Special Needs Trusts are designed to provide for the long-care of individuals who have physical or intellectual impairments and are unable to provide for themselves, whether they are elderly or very young. SNTs are intended to preserve the beneficiary’s eligibility for public benefits – Social Security, Medicare, Medicaid, SSI, and others – while maximizing the private resources of the beneficiary’s family. Crucial aspects of working with these trusts are drafting distribution clauses and selecting the right trustee to make financial and health-care related decisions for the beneficiary. Structuring and drafting SNTs can be a complex process of tradeoffs with the care of a valued family member in the balance. This program will provide you with a practical guide to the types of SNTs and the situations in which each is most appropriate, preserving public benefit eligibility, discuss distribution policies and trustee selection.

- Planning and drafting issues with Special Needs Trusts
- Types of SNTs and eligibility standards
- Relationship of SNTs to public benefits – Social Security, Medicare, Medicaid, SSI
- Key considerations in drafting distribution clauses
- Choosing individual and institutional trustees, and the use of “pooled trusts”
- Administrative issues in SNTs

**Speaker:**

**Martha C. Brown** is an attorney at the law firm of Martha C. Brown & Associates, LLC in St. Louis, Missouri, where she has more than 25 years’ experience in the fields of elder law and estate planning. She has an extensive practice advising the elderly and their families on their trust and estate planning matters with an emphasis on Special Needs Trusts. She is a Fellow of the American College of Trust and Estate Counsel, a former board member and Fellow of the National Academy of Elder Law Attorneys, and a board member of the Special Needs Alliance. Ms. Brown studied at the University of Bath, in Bath, England, received her B.A. from the University of Vermont, and received her J.D. from the University of Missouri-Kansas City.
VT Bar Association Continuing Legal Education Registration Form

Please complete all of the requested information, print this application, and fax with credit info or mail it with payment to: Vermont Bar Association, PO Box 100, Montpelier, VT 05601-0100. Fax: (802) 223-1573 PLEASE USE ONE REGISTRATION FORM PER PERSON.

First Name __________________________ Middle Initial____ Last Name________________________
Firm/Organization ________________________________________________________________
Address __________________________________________________________________________
City __________________________ State __________ ZIP Code __________________________
Phone # __________________________ Fax # ______________________
E-Mail Address _____________________________________________________________________

Drafting Special Needs Trusts
Teleseminar
January 26, 2017
1:00PM - 2:00PM
1.0 MCLE GENERAL CREDITS

VBA Members $75
Non-VBA Members $115

NO REFUNDS AFTER January 19, 2017

PAYMENT METHOD:
Check enclosed (made payable to Vermont Bar Association) Amount: _________
Credit Card (American Express, Discover, Visa or Mastercard)
Credit Card # _____________________________ Exp. Date _____________
Cardholder: ________________________________
Please note: This form is for your records in the event you are audited

Sponsor: Vermont Bar Association

Date: January 26, 2017

Seminar Title: Drafting Special Needs Trusts

Location: Teleseminar - LIVE

Credits: 1.0 MCLE General Credit

Program Minutes: 60 General

Luncheon addresses, business meetings, receptions are not to be included in the computation of credit. This form denotes full attendance. If you arrive late or leave prior to the program ending time, it is your responsibility to adjust CLE hours accordingly.
Planning with Special Needs

The Basics

Martha C. Brown
Martha C. Brown & Associates, LLC
Attorney at Law
220 W. Lockwood, Suite 203
St. Louis, MO 63119
Telephone: (314) 962-0186
mcbrown@elderlawstlouis.com
Why Use a Special Needs Trust (SNT)?

- Tool for sheltering resources for persons with disabilities;
- Improve the quality of life;
- Allows the disabled person to continue to receive government benefits, even though they are the beneficiary of a SNT; and
- Necessary for Trustee of a SNT to understand the rules of government benefits.
What is the meaning of *Disability*?

- As defined by the Social Security Administration:
  - Over the age of 65;
  - Blind; or
  - Unable to do any substantial gainful activity due to severe physical or mental impairments that will
    - Result in death or
    - Continue for not less than one year
What is the meaning of Disability?

- If someone receives
  - Supplemental Security Income;
  - Social Security Disability; or
  - CLB (formerly known as DAC);
- Then that person is disabled according to the Social Security Administration
How the Government Benefits Systems Work
# Comparison of Three Social Security Programs

<table>
<thead>
<tr>
<th></th>
<th>SSI</th>
<th>SS</th>
<th>SSDI</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supplemental Security Income</td>
<td>Social Security</td>
<td>Social Security Disability Income</td>
<td></td>
</tr>
<tr>
<td>Disability</td>
<td>Retirement</td>
<td>Disability</td>
<td></td>
</tr>
<tr>
<td>Cash + Medicaid</td>
<td>Cash</td>
<td>Cash + Medicare (After 2 years)</td>
<td></td>
</tr>
<tr>
<td>No work history</td>
<td>Work History</td>
<td>Work History</td>
<td></td>
</tr>
<tr>
<td>Income Cap - $733/month in 2017</td>
<td>Income Cap - $16,920 per year in 2017, if under 65</td>
<td>Income Cap - $1,130 per month in 2017</td>
<td></td>
</tr>
<tr>
<td>Earned &amp; unearned income</td>
<td>Earned income</td>
<td>Earned income</td>
<td></td>
</tr>
<tr>
<td>Resource cap - $2,000.00</td>
<td>No resource cap</td>
<td>No resource cap</td>
<td></td>
</tr>
<tr>
<td>Minimum cash benefit</td>
<td>Insurance</td>
<td>Insurance</td>
<td></td>
</tr>
<tr>
<td>Food and shelter</td>
<td>Unrestricted</td>
<td>Unrestricted</td>
<td></td>
</tr>
<tr>
<td>State supplements</td>
<td>Uniform in all states</td>
<td>Uniform in all states</td>
<td></td>
</tr>
<tr>
<td>US citizens only</td>
<td>All workers</td>
<td>All workers</td>
<td></td>
</tr>
<tr>
<td>May also have SSDI</td>
<td>May not have SSI or SSDI</td>
<td>May also have SSI</td>
<td></td>
</tr>
<tr>
<td>No dependent coverage</td>
<td>Covers dependents</td>
<td>Covers dependents</td>
<td></td>
</tr>
</tbody>
</table>
## Comparison of Medicare and Medicaid

<table>
<thead>
<tr>
<th></th>
<th>Medicaid (MO HealthNet)</th>
<th>Medicare</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Program:</strong></td>
<td>Health care</td>
<td>Health Insurance</td>
</tr>
<tr>
<td><strong>Administered by:</strong></td>
<td>State</td>
<td>Federal</td>
</tr>
<tr>
<td><strong>Eligibility:</strong></td>
<td>Must Qualify</td>
<td>Entitlement</td>
</tr>
<tr>
<td><strong>Qualifications:</strong></td>
<td>Financial and Disability</td>
<td>Age or Disability</td>
</tr>
<tr>
<td><strong>Covers:</strong></td>
<td>Skilled nursing care, Intermediate nursing care, Medical care, Prescriptions</td>
<td>Hospitalization, 100 days maximum in a skilled nursing or rehabilitation facility, Physician visits, Medicare Part D-Prescriptions</td>
</tr>
<tr>
<td><strong>Contribution:</strong></td>
<td>Reimbursement required</td>
<td>Premiums and co-pay</td>
</tr>
<tr>
<td><strong>Estate Recovery:</strong></td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>
SNT Requirements

- Written
- Distributions discretionary by the trustee
- Beneficiary not entitled to receive income or principal
- Trustee encouraged not to make any distributions that would jeopardize beneficiary’s eligibility for benefits
SNT Requirements

- Trust gives Trustee authority to make distributions which are in beneficiary’s best interest but may temporarily stop benefits
- Disabled individual should be the sole beneficiary of the trust during her lifetime
- Irrevocable
Types of SNTs

- Third Party SNTs
- Self Settled Trusts
  - (d)(4)(A)
  - Miller Trust (d)(4)(B) – very limited use in 209(b) states
    - Only viable for home – community based waiver in 209(b) states
  - (d)(4)(C)
- Facts and circumstances will determine the type of trust
# Special Needs Trust

<table>
<thead>
<tr>
<th>Trust Type</th>
<th>(d)(4)(A), Self-Settled</th>
<th>(d)(4)(C), Pooled</th>
<th>Third-party SNT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Established by</td>
<td>Individual, Parent, Grandparent..</td>
<td>Individual, Parent...</td>
<td>Other than disabled</td>
</tr>
<tr>
<td>Assets Funding</td>
<td>Disabled person</td>
<td>Disabled person</td>
<td>Third person</td>
</tr>
<tr>
<td>Beneficiary</td>
<td>Disabled person only</td>
<td>Disabled person</td>
<td>Anyone</td>
</tr>
<tr>
<td>Grantor Trustee</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Distributions</td>
<td>To third parties</td>
<td>To third parties</td>
<td>To third parties</td>
</tr>
<tr>
<td>Payback</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Disability</td>
<td>SSA Definition</td>
<td>SSA Definition</td>
<td>SSA Definition</td>
</tr>
<tr>
<td>GiftTax Exclusion</td>
<td>Cannot use</td>
<td>Cannot use</td>
<td>Can use</td>
</tr>
<tr>
<td>Testamentary</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Age Limit</td>
<td>Funded by 65</td>
<td>No (check state)</td>
<td>None</td>
</tr>
<tr>
<td>Frequent used for</td>
<td>PI or Inheritance</td>
<td>Same but lesser</td>
<td>Any use</td>
</tr>
</tbody>
</table>
Third Party SNT

- Established by someone other than the disabled person
- Established with assets that never belonged to the beneficiary
- Irrevocable
- No Medicaid payback
- “Tidrow” trust
- Trustee has total discretion in making distributions
Self-Settled SNT
42 U.S.C. § 1396p(d)(4)(A)

- Called (d)(4)(A) or Medicaid Payback trusts
- Irrevocable
- Beneficiary must be:
  - Disabled
  - Under 65 years of age
Self-Settled SNT
42 U.S.C. § 1396p(d)(4)(A)

- Medicaid reimbursement at death of the person with the disability
  - To all states that have provided Medicaid services
  - If not enough remains in trust to pay all states providing services, must pro-rate the reimbursements amongst the several states
- Must be funded before beneficiary reaches the age of 65
Self-Settled SNT
42 U.S.C. § 1396p(d)(4)(A)

- Parent, Grandparent, Legal Guardian or Court are only people that can create the Trust
  - As of December 13, 2016, Special Needs Fairness Act became law (P.L. 114-2155)
  - Permits disabled persons to create their own (d)(4)(A) trusts
Self-Settled SNT
42 U.S.C. § 1396p(d)(4)(A)

- Social Security issued an Emergency Message (EM) on December 13, 2016 advising Social Security workers that individuals can now create their own (d)(4)(A) trusts
  - EM-16053
  - Note: the EM does not extend to trusts created before December 13, 2016
Self-Settled SNT
42 U.S.C. § 1396p(d)(4)(C)

- Called (d)(4)(C) or Pooled trusts
- Person with disability transfers own funds to a non-profit organization as trustee
- Funds are part of a pooled trust for disabled persons
- Irrevocable
- Can be self-created or created by a Parent, Grandparent, Legal Guardian or Court
Self-Settled SNT
42 U.S.C. § 1396p(d)(4)(C)

- No age limit for Beneficiary
  - Some states have limited use of pooled income trusts to beneficiaries under the age of 65
- Non-profit organization can retain a portion of the trust fund at death of Beneficiary
  - Up to 100% of Trust Corpus
Pooled Income Trusts

- Missouri has a pooled income trust, Midwest Special Needs Trust (www.midwestspecialneedstrust.com)
- Other National Pooled Income Trusts
  - Secured Futures
    - www.securedfutures.org
  - Commonwealth Community Trust
    - www.Commonwealthcommunity.org
Responsibilities of a SNT Trustee

- Understand which distributions would jeopardize benefits being received:
  - How income is handled and
  - How payments for food and shelter might affect eligibility
- Periodic reporting required for SSI/Medicaid recipients
Responsibilities of a SNT Trustee

- Prompt response to any communications or notices received from Social Security or MO HealthNet
- Consider having co-trustees of Special Needs Trusts
Choice of Trustee

- Family members often have little fiduciary experience
- Family members often do have superior knowledge of the disabled person
- Educate family member trustee
Choice of Trustee

- Utilize co-trustees include a family member
- Courts may desire or require professional trustees
Drafting Considerations

- Not just a form
- Risk
  - Loss of client benefits
  - Attorney malpractice
  - Disciplinary action
- Grantor trust provisions for income tax
- See I.R.C. §§671-679
- Net income taxed to beneficiary
  - Not on the IRS Form 1041
Drafting Considerations

- Typically lower tax rates
- Refrain from using HEMS standard in distribution
  - Health, Education, Maintenance and Support
- Cost of trust document and trust administration vs use of ABLE Accounts
ABLE Accounts

- ABLE Accounts are beneficial to individuals without large amounts of money to fund the trust
  - $14,000 maximum amount to put in a yearly ABLE Account
- ABLE Accounts can pay for housing expenses without any reduction in the individual’s SSI amount, unlike special needs trusts
  - Distributions for housing – See POMS
Conclusion

- Goal is to maintain eligibility for government programs for disabled persons
- At times, conflicts with a family member’s desire to provide support and care for their family member
Conclusion

- A properly prepared SNT is the tool for sheltering resources so that the disabled person can continue to receive government benefits and to allow family members to provide assistance.
- Knowledge of the public benefits programs is essential.
QUESTIONS??

Martha C. Brown
Martha C. Brown & Associates, LLC
Attorney at Law
220 W. Lockwood, Suite 203
St. Louis, MO 63119
Telephone: (314) 962-0186
Special-Needs Trusts: Drafting and Administration Issues

Martha C. Brown, CELA
Martha C. Brown & Associates, LLC
220 W. Lockwood Avenue
Suite 203
St. Louis, Missouri 63119
(314) 962-0186
mcbrown@elderlawstlouis.com
Special-Needs Trusts: Drafting and Administration Issues
By and Martha Brown*

Introduction

A special-needs trust (“SNT”), also known as a supplemental-needs trust, is a trust that is used primarily to supplement, and not replace, any public benefits that the beneficiary may receive. Several different forms of SNTs were codified by the Omnibus Budget Reconciliation Act in 1993 (OBRA’93) and different types of SNTs apply to different situations. 42 U.S.C. § 1396p(d)(4)(A), (B), and (C) (2000). An SNT can be self-settled or established by third parties. 42 U.S.C. § 1396p(d)(2)(A)(2000). An SNT can either be created through a testamentary trust or can exist as a stand-alone trust. Id. An SNT can contain the assets of the individual with a disability or can be funded with assets from a third party. Id. 42 U.S.C. § 1396p(d)(2)(B)(2000). The particular set of facts and circumstances will determine the type of SNT that is used and what requirements must be satisfied.

Kinds of Special Needs Trust

The three types of SNTs used for public benefits planning are the d(4)(A) Disability Trust, the d(4)(C) Pooled Trust and the Third Party SNT. The d(4)(B) Trust, or Qualified Income Trust, is not considered for this article because d(4)(B) trusts are generally used in income-cap states, such as Florida, to allow a MO HealthNet applicant's income to be trusted and paid to the nursing home, thereby not disqualifying them from MO HealthNet. The d(4)(B) trust is relatively simple in application and because of it’s unique and narrow nature, this trust is not included under the umbrella of the three basic types of SNTs mentioned above. The d(4)(B) trust is rarely used in Missouri because Missouri is not an income-cap state. The d(4)(B) trust it is only applicable for Home and Community based waivers for MO HealthNet in Missouri.

The d(4)(A) trust is defined at 42 U.S.C. § 1396p(d)(4)(A) and the d(4)(C), or pooled trust is defined at 42 U.S.C. § 1396p(d)(4)(C). There is no statutory authority for a third-party SNT, but are excluded by definition under 42 U.S.C. § 1396p(d)(1-2). The approach by SSA to Third-Party SNTs is found at POMS SI 01120.200 D.2, which provides that if an individual does not have the legal authority to revoke or terminate the trust or to direct the use of the trust assets for his/her own support and maintenance, the trust principal is not the individual's resource for SSI purposes. The revocability of a trust and the ability to direct the use of the

*These materials are adapted from an article written by these authors for the St. Louis Bar Journal, Spring, 2009.
trust principal depend on the terms of the trust agreement and/or on State law. If a trust is irrevocable by its terms and under State law and cannot be used by an individual for support and maintenance (e.g., it contains a valid spendthrift clause, see SI 01120.200B.16.), it is **not** a resource.

<table>
<thead>
<tr>
<th>Trust Type</th>
<th>d(4)(A), Self-settled</th>
<th>d(4)(C), Pooled</th>
<th>Third-party SNT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Established by</td>
<td>Individual, Parent, Grandparent, Legal Guardian, Court</td>
<td>Parent, Grandparent, Legal Guardian, Court, Individual</td>
<td>Third Party (not disabled individual)</td>
</tr>
<tr>
<td>Funded by Assets Belonging to:</td>
<td>Disabled Person</td>
<td>Disabled Person</td>
<td>Third Party</td>
</tr>
<tr>
<td>Beneficiary</td>
<td>Disabled Person only</td>
<td>Disabled Person</td>
<td>Disabled Person &amp; nondisabled person</td>
</tr>
<tr>
<td>Grantor Trustee allowed</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Distributions</td>
<td>Payments to Third Parties</td>
<td>Payments to Third Parties</td>
<td>Payments to Third Parties</td>
</tr>
<tr>
<td>Payback provision</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Disability</td>
<td>SSA Definition</td>
<td>SSA Definition</td>
<td>SSA Definition</td>
</tr>
<tr>
<td>Gift tax annual exclusion</td>
<td>Cannot use</td>
<td>Cannot use</td>
<td>Can Use</td>
</tr>
<tr>
<td>Testamentary</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Age Limit</td>
<td>Funded by 65</td>
<td>No, but some states have transfer penalty for over 65(^1)</td>
<td>None</td>
</tr>
<tr>
<td>Frequently Used For</td>
<td>Personal injury settlement or inheritance</td>
<td>Smaller amounts or personal injury settlements or inheritance</td>
<td>Parent planning for child; testamentary gift to disabled individual; coordinate testamentary gifts; MO HealthNet planning</td>
</tr>
</tbody>
</table>

**Drafting Considerations—It’s Not A Form**

The biggest misconception among some attorneys and the public is that a SNT is just a form or that language from one SNT can apply to all SNTs. This approach causes significant problems, which can result in a beneficiary losing their eligibility for public benefits, or unnecessary payment to the State or Federal government in a third-party SNT situation. Often, drafting mistakes prove time consuming and expensive to correct.

As a practical matter, virtually all SNTs (self-settled and third party) will be treated as “grantor trusts” for income tax purposes. I.R.C. §§ 671-679. Thus, one or more of the grantor trust provisions should be spelled out in the SNT. *Id.* For a SNT that is a grantor trust, all net income of the trust will be treated as taxable income to the beneficiary of the trust. The income,
deductions, and credits of the trust are reported on the beneficiary’s individual tax return each year, and not on the fiduciary income tax return (IRS Form 1041). The result is the payment of the beneficiary’s income taxes by the trust does not constitute additional income to the beneficiary.

Another type of SNT—a Qualified Disability Trust—is found at 42 U.S.C. § 1396p(c)(2)(B)(iv), and its major feature is that it utilizes an individual’s personal income-tax exemption ($3,950 in 2014), and not the trust’s exemption ($100 or $300). Understanding that an SNT is a complex instrument does not stop at recognizing the different types of SNTs. Equally as important, is a thorough understanding of the underlying reason for the SNT—public benefits.

**Know the Public Benefits**

Besides understanding the most difference between self-settled SNTs, pooled trusts, and third-party SNTs, the second most important distinction is to understand the difference and availability of government benefits to a disabled beneficiary. A cursory review of the most relevant public benefits—SSI/MO HealthNet and SSDI/Medicare—is discussed below.

Most SNT beneficiaries are eligible or actively seek eligibility for Supplemental Security Income (“SSI”), which is needs-based (limited income and assets). The SSI eligibility rules are the most important rules to grasp because the concepts are central to understanding other eligibility rules.

SSI rules have a simple way of distinguishing between income and assets: Money received in a given month is income in that month, and any portion of that income remaining on the first day of the next month becomes an asset. In Missouri, an SSI beneficiary who receives MO HealthNet is limited to no more than $1,000 in assets. Some types of assets are not counted in this calculation (called “non-countable”) and include: beneficiary’s home, one car, household furnishings, prepaid burial contracts (need to be irrevocable), life insurance with no more than $1,500 cash value, tools of the beneficiary’s trade, and personal items.

In many states, receipt of SSI payments automatically qualifies the beneficiary for MO HealthNet eligibility. These 32 states are referred to as the § 1634 states. A § 1634 agreement specifies the state’s and SSA’s responsibilities and requires the state to provide MO HealthNet coverage to SSI recipients. 42 U.S.C. § 1383c (2000). Unfortunately, Missouri is not one of those states. Missouri is known as a “209(b)” state 42 U.S.C. § 1396a(f)(2000), which means that
it uses at least one eligibility component that is more restrictive that the MO HealthNet eligibility standard in place on January 1, 1972.

Social Security Disability Insurance ("SSDI") and Medicare benefits are not “means-tested.” Thus, there are no financial eligibility requirements. After receiving SSDI for 24 months, the beneficiary will qualify for Medicare benefits. During the two-year wait for Medicare, however, a beneficiary may rely on MO HealthNet benefits, if eligible.

Because SSI/MO HealthNet are the usual benefits considered with SNTs, the special-needs language and distribution standards are critically important because the wrong language could result in either income or assets being “available” to that beneficiary for SSI/MO HealthNet purposes.

Critical Use of Distribution Standards—Discretionary vs. Support

The common law and Restatement of Trusts (Second) treat discretionary trusts and support trusts differently. See Sections 154 and 155 of the Restatement of Trusts (Second). In essence, discretionary trusts provide no standards for the exercise of trustee discretion and support trusts require the trustee to use income and principal for the beneficiary’s support. The Restatement (Third) of Trusts and the Uniform Trust Code ("UTC") eliminate the distinction between discretionary and support trusts, treating support trusts as discretionary trusts with a support standard. Missouri adopted the Uniform Trust Code, (Mo. Rev. Stat. §§ 456.1-101 through 456.11-1106 (2009) effective January 1, 2005), which many critics believed would jeopardize the use of SNTs. Mark Merric & Douglas W. Stein, A Threat to All SNTs, TRUSTS & ESTATES, Nov. 2004. A recent article analyzed and dismissed the concerns that critics had about the UTC’s affect on SNTs. Richard E. Davis, UNIFORM TRUST CODE AND SNTs: SHOULD UTC BE FEARED, EMBRACED OR IGNORED?, NAELA JOURNAL, Vol. 5, 2009, No. 1. The most important distinction in applicable SNT trust language will be the rights of the beneficiary to distributions according to the extent of the trustee’s discretion and the trust’s distribution standards.

For all purposes, an SNT should only contain pure discretionary distribution standards. The reason behind this is while the UTC is silent concerning a beneficiary’s right to compel distributions, at common law, (The common law of the controlling jurisdiction would guide the analysis concerning a beneficiary’s right to compel a distribution. See Mo. Rev. Stat. §456.1-106 (2009) and accompanying UTC Comment), a beneficiary of a purely discretionary trust has no

*These materials are adapted from an article written by these authors for the St. Louis Bar Journal, Spring, 2009.
ability to compel a distribution if the trustee has “sole,” “uncontrolled,” or “absolute” discretion. RESTATEMENT (THIRD) OF TRUSTS, § 50 cmt. b., Reporter’s Notes to cmt. A and B. (2001). Conversely, if a trust contains support language, i.e., “support and maintenance,” a beneficiary generally has the right to compel the trustee to make distributions under the support distribution standard. *Id.*

In addition to avoiding such toxic support language as, “support and maintenance” in an SNT, language that spells out the settlor’s intent to supplement and not supplant public benefits is highly recommended. *See Tidrow v. Director, Missouri Div. of Family Serv.,* 688 S.W.2d 9 (Mo. App. E.D. 1985). The Comment to the UTC § 103 also highlights that the settlor’s intent is controlling, and courts place great emphasis on the settlor’s intent in questions of construction. *Id.* *Webb v. St. Louis County National Bank,* 551 S.W.2d 869, 875 (Mo. App. 1977).

This is important because inevitably, unwary practitioners will continue to draft SNTs with hybrid distribution language of a “discretionary support trust,” (i.e., “trustee has discretion to make distributions to beneficiary for health, education, maintenance, and support”). A clause reflecting the settlor’s intent could provide evidence to support a finding that despite support language, a trust is discretionary. *See Pohlmann v. Nebraska Department of Human Services,* 710 N.W.2d 639 (Neb. 2006). Pohlmann is instructive in the UTC context because Nebraska adopted the UTC, effective January 1, 2005. Some attorneys that draft SNTs mistakenly believe that the ascertainable standards of, “health, education, maintenance, and support” are necessary, (Generally, “HEMS” distribution standards in trusts usually concern estate-tax and gift-tax planning, which is beyond the scope of this article), or that the standards should be inserted for good measure. *See* I.R.C. §§2041, 2511, 2514. This is an incorrect assumption, and usually, a costly mistake that can harm a beneficiary on public benefits.

**Choice of Trustee**

The choice of trustee for a SNT is important and often overlooked. With some exceptions, the biggest challenge for a lay-person trustee or professional trustee alike, concern proper distributions from the trust to the beneficiary.

Frequently, a family member (parent, sibling, etc.) is appointed as trustee or co-trustee of a SNT, and comes to the role with little fiduciary experience. Frequently, it makes sense to involve a family member who usually has extensive personal knowledge about the disabled beneficiary and the beneficiary’s needs and wants. The challenge is to properly educate and

*These materials are adapted from an article written by these authors for the St. Louis Bar Journal, Spring, 2009.*
inform the lay-person trustee about public benefits, the distribution rules, and the importance of maintaining public benefits. This is why it is a good idea to develop an informational instructional guide concerning the person’s duties and responsibilities as a trustee and arm them with as much information as possible from the outset of the fiduciary relationship. A corporate or professional trustee or co-trustee may be a preferred choice for a number of reasons: public-benefits knowledge, compliance with fiduciary laws, has investment expertise, understands taxes, has insurance, and has experience concerning trust administration.

Generally, a court approving a d(4)(A) SNT is likely more reassured if a professional fiduciary is a co-trustee with a family member of the beneficiary because of the professional’s expertise and experience.

What Can the Trust Pay For?

The most vexing issues concerning SNTs usually involve administration questions due to the complicated SSI income and asset rules.

SSI has a concept of “in-kind support and maintenance” (“ISM”) that is central to understanding SNT administration. Any payment from a third party—trust included—for necessities of life like food or shelter, will be treated as countable income to the beneficiary. SSI rules distinguish between “earned” and “unearned” income. Earned income means that work is performed in exchanged for the income. Unearned income is passively received, such as bank account interest or SSDI payments. An SSI recipient can receive $20 per month in any type of income, which is called the “disregard” amount. The classification of income (earned vs. unearned) has an important effect for SSI purposes. Any unearned income reduces the SSI benefit by the amount of the income, so investment income or gifted money will reduce SSI dollar-for-dollar, minus the $20 disregard. Earned income is treated more favorably, because it only reduces SSI benefits by approximately one-half. The result is that the effect of a beneficiary receiving ISM is that the SSI benefit is reduced by the lesser of the presumed maximum value of the items provided or an amount calculated by dividing the maximum SSI benefit by three and adding the $20 disregard amount. For 2014, the maximum federal SSI benefit for a single person is $721/month. A one-third amount reduction is $233.67, which means that is the maximum amount SSI can be reduced regardless of the value of the ISM.

The Social Security Administration (“SSA”) treats the following items as “food and shelter” which means that payment of these expenses is ISM to the beneficiary: food, mortgage

*These materials are adapted from an article written by these authors for the St. Louis Bar Journal, Spring, 2009.
(including property insurance), real property taxes, rent, heating fuel, gas, electricity, water, sewer, and garbage removal. Usually, an SNT should avoid making ISM payments that would reduce the monthly SSI benefit. But in some cases, it makes sense to take the one-third reduction in SSI benefits and have a trust make ISM payments. The analysis should always hinge on what the numbers indicate is the maximum benefit to the beneficiary.

Conversely, some expenses that an SNT can pay for in Missouri include: clothing, (after March 7, 2005, clothing purchases for a beneficiary were no longer considered ISM by the Social Security Administration) phone, cable, internet service, newspaper, vehicle, (some states restrict value, type and title ownership of vehicles) insurance, maintenance, gas, (the beneficiary should have a gas-company credit card because the card cannot be used to purchase food or shelter, or converted into cash), pre-paid burial/funeral arrangements, (some states may limit the amount of the burial contract and the contract or plan must be irrevocable), tuition, books, tutoring, travel2, (there may be concern about payment for hotels and restaurants meeting the “food and shelter” definition.) Further, some states may impose limitations on companion travel not found in federal law. Airline tickets must be “non-refundable” and must not be able to be converted to cash. Entertainment, household furnishings and furniture, TV, computers and electronics, durable medical equipment, care management, (there is no federal limitation, but may states attempt to limit payments for care if made to a family member or other relative, especially if there is an obligation of support (e.g., parents of minor children)), therapy, medications, taxes, (States may attempt to direct trust language on what taxes can be paid for, such as taxes incurred as a result of trust assets or at the death of the beneficiary, and legal and trustee fees.

Social Security Administration POMS

There are no federal regulations concerning trusts as countable “resources” for purposes of a means-based testing analysis for public benefits (SSI, MO HealthNet, etc). As a result, the Social Security Administration’s Program Operations Manual System (“POMS”), (The SSA POMS can be found online at: https://secure.ssa.gov/apps10/poms.nsf/partlist!OpenView), the publicly available operating instructions for processing Social Security claims contain the underlying operating instructions for SNTs. The United States Supreme Court applied the Skidmore Doctrine. (See Skidmore v. Swift & Co., 323 U. S. 134, 139-140 (1944); also See United

*These materials are adapted from an article written by these authors for the St. Louis Bar Journal, Spring, 2009.
States v. Mead Corp., 533 U. S. 218, 228, 234-235 (2001)) and elevated the POMS to the force of law in the absence of federal regulations.

In January, 2009, the Social Security Administration has made changes to the POMS relating to both first party and third party special-needs trusts. The identifying resource section concerning trusts begins online at https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120200. The three application trust sections are: SI 01120.200; SI 01120.201; and SI 01120.203. The changes highlighted in the following sections only offer a sample of the more significant changes and are not all inclusive. These changes included revisions and clarifications to drafting requirements and trust administration. In 2010, the Social Security Administration added a POMS SI 01120.199, which addresses early termination clauses for Special Needs Trusts created under 42 U.S.C. §1396p(d)(4)(A) and (C).

A. Significant POMS Changes Affecting Drafting of Special-Needs Trusts

(1) Spendthrift Clause. POMS SI 01120.200 B 16; POMS SI 01120.200 D 1 a; POMS SI 01120.200 D 1 b. New POMS requires that every trust that seeks to be a non-countable resource must contain a spendthrift clause which means that the trust must prohibit both voluntary and involuntary transfers of the beneficiary’s interest in the trust income or principal.

(2) Revocation and Termination. POMS SI 01120.200 B 19; POMS SI 01120.200 B 20; POMS SI 01120.200 D 1 b. In a third-party trust, the focus is on whether the individual can terminate the trust and obtain the assets. If a beneficiary had the right to revoke the trust, the assets in the trust would be an available resource to the beneficiary. In addition, if the beneficiary has the right to terminate a trust, then the assets are considered a countable asset. POMS SI 01120.199 outlines which early termination clauses are accepted to the Social Security Administration.

An acceptable early termination clause must have all these requirements:

(a) Upon early termination (which is defined as termination prior the death of the beneficiary), the state will receive all the remaining trust copies, up to the amount of medical assistance paid on behalf of the trust beneficiary by Mo HealthNet.

(b) No one, other than the trust beneficiary, can benefit from the early termination of the trust. The trust corpus must be paid in full to the trust beneficiary after MO HealthNet is reimbursed.
(c) The power to terminate the trust early cannot be given or exercised by the trust beneficiary.

The POMS does clarify that upon the death of the trust beneficiary the pooled income trust is permitted to retain assets as envisioned by 42 U.S.C. §1396(d)(4)(c). POMS SI 01120.199F.3 does permit the trust to pay any taxes and administrative expenses due at the termination of the trust.

(3) **Revocability of Grantor Trust.** POMS SI 01120.200 D 3. This POMS provides that when “heirs-at-law” are named as a class of individuals that would receive the residuary of a self-settled trust rather than specific named individuals, that in most states, the trust would be considered to be irrevocable and as a result, not a countable resource. Missouri follows this provision. POMS SI KC01120.200; Revocability of Grantor Trusts (RTN 8 - 07/2009). See https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120200KC!opendocument.

(4) **Child support and maintenance.** POMS SI 01120.200 G 1 d. Child support or maintenance properly assigned and paid directly into a Special Needs Trust as a result of a court order are not income, as long as the assignment is irrevocable.

(5) **Payback.** A MO HealthNet payback provision cannot be limited to a particular period of time. POMS SI 01120.203 B 1 h A. MO HealthNet payback provision includes any funds paid on behalf of the disabled person since birth. The payback is not limited to MO HealthNet expenditures made after the trust was established. In addition, the trust must state that MO HealthNet payback will be made to all states that provided medical assistance. POMS SI 01120.203 B 1 h; POMS SI 01120.203 B 2 g.

The new POMS also clarifies that taxes, other than death taxes, are prohibited distributions prior to the MO HealthNet payback. POMS SI 01120.203 B 3 b. Also, although State law usually provides as such, a trust should clearly reflect that the State is considered a creditor rather than a residual or contingent beneficiary. POMS SI 01120.200 H 1 b.

(6) **Sole Benefit.** The d(4)(A) or d(4)(C) trust must be established for the sole benefit of the disabled individual. POMS SI 01120.203 B 3 e. Thus, a trust will be disqualified if it contains provisions that provide benefits to other persons during the lifetime of the beneficiary or allow for termination of the trust prior to the individual’s death and payment of the corpus to another individual or entity.

*These materials are adapted from an article written by these authors for the St. Louis Bar Journal, Spring, 2009.*
(7) Legal Authority to Establish Trust. A party must have “legal authority” to create a trust or else the trust will be a countable resource to the beneficiary. POMS SI 01120.203 B 3 e. A legally competent disabled adult may transfer her/his own assets into a trust or another party acting under a valid power of attorney may establish the trust or transfer of assets. POMS SI 01120.203 B 3 e. A trust can also be established by a court, (Id), but note that approval of a trust by an ineligible party by a court is not sufficient. Id

(8) Seed Trust. Some states require that a self-settled trust must be funded with an asset by the party that established the trust. The SSA allows the establishing party to “seed” the trust with a nominal amount of their own funds. Id. Missouri acknowledges that some property interest must be contributed to the trust for proper creation. Mo. Rev. Stat. §§ 456.4-401, 456.1-103(11)(2014). Under the MUTC definition of property, this could include a nominal amount of money, i.e., $10.


B. Changes Affecting Administration and Management of Trust Assets

Even if a trust is drafted properly to qualify for d(4)(A) or d(4)(C) treatment and does not disqualify an SSI recipient on application of the SSI resource rules, the trustee could violate the monthly SSI income rules when making a distribution for the benefit of the elderly or disabled beneficiary. The new POMS provide clarification concerning allowable trust distributions.

(1) Distributions that are Income. Distributions from the trust to third parties that result in the beneficiary receiving non-cash items are countable as income the month of receipt if the items would not be a partially or totally excluded non-liquid resource if retained into the month after the month of receipt. Mo. Rev. Stat. §§ 456.4-401, 456.1-103(11)(2014). This means that payments to third parties for in-kind goods and services which are not food or shelter are not countable income to the beneficiary.
(2) **Distributions that are Not Income.** Distributions made from the trust to a third party that result in the beneficiary receiving non-cash items (other than food or shelter) are not income if those items would become a totally or partially excluded non-liquid resource if retained into the month after the month of receipt. POMS SI 01120.200 E 1 c.

(3) **Distribution not for Benefit of Beneficiary.** If a trust is established with assets of the individual or his or her spouse, any disbursement from the trust that is not made to or for the benefit of the individual is considered a transfer of resources as of the date of payment and is not considered income to the individual. POMS SI 01120.200 E 2; POMS SI 011020.201 I 1 c.

(4) **Disbursement for Credit Card Bills.** If a trust pays a credit card bill for the trust beneficiary, whether the individual receives income depends on what was on the bill. If the trust pays for food or shelter items on the bill, the individual will generally be charged with in-kind support and maintenance up to the PMV. If the bill includes non-food, non-shelter items, the individual usually does not receive income as the result of the payment unless the item received would not be a totally or partially excluded non-liquid resource the following month. POMS SI 01120.201 I 1 d. For example, if the credit card bill includes restaurant charges, payment of those charges results in ISM. If the bill also includes purchase of clothing, payment for the clothing is not income.

(5) **Disbursement for Gift Cards and Gift Certificates.** Gift cards and gift certificates are considered cash equivalents. If a gift card/certificate can be used to buy food or shelter (e.g. restaurant, grocery store or VISA gift card), it is unearned income in the month of receipt. Any unspent balance on the gift card/certificate is a resource beginning the month after the month of receipt. If the store does not sell food or shelter items (e.g. bookstore or electronics store), but the card does not have a legally enforceable prohibition on the individual selling the card for cash, then it is still unearned income. POMS SI 01120.201 I 1 e.

The value of the gift card/certificate is not income in the month received if the gift card/certificate cannot be used to purchase food or shelter and cannot be resold. POMS SI 00830.522. Some trustees are providing gift cards to the beneficiary or the beneficiary’s family in $20 monthly increments since $20 is the allowable monthly disregard. A credit card issued in the name of the beneficiary, however, is not a cash equivalent because any use of the credit card...
becomes a debt legally owed by the beneficiary, which is allowed under the POMS. See POMS SI 01140.300.

C. Pooled Trusts (42 U.S.C. § 1396p(d)(4)(C))

(1) Transfers to Pooled Trusts. A transfer of resourced to a pooled trust for an individual age 65 or over may result in a transfer penalty. POMS SI 01120.203 B 2 a. In Missouri, there is a transfer penalty for an individual over age 65 funding a pooled trust, which became policy in 2013.

(2) Sole Benefit Of. The individual trust account of a pooled trust must be established for the sole benefit of the disabled individual. This exception does not apply if the account provides a benefit to any other individual or entity; or allows for termination of the trust account prior to the individual's death and payment of the corpus to another individual or entity. POMS SI 01120.203 B 2 e.

(3) Who Established Trust Account. Unlike a stand-alone self-settled trust, a legally competent disabled individual who establishes or adds to a pooled trust account with his or her own funds has the legal authority to act on his or her own behalf. A third party establishing a trust account on behalf of another individual with that individual's assets must have legal authority to act with regard to the assets of the individual. POMS SI 01120.203 B 2 f.

An attempt to establish a trust account by a third party with the assets of an individual without the legal right or authority to act with respect to the assets of that individual will generally result in an invalid trust. In the case of a trust established through the actions of a court, the creation of the trust must be required by a court order. Approval of a trust by a court is not sufficient. Id.

(4) Payback. The trust must provide payback for any State(s) that may have provided medical assistance under any State MO HealthNet Plan and not be limited to any particular State. MO HealthNet payback also cannot be limited to any particular period of time, i.e., payback is applicable from MO HealthNet recipient’s birth.3 POMS SI 01120.203 B 1 h; POMS SI 01120.203 B 2 g.

(5) The Midwest Special Needs Trust. The Midwest Special Needs Trust has a pooled income trust, which is available for use by trust beneficiaries who reside in Missouri or its adjoining states. See http://www.midwestspecialneedstrust.org/.

Grantor Trusts vs. Qualified Disability Trusts

*These materials are adapted from an article written by these authors for the St. Louis Bar Journal, Spring, 2009.
A Qualified Disability Trust is also a form of Special Needs Trust that allows the trust to utilize a personal exemption for income-tax purposes. The trust must meet the requirements set forth in the Internal Revenue Code (I.R.C. § 242 (b)(2)(C)), and the trust must be drafted to meet the requirements of 42 U.S.C. § 1396p(c)(2)(B)(iv).

A Qualified Disability Trust cannot be a grantor trust. See instructions to U.S. Tax form 1041 A Qualified Disability Trust must be a third-party trusts, which means that a Qualified Disability Trust cannot be a self-settled Special Needs Trust that is a grantor trust. A self-settled Special Needs trust is not required to be drafted as a grantor trust.

To satisfy the requirements of the Internal Revenue Code, a Qualified Disability Trust must meet the following requirements (42 U.S.C. § 1396p(c)(2)(B)(iv),) irrevocable trust; (2) established “solely for the benefit of”; (3) an individual under age 65; (4) who is disabled as defined in the Social Security Act, 42 U.S.C. § 1382c(a)(3).

Generally, an irrevocable trust is a trust that cannot be revoked or amended unilaterally by the settlor. Under common law and under the Uniform Trust Code, Uniform Trust Code, Section 103 (Definitions) the term “revocable,” as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.

The “sole benefit” requirement is satisfied only if no other person or entity can benefit from the transferred resources at the time of the transfer or for the remainder of that person’s life. vi POMS SI 01150.120.B.8.

The test for disability is met if the beneficiary is disabled for some portion of the tax year for which the exemption is claimed, (I.R.C. § 642(b)(C)) and there is a disability determination by the Social Security Administration.

**Personal Exemption for Qualified Disability Trust**

A Qualified Trust is allowed a deduction equal to the personal exemption for an individual. I.R.C. § 642(b)(2)(C)(i). For tax year 2014, that exemption amount is $3,950. If a trust does not qualify for this exemption, the trust is limited to either a $100 exemption (complex trust) or $300 exemption (simple trust). I.R.C. § 642(s)(2)(A) &(B).

**Tax Return Requirement**

Generally, a trustee must file and income-tax return (form 1041) for a trust that has: (1) any taxable income for the year; (2) gross income of $600 or more; or (3) a beneficiary who is a

---

*These materials are adapted from an article written by these authors for the St. Louis Bar Journal, Spring, 2009.*

**Effect of a Qualified Disability Trust**

Because a Qualified Disability Trust is granted a personal exemption equal to an individual's, the net income retained by the trust up to the amount of the personal exemption is not taxed. The trust pays income tax on any retained income in excess of the personal exemption amount and deductions.

The ability of a Qualified Disability Trust to use the personal exemption of an individual at a higher level is significant because a trust's marginal income-tax rates rise at a much higher rate than an individual's rate. For 2014, a trust will pay a tax at the highest marginal federal rate of 39.6% on net income over $12,150. Compare this to a single taxpayer in 2014, who would only reach the 39.6% federal rate bracket on income of $406,750.

If there is income distributed from the Qualified Disability Trust, it will be taxable to the beneficiary at the beneficiary's lower income-tax rate. A major advantage to the Qualified Disability Trust is that the trust retains some income and can have it offset by the Qualified Disability Trust's personal exemption. This ability to retain income in the trust makes the Qualified Disability Trust an attractive tax advantaged vehicle because if the accumulated tax free income is distribute in a later year, the distribution will be a tax-free principal distribution.

The treatment of capital gains in a taxable year for trust accounting purposes is pursuant to the terms of the governing instrument and applicable local law, or pursuant to a reasonable and impartial exercise of discretion by the fiduciary. See Treas. Reg. 1.643(a)-3(2004). The only restriction on capital gains treatment is that fiduciary must be consistent with the treatment (either to principal or income) from year-to-year. Id.

Most Special Needs trusts are grantor trusts for income tax purposes. But an irrevocable third party special needs trust can be a qualified disability trust.

**Final Considerations**

Ultimately, correctly identifying and evaluating the applicable public benefits and understanding the necessity for a SNT provides the most benefit to the client. Recognizing that an SNT is not just a standard form and requires careful consideration in drafting can save the attorney, the beneficiary, and the beneficiary’s family countless hours of time and hefty expense associated with an incorrectly drafted SNT that disqualified a beneficiary. And the usefulness

*These materials are adapted from an article written by these authors for the St. Louis Bar Journal, Spring, 2009.*
and benefit of an SNT for a beneficiary can sometimes only be as good as the trustee administering the trust, which highlights the importance of a knowledgeable trustee. Diligent, mindful, and proper trust administration is an increasing area of concern because some states are now conducting annual audits of SNT expenditures (for example; Michigan and Mississippi currently audit SNTs and Missouri does not but many elder-law attorneys see states trending towards more oversight and audits) and distributions to test the beneficiary’s need for public benefits. The “moving target” aspect of SNT administration highlights the importance of the SNT attorney keeping abreast of the changes in both state and federal law concerning SNTs and public benefits.

*These materials are adapted from an article written by these authors for the St. Louis Bar Journal, Spring, 2009.