

## Using Pooled Trusts In Estate Planning

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When family members provide in their estate plans for individuals with disabilities, a bequest to a stand-alone special needs trust or to a special needs trust included in the will or revocable living trust is the usual vehicle of choice, especially when there is a need to protect eligibility for public benefits. However, there are times when an individual special needs trust (SNT) is impractical. The cost to administer the trust or problems in finding a suitable trustee can be daunting. Utilizing a pooled trust in some cases may be a better option. This article will explore the whys and hows of using a pooled trust as part of the estate planning process.

### What Is a Pooled Trust?

In 1993 Congress enacted the Omnibus Budget Reconciliation Act of 1993 (OBRA '93) which authorized the use of two types of SNTs to preserve the assets of a person with a disability, while at the same time permitting that person to preserve eligibility for public benefits such as Supplemental Security Income (SSI) and Medicaid.

The first and most common type of SNT is commonly known as an individual or (d)(4)(A) SNT. This trust must be established by the parent or grandparent of the beneficiary (the person with the disability) or by that person's court-appointed guardian (or conservator) or by a court order.

The second type of SNT that was authorized by OBRA '93 is commonly known as a pooled special

needs trust or (d)(4)(C) SNT. Pooled SNTs are significantly different from (d)(4)(A) trusts in that:

- They are established and managed by a nonprofit association (usually a charitable entity organized under section 501(c)(3) of the Internal Revenue Code);
- A separate account is maintained for each beneficiary of the trust, but for investment and management purposes the various accounts are pooled, hence the name pooled trust;
- The pooled trust sub-account must be established by the beneficiary's parent, grandparent or guardian, by the court, or by the person with the disability; and
- Upon the death of the beneficiary, the balance remaining in the account (if any) may be retained by the charity establishing the pooled trust, to be used for other beneficiaries of the pooled trust. A few states have required that some or all of the trust funds remaining at the death of the beneficiary be repaid to the state Medicaid agency, but most states allow the beneficiary to elect that the charitable organization retain the balance at the beneficiary's death.

A properly drafted individual or pooled SNT will accomplish the same goal – preserving the beneficiary's eligibility for SSI and Medicaid while sheltering the trust funds to supplement government benefits as needed.

### Distinction Between a Beneficiary's Assets and the Donor's Assets

The statutory authority in OBRA '93 for an individual SNT or a pooled SNT refers to a trust containing the individual beneficiary's assets, not assets belonging to a third party. Even so, a pooled SNT in many cases can be a vehicle for receiving

assets from a third party such as a parent or grandparent. There is no restriction in OBRA '93 on pooled SNTs accepting third-party funds. Unless the pooled SNT's own rules prohibit donations from third parties, parents and grandparents should be able to make bequests to an existing pooled trust account as long as the account was established under the federal law requirements discussed above. In fact, many pooled trusts welcome funds from third parties so long as the beneficiary qualifies as a beneficiary with a disability.

Some pooled SNT nonprofit organizations have created a companion trust specifically to accept donations from third parties. The trust is administered as a pooled trust, but the third-party trust does not accept any funds owned by the beneficiaries with disabilities. For that reason, the third-party pooled SNT does not have to require that funds remaining in the trust at the beneficiary's death be retained by the nonprofit that set up the pooled trust or be repaid to the state Medicaid agency.

### **Advantages of Using a Pooled Trust in the Estate Plan**

An advantage of leaving a bequest to a pooled SNT is that the trust is already in existence and presumably has a track record for how it administers assets for beneficiaries with disabilities. Two of the biggest stumbling blocks that families face in establishing a SNT for a loved one with a disability are (1) the economics of trust administration and (2) the stability of ongoing administration.

One of the key decisions in drafting any special needs trust is selecting a trustee. For any number of reasons, having a family member serve as the trustee is not necessarily a good idea. There may be actual conflicts of interest (for example, the beneficiary's sibling who is named as trustee is also a remainder beneficiary of the trust) or there may be a well-founded desire not to burden another family member with the ongoing responsibility of the trusteeship. If government benefit issues are complicated, family members may lack the needed

expertise and make unintentional but costly mistakes that affect eligibility for benefits.

In some cases, the family may turn to a professional trustee such as a bank or trust company for assistance. Unfortunately, most professional trustees will not accept a trust that has less than a certain minimum value, often as high as \$500,000 or \$1,000,000. The requirement of a high minimum trust balance rules out a professional trustee for a significant number of families. A pooled SNT can fill this gap. Most pooled SNTs will permit creation of accounts for any sum of money, regardless of how small.

Pooled SNTs can also provide stability of ongoing administration. The nonprofit agency administering the pooled SNT should endure beyond the lifetime of any one individual trustee. Trustees of pooled SNTs have expertise in SNT issues, including government benefit eligibility rules and services available in the community for individuals with disabilities.

So what is the disadvantage of a pooled SNT versus an individual third-party SNT? The primary one is that, as noted above, most pooled SNTs must provide for retention of the remaining trust assets when the trust beneficiary dies. Depending upon the state and the trust, any funds remaining in the beneficiary's sub-account must be paid over to the charity for its general charitable purposes, paid to the state Medicaid agency for Medicaid benefits the beneficiary received during his or her lifetime, or some combination of those two retention requirements. Where these purposes coincide with the charitable desires of the donors, this may not be a problem. However, where the donors want any remainder to go to other family members, problems can arise. It is prudent for the professional advisor or family member to check with the trustee of the pooled SNT before the account is established if this is important. If the pooled SNT has a companion SNT specifically designated to receive funds exclusively from third parties, it may be possible to leave any trust balance to other family members and avoid the requirement that the trust balance be retained by the charity or repaid to the state Medicaid agency.

## Opening a Pooled Trust Account

It is very simple to set up a pooled SNT account. The master trust is already in existence so it is simply necessary to complete enrollment forms to open up a new account for the beneficiary. Enrollment forms may be available from the pooled SNT's website. The account must be set up initially by the beneficiary, a parent or grandparent, a guardian or conservator, or the court. Sometimes the pooled SNT requires that the person opening the account first consult with an attorney. The enrollment forms usually ask for information about the beneficiary's needs and individuals who can be consulted regarding distributions on behalf of the beneficiary.

Most pooled SNTs charge an initial enrollment fee and an annual maintenance fee. This of course varies from trust to trust. Some pooled SNTs use a sliding scale based on the value of the account, and some trusts may waive the fees altogether if the balance in the account is small.

Even if the primary contribution to the pooled SNT is going to occur upon the death of the donor, it may be prudent to establish the account during the donor's lifetime, funding it with a relatively small amount initially. In addition to funding a pooled SNT account through a will, a pooled SNT account could also be the designated beneficiary of a life insurance policy.

Once a pooled SNT account is opened and funded, the trustee should administer the account like any other special needs trust. Requests to the trustee for distributions may be made by the beneficiary or by individuals designated in the enrollment forms to make requests on behalf of the beneficiary. It will be up to the discretion of the trustee to determine if a requested distribution is appropriate. If the beneficiary is unable to make distribution requests on his or her own behalf and if there are no designated friends or family members to do so, it may be necessary for the trustee to assign a case manager to determine how the trust can benefit the beneficiary.

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## Conclusion

When providing for loved ones with disabilities, a bequest to a pooled SNT, whether a (d)(4)(C) or a companion third-party type, may be an appropriate alternative to establishing a stand-alone third-party SNT or a special needs trust as a sub-trust in one's will or revocable living trust. Family members should consult with an attorney familiar with special needs trusts to compare the options and then decide which type of trust will best meet their needs.

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