

Lifelong Planning: Special Need Trusts

AFFORDABLE CARE ACT & ABLE ACT

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Presenter's bio:

Peter Wall is a Vice President and Trust Officer for Colorado State Bank and Trust. Now in his 15th year of trust administration, Peter specializes in estate planning and trust facilitation, and acts as a personal consultant, advisor and liaison for affluent individuals and families. Peter focuses his efforts in the Elder Law arena and is known for his Special Needs Trust administration and planning capabilities throughout the Front Range. A Bachelor of Arts graduate from the University of Northern Colorado, Mr. Wall is the current President for the Centennial Estate Planning Council, former President of the Denver Trust Officers Association, an ex-officio board member of the Colorado Fund for People with Disabilities and a Board Member of VSA Colorado Access Gallery. He is a frequent presenter on the topics of Special Needs Trusts, estate planning, taxation, and trust administration for numerous professional and community groups and was a presenter and faculty member at the CBA 2012, 2014 and 2015 Elder Law Retreat, the 2013 National Down Syndrome Congress and the 2015 46th Annual Autism Society National Conference. Mr. Wall is also a published author, most notably in the Elder Law in Colorado Red Book, Fourth Edition.

Who needs a Special Needs Trust (SNT)?

Persons on benefits receiving funds exceeding \$2,000

- Inheritance, back-payments of Social Security, gifts
 - Settlements
 - Personal Injury
 - Worker's Compensation
 - Note need for Medicare Set-Aside Trust as applicable
 - Medical Malpractice
 - Divorce
 - Liquidation of personal assets
 - Sale of home
 - Excess resources
 - PETI funds
 - Employment wages

Persons unable to personally handle sums of money or may be vulnerable to exploitation

Persons who may receive benefits in the future

Special Needs Trusts: Disability Trusts and Special Needs Planning

Special Needs Trust (SNT) (also called Supplemental Needs Trusts, Disability Trusts, d(4)(a) and d(4)(c) Trusts).

Types of Special Needs Trusts:

- **First Party Individual Trusts**
 - Subject to Medicaid approval
 - Can be created by Court, parents or guardian of beneficiary
 - Payback provisions on death or termination of trust
 - Income taxable to beneficiary
- **Third Party Individual Trusts**
 - Settlor/Creator = third party (inter vivos or testamentary)
 - No payback provisions
 - More flexibility
- **Pooled Special Needs Trusts (1st and 3rd Party)**
 - Master trust document
 - Can be self created (1st Party)
 - Income may not be taxable



	Individual (First Party) Private Trust 42 USC § 1396p(d)(4)(A) C.R.S. § 15-14-412.8	Pooled (First Party) Trust 42 U.S.C. § 1396p(d)(4)(c) C.R.S. § 15-14-412.9	Individual Third Party Private Trust	Pooled (Third Party) Trust
Administration	Family member, professional fiduciary, bank	Non-Profit organization	Family member, professional fiduciary, bank	Non-Profit organization
Age	Must be under 65	No age restrictions per se, but at the age of 65 and over the Beneficiary must be reasonable able to spend down the funds in their expected lifetime.	Can Be of any age	Can be of any age
Transfer Penalty	None	Maybe under some circumstances for persons over age 65. None for persons under 65.	None	None
Annuities	Must name Medicaid as a beneficiary	Trustee may be named as a beneficiary	Do not need to name Medicaid or trustee as a beneficiary	Do not need to name Medicaid or trustee as a beneficiary
Definition of Disability	Must meet definition of disabled for the purposes of the SSI program	Must meet definition of disabled for the purposes of the SSI program	ADA definition is used	ADA definition is used
Tax Status	Earnings taxable	Earnings may be tax exempt	Earnings taxable	Earnings taxable
Distributions	Supplemental Needs for the Sole Benefit of the Beneficiary	Supplemental Needs for the Sole Benefit of the Beneficiary	Supplemental Needs for the Sole Benefit of the Beneficiary	Supplemental Needs for the Sole Benefit of the Beneficiary
Costs	Set up by private attorneys, cost varies. Administration costs vary	No attorney fees. Non-profit sets fees to establish and administer	Set up by private attorneys, cost varies. Administrative cost vary	CFPD: Cost to set up is \$250.00 plus 2% of amount contributed to establish trust fund. 1% annual; Case Mgmt fees
Remainder Interests (when Primary Beneficiary dies)	Medicaid must be paid first.	Will be paid back to the State Medicaid Agency to the extent it is not retained by the pooled trust.	A beneficiary can be named. (Medicaid has no claim on third-party funds)	A beneficiary can be named. (Medicaid has no claim on third-party funds)
Portability	May need to pay back Medicaid if moved out of state or terminated from Medicaid benefits.	Trust is for life. Can move to any state with similar law of pooled trusts or "ported" to new pooled trust.	Trust is for life. Can move to any state with similar law	Trust is for life. Can move to any state with similar law of pooled trusts or "ported" to new pooled trust.
Medicaid Approval	Must be approved by Medicaid in all non-SSI cases.	Pre-approved by Medicaid, but Medicaid must be notified.	Must be approved by Medicaid in all non-SSI cases.	Pre-approved by Medicaid, but Medicaid must be notified.
Social Security	Must approve all SSI cases.	Pre-approved by SSA, but SSA must be notified.	Must approve all SSI cases.	Pre-approved by SSA, but SSA must be notified.
Flexibility	Depends on document.	Streamlined process in place.	Depends on document.	Streamlined process in place.

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Know your clients' public benefits!!

- SSI (Supplemental Security Income)- \$733/month (2015)
- SSDI (Social Security Disability Income) - based on work records
- SSA (Social Security)
- Medicaid
- Medicare
- Food Stamps
- Public Housing
 - *DeCambre v Brookline Housing Authority* (D.Mass, No. 14-13425-WGY, March 25, 2015)

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Benefits Comparison

SSI	SSA	SSDI
Supplemental Security Income	Social Security	Social Security Disability Income
Disability	Retirement	Disability
No work history required	Work history required	Work history required
Income Cap - \$733/month (2015)	Income Cap – Depends on work record	Income Cap – Depends on work record
Resource Cap - \$2,000	No Resource Cap	No Resource Cap
Always Medicaid	Typically Medicare	Typically Medicare

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Benefits Comparison

Medicaid	Medicaid Expansion	Medicare
Health Care	Health Care	Health Insurance
Individual State Administration	Individual State Administration and “Opt-In”	Federal Administration
Financial <u>&</u> Disability Qualification	Financial Qualification for Income only	Age <u>OR</u> Disability Qualification
Covers in-home care programs, skilled nursing care, long term care, prescriptions	Does NOT cover in-home care or long-term care	Covers hospitalization, 100 days max rehabilitation, prescriptions
Estate Recovery: <u>YES</u>	Estate Recover: <u>NO**</u>	Estate Recovery: <u>NO</u>

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What Can an SNT Pay For?

- Recreation: vacation, companionship services, entertainment, pets, cable TV, subscriptions
- Medical Care (not covered by benefits): dental, glasses, hearing aids, massage, co-pays, vitamins/supplements, hair care, personal supplies
- Household: home purchase, maintenance, clothing, telephone, appliances, furniture, insurance, accessibility upgrades
- Transportation: public services, vehicle, auto insurance, gas, vehicle maintenance
- Education: public/private, training, computer/software, books, vocational training
- Services: attorney/accountant fees, alternative therapies, conservator/guardian fees, burial plan
- *Lewis v. Alexander, 685 F.3d 325 (3rd Cir. 2012)*

Tax

- Grantor Trust (1st Party trusts only)
 - Internal Revenue Code § 674 & § 677
 - Can be appropriate for self-administered SNTs
 - Taxability flows through to beneficiary on personal 1040 at applicable beneficiary tax rate
- Qualified Disability Trust (SNT) / 3rd Party Trust (Family Trust, etc) as applicable
 - Appropriate vehicle when using a professional fiduciary or family member
 - Obtain a TIN by submitting a SS-4 or online at www.irs.gov
 - Trust files a 1041 annually
 - Taxability flows through to beneficiary via K-1, to be reported on their personal 1040
 - Take deductions for professional expenses on K-1 as applicable
 - Taxable events (capital gains, interest, etc) may pass through and be taxed at beneficiary level / rates
 - Be aware of Principal and Income accounting for allocation of income and expenses
 - Colorado Uniform Principal and Income Act - CRS §§ 15-1-401 *et seq.*

Tax - American Taxpayer Relief Act of 2012

Tax	2012	2015	Medicare Tax	Highest Rate
LT Cap Gains	15%	20%	3.8%	23.8%
ST Cap Gains	35%	39.6%	3.8%	43.4%
Income	35%	39.6%	3.8%	43.4%
Estate Tax	\$5.12MM exempt, 35%	\$5.43MM exempt, 40%		

Trust Tax Rates (simplified) - 2015

Income Subject To Tax	Rate
< \$2,450	15%
\$2,451 < \$5,700	\$367.50 plus 25%
\$5,701 < \$8,750	\$1,180.50 plus 28%
\$8,751 < \$11,950	\$2,034 plus 33%
> \$11,950	\$3,090 plus 39.6%

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Brief Overview of the Affordable Care Act

1. Changes to Non Grandfathered In Policies

- No lifetime or annual limits
- No denial or pre-existing conditions
- Mandatory minimum coverage requirements
- 80% requirement on direct medical care reimbursement on medical loss ratios for excess premium paid
- Preventative Care

2. Expansion of Coverage and Subsidies

- Children covered on parent's plan until 26 regardless of job or marital status
- Subsidies for low income families
 - Must apply to get subsidy
 - Generally begin with family income between 100% and 400% of Federal Poverty Level

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Brief Overview of the Affordable Care Act

3. Medicaid Expansion

- Income below 133% of Federal Poverty level
- No asset test
- Voluntary within states - 29 states including Colorado
- 100% financed by Federal Government by the first three years
- New simplified application in Colorado - www.connectforhealthco.com
- Cannot be eligible for Medicare (e.g. not disabled on SSDI or SSI under age of 65)

4. Medicaid Reform

- Expanded preventative care and annual wellness checks
- Gradual elimination of the donut hole

Medicaid Programs With and Without Asset Tests

1. Medicaid Programs with Asset Tests

- SSI Recipients
- HCBS Programs
- Nursing Home Programs

2. Medicaid Programs without Asset Tests

- Family Medicaid
- Children's Health Care Plans
- Medicaid buy in programs
- Expanded Medicaid
- Katie Beckett Waiver Program

Effects of Affordable Care Act on Planning

- Movement from SNTs to Discretionary Trusts
- More use of Trigger Trusts or Standby SNT's
- More use of exchanges and expanded Medicaid
- Less disability applications
- More refined Life Care Planning
- Document changes in SNTs

The Affordable Care Act and the Impact on Trusts

What is NOT changing with the implementation of the ACA? (why a trust is still needed)

- The Medicaid Waiver Program will remain the only real benefit program that will cover significant custodial home care services for people with disabilities.
- Long-term care in Assisted Living Facilities and Nursing Facilities will still be paid by Medicaid when an individual does not have Long-Term Care Insurance, or income/resources to privately pay.
- Supplemental Security Income (SSI) will continue to have a resource limit of \$2,000 for individuals.

When a trust *may* not be needed?

- When an individual who meets the **income** requirements for Medicaid Expansion and does **NOT** need Long-Term Care or a Waiver program receives a windfall (PI Settlement, Back-payment in SSA, Inheritance), as there is no asset test for the Medicaid Expansion Service.
- Individuals need to evaluate their eligibility for other programs such as LEAP, Food Stamps, etc.
- Individuals need to evaluate the other benefits of placing funds in a Special Needs Trust
 - Budgeting - plan for spending or saving to reflect your goals
 - Protection from exploitation.
 - Community organizations provide a link to a network of community partners and resources.

Achieving A Better Life Experience (ABLE) Act

- Enacted December 19, 2014
- Amends Section 529 of the Internal Revenue Service code
- Tax-advantaged savings accounts for individuals with disabilities
 - Income earned is non-taxable
 - Contributions (up to \$14,000/year **total**) may be made by any person
 - Do not count as resource for public benefits determination*
 - Limited eligibility - onset of disability must have occurred before age 26
 - Medicaid Estate Recovery? YES.
 - To be used for “qualified disability expenses” only.
 - **Note - determination of paying for housing expenses (shelter) still pending.**

Achieving A Better Life Experience (ABLE) Act

- Disadvantages:
 - If the amount in the ABLE account exceeds \$100,000, the excess will disqualify the beneficiary from SSI.
 - Age restrictions
 - If beneficiary is not already receiving SSI or SSDI, they must obtain a doctor’s certification that they have a ‘severe and chronic’ mental or physical impairment.
 - Liability, fraud and exploitation
 - What is a “Qualified Disability Expense”? Does your client/beneficiary know?
 - Medicaid Estate Recovery
 - State specific

Case Manager, Trust Advisors/Protectors and Co-Trustees

- Case Manager
 - Knowledgeable person hired to assist trustee with services, purchases, with a knowledge of community resources and public benefits.
 - Increase the Trust's familiarity with the beneficiary and their needs
 - Identify necessary and appropriate expenditures under the trust
 - Monitor for misuse of funds of exploitation of Beneficiary
- Trust advisors can be family members, attorneys, accountants or other trusted professionals
 - Fees vary, but if there is a family member trustee, trust advisor fees may be more economical
 - Rights NOT duties
- Trust Protector
 - This is usually an attorney or other professional to oversee a trust and to change trustees if there is a need to. Usually quite inexpensive to have one in a more sizable trust (over \$100,000).
- Co-Trustee
 - Consider a family member acting as co-trustee with a professional trustee.

Trust Drafting Tips

- Statement of Intent
- Trust Reformation
 - Inherent portability issues
- Avoid mandatory (i.e. 'shall') benefits & defense language
- Avoid early termination language (e.g. 'uneconomical to retain')
- Evaluate the need for the trustee to 'consider outside resources'
 - (Restatement of the Law Third, Trusts § 50 (e))
- Plan for all assets - titling
 - Retirement plans, Real Estate, Mineral/Oil & Gas, Annuities, Life Insurance
- Investments
 - Colorado Uniform Prudent Investor Act, CRS §§ 15-1.1-101 *et seq.*
- Accountings
 - Duty to inform and account to beneficiaries, CRS §§ 15-16-303, no less than annually

The Importance of Choosing the Right Fiduciary

Ideal Trustee:

- In-depth public benefit knowledge
- Ability to stay abreast of all benefit and fiduciary law changes
- Unbiased decision making capability with beneficiary's best interests in mind in regards to discretionary distributions (i.e. beware of remainder persons)
- Advocate of the beneficiary
- Invests according to fiduciary standards (Prudent Investor Act)
- Up to date knowledge and adherence to statutory fiduciary requirements
- Expertise in tax law
- Immaculate bookkeeping abilities
- Carries Errors and Omissions Insurance/Liability Insurance or is bonded
- Can properly identify second rate service providers and/or beneficiary abuse or financial vulnerability
- Can appear in or petition the Court as needed
- Immortality

QUESTIONS?

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