

SPECIAL NEEDS TRUSTS: A PRIMER - "LET ME COUNT THE WAYS"

Arlene Lakin, Esq.
Florida Bar Board Certified Elder Law Attorney

For those of you who remember, or those who do not remember, back in the '50's and '60's, the late comedian Jackie Gleason hosted a TV show with his favorite character, Reggie Van Gleason III, a bon vivant character with a severe drinking problem. He was the scion of wealthy parents, for whom we, as attorneys, would have advised his parents to establish a *spendthrift* trust, a trust designed to prevent the beneficiary from wasting assets. Otherwise, Reggie would have blown through any inheritance his parents would have left him outright.

A *special needs* trust (SNT) may be thought of as a variant of a spendthrift trust. Simply defined, it is a trust designed for a person with special needs who cannot handle an inheritance, and, more importantly, would lose means-tested public benefits should the individual have too many countable assets. Means-tested public benefits programs, e.g., Medicaid and SSI (but not SSDI), have an asset cap of only \$ 2,000 for eligibility purposes. Because there is usually an income cap as well, there is also a special needs trust for income purposes (d4B, which references the subsection under the United States Code authorizing such trusts) - see below).

A. Third Party SNT's: These are trusts established on an individual's behalf by a 3rd party. If Reggie Van Gleason was disabled and receiving means-tested public benefits, then Reggie's parents would be the 3rd party(s) settlors of the SNT. The funds would be the parents' funds but set aside for the benefit of Reggie. These SNTs should be drafted carefully so that the individual beneficiary does not receive the assets directly, and should include the repetitive directive of only paying for needs which the government does not cover. The SNT may be a beneficiary under a Will or under a Trust; or, it may be designed as a free standing SNT. If clients believe that wealthy grandparents, for example, may want to make bequests to the SNT under their own estate documents, then a free standing SNT is recommended.

B. First Party (Self-Settled) SNT's: These are trusts funded with a disabled individual's own assets in order to keep them eligible for means-tested governmental benefits (SSI and/or Medicaid). There are 2 SNTs for assets (d4A & d4C) and 1 for income (d4B). All 3 SNT's require payback to the government at the time of the individual's death - the payback is for whatever funds the government has expended on the individual's behalf. Disabled individuals may have received assets by way of an inheritance, a transfer of assets by another, or by successfully settling a lawsuit. If a proper spend-down of the assets is not possible, then a 1st party SNT may be necessary.

42 U.S.C. § 1396p(d)(4)(A) "asset" SNT:

- The key elements of a d4A trust are as follows:
- The trust beneficiary is under the age of 65 at time of creation & funding;
- The trust beneficiary is disabled as defined in the Social Security Act;
- The trust is for the sole benefit of the individual;
- The trust is established by a parent, grandparent, legal guardian of the individual, a

court, or by the individual* (* “by the individual” added in 2016 in the federal Special Needs Trust Fairness Act under the “21st Century Cures Act”);

- The State will receive all amounts remaining in the trust upon the death of the beneficiary up to an amount equal to the total medical assistance paid on behalf of the beneficiary; and,
- The trust must be irrevocable.

NOTE: After the age of 65, additions to or augmentation of the trust will not disqualify the trust if only interest, dividends or other trust earnings. Similarly, the irrevocable assignment of the right to receive payments from an annuity or support payments made when the beneficiary was < age 65 will not be disqualifying [SI 01120.203B1c].

NOTE: When the member has lived in more than one state, the trust must provide that the funds remaining upon the death of the member are distributed to each state in which the member received Medicaid based on each state's proportionate share of the total amount of Medicaid benefits paid by all states on the member's behalf.

42 U.S.C. § 1396p(d)(4)(B) “income” SNT [a/k/a Miller Trust]:

A d4B trust does not protect assets. Its sole purpose is to render excess income exempt when the State uses an income cap as part of its eligibility determination process. The key elements of a d4B trust are as follows:

- The trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust); and,
- The State will receive all amounts remaining in the trust upon the death of the beneficiary up to an amount equal to the total medical assistance paid by the State

42 U.S.C. § 1396p(d)(4)(C) “pooled asset” SNT:

The essential elements of a d4C trust are as follows:

- It was established and is managed by a non-profit association;
- 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;
- Accounts in the trust are established solely for the benefit of disabled individuals by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court and,
- 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.

NOTE: Policies for payback to the State vary with each pooled trust company.

NOTE: SSA rules (POMS) are such that, for Medicaid eligibility, there is no age limit to join a pooled trust or add to an existing account; however, for SSI eligibility, after age 64, one cannot add to an existing pooled trust account (= a disqualifying transfer of assets/resources) without triggering a penalty period of up to 3 years.

This article is intended to educate you about the basics of special needs trusts. There is a huge amount of additional detail. If you or your client(s) are like Reggie Van Gleason III (or his parents), and means-tested public benefits are to be protected, then you need to seek the advice of an attorney who specializes in special needs trusts.