**Types of Special Needs Trusts and When to Use Them**

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## I. Introduction

Special needs trusts have become a favored estate planning technique for preserving assets received by a disabled individual through an inheritance or settlement. In many instances the beneficiary is unable to manage his or her own assets due to age or incapacity. However, the primary basis for needing a special needs trust (hereinafter "SNT")[1] is that of protecting the assets for use in enhancing a disabled beneficiary's quality of life, while at the same time preserving the beneficiary's eligibility for government benefits.

Planning for the future care of a disabled individual is rife with potential pitfalls. For instance, the traditional "structured settlement" providing for an irrevocable monthly annuity paid directly to the injured party, while beneficial in many cases, can be disastrous when public benefits currently are necessary or contemplated in the future for the injured party. Likewise, well-meaning relatives who leave an inheritance directly to a disabled individual may cause a disruption or total loss of public benefits that may be more valuable than the inheritance itself. In addition, as medical costs continue to increase, the federal and state agencies operating our nation's public benefits programs simultaneously are streamlining their eligibility standards and expanding recovery rules to recoup funds expended in support of our disabled population. Consequently, estate planning attorneys practicing in the area of public benefits must become

[1] The special needs trust also is commonly referred to as a supplemental or disability trust.

familiar with the basic rules concerning SNTs in order properly to advise clients with family members who are, or may become, dependent upon a needs-based benefit program, like Supplemental Security Income ("SSI") or Medicaid.

This article generally discusses different types of special needs trusts and identifies circumstances that might call for creation of one form of trust over another.

When drafting SNTs, an estate planner must be cognizant of several factors, including whose money goes into the trust, the age of the beneficiary, the available family structure and support system, and distinct jurisdictional regulations, all of which can create significant variations in an SNT design. As a result, no single trust design suits every situation. Further, a drafter must balance the inherent tension between ensuring that a government agency cannot invade or force a trustee's use of corpus to pay for services that otherwise would be covered by governmental benefits, and the desire to retain flexibility in an SNT to ensure that administrative amendments may be made to address changes in state and federal laws, regulations and agency interpretations governing a public benefits.

## II. Elements of Special Needs Trusts Generally

An SNT, like most discretionary trusts, authorizes an independent party to manage certain financial affairs for a disabled individual. Although an SNT may assume several forms, the instrument itself serves a very specific role with regard to a beneficiary's qualification for governmental benefits or other public services. As a consequence, SNTs contain several common features including, without limitation:

- The trust beneficiary can have NO rights to demand distributions of trust principal or income;
- Full discretionary authority vested in the trustee with regard to investments and distributions, with no duty to make specific distributions;

- Anti-alienation or "spendthrift" provisions designed to insulate the corpus from third-party attachment and reduce a trust beneficiary's control;[2]

- Express language that trust funds are to be used to supplement, not supplant, public benefits, specifically excluding "maintenance and support" language, and often restricting distributions for food and shelter costs; and

- Provide for distributions to vendors of services, and restrict distributions directly to the trust beneficiary.

These common characteristics are critical to ensuring an SNT is *not* considered an "available" resource to the trust beneficiary and that trust distributions will *not* be considered income to the beneficiary.

**Resource Eligibility – "Availability" Rules.** As a general matter, if assets are "available" to a Medicaid or SSI applicant, then the value of those assets will be counted when determining the applicant's resource eligibility. Thus, one of the principal features of any SNT is drafting the trust in such a way that the corpus will not be considered an "available" resource to, or otherwise be considered owned by, the trust beneficiary. Since a central element to determining "availability" is the level of an individual's control, SNT beneficiaries must have no authority to demand trust distributions; rather, full trustee discretion over the timing and nature of any distributions of income and principal is critical to ensuring the SNT beneficiary will be "resource" eligible for public benefits. Therefore, SNTs are "discretionary trusts," meaning trusts in which the trustee has full discretion to pay, or not to pay, income or principal from the trust.[3]

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[2] For a more detailed discussion regarding New Hampshire's statutory provisions relating to discretionary trusts and creditor claims, see NH Bar Association, Continuing Legal Education Programs, NH UNIFORM TRUST CODE, *Creditor Claims: Spendthrift and Discretionary Trusts*, Mary Susan Leahy (Sept. 15, 2004); and N.H. Rev. Stat. Ann. Ch. 564-B:5-501 *et seq.*

[3] See DeGrandpre, 7 New Hampshire Practice: Wills, Trusts and Gifts, 4th Ed., § 31.06; see also N.H. Rev. Stat. Ann. Ch. 564-B:5-504 (Discretionary Trusts; Effect of Standard); cf. generally id. at 564-B:5-506 (Overdue Distribution).

The preservation of full discretionary authority in the trustee restricts an SNT beneficiary from compelling a distribution directly to, or for the benefit of, the beneficiary. Full discretion in the trustee also prevents a beneficiary from terminating the trust in whole, or in part, in his or her favor. Thus, if a disabled beneficiary cannot demand distributions from an SNT, as would be the case with a trust that requires annual or quarterly income distributions, then the assets in the SNT should not be considered an "available resource" for purposes of determining eligibility for Medicaid or SSI.

Another essential component of an SNT is that the trustee cannot be obligated to use the trust assets to support a disabled beneficiary's basic needs, specifically food and shelter, which otherwise are intended to be satisfied by government benefits programs. As a consequence, an SNT must operate as a trust that supplements, but not supplants, public benefits for which an individual may qualify. In direct contrast, a "support trust" provides that a trustee may (or must) provide for the basic health, education, maintenance and support of the named beneficiary.[4] For purposes of determining whether public benefits are available to a disabled individual, a support trust is considered an available resource precisely because it is designed to provide for a beneficiary's basic needs. Consequently, by its very nature, a properly drafted SNT cannot be a "support trust."[5]

An interesting question is raised in the context of a trust that grants the trustee full discretion whether to make distributions of income or principal, but simultaneously grants the trustee discretion to provide for the beneficiary's support. Specifically, will such a trust be

[4] See DeGrandpre, 7 New Hampshire Practice: Wills, Trusts and Gifts, 4th Ed., § 31.07 (citing Restatement (Second) of Trusts § 154 (1959)).

[5] See 42 U.S.C. § 1396p(d)(3)(B)(i)(I) (In the case of an irrevocable trust, like a SNT: "(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income – (I) to or for the benefit of the individual, shall be considered income of the individual …."

considered a "discretionary trust," and thus a non-countable resource of the beneficiary, or will the State construe a mere grant of authority to make distributions for a beneficiary's support as creating a "support trust," and thus a countable resource? Given an uncertainty, the conservative approach is to draft SNTs as BOTH discretionary and nonsupport trusts.

In addition, the inclusion of a spendthrift provision which prevents the voluntary and involuntary transfer of a beneficiary's interest not only serves to protect SNT assets from creditor claims but also reinforces the fact that the beneficiary has no claim to the trust assets unless and until a distribution is made.[6] Therefore, at a minimum, in order to preserve a disabled individual's resource eligibility for public funds and services, an SNT should grant full discretion in the trustee with regard to distributions, expressly prohibit the use of funds for support and expressly include spendthrift protection.

**Income Eligibility – Trust Distributions.** Discretionary trustee authority, nonsupport language and spendthrift protection alone do not guarantee that an SNT beneficiary will become or remain eligible for public benefits. Rather, most government programs have a dual-prong financial test for eligibility which includes both an income and resource component. Income generally is defined in the federal regulations as anything an individual receives in cash or in kind that may be used to meet the individual's needs for food and shelter.[7] Any SNT payment of assets directly to the trust beneficiary, for instance, will be counted as income to the beneficiary. Similarly, if trust assets are used to purchase food or pay for a beneficiary's rent or residential carrying costs, the value of such distributions for food and shelter will be counted as unearned

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[6] See generally DeGrandpre, 7 New Hampshire Practice: Wills, Trusts and Gifts, 4th Ed., § 31.05 (discussing the history of "spendthrift trusts"); and *Brahmey v. Rollins*, 87 N.H. 290 (1935). See also N.H. Rev. Stat. Ann. Ch. 564-B:5-502 (Spendthrift Provision).

[7] See generally 42 U.S.C. § 1382a(a) (defining income) and 20 C.F.R. § 416.1102.

income to the trust beneficiary.[8] Therefore, the manner in which a trustee administers an SNT is equally as critical to SSI or Medicaid eligibility, as are the terms of the trust itself.

From a drafting perspective, an express prohibition against making distributions directly to the beneficiary is highly recommended. Similarly, an SNT generally should restrict a Trustee's authority to make distributions to third-party vendors for food or shelter. As with all estate planning, however, this latter rule should not be imposed or applied so rigidly that a disabled beneficiary is forced to endure substandard living arrangements. Thus, it may be beneficial to build flexibility into SNTs in order to permit a trustee to exercise certain discretion with regard to making in-kind income distributions. For example, perhaps a beneficiary would be better served if a trustee has the authority, but not the duty, to distribute assets in a manner that may jeopardize public benefits if such distribution is in the "best interests" of the trust beneficiary, or, alternatively, if a disruption only occurs for a specified time period. Additionally, if an SNT is established for a beneficiary whose disability may improve to the point that the beneficiary no longer is eligible for public benefits, rigid restrictions on a trustee's authority to jeopardize public benefits ultimately may frustrate the settlor's general intent of providing a better quality of life for the disabled beneficiary.

## III. TYPES OF SPECIAL NEEDS TRUSTS

### A. Self-Settled Trusts

Although SNTs have certain uniform characteristics, the rules governing SNTs differ dramatically depending upon the source of the funds and whether the SNT is created under and governed by federal statutory authority or the rules of common law and state statutes concerning trusts. If an SNT is funded with assets belonging to a third-party – that is, someone other than

[8] Receipt of clothing no longer is considered in-kind support and maintenance to an SSI recipient under 42 U.S.C. § 1382a and 42 C.F.R. § 416.1102. See Fed. Reg. Vol. 7, No. 24 at 6340, et seq. (Feb. 7, 2005) (preserving only receipt of clothing from an employer within its definition of income and in-kind support and maintenance); see also POMS SI 000835.400.

the trust beneficiary, such as a relative or friend – the SNT commonly is known as a third-party trust. Third-party trusts are creatures of common law and are regulated by state case law and statutes, such as the New Hampshire Uniform Trust Code, N. H. Rev. Stat. Ann. Ch. 564-B et seq. Unlike the third-party trust, the corpus of a self-settled SNT is comprised of assets previously owned by the trust beneficiary,[9] and is governed principally by federal law.

Federal law affords certain safe harbor protections to self-settled SNTs for purposes of determining Medicaid eligibility. In 1993, Congress sought to overhaul the complex Medicaid statute by enacting the Omnibus Budget Reconciliation Act of 1993 (OBRA 93), and in 42 U.S.C. § 1396p, Congress provided that an individual could be disqualified for Medicaid eligibility if the individual transferred his or her own assets to an *inter vivos* trust, even if the trust were irrevocable and the individual had no further control over the assets, **unless** the transfer took place more than five years before the Medicaid application.[10] Under the general rule, a transfer by an individual (or an individual's spouse) to the trustee of an irrevocable trust within the five-year period results in the assets being attributed to the Medicaid applicant for a period of time (the "penalty period") based upon the amount transferred. Such a penalty period could put the applicant in the worst possible situation, i.e., not having the assets to pay for care, but being penalized as if the applicant had the assets, and therefore being unable to obtain Medicaid.[11] Transferring one's own assets to a trust as a planning method five years in advance of need is only feasible when the disability can be planned for, such as with a Parkinson's or Alzheimer's patient in the earliest stages of those diseases. For victims of accidents or disabling conditions from birth or with an unpredictable onset, however, this is not an option.

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[9] *See* ROBERT B. FLEMING & LISA N. DAVIS, ELDER LAW ANSWER BOOK §§ 17-6; -20 (2d ed. 2004) (noting the contrast between "self-settled" and "third-party" trusts, the latter being funded with assets that did *not* initially belong to the trust beneficiary).

[10] The Deficit Reduction Act of 2005 extended this five-year look back period for trusts to all transfers of any sort.

[11] The Deficit Reduction Act of 2005 mandates that the date of any transfer within the past five years will be deemed to be the date of the application for Medicaid, which means that the penalty period for a transfer begins on the date of application.

Under 42 U.S.C. § 1396p(d)(4), two types of safe harbor trusts are described that can relieve this dilemma for SSI and Medicaid eligibility. Similar protections were enacted under the SSI statute.[12] Transfers of the disabled person's assets to these statutory self-settled trusts are exempt from the transfer penalty. The primary feature of these statutorily defined trusts is that upon the death of the beneficiary, the trust's corpus must be used to reimburse the state for previously paid medical assistance provided to the SNT beneficiary after the individual's death. This is commonly known as the "Medicaid payback" requirement.[13]

**1. The "(d)(4)(A)" Trust.**

The first type of safe harbor trust is under 42 U.S.C. § 1396p(d)(4)(A), commonly known as a "(d)(4)(A)" trust. There are several statutory requirements that must be followed. First, a (d)(4)(A) trust may not be created by the individual who will benefit from the trust, but must be created by a grandparent, parent, guardian, or court on behalf of the individual. Second, the trust must be irrevocable. Third, a (d)(4)(A) trust may be created only for individuals who are under the age of 65. Funds of the beneficiary transferred to the trust after age 65 will not be exempt transfers. Finally, from the remaining trust assets, the State (or multiple states if more than one provided Medicaid assistance to the beneficiary) first must be reimbursed for Medicaid benefits paid on behalf of the individual upon the individual's death.[14] To the extent any further trust funds remain, they may be distributed to the intended beneficiaries of the Medicaid recipient.

The limitations on permissible grantors can be cumbersome. As noted, the beneficiary cannot be the grantor, even though the assets being transferred to the trust are attributed to the beneficiary; this restriction applies even if the beneficiary is competent. If a disabled beneficiary is incompetent, it is a relatively simple matter to have a guardian appointed to create the trust.

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[12] See 42 U.S.C. § 1382b(e)(5) (excluding trusts created under 42 U.S.C. § 1396p(d)(4)(A) and (C) from the definition of countable resources for SSI eligibility).

[13] In order for assets held in an SNT to be exempt from the basic Medicaid rules defining countable resources for Medicaid eligibility purposes, 42 U.S.C. § 1396p(d)(4)(A) requires that "the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual …."

[14] See Appeal of David Lowy, Case No. 2006-570 (N.H. Sup. Ct. August 23, 2007).

However, a disabled adult who has no living parent or grandparent and who is competent has more difficulty complying with the federal requirements.[15] If the funds are not the result of a settlement by which a court could create the self-settled SNT, and there are no living parents or grandparents, the disabled person may need to submit to a limited guardianship in order to comply with the statute.

The trust document will be reviewed by the Social Security Administration ("SSA") and, because of the payback provision, by New Hampshire's Department of Health and Human Services ("DHHS"). The standard of review should be the same. However, for the past several years in New Hampshire, DHHS has reviewed each self-settled trust and has been aggressive in its approach. When preparing a self-settled SNT for a beneficiary, one must counsel the clients carefully, to advise them that while SSA may approve the trust, there still exists a Medicaid hurdle in New Hampshire before an individual may qualify for benefits. Accordingly, it is important that the SNT permit the trustee (or potentially a trust protector) to amend the SNT in order to protect the benefits of the beneficiary.

**Summary of (d)(4)(A) trusts:**

A. The trust corpus is an exempt resource under 42 U.S.C. § 1396p(d)(4), and 42 U.S.C.§ 1382b(e) (for trusts created on or after 1/1/2000).

B. These are self-settled trusts, intended to hold assets previously belonging to the disabled individual.

C. Transfers of resources to these SNTs are not considered disqualifying gifts.

D. When to use a (d)(4)(A) trust:

1. To shelter existing assets in order to qualify for Medicaid and SSI;

[15] POMS SI 01120.203.B.1.e specifies that "the person establishing the trust must have legal authority to act with regard to the assets of the individual." It is considered an invalid trust if the parents of a competent adult child create the trust as settlors, and then pursuant to a power of attorney deposit the assets of the child into the trust. Currently there are two solutions to this dilemma. The first is to petition the court for a limited conservatorship specifically for the purpose of transferring the assets of the disabled adult child into the trust. The second is a device created by the Social Security Administration called the "seed trust" or the "$10.00 trust." With this device, the parents deposit $10.00 of their own funds into the trust, thus "establishing" the trust, and then transfer the child's funds into the trust using the power of attorney.

2. To shelter proceeds from a settlement or judgment in a lawsuit;
3. To shelter an unplanned inheritance;
4. In divorces, consider for holding property settlements for a disabled spouse or for child support payments for disabled child; and
5. To render parent eligible for Medicaid, by transferring assets to a (d)(4)(A) trust to benefit a disabled child.[16]

E. A (d)(4)(A) trust must be established by a:

1. Parent;
2. Grandparent;
3. Court; or
4. Legal guardian.

F. The beneficiary must be:

1. An individual under age 65 (trust remains valid after 65, but additional assets cannot be added);[17] and
2. Disabled within the meaning of 42 U.S.C. § 1382c(3).

G. The (d)(4)(A) trust must have a Medicaid "payback" provision which is triggered by the death of the beneficiary. Ensure that your payback provision is not state specific. The provision should meet the SSI criteria for payment of allowable expenses prior to repaying the state. Such allowable expenses include:

1. Attorney fees;
2. Administrative costs in wrapping up the trust; and
3. Taxes.[18]

**2. The "(d)(4)(C)" Trust**

The second type of safe harbor for self-settled SNTs is found in 42 U.S.C. § 1396p(d)(4)(C), commonly known as a "(d)(4)(C)" or "pooled" trust. As with (d)(4)(A) trusts, (d)(4)(C) trusts are designed to hold assets belonging to the trust beneficiary, and thus are self-

[16] Assets could also be transferred directly to the disabled child, or to non-exempt trust solely for the benefit of disabled child. 42 U.S.C. § 1396p(c)(2)(B)(iii) and (iv).

[17] If the SNT contains a structured settlement, include a statement that "any periodic payments received as a part of the settlement shall not be considered additions to the trust estate." Also be aware that at least one Social Security Regional Office (Atlanta) has taken the position that even though structured settlement monthly payments are made to the trustee, they are counted as monthly income to the disabled beneficiary.

[18] In some jurisdictions, there exists an open question regarding whether self-settled SNTs may pay for a beneficiary's debts or funeral expenses prior to repaying the state. Cf. *In Re Special Needs Trust F/B/O Phyllis Hart* and *In Re Estate of Phyllis Hart* (Strafford County Probate Court, Docket Nos. 2001-0437, 2003-0768) (Order dated June 29, 2004) (rejecting the Department's claim of priority over a trust's payment of the deceased beneficiary's funeral expenses).

settled. This provision permits a disabled individual to transfer funds, without penalty, to a non-profit organization as trustee, which non-profit then manages the funds. Funds belonging to many disabled individuals are "pooled" for management and investment purposes.

A (d)(4)(C) trust must be irrevocable. However, there is no limit on the age of the beneficiary, nor is there a requirement that the trust be created by a parent, grandparent, court or guardian. At the death of the beneficiary, the state (or states) must be reimbursed for Medicaid expenses from any funds remaining in the trust, to the extent such funds "are not retained" by the non-profit organization.

Pooled trust structures operate in several jurisdictions, including New Hampshire. The (d)(4)(C) SNT in New Hampshire is run by the Enhanced Life Options Group ("ELO"), a non-profit organization founded in 1993. In 2004, ELO created the Enhanced Life Options Group Master Special Needs Pooled Trust ("Master Trust"), a trust document pre-approved by DHHS. Through this Master Trust program, a federally insured corporate trustee manages the assets for investment purposes and ELO acts as manager, serving as the intermediary between disabled beneficiaries and the trustee. Individuals may participate in the Master Trust by signing a "Joinder Agreement," thus establishing a sub-account. There is an initial $600 administrative fee to join the trust, and each sub-account will be assessed management/trustee fees in accordance with the fiduciaries' existing fee schedules.

**Summary of (d)(4)(C) special needs trusts:**[19]

A. The pooled trust is similar in most respects to a (d)(4)(A) trust discussed above, with the following exceptions:

    1. The trust may be established by the individual with the disability;
    2. There is no age limitation;[20]
    3. The pooled trust must be managed by a non-profit association;

[19] 42 U.S.C. 1396p(d)(4)(C).

[20] New Hampshire has not yet taken the position that transfers to a pooled trust by a person over the age of 65 is a disqualifying transfer

4. Individual accounts (there must be separate accounts for each beneficiary) are pooled for investment and management; and
5. Funds may be retained by the trust at the beneficiary's death rather than being paid back to the state.

B. When to use a (d)(4)(C) trust:

1. The beneficiary is over the age of 65;
2. The beneficiary is competent to establish the trust, has no living parent or grandparent, and does not want to go through the court;
3. An SNT needs to be established very quickly due to circumstances (such as loss of benefits if funds are not "spent" within a short period of time);
4. There is no suitable individual to serve as trustee; and
5. Assets are insufficient for a corporate fiduciary to handle, or insufficient to justify the expense of creating a trust from scratch.

It also should be noted that many of the reasons listed for when to use a (d)(4)(A) trust also apply to (d)(4)(C) trusts as well.

### B. Third-Party Trusts

By virtue of being a creature of state law rather than federal statute, the principal distinction between a third-party SNT and an SNT funded with assets of the disabled individual, is that a third-party SNT need *not* contain a Medicaid payback provision. Thus, since third-party trusts are not required to have such a provision, the grantor/settlor of such a trust retains the ability to dictate how any remaining trust corpus will be distributed upon the lifetime beneficiary's death.

In order to qualify as a third-party trust, the assets used to fund the SNT cannot be traced to property previously owned by the disabled individual for whom the trust is designed to benefit. When providing estate planning services, it is incumbent upon the attorney to determine whether any of the estate legatees or devisees currently receive, or are expected to receive, public benefits. If the client wishes to benefit a disabled child or grandchild who receives government benefits, the estate plan should have dual goals: protecting the assets being distributed to the

disabled beneficiary, while simultaneously preserving the individual's eligibility for public benefits. When a person who otherwise is not legally responsible for supporting an SSI or Medicaid recipient nonetheless wishes to improve that individual's quality of life, gifting assets to a trust during a donor's lifetime is entirely appropriate to ensure certain comforts or needs not provided through public entitlement programs continue to be met. Additionally, if an individual wishes to bequeath assets to another individual after death, and similarly is concerned with potentially jeopardizing a legatee or devisee's future eligibility for public benefits, a third-party SNT also is an answer. Precisely because the beneficiary has no legal interest in the trust assets until a distribution occurs, the disabled individual's resource eligibility generally would not be compromised by virtue of being a beneficiary of a third-party SNT.[21] However, the remaining financial issue for consideration is one of income eligibility based upon specific trust distributions. Consequently, it is essential that distributions for the benefit of the disabled trust beneficiary be made carefully in order to minimize any unanticipated disruption in public benefits.

**1. Trusts for an Institutionalized Spouse**

In many instances, third-party SNTs are established by a parent who wishes to ensure for the future care of a disabled child. However, an SNT also may be appropriate when an individual wishes to plan for the fact that he or she ultimately may predecease an institutionalized spouse who then is receiving some form of public assistance based upon financial eligibility. In this latter case, "sweetheart" wills are problematic, as an institutionalized spouse would become the owner of all of the decedent's assets if the community spouse were to die first. A testamentary SNT under a Last Will and Testament is one estate planning technique by which a community spouse may provide for an institutionalized spouse's quality of life

[21] See A.A.M. § 411 ("Trusts Using the Assets of Other Parties").

without jeopardizing such spouse's SSI and/or Medicaid benefits.[22] Similarly, any family member who receives assets upon a community spouse's death could establish a stand-alone third-party SNT for the benefit of the nursing home spouse. Since a testamentary SNT established by a community spouse, or a stand-alone SNT established by an institutionalized spouse's family member, are considered third-party trusts, no Medicaid pay-back is required, and the grantors may designate the remainder beneficiaries for any trust corpus.

**2. The "Sole Benefit" Trust**

An SNT also may be established by a third party who desires to set aside assets for a disabled child or a disabled individual under age 65, when part of the motivation to transfer assets is to achieve Medicaid eligibility for the donor.[23] Specifically, a donor may benefit a disabled child or disabled individual under the age of 65, while simultaneously avoiding the transfer of asset penalty, if the assets are transferred to a trust "solely for the benefit of" the disabled child or individual.[24]

If an aging parent faces institutionalization, he or she has the option of transferring assets outright to a permanently or totally disabled child.[25] Although a direct transfer would not disqualify the parent from Medicaid, it likely would disqualify the child due to an increase in available resources. Conversely, transferring the assets to an SNT would assist the parent in

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[22] See 42 U.S.C. § 1396p(c) ("except by will" exception); see also Transmittal 64, issued by Sally Richardson of the HCFA (now CMS) in November, 1994, stating that for the purposes of Medicaid, the definition of "trust" does not include a trust established by Will. Section 3259.1.A.1. Transmittal 64.

[23] See 42 U.S.C. § 1396p(c)(2)(B)(iii) & (iv).

[24] Under Section 3257.B.6 of Transmittal 64, for a trust to be for the "sole benefit of" the beneficiary, it must provide for distributions to the beneficiary on an actuarially sound basis, or must contain a Medicaid payback provision.

[25] See A.A.M. § 415.15 ("The following is an all-inclusive list of allowable property transfers done by an institutionalized individual that are exempt from the asset transfer penalty: . . . Assets were transferred to any of the following: the individual's spouse, another person for the sole benefit of the spouse, a child who is blind or permanently and totally disabled.") (emphasis added); see also 42 U.S.C. § 1396p(c)(2)(B)(iii) (For purposes of eligibility for Medicaid benefits: "An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that . . . [assets] were transferred to, or to a trust (including a trust described in subsection [42 U.S.C. § 1396p(d)](4)) established solely for the benefit of, the individual's child…") (emphasis added).

achieving Medicaid eligibility, while concomitantly preserving the child's eligibility for governmental services.

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