

# Colorado Special Needs Planning and Regulatory Framework



Presented by  
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# We will cover...

- Circumstances that call for an SNT
  - Entitlement and Needs-Based Benefits
- Third-party, Disability, and Pooled SNTs
- ABLE Accounts
- Drafting Different Types of SNTs
- Disability SNT Regulatory Submission & Compliance
- Social Security Administration Approval
- Key Considerations for Financial Advisors
- Trends and the Future of Special Needs Planning
- Ethics
- Case Studies

# Entitlement-Based Benefits

- Benefits that you receive regardless of your income or assets
  - Social Security Disability Income
  - Medicare (2 years later)

# Needs-Based Benefits

- Benefits that you receive only if your income and assets are below program limits
  - Supplemental Security Income (\$914/month)
  - Medicaid (medical insurance)
  - Section 8 (housing)
  - SNAP (food assistance)

# Three Types of SNTs

- Third-party Special Needs Trusts (short-hand: “3Ps”)
- “Disability Trusts” in Colorado
  - “First-party SNTs” everywhere else
  - “(d)(4)(A) SNTs” is often used
  - “OBRA SNTs” is rarely but sometimes used
  - In attorney short-hand, “1Ps”
- Pooled SNTs aka “(d)(4)(C) trusts”
- Similar to an SNT: ABLE Accounts

# SNT History and Purpose

- Third-party SNTs were first used in the 1970s to preserve benefits for beneficiaries of inheritances. These were all common law trusts.
  - Colorado now lightly regulates these (other states, like California and New York impose more burdensome regulations)
- In the OBRA 1993 Act, Congress created the first-party SNT and the pooled SNT.
  - Many states including Colorado have added regulations to Congress's creations.

# Third-party Special Needs Trusts



# Who is a Third-Party SNT for?

Any beneficiary who is or may become eligible for need-based government benefits; examples:

- Developmentally disabled children
- Mentally ill teens
- Physically disabled adults

When the **money is not the beneficiary's**

The beneficiary does not need to be found to be disabled by the SSA.



# Third-Party Special Needs Trusts

- Creatures of common law
- Grantor can be anyone **except the beneficiary**
- Trustee can be anyone **except the beneficiary**
- Can be funded by anyone **except the beneficiary**
- No minimum or maximum balance
- If there is a remainder, it goes to whoever the grantor chooses
- The beneficiary can have a limited power of appointment

# The Terrible Alternative to a Third-Party SNT

## Disinheriting a Disabled Child

- Disinheritance is an old-fashioned solution that pre-dates the creation of special needs trusts
- Disinherited, the child gets no benefit even though they are probably more needy than other children in the family
- It would be better to leave the money to the child directly so that post-mortem, we can do Disability Trust planning

## Leaving the Child's Inheritance to a Sibling

What if the sibling divorces, gets sued, goes bankrupt, dies, or has a falling-out with the disabled child?

# Third-Party SNTs in Divorce

- Child support will be considered income to the child when the child turns 18; therefore, it cannot go into a third-party SNT
- Child support for a disabled child is likely to continue for years after the age of 18 and possibly for life
- The child support income may result in the adult child's disqualification from their important benefits programs (primarily Supplemental Security Income and Medicaid)

# Disability Trusts



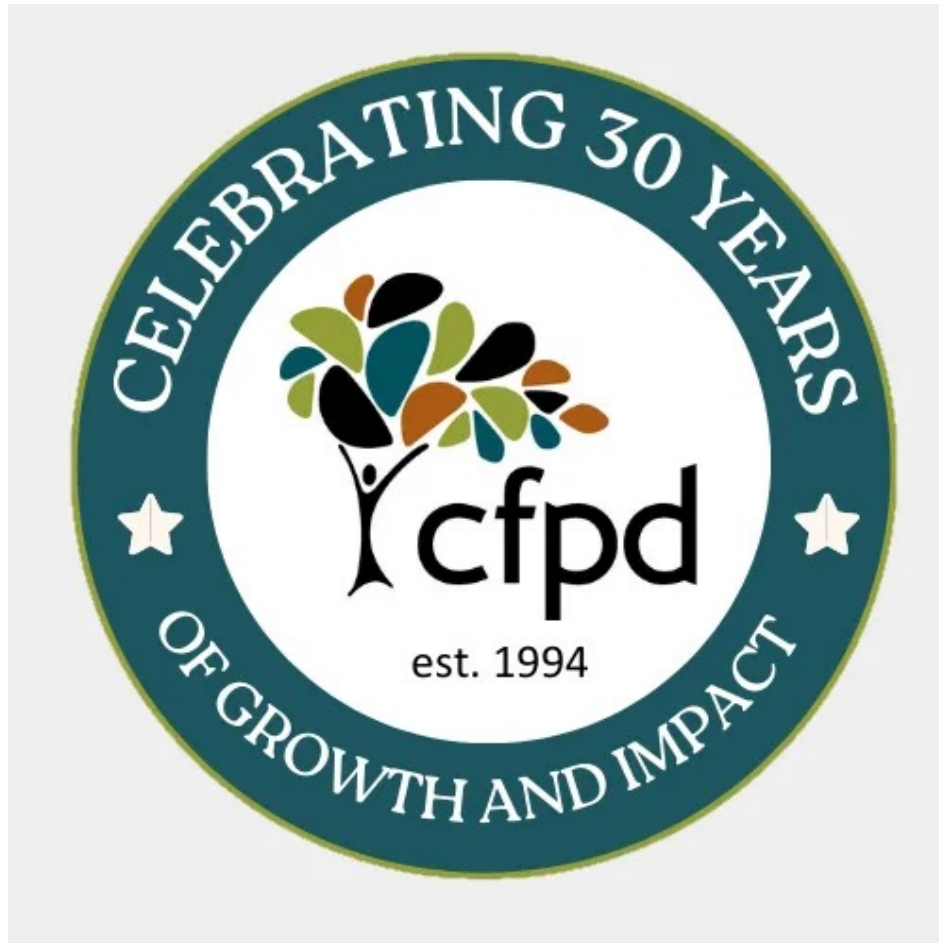
# Disability Trusts

- Can only be created by the beneficiary, their parent or grandparent, or their legal representative
- Can only be funded with the **beneficiary's money**
- Beneficiary must be found to be disabled by the Social Security Administration (SSA):  
*“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”*
- **Medicaid gets paid back** from the trust remainder

# Disability Trusts in Colorado

- “Disability Trust” is Colorado’s term for a special needs trust created under 42 U.S.C. § 1396(d)(4)(A)
- All Disability Trusts must be approved by the Department of Healthcare Policy and Financing (DHCPF or HCPF) before they are funded. C.R.S. §§ 15-14-412.6 *et seq.*
- HCPF requires several Colorado-specific provisions to be in the trust before it will approve a SNT (10 CCR 2505-10 9.100.7.E.6)

# Pooled Trusts



# Pooled Trusts

- Pooled special needs trusts are established under 42 U.S.C. § 1396(d)(4)(C)
- The trustee of a pooled trust is a non-profit organization
- All beneficiaries' assets are pooled together for investment purposes
- Separate ledgers are kept for each client
- The remainder goes to either the non-profit or Medicaid
- In the pooled trust run by the Colorado Fund for People with Disabilities ("CFPD") ([www.cfpdtrust.org](http://www.cfpdtrust.org)), the remainder goes to CFPD, not Medicaid



# ABLE Accounts



# ABLE Accounts Introduction

- Established by the Achieving a Better Life Experience Act of 2014 (26 U.S.C. § 529A)
- Beneficiary must be entitled to benefits administered by the SSA before the age of 46 or have a "disability certification" filed with the SSA each year
- "Disability certification" uses the same criteria as SSA plus must state that the beneficiary was disabled before 46.
- Must be established before participant turns 65, but can receive additional contributions after 65
- Anyone can put up to \$18,000 per year into an ABLE account but **only up to the amount of the beneficiary's gross income or the poverty line, whichever is less**

# Colorado ABLER Accounts Details

- ABLER accounts can hold up to \$400,000 but only \$100,000 is protected from SSA eligibility limits
- Owned by the beneficiary
- Designed to allow disabled people to save money from work and not lose their benefits
- Receives tax advantages similar to 529 accounts
- Only accepts contributions in cash
- Can change beneficiary to another disabled family member

# ABLE “Qualified Disability Expenses”

The ABLE account distributions, including income and capital gains that have not been taxed, are made tax-free if used for “qualified disability expenses” (defined under 26 U.S.C. § 529A(e)(5))

*“any expenses related to the eligible individual’s blindness or disability which are made for the benefit of an eligible individual who is the designated beneficiary, including the following expenses: education, housing, transportation, employment, training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses, which are approved by the Secretary...”*

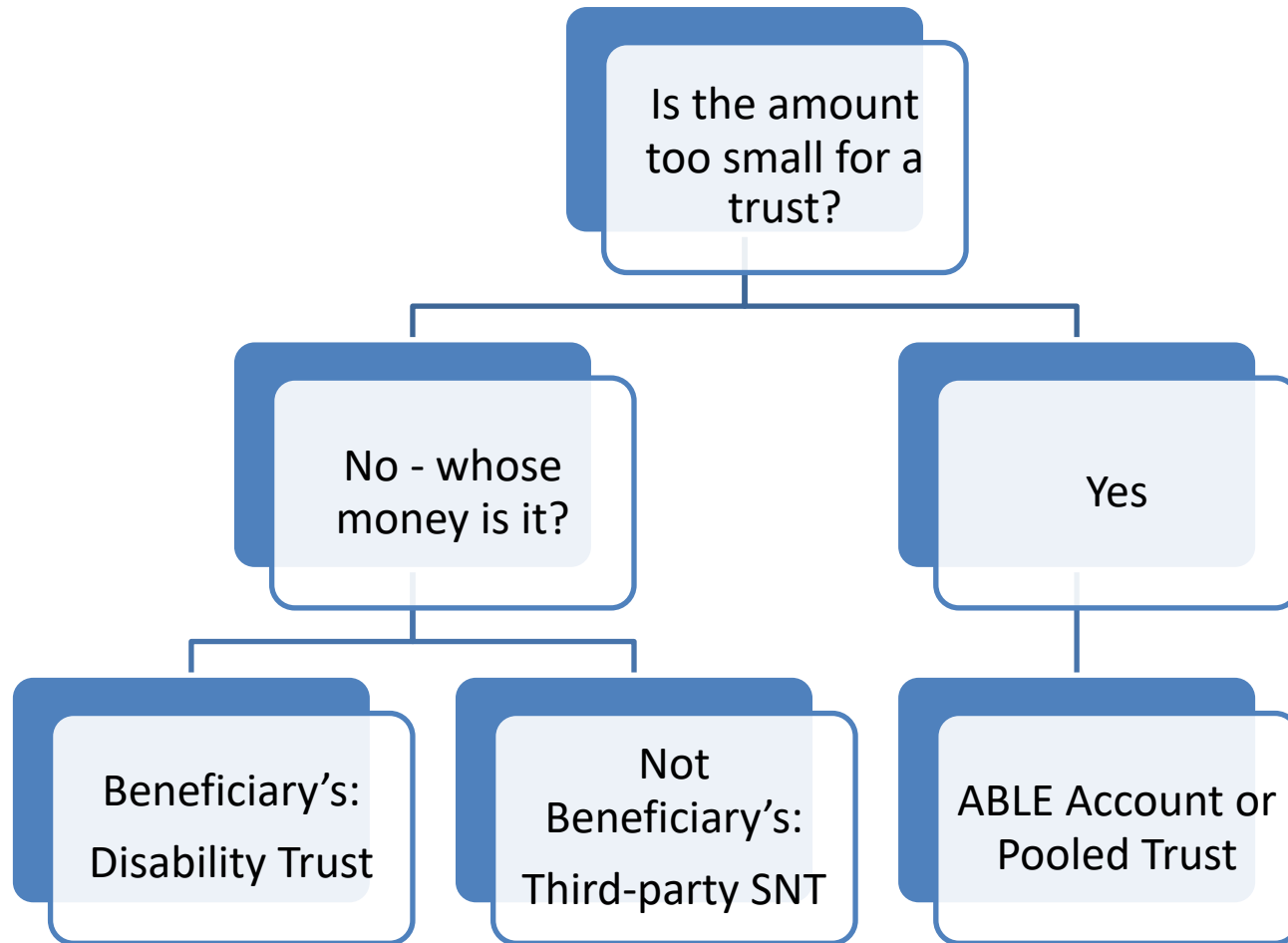
# ABLE “Qualified Disability Expenses”

- “Qualified Disability Expenses” include *“other expenses, which are approved by the Secretary...”*
- In 2020, the SSA approved the following other expenses:
  - “Food”

# Drafting Special Needs Trusts



# Analytical Process



# Is the Inheritance the Beneficiary's?

If the money funding the trust is gifts or inheritances that have not yet been completed:

- use a third-party SNT.
- if the grantor of the inheritance has already died, the money is the beneficiary's, so only a Disability Trust will work, unless...
  - Court reformation
  - Decanting if left in trust
  - Trust protector



# Choice of Trustee: Options

- Trust Department of large financial institution
- Trust Company
- Professional Private Fiduciary
- Private Individual(s) (family member, friend of grantor or beneficiary)
- The Colorado Fund for People with Disabilities will also act as a professional trustee for an individual trust

# Who Should Be the Trustee of the SNT When Parents Divorce?

Divorcing parents usually have low trust of each other. Each usually wants to be sole trustee.

- A co-trusteeship between both spouses can only be handled well by the most enlightened spouses
- It is most logical and reasonable for the spouse who is *receiving* the child support to be the trustee; after all, they would have full control if it were not in an SNT
- Sometimes it makes sense to hire an independent trustee

# Can a Private Trustee Handle the Complexities of Benefits and the Trust?

Unless the trustee is a professional, the trustee will need assistance to manage the SNT

- An **attorney** can counsel the trustee on how to stay in legal compliance with the DHCPF, SSA and other agencies
- An **accountant and the attorney** can ensure that the SNT income and expenses are tracked and reported to DHCPF correctly
- A **care manager** can help the trustee obtain additional government benefits for the beneficiary and advise the trustee on how to preserve existing benefits
- An **investment advisor** can ensure the trustee complies with the prudent investor rule and obtains a reasonable return for the beneficiary

# Memorandum of Intent: Parents Can Make the SNT Work Better

- Special Needs Trusts need guidelines to make them work well after the parents are gone
- A Memorandum of Intent written by the parents with attorney input is a great way to give instructions to the future trustee of a special needs trust
  - Annual review and updates recommended
  - Should include contact info for
    - Doctors, other medical and therapy providers
    - Local benefits agency contacts and
    - Contact info and relationships of friends and family who would be willing to help if needed
  - Include a list of triggers for distress
  - Include a list of favorite pleasures
  - Attach treatment plans and evaluations

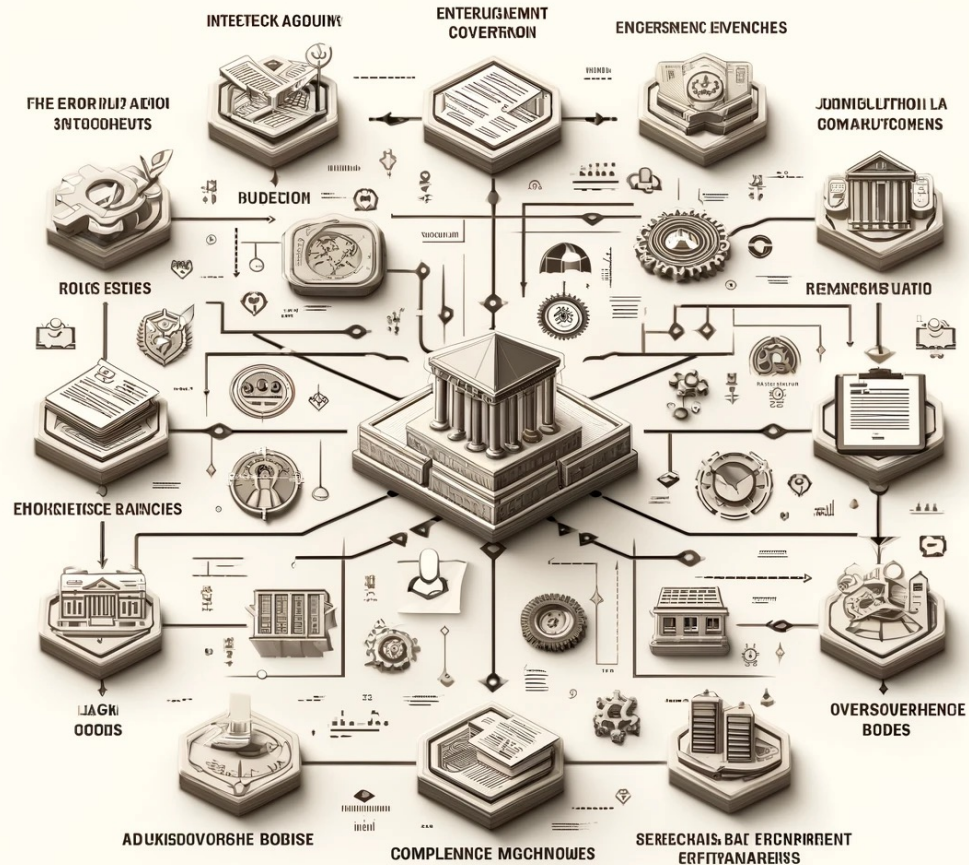
# Your Firm Process

- Initial contact with your firm may be by the beneficiary or someone caring for them. May also be made by a personal injury attorney
  - Determine who would be the grantor and whose money would be going into the SNT; that person (or their representative) is your client
- Encourage the grantor to include the beneficiary in the design meeting if the beneficiary is a competent adult
- Consider including the trustee in the process if that person is not a professional (particularly in the document review meeting so they can learn what to do)
- Use a Certificate of Trust aggressively to keep the SNT confidential (attach only the powers section of the SNT if needed – such as for real estate transactions) to protect vulnerable beneficiaries

# Design Tips

- Include provisions that encourage the trustee to pay for specific things that are important to the grantor or the beneficiary (e.g., vacation travel, family events, current computer and phone, vehicle)
  - “including but not limited to”
- Consider acting as or recommending a trust protector
  - If there is no trust protector, consider giving the trustee the power to make limited administrative, benefits eligibility, and tax law modifications to the SNT
  - Either of these will be very helpful if DHCF demands changes upon initial submission
- If beneficiary establishes a (d)(4)(A) for self, they sign as grantor
- Beneficiary can never serve as trustee
- For Disability Trusts, carefully follow all DHFP regulations (10 CCR 2505-10, Section 8.100.7.E.6)

# Regulatory Framework



# Department of Healthcare, Policy and Financing

- Department of Healthcare, Policy and Financing regulations regarding special needs trusts:

10 CCR 2505-10, Section 8.100.7.E

- Describes three types of trusts:
  - Disability Trusts
  - Special Needs Trusts
  - Pooled Trusts



# HCPF Regulations

10 CCR 2505-10, Section 8.100.7.E.6

HCPF reviews every trust established by or which benefits a Health First Colorado (Medicaid) member or applicant

10 CCR 2505-10 Section 8.100.7 is Long Term Care Medical Assistance Eligibility

8.100.7.E is Consideration of Trusts in Determining Medical Assistance Eligibility

# HCPF Regulations

10 CCR 2505-10, Section 8.100.7.E.6 (b)  
Disability Trusts

10 CCR 2505-10, Section 8.100.7.E.6 (d)  
Special Needs Trusts

# HCPF Disability Trust Regulations

- Extensive requirements of provisions that must be included and excluded from a Disability Trust
- Must be approved by HCPF before it is effective
- A sampling of requirements for approval:
  - Beneficiary must be qualified as disabled by the Social Security Administration (disability determination letter must be included with trust)
  - Termination and payback rules are very specific
  - Sole benefit rule includes HCPF and other states' agencies throughout the trust
  - Trustees' mailing addresses must be included in trust (including successor trustees)

# Disability Trust Regulations

## b. Disability Trusts

- i) A trust that is established solely for the benefit of a disabled individual under the age of 65, which consists of the assets of the individual, and is established for the purpose or with the effect of establishing or maintaining the individual's resource eligibility for Medical Assistance and which meets the following criteria:
  - a) The individual for whom the trust is established must meet the disability criteria of Social Security.
  - b) [Removed and Reserved]
  - c) The trust is established solely for the benefit of the disabled individual by the individual, the individual's parent, the individual's grandparent, the individual's legal guardian, or by the court.
  - d) The sole lifetime beneficiaries of the trust are the individual for whose benefit the trust is established, the Colorado Department of Health Care Policy and Financing, and any other state that provides medical assistance to the individual under such state's Medicaid program.
  - e) The trust terminates upon the death of the individual or if the trust is no longer required for Medical Assistance eligibility.
    - i) If the individual becomes ineligible for Medical Assistance in Colorado or any other state due to a change in residency, then the trust shall terminate unless the Department receives proof that: (1) the individual is receiving medical assistance under another state's Medicaid program; and (2) the trust is required for the individual to receive those medical assistance benefits. The trustee must submit the required proof no later than sixty (60) calendar days from the date the trustee acquires knowledge of the change in residency. An extension of time may be granted upon submission of a written request to the Department by the trustee.
    - ii) The trustee must provide the Department with notice of the individual's death, loss of Medicaid eligibility, or change in residency no later than sixty (60) calendar days from the date the trustee acquires knowledge of such event.

- f) Any statutory lien pursuant to section 25.5-4-301(5), C.R.S. must be satisfied prior to funding of the trust and approval of the trust.
- g) If the trust is funded with an annuity or other periodic payments, the trust shall be named on the contract or settlement as the remainder beneficiary or the Department and any other state that provided medical assistance to the individual under such state's Medicaid program may be named as remainder beneficiary up to the amount of Medical Assistance paid on behalf of the individual.
- h) The trust shall provide that, upon the death of the beneficiary or termination of the trust, the Department and any other state that provided medical assistance to the individual under such state's Medicaid program shall receive all amounts remaining in the trust up to the amount of total medical assistance paid on behalf of the individual. If the trust does not have sufficient funds to reimburse each state in full, the amount remaining in the trust shall be distributed based on each state's proportionate share of the total amount of medical assistance benefits paid by all of the states on the individual's behalf.
- i) No expenditures may be made after the death of the beneficiary, except for federal and state taxes. However, prior to the death of the individual beneficiary, trust funds may be used to purchase a burial fund for the beneficiary.
- j) The amount remaining in the trust and an accounting of the trust shall be due to the Department within three months after the death of the individual or termination of the trust, whichever is sooner. An extension of time may be granted by the Department if a written request is submitted within two months of the termination of the trust.
- k) The trust fund shall not be considered as a countable resource in determining eligibility for Medical Assistance.
- l) [Rule 8.110.52 B 5. b. 1) I), adopted or amended on or after November 1, 2000 and before November 1, 2001 was not extended by HB 02-1203, and therefore expired May 15, 2002.]
- m) Distributions from the trust may be made only to or for the benefit of the individual beneficiary. Cash distributions from the trust shall be considered income to the individual. Distributions for food or shelter are considered in-kind income and are countable toward income eligibility.
- n) If exempt resources are purchased with trust funds, those resources continue to be exempt. If non-exempt resources are purchased, those resources are countable toward eligibility.
- o) The trust must include the name and mailing address of the trustee. The Department must be notified of any trustee address changes or change of trustee(s) within 30 calendar days.

# Regulations Slide 3 of 3

- p) The trust must provide that an accounting of trust income and expenditures and statement of trust assets shall be submitted to the eligibility site and to the Department on an annual basis and upon reasonable request or any change of trustee. Further, the trust must provide that the trustee is required to give the Department notice of any distribution in excess of \$5,000 no later than thirty (30) days after such distribution. The Department shall acknowledge receipt within thirty (30) days of receiving the notice.
  
- q) Prior to the establishment or funding of a disability trust, the trust shall be submitted for review to the Department, along with proof that the individual beneficiary is disabled according to Social Security criteria. No disability trust shall be valid unless the Department has reviewed the trust and determined that the trust conforms to the requirements of 15-14-412.8,C.R.S., as amended, and any rules adopted by the Medical Services Board..

From the CO SOS website July 7, 2024

# Disability Trust Approval

- Disability Trust approval upon a first submission is not typical.
- Disability Trust approval upon second submission is uncertain even if you have addressed every issue raised in the Department's initial rejection letter.
- Document all of your changes to an SNT in your cover letter and keep careful records of all correspondence with HCPF.
- **A Disability Trust is not valid until it has been approved by HCPF.**

# Example Frustration with HCPF Approval

- Knowing that Disability Trusts are subject to approval by HCPF, we included a trust protector in case changes were needed.
- In another article of the SNT, we stated that all amendments to the trust must be approved by HCPF, as required in the regulations.
- Our SNT was rejected because it did not state that all amendments must be approved by HCPF *in the trust protector article* as well as the HCPF requirements article.



# HCPF Response Times Can Be Lengthy

**Medicaid.Trusts - HCPF, HCPF** <hcpf\_medicaid.trusts@state.co.us>  
To: diedre@braverman-law.com

Tue, Jun 4, 2024 at 4:31 PM

\*\*\*\*\*This is an automated response. Please do not respond to this message. \*\*\*\*\*

Thank you for contacting [Medicaid.Trusts@state.co.us](mailto:Medicaid.Trusts@state.co.us). Your email has been received, and will be processed in the order in which it was received. Our regular timelines for review are:

- Income trusts: within two weeks (14 calendar days)
- Other trusts: within 1 month (30 calendar days)
- Accountings, trust closures, and other document review: within 1 month (30 calendar days)

If you have an urgent situation or need an expedited review, please write URGENT in the subject line of your email. Make sure to include an explanation of the situation and any relevant dates.

# DHCPF Trust Unit Contact

Email: [Medicaid.trusts@state.co.us](mailto:Medicaid.trusts@state.co.us)

Fax: 303-866-3552

## **Mailing address:**

Attn: Trust Unit

Colorado Department of Health Care Policy & Financing

303 E. 17th Avenue

Denver, CO 80203

There is no phone number.

# SSA Approval

- Third-party trusts are not approved or filed with the Social Security Administration
- First-party trusts must be approved by the SSA if the beneficiary is receiving Supplemental Security Income
- The only SSA office in Boulder County is at:
  - 480 W. Dahlia Street
  - Louisville, CO 80027
  - Phone: 800-772-1213
  - Fax: 833-641-2557
  - Hours: M-F 9am to 4pm

# Issues for Financial Advisors

- Determine the beneficiary's need, considering predictable future needs and a cushion for the unpredictable for 3P SNTs
- Advise on the appropriate use of life insurance where necessary to meet the beneficiary's need for 3P
- Ensure trustee's compliance with the Prudent Investor Act once any SNT is funded
- Consider investment strategies that provide for both current and predictable future needs
- Assist with trustee accountings if the trustee is a non-professional (including reminders)

# The Future of Special Needs Planning

- California has eliminated its asset limit from Medi-Cal eligibility requirements. Will Colorado follow?
- Growing movement toward self-determination is affecting guardianships and conservatorships. Will it affect SNTs too?

# Ethics for Advisors

- If you are aware a client has a child with special needs, is it your responsibility to inform your client about special needs planning?
  - If you're an attorney, yes.
  - If you're an excellent FA, of course.
  - If you're a CPA, it would be nice.
- You can play a role in ensuring the SNT is set up in the beneficiary's best interests with your knowledge of the child and family.

# Case Study: Kevin, the Injured Plaintiff

- Kevin is a 29-year-old adult who has won a judgment against a sheriff who wrongfully shot and paralyzed him from the waist down.
- He is receiving a \$2,000,000 judgment.
- He wants his trust to invest primarily in local residential real estate which his brother will manage as trustee.
- He wants the trust to pay his brother a salary to obtain his realtor's license.

# Mary & Emma, the Heiresses

- Mary & Emma are the only children of their wealthy parents.
- Mary is severely cognitively disabled and will probably never exceed a third-grade level of understanding and skills.
- Emma was born paralyzed and has some delays but is keeping up in school with assistance.
- Their parents have a \$25,000,000 estate.



# Ellen, the Frustrated Beneficiary

- Ellen is a 46-year-old beneficiary of a testamentary SNT her parents established for her before they died 10 years ago.
- Ellen has serious physical illnesses and some mild cognitive impairment.
- Ellen has a brother who is distant and a couple of unreliable friends.
- Ellen's bills are not being paid by the trustee.
- Ellen doesn't have a copy of the trust and doesn't know who the trustee is.

# Questions and Answers



# Contact Diedre Braverman

Best ways to reach me:

Call or email Kelly Houghtalin at 303-800-1588 or [kelly@braverman-law.com](mailto:kelly@braverman-law.com) to schedule a quick teleconference, ZOOM, or in office meeting;

OR

Email to [diedre@braverman-law.com](mailto:diedre@braverman-law.com)  
cc: [kelly@braverman-law.com](mailto:kelly@braverman-law.com)

***Thank You!***



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