

SNT School for Trustees

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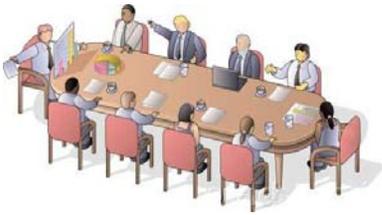
TEN MYTHS ABOUT SNTs

1. A Trustee Only Has Those Duties and Responsibilities Provided in the Trust Instrument.
2. The Trustee Cannot Pay for Food, Housing or Other Shelter Costs.
3. An Irrevocable Trust is Irrevocable.
4. The Trustee Should Not Purchase a Vehicle.
5. The Trustee Can Purchase Items the Family Uses So Long as the Beneficiary Also Uses it.



TEN MYTHS ABOUT SNTs

6. An Individual Trustee Should Not Be Paid a Fee.
7. The Trustee Should Not Pay Family Members for Caregiving Services.
8. The Trustee of a d4A Trust Should Preserve Sufficient Assets to Repay Medicaid.
9. The Trustee of a d4A Trust May Pay Funeral, Administrative and Other Expenses Before Repaying Medicaid and the Beneficiary's Estate.
10. Family Members Should Use a Previously Established d4A Trust for Gifts or Inheritances to Avoid the Costs of Another Trust.



GENERAL TRUSTEE DUTIES

- Administer the Trust in Good Faith and in Accordance with its Terms and, to the Extent the Trust is Silent, in Accordance with the Louisiana Trust Code. La. R.S. 9:2061 and 9:2111.
- Duty of Loyalty to Administer the Trust Solely in the Interests of the Beneficiary. La. R.S. 9:2082A.
- Duty of Impartiality Where There are Multiple Trust Beneficiaries. La. R.S. 9:2082B.
- Duty of Prudent Administration. La. R.S. 9:2090.
- Duty of Reasonable Care, Skill and Caution in Delegating Duties and Powers. La. R.S. 9:2087.
- Duty to Take Reasonable Steps to Take, Keep Control of and Preserve Trust Property. La. R.S. 9:2091.



GENERAL TRUSTEE DUTIES

- Duty to Keep Accurate Records of Trust Administration. La. R.S. 9:2088.
- Duty Not to Commingle Trust Assets with Trustee's Own Property. La. R.S. 9:2094.
- Duty to Take Reasonable Steps to Enforce Claims of the Trust and Defend Claims Against the Trust. La. R.S. 9:2093.
- Duty to Redress a Breach of Trust Known to Have Been Committed by a Former Trustee. La. R.S. 9:2204.
- Duty to Inform and Report to Beneficiaries. La. R.S. 9:2088 and 9:2089.
- Duty to Invest Trust Assets as a Prudent Investor Except to the Extent the Trust Provides Otherwise. La. R.S. 9:2127, et seq.



ADDITIONAL DUTIES OF A SNT TRUSTEE

- Evaluate the Beneficiary's Physical and/or Mental Condition
- Evaluate Beneficiary's Personal Care Situation and Current Living Conditions



ADDITIONAL DUTIES OF A SNT TRUSTEE

- Evaluate the Beneficiary's Current and Potential Governmental Benefits
 - SSI/SSDI
 - Medicaid/Medicare
 - Food Assistance (SNAP)
 - Subsidized Housing (HUD)
 - VA Benefits



ADDITIONAL DUTIES OF A SNT TRUSTEE

- Evaluate Beneficiary's Caregivers
- Evaluate Beneficiary's Current and Future Education, Training and Rehabilitation Needs and Programs
- Periodically Review All of the Above



ADDITIONAL DUTIES OF A SNT TRUSTEE

- Determine Whether Other Fiduciaries are Involved (continuing tutor, curator, Agent under POA, representative payee), the Extent and Limits of Their Authority and How Different Fiduciaries Will Interact.



ADDITIONAL DUTIES OF A SNT TRUSTEE

- Understand Distribution Provisions of the SNT.
- Develop an Assessment of the Beneficiary's needs, a Distribution Plan as Well as a Procedure for Disbursement Requests.
- Periodically Review and Update the Assessment and Distribution Plan.
- Understand How SNT Distributions Interact with Public Benefits.
- Some Practitioners Recommend Sending Copies of the Annual Accounting to Social Security if the Beneficiary Receives SSI.



ADDITIONAL DUTIES OF A SNT TRUSTEE

- Retain Competent Advisors to Receive Input and to Make Decisions Concerning Expenditures and Distributions, Including Care Managers
- Handle Medicaid Pay-Back Claims for d4A Trust, Payment of Debts and Distribution to Ultimate Trust Beneficiaries



ADDITIONAL DUTIES OF A SNT TRUSTEE

If a Trustee has or holds itself out as having special skills or expertise in SNTs, it has a duty to use those special skills or expertise. La. R.S. 9:2090A.

See *In the Matter of the Accounting by JP Morgan Chase Bank, N.A. et al. v. Marie H.*, 2012 N.Y. Slip Opinion 22387 (12/31/2012).



GOVERNMENTAL BENEFITS

Means Tested

Social Security Income (SSI)

Medicaid

SNAP

HUD Housing

Non-Means Tested

Social Security Disability Income (SSDI)

Medicare



SSI

Paid to a person with a disability (or a representative payee) who meets certain financial eligibility requirements.

Maximum SSI benefit in 2013 is \$710 per month and is designed to be used for the recipient's food and shelter costs. Payment made on the first day of the month.

Must have less than \$2,000 of countable assets (home, one car, household furnishings, clothing, pre-need funeral, etc. not countable).

Earned and Unearned Income can reduce or eliminate SSI benefits.

SSI eligibility is the gatekeeper for Medicaid and other major governmental benefits.

Louisiana Medicaid



SELECTED MEDICAID PROGRAMS

- Regular Medicaid (hospital, doctors, drugs)
- Children's Medicaid (LaChip, CHAMP or Family Opportunity Act-based upon family meeting federal property guidelines)
- LTC Medicaid (home and community based waiver services and institutionalized care). Waiver programs generally have long waiting lists.

Louisiana Medicaid



REGULAR AND LTC MEDICAID

Generally limited to \$2,000 of countable resources.

An individual who receives even \$1 of SSI in Louisiana automatically qualifies for regular Medicaid.

The income limit for LTC Medicaid is three (3) times the maximum SSI benefit rate in effect.



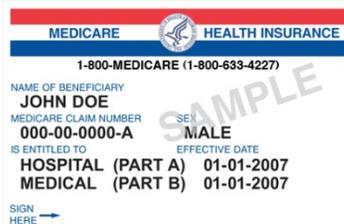
SSDI

Generally based upon the recipient's work history and payable upon the recipient's disability, regardless of age.

Not means-tested, but assumes individual cannot engage in substantial gainful activity.

Amount of benefit varies.

Payment made to recipient (or representative payee) on the third day of the month.



MEDICARE

A person who qualifies for SSDI will be entitled to receive Medicare 24 months after the date SSDI benefits begin, regardless of age.

Like SSDI, Medicare is not means-tested.



COMBINATION OF MEANS AND NON-MEANS TESTED BENEFITS

An adult child who was disabled before age 22 may be entitled to SSDI benefits based upon a parent's work history when the parent becomes disabled, takes Social Security retirement or dies. Thus, a child on SSI and its accompanying Medicaid (all means-tested) may convert to SSDI/Medicare (not means-tested) in the future.

Since the SSDI amount offsets the SSI amount, an adult child with a disability who begins receiving SSDI may lose SSI, together with the automatic Medicaid eligibility. However, Louisiana has a Disabled Adult Child (DAC) program which will restore Medicaid eligibility, provided the adult child meets the \$2,000 countable resource limit and has limited countable income (not counting the SSDI benefit).



COMBINATION OF MEANS AND NON-MEANS TESTED BENEFITS

A disabled individual who has a very limited work history and whose SSDI benefit is less than the SSI benefit may receive both SSDI and SSI benefits up to a total of the maximum SSI benefit rate.

In such case, the individual may qualify for both Medicare with Medicaid as a back-up.



STATUTORY SELF-SETTLED TRUSTS [42 U.S.C. § 1396p(d)(4)]

1. Medicaid Payback Trust (d4A)
 - Must be “established” by parent, grandparent, legal guardian or court order, not by the beneficiary
 - Beneficiary must be disabled and under age 65
 - Funded with assets already owned by the beneficiary (e.g., personal injury recovery, inheritance, gift, etc.)
 - Trust must be for the “sole benefit” of the beneficiary
 - Trust must contain Medicaid reimbursement provision upon beneficiary’s death or earlier termination of the trust
2. Pooled Income Fund
3. Medicaid Income Trust



NON-STATUTORY THIRD PARTY TRUSTS

Funded with assets belonging to others. No restriction on the beneficiary's age, need not be for the sole benefit of the beneficiary and no Medicaid pay-back provision.

- Testamentary
- Inter vivos

Test under means-based governmental programs is whether the trust assets are “available” to meet the beneficiary’s food, shelter and/or medical needs. Drafting of distribution provision becomes important as to whether the trust is construed as a mandatory support trust, discretionary support trust or a purely discretionary trust.



SNTs AND ELIGIBILITY FOR MEANS-TESTED BENEFITS

Assets held in a qualified SNT will not be counted in determining financial eligibility for SSI/Medicaid.

However, the ongoing administration of the SNT could cause loss or reduction of SSI/Medicaid.



DISBURSEMENTS FROM SNTs - CASH

A cash disbursement to the beneficiary (or any person acting on behalf of the beneficiary, such as a tutor or curator) offsets SSI dollar for dollar in the month of distribution since the beneficiary could use the funds for food or shelter, regardless of how the beneficiary actually uses the cash.



DISBURSEMENTS FROM SNTs - CASH LOANS

Proceeds from a bona fide loan are not income to the borrower in the month of receipt. POMS SI 00815.350A.1

A bona fide cash loan must be legally valid under Louisiana law and made in good faith that the loan will be repaid in the future. It should be in writing.

The repayment obligation should not be based upon a contingency, such as future income that might be paid.

The loan should include a plan or schedule for repayment.



DISBURSEMENTS FROM SNTs - CASH LOANS

Finally, the plan or schedule of repayment must be “feasible”, that is, considering the amount of the loan, the individual’s income and resources, and the individual’s living expenses. POMS SI 01120.220

Unused loan proceeds become a countable resource after the month the loan amount is received.

For loans of ISM, see POMS SI 00835.482



IN-KIND SUPPORT & MAINTENANCE (ISM)

- SSI benefits are specifically intended to pay for a person's food and shelter
- The receipt, or right to receive, food or shelter from another, including a SNT, is known as "In-Kind Support and Maintenance", or ISM for short.
- ISM will reduce the beneficiary's SSI benefit.



I WANT A HOUSE OR MOBILE HOME

- A home purchased by a SNT for the beneficiary is not a countable resource for SSI purposes. However, it is treated as income in the form of ISM, in the month of purchase only. If the trust finances the purchase, its monthly payment of the mortgage results in the receipt of ISM in the form of shelter.
- The fact that the beneficiary may reside in the home owned by the SNT rent-free does not constitute ISM nor does the beneficiary have to pay rent to the SNT.



HOUSING CONSIDERATIONS

The ability of a beneficiary with a disability to reside in a home depends upon a variety of factors, including:

- Degree of disability and whether the home is or can be made suitable to accommodate the particular disability.
- Whether the disability is degenerative to such an extent that care in the home will be impractical at some point in the future.
- Whether there are adequate ongoing supports, care giving and supervision enabling maintenance of the home (food, transportation, care attendants, etc.)



HOUSING CONSIDERATIONS

- Financial ability of the trust or the beneficiary to maintain the home (insurance, taxes, utilities, repairs and maintenance), particularly if beneficiary's only support is governmental benefits.
- Trustees should seek a "feasibility analysis" and inflation adjusted budget in advance of a home purchase or acceptance of the contribution of a home to the trust and should seek the advice of a care planner and case manager.



HOUSING CONSIDERATIONS

Although a SNT's payment for improvements to a home owned by the SNT or beneficiary (for example, handicapped-accessible improvements) are not deemed income for ISM purposes, if the Trustee makes substantial improvements to a home owned by another, such as a parent or family caregiver, there could be serious trust issues.

- In the case of a d4A trust, does the expenditure violate the "sole benefit" rule?



HOUSING CONSIDERATIONS

- Does the expenditure add significant value to the owner's home if the home is sold? Ramps and other handicapped-accessible modifications probably do not. What about additional rooms or a swimming pool?
 - Trustee may seek court instructions with notice to SSA and Medicaid
 - SNT could loan the homeowner funds secured by the home.



HOUSING CONSIDERATIONS

- Does the expenditure constitute an uncompensated transfer triggering the transfer of asset penalty for SSI?
- Medicaid Pay Back Implications in a d4A Trust Upon Beneficiary's Death, Particularly if Home is Residence of Other Family Members.
- Can Title be Placed in the Beneficiary's Name Even Though Purchased with funds from the SNT?
 - Would Medicaid argue that this violates the pay-back provision?
 - After age 54, Louisiana has an estate recovery program against the probate estate of a recipient of LTC Medicaid.



HOUSING CONSIDERATIONS

- If the home is sold, the proceeds will be a countable resource unless reinvested in another residence within 3 months or placed in a first party SNT.
- Joint Ownership Issues
 - Consider having the SNT purchase a life-estate (usufruct) interest in the home based on the SNT beneficiary's life expectancy per the Social Security tables, with another family member purchasing the remainder interest.
- When in Doubt, Seek Court Instructions But Make Medicaid a Party. See In the Matter of A.N., Sup. Ct. N.J. Docket No. A-5657-10T3 (not for publication) (4/16/2013).



IN-KIND SUPPORT & MAINTENANCE (ISM)

If the trust pays for certain other shelter or household operating expenses, these payments are considered income in the form of ISM in the month payment is made.

- Property Taxes
- Heating Fuel
- Gas
- Electricity
- Water
- Sewer
- Garbage Removal
- Property Insurance required by a Lender
- Condominium charges
- Rent



IN-KIND SUPPORT & MAINTENANCE (ISM)

Certain household expenses are not ISM

- Telephone
- Housekeeping services
- Paper goods
- Household furniture and appliances
- Repairs
- Home Improvements or renovations
- Cleaning supplies
- Rental insurance



IN-KIND SUPPORT & MAINTENANCE (ISM)

Certain household expenses are not ISM

- Cable TV
- Internet services and computer fees
- Yard maintenance
- Insurance (property, theft, fire, etc.) obtained at owner's (not required by mortgage holder) or renter's option
- Trailer space rental fee for land only



PRESUMED MAXIMUM VALUE

- ISM is valued under the Presumed Maximum Value (PMV) rule which is the lesser of its actual value or at its “presumed” value of one-third ($1/3$) of the maximum SSI federal benefit rate (\$710 in 2013) plus the \$20 general income exclusion.
- In 2013, the PMV amounts to a set \$236.66 (SSI maximum benefit level divided by 3) plus \$20, or \$256.66.



PRESUMED MAXIMUM VALUE

- The “1/3 reduction” is one-third of the maximum SSI Benefit Rate, not one-third (1/3) of the beneficiary’s SSI payment. Thus, if the beneficiary receives only a little SSI each month (for example, because of other countable income or SSDI benefits), then the 1/3 reduction rule may be fatal to the beneficiary’s SSI and SSI-linked Medicaid benefits.
- If the SNT pays the beneficiary’s rent, the beneficiary’s SSI benefit only will be reduced by \$256.66 in 2013, even if the rent payment is \$1,500. In such case, the SNT’s payment for food or other shelter costs can be unlimited since it will not increase the reduction in the SSI benefit under the PMV rule.



PRESUMED MAXIMUM VALUE

Example 1

Katie receives \$710 monthly - \$220 SSI and because of her limited work history \$490 from SSDI. She wants to move to an apartment costing \$1,500 monthly. If the SNT pays her rent, her SSI benefit reduction under the PMV rule ($1/3^{\text{rd}}$ of maximum SSI benefit of \$710 plus \$20) would eliminate her SSI and SSI-linked Medicaid, but would not affect her SSDI and SSDI-linked Medicare.



PRESUMED MAXIMUM VALUE

Example 2

Katie receives \$710 monthly from SSI for food and shelter costs. She wants to move to an apartment costing \$1,500 monthly. The SNT's payment of rent will reduce Katie's SSI benefit from \$710 monthly to \$453 monthly (a reduction of \$256.57 = PMV), but Katie will now enjoy a better quality of life and continue to retain her SSI-linked Medicaid coverage.

- Does the SNT restrict distributions?
- Can the SNT be modified?



IRREVOCABLE DOESN'T ALWAYS HAVE TO MEAN IRREVOCABLE

- May be desirable to change the administrative provisions of a SNT to provide more flexibility, such as in the distribution standards, if in the best interest of the beneficiary.
- A well-drafted SNT may authorize the Trustee (with or without court approval) to modify the administrative provisions to accomplish the purposes of the trust in light of changing governmental benefits rules and regulations.



IRREVOCABLE DOESN'T ALWAYS HAVE TO MEAN IRREVOCABLE

- A court may modify the administrative or dispositive terms of a trust if, continuation of the trust unchanged would defend or substantially impair the purposes of the trust. La. R.S. 9:2026(1). A petitioner must show a change of circumstances.
- A court may modify a trust valued at under \$100,000 or remove the Trustee and appoint a different Trustee if, in relation to the costs of administration of the trust, the continuation of the trust unchanged would defeat or substantially impair the purposes of the trust. La. R.S. 9:2026(2).



IRREVOCABLE DOESN'T ALWAYS HAVE TO MEAN IRREVOCABLE

- When in doubt, the Trustee should seek court instructions. La. R.S. 9:2233.



OTHER DISBURSEMENTS FROM SNTs – REIMBURSEMENTS TO OTHERS

Trustees of SNTs can reimburse family members who buy clothing, bedding, diapers, supplements, medical devices, transportation services, furniture and pretty much anything else without the reimbursement being counted as income to the beneficiary. POMS SI 01120.200 E.1.d and 01120.201 I.1.f.

Of course, if the SNT pays for food or shelter or reimburses someone for such costs, the beneficiary will receive income in the form of ISM.



OTHER DISBURSEMENTS FROM SNTs – CREDIT CARD BILLS

A SNT can pay a credit card bill for the trust beneficiary. However, to the extent the trust pays for food or shelter items on the bill, the beneficiary will generally be charged ISM up to the PMV for such food or shelter items. POMS SI 001120.201 I.1.d.

It often is difficult for a disabled beneficiary of a SNT to obtain a credit card, but if obtainable, the card should have a low limit so that it is not abused.



OTHER DISBURSEMENTS FROM SNTs – GIFT CARDS

Gift cards and gift certificates are considered cash equivalents and if the card/certificate can be used to buy food or shelter (e.g., restaurant, grocery store or Visa gift card) it is treated by SSI as unearned income in the month of receipt and any unspent balance as a countable resource beginning the month after the month of receipt.

If the store does not sell food or shelter items, but the card does not have a legally enforceable prohibition on the individual selling the card for cash, then it is still treated as unearned income. POMS SI 01120.201 I.1.e.



I WANT A CAR

- Should the vehicle be leased or purchased, considering the liquidity of trust assets, the current and future needs of the beneficiary, the availability of alternate means of transportation, etc.
- The Trustee should make an assessment of the beneficiary's and driver's needs:
 - Who will be the driver?
 - Does the driver have a history of seizures or other neurological conditions?
 - Does the operator have a valid driver's license and what is the operator's driving history?
 - Is the requested vehicle and adaptive equipment appropriate?



I WANT A CAR

- A car or van generally is not a countable resource for SSI and Medicaid eligibility purposes.
- Who should own the vehicle?



I WANT A CAR

- **SNT? (Not preferred)**

Advantages:

- Value of the vehicle and the purposes of its user are irrelevant.
- SNT's payment of car insurance, gasoline, repairs, etc. are not considered ISM.
- If the vehicle is sold, no urgency on reinvesting sale proceeds.

Disadvantages:

- In a d4A trust, vehicle will be subject to Medicaid pay-back.
- Other trust assets may be subjected to potential liability for uninsured accidents.

Consider:

- Insurers may charge commercial rates for vehicle owned by a trust. If beneficiary is licensed to drive, name beneficiary as an additional insured.



I WANT A CAR

- **Parent with funds supplied by the SNT (Probably a better choice)**
 - **A Must Do:** Have the SNT hold a lien against the vehicle for its full value (show on title to car) and name the SNT as loss payee on the parents' insurance.
 - SNT could pay all or a portion of the car insurance.
 - If parents use vehicle more than nominally for their personal use, consider parent paying rent to the SNT for such use or have parent pay for some of the vehicle's operating and maintenance expenses.



I WANT A CAR

- **The beneficiary**
 - Can the beneficiary safely operate and manage the vehicle?
 - Again, have the SNT shown as a lien holder on title and as loss payee on insurance policy.
 - Not subject to Medicaid payback.
 - Problem if beneficiary sells vehicle and does not reinvest in another vehicle or exempt resource for SSI eligibility purposes.
 - Beneficiary may be subject to financial exploitation.



I WANT A SWIMMING POOL, 50-INCH TV & A DISNEY WORLD VACATION

- Although these items may not be ISM, the Trustee of a third party trust is supposed to administer the trust exclusively for the benefit of the beneficiary. In a d4A trust, the trust must be for the “sole benefit” of the beneficiary.



I WANT A SWIMMING POOL, 50-INCH TV & A DISNEY WORLD VACATION

- A SNT can pay for a short vacation, including food (restaurant meals) and shelter (hotel) which will not be counted as ISM if the vacation is considered a temporary absence. A “temporary” absence may not extend past the end of the calendar month following the month it begins. The SNT could pay for attendant care (such as family member) to accompany the beneficiary if such care is necessary.
- Payments for items which other family members use may violate the “sole benefit” requirement and trigger the transfer of asset penalty for SSI purposes unless the family members pay rent (for example, an adult child and other family members living in a home owned by the SNT).



TRUSTEE FEE

- The trust instrument may specify the Trustee's fee.
- If the fee is so inadequate that no duly qualified Trustee may be found who will serve unless the amount of compensation is increased, a court may increase the fee so that the purpose of the trust will not be defeated or substantially impaired.
But see Thorpe v. Reed, Cal. App. 12/13/12.



TRUSTEE FEE

- **If the trust is silent, the Trustee is entitled to compensation that is reasonable under the circumstances. La. R.S. 9:2181. Relevant factors include:**
 - The custom of the community
 - The Trustee's skill, experience and facilities
 - The time devoted to Trustee duties
 - The amount and character of the trust property
 - The degree of difficulty, responsibility and risk assumed in administering the trust, including in making discretionary distributions
 - The nature and costs of services rendered by others to the trust
 - The quality of the Trustee's performance



TRUSTEE FEE

- Generally, a corporate Trustee will be entitled to compensation consistent with its published fee schedule maintained in the ordinary course of its business. SNTs are “high maintenance” trusts and may dictate higher than normal fees.
- If the Trustee of the SNT is the parent of a minor beneficiary receiving SSI, the Trustee must consider the impact of the SSI parental deeming of income rules on the child’s SSI eligibility and also understand that the payment constitutes taxable income to the parent. If the parent-Trustee also receives means-tested governmental benefits, a fee could impact such benefits
- A court has the discretion to deny, in whole or in part, a fee if the Trustee commits a breach of trust



CAN THE SNT PAY A PARENT FOR CAREGIVING SERVICES?

If the beneficiary is receiving LTC Medicaid (home and community based waiver services or nursing home care), personal care payments to a spouse or parent of the beneficiary are deemed an uncompensated transfer of assets triggering a penalty period for LTC Medicaid eligibility. La. Medicaid Manual, Eligibility Sec. I-1673.10.

For payments to caregivers other than a parent or spouse of a disabled beneficiary who is receiving LTC Medicaid, refer to Sec. I-1673.10 of the Louisiana Medicaid Manual on the requirements of a personal care contract.



CAN THE SNT PAY A PARENT FOR CAREGIVING SERVICES?

If the beneficiary is receiving regular Medicaid (as opposed to LTC Medicaid), the Trustee may compensate a caregiver of the beneficiary.

- The compensation should be reasonable.
- Any caregiver services should be documented in a written agreement between the SNT and caregiver listing the specific services to be rendered, the amount of time to be spent by the caregiver and a reasonable hourly rate based upon similar services rendered in the community by persons with similar training and expertise.
- Trustee should receive supporting documentation such as timesheets before payment.



CAN THE SNT PAY A PARENT FOR CAREGIVING SERVICES?

- Trustee must be concerned as to employee-independent contractor issues, income and employment tax reporting and withholding, liability issues resulting from injury to the caregiver or casualty losses from caregiver theft, liability for caregiver's injury to others while acting in the scope of employment, immigration law requirements, etc.

If caregiver is a parent:

- Does payment violate the “sole benefit” rule of a d4A trust, especially where the beneficiary is a minor and parent has obligation to provide for his/her minor child? See Hobbs v. Zenderman, 542 F.Supp.2d 1120 (N.M. 2009), aff'd on other grounds, 579 F.3d 1171 (10th Cir. 2009).
- A third-party trust does not have a “sole benefit” requirement but a Trustee still has a fiduciary duty to administer the trust in the sole interest of the beneficiary.



CAN THE SNT PAY A PARENT FOR CAREGIVING SERVICES?

If caregiver is a parent:

- Does a payment to a parent constitute an uncompensated transfer triggering a transfer of asset penalty?
- What if the care giving services require specialized training or extraordinary services?
- Taxable income to parent, subject to SSI income deeming rules for minor beneficiaries and may affect caregiver's own eligibility for means-tested governmental benefits. See Calef v. Barnhart, 309 F. Supp. 425 (USDC NY 2004) (payment by SNT to mother pursuant to court order determined to be unearned income to mother and deemed to minor daughter for SSI eligibility purposes).



DO I NEED TO REPAY MEDICAID?

- A third party SNT does not have to repay Medicaid or SSA upon the beneficiary's death or earlier termination of the SNT.



DO I NEED TO REPAY MEDICAID?

- A d4A trust must contain a provision to repay Medicaid upon the beneficiary's death up to the cost of care provided by Medicaid.
 - No repayment obligation to SSA
 - Repayment obligation has been interpreted to apply to all unreimbursed Medicaid payments over the beneficiary's lifetime, including those incurred prior to the funding of the SNT. But see First Capital Surety & Trust Co. v. Elliott, 2012 WL 4471224 (Unpub.) (Del. Chancery 9/27/2012).



DO I NEED TO REPAY MEDICAID?

WHAT CAN THE TRUSTEE OF A D4A TRUST PAY BEFORE REPAYING MEDICAID?

- SSI guidelines permit a d4A trust to pay estate taxes due to the federal government because of the beneficiary's death and reasonable fees for administration of the trust, such as court accountings or other documents or actions associated with terminating the trust prior to the Medicaid payback.



DO I NEED TO REPAY MEDICAID?

The “Stinking Dead Body Rule”

- The Medicaid payback of a d4A trust must be paid before payments for funeral expenses, debts owed to third parties, taxes due from the beneficiary’s estate (other than those arising from the inclusion of the trust in the beneficiary’s estate) and payments to residuary beneficiaries of the SNT or to the beneficiary’s estate.
 - If there is a likelihood that there will be insufficient trust funds to repay Medicaid at the beneficiary’s death, the Trustee should consider purchasing a pre-need funeral for the beneficiary.
 - What about income taxes due by the trust or the beneficiary? Trustee may consider depositing the balance in the trust with the court and citing all claimants, including Medicaid, the tax authorities and ultimate trust beneficiaries.



SHOULD THE d4A TRUST BE USED BY THIRD PARTIES?

- No, unless you want to subject the contribution to potential repayment under the Medicaid payback provision.
- Family members who desire to gift or bequeath assets to a person with a disability who is or may be eligible to receive means-tested governmental benefits should use a third party SNT which does not require a Medicaid payback.



HELPFUL RESOURCES

1. Special Needs Alliance (www.specialneedsalliance.org)
 - a. www.specialneedsalliance.org/free-trustee-handbook
(Administering a Special Needs Trust – 2013 Edition in English or Spanish)
 - b. www.specialneedsalliance.org/the-voice/archives
(collection of SNT articles)

2. Angela Canellos and Thomas D. Begley, Jr., Special Needs Trust Handbook (Aspen Publishers)

3. Special needs Trusts National Conference sponsored by Stetson University in St. Petersburg, Florida

4. Social Security Program Operations Manual
(www.secure.ssa.gov/apps10/poms.nsf/chapterlist!openview&restricttcategory=05)