

Drafting a Special Needs Trust in Utah: A Primer

by Kathie Brown Roberts and Allison Barger

This article is the first part in a two-part series exploring required provisions of special needs trusts, Utah specific requirements, and common drafting errors as highlighted by a policy specialist at the Utah Department of Health and Human Services. The second part of the series of articles will focus on the public benefits available to disabled individuals in Utah, program parameters for such benefits, and how to qualify for available benefits.

General Overview and History of SNTs

Special Needs Trusts (SNTs) were first authorized in the 1993 Omnibus Budget Reconciliation Act (OBRA '93) as set forth in 42 U.S.C § 1396p(d)(4)(A), allowing the establishment of excluded trusts for disabled recipients of means-based governmental benefits.

Means-based public benefits are a category of public benefits that require an applicant to qualify financially and (usually medically) before receiving the benefit. Typically, means-based benefit programs look at both the income and assets of an applicant to determine whether they are eligible to receive the benefit. The most common means-based public benefits are the Medicaid and Supplemental Security Income (SSI) programs. In Utah, qualification for SSI will usually result in qualification for Medicaid benefits. The Veterans Administration also offers the Improved Pension program (Aid and Attendance) to eligible veterans and spouses of veterans, which is also means-based. Utah has several ancillary public benefits programs that are means based, covered in part two of this series.

Prior to the enactment of OBRA '93, a means-based beneficiary's receipt of an inheritance or a personal injury settlement would

prevent that beneficiary from qualification under SSI and Medicaid because their assets would be considered "countable" for those programs. After OBRA '93, a parent, grandparent, legal guardian of the individual, or a court could create a SNT to hold the assets of the beneficiary. The assets within the SNT would not be considered "countable" for such programs and would not impact the beneficiary's means-based benefits. As of December 13, 2016, a person who is mentally capable (but satisfies the government's definition of "disabled") can establish their own first-party SNT.

Another type of SNT created by OBRA '93 was the "Pooled Trust," under 42 U.S.C § 1396p(d)(4)(C), more fully described below, but created a means of pooling assets of disabled individuals for investment purposes in a trust established and managed by a non-profit corporation.

For the purposes of OBRA '93, a "disabled individual" is an individual "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3).

Types of SNTs and Utah Specific Language

The primary distinction between a first-party and third-party SNT is the origin of the assets composing the corpus of the trust and the obligation of a first-party SNT trustee to repay Medicaid upon the death of the trust beneficiary. A first-party SNT and a pooled trust may hold assets belonging to a disabled individual. A third-party SNT holds assets belonging to/or originating from someone other

KATHIE BROWN ROBERTS is a Certified Elder Law Attorney by the National Elder Law Foundation and the only Utah member of the Special Needs Alliance, an invitation-only national alliance of Special Needs Practitioners. She practices estate planning, special needs planning, and adult guardianships.



ALLISON BARGER is an associate attorney at Kathie Brown Roberts, PC in Sandy, Utah, and practices in the areas of estate planning, special needs planning, adult guardianship, and estate administration.



than the disabled individual. Assets held by properly drafted SNTs will not be countable for qualification for means-based public benefits.

First-Party SNTs

The requirements for a first party SNT are specific. A properly drafted first-party SNT in Utah requires familiarity with four sources of authority: (i) 42 U.S.C § 1396p(d)(4)(A); (ii) Utah Code § 26B-6-412; (iii) the Utah Department of Health and Human Services Medicaid Policy Manual § 512-2.3; and (iv) the Social Security Administration's Programs Operations Manual System (POMS). See UTAH MEDICAID POLICY MANUAL § 512-2.3 (2017), <https://bepmanuals.health.utah.gov/Medicaidpolicy/DOHMedicaid.htm>; *Program Operations Manual System (POMS)*, SSA, <https://secure.ssa.gov/apps10/poms.nsf/partlist> (last visited June 1, 2023). Failure to properly draft a first-party SNT will cause the trust corpus to be considered countable for the purpose of qualification for SSI and Medicaid.

Required Provisions for First-Party SNTs in Utah

42 U.S.C. § 1396p(d)(4)(A) requires that a first-party SNT contain the following provisions:

- The trust must be irrevocable;
- The trust contains the assets of an individual under age sixty-five;
- The trust beneficiary is disabled as defined in 42 U.S.C. § 1382c(a)(3);
- The trust is established for the benefit of such individual by the individual, a parent, grandparent, legal guardian of the individual, or a court; and
- The State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

In addition to the above list of provisions, Utah Code § 26B-6-412 requires:

- The trustee has discretionary power to determine distributions;
- The individual may not control or demand payments unless an abuse of the trustee's duties or discretion is shown;



Congratulations to Parsons Behle & Latimer Shareholder Erik A. Christiansen Utah State Bar President

Parsons Behle & Latimer is proud to announce the election of Erik A. Christiansen to the position of president of the Utah State Bar. Many thanks to this outstanding litigator for his leadership, effort and time spent in service to the Utah State Bar.

A Different LEGAL PERSPECTIVE

201 South Main Street, Suite 1800 | Salt Lake City, Utah 84111 | 801.532.1234

**PARSONS
BEHLE &
LATIMER**

IDAHO • MONTANA • NEVADA • UTAH • PARSONSBEHLE.COM

- The trust is irrevocable, except that the trust document may provide that the trust be terminated if the individual no longer has a disability, as defined in 42 U.S.C. § 1382c; and
- The trust is invalid as to any portion funded by property that is or may be subject to a lien by the state.

The Utah Department of Health and Human Services Medicaid Policy Manual is compiled by a policy team at the Utah Department of Health and Human Services. According to the policy coordinator, Marcel Larsen-Jones, the content of the policy manual “is created with applicable Federal and State statute, federal regulation, and guidance from CMS.”

In addition to the provisions cited above, Section 512-2.3 of the Utah Department of Health and Human Services Medicaid Policy Manual provides the following additional guidance for valid first-party SNTs in Utah. These provisions clarify that in addition to the Social Security Administration, a State Medicaid Review Board can make a disability determination for an individual; that a first-party SNT is for the sole benefit of the trust beneficiary; that trusts before the date of December 13, 2016, may not be established by the individual; that the trust may be amended under certain narrow circumstances even though the trust is irrevocable; and there is a specific language requirement for payback to the state of Utah after the death of a Medicaid recipient.

Below is an excerpt from Section 512-2.3 of the Utah Department of Health and Human Services Medicaid Policy Manual:

Exclude from resources the assets placed in a SNT when the trust meets all of the following criteria:

- The trust is established for an individual who meets the Social Security criteria for being disabled (Social Security Administration or State Medicaid Review Board decision).
- The trust is established for the **sole benefit** of the disabled individual by the individual, a parent, grandparent, legal guardian of the individual or the court.
- Trusts established by the disabled individual must be created on or after December 13, 2016.
- The disabled individual is under age sixty-five when the trust is established and **when the assets are transferred to the trust.**
- The trust contains the assets of the disabled individual, **or assets that would have become the individual’s assets but for actions to place them directly into the trust.**
- The trust is irrevocable, meaning that no one can amend, revoke or terminate the trust except that the trust may contain language that says the trust may be amended but only if necessary to conform with subsequent changes to federal or state requirements.
- The trust terminates upon the death of the disabled individual or exhaustion of the trust corpus and **specifically states that upon the death of the disabled individual, the trustees will notify the state Medicaid agency and pay all amounts remaining in the trust to the state up to the total medical assistance the state has paid on behalf of the disabled individual.**

Finally, SNT drafters are advised to double-check their trust provisions with Subchapter SI 01120.203 of the POMS. Although not statutory authority, the POMS is perhaps the most widely-cited resource with respect to SNT drafting, both first- and third-party SNTs, and policy. For example, the foregoing POMS section elaborates on the priority of the Medicaid payback requirement in a first-party SNT by adding that “the State(s) must be listed as the first payee(s) and have priority over payment of other debts and administrative expenses except those set forth in SI 01120.203E.”

Administrative expenses in Subchapter SI 01120.203E of the POMS that are forbidden to be paid before the State(s) [which rendered services to a beneficiary] are:

- Taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate;
- Inheritance taxes due for residual beneficiaries;

ANNE CAMERON MEDIATION

ATTORNEY | MEDIATOR | COLLABORATIVE PROFESSIONAL



VIRTUAL AND IN PERSON
MEETINGS AND MEDIATIONS

PARK CITY AND ZOOM

FOCUSING ON FAMILY LAW

DOCUMENT DRAFTING FOR
PRO SE DIVORCE, CUSTODY,
AND FAMILY LAW

1526 UTE BLVD., SUITE 206, PARK CITY, UT 84098
435-640-2158 | 435-659-8732

ANNE@AACLAWUTAH.COM
WWW.AACLAWUTAH.ORG
WWW.UTAHCOLLABDIVORCE.COM

- Payment of debts owed to third parties;
- Funeral expenses; and
- Payments to residual beneficiaries.

Therefore, although Utah Code Section 26B-6-412 and Section 512-2.3 of the Utah Department of Health and Human Services Medicaid Policy Manual do not specifically address permissible and impermissible administrative expenses to be paid after the death of the special needs trust beneficiary, the POMS does. Trustee powers that allow such payments before Medicaid would cause the trust to fail.

Third-Party SNTs


A third-party SNT is created by someone for the benefit of a beneficiary with a disability and will be funded with third-party assets, that is, assets not owned by the beneficiary. There is no specific statutory authority (federal or state) recognizing or authorizing third-party SNTs, but the POMS, which are also followed by Utah Medicaid, authorizes third-party SNTs in Subchapter SI 01120.200 et seq. Third-party trusts can be created and funded for a beneficiary of any age. However, the only way a

SNT can be created for a spouse is through a testamentary trust under a last will and testament. *See* 42 U.S.C. § 1382b(e)(2).

Third-party SNTs can be stand-alone trusts or testamentary in nature, arising from the death of the grantor either under a living trust or by last will and testament. Only stand-alone trusts can be funded prior to the death of the grantor and can receive bequests from individuals other than the grantor. Both stand-alone and testamentary trusts can be named as designated beneficiaries of life insurance policies or retirement accounts; however, care should be taken to make sure the testamentary trust in particular is properly designated and that the trust will comply with IRS rules.

There are several advantages to third-party SNTs. A third-party SNT does not have to be a sole benefit trust. One of the most significant advantages of a third-party SNT is that it is not subject to a Medicaid payback requirement, and Medicaid cannot lay claim to the assets in the third-party SNTs. Consequently, the grantor has control over designating the residual beneficiaries of the third-party SNT.

A note about inheritance. If a disabled beneficiary is inheriting



Change your
tune on paying
national prices.

dm Depomax Merit
EST. 2006
(801) 328-1188 | scheduling@depomaxmerit.com

estate assets from a decedent, the decedent must have created the third-party SNT or directed the bequest to an existing third-party SNT for an inheritance to be considered third-party assets or “originating from” someone other than the beneficiary. Although in certain circumstances, a trust may be modified or reformed in Utah to correct drafting language attempting to create a SNT, if a beneficiary is entitled to inherit from an estate, a third-party SNT cannot later be established to receive inheritance funds. At this point, the assets are the beneficiary’s and can only be funded into a first-party trust. Advance planning is key to the creation and funding of a third-party SNT.

Pooled Trusts

A pooled trust, authorized in 42 U.S.C. § 1396pd(4)(c), is similar to a bank that holds the assets of individual account holders and created and managed by a non-profit organization. Pooled trusts usually do not require a specific deposit amount (unlike some Trust departments) and many have low administration fees. They may hold either first-party funds or third-party funds. One primary benefit of a pooled trust is professional trust administration of assets to ensure compliance with means-based program parameters. Although pooled trusts accept assets of individuals at any age, transfer of assets by an individual over the age of sixty-five into a pooled trust in Utah will be considered a transfer for less than fair market value, affecting the ability of such individual to qualify for certain Medicaid benefits. *See* UTAH MEDICAID POLICY MANUAL § 512-2.3 (2017), <https://bepmanuals.health.utah.gov/Medicaidpolicy/DOHMedicaid.htm>.

To the extent that amounts remaining in the beneficiary’s account upon the death of the beneficiary are not retained by the trust, the trust pays to the state from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the state plan under this subchapter. The pooled trust instruments usually consist of an overarching “master trust” and a joinder agreement that contains provisions specific to the individual beneficiary.

ABLE Accounts

ABLE accounts were created by the Achieving a Better Life Experience Act that was passed in December 2014. ABLE accounts are a great complement to SNTs. Similar to 529 college savings accounts, ABLE accounts are for individuals with a disability where the onset of the disability began before age twenty-six. Recently passed federal legislation will raise the eligible age of onset to forty-six in January 2026. An ABLE account can only be established by an individual with a disability or a parent or guardian of the individual. Only one

account can be created per individual. Many states have their own ABLE programs, but individuals can enroll in any state’s program, as long as the state accepts out-of-state residents, which many do.

There is an annual limit for contributions to an ABLE account. The total annual contribution limit from any source is equal to the annual gift tax exclusion, which is \$17,000 in 2023. SNTs can also contribute to ABLE accounts, subject to the total annual contribution limit. However, if the individual is employed and does not participate in an employer-sponsored retirement plan, they can contribute their earnings up to the poverty line amount from their earnings in addition to the annual contribution limit. The funds in an ABLE account are not counted for purposes of eligibility for SSI up to \$100,000. Utah Medicaid excludes ABLE accounts in their entirety. *See* UTAH MEDICAID POLICY MANUAL § 521-44 (2016), <https://bepmanuals.health.utah.gov/Medicaidpolicy/DOHMedicaid.htm>.

Distributions from an ABLE account can be made for qualified disability expenses, which includes a wide variety of things such as education, food, housing, transportation, employment training and support, assistive technology, personal support services, health care expenses, financial management, and administrative services or other disability-related expense. Importantly, payments for food and shelter from an ABLE account do NOT result in a reduction in SSI benefits if the individual is receiving SSI. This is a great advantage to individuals who are receiving SSI benefits, as the SSI benefit amount is hardly enough to pay for everyday living expenses. The IRS makes sure that expenditures from an ABLE account are qualified disability expenses, so it is important to maintain records regarding disbursements.

When the individual dies, Medicaid may seek reimbursement from the funds for amounts paid by Medicaid after the creation of the ABLE account. However, if there are excess funds in the ABLE account or the individual did not receive Medicaid benefits, a beneficiary may be designated on the account.

Most Common Drafting Errors

Jeff Dart, a policy specialist from Utah Department of Health and Human Services, reviews Utah SNTs submitted to Utah Medicaid. According to Mr. Dart, the most common drafting flaw in first-party SNTs submitted for his review is failure to provide the Medicaid payback provision after the death of the special needs individual.

With respect to third-party SNTs, Mr. Dart states that drafters do not make it clear that a trustee is prohibited from accepting assets

originating from the trust beneficiary into trust (commingling third-party assets with first-party assets). Further, he advises ensuring that third-party SNTs specifically state that the assets do not belong to the trust beneficiary and would not have otherwise belonged to the trust beneficiary.

According to other Utah Medicaid policy specialists, other common drafting errors include:

- Use of Support Trust Language: Although the drafter makes distributions discretionary, the drafter includes mandatory language to distribute income and/or principal to the beneficiary for health, education, maintenance and support.
- Inserting a Medicaid Payback provision in a third-party SNT.
- Impermissible delegation of authority to trustee-pooled trust. For example, a pooled trust trustee cannot delegate responsibilities to a for-profit entity to be retained by the Trustee.
- Not specifically prohibiting the SNT beneficiary from serving as trustee of their SNT.
- Failing to make the trust irrevocable.

- Not educating the trustee on their responsibilities with the trust.
- Creating a SNT for an individual who has not been determined disabled by the SSA or the State Medicaid Review Board.
- Not placing the assets into the trust (they are listed in the schedules and exhibits but not actually moved to the trust ownership/control).
- Not setting up the financial accounts to identify the trust as the owner.

In conclusion, SNTs are essential planning tools for individuals with disabilities for enhancing their lives. Proper drafting can preserve critical public benefits for individuals with disabilities and save significant time and money for the beneficiary. However, in assisting clients who are receiving means-based public benefits or have family members receiving those benefits, it is also important to understand some basic elements of what is available and how those benefits could be impacted without proper planning. Therefore, the second part of this series will explore public benefits in Utah and proper SNT trust administration to preserve means-based benefits such as SSI and Medicaid.

Better protecting your loved ones shouldn't be a hassle.



Secure up through **\$500,000** of Life Insurance *quickly and easily* with **QuickDecisionSM** exclusively for **Bar Association Members²**.

No Medical Exam Required • Approval Decision Within Minutes

This opportunity has been made available through the American Bar Endowment, a non-profit organization supporting lawyers and the legal profession.

▶ **See your cost and more³: SeeMyCost.com/Utah**



Underwritten by New York Life Insurance Company, 51 Madison Avenue, New York, NY 10010 on Group Policy Form GMR.

¹ QuickDecisionSM is for lawyers 64 and under on up through \$500,000 of coverage.

² The terms "Bar Association Member" and "Member" when used herein mean a practicing lawyer who is a member of the American Bar Association (ABA) or any entity that is represented in the ABA's House of Delegates, including state and many local and specialty bar associations.

³ Including features, costs, eligibility, renewability, limitations and exclusions.

New York Life's state of domicile is New York and its NAIC ID# is 66915.

Bonnie Czarny (ABE) is licensed in AR, Insurance License #404091 and in CA, Insurance License #0H99426.

ABE-7043

