

Special Needs Trusts and Developing a Care Plan

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Overview

- ▶ Legal Background of Special Needs Trusts
- ▶ Importance of Team Involvement at Trust Creation
- ▶ Case Scenarios
- ▶ Summary

First Party SNTs

- ▶ Self-settled: meaning client uses their own funds
 - ▶ Includes personal injury recoveries and outright inheritance
 - ▶ Authorized under 42 U.S.C. sec. 1396p(d)(4)(A)
 - ▶ Must be under 65 years of age
 - ▶ Must be created by a parent, grandparent, legal guardian or a court
 - ▶ Requires a payback provision
- ▶ Texas has two statutory means for court creation:
 - ▶ Property Code section 142.005
 - ▶ Estates Code section 1301.001, et. seq.

Third Party SNTs

- ▶ Funded with other people's funds (parent, grandparent, family member)
- ▶ Usually created during the lifetime of the beneficiary or in a testamentary/contingent trust in a dispositive document (will or trust)
- ▶ No age restriction
- ▶ No required payback provision
- ▶ Recognized by Social Security under its Program Operations Manual - POMS SI 01120.200, et. seq. -- generally not considered an asset.

Pooled Trust

- ▶ Authorized under 42 U.S.C. section 1396p(d)(4)(C)
 - ▶ Established and maintained by a non-profit association
 - ▶ Separate account maintained for each beneficiary
 - ▶ Funds are pooled for investment/management purposes
 - ▶ No age limit - but if transfer funds of someone 65 or older, there is a transfer penalty
 - ▶ Contains Medicaid payback provision

Key SNT Provisions

- ▶ Complete trustee discretion
- ▶ Must supplement, not supplant, the beneficiary's governmental benefits.
 - ▶ In general - no regular distributions for food, shelter, or cash
 - ▶ Discretion to reduce SSI payments through election of In-kind support and maintenance
- ▶ Irrevocable - cannot be modified or revoked by beneficiary
- ▶ Terms may vary because of state administered nature of Medicaid

The Planning Team

- ▶ The drafting attorney
- ▶ The personal injury attorney - if the funds are the result of a settlement
- ▶ The trust officer
- ▶ The case manager
- ▶ The family

The Drafting Attorney

- ▶ Assist client with capacity to prepare appropriate estate planning documents
- ▶ Understand the proposed beneficiary's current and anticipated needs
- ▶ Understand the beneficiary's eligibility for government benefits
- ▶ Consider flexibility - including providing for periods where beneficiary will not need benefits
- ▶ Provide planning assistance to parents/legal guardian of incapacitated individual.

The Personal Injury Attorney

- ▶ Fully share the assessments and damage models from the case
- ▶ Compete transparency regarding beneficiary and family/personal dynamics

Trust Officer

- ▶ Dedicated to acting in beneficiary's sole interest
- ▶ Wise use of funds to enhance the quality of beneficiary's life
- ▶ Respond to beneficiary's needs that aren't covered by public benefits
- ▶ Experience in handling SNTs and knowledgeable of proper expenditures
- ▶ Regular in-person visits, when appropriate; regular contact a must!
- ▶ Empathy for beneficiary and circumstances

Case Manager

- ▶ Help beneficiary secure care, services, and benefits
- ▶ Maintain knowledge regarding community resources
- ▶ Coordinate medical care, when necessary
- ▶ Help beneficiary/guardian make informed decisions
- ▶ Assess beneficiary needs regularly
- ▶ Serve as eyes and ears for trust officer to make sure needs are addressed

Family

- ▶ They live with the beneficiary on a 24/7 basis - respect their experiences and frustrations
- ▶ Communicate with their case manager or trust officer re: needs
- ▶ Recognize the limits of the special needs trust - e.g. - sole benefit

Case Scenarios - Common Considerations

- ▶ Pre-Drafting Analysis for SNT
- ▶ Need to consider out-of-pocket medical
- ▶ Need to consider projected life expectancy
- ▶ Need to document decision makers
- ▶ Obligation to report to state/local agencies in matters involving abuse or exploitation.

Scenario 1: Aging parent with adult disabled child

- ▶ What does this look like?
 - ▶ Congenital diagnosis (Down's/autism/cerebral palsy)
 - ▶ Parent in 70s; child in 40's
- ▶ Special Challenges
 - ▶ Who cares for the aging parent?
 - ▶ What happens to the adult child when the primary caregiver is gone?
 - ▶ What options exist?
- ▶ Planning tools
 - ▶ Basic Estate Planning Documents
 - ▶ Option for Guardian appointment for adult disabled child
 - ▶ Supports and Services

Scenario 2: Solo adult with chronic illness(es)

- ▶ What does this look like?
 - ▶ Diabetes/depression; heart disease/COPD
 - ▶ Single with 'chosen family'
- ▶ Special Challenges
 - ▶ No next of kin
 - ▶ No "default" decision maker or caretaker
 - ▶ Friends of same age
- ▶ Planning tools:
 - ▶ EP documents
 - ▶ Self Settled SNT
 - ▶ Letter of referral to probate court

Scenario 3: Adult with Traumatic Brain Injury

- ▶ What does this look like?
 - ▶ Typically male, vehicle accident
- ▶ Special challenges
 - ▶ With or without spouse?
 - ▶ Adult children?
- ▶ Planning tools
 - ▶ Does the subject have the capacity to execute a will or powers of attorney?
 - ▶ Is there a personal injury suit likely to bring settlement or judgment funds?

Scenario 4: Active Adult Couple (55+)

- ▶ What does this look like?
 - ▶ The "Panini" Generation
 - ▶ Aging parents and college-age [or younger] children
 - ▶ Working wife calls with questions about placement for husband's mother
- ▶ Planning Tools
 - ▶ For active adults [basic estate planning documents]
 - ▶ For aging parents - Medicaid planning and basic estate planning documents
 - ▶ Financial plan - Advisors?

Summary -Execution and Results

- ▶ A properly crafted SNT document and a collaborative team
 - ▶ Benefits available for beneficiary can sometimes only be as good as the trustee administering the trust. The trustee must be mindful of the "moving target" aspect of SNT administration [both changing needs of client and changing regulations].
 - ▶ Only certain expenditures are allowed. The wrong type of payments from the trust can disqualify a beneficiary.
- ▶ There is no "I" in team - attorney, trustee, care manager, wealth advisor, etc. must all work together for the common good of the client. Leave your ego at the door!
