.G.A. § 53-12-340(a).

147 O.C.G.A. § 53-12-340(e). The Code requires diversification unless special circumstances make it clear that the trust is better served by concentration of assets or unless the duty to diversify is waived. O.C.G.A. § 53-12-341.

148 O.C.G.A. § 53-12-340(b).

149 O.C.G.A. § 53-12-340(d); *See also* Restatement (Second) of Trusts, § 174.

150 O.C.G.A. § 53-12-345. Restatement (Second) of Trusts, § 171.

151 O.C.G.A. § 53-12-340(c). The limitation period for actions against trustees is ten years from when the cause of action accrues. O.C.G.A. § 9-3-27.

investment rules, the trustee's actions are evaluated in light of facts and circumstances existing at the time, and not by hindsight.[152]

Unless the duty is waived in the Trust Agreement, a Trustee shall exercise the judgment and care under the circumstances then prevailing of a prudent person acting in a like capacity and familiar with such matters, considering the purposes, provisions and distribution requirements of the Trust.[153] Essentially, this is a restatement of the Prudent Investor Rule. The nine factor non-exclusive list cited above should be considered.[154] The Trustee should also consider the portfolio as a whole,[155] and must use any special skill or expertise possessed by the Trustee.[156] So long as this decision-making process is used, the Trustee may invest in any kind of property or type of investment.[157]

Pursuant to T.C.A. § 35-3-102, all trustees, guardians and other fiduciaries in this state, unless prohibited, or another mode of investment is prescribed by the will or deed of the testator or other person establishing the trust, may invest all funds in their hands in securities specified in §§ 35-3-103 -- 35-3-111, and may also invest funds in income-producing commercial or residential property. The Trustee may also invest as permitted under the Trust document. T.C.A. § 35-15-815; T.C.A. § 35-15-105. T.C.A. § 35-14-103(b) further provides that the prudent investor rule may be expanded, restricted, eliminated or otherwise altered by the terms of the trust.

fi360, originally formed as the Center for Fiduciary Studies, provides education and professional training for fiduciaries. Fiduciary roles are distinguished as follows:

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152 O.C.G.A. § 53-12-343.
153 T.C.A. § 35-14-103(a). Subsection "(b)" permits waiver of the rule.
154 O.C.G.A. § 53-12-340(b).
155 O.C.G.A. § 53-12-340(c).
156 O.C.G.A. § 53-12-340(d).
157 O.C.G.A. § 53-12-340(e).

investment steward, investment advisor, and investment manager. A trustee would generally fall under fi360's definition of investment steward: "a person who has the legal responsibility for managing investment decisions, including plan sponsors, trustees, and investment committee members. Typically, an Investment Steward is not an investment professional, but is responsible for selecting and overseeing investment professionals to act as Investment Advisors or Investment Managers for the plan, foundation, endowment, or other entity served by the Investment Steward." Handbooks for investment stewards,[158] investment advisors,[159] and investment managers[160] are available for download.

Form: Investment Policy

I. PURPOSE:

One issue that should be acknowledged is that disabled individuals are usually out of the work force and, therefore, the resources available to them are the only resources they are likely to accumulate. For that reason, it is important to carefully consider all investments and all disbursements since either may place limited resources at risk. This document considers the investment of an individual's assets.

It is impossible to eliminate all risk. For example, money could be hidden in a safe deposit box, but inflation would chip away at its value. With that in mind, the goal of this policy is to minimize risk to an acceptable level.

The purpose of the following investment policy statement and guidelines are to:

- Establish the investment objectives, policies, guidelines and eligible securities relating to any investment owned by a person with a chronic condition and controlled by a surrogate (e.g., agent under a Power of Attorney, a Trustee, a conservator).
- Identify the criteria against which the investment performance will be measured

158 http://www.fi360.com/main/pdf/handbook_steward.pdf.
159 https://www.fi360.com/main/pdf/handbook_advisor.pdf.
160 http://www.fi360.com/main/pdf/handbook_manager.pdf.

- Communicate the objectives to others who have a vested interest or oversight responsibility (e.g., the owner, other family members, a Court supervising a conservatorship).
- Serve as a review document to guide the ongoing oversight of asset management on an annual basis.

II. GENERAL INVESTMENT POLICY AND RESERVE FUNDS:

A budget should be in place which includes an estimate of all necessary expenses over the next six (6) months. This budget should be calculated based on the owner's needs and should be distinct from any budget including the expenses of other persons (except legal dependents). The amount necessary to pay expenses over the next six (6) months is the Reserve. The person managing the owner's assets should maintain a Reserve Fund in an interest or non-interest bearing checking account, savings account, or in money market funds. The Reserve should always be accessible to pay for immediate needs as conditions change or as expenses come due. The Reserve should be adjusted not less than annually based on revisions to the budget.

III. GUIDELINES FOR INVESTING EXCESS RESOURCES:

The investment goal of the total fund is to achieve a higher rate of return than that of the Reserve Fund, balancing relative liquidity with risk potential. Investments may comprise the following categories:

Money Market Funds: Allowable range: 25% – 75% of invested assets

A quality money market fund will be utilized for the liquidity needs of the portfolio whose objective is to seek a high current income as is consistent with liquidity and stability of principal. The fund will invest in "money market" instruments with remaining maturities of one year or less, that have been rated by at least one nationally recognized rating agency (Standard & Poors, Moody's, Fitch) in the highest category for short-term debt securities. If non-rated, the securities must be of comparable quality.

Certificates of Deposit: Allowable range: 25% – 75% of invested assets

A certificate of deposit will be utilized in order to seek a current income higher than that of a money market fund. The CD may be for a term not to exceed 2 years. It is suggested that the purchase of multiple CDs be structure in a "ladder" manner, such that the full terms are reached in 3-6 month intervals.

Other Investments: Allowable Range– 0 - 25% of invested assets

Other investments may include Mutual Funds and Bonds.

Prohibited securities include: private placements, derivatives, (other than floating rate coupon bonds), margined transactions and foreign-denominated bonds.

IV. PERFORMANCE MEASUREMENT STANDARDS:

In making investment decisions, the person with responsibility for investments shall consult with an investment advisor, monitor the ongoing performance of the investment portfolio on an at-least annual basis, and report the performance to the owner, to any spouse or children of the owner, or to the Court as appropriate. Alternatively, all financial information should be provided to a Certified Public Account whose report shall be available to such persons.

6.3. Income and Principal

Typically, a distinction is made between trust principal (corpus) and trust income.[161] The default rule is that a trustee may adjust between principal and income by allocating an amount of income to principal or an amount of principal to income if certain factors exist.[162] This default rule must be altered in the trust instrument for all income-only trusts; otherwise the principal is accessible and is counted to the extent of the trustee's discretion.[163] All net income must be distributed annually unless the trust instrument provides otherwise.[164] Earnings do not belong to the beneficiary unless the trust so directs or an actual distribution is made.[165] Best practice is for the trust

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161 POMS SI 01120.201.B.1 (principal) and POMS SI 01120.201.B.3 (income). Under the POMS, the term "asset" includes both income and principal. POMS SI 01120.201.B.2.

162 O.C.G.A. § 53-12-361.

163 The provision limiting a trustee's power of allocation must be clear that its intent is to deny the trustee power to adjust between principal and income. O.C.G.A. § 53-12-361(f).

164 O.C.G.A. § 53-12-244; Restatement (Second) of Trusts, § 182.

165 POMS SI 01120.200.G.1. If the trust principal is a resource, then earnings attributed to the beneficiary's interest in the principal is income. POMS SI 01120.201.J.1.a.

instrument to clearly state what will be allocated to income and to principal,[166] including how capital gains are to be treated; in the case of capital gains, the default rule is that "money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit," is allocated to principal.[167]

If an income-only trust (which is not a special needs trust) is used, then a clear definition of income versus principal is critical. As discussed elsewhere, the purpose of an income-only trust is to eliminate access to principal, while making income available to the grantor.

6.4. Compensation

Trustees may be compensated consistent with the trust instrument or any separate written agreement between the trustee and the settlor.[168] Trustee compensation may be modified consistent with the code.[169] If there is no other agreement, then corporate trustees are compensated consistent with a reasonable published fee schedule,[170] and individual trustees are paid one percent of the initial trust principal upon funding, plus an annual fee consistent with a sliding scale in the Revised Georgia Trust Code.[171] Under some circumstances, a trustee may be entitled to extra

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166 In the absence of clear direction, the Georgia Principal and Income Act, O.C.G.A. § 53-12-380, et seq., indicates what must be allocated to income or principal. The act, however, is not always clear. For example, with respect to timber, the act provides that net receipts from the sale of timber are allocated to income if the timber removed does not exceed the rate of growth during the accounting period and to principal if it does exceed the rate of growth. See O.C.G.A. § 53-12-428. Although there are likely professionals who can make those determinations, a clearer standard might make the trustee's job easier.

167 O.C.G.A. § 53-12-420(2).

168 O.C.G.A. § 53-12-210. Co-trustees are to be compensated according to their separate agreement. O.C.G.A. § 53-12-211.

169 O.C.G.A. § 53-12-210(b). Unanimous agreement among the beneficiaries and the trustee is the primary means of modifying trustee compensation.

170 O.C.G.A. § 53-12-210(c)(1).

171 O.C.G.A. § 53-12-210(c)(2). The annual fee is apportioned with a successor trustee according to proportion of time each rendered service. O.C.G.A. § 53-12-211.

compensation[172] or to compensation from operation of a trust owned business enterprise.[173] Compensation of the trustee and payment of reasonable costs,[174] including costs associated with investment, legal or other services, does not violate the sole benefit rule.[175] Other compensation or commission (e.g., real estate commissions paid to a licensed broker) is not prohibited so long as there is a separate fee agreement executed by the settlor.[176]

6.5. Accountings under the Trust Code

Unless waived in the trust instrument or by the beneficiary,[177] trustees must account at least once annually and upon any change in trustee.[178] The accounting period is a calendar year unless a different 2 month period is selected by the trustee.[179] The trustee may petition the court for an interim accounting not more frequently than once every twelve months. If approved, the trustee is relieved of any further liability covering the period of the interim accounting.[180] Upon the resignation, removal or death of a trustee, a departing trustee, a beneficiary or a successor trustee may petition for a final accounting.[181] Any party entitled to one may seek an equitable accounting.[182]

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172 O.C.G.A. § 53-12-212.
173 O.C.G.A. § 53-12-214.
174 O.C.G.A. § 53-12-213.
175 POMS SI 01120.201.F.2.
176 O.C.G.A. § 53-12-214(c).
177 Restatement (Second) of Trusts, § 172. O.C.G.A. § 53-12-243(d) permits waiver in the trust instrument. O.C.G.A. § 53-12-243(c) permits waiver by a beneficiary.
178 O.C.G.A. § 53-12-243(b). The accounting must be to income beneficiaries and to anyone entitled to revoke the trust. Upon termination of a trust, the trustee must also account to remainder beneficiaries. The Restatement indicates that the trustee has a duty to provide complete and accurate information as to the nature and amount of the trust property at reasonable times upon request. *See* Restatement (Second) of Trusts, § 173.
179 O.C.G.A. § 53-12-381(1).
180 O.C.G.A. § 53-12-230.
181 O.C.G.A. § 53-12-231.
182 O.C.G.A. § 53-12-232. Waiver of the accounting in a trust instrument does not prevent a court from ordering one. O.C.G.A. § 53-12-243(e).

Expense disbursements are allocated to either income or principal. One-half of trustee compensation and advisor fees are allocated to income, with the other one-half being allocated to principal. All ordinary expenses associated with administration, management, preservation of trust property and casualty insurance are allocated to income. All other expense disbursements, including debt payments, taxes, and environmental reclamation are allocated to principal.[183] Taxes are allocated to income or principal depending on how the receipts are allocated.[184]

6.6. Bond

There is no default requirement that bond be posted.[185] Bond is not required unless (1) the trust instrument requires it, or (2) a court finds that bond is necessary to protect the interests of beneficiaries or creditors. If required, bond costs are charged against the trust.

6.7. Declaratory Judgment

Where trust administration is uncertain or controverted, interested parties may bring a petition for a declaratory judgment to: (1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others; (2) To direct the executor, administrator, or trustee to do or abstain from doing any particular act in his fiduciary capacity; or (3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.[186] The code broadly defines those persons who are "interested parties" as "any person interested as or through an

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183 O.C.G.A. § 53-12-450 to 451.
184 O.C.G.A. § 53-12-454.
185 O.C.G.A. § 53-12-203.
186 O.C.G.A. § 9-4-4.

executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, ward, next of kin, or beneficiary in the administration of a trust or of the estate of a decedent, a minor, a person who is legally incompetent because of mental illness or mental retardation, or an insolvent."

Chapter 7. Trust Distributions

7.1. Distribution Standards

There must be some direction concerning permitted distributions; if the trustee has an unrestricted power to dispose of property to any person and in any manner he or she so chooses, the trustee is the owner and no trust exists.[187] In the case of a discretionary trust, a court may interpose its judgment on the performance of a trustee vested with discretion to make payments to a beneficiary only when the trustee "arbitrarily declines to make any payment" or when the trustee "is acting from improper motives in exercising discretion."[188]

Special needs trusts are usually structured as discretionary trusts.[189] Trust law recognizes the validity of discretionary trusts. Except to the extent trust property was contributed by the beneficiary, the Code provides that a transferee or creditor shall not compel a trustee to pay any amount payable only in the trustee's discretion regardless of

187 Restatement (Second) of Trusts, § 125.

188 *McPherson v. McPherson*, 307 Ga. App. 548, 551 (2011).

189 Discretion is a secondary method, in addition to the spendthrift provision, of placing trust income and assets beyond a creditor's reach; the two devices are commonly used together. *See* J. Eason, *Trust Law in the 21st Century: Policy, Logic and Persuasion in the Evolving Realm of Trust Asset Protection*, 27 Cardozo L. Rev. 2621, 2629-2630 (2006). "The key as to whether or not the trust assets will be held to be available is the discretion of the trustee." T. Begley, *Drafting Special Needs Trusts: What You Need to Know* (2007), at 11 (available on the internet). With Medicaid Trusts other than special needs trusts, discretion is less important because, as discussed below, a self-settled Medicaid Trust is subject to the "any circumstance" rule.

whether the trustee is also a beneficiary.[190] While this Code provision has not been tested in the Medicaid context, it suggests that a third party trust created for the beneficiary enjoys creditor protection even if the beneficiary is the person exercising discretion over distributions.[191]

A distribution standard may restrict access to trust income and assets in a manner similar to a spendthrift provision. Even when discretion is the intended standard, there is no presumption that the trust is a protected discretionary trust; when analyzing trusts, different courts have reached different conclusions.[192] In general, three distribution standards[193] restricting distributions are addressed in the Restatement of

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190 O.C.G.A. § 53-12-81.

191 The Code does provide, however, that a beneficiary who is serving as trustee only has discretion over distributions if the power is exercised in accordance with an ascertainable standard and that it cannot be exercised to satisfy the trustee's legal obligations. O.C.G.A. § 53-12-270. The POMS distinguish mandatory trusts from discretionary trusts. "A mandatory trust is a trust that requires the trustee to pay trust earnings or principal to or for the benefit of the beneficiary at certain times... The trustee has no discretion as to the amount of the payment or to whom it will be distributed." POMS SI 01120.200.B.9. On the other hand, a "discretionary trust is a trust in which the trustee has full discretion as to the time, purpose and amount of all distributions. The trustee may pay to or for the beneficiary, all or none of the trust as he/she considers appropriate. The beneficiary has no control over the trust." POMS SI 01120.200.B.10. Some attorneys take the position, as the Georgia Trust Code seems to indicate, that the beneficiary may also serve as trustee without this dual role creating an eligibility issue. *See, e.g.*, E. Farr, et al., *Trusts for Senior Citizens* (Ali-Aba 2009), at 25. Conservative drafters will not test this theory since the POMS indicate that a beneficiary is someone who "does not hold legal title to trust property." POMS SI 01120.200.B.4. They also indicate that a countable trust is one where the beneficiary can direct the use of trust principal, POMS SI 01120.200.D.1.a, and that where "the trustee has the legal authority to withdraw and use the trust principal for his/her own support and maintenance, the principal is the trustee's resource for SSI purposes in the amount that can be used." POMS SI 01120.200.D.1.b.

192 In *Henderson v. Collins*, 245 Ga. 776 (1980), the Court found that a trust is not a discretionary trust if the beneficiary is ultimately entitled to the whole or a specific part of the trust. In *Henderson*, *citing* Restatement (Second) of Trusts, § 155, the court held that the factor preventing the trust from being treated as a discretionary trust was the beneficiary's right (or lack of a right) to a mandatory distribution when the trust terminated.

193 Former NAELA President, Craig Reaves, writes that there are four trust distribution standards, but only two work in special needs trusts. They are (1) strict special needs, prohibiting the trustee from making any distribution for food, shelter or anything else that would cause a loss of eligibility; (2) totally discretionary; (3) support; and (4) discretionary support. Reaves argues that both the support and discretionary support standards likely make the trust countable for public benefits purposes. C. Reaves, *Which Trust Distribution Standard to Use When Drafting a Trust for a Person Who Has a Disability*, 20 NAELA News 12 (2008).

Trusts: (1) support trusts,[194] (2) simple discretionary trusts and (3) a typical discretionary trust.[195] The latter two trust types are distinguished because a simple discretionary trust does not include terms like "sole discretion" or "absolute discretion," while the typical discretionary trust does include those words. Even so, a grant of absolute discretion over distributions still implies a duty of good faith."[196] In the public benefits context, a number of cases have turned (rightly or wrongly) on a court's determination that a trust was either a support trust or a discretionary trust. Support trusts generally fail to protect assets because the risk that planners are seeking to avoid is necessary healthcare.[197]

If the trust is a discretionary trust, a court is not permitted to change a trustee's decision to exercise or not to exercise a discretionary power unless it determines that the decision was an abuse of discretion.[198]

Craig Reaves, CELA, provided the following exemplar distribution standard at the 2015 Stetson SNT Basics Conference:

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194 In the absence of a spendthrift provision, a support trust may nonetheless be beyond the reach of the beneficiary and his or her creditors except as needed for support. *See* Restatement (Second) of Trusts, § 154; *citing Barnett v. Montgomery*, 79 Ga. 726 (1888). *See* Comment "b" of § 154 distinguishing a support trust from a spendthrift trust. *See* J. Eason, *supra*, at 2628-2629. It would still be countable for purposes of public benefits eligibility. *See* Restatement (Second) of Trusts, § 157(b) for exception permitting creditors to reach a support trust where necessary services or supplies are rendered.

195 A discretionary trust is distinguished from a spendthrift trust and a support trust. *See* Restatement (Second) of Trusts, § 155, Comment b. "In a discretionary trust it is the nature of the beneficiary's interest rather than a provision forbidding alienation which prevents the transfer of the beneficiary's interest. The rule stated in this Section is not dependent upon a prohibition of alienation by the settlor; but the transferee or creditor cannot compel the trustee to pay anything to him because the beneficiary could not compel payment to himself or application for his own benefit." *See also* J. Eason, *supra*, at 2627-2628.This limitation does not apply where the beneficiary is the settlor and created the trust for his or her own benefit. *See* Restatement (Second) of Trusts, § 156(2). There are also situations where drafters attempt to achieve a "blended" solution which is usually not desirable.

196 O.C.G.A. § 53-12-260; P. Tiernan, *A Trustee's Duties and Responsibilities Under Discretionary Invasion Provisions*, 79 Florida B. J. 50 (2005). In *McPherson*, *supra*, summary judgment in favor of the trustees was affirmed because there was no evidence of bad faith regarding discretionary distributions.

197 Tax planners commonly used HEMS (health, education, maintenance and support) language to create an ascertainable standard. Medicaid will treat HEMS language as a requirement that the trust pay for health care and the trust will be available.

198 O.C.G.A. § 53-12-363(a); Restatement (Second) of Trusts, § 187.

> Distributions: The Trustee may distribute as much of the income and principal of the trust estate, even to the point of distributing all or none of it, as the Trustee, in its sole and absolute discretion, may from time to time deem necessary or advisable to satisfy the beneficiary's supplemental needs and to supplement and enhance what the beneficiary is receiving from any governmental agency, including but not limited to, the Medicaid program. Any income not distributed shall at least annually be added to and become part of the principal.
>
> As used in this instrument, the term supplemental needs refers to ....
>
> It is preferred that the Trustee not make distributions from the Trust that cause a reduction or loss of any public assistance the beneficiary is receiving or entitled to receive. However, it the Trustee, in its sole discretion, determines that any distribution from this Trust, including, but not limited to, in-kind support and maintenance, will benefit the beneficiary and is in the beneficiary's best interest, then the Trustee may make such distribution even if doing so will cause a reduction or loss of public assistance benefits the beneficiary would otherwise receive or be entitled to receive.[199]

7.2. Distributions

Even where a trust is exempt, distributions may create eligibility problems.[200] For example, a trust distribution of cash to the beneficiary is unearned income and could cause a loss of benefits. Distributions paying for food or shelter are in-kind support and maintenance (ISM)[201] and are valued under the presumed maximum value (PMV) rule. Establishment of a special needs trust might gain SSI and/or Medicaid eligibility, but little is accomplished if improper administration causes a loss of benefits. It is imperative that trustees understand the rules governing trust distributions.

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199 C. Reaves, *How to Make a Trust a SNT*, p. 13-14, Stetson SNT Basics 2015.

200 In *Elias v. Colvin*, 2015 U.S. Dist. LEXIS 97321 (M.D. Penn. 2015), the Commissioner and the ALJ both found that a trust did not comply with (d)(4)(A), not because of the drafting, but because the beneficiary directed the use of the trust funds. The District court found that misuse of funds in a (d)(4)(A) was not clearly addressed in the POMS, and there was no clear answer concerning whether it invalidated the trust completely, or whether the trust was countable during the time funds were misused. The case was remanded to the ALJ for additional findings on that issue.

201 ISM is limited to food and shelter. Shelter costs are mortgage payments, including PMI if required; real property taxes; rent; heating fuel; gas; electricity; water; sewage; and garbage. See POMS SI 00835.465.D.1.

A trustee has no duty (under the Trust Code) to investigate a beneficiary's resources when determining whether to make a distribution.[202] A trust instrument may direct a trustee to consider resources when making a distribution; "in such cases, the presumption is that the trustee is to take the beneficiary's other resources into account in determining whether and in what amounts distributions are to be made, except insofar as, in the trustee's discretionary judgment, the settlor's intended treatment of the beneficiary or the purposes of the trust will in some respect be better accomplished by not doing so."[203]

If the trust is a resource for a Medicaid applicant, then a distribution to the applicant is a non-event and has no impact on eligibility; the resource is already deemed to be in the applicant's hands. However a transfer of trust assets to anyone other than the beneficiary, or any action which forecloses the beneficiary's rights to trust assets, is treated as an uncompensated transfer of resources.[204]

In circumstances where the trust is not a Medicaid resource, distributions from a trust may still impact eligibility if they are deemed as income. A distribution may be deemed to be income depending on the nature of the distribution.[205] If the trust distributes cash or purchases a non-excluded asset for the beneficiary, then the distribution is treated as unearned income.[206] Any disbursement to a third party which

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202 O.C.G.A. § 53-12-245.

203 *McPherson*, *supra*, at 552; *quoting* Restatement (Third) of Trusts, § 50, Comment e.

204 POMS SI 01120.200.E.2; POMS SI 01120.201.D.1.b; POMS SI 01120.201.E.1.a (the date of transfer is the later of the date the trust is established or when payment is foreclosed). *See also* POMS SI 01120.201.B.8 (defining "foreclosure" as "an event that bars or prevents access to, or payment from, a trust to an individual now or in the future.")

205 POMS SI 01120.200.E.1.

206 POMS SI 01120.200.E.1.a; POMS SI 01120.201.I.1. Gift cards are considered cash equivalents, while a credit card payment is not income unless food or shelter was charged to the card. POMS SI 01120.201.I.1.

pays for food or shelter is ISM.[207] Distributions which are unearned income or subject to the PMV rule may either reduce or eliminate SSI or Medicaid eligibility. Disbursements of any other kind are not income.[208]

7.2.1. Ownership of a Home

The trust's ownership of the home where the beneficiary lives does not impact SSI or Medicaid eligibility since the home would be an exempt asset if it was owned by the beneficiary.[209] Because a beneficiary has an equitable ownership interest in the home, there is no PMV reduction of SSI benefits where the trust allows the beneficiary to reside in the home rent-free.[210] Nonetheless, payment of a monthly mortgage or payment of other housing expenses is ISM subject to the PMV rule.[211]

7.2.2. Distributions to family members

Any distribution from a special needs trust to a family member is suspect and, potentially, violates the sole benefit rule. For example, trusts traditionally have been used to facilitate family visitation, paying travel expenses so other family members can visit the disabled individual. A revision to POMS SI 1120.201.F.2 in May, 2012, indicates that payments of this sort violate the sole benefit rule. Further, whether such payments are actually made, mere inclusion of discretionary power to make these distributions

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[207] POMS SI 01120.200.E.1.b; POMS SI 01120.201.I.1.b. An exception exists for temporary housing. 20 C.F.R. § 416.1149; POMS SI 00835.040. *See* R. Mason, *Should Special Needs Trust Beneficiaries eat their Pets?* (a discussion of ISM), available at https://trustchimp.com/special-needs-trust-beneficiaries-eat-pets/.

[208] POMS SI 01120.200.E.1.c; POMS SI 01120.201.I.1.c. The POMS were recently amended to clarify that disbursement made from the trust to a third party for funds expended on behalf of the trust beneficiary are not income. POMS SI 01120.201.E.1.d.

[209] POMS SI 01120.200.F.1. The Trust agreement must, however, authorize purchase of a home. *See In re Skinner*, 787 S.E.2d 440 (N.C. App. 2016), reversing a lower court which removed a trustee for purchasing a home because the trust authorized the purchase).

[210] POMS SI 01120.200.F.2.

[211] POMS SI 01120.200.F.3. A disbursement for improvements or renovations, as opposed to operating expenses, is not ISM.

might cause SSI to invalidate the trust "since it permits the trustee to use trust funds in a manner that will financially benefit the SSI recipient's family." The POMS were revised later in 2012 to eliminate the example making payment of travel expenses a countable distribution, but the issue will likely be further refined through future rule making.

7.2.3. Child support

Other laws unrelated to public benefits may impact special needs trust distributions. In *Mazyk v. Cozze*, 2012 N.J. Super. Unpub. LEXIS 2687 (2012), the court affirmed an order finding that special needs trust distributions may be recognized for the purpose of calculating a beneficiary's child support obligation. "[D]istributions can be used to pay for vacations, technology, cable television etc. and aside from the fact that it is inequitable to allow [Cozze] to partake in such luxuries while the parties' daughter is supported by the State, nothing prevents a determination that '[Cozze's] Special Needs' might include support for his daughter." Although the trust assets themselves could not be used in calculating child support obligations, the distribution of those assets was properly considered. The court relied on *Myers v. DeVore*, 2006 Ohio 5360 (Ohio Ct. App. 2006), and *Mencer v. Ruch*, 928 A.2d 294 (Pa. Super. Ct. 2007), in reaching its conclusion.

This result does not violate the sole benefit rule (in this author's opinion) because child support is the beneficiary's debt obligation. Payment of that debt improves the beneficiary's circumstances (e.g., allowing him or her to avoid being held in contempt).

Chapter 8. Trust Accounting with the Trust Unit

The States have authority to review trust accounting. Depending on the Circuit, this power stems from authority implicit in 42 U.S.C. § 1396p(d), *see Hobbs v. Zenderman*, 579 F.3d 1171 (10th Cir. 2009), or from State trust law. *See Lewis v. Alexander*, 685 F.3d 325 (3rd Cir. 2012).

In Georgia, written financial review guidelines and protocol for special needs trust were established in 2009. The following criteria are designed, for the most part, to hold trustees accountable for fiscal responsibility and to enforce the sole benefit rule:

1. All funds and assets placed in the trust for the benefit of the beneficiary must remain accessible to meet the needs of the beneficiary;
2. Trust expenditures must be made for the primary benefit of the trust Beneficiary;
3. Trust expenditures must comply with the terms of the document that established the trust;
4. Trust assets must not be unreasonably dissipated; trust expenditures must be reasonable in light of the needs of the beneficiary and the size of the trust;
5. The ongoing financial integrity of the trust must be maintained;
6. The state's interests as a remainder beneficiary and creditor must be protected;
7. Any oversight duties that may be placed on the state by law or policy must be Satisfied;
8. The trustee must administer the trust as a fiduciary with the highest level of good faith, duty and loyalty to the beneficiary of the trust, and must satisfy the following legal fiduciary duties:
    a. Maintain loyalty to the beneficiary;

b. Carry out the terms of the trust agreement;

c. Act and invest prudently;

d. Avoid delegating trustee responsibility; and

e. Maintain books and records and keep the beneficiary reasonably informed of the administration of the trust.

The protocol presumes an annual accounting will be prepared and submitted to the Trust Unit. Trust expenditures will be reviewed using a four-part test which evaluates: (1) whether the expenditure was for the primary benefit of the beneficiary; (2) appropriateness; (3) consistency with trust guidelines and published policy; and (4) whether the expenditure is reasonable and whether fair market value was paid. Certain types of expenses are subject to specific review: (i) expenditures which are not clearly for the sole benefit of the beneficiary; (ii) caregiver wages; (iii) housing expenses; (iv) vehicle expenses; and (v) egregious expenditures. The policy described how the Trust Unit analyzes each of these specific types of expenditures, again, focusing on fiduciary responsibility and the sole benefit rule.

Failure to comply with the rules causes the trust to be deemed non-compliant. The Department's recourse options for non-compliant trusts include: (a) correction of the action going forward; (b) demand for recovery to the trust; (c) cash reimbursement to the trust; (d) re-titling and retransfer of asset to the trust; (e) and disenrollment of the beneficiary from Medicaid. Ultimately, the Department's primary means of enforcement is disenrollment because, at best, the Department is a contingent beneficiary while the primary beneficiary is living and has limited enforcement rights.

An annual accounting form is attached as Appendix D. Also attached are two documents from the Trust Unit. The first is the Georgia Department of Community Health – Trust Unit's Trust Accounting Review: Financial Review Guidelines and Protocol. The second is Preparing Annual Trust Accountings For Filing with the Georgia Department of Community Health: A General Guide for Trustees of Approved Special Needs Trusts. A document of interest, that is not included, is Exhibit A to Bill Overman's ICLE presentation at this seminar in 2010. There, Mr. Overman included a nine page table indicating how the Trust unit reviews specific disbursements, referencing applicable POMS provisions. *See* W. Overman, *The DCH Trust Accounting Review Program: What You Need to Know*, in Special Needs Trusts (ICLE of Georgia 2010).

Appendix A: Georgia's Trust Unit

Georgia DCH contracts with HMS to review special needs trusts. Contact information is below:

William H. Overman, JD, CAP
Director, Trust Services
900 Circle 75 Pkwy SE, Ste 650
Atlanta, GA 30339-3946
678.564.1168 x 2136
Fax: 678.564.1169
WOverman@hms.com

Trust Unit/Special Needs Trusts FAQ

1. **What is a trust?**
A trust is a legal arrangement where property is held by a trustee (the person who handles the trust) for the benefit of a beneficiary (the person for whom the trust is created). It is usually established either by a written trust agreement or by the terms of a will. The general administration of the trust is governed by the terms of the document that creates it.

2. **What is the Trust Unit?**
The Trust Unit is the office that reviews Special Needs Trusts (SNTs) and annual trust accountings sent to the Legal Services Section of the Georgia DCH.

3. **Why does Georgia review Special Needs Trusts?**
If a SNT does not meet certain legal requirements the beneficiary might not be able to become eligible for Medicaid or might lose eligibility for Medicaid. These legal requirements are specified by federal law and policy and Georgia law and policy.

4. **What rules apply to trust expenditures?**
In general terms, trustees must always follow the federal and state law applicable to Special Needs Trusts, and also Georgia Medicaid policy. This Georgia policy is located in the Georgia Department of Human Resources' Division of Family and Children Services (DFCS) Medicaid Manual at Section 2337 for Qualified Income Trusts and Pooled Trusts and at Section 2346 for Special Needs Trusts. The Manual can be found in local DFCS offices.

5. **What happens at the trust beneficiary's death?**
Notice of the death must be given to the Trust Unit and DCH Third Party Liability within five (5) days of the death, preferably by fax (678-564-1169). The notification should include:

- Full name of the deceased beneficiary
- Medicaid ID number and/or Social Security number of the beneficiary
- Date of death and copy of the death certificate

- Contact information for the personal representative and/or attorney handling the estate, including name, address, and telephone number

When the Death Certificate is issued, arrangements for appropriate repayment of medical assistance received will be made and payment, along with a copy of the Death Certificate, must be sent to:
Georgia Department of Community Health
Attn: Trust Unit
900 Circle 75 Parkway
Suite 650
Atlanta, GA 30339

6. **What trusts need to be sent in for review?**
Trusts that need to be sent to the DCH Trust Unit for review include (1) Special Needs Trusts funded with assets of the person establishing the trust or with assets of the beneficiary, (2) Pooled Trust Accounts (3) Testamentary Special Needs Trusts (including those set up in a Living Trust or Family Trust), and (4) Third Party Special Needs Trusts where the beneficiary is receiving Medicaid.

7. **Where are trusts sent for review?**
Trust documents and supporting documentation are sent to:

Georgia Department of Community Health
Attn: Trust Unit
900 Circle 75 Parkway
Suite 650
Atlanta, GA 30339
Phone: 678-564-1168
Fax: 678-564-1169

8. **What is the review process?**
The review process is a standardized system in which the trust document and all supporting documentation are reviewed to make sure that the requirements of federal law and policy and Georgia law and policy have been met. The source of funds going into the trust must be revealed. If the funds come from a lawsuit or settlement and there is a pre-trust Medicaid lien, the lien must be resolved before the trust can be approved. Opportunities are provided to make needed corrections or provide additional information. The process is designed to encourage approvals.

9. **How long does the review take?**
If the trust document and all necessary supporting documentation are submitted and the required criteria are met, a trust generally can be approved in 30 to 45 days. If there are problems or deficiencies, there is a More Information Needed process that provides notice of the specific problems and/or deficiencies and allows time to correct them.

10. **What happens if the trust is approved?**
If the trust is approved, the approval is entered in the records and a formal Approval Notice is issued and mailed to the person who submitted the trust. The notice includes a

reminder that an annual inventory update and accounting must be filed within sixty (60) days of the anniversary date of the trust.

11. **What happens if the trust is not approved?**
If the trust is not approved, a formal Denial Notice is mailed to the person who submitted the trust, and to DFCS. This denial may result in the loss of eligibility for Medicaid. In the Denial Notice, one last opportunity is given to request Reconsideration. The Reconsideration process gives additional time for any problems and/or deficiencies to be corrected.

12. **Who reviews trust accountings?**
Annual inventory updates and accountings are reviewed by the Accounting Review staff of the Trust Unit, which includes a Certified Public Accountant (CPA).

13. **What are the trust accounting requirements?**
The basic requirement is that the trustee must annually file an inventory update and accounting with the Trust Unit. The inventory update and accounting must be filed within sixty (60) days of the anniversary date of the establishment of the trust, and must include copies of financial statements that verify the trust inventory. A general guide on how to prepare accountings is available from the Trust Unit.

14. **What is the accounting review process?**
The accounting review process consists of a financial examination of the trust inventory updates and annual accountings filed by the trustees of approved SNTs. The general purpose of this review is to verify the financial integrity of the trust and that the trust is being administered for the sole benefit of the beneficiary. At the conclusion of the trust accounting review process, the annual inventory update and accounting is formally approved or denied. Denial may result in the loss of eligibility for Medicaid.

Source: http://hms.com/ga/medicaidrecovery/trust-unit/

Appendix B: Georgia DCH SNT Accounting Form

Trust Accounting Period: _________ through __________[212]

BEGINNING BALANCE	(as of ______________)		________
Cash in:	Initial funding	________	
	Investment income	________	
	Investment income	________	
	Lawsuit settlement	________	
	Other	________	
Total cash in			________
Cash out:			
	Trustees fees	________	
	Annuity Purchase	________	
	Bank fees	________	
	Caregivers payroll	________	
	Payroll taxes	________	
	Property purchase	________	
	Property taxes	________	
	Accounting	________	
	Legal	________	
	Cable TV	________	
	Care Management	________	
	Cell Phone	________	
	Garbage/trash	________	
	Transportation	________	
	Vehicle Purchase	________	
	Vehicle expenses	________	
	Prescription Drugs	________	
	Home maintenance & repairs	________	
	Durable medical equipment	________	
	Supplies not covered	________	
	Mobility assistance	________	
	Utilities	________	
	Wheelchair service	________	
	Expense for delivery	________	
	Other expenses (attached list)	________	
Total cash out:			________
ENDING CASH BALANCE			________

Signature of Preparer: ________________________________

Date: ________________________________

212 Form provided by William Overman.