

# Special Needs Trusts and the Affordable Care Act: Frequently Asked Questions

---

CANHR  
WEBINAR June 4, 2014

6/4/2014

Special Needs Trusts and the ACA

1

## Special Needs Trusts and the ACA

---

- Basic Principles: The ACA offers:
  - Expanded Medi-Cal
  - Private Health Insurance through the Exchange
  - Coverage of children to age 26 on parental insurance regardless of status
  - Coverage of pre existing conditions
  - Removal of lifetime limits on insurance coverage
  - Caps on out-of-pockets for individuals

6/4/2014

Special Needs Trusts and the ACA

2

## Special Needs Trusts and the ACA

---

- Would a SNT be helpful under the ACA?
  - Effect of Expanded Medi-Cal [no asset caps]
  - Possibility of Buying Insurance on an Exchange
  - Loss of SSI if Beneficiary has Direct Access to Funds

6/4/2014

Special Needs Trusts and the ACA

3

## Special Needs Trusts and the ACA

---

- Basic Principles:
  - Medi-Cal Expansion: Assistance for individuals based on MAGI income (138% of federal poverty level--\$1,321 for single person household; \$1,783 for two person household; \$2,245 for three person household)
  - Assets not counted
  - MAGI: see The Advocates Guide to MAGI
    - [http://www.healthlaw.org/publications/agmagi#.U4vSEHbj\\_M](http://www.healthlaw.org/publications/agmagi#.U4vSEHbj_M)

6/4/2014

Special Needs Trusts and the ACA

4

## Special Needs Trusts and the ACA

---

### □ Basic Principles:

- Medi-Cal Expansion: Does not affect persons on Medi Cal through categorical linkages (SSI)
- Does not affect long term care Medi Cal (but see below re Coordinated Care Initiative)
- Does not affect persons on Medicare (but see below re Coordinated Care Initiative)

6/4/2014

Special Needs Trusts and the ACA

5

## Special Needs Trusts and the ACA

---

### □ Basic Principles:

- Buying Private Insurance on the Exchange
  - Uses MAGI income to determine eligibility
  - Premium credit in form of tax credit—if income is 139-400% of FPL (\$1,331-\$3,830 a month)
  - Out of Pocket cost sharing—if income is 138-250% of FPL—requires enrollment in Silver Plan

6/4/2014

Special Needs Trusts and the ACA

6

## Special Needs Trusts and the ACA

---

### □ Basic Principles:

#### ■ Buying Private Insurance on the Exchange

- Tax credit examples:
  - For Income at least 133% but less than 150% of FPL, participant pays 3-4% of income toward premium, or \$57 a month at the 150% level (\$1,436)
  - For Income at least 200% but less than 250% of FPL, participant pays 6.3-8.05% of income toward premium, or \$193 a month at the 250% level (\$2,394)
  - Credit is tied to second lowest cost Silver Plan in area but can be used for any plan

6/4/2014

Special Needs Trusts and the ACA

7

## Special Needs Trusts and the ACA

---

### □ Basic Principles:

#### ■ Buying Private Insurance on the Exchange

- Cost sharing Assistance:
  - Must buy Silver Plan; Can Get Premium Credit Also
  - Income between 100% and 250% of FPL (\$958-\$2,394 per month)
  - Provides reductions in deductibles, office visit costs, maximum out of pockets
  - Examples: Income up to 150% FPL (\$1,436/mo):
    - Max out of pocket: \$1,000/yr; office visit co-pay:\$10;
    - Hospital inpatient: \$100/admission
  - Income at 250% of FPL (\$2,394/mo):
    - Max out of pocket: \$4,000/yr; office visit co-pay: \$30
    - Hospital inpatient: \$1,500/admission

6/4/2014

Special Needs Trusts and the ACA

8

## Special Needs Trusts and the ACA

---

### □ Basic Principles:

- Coordinated Care Initiative: Will Affect Dual Eligibles, Seniors, Disabled Persons:  
**Eight Counties:** Alameda, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Mateo, Santa Clara: one million persons will be affected

- Will Require All Affected Persons to Enroll in Managed Care Plans
- Integrates Long Term Care Services

6/4/2014

Special Needs Trusts and the ACA

9

## Special Needs Trusts and the ACA

---

### □ Basic Principles:

- Coordinated Care Initiative:
  - Cal Medi-Connect (CMC):
  - For Medi-Cal and Medicare Enrollees:
    - Option: Enroll in CMC for coordinated benefits for Medicare and Medi-Cal; OR opt out of CMC and have Medicare and Medi-Cal in managed care plan: OR enroll in PACE program, if available and if one is eligible
    - Either opt out OR PASSIVE ENROLLMENT

6/4/2014

Special Needs Trusts and the ACA

10

## Special Needs Trusts and the ACA

---

- What options for a special needs person?
  - 1-Stay with conventional wisdom: keep benefits in place; use SSI if available and Medi-Cal and Medicare
  - The SNT protects the funds from creditors; allows beneficiary to receive public benefits; provides management and disposition on death
  - Downside: Open to recovery claims if first party trust

6/4/2014

Special Needs Trusts and the ACA

11

## Special Needs Trusts and the ACA

---

- What options for a special needs person?
  - 2-Opt out of Trust: Competent beneficiary receives funds; goes off SSI
  - Recipient can apply for Expanded Medi-Cal based on MAGI; or can purchase insurance on the Exchange
  - Downside: If over 55 or in long term care: recovery for expanded Medi Cal benefits received
  - Downside: Loss of SSI; loss of eligibility for SSI rate for assisted living

6/4/2014

Special Needs Trusts and the ACA

12

## Special Needs Trusts and the ACA

---

- What options for a special needs person?
  - Consider having trustee pay for private health insurance
  - Keeps SSI income
  - Beneficiary will continue to have access to Medi-Cal coverage for long term care services

---

6/4/2014

Special Needs Trusts and the ACA

13

## Special Needs Trusts and the ACA

---

- What options for a special needs person?
  - Make sure trustee can pay for private care:
    - Trust terms may have to be modified
    - Permit trustee to pay for healthcare even if beneficiary qualifies for government support

---

6/4/2014

Special Needs Trusts and the ACA

14

## Special Needs Trusts and the ACA

---

### □ Financial Effect of Loss of SSI:

- Assume \$100,000 settlement
- SSI and net settlement income: \$12,610 spendable income
- No SSI and net settlement income: \$3,614 spendable income

□ In both cases individual is on Expanded Medi Cal

□ (This slide and the next two are adapted from Urbatsch and Macdonald, The Affordable Care Act's Financial Effect on Settlement Planning for Plaintiffs with Special Needs)

6/4/2014

Special Needs Trusts and the ACA

15

## Special Needs Trusts and the ACA

---

### □ Financial Effect of Loss of SSI:

- Assume \$1,000,000 settlement
- SSI and Net Settlement Income: \$33,484 spendable income
- No SSI, Buy ACA Insurance: \$15,794 spendable income
- Use SNT, Buy ACA Insurance: \$20,684 spendable income

6/4/2014

Special Needs Trusts and the ACA

16



## Special Needs Trusts and the ACA

---

### □ Financial Effect of Loss of SSI:

- Assume \$2,868,000 settlement
- SSI and Net Settlement Income: \$67,500 spendable income
- No SSI, Buy ACA Insurance: \$67,504 spendable income
- Use SNT, Buy ACA Insurance: \$53,766 spendable income
  
- (All illustrations on this and previous slides based on premium costs and applicable subsidies for a forty year old woman)
  
- SO: For any settlement under the \$2,868,000 level, the individual is better off keeping SSI

6/4/2014

Special Needs Trusts and the ACA

17

## TAXONOMY OF SPECIAL NEEDS TRUSTS

---

- Third party trusts: Either part of estate planning of a parent, sibling, child, or other relative for the benefit of a person on public benefits or likely to be on public benefits
- D4A "Payback" trusts: First-party trust, may or may not be grantor trust
- "Litigation" Special needs trust: to hold settlement or judgment awards

6/4/2014

Special Needs Trusts and the ACA

18

## Third Party Special Needs Trust

---

- Characteristics:
  - a. Assets do not belong to beneficiary;
  - b. Settlor is not beneficiary;
  - c. No need to include payback provisions;
  - d. Treated by Medi-Cal as "other trust."  
Existence of trust to be disclosed, but trust counts only if payments made directly to beneficiary.

6/4/2014

Special Needs Trusts and the ACA

19

## Third Party Special Needs Trust

---

- This special needs trust will be part of a trust established by a parent, child, sibling, or other family member for a disabled or incapacitated beneficiary.
- This type of trust can be used to hold assets passing from community spouse's estate, where community spouse dies before institutionalized spouse.
  - To use trust for this purpose, funding must be through will of community spouse.

6/4/2014

Special Needs Trusts and the ACA

20

## Third Party Special Needs Trust

---

- Characteristics:
- e. SSI treatment: See POMS SI 01120.200:
  - B.17 defines third-party trust, new POMS adds attention to funding vs. establishing.
  - D.1 defines which trusts are resources (power to revoke and use funds makes trust a resource; new POMS adds "terminate" power)
  - D.2 defines trusts that are not resources

6/4/2014

Special Needs Trusts and the ACA

21

## Third Party Special Needs Trust

---

- Characteristics:
- f. Medi-Cal treatment:
  - 22 CCR 50489.9(b) on availability of third party trusts: power to revoke makes trust available
  - (b)(2): If trust irrevocable, assets not available until they are distributed

6/4/2014

Special Needs Trusts and the ACA

22

## Third Party Special Needs Trust

- ACA and Third Party Trusts:
  - Where the trust is part of an estate plan: not likely to be affected by ACA
  - Settlor's motives usually include assuring proper management; keeping trust from creditors; assuring high quality of life for beneficiary; keeping or getting public benefits
  - Trust language should be flexible—so Trustee can buy medical insurance . . . .

6/4/2014

Special Needs Trusts and the ACA

23

## Third Party Special Needs Trust

- Some problems and some tips:
  - 1. The payback provision!!! Yes, some of these trusts have payback provisions—and of course they shouldn't. Action to take?
    - --If they are already irrevocable, consider reformation
    - --If there is too little in them, consider cost benefit analysis before acting.

6/4/2014

Special Needs Trusts and the ACA

24

## Third Party Special Needs Trust

---

- Some problems and some tips:
  - 2. Blown trustee provisions: How difficult it is to foresee problems in the future when one names trustees; consider reformation or amendment of irrevocable trusts, or specific powers to replace trustee.

---

6/4/2014

Special Needs Trusts and the ACA

25

## Third Party Special Needs Trust

---

- Some problems and some tips:
  - 3. Failure to provide for ISM: But mom didn't want to spend a penny if Joey got SSI . . . . Again, if the trust is irrevocable, your remedy is reformation. Explain the benefits to Joey of having the trustee be able to enhance his life with a rent subsidy (if it is warranted).

---

6/4/2014

Special Needs Trusts and the ACA

26

## Third Party Special Needs Trust

---

- Some problems and some tips:
  - 4. Using a precatory SNT to hold transfers:
    - Parent makes transfers
    - Children receive the donations, bank them
    - One or more children establish a SNT, then fund it with money from the gifts
    - Note—no present interest, so no use of annual exclusions

6/4/2014

Special Needs Trusts and the ACA

27

## Third Party Special Needs Trust

---

- Some problems and some tips:
  - 5. A SNT set up by child to hold estate for benefit of ill spouse:
    - Well spouse does new estate plan: all to kids, if no surviving ill spouse; all to SNT established by a child if ill spouse survives
    - A child sets up third party trust, funds with token gift
    - If well spouse dies first, will of well spouse funds the SNT through probate

6/4/2014

Special Needs Trusts and the ACA

28

## Third Party Special Needs Trust

- Some problems and some tips:
  - 6. A SNT set up by family members to hold settlement or inheritance for disabled family member
    - Goal of this planning: Set up SNT for disabled though competent government benefits recipient—and avoid recovery.
    - Careful analysis of benefits needed: If Medi-Cal involved but not SSI, there will be no transfer penalties for most transferees
    - Tax consequences: Transferor and eventually donees may have obligation to file 709s
    - Best suited for: Individuals with extensive Medi Cal exposure already. Recovery from first party SNT (assuming revision of Shewry v. Arnold situation) could well use up all trust

6/4/2014

Special Needs Trusts and the ACA

29

## Third Party Special Needs Trust: Recent FAQs

- How to set up “donee trust”? (My term is precatory 3<sup>rd</sup> party trust.)
- Follow general rules per POMS and 50489.9 for third party trusts: Arms length funding, no ability of beneficiary to revoke, no mandatory distributions of principal or income
- Check CEB SNT book, Irrevocable Trust book; Lexis/Nexis California Wills and Trusts Drafting System, etc.

6/4/2014

Special Needs Trusts and the ACA

30

## Third Party Special Needs Trust: Recent FAQs

---

- Can donee trust be used as catchment for transfer of a personal injury settlement?
- Facts: Benefits recipients over age 65, get substantial settlement
- Can they transfer to family members, who then set up third party SNT?
- Yes but: even though we have the precedent of the Conte case, SSI will cut them off and force a lengthy fight

6/4/2014

Special Needs Trusts and the ACA

31

## Third Party Special Needs Trust: Recent FAQs

---

- Structural and Tax Issues:
  - Is trust revocable or irrevocable? Yes.
  - Revocable trust has same characteristics as any living trust—available to creditors of grantor, can be revoked or amended, all income taxable to grantor
  - Irrevocable—safe from creditors; guarantee for beneficiary; can be taxed to grantor if 5% or more reversionary interest for grantor

6/4/2014

Special Needs Trusts and the ACA

32



## Third Party Special Needs Trust: Recent FAQs

---

- Hedlund v. Wisconsin Case: How Not to Do Third Party SNT Following Gifting (2011 WL 4835721 (Wis.App.), 10/13/11)
  - Holding: Trust funded with assets placed into trust on the day of the transfer from donor were considered available to donor

6/4/2014

Special Needs Trusts and the ACA

33

## Third Party Special Needs Trust: Recent FAQs

---

- In June 1991, children set up a trust for mom and dad
- On same day, mom and dad transferred assets to the kids, and in the same document the kids transferred the assets to the trust
- In the next year, the parents transferred more real estate to the kids, who on the same day put it in the trust

6/4/2014

Special Needs Trusts and the ACA

34

## Third Party Special Needs Trust: Recent FAQs

---

- “The disputed statutory language requires that the “assets of the individual ... Were used to form all or part of the corpus of the trust.” WIS. STAT. § 49.454(1)(a). It does not
- require that the individual have legal ownership of the assets used to form the trust *at the time the trust is formed.*”—This is the key holding.

6/4/2014

Special Needs Trusts and the ACA

35

## Third Party Special Needs Trust: Recent FAQs

---

- “The category of persons in WIS. STAT. § 49.454(1)(a)4 plainly brings within § 49.454 trusts that are not established *directly* by an applicant or person legally authorized to act on behalf of the applicant but are *indirectly* established by the applicant in that the applicant directs or requests another person to establish the trust using the individual's assets.”—The logic used by the court to handle who establishes the trust.

6/4/2014

Special Needs Trusts and the ACA

36

## Third Party Special Needs Trust: Recent FAQs

---

- Conclusions:
  - 1. Wisconsin statute is same as California's 22 CCR 50489.5 defining irrevocable trust
  - 2. Drafters should make donors clearly state intent of their gifts
  - 3. Precatory third party trusts should be established with an eye toward keeping the timing in mind
  - 4. Same day funding is not appropriate

6/4/2014

Special Needs Trusts and the ACA

37

## Third Party Special Needs Trust: Recent FAQs

---

- Parent settled trust gives trustee discretionary power to pay for "health, education, support and maintenance"; does this trust have to be reformed to protect its assets?
- If trust does not permit beneficiary to revoke trust or oblige trustee to make payments, you're probably ok, BUT

6/4/2014

Special Needs Trusts and the ACA

38

## Third Party Special Needs Trust: Recent FAQs

---

- Beneficiary COULD sue to oblige trustee to make payments.
- Recommended course of action: consider a reformation petition under PC 15409

6/4/2014

Special Needs Trusts and the ACA

39

## D4A "Payback" Trust

---

- This special needs trust is governed by OBRA 93 (federal law) and 22 CCR 50489.9 (California Regs.). SSI trust rules also apply (POMS:SI 01120.201).
- Characteristics:
  - a. Funded with assets belonging to beneficiary;
  - b. Established, per statute, by parent, grandparent, legal guardian, or court;
  - c. Must pay State back for all medical assistance received, up to full amount of trust at death of beneficiary;
  - d. Beneficiary must be under 65 and disabled at time of establishment and funding of trust.

6/4/2014

Special Needs Trusts and the ACA

40

## D4A "Payback" Trust

---

- How to establish:
  - 1. Assets test: With assets of individual who is disabled and under 65 at time trust established
  - 2. Settlor test: Established for benefit of disabled individual or spouse by parent, grandparent, legal guardian, or court.
    - What if: Individual is disabled but not eligible for benefits because of excess assets?
    - What if: No parent or grandparent or legal guardian?

6/4/2014

Special Needs Trusts and the ACA

41

## D4A "Payback" Trust

---

- How to establish:
  - Use of Power of Attorney to establish trust: Where the disabled person is competent—disabled person appoints attorney in fact, where there is power to establish trust in the document
  - Attorney in fact petitions court under Prob Code 4541(b) for court approval of trust; major change required here regarding content of order.

6/4/2014

Special Needs Trusts and the ACA

42

## D4A "Payback" Trust

---

- How to establish:
  - Petition must ask for court to order establishment of the trust POMS SI 01120.203B1f: "In the case of a trust established through the actions of a court, the creation of the trust must be required by the court order. Approval of a trust by a court is not sufficient."
  - Many courts willingly agree to modify 4541 procedure to accommodate this change, to avoid unnecessary conservatorships or 3600 proceedings

6/4/2014

Special Needs Trusts and the ACA

43

## D4A "Payback" Trust

---

- How to establish:
  - Use of Petition under substituted judgment in a conservatorship, where disabled person lacks capacity
  - Trusts established in this manner subject to CRC 7.903 restrictions.

6/4/2014

Special Needs Trusts and the ACA

44

## D4A "Payback" Trust

---

- Some problems and some tips:
  - 1. Flawed payback language: The rookie mistake—trustee to pay "all claims of the state."
    - Cure: If trust not yet final, go back to source language: Procedures manual, law, regs
    - If trust is final: Reformation of trust. Many courts will do these petitions ex parte.

6/4/2014

Special Needs Trusts and the ACA

45

## D4A "Payback" Trust

---

- Some problems and some tips:
  - 2. No one to be the settlor: No living parent or grandparent.
    - Cure: Be adopted.....
    - Or—appoint an attorney in fact, have him or her petition the court for authority to set up SNT; get court order that requires establishment of trust by attorney in fact.

6/4/2014

Special Needs Trusts and the ACA

46

## D4A “Payback” Trust

---

- Some problems and some tips:
  - 3. No one to be the trustee: Here’s the real tough one.
    - Cure: if no reliable friends, speak with professional fiduciaries;
    - But—there’s only \$30,000 in the trust . . . .
    - Cure, second cut: the beneficiary’s church, or neighbors, or more remote family members.

6/4/2014

Special Needs Trusts and the ACA

47

## D4A “Payback” Trust

---

- Some problems and some tips:
  - 4. How do I arrange to name beneficiaries in case there’s something left over? And what if I change my mind?
    - In the planning stages—prompt the client (even if the client is the settlor or trustee to be) for who are the beneficiary choices of the SNT beneficiary
    - Remember the benefit of a special power of appointment

6/4/2014

Special Needs Trusts and the ACA

48



## D4A "Payback" Trust

---

- Some problems and some tips:
  - 5. Payback to California only; payback only for services received after trust set up: POMS SI 01120.203B1h requires trust to pay back to any state to any state from which medical assistance is received and cannot be limited to payments made after the trust is established.

6/4/2014

Special Needs Trusts and the ACA

49

## D4A "Payback" Trust--Funding

---

- FAQ: Disabled and incapacitated person gets settlement; parent establishes first party SNT
- No conservatorship or power of attorney in place: Can rep payee ask person controlling the funds to deposit them to rep payee account and then transfer to trust?
- Probably not: no authority for rep payee to do that. Do conservatorship and transfer funds, then terminate conservatorship

6/4/2014

Special Needs Trusts and the ACA

50

## D4A “Payback” Trust-- Establishment

---

- FAQ: Voluntary conservatorship;  
Can petitioner—future conservatee ask court  
for order under 2580 to establish SNT?
- Probably safer to establish conservatorship  
and have conservator petition to set up the  
trust. . . .

6/4/2014

Special Needs Trusts and the ACA

51

## First Party Special Needs Trust

---

- ACA and First Party Trusts:
  - Most beneficiaries will be anxious about  
losing SSI
  - Any who are on SSI rates at assisted living  
facilities will want to avoid the loss of  
affordable housing
  - A very large settlement or other funding  
source might be attractive to some  
beneficiaries, assuming they can manage it  
property

6/4/2014

Special Needs Trusts and the ACA

52

## First Party Special Needs Trust

---

- ACA and First Party Trusts:
  - Proper management of trust assets creates incentive to choose SNT
  - Recovery issue: will be a consideration for any SNT beneficiary

---

6/4/2014

Special Needs Trusts and the ACA

53

## “Litigation” Special Needs Trust

---

- This special needs trust is designed to hold the proceeds of a judgment for minor or person with a disability who receives proceeds. It is governed by Probate Code Section 3600 et seq.
- Characteristics:
  - a. Subject to review by State before approval by court;
  - b. Requires notification by trustee at death of beneficiary and payment of any claims State may make; statutory restrictions on how much can be placed in trust; subject to Rule of Court 7.903.

---

6/4/2014

Special Needs Trusts and the ACA

54

## “Litigation” Special Needs Trust

---

- Characteristics:
- c. Trust must also follow “D4A” payback language to be valid under SSI and Medi-Cal rules
- d. *Shewry v. Arnold* issues—present state of law in California permits not only 3600 trusts but ALL “d4A” trusts to be subject to recovery statute and regs, negating clear intent of state exceptions carved out to permit “d4A” trusts

6/4/2014

Special Needs Trusts and the ACA

55

## “Litigation” Special Needs Trust

---

- e. State complains it loses cases where trustee refuses to pay back per d4A requirements: what does this mean for drafter?
  - Failure to draft pursuant to the d4A requirements can mean disqualification for Medi-Cal and SSI
  - And what does it mean for the Trustee? If SNT beneficiary dies leaving a surviving spouse, or a disabled, blind or minor child, can trustee refuse to pay the state back?
    - Read *Shewry* with care; consider also issues of trustee liability for failure to follow terms of trust.

6/4/2014

Special Needs Trusts and the ACA

56

## “Litigation” Special Needs Trust

---

- Some problems and some tips:
  - 1. Hand-off from the Litigation attorney—
    - Who files what? First, there’s a petition to approve the settlement
    - Then there’s a petition to approve the trust
    - And you have to find out about the beneficiary’s needs and benefits
    - And you have to notify the state, get the state’s approval of the trust, and while you’re at it . . .
    - Comply with the confidentiality portions of the settlement

6/4/2014

Special Needs Trusts and the ACA

57

## “Litigation” Special Needs Trust

---

- Some problems and some tips:
  - 2. Double Tasking the Payback Language:
    - A pure litigation trust has to comply with Probate Code Section 3605—and 22 CCR 50489.9
    - All litigation SNTS are also D4A SNTS
    - BUT even though you must put in required language, you may be able to avoid recovery under *Shewry v. Arnold*

6/4/2014

Special Needs Trusts and the ACA

58

## “Litigation” Special Needs Trust

---

- Some problems and some tips:
  - 3. Bond, Accountings, Fee Restrictions, and Investment Hassles—Rule 7.903
    - If the litigation SNT is set up by court order under 3600 et seq., it’s bound by 7.903
      - BUT—if the trustee is a trust company, no bond is required!
      - However—the trustee is still required to present accountings, follow conservatorship rules on investments, and obtain orders before paying trustee and attorney fees

6/4/2014

Special Needs Trusts and the ACA

59

## “Litigation” Special Needs Trust

---

- Some problems and some tips:
  - 4. Avoiding Court Involvement in Litigation SNTS
    - Prob Code Section 3613—provides an opt out for the successful plaintiff who has capacity
    - The plaintiff can direct transfer of the settlement to the trustee without court involvement
    - The trust becomes a conventional d4A trust.

6/4/2014

Special Needs Trusts and the ACA

60

## “Litigation” Special Needs Trust

- ACA and Litigation Special Needs Trusts
  - Except for trusts set up under the 3613 exception, all subject to CRC 7.903 limitations
  - Settlement recipient usually unable to manage funds
  - Size of settlement can make SSI issue moot, but dollar amount available for beneficiary with SSI usually greater than dollar amount with only income from the trust

6/4/2014

Special Needs Trusts and the ACA

61

## FAQs—Some Recovery Pointers

- Get the right language in those trusts!
  - New POMS SI 01120.203B1h: On death “state will receive all amounts remaining in trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual [under Medi-Cal...]. The state must be listed as the first payee and have priority over payment of other debts and administrative expenses except as listed in SI 01120.203B.3.a.

6/4/2014

Special Needs Trusts and the ACA

62

## FAQs—Some Recovery Pointers

---

- Get the right language in those trusts!
  - “The trust must provide payback for any states . . . and not be limited to any particular period of time, i.e., payback cannot be limited to the period after establishment of the trust.”
  - California: 22 CCR 50489.9a3C: “The State receives all remaining funds in the trust . . . upon the death of the individual or spouse or upon termination of the trust up to an amount equal to the total medical assistance paid . . . by the Medi Cal program.”

6/4/2014

Special Needs Trusts and the ACA

63

## FAQs—Some Recovery Pointers

---

- Get the right language in those trusts!
  - California: Eligibility Procedures Manual (available on line on DHCS website) 9J-p. 74-75: “. . . On death . . . Or upon termination of the trust, DHS shall receive all assets remaining in the trust up to an amount equal to the total medical assistance paid on behalf of that individual by Medi-Cal.”

6/4/2014

Special Needs Trusts and the ACA

64



## FAQs—Some Recovery Pointers

---

- Get the right language in those trusts!
  - Track the regs and the procedures manual, and argue later about *Shewry* or other exceptions; **don't** fall back on PC 3605 language: “. . . At the death of the . . . Beneficiary or on termination of the trust, the trust property is subject to the claims of . . . [DHCS, other state agencies]”.

6/4/2014

Special Needs Trusts and the ACA

65

## FAQs—Some Recovery Pointers

---

- Pointers for Challenges Under *Shewry*:
  - *Shewry v. Arnold*, 125 Cal. App. 4th 186, 22 Cal. Rptr. 3d 488 (2nd District, 2004)—all first party special needs trusts subject to *claims* under 42 USC 1396p(b), not payback provisions

6/4/2014

Special Needs Trusts and the ACA

66

## FAQs—Some Recovery Pointers

---

- Pointers for Challenges Under Shewry:
  - Opens up challenges to payback where:
    - Disabled beneficiary receives services under age 55
    - Disabled beneficiary survived by spouse, child under age 21, blind child, disabled child

---

6/4/2014

Special Needs Trusts and the ACA

67

## FAQs—Some Recovery Pointers

---

- Pointers for Challenges Under Shewry:
  - Department Response: Will litigate but generally open to negotiate compromise

---

6/4/2014

Special Needs Trusts and the ACA

68

## FAQs—What Expenses Can the Trust Pay on Death of Beneficiary?

---

- New POMS are explicit: See SI 01120.203B3a:
- Allowable: taxes due because of the death of the beneficiary; Reasonable fees for administration: accounting, completion and filing of documents, other required actions

6/4/2014

Special Needs Trusts and the ACA

69

## FAQs—What Expenses Can the Trust Pay on Death of Beneficiary?

---

- New POMS are explicit: See SI 01120.203B3a:
- Prohibited: taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate; inheritance taxes due for residual beneficiaries; payment of debts owed to third parties; funeral expenses; payment to residual beneficiaries.

6/4/2014

Special Needs Trusts and the ACA

70

## FAQs—What Expenses Can the Trust Pay on Death of Beneficiary?

---

- California: Procedures Manual 9J, page 75:
- “Funds may be retained . . . for:
  - “The cost of the individual’s remaining management and investment fees, or outstanding bills for the benefit of the [beneficiary] that fall within the terms of the trust, or burial/funeral expenses of the disabled individual . . . .”

6/4/2014

Special Needs Trusts and the ACA

71

## FAQs—What Expenses Can the Trust Pay on Death of Beneficiary?

---

- How to handle SSI vs. Medi-Cal? “Trustee is prohibited from paying for any administrative or other costs prior to reimbursement of the state [formulaic language here] other than those expenses specifically permitted by prevailing Federal and State laws ....” OR

6/4/2014

Special Needs Trusts and the ACA

72

## FAQs—What Expenses Can the Trust Pay on Death of Beneficiary?

---

- How to handle SSI vs. Medi-Cal? “Trustee is authorized to pay all administrative and other expenses permitted by prevailing Federal and State laws and regulations at time of death of beneficiary or earlier termination of the trust.”

6/4/2014

Special Needs Trusts and the ACA

73

## FAQs—Planning for Burial/Funeral Expenses

---

- SI 01120.201H covers burial trusts and prepaid burial and funeral expenses. H1a covers irrevocable burial contracts. H3 covers burial spaces and \$1,500 in burial funds.
- So: For your SSI beneficiary: plan ahead.
- Or: Once the beneficiary is dead, SSI is no longer an issue; the trustee can consider paying burial and funeral costs, which would be permitted under Medi Cal rules.

6/4/2014

Special Needs Trusts and the ACA

74

## FAQs—Notifications of the Existence of the Trust

---

- ❑ Prior Notification: PC 3604-3605—Trust has to be sent to Director, DHCS with notice of hearing. No prior notification required with PC 4541 trusts. If trust being set up under 2580, probably a good idea to notice DHCS, although not a statutory obligation
- ❑ Disclosure to SSI/Medi-Cal: All trusts of which benefits recipient is beneficiary must be disclosed to SSA and/or County social services agency at time of application or redetermination.

6/4/2014 Special Needs Trusts and the ACA

75

## FAQs—What to do about Education Savings Accounts and 529 Plans?

---

- ❑ Issue: Parents set up Coverdell or 529 Plans for Child. Child is disabled, about to turn 18—Do parents have to pull plug on savings accounts and convert to SNT assets?
- ❑ No: POMS are clear on this point:
  - SI 01130.460: Coverdell accounts (ESAs) do not count as resources of beneficiary
  - SI 01140.150: 529 Plans (QTPs) are resources of donor, not of beneficiary

6/4/2014

Special Needs Trusts and the ACA

76

## FAQs—What to do about CUTMA Accounts?

---

- ❑ Issue: Can a CUTMA account substitute for a special needs trust? Under POMS SI 01120.205, funds in CUTMA not countable until minor attains age of majority;
- ❑ The Medi Cal Property Manual (Manual Letter 179, page 9J-79) counts such accounts if the custodian can use the funds without going to court to get a court order; otherwise, account is unavailable until beneficiary reaches age 18

6/4/2014

Special Needs Trusts and the ACA

77

## FAQs—What to do about Blocked Accounts?

---

- ❑ Can a conservator set aside funds in a blocked account, or can the attorney use her IOLTA account, to hold funds for later use in paying fees once someone is on Medi Cal?
- ❑ POMS SI 01140.215: If funds are accessible via petition rather than litigation, they are available to conservatee

6/4/2014

Special Needs Trusts and the ACA

78

## FAQs— What Court to Use?

---

- Interesting question: Personal injury matter is resolved in federal court: where should 3600 trust be established?
- In the most favorable county superior court that has any reasonable nexus to the case! The 2004 modifications to the 3600 statutes added an “after the fact” provision at Sec. 3604(a)(2) that essentially opens the door for any available court to accept a petition to establish the trust.

6/4/2014

Special Needs Trusts and the ACA

79

## FAQs—IRA Payouts to SNTS

---

- “Can I leave all or part of my IRA to a SNT?”
  - -Yes—Follow rules at IRC Reg Sec 1-401(a)(9)-4, A-5:
    - --Trust valid under state law;
    - --Trust irrevocable either now or on death of plan owner
    - --Beneficiaries identifiable from the trust language
    - --Documentation to plan administrator by designation date
    - --All beneficiaries must be individuals

6/4/2014

Special Needs Trusts and the ACA

80



## FAQs—IRA Payouts to SNTS

---

- “Can I leave all or part of my IRA to a SNT?”
  - Payout on measuring life of oldest beneficiary of trust—so be careful with remainder beneficiary choice
  - Trust can be an accumulation trust (i.e., IRA distributions do not have to be passed through to the beneficiary when received)
  - Distributed IRA can be converted into first party special needs trust [PLR 200620025]

6/4/2014

Special Needs Trusts and the ACA

81

## FAQs—IRA Payouts to SNTS

---

- See my Net News piece, 2008, and Review Bradley Figon in the Elder Law Reporter, May 2007. “First Party D(4)(A) Trusts and Inherited IRAs”

6/4/2014

Special Needs Trusts and the ACA

82

## FAQs— Section 8 and SNT Distributions

---

- Issue: Can Section 8 count distribution from SNTS as income?
- *Finley v. City of Santa Monica*, an LA County Superior Court case, May 25, 2011, holds that payments from principal of SNT do not count as income and thus cannot be used to boost base for rent calculation

6/4/2014

Special Needs Trusts and the ACA

83

## FAQs— Section 8 and SNT Distributions

---

- See 24 CFR 5.609(a)(3) and (c)(3) for support that inheritances and personal injury recoveries are excluded from income calculation. Income from these assets, if distributed, would count: 24 CFR 5.609(b)(3).
- Review Greg Wilcox Net News Article in Spring 2013 issue.

6/4/2014

Special Needs Trusts and the ACA

84

## FAQs— Where do testamentary special needs trusts fit?

---

- A testamentary trust is a third party trust —no payback provision required. Where the trust is ordered by terms of the will but not drafted per se as part of the existing will, the attorney administering the estate can draft the special needs trust to meet the conditions in the will. For instance:

6/4/2014

Special Needs Trusts and the ACA

85

## FAQs— Where do testamentary special needs trusts fit?

---

- “And little Jimmy’s share shall be held for him in a special needs trust and on his death distributed to Sally and Joey.”
- Lots of room here for creative drafting as part of the petition for distribution, with notice to Sally and Joey and all other interested parties—but [I believe] not to the State. [Other experts disagree. When in doubt—send the notice . . . .]

6/4/2014

Special Needs Trusts and the ACA

86

## FAQs— Expenditures by Trustee of SNT—and some ISM issues

---

- “Can the SNT pay rent?”—Of course; payments for food or shelter must be reported and will cause reduction in SSI by the amount paid or the PMV amount of \$245 for 2009, whichever is less.
- “But what if there is a big back payment due—the beneficiary went to Las Vegas and blew his SSI on slow horses and double zero roulette?” Same result: a \$5,000 payment for back rent will cause one month PMV diminution of SSI.

6/4/2014

Special Needs Trusts and the ACA

87

## FAQs— Expenditures by Trustee of SNT—and some ISM issues

---

- “Can the trust own a house where the beneficiary lives?”
- Yes, and there is no ism for deemed rent, since the beneficiary is considered an equitable owner of the house held by the trust.
- “And what about the upkeep of the house?” Here, you’re out of luck: payment of utilities, insurance, taxes are ISM and will reduce the SSI payment. See POMS SI 01120.200F3c.

6/4/2014

Special Needs Trusts and the ACA

88

## FAQs—Changes to Trust

---

- “The beneficiary hates the trustee—what do I [administration attorney] do now?”
- Many drafters include provisions for trust protectors—often, the drafting attorney, or an outside attorney—to name successor trustees where there is an absence of successor trustee. If the original trustee refuses to leave, the beneficiary [or guardian ad litem if beneficiary not competent] can petition court under Section 17200.

6/4/2014

Special Needs Trusts and the ACA

89

## FAQs—Changes to Trust

---

- “Can the beneficiary change the trustee?” As a number of commentators to the listserv noted, this is probably not a good idea. Any powers given to the beneficiary that could possibly influence distributions or disbursements from the trust, other than a limited/special power of appointment, will raise red flags re control issues. But a beneficiary who is frustrated by a trustee who does not faithfully execute the powers under the trust can petition the Court to change the trustee.

6/4/2014

Special Needs Trusts and the ACA

90

## FAQs—Changes to Trust

---

- “Mom and Dad are disabled, each has a SNT naming kids as beneficiaries. Dad died. Can trust be modified so mom is named as beneficiary?”
- If these are first party trusts, no. BUT under *Shewry v. Arnold*, you could modify the trust during dad’s lifetime with appropriate petition under 15400 et seq. and then claim no recovery due so long as mom is alive.

6/4/2014

Special Needs Trusts and the ACA

91

## FAQs—Changes to Trust

---

- There were several ListServ questions about trust modification in the past year. Here are a few:
  - I. Dad leaves testamentary trust for spouse; to daughters on Mom’s death
  - One becomes disabled and on public benefits
  - Can disabled daughter’s share be transferred to the snt that Mom set up?
  - YES: either by modifying the testamentary trust so daughter’s half goes to the existing SNT; or by reforming the testamentary trust so that daughter’s half is placed in SNT within testamentary trust

6/4/2014

Special Needs Trusts and the ACA

92

## FAQs—Changes to Trust

---

- There were several ListServ questions about trust modification in the past year. Here are a few:
  - II. The bad trustee problem: Friend of beneficiary takes settlement money, gets trust set up, then abuses the trust.
  - Remedy: Trustee can be removed under 15642; successor trustee can use court order to take possession of assets; if necessary, pursue bad trustee for fiduciary abuse

6/4/2014

Special Needs Trusts and the ACA

93

## FAQs—Changes to Trust

---

- There were several ListServ questions about trust modification in the past year. Here are a few:
  - III. Notice questions: Trust to be modified under 15409 has forty beneficiaries; only one is affected by proposed change under the petition; WHO GETS NOTICE?
  - Under 17203, all beneficiaries are entitled to notice. If some of them are not findable—the court would likely dispense with notice upon application.

6/4/2014

Special Needs Trusts and the ACA

94

## FAQs—Changes to Trust

---

- There were several ListServ questions about trust modification in the past year. Here are a few:
  - IV. Out of state problem: Decedent in Minnesota; special needs beneficiary in Minnesota; trustee lives in CALIFORNIA.
  - Facts a bit murky, but: If trustee, a California resident, can bring trust into California Court, can modify it under changed circumstances: Daughter would lose benefits if trust not changed.
  - Or: someone can create D4A for beneficiary, who can transfer her inheritance to it

6/4/2014

Special Needs Trusts and the ACA

95

## FAQs—Botched Beneficiary

---

- Decedent sets up SNT for one child's share of an annuity; then does not change annuity beneficiary designation; how fix?
- There should be an analogy here to the IRA problem. PC 2459 would apply to annuities and retirement plans and provides a broad range of powers to change beneficiaries, payment options, to surrender rights, cash in policies, and other powers.

6/4/2014

Special Needs Trusts and the ACA

96



## FAQs—Botched Beneficiary

---

- ❑ Since the annuity in question was not the beneficiary's, there might be a question whether the insurance company would honor the order to make payment to the SNT—but it's worth a try under 2580, which is the umbrella for a petition under 2549(c).

---

6/4/2014

Special Needs Trusts and the ACA

97

## FAQs—Early Termination Provisions

---

- ❑ POMS SI 01120.199 effective 9/15/10:
- ❑ 90 day deadline to amend (d)(4)(A) and (C) trusts to conform to new rules
- ❑ 90 days starts when individual is informed that the trust must be amended by SSA, so no panic about tearing all your old files apart

---

6/4/2014

Special Needs Trusts and the ACA

98

## FAQs—Early Termination Provisions

- ❑ Existing law:
- ❑ PC 3605(b): “. . . At death of . . . Beneficiary or on termination of the trust, the trust property is subject to the claims . . . .”
- ❑ 22 CCR 40589.9(a)(3)(C): “ The State receives all remaining funds in the trust. . . Upon the death of the individual . . . Or upon termination of the trust . . . .”

6/4/2014

Special Needs Trusts and the ACA

99

## FAQs—Early Termination Provisions

- ❑ Existing law: Medi-Cal Eligibility Procedures Manual, 9J, pp. 74-75:

1. **INDIVIDUAL TRUST CHARACTERISTICS**

Individual trusts must have all of the following conditions:

- d. Provides that, upon the death of the disabled individual or disabled spouse or upon termination of the trust, DHS shall receive all assets remaining in the trust up to an amount equal to the total medical assistance paid on behalf of that individual by Medi-Cal.

6/4/2014

Special Needs Trusts and the ACA

100

## FAQs—Early Termination Provisions

---

- Three Requirements in new regs:
- 1-Upon early termination the State(s), would receive all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s);

6/4/2014

Special Needs Trusts and the ACA

101

## FAQs—Early Termination Provisions

---

- 2. [after permitted expenses] . . . .**all** remaining funds are disbursed to the trust beneficiary; and
- 3. The early termination clause gives the power to terminate to someone other than the trust beneficiary.

6/4/2014

Special Needs Trusts and the ACA

102

## FAQs—Early Termination Provisions

---

### □ Possible Problems:

- Trust language may not explicit reserve early distribution for beneficiary;
- Power to terminate may not be explicitly provided to trustee

---

6/4/2014

Special Needs Trusts and the ACA

103

## FAQs—Early Termination Provisions

---

### □ Remedies:

- Petition under 15409 for modification of irrevocable trust
- Notice to all trustees and all beneficiaries (Section 17203)
- Many courts will allow these petitions to be heard ex parte upon filing of consents of all persons entitled to notice
- Might need appointment of guardian ad litem if beneficiary unable to give consent

---

6/4/2014

Special Needs Trusts and the ACA

104

## Pooled Trusts: D4C

---

Funding: The 65 and over problem

6/4/2014

Special Needs Trusts and the ACA

105

## Characterizing the Funding: Is It A Transfer?

---

- ❑ **Subsection (c) Applies: When an Individual Transfers Funds to Another Person, or into a trust that prohibits transfers to the Individual.**
- ❑ The general rule of Subsection (c): "if an institutionalized individual or the spouse of such an individual . . . disposes of assets for less than fair market value," the individual will be ineligible for Medicaid funded long-term care. 42 U.S.C. § 1396p(c)(1)(A).

6/4/2014

Special Needs Trusts and the ACA

106

## Characterizing the Funding: Is It A Transfer?

---

- The Subsection (c) Four Exceptions to Penalizing a "Transfer of Assets."**
- (i) were transferred to or for the sole benefit of the spouse;
- (ii) were transferred by spouse for sole benefit of the spouse;
- (iii) were transferred to or in trust for the individual's blind or disabled child
- (iv) were transferred to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1614(a)(3)) [42 U.S.C. § 1382c(a)(3)]

6/4/2014

Special Needs Trusts and the ACA

107

## Characterizing the Funding: Is It A Transfer? Subsection (c) or (d)?

---

- When an Individual Places His or Her Assets into a Trust for His or Her Own Benefit, Subsection (d), not (c), Applies because this was not a transfer of assets for purposes of 42 U.S.C. § 1396p(c).**
- Assets Placed in Self-settled Special Needs Trusts for the Benefit of the Settlor Continue to Be the Settlor's Assets, by Virtue of His or Her Retention of Equitable Ownership. 42 U.S.C. § 1396p(d)(3)(B)(i)&(ii).

6/4/2014

Special Needs Trusts and the ACA

108

## The Social Security Act Concept of Equitable Ownership

---

- POMS Definitions: "A trust is a right of property established by a trustor or grantor. One party (trustee) holds legal title to trust property which he or she manages for the benefit of another (beneficiary). The beneficiary does not have legal title but does have an equitable ownership interest." SI 01110.515C.2;

6/4/2014

Special Needs Trusts and the ACA

109

## SSI Position: Establishment of Pooled Account Funding is Transfer

---

- So—Notwithstanding the doctrine of equitable ownership, and notwithstanding the POMS treatment of pooled trusts [SI 01120.203B.2.], SSI treats the funding as a transfer if the beneficiary is 65 or over—note the caveat language that follows the exception language in the POMS

6/4/2014

Special Needs Trusts and the ACA

110

## SSI Position: Establishment of Pooled Account Funding is Transfer

---

- **NOTE:** There is no age restriction under this exception. However, a transfer of resources to a trust for an individual age 65 or over may result in a transfer penalty (see SI 01150.121.)."

6/4/2014

Special Needs Trusts and the ACA

111

## SSI Position: Establishment of Pooled Account Funding is Transfer

---

Suggested Strategy: Unless you have a lot of time to fight SSA, don't try to get the SSI beneficiary in a pooled trust—look for other means to deal with the money being received.

6/4/2014

Special Needs Trusts and the ACA

112



## Medi-Cal Position: Establishment of Pooled Account Funding is OK

---

The Flip Side: DHCS has acquiesced in the arguments presented over the past years that the pooled account, reserved as it is for the sole benefit of the beneficiary, is not a transfer.

So: You may join a pooled trust and move a beneficiary's funds to a pooled trust account—even if the beneficiary is 65 or over.

6/4/2014

Special Needs Trusts and the ACA

113

## Disadvantages of Pooled vs. individual or (d)(4)(A) Trust

---

- Problems with Post age 65 funding: Decision in Center for Special Needs Trust Administration v. Benton, 8<sup>th</sup> Circuit, 4/16/12, No. 11-2158:
- Court held that funding of pooled trust was a transfer, and thus the language of 42 USC 1396p(c)(2)(B) (iv) applies.
- 

6/4/2014

Special Needs Trusts and the ACA

114

## Disadvantages of Pooled vs. individual or (d)(4)(A) Trust

---

- Problems with Post age 65 funding:  
So keep in mind as we look at the rest of the analysis why our California result might be questioned in the future.
- 

6/4/2014

Special Needs Trusts and the ACA

115

## Hypo 1: Vicky Victim's \$80,000 Settlement

---

- Vicki: LTC resident; \$80k p.i. award; Medi-Cal beneficiary; p.i. case has been dismissed; she is 85 years old.
- Court access: through PC 3604(a)(2)
- Not eligible for (d)(4)(A), so . . .
- Your CANHR referrals point you to a (d)(4)(C) trust

6/4/2014

Special Needs Trusts and the ACA

116

## Hypo 1: Vicky Victim's \$80,000 Settlement

---

- Is Vicki disabled? With consent you get doctor's letter that she meets disability standards (42 USC 1382c(a)(3))
- You file: under PC 3600 et seq., through her guardian ad litem, seeking authorization to execute joinder agreement to establish account in pooled SNT

6/4/2014

Special Needs Trusts and the ACA

117

## Hypo 1: Vicky Victim's \$80,000 Settlement

---

- Review of trust: Does it meet CRC 7.903 requirements? Note that it provides for payments on account per PC 2643 and CRC 7.555
- Meet with client and guardian ad litem; they sign fee agreement; complete joinder agreement, send it to the nonprofit, with letter re seeking court approval

6/4/2014

Special Needs Trusts and the ACA

118

## Hypo 1: Vicky Victim's \$80,000 Settlement

---

- Is a Medicare Set-Aside needed? The PI lawyers have already reported the settlement to CMS
- Will it be necessary to set aside part of the payment for future medicals that would otherwise fall on Medicare? [Vicki's civil trial counsel, doctor say no further accident related issues.] Do CYA letter to PI attorney.

6/4/2014

Special Needs Trusts and the ACA

119

## Hypo 1: Vicky Victim's \$80,000 Settlement

---

- You're ready to file! Petition + joinder agreement, trust, settlement documents from civil trial, and points and authorities.
- Notice to DHCS with documents and cover letter explaining your actions and making clear that Vicki is 85.

6/4/2014

Special Needs Trusts and the ACA

120

## Hypo 1: Vicky Victim's \$80,000 Settlement

---

- Order in hand, joinder agreement signed by all parties, you send cashier's check to trust and send copy of agreement to DHCS—Vicki is now a beneficiary of a pooled trust.

6/4/2014

Special Needs Trusts and the ACA

121

## Hypo 2: Joe Beneficiary's \$50,000 gift

---

- Joe is 71, on SSI. Distant aunt left him \$50,000, which just arrived in the mail.
- You visit Joe. He lives at home, on IHSS, which helps to keep him there.
- After a bit of research [Google again, that tool you spent three years learning how to use at law school].....

6/4/2014

Special Needs Trusts and the ACA

122

## Hypo 2: Joe Beneficiary's \$50,000 gift

---

- You find out that Joe can join a pooled trust, for Medi-Cal purposes, BUT
- The POMS refer to the funding of a special needs trust as a transfer.
- You also find that he owes \$48,000 on his house, so—You have him pay off his debt and put the remaining \$2,000 in his bank account.