PRESENTED AT

15th Annual Changes and Trends Affecting
Special Needs Trusts

February 7, 2019
Austin, Texas

Special Needs Trust Overview

UPDATED & PRESENTED BY:

RANDY E. DREWETT

PREPARED BY:

WRIGHT ABSHIRE, ATTORNEYS PC

Author / Presenter Contact Information:

Randy E. Drewett
Certified Elder Law Attorney
2935 Toccoa
Beaumont, Texas 77703

randy@randydrewett.com
409-833-4000

Wesley E. Wright
Certified Elder Law Attorney
Wright Abshire, Attorneys PC
4949 Bissonnet
Bellaire, Texas 78746

wes@wrightabshire.com
713-660-9595

TABLE OF CONTENTS

I. INTRODUCTION 1

II. SPECIAL NEEDS TRUST OVERVIEW 2
- A. Self-Settled Special Needs Trusts 2
  - 1. (d)(4)(A) Special Needs Trust 2
  - 2. (d)(4)(C) Pooled Special Needs Trust 3
- B. Third-Party Settled Special Needs Trusts 3
- C. Differences Between Self-Settled Special Needs Trust and Third-Party Special Needs Trusts 4
- D. Why Use a Special Needs Trust? 4
- E. Alternatives to the Creation of a Special Needs Trust 5

III. AVAILABLE PUBLIC BENEFITS FOR PERSONS WITH DISABILITIES 6
- A. Benefits Not Based on Financial Need 6
  - 1. Social Security Disability Insurance ("SSDI") 6
  - 2. Medicare 7
  - 3. Military and Civil Service Survivor Benefits for Adult Children with Disabilities 9
  - 4. VA Disability Compensation 10
- B. Benefits Based on Financial Need 11
  - 1. Supplemental Security Income ("SSI") 11
  - 2. Medicaid 12
  - 3. Housing Choice Voucher Program ("Section 8") 14
  - 4. Veterans Administration Benefits 15

IV. TRUSTS AFFECTING MEDICAID ELIGIBILITY 18
- A. General Rules on Trusts "Established By" the Client 18
  - 1. History and Purpose of Trusts Established By the Client 18
  - 2. Definition of "Established By" the Client (Self-Settled Trusts) 18
  - 3. Revocable Trusts Established by the Client 19
  - 4. Rules Applying to Irrevocable Trusts Established by the Client 19
- B. Exceptions to General Rules Governing Trusts "Established By" the Client 20
- C. Rules Affecting Trusts Not "Established By" the Client (Third-Party Settled Trusts 20
  - 1. Nature and Purpose of Third-Party Settled Supplemental Needs Trusts 20
  - 2. Requirements for Third-Party Settled Supplemental Needs Trusts 20

V. DRAFTING (d)(4)(A) SPECIAL NEEDS TRUSTS 21
A. POMS Requirements 21
B. Additional SSI Requirements 22
1. Disability Determination 22
2. Administrative Expenses 22
3. Irrevocability 23
4. Legal Authority to Act with Respect to the Assets of the Individual 24
C. Miscellaneous Considerations 24
1. Trustee 24
2. Prohibition of Contributions After Age 65 25
3. Trust Protector 25
4. Distribution Provisions 25
5. Bonding and Surety 26
6. Qualification and Public Accountings 26
7. Powers of Trustee 26
8. Spendthrift Provision 26
9. Fees, Taxes and Administration 26
10. Trustee Compensation 26
11. Amendment 26
12. Grantor Trust Status 26

VI. DRAFTING (d)(4)(C) SNTs 27
A. POMS Requirements 27
B. Drafting the (d)(4)(C) SNT 28

VII. DRAFTING PROVISIONS FOR THIRD-PARTY SNTs 28
A. POMS Requirements 28
B. Medicaid Requirements 28
C. Miscellaneous Provisions 29
1. Purpose Clause 29
2. Non-Reduction Clause 29
3. Emergency Clause 29
4. Authority to Rent Property to the Beneficiary 29
5. Spendthrift Clause 29
6. Discretion 30
7. Termination Clause 30
8. Amendment Clause 30
9. Trustee 30
10. Trust Protector 31

11. Distribution Provisions 31
12. Powers of Trustee 31
13. Fees, Taxes and Administration 32
14. Trustee Compensation 32
15. Planning for Retirement Plan Distributions 32
C. Planning to Obtain an Annual Exclusion for Contributions to the SNT 32
D. Caution 33

VIII. SNT ADMINISTRATION 33
A. Notification to the Social Security Administration 33
B. Notification to the State 34
C. Trust Administration Duties 35
D. Written Advice 35
E. SSA Policy Concerning Disbursements from a SNT 35
F. Medicaid Requirements 37
G. State Requirements and Decoupling 37
H. Trust Taxation Issues 37
1. Income Tax 37
2. Taxpayer ID Number 38
3. Fiduciary Income Tax 38
4. Qualified Disability Trust 39
5. Gift Tax on Funding Trust 39
6. Estate Tax 39
I. Investment of Trust Assets 39

IX. LITIGATION ASPECTS OF ESTABLISHING SNTs.....40
A. Establishment Process for Inheritances and Excess Funds 40
B. Establishment and Administration Process for Matrimonial Law 41
C. Establishment Process for Personal Injury Claims 41
1. Involvement of Special Needs Attorney 41
2. Medicaid Liens, Medicare Claims and ERISA Plan Reimbursement Claims 42
3. TRICARE & Veteran's Administration Reimbursement Claims 44
4. ERISA Plan Reimbursement Claims 44
5. Settlement of Personal Injury Claims 44

X. WHAT CONCLUSIONS CAN WE REACH? 45

APPENDIX I: ***Essential Special Needs Planning Library***
APPENDIX II: ***2019 Benefit Eligibility Numbers***

Special Needs Trusts Overview

by

Wesley E. Wright
Wright Abshire, Attorneys
Offices in Bellaire, Fayette County and The Woodlands, Texas
713-660-9595
www.wrightabshire.com

I. INTRODUCTION

According to a study funded by the National Institute on Disability and Rehabilitative Research, it is estimated that over 56.7 million Americans are disabled. This number represents approximately 18.7% of the entire population of the United States (303.9 million per the 2010 U.S. Census).[1] Of these individuals, approximately 38.3 million suffer from a severe disability (about 12.6% of the population), and about 12.3 million people aged 6 and older need assistance with one or more activities of daily living.[2] The number of Americans with disabilities is expected to increase as the U.S. population ages. In light of the growing number of Americans with a disability, the need for special needs planning, as well as the establishment and administration of special needs trusts, is growing.

Attorneys not familiar with special needs planning or attorneys just beginning to practice in this area, are often confused and overwhelmed with the vast amount of knowledge necessary to adequately advise and plan for their clients. While only one tool in the attorney's bag, special needs trusts present an excellent opportunity to preserve both assets and the beneficiary's eligibility for government benefits. However, improper drafting or inadequate counseling in the preparation of a special needs trust can create disastrous consequences for the beneficiary, including the reduction or total loss of means-tested government benefits. Additionally, failure to keep abreast with the ever-changing Social Security policy regarding special needs trusts and revisions to Social Security's Program Operation Manual System ("POMS") can cause extreme adverse effects on a beneficiary's eligibility for public benefits.

The purpose of this paper is to provide an overview of special needs trusts, including the different types of special needs trusts, drafting techniques and administrative concerns. Additionally, this paper will provide an overview of the types of public benefits preserved by special needs trusts, as well as how these trusts affect the beneficiary's receipt of public benefits. Finally, this paper will explore the use of special needs trusts in a litigation context.

[1] http://www.census.gov/prod/2012pubs/p70-131.pdf
[2] http://www.census.gov/prod/2012pubs/p70-131.pdf

II. SPECIAL NEEDS TRUST OVERVIEW

One of the most common tools used by attorneys in planning for public benefits is a special needs trust ("SNT"). Governmental benefits are designed to provide basic health care, food and shelter. As such, governmental benefits provide for only a meager existence to recipients. A SNT is designed to provide additional needs and extras, such as vacations, that normal governmental benefits do not provide. A SNT can either be self-settled or third-party settled depending on the source of the funding. Each of these types of trusts are discussed below.

CAUTION: When establishing or administering a SNT, it is important to correctly determine the source of the funding (i.e. self-settled or third-party funds). As discussed below, these two types of trusts have different requirements. Additionally, a catch-all trust that includes both self-settled and third-party funds is prohibited. Third-party funds should never be comingled with a self-settled trust, and vice versa.

A. Self-Settled Special Needs Trusts

To provide for the payment of supplemental needs, federal law permits an individual with disabilities to retain his or her resources in one of two types of SNTs. Without the creation of such trust, the resources would count as an asset of the individual, disqualifying him or her from SSI[3] or Medicaid benefits.[4] The two types of trusts are commonly referred to as (d)(4)(A) and (d)(4)(C) SNTs.[5] These two types of SNTs are self-settled or first-party SNT trusts, meaning that these trusts are funded with the beneficiary's own funds.

1. (d)(4)(A) Special Needs Trust

A (d)(4)(A) SNT is a trust created (and funded) for the sole benefit of an individual with a disability under the age of 65 by the individual, by the individual's parent, grandparent or legal guardian, or by a court.[6] The trust is funded with the disabled person's assets. The trust must provide that the state Medicaid agency will receive amounts remaining in the trust upon the individual's death up to the amount paid by each state under the Medicaid program for services to the disabled individual.

In Texas, a court may create a court managed trust under Chapter 1301 of the Texas Estates Code or a §142 trust under the Texas Property Code. Both of these trusts may be drafted to conform with the requirements of 42 U.S.C. §1396p(d)(4)(A) to qualify as a special needs trust. Since the passage of the Special Needs Trust Fairness Act in December 2016, an individual with only a physical disability has been able to act as grantor of his or her own (d)(4)(A) SNT. An individual who has only a physical disability can also petition a Court to create a Chapter 1301 management trust.[7]

---

[3] 42 U.S.C. §1382b.
[4] 42 U.S.C. §1396p(d)(4).
[5] 42 U.S.C. §1396p(d)(4)(A), (C).
[6] 42 U.S.C. §1396p(d)(4)(A).
[7] Tex. Estates Code §1301.101(a)(1).

UT LAW CLE THE UNIVERSITY OF TEXAS TEXASLAW

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the UT Law CLE eLibrary (utcle.org/elibrary)

Title search: Special Needs Trusts Overview

Also available as part of the eCourse
A Closer Look at the Different Types of Special Needs Trusts

First appeared as part of the conference materials for the
15th Annual Changes and Trends Affecting Special Needs Trusts session
"Special Needs Trusts Overview and Third-Party SNTs"