

Thoughts on Supporting Healthy Dependents Using Funds from a Disabled Parent's or Spouse's Special Needs Trust

David Lillesand, Esq.

www.FloridaSpecialNeedsLaw.com

(305) 670-6999

The issue. Can the Trustee of a first party, self settled d4A Special Needs Trust designed to retain SSI and SSI-related Medicaid, pay the costs of raising the disabled person's children, and supporting his or her spouse, in the absence of a court order, without violating the SSI/Medicaid "sole benefit rule"? This paper indicates that the answer is "yes."

Support for the most restrictive view. Traditional SNT theory, as yet unexamined in any depth, holds that a Special Needs Trust must be a "sole benefit trust." This is based on interpretations of two statutes: the OBRA '93 statute that created SNTs, and the anti-transfer of assets (resources) statute. The first statute that permits SNTs creates a "for the benefit" rule and states that:

42 U.S.C. §1396p(d)(4)(A): A trust containing the assets of an individual under age 65 who is disabled (as defined in section [1614\(a\)\(3\)](#)) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if 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 title."

Note that the d4A statute does not say "for the sole benefit of such individual." Therefore, in interpreting this first statute, the Social Security Administration, in its POMS for administering the SNT provisions for the SSI program, described the "for the benefit" rule as follows:

SI 01120.201.F.1. Consider a trust established "for the benefit" of an individual if payments of any sort from the corpus or income of the trust are paid to another person or entity so that the individual derives some benefit from the payment. [emphasis added].

The SSA POMS clearly does not require that the payment must produce exclusive benefit for the disabled individual, just that the disabled person derives some benefit from the trust payment.

The second statute containing the anti-transfer of resources (assets) rules, and which permits the funding of the d4A trust by transfer of the disabled person's assets to the d4A trust, is more restrictive. It is the source of the "sole benefit" requirement:

42 U.S.C. § 1382b(c)(1)(C)(ii)(IV): An individual shall not be ineligible for benefits under this subchapter by reason of the application of this paragraph to a disposal of resources by the individual or the spouse of the individual, to the extent that...the resources...were transferred to a trust (including a trust described in section [1396p \(d\)\(4\)](#) of this title) established solely for the benefit of an individual who has not attained 65 years of age and who is disabled; [emphasis added].

The corresponding SSA POMS provision for the transfer of resources penalty statute is, at first blush, consistently more restrictive. POMS SI 01120.201.F.2. contains four main provisions:

1. "Consider a trust established **for the sole benefit of** an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life."
2. "However, the trust may provide for reasonable compensation for a trustee(s) to manage the trust, as well as reasonable costs associated with investment, legal or other services rendered on behalf of the individual with regard to the trust." "In defining what is reasonable compensation, consider the time and effort involved in providing the services involved, as well as the prevailing rate of compensation for similar services considering the size and complexity of the trust."
3. "Do not consider a trust that provides for the trust corpus or income to be paid to or for a beneficiary other than the SSI applicant/recipient to be established for the sole benefit of the individual."
4. "However, payments to a third party that result in the receipt of goods or services by the individual are considered for the sole benefit of the individual."

Read literally, the second sentence of the above POMS section would only permit payment for reasonable trustee compensation, costs associated with investment, legal and other services. The third provision seems only to disqualify a trust, as an exempt resource, that by its written terms provides for payments to a beneficiary other than the disabled person, as not established solely for the benefit of the disabled person. The fifth sentence contained in item number four above, however, states a more expansive definition of permissible payments, the receipt of goods or services by the individual results in meeting the "sole benefit" rule. Note that it doesn't state receipt of goods or services solely by the individual.

Traditional trust law limits the application of the "sole benefit rule." What counts as the receipt of goods or services by the disabled individual? A d4A trust is a first party or self-settled grantor trust. If the sole benefit rule limits what a trustee can pay for – goods or services that are for the sole benefit of the disabled person, these anti-transfer of resources provisions fly in the face of long-standing trust law for self-settled first party trusts. In Florida and most jurisdictions, self-settled/first party grantor trusts are not safehavens from the claims of the self-settling beneficiary's creditors. Only a few states, like Delaware and Alaska, have Asset Protection Trusts where an individual can seek to shelter the individual's personal assets from creditors. It would seem, therefore, that sole benefit trusts, such as d4A SNTs are not only permitted, but required, to pay just debts.

Debts with the force of law – civil and criminal. Certain debts seem to be unavoidable, and certainly within the reach of creditors, given the prohibition against sheltering debts by self-settled spendthrift trusts. For example, how could a d4A trustee refuse to pay the IRS for unpaid federal income taxes, federal student loan obligations (not even dischargeable in bankruptcy), deficiency judgments in mortgage foreclosure and auto repossession actions, and civil judgments for defaults in payment of personal loans, and court-ordered child support and alimony obligations.

Failure to pay certain creditors, even without a court order or judgment, are federal or state crimes, such as non-payment of federal income taxes (a felony), and non-payment of traffic tickets (a misdemeanor). Failure to pay court-ordered child support or alimony can result in criminal contempt and incarceration, as well as enforceable civil judgments against a person's assets, including those in a d4A or d4C trust.

Specific criminal and civil rights regarding support. Failure to provide food, clothing, shelter and medical care for children in the disabled person's care is a felony, punishable by incarceration, even in the absence of a court order for child support. For example, Florida Criminal Statute §827.03(3) defines non-support of a child, styled "Neglect of a child," as a second or third degree felony and defined as:

A caregiver's failure or omission to provide a child with the care, supervision, and services necessary to maintain the child's physical and mental health, including, but not limited to, food, nutrition, clothing, shelter, supervision, medicine, and medical services that a prudent person would consider essential for the well-being of the child.

Note that the criminal statute is not limited to parents. It imposes criminal liability on a "caregiver" which presumably could include a step-parent head of the family.

There is no comparable criminal statute for failure to support a spouse. However, Under the theory that marriage is a contract, the Florida legislature has created an action for maintenance of a spouse without requiring a divorce (dissolution of marriage) action.

Florida Statutes, §61.09: If a person having the ability to contribute to the maintenance of his or her spouse...fails to do so, the spouse who is not receiving support...may apply to the court for alimony...without seeking dissolution of marriage, and the court shall enter an order as it deems just and proper.

Cannot the trustee "settle" the claim before it is filed? The law always favors the resolution of claims before they become litigation.

Based on the foregoing criminal statutes for support of spouses and children, it seems that the trust assets could be used to make payments for which failure to pay would result in serious penalties, as would failure to pay income taxes.

Public Policy Argument. Another argument for using the disabled beneficiary's Special Needs Trust funds to support spouses and particularly children, in apparent contradiction to the "sole benefit rule," has to do with the very nature of the personal injury settlements or court verdicts that commonly form the excess resources of the majority of SNT trust estates.

One of the elements of a personal injury recovery is economic loss, particularly, past lost income and future lost income reduced to present day value. It is from their income that individuals support their families. The purpose of providing settlement funds or court judgments is to make the injured party whole to, among other things, support his or her family. The size of the settlement is calculated based in part on the amount of income the injured party was making in the past, with a projection for lost wages in the future. It is then reduced to present day value and awarded to the plaintiff. Often these calculations result in tens or hundreds of thousands of dollars. If the plaintiff is a recipient of SSI and SSI-related Medicaid, he or she may use the personal injury settlement funds to establish a Special Needs Trust.

How ironic would it be if the rules for administering Special Needs Trusts would prevent the use of the funds for support of the disabled person's family, when the size of the trust estate was based in part on the calculation of the lost earnings that would be used to support the spouse and children. It is hard to believe that Congress, in fashioning the d4A and transfer of resources statutes intended to have a disabled parent collect all the funds for loss of future earnings, aggregate them, and then require that instead of supporting the spouse and children as intended,

use the lost earnings only on the disabled person, leaving the spouse and children without a means of support.

Summary. There is no federal regulation or even an SSI POMS provision that addresses the use of d4A Special Needs Trust funds to pay items of support of the disabled person's spouse or children. The published "rules" neither allow, nor disallow, such payments. Public policy and state non-support criminal statutes, however, would indicate that withholding support for spouses or children would violate the law. The Social Security Administration has indicated that payment of taxes, administration costs of the trust, and attorney's fees do not violate the sole benefit rule. Because d4A Special Needs Trusts are self-settled trusts not safe from the claims of legitimate creditors, it would seem not only right, but proper, that trust funds be used to support the disabled person's legal dependents.

A copy of the referenced statutes follows.

Statutes and POMS relating to "for the benefit" and "established solely for the benefit" standards in SSI and SSI-related Medicaid statutes and rules

Individual special needs trust provisions regarding "for the benefit" of the disabled individual versus "established solely for the benefit" of the disabled individual:

"For the benefit" standard:

Medicaid Special Needs Trust Statute – 42 USC §1396p(d)(4)(A):

(4) This subsection [declaring that trusts established with the assets of an individual or spouse will be considered a resource for Medicaid eligibility purposes] shall not apply to any of the following trusts:

(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section [1614\(a\)\(3\)](#)) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if 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 title.

"Established solely for the benefit" standard:

Medicaid Anti-Transfer of Assets Statute:

42 U.S.C. § 1396p. Liens, adjustments and recoveries, and transfers of assets

(c) Taking into account certain transfers of assets

(2) An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that—

(B) the assets—

(iv) were transferred to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section [1382c \(a\)\(3\)](#) of this title);

SSI Anti-Transfer of Resources Statute

42 U.S.C. § 1382b. Resources

(c) **Disposal of resources for less than fair market value**

(1)

(C) An individual shall not be ineligible for benefits under this subchapter by reason of the application of this paragraph to a disposal of resources by the individual or the spouse of the individual, to the extent that—

(ii) the resources—

(IV) were transferred to a trust (including a trust described in section [1396p \(d\)\(4\)](#) of this title) established solely for the benefit of an individual who has not attained 65 years of age and who is disabled;

Criminal and Civil Statutes on Non support of spouse and kids

Florida Criminal Statute, §827.03 Abuse, aggravated abuse, and neglect of a child; penalties.--

827.03 Abuse, aggravated abuse, and neglect of a child; penalties.—

"3)(a) "Neglect of a child" means...A caregiver's failure or omission to provide a child with the care, supervision, and services necessary to maintain the child's physical and mental health, including, but not limited to, food, nutrition, clothing, shelter, supervision, medicine, and medical services that a prudent person would consider essential for the well-being of the child;..." is punishable as a second degree or third degree felony.

(b) A person who willfully or by culpable negligence neglects a child and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the child commits a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(c) A person who willfully or by culpable negligence neglects a child without causing great bodily harm, permanent disability, or permanent disfigurement to the child commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(4) For purposes of this section, "maliciously" means wrongfully, intentionally, and without legal justification or excuse. Maliciousness may be established by circumstances from which one could conclude that a reasonable parent would not have engaged in the damaging acts toward the child for any valid reason and that the primary purpose of the acts was to cause the victim unjustifiable pain or injury.

Florida Criminal Statute, §827.06 Nonsupport of dependents.--

(1) The Legislature finds that most noncustodial parents want to support their children and remain connected to their families. The Legislature also finds that while many noncustodial parents lack the financial resources and other skills necessary to provide that support, some parents willfully fail to provide support to their children even when they are aware of the obligation and have the ability to do so. The Legislature further finds that existing statutory provisions for civil enforcement of support have not proven sufficiently effective or efficient in gaining adequate support for all children. Recognizing that it is the public policy of this state that children shall be maintained primarily from the resources of their parents, thereby relieving, at least in part, the burden presently borne by the general citizenry through public assistance programs, it is the intent of the Legislature that the criminal penalties provided for in this section are to be pursued in all appropriate cases where civil enforcement has not resulted in payment.

(2) Any person who willfully fails to provide support which he or she has the ability to provide to a child or a spouse whom the person knows he or she is legally obligated to support commits a misdemeanor of the first degree, punishable as provided in s. [775.082](#) or s. [775.083](#).

(3) Any person who is convicted of a fourth or subsequent violation of subsection (2) or who violates subsection (2) and who has owed to that child or spouse for more than 1 year support in an amount equal to or greater than \$5,000 commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

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