



WSSFC 2022

Substantive Track – Session 2

The ABCs of SNTs

Carol J. Wessels

About the Presenters...

Kristi L. Papez, graduated from Marquette University Law School in December 2014 and began her legal career at Miller & Miller, LLC, a general practice law firm in Portage, WI. She focused her practice on the areas of Guardian ad Litem, probate, and estate planning. Kristi joined Wispact in August 2017 and is the current Senior General Counsel. Kristi is a member of the National Academy of Elder Law Attorneys and the Wisconsin Chapter of NAELA, the Elder Law and Special Needs Section and Real Property, Probate & Trust Law Section of the State Bar. She is also on the board of directors for the Wisconsin Chapter of the American Parkinson Disease Association.

Carol J. Wessels has been practicing elder and special needs law since 1991. She graduated from Wisconsin Law School in 1988 and is an owner of Wessels & Liebau LLC in Mequon, Wisconsin. In addition to traditional elder law, she handles contested litigation cases and Medicaid appeals. Carol recently completed two terms on the Board of Directors of the National Academy of Elder Law Attorneys. Outside her practice, Ms. Wessels spends her time as a warrior in the fight to end Alzheimer's through her work on the Board of Directors of the Alzheimer's Association of Wisconsin, where she currently serves as the chair of the Public Policy Committee. You can follow her blog at www.wesselselderlaw.wordpress.com or visit her website at www.WesselsLiebau.com

The ABCs of SNTs

SUPPLEMENTAL NEEDS TRUSTS - The Basics

Presented by:
Carol J. Wessels
Wessels & Liebau LLC
www.wesselsliebau.com

Course Materials Prepared With:

Kristi Papez
Wispect Senior General Counsel
www.wispect.org
October, 2022

I. Objectives: participants will understand the following by the end of the presentation:

- What is an SNT
- What is the difference between a private SNT and a pooled trust
- When should you consider an SNT
- What are some alternatives
- Who should you contact and when

II. Why is this relevant to me? (Why are my client's benefits important to the matter I am handling?)

A. Some benefits are "needs-based" meaning that eligibility is based on having a limited amount of income, or assets, or both. Examples: SSI (\$2000 asset level per 20 CFR 416.1205) Medicaid nursing home benefits (See e.g. Wis. Stat. § 49.47(B) - \$2000 for single)

B. For clients on needs-based benefits, certain things that are related to your matter could cause them to lose eligibility. Examples: personal injury settlement, inheritance, divorce.

C. Even if the work you do on the client's matter is objectively excellent within the scope of the matter (such as a fantastic personal injury settlement) if it has negative effects on the central aspects of your client's life, the level of satisfaction for your client will be significantly impacted, and not in a good way.

III. What is a Supplemental Needs Trust?

A Supplemental Needs Trust (SNT) is a trust for the benefit of a person with a disability of any kind. Disability can be caused by developmental disability, mental illness, traumatic brain injury, dementia, physical illness, physical injury, drug or alcohol addiction or some combination of any of these.

The primary purpose of all planning for persons with disabilities should be to provide for as happy and comfortable a life for the person as is possible. Usually this requires financial resources to supplement - not replace - public benefits. Thus, an SNT may provide the bridge between public benefits and a comfortable and secure life.

A properly crafted SNT will allow a disabled individual to continue to receive needs-based benefits. This is because the SNT is set up so that assets in the SNT are outside the direct reach of the disabled individual and is administered with an eye to distributions that do not interfere with benefits. For this reason, it is critical that the trustee have a good understanding of the rules.

IV. Types of Supplemental Needs Trusts

A. “First party” vs. “Third party”: In considering the trust descriptions below, one fundamental difference is perhaps more significant than any other: WHOSE funds are in the trust.

1. “First Party” trusts are funded with the *assets of the disabled individual*. Typically the assets come from a personal injury settlement, inheritance, or other “windfall” type of payment that is – relative to the individual’s assets as a whole – large and singular / infrequent. It would also be funded with the liquidation of assets that otherwise would render the individual ineligible for benefits, such as a retirement fund. First party trusts will virtually always have a Medicaid “payback” provision. First party trusts are also called “self-settled” trusts.

2. “Third party” trusts are funded with the assets of someone else besides the disabled individual. Because these funds never belonged to the disabled individual, a Medicaid Payback provision is not required. It is important NEVER to mix third-party funds with first-party funds.

B. “Special Needs”, “Amenities” or “Luxuries” Trusts: Some trusts for persons with disabilities are drafted so that distributions may be made only for luxuries or amenities; distributions for any basic living expense are prohibited. This may be appropriate if the trust is small or the beneficiary’s needs are certain to be very limited. In other cases, the unintended effect is to require the beneficiary to live below the poverty level.

C. Discretionary Trusts: A trust established and funded by a person with no legal duty to support the disabled beneficiary, which gives the trustee full discretion over distributions, can be a SNT, even if the trustee could exercise his/her discretion to provide for the beneficiary's basic needs. These are always third-party trusts.

D. "OBRA" Trusts: A trust funded with the assets of the disabled person under 65 (or his/her spouse) after October 1, 1993. This type of trust must have a "payback" provision, or the person will not qualify for some types of Medical Assistance. This is one kind of "first party" trust. An OBRA trust is typically drafted by an attorney experienced in special needs planning.

E. Pooled trusts: A pooled trust combines the assets of many disabled individuals, to maximize investment potential and reduce costs. Pooled trusts can be either first-party or third-party trusts. In Wisconsin, two examples of pooled trusts are the Life Navigators trusts and the Wispact trusts. The Trust assets are managed by a corporate trustee. The Trustee provides professional money management at a somewhat reduced cost and will accept trusts substantially smaller than is usually required. Trust services are overseen by the non-profit community group or organization that established the trust, generally a group that is familiar with the needs of persons with disabilities. When the beneficiary dies, if the funds are "first party" funds, then they will be used to repay Medicaid if the funds are sufficient for full repayment; if not sufficient for full repayment, the funds will be retained in a "pool" to be used for other disabled beneficiaries. Third party pooled trusts need not have a repayment provision.

Pooled trusts have one "Master" trust document. Individuals (by their attorneys) complete case-specific paperwork to open an account, but do not actually draft the trust.

V. First Party Trust Creation Rules. MA and SSI treat a transfer to a trust as divestment, and assets in a trust as available, unless it is a properly established supplemental needs trust or pooled trust (42 USC 1396(p)(D)(4)(C)). A first-party trust is subject to the following requirements:

First Party Trust Creation Requirements		
	Pooled Trust	Non-Pooled OBRA Trust
Grantor Disability	Yes, must be disabled	Yes, must be disabled
Age of Grantor	Any age, can be over 65	65 or younger
Who may establish?	Parent, grandparent, guardian, court or individual him/herself	Individual, Parent, grandparent, guardian or court
Payback Requirements	Must repay Medicaid only if remaining trust funds sufficient for full payment. Otherwise funds remain in the pool.	Yes, must repay all medicaid received by grantor

A. Disabled grantor: The individual funding the trust is disabled under Social Security standards;

- B. Age of Grantor:
1. Non-pooled trust: the individual is under age 65;
 2. Pooled trust: may be any age; however, SSA may view funding as divestment if over 65;
- C. Who may establish the trust:
1. For a non-pooled SNT: The trust is established by the individual him or herself, a parent, grandparent, legal representative, legal guardian or court
 2. For a pooled trust, any of the above persons also may establish the trust.
- D. Payback:
1. Non-pooled trust: The state will receive all amounts remaining in the trust upon the death of the individual, up to an amount equal to the total Medicaid paid on behalf of the individual by any state. (Note, a payback under this section could be more expansive than traditional Medicaid estate recovery, since it is all Medicaid benefits paid on behalf on an individual over the course of their entire lifetime)
 2. Pooled trust: If funds in the trust are not sufficient to make a full payback, funds may be retainer in the trust to provide services to other disabled individuals.
- E. Creation of Supplemental Needs Trust in Guardianship cases: There is specific statutory authority for the creation and transfer of assets to an irrevocable supplemental needs trust for the benefit of the ward. Wis. Stat. §54.20(2)(c).
1. The power must be granted by the Court. This can be requested in the “additional powers” section of the petition for guardianship of the estate.
 2. Practice tip: It may be in the individual’s best interests to request permission to set up and fund an SNT or Pooled trust subaccount, during the initial petition, even if you are not sure this will be used. A Court may be hesitant about approving an unseen SNT, and in this case, you may wish to petition for approval to use the Wispact Trust.
- F. Court-Ordered Supplemental Needs Trust (Non-Guardianship Cases)
1. Where a Medicaid recipient comes into a sum of money that will affect his or her eligibility for Medicaid, a supplemental/special needs trust is an option. If appropriate, the individual him or herself may petition the Court to establish the trust.
 2. Legal Authority: The Federal law recognizing SNTs in Medicaid cases is 42 USC § 1396(d)(4)(a). Wisconsin also recognizes SNTs as an exempt asset for Medicaid under Wis. Stat. § 49.454(4). Also, the Wisconsin Court of Appeals

recognized the use of Medicaid Payback/Supplemental Needs Trusts under Wis. Stat. § 49.454(4) in Marjorie A. G. v. Dodge County DHS (In re Scott G.G.), 2003 WI App 52, &11, 261 Wis. 2d 679, 685 N.W. 2d 438 (Ct. App. 2003). As far as the court procedure is concerned, there is no specific Wisconsin statutory authority for a Court to establish an SNT, although § 704.0401(4) contemplates that a court may establish a trust pursuant to statutory or equitable powers. The authority comes from the Court's plenary jurisdiction under statute and the Wisconsin Constitution.

a) Statutes: Wis. Stat. § 753.03 sets forth broad jurisdiction for courts in this State: The circuit courts have the general jurisdiction prescribed for them by Article VII of the Constitution and have power to issue all writs, process and commissions provided in Article VII of the Constitution or by the statutes, or which may be necessary to the due execution of the powers vested in them. The circuit courts have power to hear and determine, within their respective circuits, all civil and criminal actions and proceedings unless exclusive jurisdiction is given to some other court; and they have all the powers, according to the usages of courts of law and equity, necessary to the full and complete jurisdiction of the causes and parties and the full and complete administration of justice, and to carry into effect their judgments, orders and other determinations, subject to review by the court of appeals or the supreme court as provided by law. The courts and the judges thereof have power to award all such writs, process and commissions, throughout the state, returnable in the proper county.

b) Equitable Power: Wisconsin courts have long held common law, equitable authority to establish trusts. Woodmansee v. Schmitz, 202 Wis. 242 (Wis. 1930). Article VII, Section 8 of the Wisconsin Constitution abolished the distinction between courts of equity and courts at law. This states in pertinent part, "Except as otherwise provided by law, the Circuit Court shall have original jurisdiction in all matters civil and criminal within this State...". Wisconsin Constitution Article VII, &8.

c) Constitutional Authority: Under the Wisconsin Constitution, circuit courts in Wisconsin are constitutional courts with general original subject matter jurisdiction over all matters civil and criminal. Thus, a circuit court is never without subject matter jurisdiction. Village of Trempealeau v. Mikrut, 2004 WI 79, &1 (Wis. 2004); this grant of jurisdiction is extremely broad. In the Matter of Eberhardy, 102 Wis. 2d 539, 548 (1981).

VI. Differences between “pooled” trust and private (stand-alone) SNT

- A. Pooled trusts are generally not customizable
 - 1. Each sub-account within a pooled trust is created by a fill-in-the-blank document known as a “joinder agreement” that joins the account to the Master Trust.
 - 2. Stand-alone trusts (D4A trusts) are highly customizable, so long as they follow the requirements to be an exempt resource to the beneficiary
- B. Fees and minimum balance requirements can vary widely
 - 1. Corporate or bank trustees of stand-alone trusts often charge much higher fees for the administration of such a customized trust.
 - 2. Pooled trusts can offer lower fees because all accounts are administered and invested in the same manner.
 - 3. Pooled trusts have very low minimums to enter the pool (often less than \$1,000), whereas bank or corporate trustees require minimum balances in the \$300,000-\$500,000 range.
 - 4. Pooled trusts have negotiated much lower rates for services such as fiscal intermediaries, property management companies, or SSA-approved debit True Link cards.
- C. Choice of trustee
 - 1. Pooled trusts do not offer a choice of trustee
 - a) Partner with a professional trustee
 - b) Non-profit is the trust director, trust protector, and trust manager
 - 2. Stand-alone trusts can be managed by a bank trustee, other professional or corporate trustee, or an individual who is knowledgeable and willing (family member, perhaps)
- D. Customer service and institutional knowledge can vary widely (managing a special needs trust and staying abreast of changes in the law is challenging!)
 - 1. Pooled trusts are managed by non-profit organizations that are staffed by individuals knowledgeable about public benefits, who often have a connection to, and are empathetic to, the disability community
 - a) A network of service providers readily available
 - b) Special needs trusts are the only trusts a pooled trust has (no “wealth services division” like a bank)
 - 2. Corporate or bank trustees sometimes do not understand public benefits, special needs trusts, or the disability community, and they sometimes lack the knowledge and ambition to work closely with a beneficiary
 - a) May make a cash distribution to the beneficiary, not understanding the consequences
- E. Other administration differences

1. Pooled trusts are much less likely to play it fast and loose with distributions because of the fear of unwanted attention from SSA
 - a) Unwanted attention on one sub-account could cause a ripple effect to all accounts
 - b) Organizational policy leads to strict documentation requirements for reimbursements or large purchases
 2. Trustees of stand-alone trusts may be more willing to make questionable distributions (especially if the trustee is a family member, and not a corporate or bank trustee)
- F. “Unique Assets” are disfavored by pooled trusts
1. Pooled trusts keep their fees down by keeping things *in* the pool.
 2. Unique assets, such as real estate, rental properties inherited IRAs, brokerage accounts, gold bars, land contracts, etc., must be held outside the pool and incur additional costs and labor by the trustee.
 3. Corporate or bank trustees, of stand-alone trusts, can readily accept unusual or burdensome assets (and they charge for this)
- G. Age differences
1. Pooled trusts can be created and funded regardless of how old the beneficiary is
 2. Stand-alone trusts cannot be created or funded after the beneficiary reaches age 65
- H. Medicaid payback provisions differ
1. The non-profit organization managing the pooled trust can retain the funds at death (because of this, pooled trusts are able to offer generous grants to current beneficiaries)
 2. A stand-alone trust *must* payback to Estate Recovery up to the total amount of Medicaid used by the beneficiary over the course of their lifetime

VII. The basics of different benefits:

- A. “SSI” vs. “SSDI”
1. Social Security benefits and Supplemental Security Income benefits have different eligibility rules- 20 CFR 404 *et seq* (*Social Security*); 20 CFR 416 *et seq.* (*SSI*)
 2. However, people often confuse “Social Security Disability” or SSDI, which is based on earnings, with “Supplemental Security Income” or SSI, which can be granted based on disability but is a needs-based benefit. “SSI” and “SSDI” are easily interchanged by anyone who does not regularly practice with these benefits.
- B. SSI vs. SSDI – telling the difference

1. Look at the Award Letter - Letters regarding SSI almost always state “Supplemental Security Income” under “Social Security Administration” in the upper left-hand corner (see examples)
2. Look online: www.socialsecurity.gov/myaccount/
 - a) Client must create own account
 - b) Can print verification letter showing type of benefits, amount of benefits, begin date.
 - c) Will also show Medicare information
3. Look at the bank statement
 - a) All federal payments must be delivered electronically.
 - b) Deposits from Social Security will show up as something like:
ACH SSA TREAS 310 \$Amount
xxSocSec
4. Deposits from Federal SSI will look something like:
ACH SSI TREAS 310 \$Amount
xxSuppSec
5. Deposits from State SSI will look something like:
ACH/State of Wisc \$83.78 or 179.77
SSI

C. Medicare or Medicaid

- a) Medicare is Federal Health Insurance based on work history: 42 CFR 405
- b) Medicaid is a combined federal / state program. 42 CFR 430, Wis. Stat. § 49.43 *et seq.* It is also called “Title 19”, “Medical Assistance” or “MA”.
 1. Most varieties based on limited income and assets
 2. BadgerCare does not have asset limit
 3. CARES Notice – See example
 4. ACCESS account <https://access.wisconsin.gov/>

D. Other benefits

1. Veterans’ Income Benefits
2. “Pension” is needs-based
3. Incl. Aid and Attendance
4. “Compensation” is not
5. https://www.ebenefits.va.gov/ebenefits-portal/ebenefits.portal?_nfpb=true&_nfxr=false&_pageLabel=Home
 More complicated than SSA to create account, needs ID.
6. Food Stamps

7. Public Housing/Section 8

VIII. Why a SNT isn't always the answer

- A. Affordable Care Act
 - 1. Elimination of pre-existing conditions, consider enrollment in Marketplace plan
 - 2. Medicaid payback doesn't apply to Marketplace plan
 - 3. Marketplace plans do not cover Long Term Care
- B. Non-Asset Medicaid - Individuals with lower income may qualify for Badgercare – no asset restriction.
- C. Importance of “categorically needy” status.

IX. Alternatives to SNT

- A. Keep and go off benefits
- B. Buy excluded assets – possibly a house, car, personal items
- C. Pay off debt / mortgage
- D. Give it away – CAUTION!

X. Third-Party Trusts: Testamentary Trust vs. “Living” (non-testamentary) Trust.

- A. A third-party SNT may be testamentary or “living” i.e., created during the lifetime of the grantor.
- B. With a testamentary trust, a probate will be needed to establish the trust, but not for ongoing supervision.
- C. A non-testamentary trust may provide more flexibility.
 - 1. If several people want to benefit one disabled person and the same remainder beneficiaries, one non-testamentary SNT can be used in their separate estate plans.
 - 2. A non-testamentary trust can be funded before the death of the grantor.
 - 3. A non-testamentary trust can be named as beneficiary of life insurance or other assets.

XI. Third-Party Supplemental Needs Trust as Beneficiary of Retirement Arrangements, Life Insurance and Annuities.

A. People may buy a life insurance policy or annuity specifically to fund a SNT. This provides peace of mind; the SNT will be funded with a definite amount of money. Already existing policies can be used in the same way.

B. An individual can name a SNT as beneficiary of IRAs and other retirement arrangements. However, care must be taken to understand the tax consequences of this choice.

***Special note: This is a good time for the standard reminder that even though Medicaid, SSI, and Income Taxes are all based on federal laws, there is relatively little consistency between benefits planning and tax planning. Planning needed to preserve benefits may have your accountant pulling her hair out.*

C. Money in non-Roth retirement arrangements has never been taxed, and therefore will be taxed when it is withdrawn from the retirement plan. The law requires that money be withdrawn at certain times and in certain amounts (the Required Minimum Distribution or RMD). The usual goal in planning is to defer withdrawals as long as legally possible and therefore both defer income taxes and keep income as low as possible so that the withdrawals are taxed at the lowest possible rate.

D. Typical planning with trusts and retirement plans involves the creation of “conduit” properties in the trust that require the distributions from the IRA to be passed along to the designated beneficiaries. This maximizes the amount of time over which an IRA can be drawn out.

E. Special Needs Trusts are designed under the Secure Act as the equivalent of Eligible Designated Beneficiaries, so the retirement funds can be distributed to the trust over the life expectancy of the disabled beneficiary.

XII. Administration; basic principles:

The complexities of SNT administration are beyond this introductory session. There are some basic principles that will be a good start:

A. Know what benefits the beneficiary is receiving. The kinds of public benefits will govern the extent to which distributions will affect benefits. For example, Social Security Disability (SSD) is not a needs-based benefit. It is essentially the early receipt of an individual’s own earned Social Security Retirement which is paid due to an individual’s becoming disabled. Where the beneficiary of an SNT is receiving only SSD, then distributions can be quite liberal and can even involve cash payments to the individual. On the other hand, if the individual is receiving Supplemental Security Income (SSI) then distributions must be carefully monitored since any cash will reduce the individual’s benefit for that month, and payment of expenses for food and shelter will also result in a

reduction of benefits even if they are paid to someone other than the beneficiary, such as a landlord.

B. Understand the “presumed maximum value rule” POMS SI 00835.300. This rule provides that where an SSI recipient receives food or shelter (or payment of either expense) from another (such as a trust) SSI will be reduced by one-third of the federal benefit rate, unless the beneficiary establishes that the value of the payments for food and shelter was less than one-third of the federal benefit. In any event, payments of food or shelter will reduce the SSI just like a payment of cash. For an explanation of what kinds of things fall within this rule, see 20 CFR 416.1130

C. Maintain good records in the event that there are questions.

D. Familiarize yourself with the provisions of the new Uniform Trust Code (Ch. 701) in the event that the trust needs to be modified to repair a defect or address a concern.

XII. Help us help you!

1. Get a special needs attorney involved early
2. DO NOT SETTLE a matter involving an influx of cash to the individual until after consultation
3. Timing is everything (well not really, but it IS important)
4. Time involved for getting guardianship
5. Time of receipt of funds – not end of month!
6. Timing to report: Medicaid is 10 days after event (i.e. receipt of funds) SSI is 10 days from the beginning of the month after which the event happened.
7. Don’t assume SNT is always the answer.

The ABCs of SNTs

Understanding when a special needs trust may be
right for your client.

Carol J. Wessels
Wessels & Liebau LLC
Kristi Papez
Wispect, Inc.
October, 2022



Objectives for today

- Understand the situations where a special needs trust should be considered;
- Understand how a SNT works and is created;
- Understand what benefits your clients are getting, and know how to find out;
- Understand why a special needs trust is not always the best answer for a client on public benefits.

What is a Special Needs Trust and Why use it?

- These are special trust arrangements set up to protect eligibility for Medicaid, SSI, etc.
- Funds obtained will mean very little if it causes individual to lose benefits
- Allows “quality of life” expenditures that may improve life after injury.

Downsides of SNT

- Medicaid “Payback”;
- Lack of flexibility and control;
- Client confusion – it’s not just another bank account;
- Cost of administration;
- Potential for Trustee Error (usually in Private Trusts).

Introduction To SNT’s

The different Kinds of Special Needs Trusts



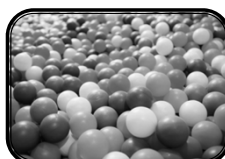
First Party (Self funded)



Third Party



Standalone (Private)



Pooled

FIRST PARTY VS THIRD PARTY

- FIRST PARTY SNT
- “Self-Funded”
- Beneficiary’s own funds or funds directed to beneficiary
- Must have payback



- THIRD PARTY SNT
- Funded with someone else’s money
- NO Payback
- Never add beneficiary’s funds



Stand-alone Self-Funded (First Party) SNT (d4A)

- Beneficiary is disabled
- *Beneficiary is < 65 years old at time of creation*
- “Sole Benefit” for beneficiary
- No legal right to distributions from the trust
- Trust created by individual, parents, grandparent, guardian, or court
- Consult with Private Attorney for drafting and advice.
- Remaining assets in the trust must reimburse the Medicaid State Agency

Pooled Self-Funded (First Party) Trust (d4C)

- Beneficiary is disabled
- Trust established by a not-for-profit : i.e. Wispact, Life Navigators
- Separate account maintained for each beneficiary
- "Sole Benefit" for beneficiary
- Irrevocable
- No legal right to distributions from trust.
- Trust established by individual, parents, grandparent, guardian, or the court
- *Beneficiary can be > 64 at time of establishment.*
- Assets remaining in trust can go to retained fund before repaying Medicaid State Agency
 - Retained Fund must be spent on beneficiaries of pooled trust.

Third Party Pooled and Stand-alone SNT

- Established with assets of someone who is not the beneficiary, such as a parent or grandparent.
- Cannot mix any assets of the beneficiary with the trust.
- Divestment rules to the person whose funds are being used, when considering creation.
- The disabled beneficiary cannot have any legal right to distributions from the trust.
"Discretionary" trust.

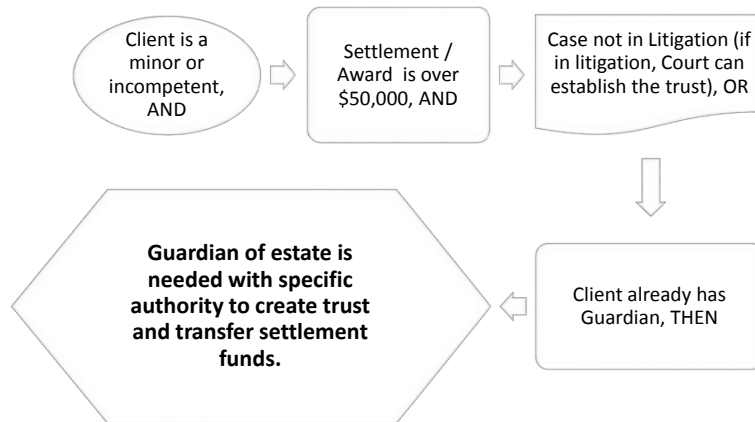
Special Needs Trust – getting it done

- Why have a special needs trust – and why not
- Who can set up a special needs trust
- When do you need a guardian
- How much time does it take?

Who can set up an SNT?

- 42 USC 1396p(d)(4)(a) trusts are privately drafted trusts that can be established by the individual him or herself, DPOA agent (with proper authorization), a parent, grandparent, guardian (with proper authorization), or court. Grantor must be under 65.
 - Could be created by court where case is filed;
 - If out of court, could be created by competent individual or any of the others listed;
 - If guardian, need to have specific authority and guardian of estate, not just person.
- 42 USC 1396p(d)(4)(c) trusts are “pooled” trusts set up by a non-profit agency, accounts within the trust can be opened by the individual, DPOA agent, parent, grandparent, guardian, or court. In WI, grantor may be any individual.

When does my client need a guardian to establish a trust?



SNT's Are Not Countable Assets Or Income for SSA/SSI/MA

- SNT's are not countable assets nor income for Social Security and Medicaid based benefits.
 - Proper creation
 - Proper Administration
 - A beneficiary cannot receive distributions directly.
 - Sole Benefit Rule
 - SSI limitations
- SNT's do count for VA benefits (Aid & Attendance)

Exemptions From Divestment Rules*

- Transfers to a third party trust are divestments unless:
 - The disabled beneficiary is the settlor's child.
 - The disabled beneficiary is not the settlor's child but is under 65 years old.

*Not a comprehensive list of divestment rules, but provides a good background.

Comparing Pooled Trust and Standalone SNT's

Pooled Trust

- The Retained Fund
- Can be Created by Those > 64
- Expertise in Trust, Special Needs Trusts, and Public Benefits Law
- Professional Services at an Affordable Cost
- Can be established quickly
- Creation grants (Wispect, Life Navigators)
- Creator cannot choose trustee

Standalone Trust

- Creator can choose the trustee
- Trustee may or may not charge any fees
- Cost of legal advice to trustee may be higher than pooled trust
- Potential for mistakes if a layperson trustee
- Typically more expensive to create

What Happens After A Beneficiary of a Self-Funded Wispact Trust Passes Away?

- If the remaining amount < Medicaid Payback = all to retained fund
- If the remaining amount > Medicaid Payback Amount,
 - First to Medicaid Payback .
 - Then whatever is left to remainder beneficiaries.
- The trust's remaining assets can *always* be directed to benefit a specific person under the retained fund.



The Retained Fund

- Can direct remainder to go to another disabled family member
 - E.g. sibling or spouse
- The Retained Fund also helps beneficiaries on a grant-like basis.
 - Funeral expenses not pre-paid and incurred after death;
 - Distributions for emergency situations;
 - Subsidize creation costs for trusts funded with certain amounts.

Why are my client's benefits important to their legal matter?

- Some benefits are “needs-based” meaning that eligibility is based on having a limited amount of income, or assets, or both.
- For clients on needs-based benefits, receiving money directly through a PI settlement, inheritance, or other success on your part could cause them to lose eligibility.
- The funds you worked hard to get for your client will simply be spent on basic needs to replace the lost benefits, causing frustration at best and dissatisfaction at worst.

What is my client on?

- Why do you need to know?
- Why your client may not be the best source of information.
- Why special needs attorneys sometimes think you are not the best source of information.
- How we double check on what you tell us, and how you can get ahead of the game.



Let's play Acronym Soup!

- | | |
|--------|-------|
| ● SSA | ● VA |
| ● SSI | ● A&A |
| ● SSDI | ● SNT |
| ● TANF | ● MA |
| ● SNAP | ● MSP |
| ● ACA | ● MSA |

“SSI” vs. “SSDI”

- Social Security benefits and supplemental security income benefits have different eligibility rules
- However, people often confuse “Social Security Disability” or SSDI, which is based on earnings, with “Supplemental Security Income” or SSI, which can be granted based on disability but is a need’s based benefit. “SSI” and “SSDI” are easily interchanged by anyone who does not regularly practice with these benefits.

SSI vs. SSDI – telling the difference

- Look at the Award Letter
- Look online: www.socialsecurity.gov/myaccount/
 - Client must create own account
 - Can print verification letter
- Look at the bank statement
 - All federal payments must be delivered electronically.
 - Amounts may give you a clue – federal SSA deposit over \$841 (2022) is typically SSD, not SSI.
 - Sources may give a clue – WI pays SSI (\$83.78 or \$179.77) , but not SSD
 - Number of payments may give you a clue. Two Social Security federal payments typically mean client receives some SSI.

Medicare or Medicaid

Medicare

- Federal Health Insurance based on work history
- “Red White and Blue” Card
Or
- Medicare Advantage Card:
 - AARP Medicare Complete
 - Humana
 - Others
- Can use My Social Security Account for details

Medicaid

- State Administered Health benefit
- Most varieties based on limited income and assets
- BadgerCare does not have asset limit
- “Forward” Card indicates enrollment
- CARES Notice
- ACCESS account
 - <https://access.wisconsin.gov/>

Other benefits

- Veterans' Income Benefits
 - "Pension" is needs-based
 - Incl. Aid and Attendance
 - "Compensation" is not
 - More complicated than SSA to create account, needs ID.
- Food Stamps
- Public Housing/Section 8

Handy Comparison Chart

Benefits that may be affected by settlement/award

- Supplemental Security Income
- Medicaid / Mapp / Family Care
- Housing Assistance
- Veterans Pension / Aid & Attendance

Benefits not affected

- Medicare / Medicare Advantage
- Social Security Disability
- Social Security
- Railroad Retirement

No Effect unless funds generate income

- Badgercare (generally)
- Food Stamps (Generally)
- Veterans Compensation
- Military retirement

Prepared 2022 by Carol Wessels

Why a SNT isn't always the answer

- Affordable Care Act

- Elimination of pre-existing conditions, consider enrollment in Marketplace plan
- Medicaid payback doesn't apply to Marketplace plan
- Marketplace plans do not cover Long Term Care

- Non-Asset Medicaid

- Individuals with lower income may qualify for Badgercare – no asset restriction.
- Importance of “categorically needy” status.

Alternatives to SNT

- Keep and go off benefits
- Buy excluded assets – possibly a house, car, personal items
- Pay off debt / mortgage
- Give it away – CAUTION!

Help us help you!

- Get a special needs attorney involved early
- Consult BEFORE the funds come in
- Timing is everything (well not really, but it IS important)
 - Time involved for getting guardianship
 - Time of receipt of funds – not end of month!
 - Timing to report
- Don't assume SNT is always the answer.