

Drafting Special Needs Trusts



SALLY L. SCHOFFSTALL, CELA
SCHOFFSTALL ELDER LAW
2987 CORPORATE COURT
OREFIELD, PA 18069
SALLY@LVELDERLAWATTORNEY.COM
610 706-0686
NOVEMBER, 2018

Gather Accurate Facts – Obtain Verification of Benefits in Writing



Entitlement Benefits:

- Social Security Disability
- Medicare

Needs Based Benefits:

- Supplemental Security Income
- Medical Assistance
- HUD
- Food Stamps
- Etc.

Is SNT necessary & appropriate? Any alternatives?



- ABLE ACCOUNT – PA ABLE IS AN OPTION AS ARE ABLE ACCOUNTS SPONSORED BY OTHER STATES
 - Only 1 allowed per person
- IS MEDICAL COVERAGE THROUGH ACA OF 2010 MARKETPLACE A BETTER OPTION?
- CAN MODEST AMOUNT BE SPENT DOWN?
- CONSIDER A POOLED TRUST



If SNT is best course; what type to use?



- **1st Party Trust**
 - ✦ a/k/a self-settled trust, d4A trust, payback trust
- **3rd Party Trust**
 - ✦ Testamentary
 - ✦ Inter vivos
- **Pooled Trust Issues**
 - ✦ For 3rd party pooled trusts, will trust administrator allow remainder to be paid to named beneficiaries?
 - ✦ Over 65 yr old beneficiary with 1st party funds



Great Resource: Administering a Special Needs Trust: A Handbook For Trustees (2018 Edition) prepared by Special Needs Alliance

1st Party/3rd Party SNT Comparison



1st Party Trust

- Established by court, parent, grandparent, guardian of beneficiary, **or beneficiary herself**
- Beneficiary's \$
- Sole benefit – yes
- Payback required - Yes
- Age limit – under 65
- Must be irrevocable

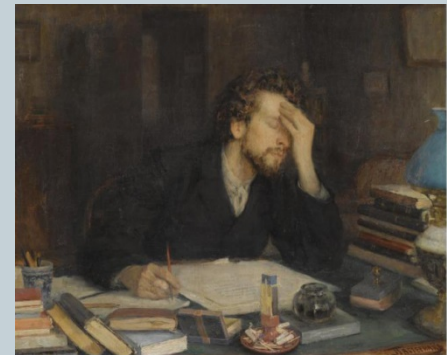
3rd Party Trust

- Established by beneficiary's relative; often a parent
- Relative's \$
- Sole benefit – No
- Payback required – No
- Age limit – No
- Rev. or irrevocable

Before beginning to draft.....



- Know about the beneficiary's current needs
- Make informed assumptions about future needs
- Draft for flexibility within known parameters



1st Party SNT Nagging Issues



- **Revised POMS – Issued 4/30/18**
 - Old Draper funding problem – follow POMS SI 01120.203 precisely
 - Assignability of U.S. Military Survivor Benefits to a 1st party SNT
 - Further interpretation of sole benefit rule
 - Trust Review Process – 90 day amendment period for trusts deemed to be a resource
 - Family caregiver rules
 - 3rd party travel rules
 - Court Orders establishing 1st party trusts
 - True Link cards



3rd Party SNT drafting issues



- Testamentary or stand alone trust?

- Might Grandma want to contribute?



- If SNT is for surviving spouse, must be established by Will of deceased spouse. See 42 U.S.C. §1396p(d)(2)(A).

- Revocable or irrevocable?



3rd Party SNT drafting issues



- Specific direction regarding spending or broad statement of intent?

- ✦ Fleming survey: 34% no detail
41% detail but only illustrative

Current wisdom: **Less is more**



- Power to establish irrevocable burial reserve

- ✦ Can't use 1st party trust money to pay for burial after beneficiary's death – always pre-fund the burial plan

3rd Party SNT Drafting Issues con't.....



- **Who pays income tax on trust earnings?**
 - ✦ Grantor – want grantor trust status. Does grantor have \$?
 - ✦ Beneficiary
 - ✦ Trust – Qualified Disability Trust (See articles - pp. D-25 and 29)

Trust tax brackets are compressed as compared to individual brackets. In 2018, 37% highest tax bracket applies to single individuals with income over \$500,000, couples with income over \$600,000, and trusts with income over \$12,500



Qualified Disability Trust



- **IRC §642(b)(2)(C)(iii)(I) provides for an extra income tax exemption, equal to an individual's personal exemption (\$4150 in 2018), available for a complex trust that meets the following requirements:**
 - ✦ **Trust must be irrevocable and for sole benefit of a disabled beneficiary**
 - ✦ **Beneficiary must be disabled per Social Security definition; i.e., unable to engage in substantial gainful activity due to medical or mental impairment.....death**
 - ✦ **Beneficiary must be under age 65 when trust created.**

Otherwise, trust exemption is \$100 or \$300

3rd Party Drafting Issues con't.....



- **Power of amendment vs trust protector**

- ✦ Fleming Survey: 48% never or infrequently
20% occasionally
31% frequently or always

When 3rd party trust protector used, what powers given:

Modification/amendment

Termination

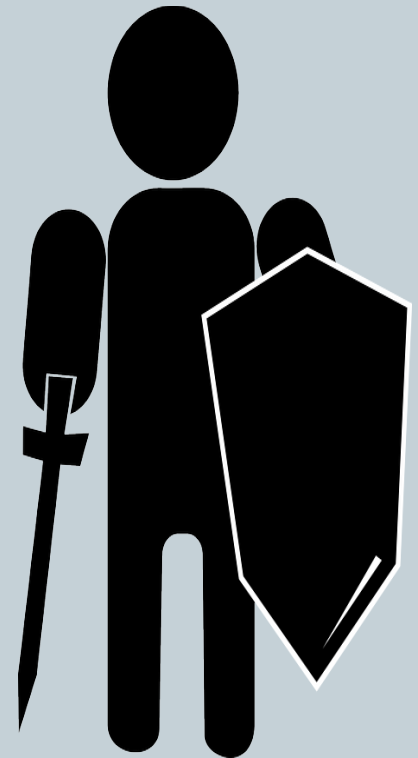
Change terms to permit continued eligibility

Change trustee

Change venue

Demand accounting

Recommend care/management choices



3rd Party SNT Drafting Issues cont't.....



- Will qualified funds be paid to the trust?
 - Does the trust qualify as a Designated Beneficiary? **If you don't have a copy of Natalie Choate's book on your desk, ask for it for the Holidays!**
 - Accumulation or conduit provisions in the SNT?
 - ✦ Drafters often choose accumulation provisions in SNT's because funds saved for future use
 - ✦ If 3rd party SNT has ultimate charitable beneficiaries, conduit provisions required to avoid 5-year payout



3rd Party Drafting Issues con't.....



- **Permission to cause beneficiary to lose public benefits**
 - e. g. - Better quality healthcare available via ACA
 - More housing options may be available
- **Appointment of trustees – be sure to create chain of succession or appointment**
- **Understand ISM**

Thank you
Enjoy remainder of Institute!



CONTACT ME WITH QUESTIONS

SALLY L. SCHOFFSTALL, CELA

610 706-0686

SALLY@LVELDERLAWATTORNEY.COM