

What Attorneys Need To Know About Special Needs Trusts

Bernard A. Krooks and Andrew Hook

A. What Is A Special Needs Trust?

1. *Introduction*

- a. People with disabilities have many needs beyond basic medical care, food, clothing and shelter, including:
 - i. Recreation;
 - ii. Transportation;
 - iii. Dental care;
 - iv. Telephone and television services;
 - v. Hair and nail care;
 - vi. Differentials in cost of housing and shelter;
 - vii. Supplemental nursing care;

Bernard A. Hooks is a principal of Littman Krooks LLP in New York City. **Andrew Hook** is a partner in the Portsmouth, Virginia, law firm of Oast & Hook, P.C.

A complete set of the course materials from which this outline was drawn may be purchased from ALI-ABA by calling 1-800-CLE-NEWS and asking for customer service. (Have the order code CK059 handy). Or order online at www.ali-aba.org/aliaba/CK059.htm.

- viii. Private case management; and
 - ix. Mobility aids, including electric wheel chairs.
- b. To provide for the payment of these needs, federal law permits a person with disabilities to retain his or her resources in one of two types of special needs trusts ("SNT") without those resources disqualifying him or her from SSI or Medicaid benefits. 42 U.S.C. §§1382b, §1396p(d)(4). The two types of trusts are:
- i. d(4)(A) SNT. 42 U.S.C. §1396p(d)(4)(A). A d(4)(A) SNT is a trust created for the sole benefit of an individual with a disability under the age of 65 by the individual's parent, grandparent, legal guardian, or court. 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 under the Medicaid program for services to the individual.
 - ii. d(4)(C) "Pooled" SNT. 42 U.S.C. §1396p(d)(4)(C). A d(4)(C) SNT is a trust created and managed by a nonprofit organization. A separate sub-account is maintained for each beneficiary of the trust, but the assets are pooled for investment and management purposes. The account is created for the sole benefit of an individual with a disability by the individual's parent, grandparent, legal guardian, court, or *the individual*.
 - (1) One of the most significant differences between a d(4)(A) and a d(4)(C) trust is the ability of an individual with a disability to create his or her own pooled trust sub-account.
 - (2) The pooled trust must provide that to the extent that funds in the account are not otherwise retained by the trust upon the individual's death, the state Medicaid agency must receive the amounts remaining up to the amount paid by the Medicaid program for the individual.
- c. The typical estate planning SNT is a Third Party SNT.
- i. A Third Party SNT is a special needs trust created and funded with the assets of a person other than the disabled beneficiary. If the disabled beneficiary does not have the legal authority to revoke the trust or direct the use of the trust for his or her own support, then the trust is not a resource for SSI eligibility purposes. Therefore, a Third Party SNT should

not have a support and maintenance distribution standard. *See* POMS SI 01120.200

(1) As part of their estate planning, parents and grandparents frequently create and fund Third Party SNTs for the benefit of their beneficiaries who have disabilities.

(2) The Third Party SNT affords the parents or grandparents the opportunity to preserve the beneficiary's public benefits and to supplement those benefits.

(3) In addition, the Third Party SNT provides for the proper management of the gift to the disabled beneficiary for the beneficiary's entire lifetime.

(4) At the disabled beneficiary's death, the property can pass as designated in the will or trust agreement or by exercise of a power of appointment.

ii. d(4)(A) and d(4)(C) SNTs differ from Third Party SNTs in that d(4) trusts contain the resources of an individual with disabilities and must contain a mandatory payback provision.

iii. A Third Party SNT can be created by a revocable inter-vivos trust agreement, irrevocable inter-vivos trust agreement, or a will. A d(4)(A) or d(4)(C) SNT must be created by an irrevocable inter-vivos trust agreement.

d. Special Needs Trusts are also sometimes called supplemental needs trusts. However, the Social Security Administration refers to d(4)(A) and d(4)(C) trusts as special needs trusts. Practitioners typically refer to third party SNTs as "supplemental needs trusts" and first party SNTs, such as d(4)(A) and d(4)(C) trusts, as "special needs trusts."

e. This outline will consider and discuss d(4)(A) and d(4)(C) SNTs.

2. *Purpose.* The purpose of the SNT is to avoid:

a. The imposition of a period of ineligibility for SSI or Medicaid due to the transfer of the resources to the trust (42 U.S.C. 1382b(c)); and

b. The treatment of the trust as a resource for SSI or Medicaid eligibility purposes.

3. *Uses and Misuses.* The following are typical situations in which an SNT is used to protect the SSI or Medicaid benefits of a disabled individual:
 - a. Tort recovery or settlement;
 - b. Inheritance (i.e., ineffective or no estate planning by the disabled individual's family);
 - c. Equitable distribution or alimony;
4. Due to the pay back requirement for d(4)(A) and d(4)(C) SNTs, the parents, grandparents, or other family members of a person with disabilities should not make gifts to the disabled person using a d(4)(A) or d(4)(C) SNT. They should use a Third Party SNT to make the gift. Unfortunately, in many cases, the estate planning attorney mistakenly drafts a d(4)(A) SNT or recommends a d(4)(C) SNT rather than a Third Party SNT. The improper use of the d(4)(A) or d(4)(C) SNT could result in the unnecessary repayment of Medicaid benefits to the state and a malpractice action against the estate planning attorney.

B. Is It Malpractice To Fail To Preserve SSI And Medicaid Eligibility?

1. *Personal Injury Case*
 - a. Christina Grillo settled a personal injury case in 1991 for a lump sum upon the advice of her personal injury attorney. She later sued the attorney and guardian ad litem for malpractice. She alleged that the defendants: (i) failed to consult competent experts concerning a structured settlement and (ii) failed to plan to preserve her SSI and Medicaid eligibility. Ms. Grillo alleged that a structured settlement with a d(4)(A) SNT would have protected her personal injury settlement from dissipation, provided tax benefits, and protected her SSI and Medicaid benefits. The case was settled by all defendants for a combined sum of \$4.1 million. *Grillo v. Petiete et al.*, 96-145090-92 (96th Dist. Ct., Tarrant Cty., Texas); and *Grillo v. Henry Cause*, 96-167943-96, (96th Dist. Ct., Tarrant Cty., Texas).
 - b. Edith Saunders, the conservator for James A. Saunders III (Jamie), settled a personal injury action on Jamie's behalf. As a part of the application to compromise and settle the claim, the conservator requested that the net settlement amount be placed in a d(4)(A) SNT for Jamie to preserve his Medicaid eligibility. The State of Connecticut objected. The Supreme Court of Connecticut rejected the attorney general's argument that the conserva-

tor should spend down all of Jamie's assets and then re-apply for Medicaid assistance. The court ruled: "By contrast, with the creation of the trust, Jamie will retain his Medicaid eligibility and Saunders (the conservatrix) can provide for his supplemental needs from the trust assets, while Medicaid provides for his basic medical care. Therefore, not only is the latter course of action clearly the better one for Jamie, *it may be fairly stated that by failing to follow it, the Probate Court, and Saunders potentially could have been deemed to be in dereliction of their duties to Jamie* (italics added)." *Dept. of Social Services v. Saunders*, 724 A.2d 1093, 1105 (Conn. 1999). This duty requires the fiduciary of an estate and indirectly, the trial lawyer, to protect the disabled client's settlement.

2. Estate Planning

- a. In 2000, an attorney was retained to draft the will that left a significant sum to the testatrix's sister who resided in a nursing home. The Medicaid program was paying for the sister's care.
- b. After the testatrix's death, the sister was disqualified for Medicaid assistance, had to spend down the inheritance, and re-apply for Medicaid assistance.
- c. The Supreme Judicial Court of Maine held that the attorney "could and should have drafted a 'Supplemental Needs Trust' for Robenson, thereby avoiding the Medicaid spend down...."
- d. On October 25, 2002, the court suspended the drafting attorney's license to practice law due to his failure, *inter-alia*, to create the supplemental needs trust. *Board of Overseers of the Bar v. Ralph W. Brown, Esq.*, 2002 Me. LEXIS 190 (Me. October 25, 2002).

C. What Public Benefits Are Available For People With Disabilities

1. Benefits Not Based On Financial Need

a. Social Security Disability Insurance

- i. An individual is entitled to SSDI benefits if he or she:

- (1) Is under full retirement age;

- (2) Has at least 20 credits in the 40-quarter period ending with the quarter in which the individual became disabled (20/40 rule), and is