SPECIAL NEEDS TRUSTS FOR ASSET PROTECTION

PLANNING, IMPLEMENTATION, RECENT DEVELOPMENTS, AND A COMPARISON OF ABLE ACCOUNTS

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SPECIAL NEEDS TRUSTS
FOR ASSET PROTECTION

(PLANNING, IMPLEMENTATION, RECENT DEVELOPMENTS)

28th Annual EBA Estate and Business Planning Institute

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SPECIAL NEEDS TRUSTS FOR ASSET PROTECTION
PLANNING, IMPLEMENTATION, RECENT DEVELOPMENTS, AND A COMPARISON OF ABLE ACCOUNTS

I. Introduction.

A. Goals of special needs trusts and asset preservation planning:

1. Leaving funds for the benefit of a child without causing a child to loose important public benefits.

2. Making sure that the funds are well managed.

3. Making sure that other children are not overburdened with caring for a disabled sibling, and that burdens fall relatively evenly among the siblings.

4. Being fair in terms of distributing the estate between the disabled child and the other children.

5. Making sure there is enough money available to meet a disabled child's needs.

B. An individual typically strives to provide for his own needs, and the needs of his spouse, while maintaining as much control as possible without "tainting" the asset protection arrangement being utilized due to too much control.

II. Alternative Ways of Structuring Trust Distribution Criteria.

A. The following are the standards commonly used for distributions by the trustee of a trust:

1. Mandatory or discretionary distribution of "income" only.

a. "Income" would normally be determined by the trust itself and by state law, including the Indiana Uniform Principal and Income Act (UPAIA), I.C. 30-2-14-1, *et seq.*).

(1) Although the name "Uniform " implies standardization, there are differences in most state laws incorporating various provisions of the UPAIA.

(2) The 2008 revised UPAIA has been adopted by 27 states and the District of Columbia.

(3) Although it is often said that the UPAIA "governs" the accounting of trusts and estates, it actually speaks more to the issue of "who gets what" as between different beneficiaries.

(4) The general approach of the UPAIA is that the trust instrument controls the allocation of a receipt or a disbursement to either income or principal, but the governing instrument may grant the trustee discretion in regard to the allocation and the trust itself may "opt out" of the provisions of the UPAIA.

(5) For more specific information regarding UPAIA, see *Intracacies of the Uniform Principal and Income Act - Part 1*, Candland, Murphy, and Farnsworth, Estate Planning, Vol. 44 No. 5 (May 2017).

b. In general, "income" does not normally include capital gains, although income could be defined to include capital gains or the trust could give the trustee discretion to allocate capital gains to income.

(1) In general, capital gains would not be treated as income because of the goal of preserving the principal of the trust, particularly in the case of an asset protection trust such as an irrevocable income-only trust (IIOT).

(2) However, for certain income tax reasons, if capital gains are treated as income, then the capital gains can be distributed to the income beneficiary, thus avoiding tax at the level of the trust and resulting in the beneficiary being taxed on the capital gains received by the beneficiary.

c. If the income distribution provision is mandatory, the trustee would not have discretion regarding income distributions.

2. "Discretion" to spray income and/or principal among the beneficiaries.

a. With less discretion, opportunities for asset preservation are reduced.

(1) A "support" standard will make the trust a support trust, which will be subject to claims by Medicaid agencies and may be subject to claims by other third parties.

(2) "Ascertainable standards" which might include support, or the common criteria of "health, education, maintenance or support" (the so-called "HEMS" criteria), are often used so that the beneficiary may serve as the trustee without the trust being included in the beneficiary's estate for federal estate tax purposes.

(a) Trusts subject to the HEMS or similar distribution criteria will in my opinion be subject to claims by

Medicaid agencies and may be subject to claims by other third parties.

(b) The HEMS criteria are very commonly used because of a general understanding of the meaning of such criteria, particularly when asset preservation is not a goal of the trust.

b. "Absolute" discretion with no objective standard makes the trust a fully discretionary trust.

(1) Such a trust should be immune from the claims of most creditors if a spendthrift provision is used.

(2) Such a trust would be exempt for SSI purposes as long as the beneficiary was not the trust creator, nor the trustee, and did not control trust distributions; however, it may not be protected from claims of Medicaid agencies because of the issue of "availability" of the trust assets.

c. "Absolute" discretion with instructions not to make distributions that would reduce or replace government benefits is the basis of a "special needs trust."

d. For an enlightening although dated discussion of the powers that a donor can retain over transferred property, and some of the tax and other consequences of these powers, see Estate Planning, Vol. 24, No. 27, Digby, "What Powers Can a Donor Retain Over Transferred Property?"

B. Control and irrevocability.

1. To the extent the grantor has control, those assets will be considered available and vulnerable to creditors.

2. A non-grantor beneficiary who does not have control may have protection depending on the terms of the trust and applicable state law and whether or not the beneficiary has the power to compel distributions.

a. A "spendthrift" provision will provide protection, generally, against claims by third parties.

b. Note, however, that the IRS may be able to levy upon even a spendthrift trust. See *IRS v. Orr*, 180 F. 3d 656 (5th Cir. 1999).

3. Trusts must be irrevocable in order to protect assets. Be aware, however, of the gift tax and other tax implications of irrevocable trusts.

4. It is possible to utilize a trust effectively in order to protect assets for a beneficiary who is receiving public benefits or who may require long-term care.

a. In general, trusts which the Medicaid applicant or the spouse created and retained an interest will not be protected and will generally be counted as available.

(1) One exception is an "income only" trust pursuant to which "only income" is payable to the grantor-beneficiary, but not principal; the principal may be immunized against Medicaid claims, subject to the transfer penalty implications.

(2) Another exception to this rule will be the "safe harbor" SNTs discussed in Part VI of these materials.

b. A trust for a surviving spouse intended to meet only the spouse's special needs and not count as the spouse's assets **must** be established under a will, i.e., it must be a testamentary trust and cannot be a living trust.

(1) Assets can only be protected for the benefit of a surviving spouse if a testamentary trust is used which meets the "special needs" criteria.

(2) Such resources will not be counted as "available" to the surviving spouse. 42 U.S.C. §1396p(d)(2)(A); IHCPPM §2615.75.20.10.

5. The chart attached as Exhibit "A" identifies various types of trusts, how they are created, and the Medicaid and other implications of those trusts.

C. Contrasting self-settled trusts versus third-party trusts:

1. All trusts established during lifetime (called "*inter vivos*" trusts), whether special needs trusts or otherwise, can be divided into two classes:

a. Those created and funded by someone other than the creator or the person receiving public benefits - this is a "third-party" trust.

b. Those funded with the beneficiary's own funds - this is a "self-settled" or "first party" trust.

2. In most cases, trusts created with personal injury settlements will fall in the latter category.

3. For "self-settled" trusts, both the Medicaid and SSI rules are very strict regarding the trusts that will be exempt for eligibility purposes. Trusts that do not meet a "safe-harbor" as discussed in Part VI of these materials will be counted as belonging to the applicant, rendering him or her ineligible for benefits.

D. Trust funding issues.

1. How do you determine how much to put into the trust?

2. How much will your spouse, child or other beneficiary with special needs require over his or her lifetime?

   a. The use of a financial planner with experience in this area can help make projections to assist with the appropriate determinations.

   b. When personal injury settlements are involved, the advisability of utilizing a Medicare set-aside arrangement should be considered; refer to Part XIII of these materials.

   c. It may be better to commit more money, rather than less, since one cannot be certain that current programs will continue, and it may be necessary to pay for services, such as case management, that may be available without charge today.

   d. Consider the use of life insurance as a means of supplementing the estate in order to meet the various needs of all of the beneficiaries.

E. Personal injury cases.

1. Must evaluate the advantages and disadvantages of a lump sum versus a structured settlement, and placing the settlement proceeds in trust.

   a. Structured settlements are virtually risk free and the annuities acquired are essentially never taxed, which may cause a structured settlement with a lower return to be equivalent to a taxable investment with a higher return.

   b. The drawback of a structured settlement is its inflexibility; it does not permit certain major purchases, and it can destroy a client's current or future eligibility for public benefits.

2. Cash settlements offer greater flexibility both in terms of when the funds will be available to make a large purchase, such as a home or handicap van, and being able to take advantage of and respond to fluctuations in the market.

a. A combination approach utilizing a special needs trust may work well and might provide the best of all worlds.

b. The payment or payments received as a part of the "structure" could be used to meet the immediate needs while the remaining payments or future structured payments can be used to fund a first-party self-settled SNT.

F. There are alternative ways to protect or utilize assets in order to qualify for public benefits besides placing assets inside a trust; the following is an exemplary but not an exhaustive list:

1. Purchase exempt resources, such as a motor vehicle or home, prepaid funeral trust, etc.

2. Pay off debt, including mortgages and credit cards.

3. Prepay bills.

4. Forego needs-based benefits and rely on the individual's resources, income and non-needs based benefits.

5. Prepayment of room and board - in general, a prepayment must be non-refundable.

6. Personal service contracts for a limited term or for life.

a. There are significant tax implications of personal service agreements, particularly when appreciated assets are transferred to the care provider in exchange for the agreement to provide care.

b. Refer to Internal Revenue Code §83 and the applicable Treasury regulations.

III. Medicaid Transfer of Assets Rules.

A. OBRA 1993 (OBRA), Pub. L. No. 103-66, 107 Stat. 213, applies to assets disposed of after August 10, 1993 and trusts established after that date.

B. The "look-back period" for identifying uncompensated transfers of assets under ORBA was 36 months, except in the case of payments to or from a trust, or portions of a trust, which are treated as disposed of by the individual and which were subject to a 60-month "look-back period."

1. For those who apply for Medicaid subsequent to admission, the period runs from the date of the application.

2. For those who enter an institution while receiving Medicaid, the look-back period is dated back from the date of admission.

3. The Deficit Reduction Act of 2005, Pub. Law 109-171 (the "DRA") extended the look-back period to a date that is 60 months after the date of enactment of the DRA (February 8, 2006), subject to the extension of effective date provisions of the DRA to accomplish state law amendments [§ 6016 (E)(3)].

   a. Indiana's final rule was filed with the Indiana Secretary of State on August 18, 2009, published in the on-line Indiana Register on September 16, 2009, and became effective November 1, 2009.

   b. The change to a 60-month look-back period encouraged the utilization of trusts in light of the pre-DRA five-year look-back period applicable to trust transfers.

      (1) Previously, in order to avoid the five-year look-back period for trusts, outright transfers were preferred.

      (2) With the same five-year look-back period applicable to all transfers, trust transfers, which provide greater protection, are now the preferred mechanism of transferring and protecting resources.

C. There is currently no penalty, speaking generally, for a person at home receiving regular Medicaid except in the case of certain waivered services (Home and Community-Based Services under the Developmental Disabilities, Autism, Assisted Living, Support, Service or Medically Fragile Children's Waivers).

D. The applicable penalty period is determined by dividing the value of the resources transferred by a set rate.

1. For transfers prior to July 1, 2002, there were three regions, and the divisor depended on the region in which the Medicaid application was filed.

2. Since July 1, 2002, there is one rate, which as of July 1, 2017 was $6,439.

E. The following are the major changes in the Indiana Medicaid rules between pre-DRA and post-DRA transfers:

	Transfers before 11/01/09	Transfers On or After 11/01/09
Look-Back Period	3 years; 5 years for some trusts	5 years
Beginning date of Penalty	Month After Transfer	When otherwise eligible for Medicaid with an approved application or month in which transfer occurred, whichever is later
Multiple Transfers	Treated separately unless occur in same or consecutive months	Add them all together
Partial month penalties	No partial month penalties; round down to nearest whole number of months	Can be partial month penalties. Calculated as number of months and days.

Remember that it is the penalty period which controls and not the look-back period.

1. The look-back period circumscribes the maximum penalty effect of a transfer if the Medicaid application is filed after the period has elapsed.

2. Note, however, that the DRA significantly changed how the Medicaid penalty will be calculated if the application for Medicaid occured within the DRA-mandated 60-month look-back period.

3. For a partial month, the penalty calculation is rounded up at the second decimal place (hundredths), and the fractional part of the penalty period is multiplied by 30.42 (since there are 30.42 days in an average month) and rounded up to determine the number of days of eligibility. For example, a $50,000 transfer divided by the divestment penalty divisor of $6,439 would give rise to a penalty of 7.765 months, which would be rounded up to 7.77. The fractional part of .77 is multiplied by 30.42, which equals 23.423. This result is rounded up to 24. Consequently, the penalty period would be seven months and twenty-four days.

4. For additional information concerning the transfer penalty rules, see U.S.C. §1396p(c); Indiana Administrative Code, 405 IAC. 2-3-1.1; and IHCPPM §§2640.10.00 through 2640.10.35.20.

IV. SSI Transfer of Assets Rules.

A. The SSI transfer rules are very similar in structure to the current Medicaid transfer of asset rules. The "look-back period," however, is always 36 months in the case of SSI.

1. It was several years after the adoption of OBRA 93 before the SSI transfer rules were amended to be more consistent with the Medicaid rules applicable to divestment and which established a 36-month look-back period for SSI transfers.

2. After the DRA, a significant inconsistency now exists again between the impact of divestment for SSI purposes as compared to the impact for Medicaid purposes.

B. The "penalty period" (that period of time during which a person cannot receive SSI because of a transfer) can never be more then 36 months, while there is no "cap" on Medicaid transfers except to the extent that the "look-back period" applies. The penalty is calculated by dividing the amount gifted by the maximum SSI benefit (federal benefit plus state supplement, if applicable) which the individual could receive based upon his or her living arrangement (in 2017, $735 for an individual and $1,103 for a couple).

1. As in the case of Medicaid, certain transfers of a home may be exempted (e.g., if to the spouse of the transferor, a child of the transferor who has not attained 21 years of age or is blind or disabled, a sibling of the transferor who has an equity interest in the home and who resided in the transferor's home for a period of at least one year immediately before the date the transferor becomes institutionalized, etc.). Also exempt are all transfers of resources to the spouse and transfers to certain Medicaid exempt "safe harbor" trusts.

2. Under current SSI regulations, almost anything received by an individual during the course of a month, such as the settlement of a personal injury case, is income.

   a. It does not lose its character as income and become a resource until the first moment of the following month.

   b. Consequently, the transfer of the settlement proceeds may affect SSI during future months, and of course, in any event, the receipt of "income" in the month of receipt will affect the SSI benefit for that month.

C. There are exceptions for certain lump sum payments.

1. Certain non-recurring lump sum payments, such as retroactive SSI, Social Security and VA benefits, are exempt as resources for Medicaid and SSI purposes for nine months. 20 C.F.R.§416.1233 and IHCPPM § 2615.65.00.

2. Federal tax refunds are disregarded as income in the month received and not treated as a resource for a period of 12 months for all federal means-tested programs, including Medicaid. IHCPPM § 2845.30.00.

3. Any amount refunded on income taxes already paid is not income, even if the tax was withheld or paid, or received, in a period prior to application for SSI benefits, and even if the income taxes were excluded as work expenses of the blind. POMS SI 00815.270.

D. The SSI transfer penalty rules apply only to transfers occurring on or after December 14, 1999.

1. Also, transfers giving rise to a penalty may be "cured" as in the case of Medicaid by the person to whom the gift was made by returning the gift to the transferor - this is frequently called a "gift-back".

2. Again, as previously noted, there are many exceptions to the transfer rules, as in the case of Medicaid, such as a trust for the sole benefit of a blind or disabled child, and transfers to certain "safe harbor" trusts, such as a so-called "under age 65" (d)(4)(A) trust and a (d)(4)(C) "pooled trust."

E. Understanding the "POMS" (the Social Security Administration's Program Operations Manual System), which is the publicly available set of operational instructions for administering, among other things, SNTs, is very important in addressing issues relating to SSI eligibility.

1. See POMS GN 02410.001(2002).

2. The United States Supreme Court has stated that "...while these administrative interpretations are not products of formal rule making, they nevertheless warrant respect...". Washington DSS v Keffler 123 S.Ct. 1017, 1027, 537 U.S. 371, 385(2003).

3. References to various POMS provisions will be made in future sections of these materials.

V. Benefit Programs Other Than Medicaid and SSI.

A. Benefit programs not based on need will not be considered in these materials.

1. In general, if the program is not means-tested, there is no need for a special needs trust unless means-tested programs are anticipated in the future.

   a. However, the receipt of certain benefits could affect eligibility for means-tested programs that might be needed in the future because of the receipt and accumulation of benefits.

   b. In such a case, a special needs trust might be used as a means of sheltering the accumulated benefits in an effort to avoid a negative impact on future benefit eligibility.

2. The following is a non-exclusive list of the programs that will not be considered:

   a. Social Security Disability.

   b. Medicare.

   c. Special education under the Individuals with Disabilities Education Act.

   d. Civil service and military survivor benefits for disabled adult children.

      (1) It should be noted, however, that the Disability Military Child Protection Act, 10 U.S.C. § 1450, became law on December 19, 2014.

      (2) Prior to this new law, military members and retirees who were parents of a child with a disability were unable to plan properly for the child's future.

         (a) Federal law did not previously permit them to direct their retirement benefit under a survivor benefit plan to a special needs trust on the retiree's death.

         (b) The Department of Defense had consistently determined that a "person" under the law then in effect did not include a trust.

         (c) Prior to this new law, the only choices were either to have the benefit paid to a non-disabled "person", thereby disregarding the child completely and hoping that others would care for the child, or to have the survivor benefit paid outright to the child, thereby affecting the child's eligibility for public benefits.

(d) Survivor benefits may now be directed to an SNT provided that certain requirements are met.

(e) For additional information, see <u>*The Elder Law Report*</u>, Vol. XXVII, Issue 2, September 2016.

B. Following are a few of the benefit programs based on financial need:

1. Housing choice voucher program ("Section 8").

a. A federal subsidy to assist with the cost of monthly housing; the household pays a portion of monthly housing costs based on the income of the household (usually equal to 30 percent of the household's monthly adjusted income).

b. Administered by a public housing agency ("PHA") under a contract with U.S. Department of Housing and Urban Development ("HUD").

c. The Section 8 program is income-tested, not resource-tested, although due to changes made recently by the Housing Opportunity Through Modernization Act of 2016 (HOTMA), discussed briefly later in this section, there is now an eligibility test based on resources to the extent that housing assistance cannot be provided to any family whose net assets as defined by HOTMA exceed $100,000 adjusted for inflation.

(1) To be eligible for the Section 8 program, an applicant must not have income that exceeds the applicable income limit (the income limits used to determine eligibility vary by program from 30 percent of the median income for the area to 95 percent).

(2) Income from resources is counted as income to the tenant, and if the tenant transfers resources, income is imputed to the tenant at the rate of 2 percent per year.

(3) The eligibility limit may be less than a later limitation for continuation of eligibility.

d. The Section 8 program does not specifically exempt (d)(4)(A) or (d)(4)(C) SNTs, but has its own rules relating to trusts which can be found in the *HUD Handbook*, 4350.3 REV-1, § 5-7, <u>www.hudclips.org</u>.

(1) A Section 8 applicant must report all income earned by his or her assets or two percent per year if no income is earned on an asset.

(2) If no family member has access to either the principal or income of the trust at the current time, the trust is not included in the calculation of income from assets; therefore, SNTs should not be considered as resources if no family member who resides in the Section 8 housing apartment is a trustee of the trust.

(3) Distributions from the trust on a recurring basis to the applicant (other than for groceries) will be considered in the applicant's annual income. Temporary, non-recurring or sporadic income, including gifts, is not counted.

(4) Generally, the creation of the trust is considered an asset disposition for less than fair market value and the applicant must include income from the assets transferred to the trust for eligibility purposes for two years.

  (a) However, there is an important exception for trusts funded with the proceeds of a litigation settlement or judgment.

  (b) These assets are excepted from the two-year rule.

(5) In general, to avoid income inclusion issues, payments from trusts need to be irregular and sporadic, and the tenant should not have access to the income or be a trustee of the trust.

e. *DeCambre v. Brookline Housing Authority*, Nos. 15-1458 and 15-1515, U.S. Court of Appeals, First Circuit (June 14, 2016), addressed the HUD income rules.

(1) The essence of *DeCambre* is that actual distributions from a trust which carry out trust income will to that extent generate countable income that can increase rents for Section 8 program purposes, but to the extent the distributions reflect principal, they should be disregarded.

(2) *DeCambre* may not be followed by PHA's in other judicial circuits, and it should be noted that the HUD rules do not address in an authoritative way SNT issues in its rules and regulations.

(3) It should be noted that the Housing Opportunity Through Modernization Act of 2016 (HOTMA), H.R. 3700, which was signed into law on July 29, 2016 after being unanimously passed by Congress, makes changes in the Section 8 rules.

(a) HOTMA changes how income is defined and what deductions can be taken when determining a tenant's rent responsibility for all federal housing programs.

(b) It also changes rules regarding income reviews, eligibility limitations, and the procedure for terminating a tenancy or increasing rent for families in public housing whose income for the most recent two consecutive years exceeds 120 percent of the area's median income.

2. V.A. Pension Program.

a. Although a complete analysis of veterans benefits will not be addressed in this presentation in any significant way, the following matters should be noted:

(1) A veteran who has served as little as 90 days of consecutive active duty of which as little as one day was during a war-time period, and who received an other than dishonorable discharge, may be entitled to a Special Monthly Pension ("SMP") to offset the cost of necessary healthcare.

(2) In addition to the basic SMP, there may be additional monetary allowances provided with the pension:

(a) If the person is considered housebound, a "Housebound" benefit may be available;

(b) If the recipient needs the regular attendance of another person, the veteran or widow(er) may be entitled to Aid and Attendance ("A & A") benefits.

(3) For Housebound benefits to be available, the veteran or widow(er) must be disabled and essentially confined to the home.

(a) A significant disability is required.

(b) People age 65 and older are presumed to be disabled.

(4) For A & A benefits to be available, a veteran or widow(er) must be blind, living in a nursing home or assisted living facility, or unable to attend to certain activities of daily living.

(a) If the claimant needs daily services without which he or she would need nursing home, hospital or institutional care, then he or she may be entitled to A & A benefits.

(b) See 38 U.S.C. § 1502(b) and 38 C.F.R. §§ 3.352(a), 3.351(c)(3).

(5) For the permissible family income limits to receive the basic SMP and the Housebound or A & A supplemental benefits, see www.va.gov.

(6) To file for SMP benefits, an applicant must present an application to the Office of Veterans Affairs.

(a) Applications are now available on line, but supporting documentation must be sent separately to the VA.

(b) For information on the different offices, see www.vetsresource.com and www.vba.va.gov/VBA/.

(7) Veterans may obtain free assistance with filling out the application from accredited veterans service organizations; organizations or individuals, including attorneys, are not permitted to charge fees for assisting a client with the application process.

(a) However, if the claim is denied, or approved for a lower benefit than expected, the claimant may hire a paid representative to assist in the appeal. An advisor may also charge for planning and advice not related to filing the application.

(b) For the purpose of determining VA pension benefits, the assets in a self-settled special needs trust must be considered in determining eligibility for a VA pension. Department of Veterans Affairs, Office of the Regional Council, Washington, DC, VAO Pg. Cp. Rec. 33-97.

(8) For a detailed discussion of the VA pension rules and certain proposed changes in those rules, as well as a comparison of the Medicaid and VA pension eligibility requirements, please refer to my website and review the article entitled "*Proposed Changes to the VA Pension Rules, VA Pension Trust Issues, and a Comparison Between the Medicaid and VA Pension Trust Rules.*"

b. Other VA benefits that will not be addressed include claims for dependency and indemnity compensation and VA health care.

3. There are other needs-based benefits which will not be discussed in these materials, such as Temporary Assistance for Needy Families ("TANF", formerly "AFDC") and food stamps.

a. These programs place limits on eligibility depending on financial status.

b. Planning involving special needs trusts should take into account the availability of these and other benefit programs.

(1) The trustee of an SNT should verify the particular needs-based benefits the trust beneficiary is currently receiving.

(2) The trust can be administered and distributions made to preserve eligibility for the particular benefit(s) the beneficiary is receiving.

VI. Types of Special Needs Trusts.

A. 42 U.S.C. §1396p(d)(4)(A) [SSA §1917(d)(4)(A)] Trusts.

1. Prior to December 13, 2016, these so-called (d)(4)(A) disability trusts could only be established by a parent, a grandparent, a legal guardian, or the court, with assets of a Medicaid beneficiary who is under 65 years of age.

a. The Special Needs Trust Fairness Act (SNTFA), effective December 13, 2016, allows the beneficiary himself or herself to establish a (d)(4)(A) trust using the beneficiary's own assets.

b. Shortly after passage of the SNTFA, the Social Security Administration (SSA) issued an emergency release stating that the resource capping provisions of the SSI trust statute shall not apply to a (d)(4)(A) trust established through the actions of the individual, as well as by a parent, grandparent, legal guardian or a court.

c. The SSA's Program Operations Manual System (POMS) makes clear that for the purpose of SSI eligibility, to "establish" a (d)(4)(A) trust means to take the physical action to sign the trust.

d. A legally competent disabled adult could transfer his/her own assets into the trust, or another individual acting under a validly created power of attorney could transfer the assets, but the disabled individual could not "sign" the trust prior to the SNTFA.

2. In the case of a trust established through the actions of a court, the creation must be by court order, effectively having the judge sign the trust or ordering a party to sign the trust under court order.

   a. If a court only allows or ascents to a trust signed by a third party (other than a parent, grandparent or guardian), then the trust will be invalid.

   b. The POMS also address the use of a power of attorney, stating that a power of attorney which has been validly created according to state law by a parent or grandparent may be used by the independent agent to establish a trust for the beneficiary on behalf of the parent or grandparent. POMS SI 01120.203B 19.

3. A (d)(4)(A) trust does not give rise to a Medicaid or SSI transfer penalty, and the assets in the trust are protected as long as they are used to provide for the "supplemental needs" of the beneficiary and not for support.

4. The assets transferred for the beneficiary might be funds received from an inheritance or a personal injury settlement.

   a. The excess resources could be transferred to a (d)(4)(A) trust without incurring either a Medicaid or SSI penalty.

   b. The beneficiary's eligibility for Medicaid and SSI would not be affected.

5. Trust income will generally be attributable and taxable to the beneficiary for income tax purposes because of the nature of the SNT as a "grantor trust" for income tax purposes. but as long as it is used to provide for the beneficiary's "special needs," no disqualification for or impact on Medicaid or SSI eligibility should occur.

6. Upon the death of the beneficiary, however, the remainder must be made available to all applicable state Medicaid agencies for reimbursement of medical assistance; this is the so-called "pay-back requirement."

7. For all forms of special needs trusts based on disability, the definition of "disability" is the same definition contained in the Social Security Act for determining eligibility for SSI or SSDI. 42 U.S.C. §1382c(a)3A.

   a. If a special needs trust is being considered before the beneficiary has been determined to be disabled by the Social Security Administration, consider obtaining an advisory opinion from an experienced Social Security Disability attorney as the foundation to proceed in drafting the special needs trust.

b. The POMS provide that if there has not been a determination of disability, the case can be sent for a medical determination after the trust has been established. POMS SI 01150.121.

8. As previously indicated, a self-settled trust of this type may be helpful to deal with a tort recovery, an inheritance or any other unanticipated payment.

   a. Although certain payments might be deemed to be income rather than assets, an irrevocable assignment of child support or alimony payments made directly to a trust as a result of a court order will not be treated as income as long as the assignment is irrevocable. POMS SI 01120.200G.1.d.

   b. The POMS clarify that these special rules apply to trusts established with the assets of an individual on or after January 1, 2000. POMS SI 01120.201B.7.

   c. There is an example of a disabled SSI recipient over age 18 who receives child support, which is assigned by court order directly into the trust.

      (1) Since the child support is the SSI recipient's income, the recipient is the grantor of the trust, and the trust is a resource unless it qualifies as a self-settled special needs trust. POMS SI 01120.201C.2.b.

      (2) This clarifies that child support is the recipient's income and must be diverted to a first party special needs trust rather than a third party special needs trust.

      (3) The same reasoning would presumably apply to alimony.

9. Payments under a structured settlement received and deposited to the (d)(4)(A) trust after age 65 do not disqualify the trust from self-settled special needs treatment so long as the trust and the structure were in place prior to age 65.

   a. Be careful of structured settlements involving parents who may be receiving annuitized payments in addition to the amount used to fund the child's (d)(4)(A) trust.

   b. Since structured settlement annuities may be liquidated, they have been treated as a resource in some cases, even if the amount of the deemed income to the parent would not adversely affect the child's SSI eligibility.

10. A (d)(4)(A) trust must be established for the "sole benefit" of a beneficiary.

11. Special SSI requirements apply in addition to the statutory requirements of 42 U.S.C. §1396p(d)(4)(A):

    a. Prior to August 15, 2002, some SSA Regional Counsel took the position that inter-vivos or post-mortem payment of taxes, trustee fees, or other administrative expenses violated the Medicaid repayment requirement.

        (1) The POMS were amended to make clear that the "sole benefit" requirement is not violated if certain administrative expenses are paid during the life of the disabled beneficiary, and certain others are paid after death but before the repayment of Medicaid.

        (2) The prohibited and allowable administrative expenses are found in POMS SI 01120.203B.3.

        (3) In general, certain taxes and reasonable fees may be paid post-death. Payment of debts owed to third parties, funeral expenses (the "stinking dead body rule"), and payments to residual beneficiaries post-death are not permitted.

        (4) Similarly, pursuant to I.C. 30-4-3-25.5, when a (d)(4)(A) trust is terminated, the trustee shall not pay fees or distribute trust property to any person entitled to a payment from the trust until the Office of Medicaid Policy and Planning has been fully reimbursed for Medicaid assistance provided to the person for whom the trust was created, but the trustee may pay federal and state taxes from the trust before reimbursing the Office of Medicaid Policy and Planning.

    b. Some regional offices have published regional instructions relating to what is necessary to have a valid irrevocable trust under state law.

        (1) In certain states, the trust must specify a particular person or entity as the residual beneficiary.

        (2) While "children," "issue," or "descendants" are specific enough, "heirs" or "my estate" are not sufficient terms.

    c. In certain states, any residual beneficiary, even an unborn child, is adequate for the purpose of establishing irrevocability.

(1) In others, as long as the trust names a residual beneficiary other than an unborn child, then the trust would be considered to be irrevocable.

(2) If the residual beneficiary is an unborn child or children, and the grantor has no child or children, and there is evidence that the grantor is unable to have children, then the trust might be considered to be revocable.

d. In certain states, if a specific person or entity is designated, it would also be permissible to name in addition an estate or heirs to establish a sufficient residual beneficiary.

e. There are a number of definitional provisions in the POMS, such as the "fiduciary," the "trustee," and the "trust beneficiary," etc. See POMS SI 01120.200B.

12. The SSA has determined that Indiana does not allow an individual to establish a "dry" trust and requires that if an SNT is established by a parent or grandparent (but not when established by a court), at least some "seed" money must be deposited before the funds of the trust beneficiary are placed into the trust.

a. Unless this process is followed, the SSA may determine that the trust is not valid.

b. The SSA also thinks that Indiana's statutory version of the Doctrine of Worthier Title requires that a trust that purports to be irrevocable is actually revocable if there is only one beneficiary.

(1) The SSA does not consider the state to be a trust beneficiary by virtue of the "pay-back" provision.

(2) The SSA does not accept a general category of persons (such as "heirs-at-law") to be trust beneficiary, and so it is important in these cases to be sure that there is at least one additional specific named beneficiary of the trust, or the SSA will determine that trust is revocable and will disqualify the trust beneficiary from SSI.

(3) One solution to these problems has been called the "Two Ten Buck Rule" pursuant to which: (i) the parent or grandparent places ten dollars of his or her own money into the trust before the beneficiary's funds are added, and (ii) specifies that when the trust beneficiary dies, someone else gets ten dollars back after the pay-back to the state but before the heirs-at-law get the balance, if any.

13. Because a self-settled SNT must be for the “sole benefit of” the disabled beneficiary, there are many limitations on the permissible uses of trust resources:

    a. A self-settled SNT cannot be used to pay a legal obligation of support for a parent because the parent has a duty to provide shelter for the minor children, and in some states, for their disabled adult children.

    b. In most instances it will be necessary for the parent to pay a *pro-rata* share of expenses of the home to the extent that the trust owns a home and the parent is a co-owner and/or co-occupant. This will be addressed later in these materials in more detail.

14. Consider including the following provisions in a first party ("self-settled") (d)(4)(A) SNT:

    a. Include language prohibiting the beneficiary from terminating the trust.

    b. Do not include language permitting the termination of the trust by the trustee or anyone during the lifetime of the beneficiary, to avoid the problem of payments being made to a third party other than the beneficiary, thus violating the "sole benefit" requirement for special needs trusts.

    c. The trust must be administered properly, as well as being properly drafted and funded. Improper distributions from a properly drafted and funded trust can cause the loss or reduction of public benefits. See the comments which follow regarding "In-Kind Support and Maintenance" (ISM) and the “Presumed Maximum Value” (PMV) rule.

    d. A "spendthrift clause" is essential, since if a beneficiary can sell or assign his or her beneficial interest in the trust, the interest would be treated as a resource. POMS SI 01120.200D.1.a.

    e. Since there appears to be no federal restriction on naming a family member as a contingent beneficiary of the guaranteed portion of a structured payment upon the death of the primary beneficiary, then unless state law precludes doing so, it may be possible to avoid a payback to the Medicaid program by having the structured payment paid to a family member and not to the trust.

    f. Payback is not limited to Medicaid expenditures made after the trust was established; therefore, if more than one state has made payments, the funds remaining in the trust must be required to be paid pro rata. POMS SI 01120.203B.1.h.

g. Taxes due from the estate of the beneficiary, other than those arising from the inclusion of the trust in the estate and inheritance taxes due from residual beneficiaries, are not permitted prior to reimbursement of the state for medical assistance. POMS SI 01120.203B.3.b.

h. Use the words "for the sole benefit of" in the self-settled special needs trust document.

B. 42 U.S.C. §1396p(d)(4)(B) [SSA §1917(d)(4)(B) Trusts.

1. These are the so-called "Miller trusts" or "qualified income trusts" which became applicable to all Medicaid beneficiaries in Indiana on June 1, 2014, when Indiana converted from a § 209(b) state to an SSI state.

   a. Prior to June 1, 2014, a Miller trust applied in Indiana only in the case of a Medicaid waiver when a Medicaid applicant's or recipient's income exceeded the Special Income Limit (SIL).

   b. In the case of an institutionalized Medicaid applicant or recipient, because of the "spend-down" requirement, the Miller trust was not applicable irrespective of the level of the applicant's/recipient's income.

   c. A Miller trust is now required for institutional eligibility as well as waiver recipients if the Medicaid applicant's/recipient's gross income exceeds the SIL, which beginning in 2017 is $2,205 per month and adjusted annually.

2. 42 U.S.C. §1396p(d)(4)(B) imposes only two requirements for a Miller trust:

   a. The trust may be composed of only pension, social security, and other income of the individual (and accumulated income in the trust).

   b. The State must receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total amount of assistance paid on behalf of the individual under a State Medicaid plan.

3. The trust becomes the assignee of some of the periodic income of the beneficiary, and the income so assigned does not count toward Medicaid income eligibility, but is still treated as available income for the purpose of calculating the beneficiary's duty to contribute to the cost of care as required under 42 CFR § 435.725(c). The same regulation directs that the cost of care contribution be reduced by a personal needs allowance, payments to a community spouse (to the extent necessary to bring the community spouse's income up to the MMMNA level), and Medicare Part B premiums, among other items.

4. Mechanically, a (d)(4)(B) trust should be operated so that each month it receives the beneficiary's income, and immediately makes payment to the nursing facility or the care provider, the beneficiary (for his or her personal needs amount), and the spouse if there is a spousal allocation. Within a few days of the receipt of the monthly income, the trust account may be virtually emptied.

5. There is no requirement that personal needs be paid for directly from the trust account, nor that any unused personal needs accumulate.

6. Because the trust must provide for repayment of the Medicaid benefit amount at the beneficiary's death, there is good reason to maintain the trust balance at the lowest possible level.

7. The trust can be composed only of income and cannot be used to shelter resources.

    a. The recipient can first receive the income and then transfer it, or a portion of the income, into the trust, or the income can be deposited directly into the trust by the payor.

    b. The recipient cannot irrevocably transfer the right to receive the income to the trust, as that would be treated as a transfer subject to a penalty.

    c. The trust must be irrevocable.

    d. Even though the trust is irrevocable, deposits only need to be made into the trust for the months when the individual is receiving Medicaid, while either in an institution or receiving waiver services, and only while receiving income above the SIL.

    e. If the recipient goes off Medicaid, or leaves the nursing home or stops receiving waiver services, or if the income drops below the SIL, then deposits no longer need to be made into the trust.

    f. The federal statute does not limit how the funds deposited into the trust can be spent.

    g. The CMS State Medicaid Manual allows the funds to be used broadly.

        (1) For example, funds can be used to pay administrative fees of the trust, income tax owed by the trust, attorneys fees which the trust is obligated to pay, food or clothing for the individual, or mortgage payments for the individual's home.

(2) Payments that are used or could be used for food or shelter will be treated as income, which could render the beneficiary ineligible for SSI or reduce the SSI benefit due to the payment, or the payment could impact Medicaid.

(3) However, if the FSSA's post-eligibility budget is calculated properly, then the funds deposited into the trust would generally be needed to pay the liability and there would generally not be funds in the trust available to pay for anything else, unless due to a hospitalization and eligibility for Medicaid skilled nursing care coverage, nursing home or other medical expenses are received and are covered by Medicare for the applicable coverage period and as a result income accumulates.

C. 42 U.S.C. §1396p(d)(4)(C) [SSA §1917(d)(4)(C)] Trusts.

1. These are the so-called "pooled trusts" or "non-profit association trusts" such as the SWIRCA & More Pooled Trust established by Southwestern Indiana Regional Council on Aging, Inc.

2. This type of trust may be funded with the beneficiary's assets by a parent, grandparent, a legal guardian, or the court, or by the beneficiary himself or herself, using his or her own assets.

3. As in the case of the (d)(4)(A) trust, this trust shelters the assets belonging to the person who is disabled, and should not affect the beneficiary's Medicaid or SSI eligibility as long as the trust is used for supplemental needs and not for support.

4. As in the case of the (d)(4)(A) trust, the income will normally be attributable to the beneficiary for income tax purposes because of the status of a sub-account as a "grantor trust," but will not affect the beneficiary's eligibility for Medicaid or SSI as long as it is used to provide for the beneficiary's "special needs" and not to provide for the beneficiary's support.

5. As in the case of a (d)(4)(A) trust, there is no transfer penalty for assets transferred to a pooled trust sub-account.

a. The SSI POMS suggest that a transfer to a (d)(4)(C) trust by a person 65 years of age or older would be penalizable, but penalties have not generally been imposed by the SSA for such transfers. POMS SI 01120.203(B)(2)(a).

b. The State of Indiana has not thus far imposed Medicaid eligibility penalties in cases involving a transfer by a Medicaid applicant/recipient who is 65 years of age or older.

6. As in the case of (d)(4)(A) and (d)(4)(B) trusts, there is a "payback" requirement to the state Medicaid agency for reimbursement for medical assistance except to the extent that assets stay in the trust for the benefit of beneficiaries of other pooled trust sub-accounts.

7. Attached is information concerning the SWIRCA & More Pooled Trust:

    a. A copy of an informational brochure is attached as Exhibit "B".

    b. The current SWIRCA & More Pooled Trust Joinder Agreement is attached as Exhibit "C".

8. In some instances a "tandem" special needs trust is implemented by combining a third-party special needs trust with a pooled trust sub-account arrangement.

    a. For example, a family member might be in charge of a trust established by a parent, but it might be felt that the trustee of a pooled trust arrangement under (d)(4)(C) might be more appropriate for determining the special needs of a disabled beneficiary.

    b. In such a case, the trustee of the third-party trust may be authorized to make distributions to a pooled trust sub-account for the benefit of the disabled beneficiary.

    c. This kind of arrangement can combine the benefits of a third-party trust, which might hold, invest and manage the family trust assets, and yet allow distributions to be made to a pooled trust sub-account that can be overseen with professional monitoring.

9. Please note that if a (d)(4)(C) pooled trust sub-account is established by a third-party (i.e., a parent, grandparent, etc.), using the third-party's own funds and not using the funds of the beneficiary, then the pooled trust sub-account essentially becomes a third-party special needs trust for which there is no mandatory pay-back requirement to the states which provided Medicaid benefits.

D. Third-party created trusts.

1. In general, if absolutely discretionary and not created for a spouse, such trusts may be established either as *inter vivos* trusts or as testamentary trusts with no Medicaid or SSI consequences provided the trust is administered properly.

a. Refer to Part VII of these materials which follows regarding the differences between the SSI rules and the Medicaid rules pertaining to special needs trusts.

b. It is recommended that if Medicaid eligibility is specifically contemplated, the trust should be established specifically as a discretionary special needs trust.

c. The trust rules are too unsettled to rely on arguments relating to the extent of a trustee's discretion, and although a third party discretionary trust not referencing special needs might provide greater flexibility, special needs trusts can actually be written to be very flexible arrangements.

(1) In general, for SSI purposes, a fully discretionary trust will not be treated as a resource as long as the SSI beneficiary does not control the trust distributions.

(2) For Medicaid and SSI purposes, a self-settled SNT must meet the "safe harbor" requirements of either (d)(4)(A), (d)(4)(B), or (d)(4)(C).

(3) A third-party SNT must be fully discretionary and, in general, be very restrictive in regard to distributions that could be made for health, support, or any purpose that would adversely affect Medicaid eligibility.

2. As previously noted, however, for Medicaid purposes, a third party special needs trust created for the benefit of a spouse can only be established pursuant to the deceased's spouse's last will and testament (i.e., it must be a testamentary special needs trust for the benefit of the surviving spouse).

a. A basic element of asset preservation planning for a spouse is the establishment of a testamentary special needs trust for the surviving spouse in anticipation of the death of the predeceasing spouse.

b. In order to plan effectively and accomplish a flexible result, particularly if circumstances change or the anticipated consequences do not come to fruition, it may be necessary for both spouses to execute a last will and testament containing testamentary special needs trust provisions for the surviving spouse, and then to retitle assets and/or coordinate appropriate beneficiary designations, and perhaps change those arrangements from time to time, in order to protect the presumptive surviving spouse prior to the death of the presumptive predeceasing spouse.

c. It is very important for the community spouse to establish a testamentary special needs trust under the community spouse's last will and testament for the benefit of the surviving institutionalized spouse to assure that the Medicaid eligibility of the institutionalized spouse is not adversely impacted due to the premature demise of the community spouse.

(1) 405 IAC 2-3-1.1(i)(4) provides as follows, thus allowing a protected trust mechanism for a Medicaid eligible spouse, while not trying to "disinherit" the spouse which would be clearly impermissible:

> In the case of a surviving spouse who fails to take a statutory share of a deceased spouse's estate, no penalty will be imposed if the deceased spouse has made other equivalent arrangements to provide for a spouse's needs. "Other equivalent arrangements" includes, but is not limited to, a trust established for the benefit of the surviving spouse.

(2) In general, the testamentary special needs trust will be accepted as an "equivalent arrangement" in satisfaction of the spousal allowance specified by I.C. 1-4-1 and the "statutory right of election" specified by I.C. 1-3-1.

d. In some cases, the last will and testament might be written to fund the special needs trust with only enough of the community spouse's assets to satisfy the spousal allowance and the statutory right of election as required in that particular case, rather than to provide for the entire estate to pass to the TSNT for the benefit of the surviving spouse.

(1) In most cases, however, particularly when resources are limited, it is better to contemplate that the entire estate of the predeceasing spouse shall pass into the TSNT for the benefit of the surviving institutionalized spouse.

(2) In such cases, it might be appropriate to provide for particular assets to pass directly to the children or other beneficiaries, perhaps by a specific beneficiary designation for an IRA or life insurance, or perhaps by using a pay-on-death (POD) or a transfer-on-death (TOD) arrangement providing that the surviving child or children will receive the specific assets.

e. If a revocable trust is being used for probate avoidance purposes, the special needs trust under the deceased community spouse's last will

and testament can still be funded by including a provision in the community spouse's revocable trust which will in effect move the assets from the revocable trust into the testamentary special needs trust under the community spouse's last will and testament.

3. In general, a third party trust does not need to be established for the "sole benefit" of a beneficiary, and can include a number of beneficiaries. Consequently, more tax and other planning opportunities are available, including the ability to distribute IRA and other qualified distributions among a number of beneficiaries in order to avoid the income tax "trapping" problem that can exist in the case of a "sole benefit" special needs trust.

4. Although not intended to represent an exhaustive analysis of Indiana law on the issue of third-party created trusts where the settlor retains no beneficial interest, the following may be expository:

   a. In *Sisters of Mercy Health v. First Bank*, 624 N.E.2d 520 (Ind. App. 1993), the trust contained a spendthrift provision, but the trust was not insulated from a third-party claim.

      (1) This case involved a testamentary trust established by the beneficiary's spouse; medical necessities furnished by the plaintiff were not paid by the trustee.

      (2) There was no express prohibition relating to the trust's payment for medical necessities.

      (3) Absent such express direction to the trustee, both Indiana policy and the decedent's presumed intent were found to support enforcement of payments to the creditor for necessities furnished to the beneficiary.

      (4) In the case of a TSNT, the trust would be specifically prohibited from making distributions for medical payments which would otherwise be covered by the Medicare or Medicaid programs.

   b. See also *Robison v. Elston Bank & Trust Co.*, 48 N.E.2d 181, 187 (Ind. App. 1943), *reh'g denied*.

VII. Other Special Needs Trust Issues.

A. SNTs are extremely important for persons with disabilities in order to preserve eligibility for "needs-based" benefits.

1. The Social Security Act does not recognize an SNT *per se* for SSI purposes, but instead distinguishes trusts that are not an available resource to the beneficiary for the purpose of determining eligibility for SSI.

   a. There is no federal statutory authority for a third party special needs trust.

   b. However, authority is found in the POMS at SI 01120.200.

2. For SSI purposes, a discretionary trust is "... a trust in which the trustee has full discretion as to the time, purpose and amount of all distributions."

   a. If the beneficiary has no control over the distributions, the trust is not counted as an available resource for SSI eligibility.

   b. However, distributions from any trust, including an SNT, for a beneficiary receiving SSI or other "needs-based" benefits may trigger both tax and public benefits consequences.

      (1) "If an individual (claimant, recipient, or deemor) has legal authority to revoke the trust and then to use the funds to meet his food or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance under the terms of the trust, the trust principal is a resource for SSI purposes." POMS SI 01120.200D.1.a.

      (2) A "deemor" is an individual whose income and resources are subject to deeming as defined in POMS SI 01310.001B.

      (3) Such individuals include ineligible parents, sponsors of aliens, ineligible spouses, and other essential persons.

3. The Medicaid trust rules are somewhat different:

   a. For a first-party "self-settled" SNT, trust income and principal would be considered to be "available" if either the income or the principal under "any circumstances" could be used for a particular purpose. 42 U.S.C. §1396p(d)(3)(B)(I).

      (1) This is the so-called "any circumstances" test that applies to a first-party self-settled trust.

      (2) An exception exists for the "safe harbor" trusts allowed under 42 U.S.C. §1396p(d)(4)(A), §1396p(d)(4)(B), and §1396p(d)(4)(C).

(3) In the case of an irrevocable income-only trust (IIOT), if it is properly established, then only the income would be treated as available to the creator; as set forth in the Indiana Health Care Program Policy Manual (IHCPPM), beginning at §2615.75.10, the trust corpus will not be treated as an available resource and instead will be treated as having been transferred for Medicaid penalty calculation purposes when the trust was established or funded.

b. Much more flexibility is available for third party created trusts.

(1) Pursuant to IHCPPM §2615.75.20, a third-party trust established by someone other than a spouse of a Medicaid applicant or recipient and funded with the assets of the third party are not governed by OBRA 93 and the trust itself must be reviewed for the purpose of determining the "availability" of the trust.

(2) As a general rule, in order to avoid questions concerning the "availability" of the trust income or principal, a third-party SNT should be written very clearly to restrict distributions that might have any impact on public benefits.

c. Self-settled trusts, whether created by the individual or his or her spouse, or someone with authority to act on behalf of the individual (i.e., under a power of attorney), or a court or administrative body, will give rise to particular transfer penalties, depending on whether the trust is revocable or irrevocable and when distributions are made from the trust to third parties other than the creator, unless the trust is one of the "safe harbor" trusts discussed in detail in Part VI of these materials.

d. In the case of third party created trusts, creators should avoid criteria such as "support" or "health" or "welfare" and instead refer to specified "special needs" or "supplemental care" criteria, and to include very clear and specific language that the beneficiary's needs-based benefits shall not be affected by trust distributions.

4. Self-settled trusts that are not "safe harbor" (d)(4)(A) or (d)(4)(C) trusts will generally be considered available for SSI purposes unless created prior to January 1, 2000, in which case such grandfathered trusts, if irrevocable and discretionary, in most cases will not be considered to be available until funds are actually distributed.

5. "Supplemental needs" (d)(4)(A) trusts for disabled persons under age 65, and (d)(4)(C) "pooled trusts" for disabled persons of any age, are exempted

for both Medicaid and SSI purposes, although it is possible a penalty may be invoked if created by a person age 65 or older.

a. "Payback" is required if the disabled person's assets are used to fund these trusts.

b. A (d)(4)(A) "under age 65" trust and a (d)(4)(C) "pooled trust" may be created using the disabled person's own assets, subject to possible transfer penalty implications in the case of a (d)(4)(C) trust if an individual's own assets are transferred and the individual is 65 years of age or older.

B. For SSI and Medicaid, "income" for the purpose of determining eligibility is cash or anything that can be used for food or shelter.

1. As will be noted later, "income" for SSI purposes is not the same thing as "taxable income" for income tax purposes.

2. "Income" for SSI purposes includes in-kind support and maintenance ("ISM"), which might involve providing for food or shelter either directly or indirectly rather than providing cash that can be expended for food or shelter.

a. Clothing was included as an item of ISM until March 9, 2005, when the Social Security Administration published final regulations amending the income and resource rules for the SSI Program.

b. Consequently, a special needs trust can now purchase clothing without being deemed to have provided ISM.

C. "Income" for tax purposes requires an entirely distinct analysis.

1. "Taxable income" for trust beneficiaries can either be a direct distribution to a beneficiary or payments made to another person for the benefit of the beneficiary, but it must be a distribution of "income" rather than principal.

a. If the trustee of an SNT pays the telephone bill of the beneficiary out of trust income, the beneficiary has received a benefit and will be deemed to have received "taxable income."

b. However, the beneficiary would not be deemed to have received "income" for benefits purposes because the beneficiary received neither cash nor food or shelter.

2. An SNT that is the designated beneficiary ("DB") of a retirement plan or account will be subject to the trust income rules found in I.R.C. § 641, *et seq*.

a. Ordinary income received by the trust and not distributed is taxed at compressed rates (for 2017, 39.6 percent after only $12,500 of taxable income).

b. If the DB received the retirement proceeds directly, the highest bracket of 39.6 percent in 2017 for a single taxpayer would not be reached until the beneficiary received taxable income of $418,400.

c. A trust which is not a "grantor trust" is treated as a separate tax entity and discretionary distributions of income pass through and are taxable to the beneficiary to the extent distributed.

3. After the death of the participant, distributions of "qualified dollars" (i.e., taxable distributions from a retirement plan, including an IRA) are generally taxed to the beneficiary as income in respect of a decedent ("IRD") when received, with taxation being accelerated if the right to receive the income is transferred by the beneficiary or the decedent's estate.

   a. IRD distributions from retirement plans are considered wholly or partially distributions of principal for trust accounting purposes, while for income tax purposes the distributions are considered income.

   b. A trust receiving retirement benefits should allow the trustee to distribute discretionary amounts of income and principal to avoid trapping the income at the trust level and subjecting the distributions to higher tax rates; however, this would be problematic in the case of a (d)(4)(A) or (d)(4)(C) trust which must be established for the "sole benefit" of the disabled beneficiary and which may require the accumulation of income to preserve benefits.

   c. PLR 200620025, which as a private letter ruling cannot be relied on as a legal precedent, lays the groundwork to show how inherited IRAs can be transferred to trusts during lifetime.

      (1) The IRS determined that transferring an inherited IRA to a grantor trust will neither (i) be considered a sale or exchange resulting in the immediate recognition of income, nor (ii) result in taxable income being triggered under I.R.C. §691(a)(2).

      (2) Further, the IRS ruled that the required minimum distributions, as described under I.R.C. §401(a)(9), paid to a trust for the benefit of a disabled beneficiary, are to be calculated using the disabled beneficiary's life expectancy.

      (3) This PLR may be found at ftp://ftp.irs.gov/pub/irs-wd/0620025.pdf.

4. If the expected needs of the SNT beneficiary are likely to be less than the minimum required distributions ("MRDs") from the retirement plan or account, then the SNT may not be the most desirable beneficiary.

   a. Distributions to avoid tax at the trust level may eliminate eligibility for SSI and Medicaid.

   b. Distributions not made will be taxed to the trust at compressed rates.

   c. In such cases, the retirement plan might better be payable to a beneficiary who is not disabled, and for other assets, such as life insurance, to be paid or distributed to the SNT.

   d. If there are other beneficiaries of a third party trust which is not subject to the "sole benefit" requirement in addition to the disabled beneficiary, then the IRD distributions may be distributed to the non-disabled beneficiary as a means of avoiding tax at the trust level without affecting the disabled beneficiary's eligibility for SSI or Medicaid.

5. Life insurance is an excellent funding vehicle for a special needs trust because of the general absence of income tax consequences, although there are exceptions to the non-taxability of life insurance.

VIII. SSI Impact of Trust Distributions.

A. Supplemental Security Income ("SSI") is a federal program administered to provide a minimum level of monthly income. See 20 C.F.R.416.101, *et seq.*

   1. Title XVI of the Social Security Act specifies who is eligible, the amount of cash payments, and the conditions under which payments can be made.

   2. The purpose of the SSI program is to provide a basic level of income for a person who may not have adequate Social Security credits to draw a level of Social Security Disability income which is at least equal to the SSI monthly income amount.

      a. If you are receiving income from another source, your SSI benefit will be cut dollar for dollar.

      b. While the SSI program's benefits are meager, in most states SSI recipients are automatically eligible to receive Medicaid.

      c. SSI recipients will also be eligible for food stamps in most states and in some cases for special programs for the developmentally disabled,

and in most states (particularly so-called "SSI states" such as Indiana) will automatically be eligible for Medicaid.

(1) As noted in Part VI, Indiana converted from a § 209(b) state to an SSI state on June 1, 2014.

(2) In § 209(b) states, there can be some differences between the SSI rules and the Medicaid eligibility rules, but in general the Medicaid eligibility requirements cannot be more restrictive than the SSI requirements.

B. For an in depth discussion of the SSI implications of particular trust provisions, see John J. Campbell, *Basic Strategies for SSI Planning* (NAELA Journal, Volume 1, 2005), 311, *et seq*, and Part VIII which follows.

1. In most states SSI recipients are categorically eligible for most other essential needs-based public benefits, including Medicaid.

a. Eligibility for SSI does not automatically qualify a beneficiary for Medicaid in so-called § 209(b) states, but the rules for obtaining Medicaid eligibility are usually very similar to the SSI rules.

b. Indiana was a § 209(b) state until it converted to an SSI state on June 1, 2014.

c. Most of the comments in this section of this outline will focus on SSI eligibility with distinctions concerning Medicaid being addressed in a few areas.

2. SSI is a "needs-based" benefit requiring disability and imposing resource and income limitations.

a. Recipients must either be age 65 or older, or blind or disabled, and have income and resources within specified limits.

b. The resource test establishes eligibility; the income test determines the size of the benefit that the recipient will receive.

3. The SSI amount is set annually at the federal level and supplemented by certain states (but not Indiana) to meet basic needs for food and shelter.

a. "Income" is anything an individual receives in cash or in kind that can be used to meet the individual's needs for food and shelter.

b. In 2017, the maximum SSI benefit for an individual is $735.00 and $1,103.00 for a couple, without a state supplement adjustment, which is expected to cover all food and shelter needs.

4. Receipt of anything not specifically exempted which can be applied, either directly or indirectly, by sale or conversion, to meet basic needs of food and shelter, will be treated as income.

   a. Since there is no specific exemption for a boat, receipt of a boat as an inheritance or gift would result in the assumption that it could be sold or converted and the value would count as income in the month that it is received.

   b. For every dollar more than (i) $20 per month of "unearned income" paid to an SSI recipient, and (ii) one-half of earned income above $65 per month, his or her benefits will be reduced dollar for dollar.

   c. Unearned income includes cash from any source as well as assets which are not exempted, and can include other benefits (such as Social Security Disability).

   d. Cash paid directly from the trust to the individual will always count as income and will reduce the SNT beneficiary's benefits dollar for dollar.

5. A trustee's payment to a third party not providing a disabled beneficiary with food or shelter does not cause disqualification or diminution of benefits.

   a. Payment of an individual's bills, such as medical insurance premiums, by the trust directly is not income for SSI purposes unless the payment results in the beneficiary receiving an asset as a result of the payment that can be used for food or shelter.

   b. An expenditure for food or shelter is countable income called "In-Kind Support and Maintenance" ("ISM").

   c. Receipt, or the right to receive, ISM (i.e., payment for food or shelter), will result in a reduction of SSI benefits on a dollar for dollar basis, up to a presumed maximum value ("PMV").

   d. The PMV is the limit on the amount of ISM that can be charged.

   e. Any food or shelter received is presumed to be worth a maximum value, or PMV.

   f. The amount of the PMV is equal to one-third the federal benefit rate ("FBR") in effect for the month in which ISM is received for an individual or an eligible couple (assuming the $20 disregard has already been applied to an unearned income payment).

   g. The PMV rate for the year 2017 is $245 (one-third of $735).

h. The PMV rule allows a trustee discretion to make distributions for food and/or shelter costs with the result that paying the beneficiary's rent will cause a reduction of the beneficiary's SSI by not more than $245 per month after applying the $20 disregard.

i. For example, if an SNT receives a $12,000 retirement distribution and uses it to pay the SNT beneficiary's rent of $1,000 per month directly for the full year, the trust has no retained income and the beneficiary would receive $12,000 of taxable income for the entire year; for SSI purposes, however, the PMV is limited to $245, after applying the $20 disregard, if applicable, for the particular month, and if the beneficiary was receiving $735 per month, the beneficiary's benefits would be reduced to $490 ($735 - $245 = $490).

(1) Note, however, that prepayment of rent, if refundable, may be deemed to give rise to a resource, and even if acceptable for SSI purposes, may be treated as a resource for Medicaid purposes.

(2) Prepayment of rent which is not refundable may not be a very good use of resources in light of the possibility that circumstances can change and the loss of non-refundable rent could cause a significant adverse financial impact.

j. If the actual value of the ISM is less than the PMV, only the actual value is counted as ISM.

(1) For example, if a third party pays the household's electric bill, which was $100, only $100 is counted as ISM.

(2) The $100 amount is divided equally among all the household members. If the household has four members, only $25 of ISM is counted for the SSI eligible individual.

(3) Note that such a payment from a "safe harbor" SNT would violate the sole benefit rule.

k. The following housing-related items are exemplary ISM payments: mortgage payments, property insurance, rent, gas, electricity, heating fuel, water, sewer, garbage collection services, and real property taxes. POMS SI 00835.020B.36 and SI 00835.465.B.1; 20 C.F.R. §416-130b.

l. Other housing-related items are not considered to be ISM: telephone, cable, internet bills, condo fees, closing costs, purchase or replacement of furniture and equipment, insurance not required by a

mortgage holder, and purchase of household supplies other than food.

m. For additional information, refer to POMS SI 01120.200F and SI 00835.901.

6. Although SSI criteria in the case of SNTs may be more restrictive than the Medicaid criteria, *Ramey v. Rizutto*, 72 F.Supp.2d 1202 (D.C. Colo. 1999), aff'd *Ramey v. Reinertson*, 268 F.3d 955 (10th Cir. 2001), held that an individual who is eligible for SSI under the federal social security regulations cannot be denied Medicaid benefits by the application of more restrictive state laws or regulations.

7. Trust ownership or purchase of home:

   a. If the trust is not a resource for SSI purposes, and purchases and holds a residence as a home for the beneficiary, the residence is not a resource to the beneficiary, nor would it be a resource if the beneficiary moves from the house if the trust is exempt.

      (1) The trust holds legal title and, therefore, the beneficiary is considered to be living in his/her own home based on having "equitable ownership under a trust."

      (2) Even if the trust is a resource to the individual, the home would still be subject to exclusion as his/her home which is exempt for SSI purposes.

      (3) In the case of a self-settled SNT, it is usually desirable not to have the home owned by the trust because it would be subject to Medicaid pay-back on the death of the disabled beneficiary.

      (4) If an SNT owns a home, it might be appropriate to have a housemate move in who will pay rent or a *pro rata* share of the expenses, and who might also manage the home; ownership by the trust avoids the danger that rent paid by a housemate would be considered as income to the beneficiary for public benefit purposes.

   b. A beneficiary does not receive In-Kind Support and Maintenance ("ISM") in the form of rent-free shelter while living in a home in which he/she has an ownership interest.

   c. Payment of rent by the beneficiary will not affect his/her SSI payments.

d. Since purchase of a home by the trust establishes an equitable ownership for the beneficiary, the purchase results in receipt of shelter in the month of purchase that is income in the form of ISM which will be valued at no more than the PMV.

e. Even though the beneficiary has an ownership interest, and if living in the home does not receive ISM in the form of rent-free shelter, purchase of the home or payment of the monthly mortgage payment by the trust is a disbursement from the trust to a third party that results in the receipt of ISM in the form of shelter for the month of purchase and each month there is a mortgage payment.

f. If the trust, which is not a resource, purchases the home outright and the individual lives in the home in the month purchased, the home would be income in the form of ISM and would reduce the individual's payment by no more than the PMV in the month of purchase only, regardless of the value of the home.

g. If the trust which is not a resource purchases the home with a mortgage and the individual is living in the home in the month purchased, the home would be ISM in the month of purchase. Each of the subsequent monthly mortgage payments would result in the receipt of income in the form of ISM to the beneficiary living in the house, each valued at no more than the PMV.

h. If the trust pays for other shelter or household operating costs, such payments would be income in the form of ISM in the month of payment.

i. If the trust pays for improvements or renovations to the home (e.g., renovations to the bathroom to make it handicapped accessible or installation of a wheelchair ramp, or assistance devices, etc.), the individual does not receive income. Disbursements from the trust for improvements are presumed to increase the value of the resource, and unlike household operating expenses do not result in ISM.

j. For additional information, refer to POMS SI 01120.200F.

k. Because a self-settled special needs trust must be for the "sole benefit" of the disabled beneficiary, if the home is occupied by other family members, they must pay their *pro rata* share of the expenses of operating the home, and may be obligated to pay rent as well.

l. If the self-settled SNT purchases a home as a tenant in common with the parents of the beneficiary of the trust, there would be a Medicaid pay-back with respect to the interest in the home owned by the trust, the parents would be required to pay a *pro rata* share of expenses,

and the trustee could not pay or discharge a legal obligation of support of the parents.

8. Beneficiary ownership of the home.

   a. If the beneficiary owns the home, the advantage is that the home would not be subject to the pay-back requirement applicable to the trust.

   b. However, the home may still be subject to a Medicaid lien, and Medicaid estate recovery on the death of the beneficiary, if the beneficiary receives medical assistance after age 55.

      (1) In general, under Medicaid law, following the death of the Medicaid recipient, the State must attempt to recover from his or her estate Medicaid payments during the recipient's lifetime.

      (2) The issue of estate recovery is addressed in more detail later in Part XI of these materials.

   c. One disadvantage of ownership by the beneficiary is the risk that the beneficiary may not be financially responsible and may fail to make a mortgage payment or to maintain homeowners insurance, pay taxes, etc.

   d. Another disadvantage is that if the home is sold, the proceeds would result in a large countable resource which would disqualify the beneficiary from SSI and Medicaid unless placed into a self-settled, "safe-harbor" SNT; this might be problematic once the beneficiary attains age 65.

   e. The beneficiary would need to pay home operating expenses (utilities, taxes, insurance, etc.) from his or her SSI income or suffer a reduction due to "ISM".

   f. It might be possible for a parent or a third party to loan money to the disabled beneficiary to be used to purchase a home, which could even be structured in the nature of a reverse mortgage arrangement; the loan would not be countable income and at least the portion of the proceeds of sale attributable to the mortgage loan pay-back could be protected in the event of the sale of the property either prior to or following the death of the beneficiary.

9. The SNT could pay for a life estate in the home with the remainder to be purchased and owned by the parents.

a. The trust would then pay the lion's share of the purchase price because of the value of the beneficiary's life estate.

b. The parents would be required to pay the value of the remainder interest and for their share of any home improvements or expansions.

c. If the parents live in the home, a fair market rental would have to be paid comparable to any tenant who would have the right to use and occupy a portion of the entire property, since the life estate of the beneficiary would entitle the beneficiary to complete occupancy during the beneficiary's lifetime.

10. Trust ownership of an automobile.

    a. It is not unusual for a special needs beneficiary to have access to a vehicle, such as a handicapped van.

    b. Ownership by the SNT gives the advantage of control, but since a vehicle is a wasting asset, it is not an ideal trust investment.

    c. There are also insurance and liability issues and concerns.

    d. There is an obvious problem with a parent or another non-beneficiary having ownership of the vehicle due to the "sole benefit" requirement applicable to a trust's payment, including payment of continuing maintenance expenses.

    e. In appropriate circumstances, the vehicle can certainly be owned by the beneficiary, which will normally be exempt for public benefits purposes.

    f. To the extent that there is joint ownership between the parents or the spouse and a beneficiary, it may be possible to avoid the Medicaid pay-back requirement, although there is at least the possibility of Medicaid estate recovery.

    g. In such an event, any non-beneficiary should pay an allocable portion or all of the vehicle ownership and maintenance expenses.

11. Vacation travel issues.

    a. Since a first party SNT is subject to the "sole benefit" rule, no money can be spent on anyone other than the beneficiary. Consequently, a chaperone or someone traveling with the beneficiary must pay his or her own way.

b. In general, money spent while away temporarily on a vacation for a hotel room and food would not be considered to be in-kind support and maintenance ("ISM"), and would not affect an SSI beneficiary's monthly benefit.

c. Vacation expenses should be paid directly to the provider rather than paid to the beneficiary, since a payment to the beneficiary would be treated as income. Alternatively, a co-traveler may pay those expenses and can then be reimbursed by the trust.

d. The only time a first party SNT can be used to pay a co-traveler or chaperone under the SSI POMS rules is if the co-traveler is a skilled health care trained professional and it is necessary for him or her to be a travel companion for the beneficiary. It would be necessary to obtain a medical letter that the travel companion is necessary.

e. Of course, the fundamental determination is that the vacation is appropriate based on the typical special needs criteria. That should not be too much of an issue in most instances unless it is a frivolous trip or the trip is too expensive.

f. The trustee should require receipts, and so the use of a credit card might be helpful.

g. The value of a ticket for domestic travel would typically not be treated as a resource, although the value of tickets for non-domestic travel might be unless the ticket cannot be sold or converted due to travel restrictions, etc.

h. A special vacation might be considered for someone who requires non-family supervision; there are companies that offer vacations for such individuals.

IX. Indiana Medicaid Income Rules.

A. Different rules apply if a person is institutionalized or has been approved for a waiver, the Money Follows the Person (MFP) Program, or the Program for All-inclusion Care to the Elderly ("PACE"). The following rules apply for a person in the community, i.e., "at home":

1. An income standard applies, and if a person has countable income above the income standard, he or she is not eligible.

2. The income standard for Medicaid for the aged, blind, and disabled is 100 percent of the Federal Poverty Level (FPL), which as of July 1, 2017 is $1,005 for a single person and $1,354 for a household of two.

3. "Countable income" is used to determine eligibility for Medicaid for the aged, blind, and disabled.

4. An applicant household's "countable income" is the income after any exemptions and deductions.

   a. Some income is not counted at all, such as SSI benefits.

   b. Various exemptions are listed in IHCPPM § 2800.

   c. Only the interest payments on a promissory note are counted as income; this applies even if the promissory note is non-negotiable and not counted as a resource. IHCPPM § 2615.50.00.

   d. Money borrowed or money received as repayment of a loan is not income.

   e. The full amount of an annuity payment is counted as income.

   f. There is a standard disregard of $20 of unearned income.

   g. There is also an earned income disregard of $65 per month.

   h. One-half of earned income in excess of the $65 disregard and any amount allocated to a dependent child or an essential person is also disregarded.

   i. Either unearned income or earned income can be allocated to a dependent child or to an essential person.

   j. Essentially, gross earned income, minus any unused part of the standard disregard and any unused allocation to a dependent child or essential person that was not deducted from unearned income minus the earned income disregard of $65, is divided by two, and the result is the amount of countable earned income.

      (1) For the allocation to a dependent child, see IHCPPM § 3455.05.10.

      (2) For allocation to an essential person, see IHCPPM § 3455.05.15.

B. For a person in a nursing home or a medical institution, or eligible for Medicaid waiver services, there is both an eligibility budget and a post-eligibility budget.

1. See IHCPPM § 3455.05.30 and IHCPPM § 3455.15.00.

2. The eligibility budget is used to determine the initial eligibility, while the post-eligibility budget is completed to compute the liability, which is the amount of income that must be paid to the medical facility or for medical services.

3. A Medicaid recipient will have a "liability" rather than a "spend down".

   a. When both spouses reside in a nursing home, their incomes are considered separately.

   b. A person in an institution or eligible for a Medicaid waiver is only eligible for Medicaid if the person's income does not exceed the SIL; if it does, then a "safe harbor" (d)(4)(B) "Miller" trust is required in order to qualify the person for Medicaid by shifting the excess income through the qualified income trust in order to obtain or maintain Medicaid eligibility.

   c. Gross income is used for Medicaid budgeting purposes.

   d. Payments from a long term care insurance policy are generally not counted as income if the payments are used to pay medical expenses. See IHCPPM § 2840.50.00.

4. Treatment of veterans' benefits.

   a. IHCPPM § 2840.10.10 states that the VA Aid & Attendance allowance and the Housebound allowance are not counted as income for the eligibility test.

      (1) Unfortunately, the FSSA does not provide specific guidance for workers, and notices issued by the VA regarding the VA pension are not helpful in explaining how the benefits are determined.

         (a) The IHCPPM does state that if the individual's countable income is too high to allow them to qualify for any VA pension at annually established MAPR levels (i.e., the levels that apply without aid and attendance), they will only receive a VA payment based on the reduction of countable income by the ongoing medical expenses; in that situation, the entire amount of the VA payment which indicates "Aid and Attendance" applies due to excess medical expense may be exempted.

         (b) Applicants whose income is less than the MAPR must provide a current breakdown of which portion, if any, of the VA benefit is Aid and Attendance.

(c) Only the Aid and Attendance amount will be discounted in the budget.

(2) Various court cases have determined that the test is whether the VA benefits were paid due to unreimbursed medical expenses, not whether a portion of the payment was labeled by the VA for Aid & Attendance. *Galletta v. Velez*, 2014 U.S. Dist. LEXIS 75248, 2014 WL 2468615 (D.N.J. June 3, 2014).

(3) If no VA benefits would have been paid except for medical expenses, then none of the VA payment should be countable income.

(4) For additional information concerning the VA pension, please refer to Section V.B.2. of these materials addressing the VA pension program, and you may review the article therein referenced and which is located on my website entitled "*Proposed Changes to the VA Pension Rules, VA Pension Trust Issues, and a Comparison Between the Medicaid and VA Pension Trust Rules.*"

b. To determine the portion of the VA benefit that is based on unreimbursed medical expenses, it will be necessary to compare the VA benefits actually paid to the amount of the VA benefits, if any, that would be received if there were no unreimbursed medical expenses.

(1) This amount should not be countable as income in determining Medicaid eligibility.

(2) Unfortunately, the VA benefits award letter is not very clear, and the attached appendices detailing the amount of income and the annual medical expenses will often be very difficult to decipher.

(3) Even if the VA income is not treated as income, it must be applied toward the medical expenses. Consequently, the end result will be the same as if the income was counted, as it will still be paid to the nursing home as a part of the Medicaid recipient's monthly charges.

(a) In many cases it may be easier to treat the payment as income, and to run that income, or a portion of it, through a Miller trust if required based on the level of countable income, rather than to argue with the FSSA over the excludability of that income which would have to be paid to the nursing home in any event.

(b) By not including the VA pension as income because it can be shown as attributable to medical expenses, a Miller trust may not be required, but it would still be necessary to pay the pension toward medical expenses if that income is going to be treated as non-countable for Medicaid budgeting purposes.

X. Special Needs Trust Drafting and Administration Issues.

A. Including POMS Provisions in the Trust Documents.

1. Many trustees are clueless about the proper management of SNTs.

2. Including specific instructions may help.

3. In the case of a (d)(4)(A) trust, include a provision in the trust agreement that directs the SSA staff to the 8-Step Action Chart in the POMS at SI01120.203D.1 in order to assure a favorable review and approval of the special needs trust by SSA.

B. The trust should state that the trustee is to consider the best interest and needs of the disabled person over all others, including the Medicaid program.

1. The trustee should be clearly advised that its sole responsibility is to do what is in the best interest of the principal beneficiary.

2. The trustee should be encouraged in the trust document to employ social workers, attorneys, and other experts to aid the trustee in proper management of the trust.

3. Alert the trustee to the need to purchase pre-need funeral services and burial plots (possibly through actions of a guardian or attorney-in-fact and using other available assets), and to avoid the "stinking dead body rule".

4. Include an escape hatch to amend the trust to conform to its purposes and changes in the law. Given the lengthy SSI appeal process, it may make sense to amend the trust to conform to SSA demands rather than to appeal.

5. The trustee and others should be advised of the SSI recipient's duty to report any changes in income, resources, living arrangements or other conditions pursuant to 20 CFR § 416.708. Failure to report could constitute fraud and may result in criminal or civil penalties.

6. The trustee should assess and be aware of the following issues concerning the beneficiary and the beneficiary's family:

a. Financial sophistication in general and willingness to follow sole benefit requirements of SNTs.

b. Unrealistic expectations of financial returns and ability to deal with investment risks.

c. Beneficiary and family credit history problems.

d. Extent of medical involvement - how sick is the beneficiary?

e. Existence of other resources to support the family and the beneficiary.

7. All distributions should be made with knowledge and awareness of the income and resource implications.

C. The family may consider giving special instructions to the trustee for guidance in the administration of the trust for the principal beneficiary.

1. Does the beneficiary sign some checks, control certain funds, complete bank deposit slips, etc., and precisely how much help does the beneficiary need with money management?

2. What kind of living conditions is the beneficiary accustomed to?

a. Does the beneficiary require or expect the beneficiary's own bedroom?

b. Is the beneficiary accustomed to a particular kind of bed or mattress?

c. What kinds of appliances and/or entertainment mechanisms should the beneficiary have (e.g., TV with remote, VCR/DVD/DVR, stereo, radio, telephone, computer, video games, golf clubs, bowling ball)?

d. Does the beneficiary help with the daily or periodic chores, such as making the beneficiary's bed, some cleaning, cutting the lawn, shoveling snow, etc.?

e. What are the beneficiary's practices and how much help does the beneficiary need in the area of personal hygiene?

3. What specific medical issues need to be addressed, such as medications, and who are the beneficiary's medical providers?

4. Is the beneficiary employed and what are the beneficiary's work capabilities?

5. What foods does the beneficiary like and what are the beneficiary's eating habits?

6. Does the beneficiary like to travel, and what are the beneficiary's entertainment preferences?

7. Is the beneficiary able to vote, and if so, how much assistance does the beneficiary need?

8. What are the beneficiary's funeral preferences?

9. Are there any eccentricities that should be considered?

D. Tax issues in the planning and administration of special needs trusts:

1. A trust set up by a third party will typically be a non-grantor trust for income tax purposes, and be treated as a separate taxpaying entity requiring a taxpayer identification number and the trustee will be required to file fiduciary income tax returns.

2. If it is a non-grantor trust for income purposes, it typically will not be a "simple trust" because it is generally not advisable to require the distribution of all income to or for the benefit of the beneficiary each year.

    a. The trustee will generally have discretion whether or not to distribute the income, as compared to a "simple trust" for income tax purposes which requires the distribution of all trust income annually.

    b. Consequently, SNTs are usually either complex trusts or grantor trusts for income tax purposes.

3. While a third party SNT is usually treated as a "complex trust" for income tax purposes, a self-settled SNT is generally a grantor trust for income tax purposes.

    a. With a grantor trust, the social security number of the beneficiary may be used rather than a tax identification number.

    b. The income generated by a grantor trust is taxed to the grantor whether or not it is distributed.

    c. All of the income earned by the SNT which is a grantor trust, whether distributed to the grantor or not, will be reported as income to the grantor on the grantor's individual federal and state returns.

4. When a grantor is treated as the owner of the trust and the trustee is not the grantor, then the trustee may choose between two approaches for tax reporting:

    a. Furnish the name and social security number of the grantor, and the address of the trust, to all those who pay income to the trust, and furnish an executed Form W-9; or

    b. Furnish the name, address and tax identification number of the trust to all who pay income to the trust or hold accounts for the trust who or which will issue an IRS Form 1099 showing the income or gross proceeds received by the trust, and

        (1) File an IRS Form 1041 and corresponding state income tax return which does not show the income on the actual return; and

        (2) Attach a statement showing the name, address and social security number of the beneficiary and the grantor and the amount of income, deductions and credits allowable to the grantor.

    c. The Internal Revenue Manual offers instructions regarding the need for a taxpayer identification number in regard to a trust - see IRM 21.7.13.

5. Generally, and as noted previously, the practical result of undistributed income if the SNT is not a grantor trust is the possible increase in the income tax liability of the trust because of the compressed trust tax rates.

    a. If the SNT is treated as a grantor trust, then the income will be taxed at the grantor's own tax rates, which will usually be lower than the rates applicable to trusts.

    b. A third party non-grantor trust which is not required to meet the requirements of 42 U.S.C. §1396p(d)(4)(A) or (C) may also provide for other beneficiaries as permissible distributees of the income.

6. IRC §642(b)(2)(C), enacted by the Victims of Terrorism Tax Relief Act of 2001, PL. 107-134, §116(a), provides that a "qualified disability trust" is allowed a personal exemption equal to the IRC §151(d) personal exemption for an individual.

    a. A qualified disability trust (QDT) is any trust that meets the following two requirements of 42 U.S.C. §1396p(C)(2)(B)(iv):

(1) As of the close of the tax year the trust must be established for the sole benefit of a person under age 65;

(2) The beneficiary must be disabled within the meaning of §1614(a)(3) of the Social Security Act, 42 U.S.C. §1382(c)(a)(3), for some portion of such year.

b. A trust shall not fail to meet these requirements merely because the corpus of the trust may revert to a person who is not so disabled after the trust ceases to have any beneficiary who is so disabled or because the beneficiary attains age 65.

(1) After age 65, no further contributions can be made to the trust.

(2) Accumulated income and growth after age 65 continues to meet QDT status.

c. To maximize these benefits, it is important to give the trust as much discretion as possible to allocate distributions of income and principal for the beneficiary in order to take advantage of the beneficiary's personal exemptions and standard deduction amounts.

d. Treas. Reg. § 1.643(a)-3 allows the trustee flexibility to allocate capital gains to income, the only restriction being consistency. Any distribution of principal made during the year would carry out the excess capital gain to the beneficiary which can be excluded from tax through the beneficiary's personal exemption and/or the standard deduction.

e. For these arrangements to work, the grantor trust rules must be avoided.

f. QDT status confers the power to accumulate $4,050 in 2017 each year (as adjusted each year after 2010) in the trust tax-free.

(1) Additional expenses beyond those that the parents may be paying out of their own funds can then be paid for by the trust and are treated as carrying out income to the beneficiary.

(2) To the extent that expenses paid by the beneficiary qualify for medical expenses, further income tax reduction is possible.

g. See Sherman, "The Overall Tax Impact of Accumulating Versus Distributing Trust Income," Estate Planning, Vol. 27, No. 3 (February 2001).

7. For income tax purposes, the grantor of a trust may be the beneficiary who furnished the trust funds in a self-settled trust, but who may not necessarily be the individual named as the grantor in the trust agreement.

   a. For example, a "safe harbor" (d)(4)(A) self-settled trust for a beneficiary of a negligence award may be created by that beneficiary's parents for the beneficiary.

   b. Although a parent may be called the grantor in the trust agreement, if the funds of the trust would be deemed to be contributed by the beneficiary, the grantor trust rules would apply to the beneficiary who funded the trust.

8. When creating self-settled trusts, practitioners often include provisions to assure that the trust is treated as a grantor trust:

   a. Retaining the power to reacquire the trust corpus by substituting property of an equivalent value pursuant to IRC §675.

   b. Where income is distributed to the grantor or the grantor's spouse or held to accumulate for future distributions to the grantor or the grantor's spouse without approval or consent of any adverse party pursuant to IRC §677(a).

   c. Retaining an unrestricted power to remove or substitute trustees and to designate any person, even one related to or subordinate to the grantor, as a replacement trustee pursuant to IRC §674, Reg. Sec. 1.674(d)(2).

   d. Other grantor trust provisions may be found in IRC Sections 673, 674, 675, 676 and 677. Some of these provisions, such as the power to revoke the trust, would not be appropriate for a self-settled SNT.

9. The income tax grantor treatment may be different than the estate tax treatment.

   a. The mere fact that the grantor is subject to income tax on the income does not necessarily require inclusion in his or her estate for estate tax purposes.

   b. There is no absolute correlation between the income tax and estate tax impact of the grantor trust rules.

   c. If a third party SNT is created for the benefit of a disabled beneficiary, funds placed in that trust may be subject to gift tax and may not be eligible for the gift tax annual exclusion because the transfer involves a gift of a future interest.

(1) However, if the third party grantor who creates or funds a trust retains a power of disposition of the trust assets (such as a testamentary limited power of appointment over the remainder interest), the transfer may be considered an incomplete gift.

(2) See Treas. Reg. §25.2511-2(b).

d. If a parent establishes a third party special needs trust and is designated as the trustee, and retains the power to accumulate income for the child's benefit, or if distributions will be made at the parents' discretion which is not covered by an ascertainable standard, the trust assets would be taxed in the parents' estate for federal estate tax purposes.

e. A reserved power to substitute other property of equal value for property already held in the trust would make the trust a grantor trust for income tax purposes, but since it is not a power to alter, amend or revoke, that power would not by itself make the trust includable for estate tax purposes.

f. Rev Rul 2008-22, 2008-16 IRB 696, establishes that the corpus of an irrevocable trust that a grantor created during life is not includable in his or her gross estate under IRC §2036 or IRC §2038 merely because the grantor retained the power, exercisable in a non-fiduciary capacity, to acquire property held by the trust by substituting other property of equivalent value.

g. Although certain types of economic control over the trust may make the trust income taxable to the grantor, the trust itself is not, on that ground alone, includable in the grantor's estate for estate tax purposes.

E. Other SNT provisions and issues to be considered:

1. Consider designating a trust protector with authority to remove and replace the trustee if the trustee is not adequately discharging its fiduciary duties.

2. The trust should not direct that distributions be made for support, health or maintenance of the beneficiary; likewise, discretionary health, maintenance or support criteria are inappropriate.

a. Some practitioners use fully discretionary language with precatory special needs language.

b. Some practitioners use fully discretionary SNT language and prohibit distributions for food and shelter. In light of the uncertainty of the

future needs of the beneficiary, this may be overly restrictive in some states.

c. Some practitioners, use fully discretionary special needs language that specifically authorizes the trustee to provide ISM if the trustee deems that the beneficiaries needs will be better met with a distribution in spite of the partial reduction in SSI benefits or Medicaid due to the ISM and PMV rules.

d. The following Medicaid rules apply in the State of Indiana for trusts established after the effective date of OBRA 1993, i.e. August 11, 1993:

(1) Trusts established with the assets of the Medicaid applicant/recipient or his or her spouse, unless established pursuant to a last will and testament, will be subject to the OBRA 1993 rules set forth in IHCPPM §2615.75.20.

(2) Pursuant to IHCPPM §2615.75.20.10, trusts established on or after August 11, 1993 that are not governed by OBRA 1993 must be reviewed for the purpose of determining the "availability of the trust." This would include trusts created by will (i.e., testamentary trusts), or by a third party other than a spouse or someone acting in behalf of the applicant/recipient and funded with the assets of another person.

(3) In general, if funds from the trust can be distributed, then they will be presumed to be available.

3. The trust should contain a spendthrift provision designed to protect the trust assets from the claims of the beneficiary's creditors.

a. Since a (d)(4)(A) SNT is funded with the assets of a disabled beneficiary, it is a question of state law whether the spendthrift provision will be effective against the beneficiary's creditors other than the state Medicaid program.

b. However, for public benefits purposes, the SNT with a spendthrift provision will be effective for SSI and Medicaid purposes by virtue of the specifically applicable statutory provisions.

4. The trust should authorize trustee compensation and payment of fees, taxes and administrative expenses.

a. Indiana Senate Bill No. 301, effective July 1, 2009, added I.C. 30-4-3-25.5, which applies beginning October 1, 2009, provides that, except for federal and state taxes, the trustee of a trust created to comply

with 42 U.S.C. §1396(p)(d)(4)(A) shall not distribute trust property after the death of the beneficiary to any person entitled to payment from the trust until the Office of Medicaid Policy and Planning (OMPP) has been fully reimbursed for assistance rendered to the person for whom the trust was created.

b. Accrued and unpaid fees as well as reimbursement for expenses advanced which might be reimbursable prior to the death of the beneficiary may not be paid after the death of the beneficiary until OMPP has been reimbursed. Only federal and state taxes can be paid before reimbursing OMPP.

5. Allow amendment by the trustee or court as necessary to comply with applicable federal and state laws, regulations, POMS and other policies concerning SNTs.

6. Depending on the desirability of doing so, if the trust is a third-party SNT, determine whether to draft the trust as an intentionally defective grantor trust, or to avoid grantor trust status in order to meet the qualified disability trust (QDT) requirements of I.R.C. § 642(b)(2)(C).

F. Trust Approval by SSA and Medicaid.

1. The trust should be submitted to the SSA for approval since SSI recipients are under a continuing duty to report to the SSA any changes in their income, resources, living arrangements, or other conditions. 20 C.F.R. § 416.708.

2. A self-settled special needs trust should also be submitted to the state Medicaid agency, as also should other possible trust arrangements depending on the interest of the beneficiary.

3. Consider including the following in the notice when appropriate:

a. Client's name and social security number.

b. Document receipt of the personal injury settlement, inheritance, or other funds, including copies of relevant documents, the trust agreement, and bank statements showing the deposit to the trustee's account and any disbursements to date.

c. Also include the SSA's POMS sections on trusts and containing the eight-step action chart to help the claim representative analyze the trust, all of which should be submitted with supporting documents by certified mail (see POMS SI 01120.203).

d. Letter and supporting documents should be sent to the local SSA office providing services to the client, and perhaps also to the SSA district office pertaining to the representative payee if there is a representative payee.

e. SSA will probably not send a letter approving the trust, but would definitely send a notice if the trust is not approved.

G. Fraudulent transfer and related issues.

1. Although this presentation will not address such issues in any significant way, practitioners should be aware of the following:

a. I.C. 32-18-2-14, concerning transfers which are voidable as to present and future creditors.

b. I.C. 31-16-17-1, concerning a child's duty to furnish support for parents.

c. I.C. 35-43-5-7, relating to certain criminal violations for welfare fraud.

2. Related issues of which practitioners and family members need to be aware:

a. Voluntarily assuming liability: Pursuant to the federal guarantor prohibition under the Nursing Home Reform Act, 42 U.S.C. §§1395i-3(c)(5)(ii), 1396r(c)(5)(ii), facilities certified for Medicare or Medicaid payments may not include a financial guarantee as a condition of admission or continued stay.

b. A child or other person may be liable for a breach of fiduciary duty if he or she (i.e., a guardian or attorney-in-fact) fails to apply funds to the obligations of the protected person or misappropriates funds).

c. Beware of conflicts of interest which may give rise to claims for breach of fiduciary duty.

XI. Estate Recovery.

A. For the federal law requirement that states must assert claims against a Medicaid recipient's probate estate, and which allows states to assert claims against various types of non-probate transfers, see 42 U.S.C. §1396p(b).

1. Estate recovery is handled differently in almost every state, with each state having its own processes for dealing with probate and non-probate assets, spousal recovery, liens, and undue hardship waivers.

2. Indiana allows a preferred claim against the estate of a Medicaid recipient for any Medicaid benefits received after age 55. I.C. 12-15-9-1.

3. Indiana has adopted an expanded estate definition to include certain non-probate transfers. I.C. 12-15-9-0.5(a)(2).

   a. There is a nine month time limit within which to make such a claim against certain non-probate transfers if the transfer occurred on or after May 1, 2002. I.C. 12-15-9-0.6 and 12-15-9-0.8.

   b. The expanded definition does not apply to joint survivorship tenancies created before July 1, 2002.

   c. Recovery does not apply against tenancy by the entirety ownership or to the payment of the death proceeds of a life insurance policy.

   d. Estate recovery does not extend to recovery against a remainder interest in real estate, as a life estate holder cannot prevent the property from passing to the remainderman at death.

   e. Property held in a revocable trust, if the grantor has full authority to revoke the trust or withdraw all of the funds, is included in the definition.

   f. An annuity would be subject to recovery if it meets the "non-probate transfer" definition, i.e., that the grantor had the right to withdraw or revoke the funds. It would not extend to an irrevocable annuity.

   g. The claim cannot be enforced against a decedent's "personal effects", ornaments or keepsakes. I.C. 12-15-9-2(3).

   h. The claim cannot be asserted against assets which were disregarded under the Indiana Partnership Long Term Care Insurance Program, a program which is designed to encourage the purchase of qualified long term care insurance policies. IHCPPM §4650.05.00.

   i. The State cannot recover against the value of real estate owned by the Medicaid recipient and his or her spouse as tenants by the entirety, or if the house is in the spouse's name and the Medicaid recipient relinquished his interest in the property.

   j. Likewise, recovery cannot be made if the residence is in an irrevocable trust.

4. State Medicaid agencies may place a lien called a TEFRA lien (under the Tax Equity and Fiscal Responsibility Act of 1982) on real estate owned by

Medicaid recipient during his or her lifetime if the recipient is in a nursing home and unlikely to return home.

a. The lien cannot be imposed if certain dependent relatives are living in the property (i.e., if a spouse, a disabled or blind child, a child under 21, or a sibling with an equity interest in the house who is living there if he or she has lived there for at least 18 months before the recipient entered the nursing home).

b. If the Medicaid recipient is discharged from the nursing home, the State must release the lien.

c. The Office of Medicaid Policy and Planning (OMPP) can file a lien only after it determines that a Medicaid recipient who resides in a nursing home, intermediate care facility for the mentally retarded (ICFMR), or hospital, cannot reasonably be expected to be discharged and return home. I.C. 12-15-8.5-2.

d. Before it obtains a lien, OMPP must provide notice to the recipient and the recipient's authorized representative, if there is one, of OMPP's intent to obtain a lien and of the recipient's right to request an administrative hearing to challenge the filing of a lien.

e. There is no single consistent way that the various states use or implement Medicaid liens, and some states do not utilize them or, even if such liens are recognized, do not enforce them.

5. Federal law prohibits states from recovering from an estate until after the death of the recipient's spouse, or for as long as there is a child of the deceased who is under age 21 or who is blind or disabled.

6. An undue hardship might result in preserving a residence as well, e.g., if a Medicaid recipient's child has no other permanent residence, the child may be able to avoid a claim on the basis of undue hardship.

a. Federal law requires the states to establish a procedure for waiving estate recovery if it would cause an undue hardship.

b. A few states do not have a specific provision in the state Medicaid regulations, and some states provide very little detail regarding an undue hardship waiver.

c. Common reasons for granting an undue hardship include: the estate assets or property may be necessary to a Medicaid recipient's livelihood or support (such as some business assets); finding that enforcing estate recovery would deprive the applicant of medical care

or food, clothing, shelter, or other necessities of life; and finding that estate recovery would cause the applicant to become homeless, etc.

B. As of July 1, 2005, I.C. 12-15-9-1 was amended to allow recovery against the estate of the deceased Medicaid recipient's spouse following the spouse's subsequent death.

1. However, some court cases had held that such statutes conflict with federal law. See *Hines v. Department of Public Aid*, (Ill. No. 100841, May 18, 2006).

2. Nevertheless, the Oregon Court of Appeals held that the State of Oregon may retroactively apply an estate recovery statute against a life estate created before the adoption of the statute, although the case was decided merely on the basis of the trial court having erred in granting summary judgment. *State of Oregon v. Jack Willingham*, State of Oregon Court of Appeals, May 31, 2006 (Number 0308-08747; A126258).

3. This provision was repealed, and I.C. 12-15-9-5 now prohibits the State of Indiana from filing a claim against the surviving spouse of a deceased Medicaid recipient.

XII. A Comparison of ABLE Accounts.

A. Passage by the U.S. Congress of the Achieving A Better Life Experience Act of 2015 (the "ABLE Act") was covered in detail at the 37th Annual Judge Robert H. Staton Indiana Law Update sponsored by the Indiana Continuing Legal Education Forum (ICLEF).

1. My materials are available on my website, www.rkcraiglaw.com.

2. The materials for the 37th annual conference on my website are titled *2015 Elder Law Developments*.

B. Additional information explaining developments that occurred subsequent to enactment were addressed at the 38th Annual Judge Robert H. Staton Indiana Law Update sponsored by the Indiana Continuing Legal Education Forum (ICLEF).

1. My materials are available on my website, www.rkcraiglaw.com.

2. The materials for the 38th annual conference on my website are titled *2016 Elder Law Developments*.

3. The first actual ABLE accounts were not established until the middle of 2016, when Ohio launched its STABLE accounts, followed shortly thereafter by Tennessee.

C. General background.

1. The ABLE Act allows each state to establish and operate an ABLE program.

2. The purpose of the ABLE Act is to allow contributions to be made to an ABLE account that was established for the purpose of meeting the Qualified Disability Expenses (QDE) of the disabled beneficiary.

3. Because the ABLE Act amended § 529 of the Internal Revenue Code and provides for thresholds tied to that section's permitted accounts in each state, ABLE accounts are similar to § 529 college savings accounts.

    a. For those under 19, must establish that beneficiary was either blind or disabled under the Social Security Act definitions, or under the new disability certification criteria set forth in § 529A(e)(2) of the Act.

    b. For those older than 19, must establish that beneficiary was either blind or disabled under the Social Security Act definitions, and that such blindness or disability occurred before the date on which beneficiary turned age 26.

    c. For the purpose of defining disability, the phrase "marked and severe functional limitations" means the standard of disability in the Social Security Act (see 20 C.F.R. § 416.906).

D. Purposes and goals of the ABLE Act.

1. To allow persons to place their own assets in an account that presumably would be easier to establish and to administer than a "(d)(4)(A)" trust.

2. To avoid the limitation prohibiting the disabled person himself from being able to establish a "(d)(4)(A)" trust, but this limitation has now been eliminated by the SNTFA.

3. To allow the disabled person to manage his or her own account, if able to do so; note, however, that the ability to manage is very limited.

E. Advantages of ABLE accounts.

1. Simplicity and economy in terms of establishment and administration.

2. Allows the disabled person himself or herself to be the account manager and decide what distributions should be made and for what purposes, unlike a "(d)(4)(A)" trust or a "(d)(4)(C)" pooled trust for which a third-party trustee is needed for that role.

3. All growth in an ABLE account is income-tax free.

4. Contributions by third parties qualify for the annual gift tax exclusion, but contributions must be in cash unless it is the result of an in-kind rollover.

5. The designated beneficiary of the ABLE account can be changed to a different disabled family member.

6. There is no age-65 limit on the disabled person funding his or her own ABLE account as long as the disability occurred before age 26.

7. Distributions for QDE are income-tax free.

   a. QDE are defined as: "Any expenses related to the eligible individual's blindness or disability which are made for the benefit of an eligible individual who is the designated beneficiary, including the following expenses: education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses which are approved by the Secretary under regulations and consistent with the purposes of this section."

   b. Proposed IRS regulations interpret QDE very liberally and broadly, perhaps even more broadly than would be allowed for distributions from a "(d)(4)(A)" trust or a "(d)(4)(C)" pooled trust.

   c. The IRS has concluded that QDE "should be broadly construed to permit the inclusion of basic living expenses and should not be limited to expenses for items for which there is a medical necessity or which provide no benefits to others in addition to the benefit to the disabled individual."

   d. The proposed regulations include in QDE "expenses that are for the benefit of the designated beneficiary in maintaining or improving his or her health, independence, or quality of life." [Prop. Reg. §1.529A-1(b)(16)].

   e. Expenses will not be QDE if they are incurred at a time when a designated beneficiary is neither disabled nor blind within the meaning of Treas. Reg. § 1.529A-1(b)(9)(A) and § 1.529A-2(e)(1)(I).

   f. If the IRS imputes a penalty because a distribution is not a QDE, the impact could be minimal or irrelevant:

(1) The ten percent withdrawal penalty is only levied on the income (the appreciation portion) of the account that is distributed.

(2) For example, if the parents contribute $1,000 per month at the beginning of each month, which is used immediately to pay a non-qualified expense, the penalty would be zero, since there would be no income earned from that investment, nor would there be any chance of a Medicaid pay-back lien on the ABLE account funds since the account would be a conduit for payments and there would be no account build-up subject to the lien.

(3) If an ABLE beneficiary is also a beneficiary of a third party SNT which owns a home in which the beneficiary lives, there will be no Medicaid lien or estate recovery because the beneficiary does not own the home; if the SNT funds the ABLE account with money that can be used to pay taxes and utilities, there will be no loss to the beneficiary of benefits, as noted below, and the beneficiary will not be saddled with the obligation of paying rent.

8. Distributions for QDE are not countable income for public benefits purposes (*see* POMS SI § 01130.740).

a. This makes distributions from ABLE accounts more beneficial than administering a "(d)(4)(A)" trust or a "(d)(4)(C)" pooled trust, or even, perhaps, a third-party SNT.

b. Distributions of cash can be made from an ABLE account without affecting benefits, although accounting to public benefits agencies for such distributions could be complex and administratively inconvenient.

(1) Unfortunately, Housing Authorities in the case of the Section 8 Housing Program have generally regarded virtually any distribution to be income for Section 8 purposes, thus increasing rent by 30 percent of the amount distributed.

(2) However, see the *DeCambre* decision previously referenced in Part V.B.1.e in which the U.S. Court of Appeals for the First Circuit ruled that it is only actual income distributed from a "(d)(4)(A)" trust that should be countable, which might make the importance of an ABLE account for a Section 8 beneficiary less significant.

c. An ABLE account's greatest benefit may be the ability to use the ABLE account funds for housing assistance without SSI reduction for in-kind support and maintenance (ISM).

(1) The SSA recently directed that distributions from an ABLE account do not count as income for SSI purposes regardless of whether the distributions are for non-housing QDEs, housing QDEs, or non-qualified expenses. (POMS SI § 01130.740).

(2) For persons with disabilities and their families, and especially those on public benefits, finding sustainable housing can be daunting.

(3) The ABLE Act provides a new tool to assist persons with disabilities and their families to secure housing and in some cases minimize the loss of benefits.

(4) The ABLE Act can be used to assist a beneficiary of an ABLE account to provide for their housing needs.

(a) For example, a major expenditure of many special needs beneficiaries is for housing and utility payments;

(b) If parents provide money directly, there is a dollar-for-dollar reduction in SSI which can cause the complete loss of benefits;

(c) If the parents pay the housing costs directly, the payments would be counted as ISM, and the child's SSI benefits would be reduced but not eliminated;

(d) If instead the parents contribute to his or her ABLE account, and in turn the funds in the ABLE account are used to pay the housing costs, then there would be no reduction in SSI.

(5) As a planning maneuver, a parent's planning for a disabled child presumably could entail establishing a third-party SNT and directing the SNT to continue to contribute to the ABLE account annually in an amount necessary to pay or contribute toward the housing costs.

(6) The POMS provide that QDEs for housing, as well as for non-housing QDEs, are excluded as income and are treated instead as a conversion of a resource from one form to another.

(a) The POMS exclude from the designated beneficiary's countable resources a distribution for non-housing QDE if the beneficiary retains that distribution beyond the month of receipt.

(b) The exclusion applies as long as the distribution is unspent and identifiable and is intended to be used for a non-housing-related QDE.

(c) If the beneficiary uses a distribution previously excluded for either a non-qualified purpose or as a housing-related QDE, or if the individual's intent to use it for a qualified disability expense changes, the amount of funds used for a non-qualified expense or for a housing-related QDE will be treated as a resource as of the first moment of the month in which the funds were spent, or if the individual's intent changes, the funds will be treated as a resource as of the first day of the following month.

(d) If the beneficiary spends the housing-related distribution within the month of receipt, there is no effect on eligibility; however, the distribution for housing-related QDE or for an expense that is not a QDE will be treated as a resource if the beneficiary retains the distribution into the month following the month of receipt.

F. Disadvantages of ABLE accounts.

1. While not necessarily disadvantageous, the advantages of accumulations not being taxable may be negligible due to the fact that most disabled beneficiaries are in a very low or zero income-tax bracket.

2. In order to establish an ABLE account, the disabled person must be eligible for SSDI or SSI, or submit a disability certification, which is not required in the case of a "(d)(4)(A)" trust or a "(d)(4)(C)" pooled trust.

3. A disabled person can have no more than one ABLE account.

4. The disabled person or his or her guardian cannot direct investments of the account more than two times per calendar year, and the range of investment options are determined by the state.

5. Distributions other than for QDE are subject to income tax under the annuity rules, and an additional penalty of ten percent is imposed on the taxable amount distributed.

6. There is a Medicaid payback requirement on the death of the disabled beneficiary, which applies, also, in the case of a "(d)(4)(A)" trust and a "(d)(4)(C)" pooled trust.

    a. In the case of a "(d)(4)(A)" trust and a "(d)(4)(C)" pooled trust, the Medicaid payback covers all medical assistance ever received under Medicaid programs in any and all states, even if the trust was established and funded long after the Medicaid benefits began.

    b. In the case of an ABLE account, payback is only required for medical assistance paid by the Medicaid program ***after*** the ABLE account was established.

7. The disabled person must have been disabled prior to attaining age 26.

    a. Proposed legislation is pending in Congress which would raise the age to 46 from 26.

    b. It may be difficult for older persons to prove their disability onset was prior to age 26.

8. Any amounts in the ABLE account in excess of $100,000 are countable for SSI purposes (but not for Medicaid purposes).

9. Annual contributions from all sources combined, including the disabled person, cannot exceed an amount equal to the annual gift tax exclusion (currently $14,000 per year).

10. Aggregate contributions from all sources, including the disabled person, are limited to the state's aggregate contribution limit for Section 529 plans (the Indiana limit is $450,000).

G. Planning considerations:

1. In most cases, and certainly in the case of larger distributions over time, third-party contributions can be made more favorably by means of other arrangements than by means of funding an ABLE account.

    a. Because Medicaid payback is required for ABLE accounts, and not in the case of a third-party special needs trust, then in most instances it will be better for a parent or other third-party donor to establish a separate third-party SNT in order to avoid the Medicaid payback.

    b. An ABLE account might be useful for small gifts from other people, but it would generally not be a very good receptacle for a significant gift or bequest.

2. An ABLE account might be appropriate for a disabled person who is able to manage his or her own funds and who finds it very important personally to maintain control and individual autonomy.

3. For a disabled person who is accumulating income, perhaps from wages, SSI benefits, etc., over a period of time, placing funds in an ABLE account may be an easy and convenient mechanism for placement of funds in order to avoid accumulating resources in excess of the $2,000 resource limitation.

4. An ABLE account might be a convenient and easy way to preserve funds from a small Uniform Transfers to Minors Act (UTMA) account when a young disabled person expects to apply for SSI at the age of 18 when the UTMA account would be a countable asset.

5. An ABLE account would be a convenient way to save for a major purchase, whether for a service or for a non-countable asset (a home, car, etc.) without the cost and complexity of setting up a separate trust.

6. An ABLE account might be useful for a disabled person who is over the age of 64 and cannot utilize a (d)(4)(A) trust or when a (d)(4)(C) pooled trust arrangement is not available in his or her jurisdiction, or if the state in which he or she resides would treat the funding of a pooled trust sub-account as a penalizable transfer.

7. An ABLE account might be a convenient source to deposit a distribution from a larger SNT, including possibly a third-party SNT, which might make a direct distribution to an ABLE account to allow the beneficiary some degree of autonomy and control or to fund regular payments of housing expenses.

   a. There are no regulations or rulings yet to provide a definitive answer to the question whether or not an ABLE account could be funded in part by a distribution from another trust.

   b. Making such a distribution would allow the beneficiary to take advantage of other benefits of an ABLE account, such as non-countability of distributions for housing purposes.

   c. *Query: would the distribution from the trust to the ABLE account, to the extent that it included income from a separate trust, be deemed income for Section 8 purposes?*

H. Availability of ABLE accounts.

1. Ohio became the first state to offer ABLE accounts on June 1, 2016 (called STABLE accounts in Ohio), followed by Tennessee on June 13, 2016, Nebraska on June 30, 2016, and Florida (for Florida residents only) on July 1, 2016. In addition to Indiana's recent commencement of ABLE

account enrollment, the following states are among those which currently have ABLE programs up and open for enrollment: Alaska, Florida, Illinois, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, North Carolina, Ohio, Oregon, Rhode Island, Tennessee and Virginia.

a. ABLE account enrollment began in Indiana in July of 2017.

(1) See the website for INvestABLE Indiana for information concerning plan eligibility, benefits and investment options: https://savewithable.com/in/home.html.

(2) For more information, contact Amy Corbin, Executive Director of the Indiana ABLE Authority (Acorbin@tos.IN.gov).

b. For a chart comparing the various state plans, see: http://tinyurl.com/ASNP-ABLEchart.

c. For an update of various available state plans, refer to the website of the ABLE National Resource Center at www.ablenrc.org/.

2. There is no longer a residency requirement, and an ABLE account can be established in any state that allows a non-resident of that state to establish an ABLE account [Consolidated Appropriations Act, 2016, PL114-113 12/18/2015, Division Q(III)(A), Section 303]. Most current plans allow enrollment of out-of-state residents.

3. It would usually be best to enroll in plans which permit transfers to different ABLE accounts to allow switching to a different plan in the future.

a. A "rollover" from one ABLE account to another is permitted, if accomplished within 60 days, although the process may be inconvenient and fraught with risks.

b. It may be better to establish an ABLE account through a plan which permits a direct transfer to another ABLE account.

4. It should be noted that presently final regulations have not been established by the Treasury Department regarding the rules applicable to ABLE accounts.

a. See IRS Notice 2015-81 issued November 20, 2015.

b. You may refer to the materials that I presented at the 38th Annual Judge Robert H. Staton Indiana Law Update referenced previously in these materials, or consult my website at www.rkcraiglaw.com under the title *2016 Elder Law Developments*.

c. The IRS has stated that various states and financial institutions may rely on the current Proposed Regulations.

5. It should be noted also that not all federal public benefits programs are yet fully in compliance with ABLE statutes.

a. As noted in the materials that I presented at the 38th Annual Judge Robert H. Staton Indiana Law Update, the Social Security Administration has published revisions to its Program Operations Manual System (POMS), which I addressed in some detail in my 2016 Elder Law Developments materials (which are available on my website as referenced above), and in regard to which some of the changes have been previously discussed.

b. Thus far nothing has been published in conjunction with the Section 8 housing (HUD) program or the Veterans Administration pension program.

c. There may also be certain Medicaid issues pending the adoption of specific Medicaid rules and regulations.

I. Other ABLE account issues:

1. The proposed IRS regulations make it clear that the designated beneficiary is the owner of the account and manages the distributions.

a. The IRS recognizes, however, that certain eligible individuals may be unable to establish an account themselves.

b. Therefore, the proposed regulations clarify that if the eligible individual cannot establish the account, the eligible individual's agent under a power of attorney, or if none, his or her parent or legal guardian, may establish the ABLE account for that eligible individual.

2. Compare this to the (d)(4)(A) and (d)(4)(C) trust requirements and the SNTFA.

a. As a planning matter, as in the case of virtually every other individual, if the eligible individual has capacity, it is a good idea for the individual to sign a power of attorney immediately.

b. If the beneficiary lacks capacity to manage the account and the parents have signature authority, the parents may want to consider establishing a conservatorship or guardianship to fund and manage an ABLE account, and to include a successor to be able to continue managing both accounts.

J. The foregoing commentary regarding ABLE accounts has drawn significantly from *The Elder Law Report*, Vol. XXVII, Issue 3, October 2016. (Attached as Exhibit "D" is a chart comparing ABLE accounts and Special Needs Trusts prepared by the Tucson, Arizona firm of Fleming & Curti, PLC).

XIII. Medicare Set-Aside Arrangements.

A. The Medicare Secondary Payor Act (the "MSP Act") essentially provides that Medicare need not fund care for which a third party has liability, and will not pay for care covered by a health or accident insurance policy that is primary to Medicare.

1. However, federal law does not spell out an appropriate methodology to calculate the government's claims.

2. The Centers for Medicare and Medicaid Services (CMS) has issued detailed procedures regarding workers' compensation medical damage payments for future treatments before Medicare will cover treatments for work injuries.

3. However, because the MSP Act does not distinguish between workers' compensation carriers and others, there is a potential liability for a Medicare participant's future medical expenses.

a. CMS has authority to require tort claimants to apply damages for future medical expenses toward future care arising from a tort.

b. However, CMS has not promulgated guidance on coordinating Medicare benefits with tort recoveries and generally has not taken action against tort recoveries to pay for future medical expenses, although some commentators have warned that practitioners can expect more vigorous enforcement of the MSP as part of efforts to shore up Medicare's finances.

c. In a February 2017 memorandum issued by CMS, a mechanism has apparently been put in place to track liability payments when there should be an MSA in place; if one is not in place, Medicare may deny payments.

B. Required Reporting Entities (RREs) under the MSP Act include liability insurance plans, no-fault insurance plans, and workers' compensation plans.

1. RREs have responsibility to determine whether a plaintiff/claimant is entitled to Medicare benefits on that basis, and upon settlement of the Medicare beneficiary's claim, must submit all information required by CMS with respect to the claimant to CMS.

2. These requirements generally became effective on July 1, 2009, but there has been a great deal of confusion regarding CMS requirements relating to liability settlements as compared to workers' compensation settlements.

   a. In other words, even though the MSP Act applies to all tort settlements, there are no actual rules or guidelines in existence to address liability settlements such as those that exist in the case of workers' compensation settlements.

   b. Medicare Set-Aside Arrangements ("MSAs") are not specifically required by federal law in any context, but rather, an MSA account is a tool used to provide a safe means to reasonably consider Medicare's interest as a secondary payor. See 42 U.S.C. §1395y.

   c. Although CMS has acknowledged that there is no Medicare requirement to establish Medicare set-aside arrangements, to date there has been no specific clarification in regard to the way to address future medical expenses in liability cases.

   d. CMS offices will not even review most MSAs, although some will review them if the settlement exceeds a specific amount.

   e. The National Academy of Elder Law Attorneys (NAELA) Medicare Set-Aside Task Force issued a report in 2010 recommending that clients should be advised that the MSP Act applies to all tort settlements and that CMS considers personal injury plaintiffs to have an obligation to report to protect Medicare's interest in coordinating future benefits.

   f. It advises personal injury clients to consider a formal MSA arrangement with applications for approval to CMS, particularly in large cases.

C. An MSA is a trust or a trust-like arrangement that is set up to hold settlement proceeds for future medical expenses.

   1. It may be a good idea in most cases to have a specialized company evaluate the future medical needs and recommend an amount that should be set aside for future medical care.

   2. CMS, in theory, should approve the amount.

      a. The account would then be funded in either a lump sum or with a "structured settlement annuity" that will refill the account over time.

      b. The administrator of the MSA should use the funds only to pay for medical care relating to the personal injury leaving Medicare or private

insurance free to provide coverage for medical expenses that are not related to the injury.

3. A special needs trust should set forth the intent to embed an MSA so that there is no question about how much is going into the MSA and how it will be administered.

    a. It is critical that the assets be segregated.

    b. The MSA's administrative cost cannot be paid by the MSA, but can be paid as an expense of the trust.

    c. However, the MSA can pay any taxes it generates.

    d. Any funds left in the MSA can flow back into the SNT.

    e. The SNT's trustee should not be burdened with the responsibility of managing the MSA, but can be given authority to hire an administrator, the cost of which cannot come from the MSA, nor should those costs reduce the trustee's compensation.

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TYPE OF TRUST	TESTAMENTARY SUPPORT	TESTAMENTARY SUPPLEMENTAL (SPECIAL) NEEDS	REVOCABLE INTERVIVOS	IRREVOCABLE INTERVIVOS	THIRD PARTY INTERVIVOS
WHO CREATES IT	Testator in a will (obviously not the beneficiary – a third party, such as a parent).	Testator in a will (obviously not the beneficiary – a third party, such as a parent).	Settlor who derives some benefit or retains control. May revoke trust.	Settlor who may or may not derive a benefit or retain control. May not revoke.	Created with third party's assets for benefit of the beneficiary.
WHAT IT DOES	Provides designated support to the beneficiary.	Provides only supplemental needs, not support, to beneficiary.	Holds assets received from the beneficiary/settlor. Used as directed in trust.	Cannot be revoked by settlor, may or may not provide benefit to settlor.	Provides a beneficiary with either support or other benefits at the direction of the trustee.
EFFECT ON MEDICAID ELIGIBILITY	Disqualifies beneficiary since trust provides support.	Beneficiary (including a spouse) qualifies for Medicaid unless benefits for spouse treated as a transfer due to failure to assert spousal election. Assets were not derived from beneficiary.	Disqualifies beneficiary - deemed an available asset.	Disqualifies settlor to extent settlor receives benefit; or if paid to another it is deemed a transfer of assets.	Support disqualifies beneficiary; trustee discretion may also disqualify.
EFFECT ON VA AID AND ATTENDANCE ELIGIBILITY	Disqualifies beneficiary since trust provides support per OGC Opinion 33-97.	Per OGC Opinion 72-90, arguably would not affect VA pension qualification except to the extent that trust assets are distributed or made available to the veteran, however, this position is unsettled.	Disqualifies veteran beneficiary - deemed an available asset.	Disqualifies veteran beneficiary if the claimant and/or his or her spouse is either an income or a principal beneficiary because there was not an "actual relinquishment of rights in the property and income from the property" per OGC Opinion 73-91.	Unless established by the veteran's spouse, should not be treated as a resource except to the extent that assets are available for the veteran's support unless assets are actually distributed to or made available to the veteran per OGC Opinion 72-90.
EFFECT OF DISBURSEMENTS	Distributed income is income to beneficiary. Income or corpus used to support.	Distributed income attributed to beneficiary, but distributions used for non-support items.	Probably deemed a grantor trust, all income attributed to settlor.	If paid to or for benefit of settlor, deemed to be available. If paid to another even after initial look-back period, a transfer may be considered.	Disbursement, either mandatory or discretionary, likely to mean an available asset. Income distributed is income to beneficiary.
LOOK-BACK PERIOD FOR MEDICAID PURPOSES	N/A, beneficiary disqualified for Medicaid.	N/A, not created with beneficiary's assets.	60 months per OBRA 93 for transfers from trust to a third party. However, due to control by settlor it is always an available asset.	60 months per OBRA 93.	N/A - not assets of beneficiary.
ULTIMATE DISPOSITION OF CORPUS	As directed by the trust instrument.	As directed by the trust instrument.	As directed by trust instrument.	As directed by trust instrument.	As directed by trust instrument.

EXHIBIT "A"

TYPE OF TRUST	**THIRD PARTY INTERVIVOS SUPPLEMENTAL NEEDS**	**d(4)(A) DISABILITY TRUST UNDER OBRA 93**	**d(4)(B) QUALIFIED INCOME TRUST (MILLER OR "UTAH GAP" TRUST) UNDER OBRA 93**	**d(4)(C) NON-PROFIT ASSOCIATION TRUST UNDER OBRA 93**	**IRREVOCABLE INCOME ONLY TRUST (IIOT)**
WHO CREATES IT	Created with third party's assets for benefit of the beneficiary by third party.	Parent, grandparent, legal guardian, court or the beneficiary with assets of beneficiary who is under 65 years of age. May also be established by third party with third party's assets.	Anyone using beneficiary's income. In Colorado, the court, using beneficiary's income.	Parent, grandparent, legal guardian, court, or the beneficiary using beneficiary's assets. May also be established by third party with third party's assets.	Beneficiary or third party using assets of the creator.
WHAT IT DOES	Provides only supplemental needs, not support to beneficiary.	Shelters funds belonging to person with disability as long as trust used for supplemental needs and not support.	Receives beneficiary's income and pays for support up to income cap limit for Medicaid.	Shelters funds belonging to person who's disabled, as long as trust used for supplemental needs and not support.	Pays income only for use of beneficiary at a level that usually will not disqualify beneficiary for Medicaid.
EFFECT ON MEDICAID ELIGIBILITY	Beneficiary (other than spouse) qualifies, not an available asset, and funds not derived from beneficiary.	Beneficiary qualifies as soon as funds are in trust and not used for support.	Qualifies beneficiary for Medicaid who would otherwise be disqualified because of income above the cap.	Beneficiary qualifies as soon as funds are in trust and not used for support.	Theoretically, beneficiary is qualified since benefits (i.e., income) are made at a level that would not disqualify or would have only a minimal or immediate impact.
EFFECT ON VA AID AND ATTENDANCE ELIGIBILITY	Per OGC Opinion 72-90, should not affect VA pension qualification except to the extent that trust assets are distributed or made available to the veteran.	Would most likely disqualify veteran if established by either the veteran or the veteran's spouse; should not affect VA pension qualification per OGC Opinion 72-90 if established by a third party except to the extent that trust assets are distributed or made available to the veteran.	Not utilized in the context of VA qualification.	Would most likely disqualify veteran if established by either the veteran or the veteran's spouse; should not affect VA pension qualification per OGC Opinion 72-90 if established by a third party except to the extent that trust assets are distributed or made available to the veteran.	Income to be taken into account if the veteran is the beneficiary; if the claimant and/or his or her spouse established the trust, trust assets would be deemed to be available to the beneficiary because there was not an "actual relinquishment of rights in the property and income from the property" per OGC Opinion 73-91.
EFFECT OF DISBURSEMENTS	Distributed income is income to beneficiary.	Income may be attributable to beneficiary. As long as used for supplemental needs, no disqualification for Medicaid.	Amount below the income cap is paid for beneficiary's support or other needs, excess may be retained in trust.	Income may be attributable to beneficiary. As long as used for supplemental needs, no disqualification for Medicaid.	Income attributable to beneficiary. Income paid subject to spend-down.
LOOK-BACK PERIOD FOR MEDICAID PURPOSES	N/A, not created with beneficiary's funds.	N/A - if proper disability trust there is no transfer penalty.	N/A - if proper income trust there is no transfer penalty.	N/A - if proper pooled trust there is no transfer penalty except possibly for transfers of the beneficiary's own assets who is 65 years of age or older.	60 months per OBRA 93 on any transfers of corpus to or from trust.
ULTIMATE DISPOSITION OF CORPUS	As directed by trust instrument.	Upon death of beneficiary, remainder must be available to state for reimbursement of medical assistance.	Upon death of beneficiary, remainder must be available to state for reimbursement of medical assistance.	Upon death of beneficiary state may seek reimbursement only if remainder does not stay in the trust for charity.	As directed by the trust instrument upon death of income beneficiary.

Peace of Mind

A Pooled Trust can provide peace of mind that contributions will last throughout a lifetime. Some of the benefits of allowing a non-profit organization such as SWIRCA & More to manage your loved one's trust are:

- Ease of access to funds;
- Someone else manages the dollars;
- The resources are used only for supplemental needs;
- Continuity of management will exist even if a family member moves out of the area, becomes disabled or dies. SWIRCA & More will be here to carry out your wishes;
- Your expectations for the Trust will be delivered;
- Experienced management skills and knowledge of current government regulations will exist;
- Families do not have to worry about learning regulations and dealing with government agencies.

> *"I am glad our family made the decision to set up a Pooled Trust account for our mother. We have been able to get mom the extra items she needs without having to worry about money. Having this trust really helped us when she needed a lift chair. I would highly recommend the Pooled Trust through SWIRCA & More."*
>
> – Diana, daughter of pooled trust recipient

For More Information

If you are interested in learning more about this government approved d(4)(c) trust created specifically for the elderly and disabled, contact SWIRCA & More for detailed information or for an application to begin the process.

$10,000 minimum investment,
$500 enrollment fee,
minimum annual fee.

The Trustee for the SWIRCA & More Pooled Trust is Old National Bank Trust Company.

16 W Virginia Street
PO Box 3938
Evansville IN 47737-3938

WWW.SWIRCA.ORG

Consider Our

Pooled Trust

To meet supplemental needs for loved ones and provide for an enhanced quality of life

EXHIBIT B

Pooled Trust

SWIRCA & More is proud to offer a trust specifically designed for the elderly and disabled. Our Pooled Trust offers a way for you to provide for your loved one. Through the trust, the purchase of supplemental items and services are authorized to meet your loved one's needs and wants, without fearing that your trust resources will make the beneficiary ineligible for government benefits.

Examples of government benefits that excess resources could disqualify loved ones for are Supplemental Security Income (SSI) or Medicaid. These may pay for primary living needs such as food, housing and medical care, but do not cover the supplemental needs that the Pooled Trust can cover:

Examples of supplemental needs (not an all inclusive list):

- Cable TV
- Transportation
- Recreation Expenses
- Travel Expenses
- Supplies
- Unpaid Medical Bills
- Caregiver Reimbursements

The assets of all the beneficiaries in a Pooled Trust are combined (or "pooled") for investment purposes so the trustee can have more investment possibilities. The trustee still separately accounts for each person's interest in the Pooled Trust.

You can lean on our experienced, highly trained team to advocate on your loved one's behalf. SWIRCA & More has been serving the families of Southwestern Indiana since 1974 and the Pooled Trust was created in 2002 to meet specific needs of the elderly and disabled.

How is a Pooled Trust Funded?

A Pooled Trust may be funded in many different ways. The beneficiary's assets or property can be contributed to the trust... or a gift, will or inheritance can provide the funds. You can choose to fund a trust either while living, at retirement or in a will, so as to assure that the money to care for the loved one is protected.

A beneficiary is any person of any age who has been diagnosed with a physical or mental impairment that substantially impairs that person's ability to support and care for their self.

"You can establish a pooled trust account for your loved one as a way of improving his or her enjoyment of life without causing your loved one to lose eligibility for public benefits."

– Randall K. Craig, Elder Law Attorney

Phone: 812-464-7817 OR Toll Free: 866-400-0779
SWIRCA & More • 16 W. Virginia St • PO Box 3938 • Evansville, IN 47737
Email: adrc@swirca.org • www.swirca.org

AMENDED AND RESTATED
JOINDER AGREEMENT FOR
SOUTHWESTERN INDIANA REGIONAL COUNCIL ON AGING, INC.
POOLED TRUST

(Revised December 15, 2015)

THIS IS A LEGAL DOCUMENT. YOU ARE ENCOURAGED TO SEEK INDEPENDENT, PROFESSIONAL ADVICE BEFORE SIGNING.

The undersigned hereby enrolls in and adopts the Southwestern Indiana Regional Council on Aging, Inc. ("SWIRCA") Pooled Trust dated June 10, 2002, which is incorporated herein by reference.

A. Beneficiary's name: ______________________________

Address: ______________________________

____

What is the nature of the Beneficiary's disability? ______________________________

____

If the Beneficiary's condition has been medically diagnosed, what is the diagnosis?

____

What is the prognosis at this time? ______________________________

____

Beneficiary's Social Security Number: ______________________________

Phone (day): ________________ (evening): ________________

Birth date: ______________________________

Does the Beneficiary receive Supplemental Security Income?

Yes: ______ No: ______

If yes, indicate amount per month: ______________________________

Does the Beneficiary receive Social Security Disability Income (SSDI)?

Yes: ______ No: ______

EXHIBIT C

If yes, indicate amount per month: ______________________________

If the Beneficiary receives Medicaid, what is the Medicaid card number?

____

If the Beneficiary receives other government assistance, such as Food Stamps, SILP, AFA, CHOICE, ARCH, Section 8 Housing, etc., list these benefits here:

____

____

____

____

If the Beneficiary is covered under any policy of health insurance, what is the insurer's name and address, and what is the policy number?

Insurer: ______________________________________

Address: ______________________________________

____

Policy Number: ________________________________

If the Beneficiary is covered under any prepaid funeral or burial insurance plan, what is the insurer's name and address, and what is the policy number?

Insurer: ______________________________________

Address: ______________________________________

____

Policy Number: ________________________________

Has the Beneficiary signed a funeral planning directive?

Yes: ______ No: _______

If the Beneficiary has signed a funeral planning directive, please provide a copy.

B. Grantor's Name: ______________________________

Address: ______________________________

____

Grantor's Social Security Number: ______________________________

Phone (day): ____________________ (evening): ____________________

Grantor's birth date: ______________________________

Relationship to Beneficiary: ______________________________

C. Trust sub-account number: ______________________________

Sub-accounts funded with the Beneficiary's own funds, whether by the Beneficiary or a parent, grandparent, legal guardian or by a court, or which are otherwise subject to the payback requirements of 42 U.S.C. 1396(d)(4), shall be identified as "Sub-account A" sub-accounts. All other accounts shall be identified as "Sub-account B" sub-accounts. **CAUTION**: The transfer of funds of a Beneficiary to a Sub-account A sub-account if the Beneficiary is 65 years of age or older may be subject to a Medicaid transfer penalty giving rise to a period of ineligibility for Medicaid.

D. Guardians or Representatives:

If the Beneficiary has a legal representative (e.g., legal guardian, conservator, representative payee, agent acting under a durable general power of attorney, trustee, or other legal representative or fiduciary), what is the name, address and relationship of such person to the Beneficiary?:

Name: ______________________________

Address: ______________________________

____

Phone (day): ____________________ (evening): ____________________

Relationship: ______________________________

Unless the Grantor requests otherwise and until the Grantor is no longer able to serve as such, the Grantor shall be the Beneficiary's Primary Representative. When the Grantor is no longer able to act as the Beneficiary's Primary Representative, the

Guardian or Representative listed in this Section D above shall be the Primary Representative (with a court-appointed Guardian, if any, taking precedence). If the person listed in this Section D above ceases to serve, please list below, in order, the persons that you would like to be the successor Primary Representative:

First Alternate:

Name: ____

Address: ____

____

Phone (day): ____________________ (evening): ____________________

Relationship: ____

Second Alternate:

Name: ____

Address: ____

____

Phone (day): ____________________ (evening): ____________________

Relationship: ____

No Alternates Remaining:

If none of the named Primary Representatives or Successors are able to serve, how would you like for another Primary Representative to be selected?

____

____

E. Definitions: For all purposes under this Joinder Agreement:

1. "Government Assistance" shall have the same meaning as set forth in the Declaration of Trust of SWIRCA.

2. "Unfunded Enrollment" shall mean:

(a) the Grantor has paid the initial enrollment fee and is not delinquent in paying any annual renewal fee, and

(b) the Grantor has executed this Joinder Agreement, which SWIRCA has approved and the Trustee has accepted, but

(c) the trust sub-account has not been funded.

3. "Funded Enrollment, Distributions Deferred" shall mean:

(a) Sections (a) and (b) of Unfounded Enrollment (A.2 above) apply, and

(b) the trust sub-account has been funded, but

(c) the Grantor has directed that distributions be deferred.

4. "Funded Enrollment, Distributions Authorized" shall mean:

(a) Sections (a) and (b) of Funded Enrollment, Distributions Deferred (A.3 above) apply, and

(b) distributions are authorized.

F. Time of funding the trust sub-account:

	Grantor(s) Should Initial Appropriate Line(s)
1. If a single Grantor, upon the Grantor's death, with its Status to be Funded Enrollment, Distributions Authorized.	____________________
2. Where there are two or more Grantors, upon the death of one or more of the Grantors, with its status to be Funded Enrollment, Distributions Authorized.	____________________
3. Immediately, with its status to be:	
(a) Funded Enrollment, Distributions Deferred	____________________
or	
(b) Funded Enrollment, Distributions Authorized	____________________
4. If the sub-account's status is Funded Enrollment, Distributions Deferred, and if the Grantor then	

dies, or if the Grantor becomes mentally or physically incapacitated, the Grantor directs that upon such death, or upon such incapacity being certified by a physician or a court to SWIRCA, or as determined by SWIRCA in its reasonable discretion, the sub-account's status shall become Funded Enrollment, Distributions Authorized. ____________________

G. Method or source of funding:

Grantor Initials Appropriate Line(s)

1. The trust sub-account is to be funded under the Grantor's will. ____________________

2. The trust sub-account is to be funded through life insurance or other contractual benefits, and the SWIRCA Pooled Trust will be designated as primary beneficiary. ____________________

3. The amount the Grantor contributes now, or intends to contribute later, to the Beneficiary's sub-account, is ______________________________. (The amount intended to be contributed later is subject to change by the Grantor.)

4. If the amount the Grantor actually contributes is less than the amount specified in G.3 above, the Trustee may, but is not required to, convert the sub-account's status to Funded Enrollment, Distributions Authorized, notwithstanding the shortage.

5. Notwithstanding items G.1 through G.4 above, if the amount the Grantor actually contributes during life or at death is less than Ten Thousand Dollars ($10,000), which is the minimum in effect when executing this Joinder Agreement for participation as a SWIRCA Pooled Trust sub-account, the Trustee shall decline to accept such contribution for participation as a SWIRCA Pooled Trust sub-account.

H. Distributions upon the Beneficiary's death:

1. If, upon the Beneficiary's death, funds remain in his or her separate trust sub-account, said funds shall be distributed as follows:

(a) If the Sub-account is identified as a "Sub-account A" sub-account [because it was established with a Grantor's own funds or is otherwise subject to 42 U.S.C. 1396(d)(4)], fifty percent (50%) shall be retained

by the SWIRCA Pooled Trust and shall be allocated by the Trustee in accordance with the Trust.

(b) If the Sub-account is identified as a "Sub-account B" sub-account because it **was not** established with a Grantor's own funds [or is otherwise not subject to the payback requirements of 42 U.S.C. 1396(d)(4)], _______ percent (___%) shall be distributed to SWIRCA (insert the desired percentage - there is no mandated minimum and the percentage specified should be considered entirely voluntary).

(c) From any remainder in excess of the amounts to be retained or distributed for or to the SWIRCA Pooled Trust or SWIRCA, if the sub-account is identified as a "Sub-account A" sub-account, the remaining fifty percent (50%) shall be distributed to all States up to an amount equal to the total medical assistance paid on behalf of the Beneficiary under every such State Medicaid Plan based on each State's proportionate share of the total amount of Medicaid benefits paid by all of the States on the Beneficiary's behalf, or as otherwise required by applicable law, which shall constitute a lien to the extent required by law.

(d) Any balance remaining shall be distributed to the following remaindermen as stipulated below:

Name	Address	Telephone	%	Grantor's Initials

2. If the Beneficiary's residence changes from Indiana to another state, distributions may cease until appropriate arrangements can be made within the sole discretion of the Trustee. If appropriate arrangements are not made which are satisfactory to the Trustee, the Beneficiary's sub-account may be terminated by the Trustee with the remaining sub-account property distributed according to H.1.

3. A share for a remainderman named in H.1 who does not survive the Beneficiary shall lapse and be distributed in equal shares to the other remainderman then

living, if any, and if there are none, then the remaining amount shall be retained by the SWIRCA Pooled Trust and shall be allocated by the Trustee in accordance with the Trust.

4. If, after the Beneficiary's death, the Trustee receives funding designated for that Beneficiary's sub-account, that funding shall be distributed in accordance with the provisions of this item H.

5. Any distribution to a remainderman who has not attained the age of 21 may be distributed by the Trustee to a custodian under the Indiana Uniform Transfers to Minors Act, and the Trustee shall have the right to designate the custodian. Any distribution to a remainderman who is incapacitated may be distributed by the Trustee to a custodial trustee under the Indiana Uniform Custodial Trust Act, and the Trustee shall have the right to designate the person to serve as the custodial trustee. The custodian or custodial trustee may be the Trustee.

6. The Grantor acknowledges that either SWIRCA or the Trustee may incur additional costs if any remainderman can not be easily located. The Grantor acknowledges and agrees that the Trustee and SWIRCA may recover any reasonable costs and expenses incurred in attempting to locate a remainderman.

I. Fees:

The following fees shall be payable either to SWIRCA or the Trustee, as set forth below;

1. The Grantor shall pay an enrollment fee of five hundred dollars ($500.00) which shall be paid to SWIRCA at the time this Joinder Agreement is executed.

2. The Grantor shall pay an annual renewal fee of seventy dollars ($70.00) which shall be paid to SWIRCA until the sub-account's status becomes Funded Enrollment, Distributions Deferred, or Funded Enrollment, Distributions Authorized.

3. An annual consulting and maintenance fee shall be due after a sub-account becomes funded whether distributions are deferred or authorized. Although these annual fees may increase or decrease over time, the current annual consultation and maintenance fee shall be as follows:

   1.25% for amounts up to $100,000.00

   1% for amounts over $100,000.00

   Minimum annual fee $300.00

4. Trustee fees shall be paid to the Trustee in accordance with the provisions of the SWIRCA Pooled Trust as set forth in the Trustee's fee schedule approved from time to time by SWIRCA.

5. The Trustee and SWIRCA have authority from time to time, if necessary, under the terms and provisions of the SWIRCA Pooled Trust, to assess all sub-accounts or certain sub-accounts with special assessments for specific costs such as the cost of defending a sub-account or taking actions to preserve a Beneficiary's Government Assistance.

6. Additional fees may be imposed for special services, such as a check writing fee for checks in excess of twelve (12) per year, tax preparation fees, and similar matters.

J. Miscellaneous:

1. The provisions of this Joinder Agreement, as entered into this __________ day of ____________, 20____, may be amended as the Grantor, SWIRCA, and the Trustee may mutually agree, so long as any such amendment is consistent with the SWIRCA Pooled Trust.

2. The SWIRCA Pooled Trust is only available to Beneficiaries whose Grantors are in good standing with SWIRCA and not delinquent in regard to the payment of any fees due to SWIRCA. To be in good standing, a Grantor shall have paid the initial enrollment fee and shall have paid the required annual renewal fee(s) within the prescribed time, and shall have funded the sub-account in accordance with the provisions of this Joinder Agreement.

3. A trust sub-account cannot attain the status of Funded Enrollment, Distributions Authorized if the Beneficiary's Grantor is not in good standing with SWIRCA.

4. If the Grantor terminates his or her Joinder Agreement and if the trust sub-account has not yet been funded, the SWIRCA Pooled Trust and this Joinder Agreement shall then become null and void as to the Grantor, the Beneficiary, SWIRCA and the Trustee.

5. The Joinder Agreement and the SWIRCA Pooled Trust may be terminated by SWIRCA as to the Grantor, the Beneficiary and the Trustee upon nonpayment of any required renewal fee or the failure to fund the sub-account in accordance with the provisions of this Joinder Agreement; provided, however, that there shall first be reimbursed to all States up to an amount equal to the total medical assistance paid on behalf of the Beneficiary under every such State Medicaid Plan based on each State's proportionate share of the total amount of Medicaid benefits paid by all of the States on the Beneficiary's behalf; and provided further, however, other than taxes due from the Trust sub-account to any States

or the Federal government due to the termination of the Trust, and reasonable fees and administrative expenses associated with the termination of the Trust, no entity other than the Beneficiary shall benefit from the early termination of any Trust sub-account.

6. Taxes:

   a. The Grantor acknowledges that contributions to the SWIRCA Pooled Trust are not deductible as charitable gifts or otherwise.

   b. Trust sub-account income, whether paid in cash or distributed in other property, may be taxable to the Beneficiary subject to applicable exemptions and deductions. Professional tax advice is recommended.

   c. Trust sub-account income may be taxable to the SWIRCA Pooled Trust, and when this is the case, such taxes shall be payable from the trust sub-account.

7. Only one Beneficiary may be enrolled under one trust sub-account. An additional Joinder Agreement and a separate trust sub-account must be established for each Beneficiary.

8. The SWIRCA Pooled Trust will be managed by SWIRCA and administered by the Trustee in accordance with the terms, provisions and conditions of the Declaration of Trust, as the same may be amended from time to time. The SWIRCA Pooled Trust is governed by the laws of the State of Indiana in conformity with the provisions of 42 U.S.C. Section 1396p, as amended August 10, 1993 by the Omnibus Budget Reconciliation Act of 1993. To the extent of any conflict of any terms of the SWIRCA Pooled Trust and any governing law, the governing law and regulations shall control.

9. The Grantor acknowledges that the Grantor has been advised to have the SWIRCA Pooled Trust and this Joinder Agreement reviewed by the Grantor's own attorney prior to the execution of this Joinder Agreement. The Grantor acknowledges that the Trustee is a financial institution and is not licensed or skilled in the field of social services. The Grantor acknowledges and agrees that the Trustee may conclusively rely on SWIRCA to identify programs that may be of social, financial, developmental or other assistance to the Beneficiary. The Trustee, its agents and employees, as well as their agents' and employees' and their respective heirs and legal representatives, shall not in any event be liable to the Grantor or the Beneficiary or any other party for its acts as the Trustee as long as the Trustee acts reasonably and in good faith.

10. The Grantor recognizes and acknowledges the uncertainty and changing nature of the guidelines, laws, rules and regulations pertaining to government benefits.

The Grantor agrees that SWIRCA shall not in any event be liable for any loss of benefits or otherwise as long as SWIRCA acts in good faith.

11. The Grantor acknowledges that upon execution of this Joinder Agreement by the Grantor, SWIRCA and the Trustee, and the funding of a sub-account for the Beneficiary, this trust as to the Grantor and the Beneficiary shall be irrevocable. The Grantor acknowledges that after the funding of the sub-account, the Grantor shall have no further interest in, and does hereby relinquish and release all right to income and control over, all incidents of interest of any kind or nature in and to the contributed assets and all incom e therefrom.

12. The Grantor represents and warrants that the Grantor has not been provided, nor is the Grantor relying on, any representation of, or any legal advice by, SWIRCA or the Trustee in regard to the execution of this Joinder Agreement.

13. The Grantor agrees to abide by and adhere to the grievance procedure which is attached hereto and incorporated herein by this reference.

14. The Grantor further represents and warrants that the Grantor is entering into this Joinder Agreement voluntarily as the Grantor's own free act and deed; that if the Grantor has not had the SWIRCA Pooled Trust or the Joinder Agreement reviewed by the Grantor's own attorney, then the Grantor has voluntarily waived and relinquished that right; that the Grantor has been provided with a complete copy of the SWIRCA Pooled Trust Declaration and this Joinder Agreement prior to signing this Joinder Agreement; that the Grantor has reviewed and understands to the Grantor's full satisfaction the legal, economic and tax effect of these instruments; and that SWIRCA is or may be a Remainder Beneficiary of a portion of the sub-account established hereby upon the death of the Beneficiary as provided by this Joinder Agreement.

IN WITNESS WHEREOF, the undersigned Grantor has reviewed and signed this Joinder Agreement, understands it, and agrees to be bound by its terms, and the SWIRCA Pooled Trust has accepted and signed this Joinder Agreement this ____________ day of ______________________, 20________.

____
GRANTOR

____
GRANTOR

SOUTHWESTERN INDIANA REGIONAL COUNCIL ON AGING, INC.

BY:______________________________

ITS: ______________________________

OLD NATIONAL WEALTH MANAGEMENT, TRUSTEE

BY:________________________________

ITS: _______________________________

I affirm, under the penalties for perjury, that I have taken reasonable care to redact each Social Security number in this document, unless required by law, Randall K. Craig, J.D., CELA, CAP.

THIS INSTRUMENT PREPARED BY:
Randall K. Craig, J.D., CELA, CAP
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5000 East Virginia Street, Suite 1
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Comparing ABLE Act accounts and special needs trusts

	ABLE Account	First-party Special Needs Trust	"c-2-B" Third-Party Special Needs Trusts	Third-party Special Needs Trust
Governing authority	26 USC §529A (tax code)	42 USC §1396p(d)(4)(A) and (C)	42 USC §1396p(c)(2)(B))	State Trust law
Cost to establish	Nominal startup fee	(A): Legal fees for preparing trust; additional fees for limited guardianship if no living parent/grandparent (C: Legal fees for advising re use of trust; nominal trust joinder fee	Legal fees for preparing trust	Legal fees for preparing trust
Payback provision	Yes. State entitled to receive all ABLE balance at death of beneficiary up to amount of Medicaid provided	Yes. (A): State named as remainder beneficiary to extent of Medicaid provided (C): Same, collected after PSNT retention	No, but as alternative, trust must make distributions on an "actuarially sound basis"	No
Eligibility requirements	Individual entitled to Social Security benefits (or otherwise disabled) before age 26	(A): Under 65 at time of trust creation and funded and disabled by Social Security definition. (C): No age limit, but some states impose penalty for long term care; disabled by SSA definitioin.	For child of grantor, no age limit but must be disabled by Social Security definition For all others, under 65 at time of trust creation and funded and disabled by Social Security definition.	No limits or requirements
Grantor/settlor	Any person (but beneficiary owns account)	(A): Person with disability, but trust must be established by parent, grandparent, guardian or court; (C): Person with disability; trust must be established by beneficiary, parent, grandparent, guardian or	Anyone	Anyone other than person with disability

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Tucson, Arizona
July 6, 2016

EXHIBIT D

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		court.		
Tax issues	No tax on earnings; distributions taxed unless used for "qualified disability expenses"	Trust earnings taxed to beneficiary under grantor trust rules; no separate tax on distributions	Taxed at higher trust rates **but** distributions to or for beneficiary carry out income tax liability; may be set up to grantor pays income tax at his or her rate	Ttaxed at higher trust rates **but** distributions to or for beneficiary carry out income tax liability; may be set up to grantor pays income tax at his or her rate
Effect of distributions on benefits	If for "qualified disability expenses," no effect on eligibility or benefit levels	Only distributions for food and shelter raise issues re: eligibility; distributions directly to beneficiary generally precluded	Distributions to beneficiary may cause benefit reduction or loss, as may distributions for food or shelter; other distributions have no effect on most eligibility programs	Distributions to beneficiary may cause benefit reduction or loss, as may distributions for food or shelter; other distributions have no effect on most eligibility programs
Management of assets	State program provider; account holder may choose state	(A) Someone other than beneficiary; court often supervises (C): Pooled trust administrator	Someone selected by settlor; often family members but sometimes professionals (with costs and bureaucracy)	Someone selected by settlor; often family members but sometimes professionals (with costs and bureaucracy)
Countable resource?	Yes for SSI if balance exceeds $100,000	No	No	No
Maximum contribution	Gift tax exemption amount (currently $14,000) per year total, from any source	No limit	No limit	No limit
Limit on number of accounts	1 per beneficiary	No limit	No limit	No limit

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